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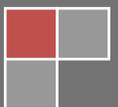
The Reduction of Canadian Forces Members' Disability Benefits

The Effects of the 2006 New Veterans Charter

The 2006 New Veterans Charter reduced disabled Canadian Forces Members' benefits, in certain cases, by 30 to 90 percent. The Equitas Society outlines in this position paper the global problems facing our new generation of veterans, and possible remedies.

A "POSITION PAPER" prepared under the authority of the
Board of Directors - EQUITAS DISABLED SOLDIERS FUNDING
SOCIETY.

April 2012



This paper is a living document intended to provide the Equitas Society's position on how the New Veterans Charter is affecting disabled Canadian Forces members. Although all efforts have been made to verify, and reference, facts and statements made in this document, any views or opinions presented herein are solely those of the author, and do not necessarily represent those of the disabled soldiers represented by the law firm Miller Thomson LLP. This position paper is considered factually accurate on its date of completion – April 3, 2012. Due to the changing nature of disability benefit programs, readers are cautioned to confirm with the actual sources and Acts cited in this paper.

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The Reduction of Canadian Forces Members' Disability Benefits - A Position Paper

1.0 Executive Summary

This position paper is predicated upon facts known to the Equitas Society¹ in April 2012 which prompt our reaching the conclusion that specific changes are required to the *New Veterans Charter [NVC]*² in order to ensure that disabled Canadian Forces members receive equal, life-long benefits consistent with the standard that the majority of Canadian workers receive under existing, applicable workers' compensation programs. These changes are required in a timely manner to accommodate disabled members who have recently returned from the Afghan War and all changes to the *NVC* need to apply to members who have made disability claims dating back to April 2006.

The Equitas Society has found four key areas in which the *NVC* fails disabled Canadian Forces members:

- 1) Severely disabled Canadian Forces members who receive a lump sum payout and long-term Earning Loss benefits under the *NVC* can be financially disadvantaged by approximately 30% compared with the previous *Pension Act*³ benefits, due mainly to *NVC* benefit reductions at age 65.⁴ In addition, long-term *NVC* benefits are taxable and subject to claw back, which is not the case under standard workers' compensation programs. The current *NVC* claw back provision is a disincentive for severely disabled members to seek any other employment.

¹ The Equitas Disabled Soldiers Funding Society – www.equitassociety.ca

² <http://lois.justice.gc.ca/PDF/C-16.8.pdf>

³ <http://laws-lois.justice.gc.ca/eng/acts/P-6/index.html>

⁴ For details see examples in <http://www.queensu.ca/dms/publications/claxton/Claxton13.pdf>

- 2) Moderately disabled Canadian Forces members who receive a lump sum payout and short-term Earning Loss benefits under the *NVC* can be financially disadvantaged by up to 65% compared with the previous *Pension Act* benefits, due to gaps in the *NVC* settlement process.⁵
- 3) Partially disabled Reserve Canadian Forces members who are not medically released and who receive only a lump sum payout can be financially disadvantaged by up to 90% of what other workers' compensation programs, and the courts, would award due to the *NVC* not including future earnings losses in the calculation of any settlement. Also, deficiencies in the *NVC* 'Table of Disabilities' are a contributing factor to these underpayments.⁶
- 4) The administration of the *NVC* is highly complex, and in many cases requires the assistance of lawyers from the Bureau of Pension Advocates⁷ to assist disabled members through the various levels of review and appeal. The benefits relationship chart in Appendix A⁸ demonstrates this complex process. Due to administrative delays under the *NVC*, many Canadian Forces "home units" have had to be quite generous and resourceful in providing support to their disabled members. However, these "side deals" have placed stress on recovering members, as there is no certainty to these acts of kindness.

Since 1915, workers in Canada have been provided workers' compensation benefits that insure their earnings and earning-capacity against work-related injury, disease and disability. In return for a proper workers' compensation program, workers give up their right to sue their employers for employment related loss of earnings and capacity. The *NVC* is a radical change to the way injured workers are compensated for short-term and

⁵ Appendix B : For details see (page 51 & 52) - VAC Report, "Evaluation of Disability Pensions and Awards - Final – August 2010"

⁶ Reserve soldier examples provided in Section 5 of this paper

⁷ <http://www.veterans.gc.ca/eng/department/organization/bpa1>

⁸ Provided by the Office of the Veterans Ombudsman

long-term disabilities, focusing on retraining and lump sum payouts in lieu of disability pensions.

Although the creation of the *NVC* concept of ‘upfront’ funding combined with retraining may be a noble proposition to promote financial independence, the reality is that many disabled members simply find themselves forced out of their income source (fired), unable to find meaningful work and provided a total financial compensation package that is insufficient to maintain a middle-class lifestyle. This change in disability compensation was imposed on a segment of the Federal workforce that has little to no bargaining power. However, Canadian Forces members are workers and have basic workers rights in Canada; regardless if these rights are being properly applied.

Given that Canadian Forces members are expected to perform duties in active war zones, on UN missions in unstable regions and on humanitarian missions in devastated countries, the assumption is these members have equal or greater disability benefits compared to other Canadian workers. The Equitas Society believes that Canadians will be very supportive of improved disability benefits for Canadian Forces members required to raise their benefits to be equal with other Canadian workers.

Possible remedies to the *NVC* are larger lump sum payouts in some cases, better life-long financial support which is tax-free, indexed and free of claw back, better employment integration into the federal civil service, and/or employment integration into equal paying jobs through an employment placement program for disabled members.

Should such changes not be forthcoming, disabled Canadian Forces members have a strong legal case to challenge the *NVC* using the *Canadian Charter of Rights and Freedoms*.¹¹ At issue is that the *NVC* may not qualify as a proper workers’ compensation program, and the *NVC* may be discriminating against disabled Canadian Forces members compared to other Canadian workers.

¹¹ *Canadian Charter of Rights and Freedoms*, R.S.C., 1985 Appendix II, No. 44 see also Part I (ss. 1 to 34) of the *Constitution Act, 1982*. [the “*Charter*”]

2.0 The NVC in Perspective

The *NVC* may be sufficient to deal with Canadian Forces regular members who can remain in the service, or who can retire with a sizable regular pension. In such instances any lump sum payout serves as a supplement to their traditional income sources. However, in many cases there is a large variation between what a Canadian Forces regular member would have received under the previous compensation programs and what he or she receives under the *NVC*. A 2010 Veterans Affairs Canada report entitled 'Evaluation of Disability Pensions and Awards – Final August 2010', which evaluated disability awards pre- and post- the *NVC*, cited examples that generally demonstrated that the *NVC* provided less overall funding to disabled Canadian Forces members. The up-side is these members received their funding sooner, and were eligible for retraining that was not previously provided.¹² Nevertheless, for example, calculations cited in this report demonstrate that moderately (40%) disabled Canadian Forces members will receive only approximately 30% of the financial support that they would have received under the previous compensation system, \$214,366.09 (*NVC*) compared to \$646,649.68 (pre-*NVC*).

A 2011 study by Queens University entitled 'Supporting Canadian Veterans with Disabilities: A Comparison of Financial Benefits' compared Canadian Forces regular members' disability benefits under the previous *Pension Act* versus the *NVC*. Similar to the actual cases provided to the Equitas Society, this university study also shows examples where the *NVC* provided less in overall funding. These actual cases and theoretical examples are when severely disabled members receive all, or nearly all, of the *NVC* benefits that can be provided. Nevertheless, these cases and examples demonstrate that the *NVC* can provide only approximately two thirds of the financial support as previously available under the *Pension Act*.

Although *Bill C-55* closed the gap for severely disabled members, especially for low income members, the *NVC* as amended by *Bill C-55*, still can, and still does, provide

¹² Veterans Affairs Canada – Evaluation of Disability Pension and Award – Final August 2010:
<http://www.veterans.gc.ca/eng/department/reports/deptaudrep/2010-08-dadp/appendix-f>

reduced disability benefits for regular members who are medically released from the Canadian Forces, when compared with the previous *Pension Act*, especially for younger members.

Given the reduction in overall disability benefits, many Canadian Forces members have expressed concern for their long-term ability to derive a reasonable middle class income. This problem may be solved by placing medically released regular members directly into other, equal-paying federal jobs, creating a job placement program for disabled members or by providing workers' compensation based upon an income insurance monthly payment supplement program. This would be in addition to lump sum settlements and other program funding granted to medically discharged regular members that is tax-free, indexed and not subject to claw back. The goal is to simply raise Canadian Forces members' disability benefits to the same level as other workers' compensation programs.

Regarding Canadian Forces reserve members who were recently injured on Class C¹³ contracts in Afghanistan, there are numerous examples where the *NVC* is simply woefully inadequate in compensating them for their life-time reduction in earning capacity. Disabled Canadian Forces reserve members generally do not have a traditional income source after being released back to Class A¹⁴ status, and their ability to earn a life-long income can be greatly affected by their physical and mental health – they are in a position where they have to apply for new jobs where their disabilities can be an impediment. Canadian Forces reserve members who are disabled in the course of their military duties require a program that does more than merely compensate them for bodily medical losses (often referred to as a “meat chart payout”), plus retraining. Like any worker, they also require a program to compensate them for their loss of future earnings, whether it is a total income loss or a partial income loss. Compensation for what they would have earned as able-bodied workers and what they will earn as disabled workers, while needed, currently is not included. Canadian Forces reserve

¹³ Full time contract at regular soldier's pay and embedded with regular members during deployment

¹⁴ Parading at their home unit at ½ day's paid per week, plus any weekend exercise pay

members, who are disabled, need to be either placed directly into other equal paying federal jobs, or provided with workers' compensation-based income insurance monthly supplement payments. Such a monthly payment program would be in addition to their lump sum settlement and other program funding, and should be tax-free, indexed and not subject to claw back. There should be research conducted to determine if placing disabled Canadian Forces reserve members into other workers' compensation programs through the *Government Employees Compensation Act*¹⁵ would be a positive solution.

It should be noted that the previous *Pension Act* paralleled other worker compensation programs. The *NVC* (which came into effect in 2006) does not address the life-long income earning loss component for disabled Canadian Forces members, except in the most severe cases. Except in such severe disability cases, the *NVC* appears to be a “loss of limb” insurance scheme with a two-year retraining allowance program; whereas traditional workers' compensation programs insure the workers' actual lifetime earnings. However, again except in the most severe cases, the *NVC* does not factor in the reduction of career earning capacity for disabled Canadian Forces members. In the cases where a disabled Canadian Forces member is provided long-term income support due to their severe incapacitation, most of his or her financial support ends at age 65, which begs the question: “How are these severely disabled Canadian Forces members going to care for themselves in their old age?” This current system fails our members when they need financial support the most.

This difference in program themes has created a lot of misunderstanding, especially since the *NVC* ambiguously uses many terms found in workers' compensation programs. For example, the term ‘Minimum Earnings Guarantee’ (Earning Loss Benefit) of 75% of the Canadian Forces member’s previous wage sounds like a life-long earning compensation program. However, except in the most severe cases, this minimum earnings guarantee is actually a training allowance, which certain Canadian Forces members are allowed to participate in for a defined period under an approved

¹⁵ <http://laws-lois.justice.gc.ca/PDF/G-5.pdf>

rehabilitation program, normally for 2-4 years maximum. After the rehabilitation program is completed, in most cases the Minimum Earnings Guarantee program ends, notwithstanding the fact that the disabled Canadian Forces member may remain unemployed and precluded from employment by service-related disabilities. In addition, often the phrase Long Term Disability payment, or LTD, is used to describe a Canadian Forces members' training allowance during this two-year program.

Stepping outside of a comparison between the previous *Pension Act* and the *NVC*, it should be recognized that a severely disabled worker under current provincial workers' compensation programs would be compensated at the level of over 2.0 million dollars in tax-free income benefits (in today's money) from their twenties to age 65. Anything less than this amount for the same age severely disabled Canadian Forces members is a reduced benefit compared to established workers' compensation programs. Based on the research reviewed and actual cases provided, it is clear that the *NVC* provides less overall funding than the previous *Pension Act*, and often it provides less in benefits than other disability compensation programs.

3.0 Disabled Member Disability Compensation Background

Members of the Canadian Armed Forces are employed by the Department of National Defence, and are considered federal employees. They are referred to in this paper as Canadian Forces members, or members. Upon enlistment, these Canadian Forces members sign an employee contract for a defined period of employment. During this signing process, written employee benefits are presented to all serving Canadian Forces members. Citizens during the recruitment process often study these benefits as they carefully consider becoming career members. Once injured, Canadian Forces members' disability benefits are administrated by Veterans Affairs Canada, a Federal Government department which is separate from the Department of National Defence.

In 2006, the *Canadian Forces Members and Veterans Re-establishment and Compensation Act (CFMVRCA)*¹⁶, referred to as the *NVC*, came into effect. This Act established a lump sum payout program for Canadian Forces members, RCMP members and certain others in lieu of disability pensions as previously provided for by the *Pension Act*. This paper deals only with the issues faced by Canadian Forces members.

The *NVC* in 2006 had a liability cap of \$250,000.00 for a severe disability; it now is approximately \$285,000.00. Members receive lump sum payouts that are pro-rated, based on a disability assessment ranging from 5% to 100%. For example, a 5% disability assessment would draw a payment of \$14,250.00. All these lump sum payouts are meant to be invested by the members, and the derived income is supposed to support Canadian Forces members with their disabilities for the rest of their natural lives. In many cases, this expectation is unrealistic.

The lump sum payout program has proven to be inadequate, especially in total incapacitation cases; as a result, in 2010 *Bill C-55*¹⁷ amended the *NVC* to improve certain monthly income benefits. Although the *NVC* and *Bill C-55* used the same terminology as in other workers' compensation programs, the *NVC*, as amended by *Bill C-55*, in most cases does not pay long-term monthly benefits, and most of its programs are subject to claw back, and end at age 65. The claw back provision for members on long-term benefits is a disincentive for them to pursue gainful employment.

The result is that some Canadian Forces members who are disabled have been disadvantaged under the *NVC*, by 30%¹⁸ to 65%¹⁹ as compared to the previous members' *Pension Act*. Canadian Forces reserve members with partial disabilities have

¹⁶ <http://lois.justice.gc.ca/PDF/C-16.8.pdf>

¹⁷ http://legion.ca/_PDF/SBureau/c55-e_LegislativeSummary_Mar11_E.pdf

¹⁸ <http://www.queensu.ca/dms/publications/claxton/Claxton13.pdf> and cases provided by the Equitas Society

¹⁹ Veteran Affairs Canada report: 'Evaluation of Disability Pension and Award – Final August 2010'

been disadvantaged under the *NVC* by as much as 90%, as compared to lump sum court settlements and provincial workers' compensation program awards.²⁰

As the *NVC* was imposed on members by an Act of Parliament, there are issues of fairness with regard to how Canadian Forces members can voice their concerns with the resulting compensation benefits. In fact, the *Crown Liability & Proceedings Act*²¹ actually prevents disabled members, in most cases, from being able to obtain a court review of their one-time, lump sum disability payout.

Given that cases exist which demonstrate the lower disability benefits provided to Canadian Forces members, as compared to other Canadian workers, there is a strong argument that members are entitled to ask the courts to address the *NVC* using sections 7 and 15 of the Canadian *Charter of Rights and Freedoms*. These sections speak to matters where the government applies laws arbitrarily, and to the government imposing laws which do not provide treatment equal to what is provided to other Canadians – clearly acts of discrimination.

The national Canadian law firm of Miller Thomson LLP²² has agreed to represent, 'pro bono', disabled Canadian Forces members affected by the *NVC* in a class action lawsuit concerning their constitutional right to be provided equal disability benefits as compared with other Canadian employees. A sizable group of disabled Canadian Forces members from across Canada with settlements under the *NVC* have stated their willingness to become members of the class or classes of veterans in the proposed Miller Thomson LLP legal action.

Since there are too many claims to be brought individually, it is proposed that the legal proceeding be brought as a class action as a convenient mechanism for determining the constitutional and other rights of the many disabled Canadian Forces members who are suffering loss and damage as a result of the *NVC*. The class action is brought by

²⁰ See examples by Members A & B of this report

²¹ <http://laws-lois.justice.gc.ca/PDF/C-50.pdf>

²² <http://www.millerthomson.com/welcome-bienvenue>

representative plaintiffs on behalf of hundreds, or even thousands, of individuals having common interests. In order to proceed as a class action a Canadian superior court must certify the action as appropriate to proceed as a class action on the basis that there is an identifiable class of persons with claims raising common issues that could be represented by a representative plaintiff or plaintiffs.

The Equitas Society is a British Columbia-based, national organization which has agreed to provide, through fund-raising, the members' disbursement costs for the proposed lawsuit. In the normal course, disabled Canadian Forces members contacting the Equitas Society are referred to Miller Thomson LLP for confidential solicitor-client discussions relating to the willingness of the individual members to participate in the class action.

This paper has been drafted by the Equitas Society as a synopsis of the issues facing disabled Canadian Forces members who have received settlements under the *NVC*. Due to confidentiality agreements, where cases are identified, individual Canadian Forces members' identities have been withheld. Those Canadian Forces members whose individual cases are divulged have agreed to their medical details being cited. It should be noted, however, that a number of the disabled Canadian Forces members, both serving and retired, who have contacted the Equitas Society have expressed concern that they may be disadvantaged by entities within the Canadian Government if they were to speak out about their problems with Veterans Affairs Canada and dispute their settlements under the *NVC*.²⁴ Consequently, the Equitas Society may have been provided disabled Canadian Forces members' information not reported to Veterans Affairs Canada.

4.0 Assumptions

The Equitas Society has been in contact with various individuals within the Government of Canada. Some trends have emerged. First, all persons contacted seem well-meaning and sincere. Second, the overall response from such persons within the

²⁴ <http://www.ctv.ca/CTVNews/TopStories/20100927/veterans-files-leaked-100927/>

government is that there is no problem with the *NVC*; in their view members are being fairly treated. However, in many cases, they are not familiar with the nuances and the shortfalls of the *NVC*. The main issue for the Equitas Society is that many cases presented by disabled Canadian Forces members confirm that a long-term disadvantage in compensation benefits exists for them. These disabled Canadian Forces members have provided detailed financial projections demonstrating that their disability funding under the *NVC* is less than the previous *Pension Act*, and is less than other workers' compensation programs and court settlements. The Equitas Society has tested the validity of their claims, and believes them to be true.

The Equitas Society is non-partisan, and has no purpose other than to seek fair disability settlements for Canadian Forces members. The Equitas Society has conducted its own research into this matter, has consulted with established experts in the field (such as lawyers specializing in personal injury claims, other veterans organizations, and specialists knowledgeable about workers' compensation programs) and has contacted the Office of the Veterans Ombudsman to confirm publicly available facts.

The Equitas Society believes that no meaningful progress can be made between dissatisfied disabled Canadian Forces members and Veterans Affairs Canada unless certain basic assumptions are agreed upon regarding disabled workers' benefits applicable to them. These assumptions are as follows:

4.10 Life Time Employee Income – Seeking a Middle Class Lifestyle

An average Canadian worker, at a Canadian Forces member's income, should earn around \$2,500,000.00 in today's money during their working career. This figure is calculated on the basis of a worker making a starting wage of approximately \$30,000.00, increasing to \$80,000.00 per year over a 40+ year period (25 to 65 years old).²⁵ No retirement pension income is included in these calculations. Such an income level is required for the worker to support him/herself and their immediate family in a middle class lifestyle. Without this level of income a Canadian Forces member will be

²⁵ Statistics Canada – Average (Canadian) Income - <http://www40.statcan.ca/l01/cst01/famil21a-eng.htm>

unable to support him/herself or their family without financial assistance from family, friends, outsiders or other government programs (e.g., provincial welfare), or by accepting a lesser lifestyle – near or below the poverty line.²⁶

4.20 Standard Worker Compensation Programs

A standard workers' compensation program is a trade-off between employees and employers. The employees agree to give up their right to sue their employer and, in turn, the employer agrees to fully insure the employees' income for life. At issue for the NVC is the question of whether it still classifies as a comparable workers' compensation program.

“Workers' compensation was Canada's first social program to be introduced as it was favoured by both workers' groups and employers hoping to avoid lawsuits. The system arose after an inquiry by Ontario Chief Justice William Meredith, who outlined a system in which workers were to be compensated for workplace injuries, but must give up their right to sue their employers. It was introduced in the various provinces at different dates. Ontario was first in 1915, Manitoba in 1916, British Columbia in 1917.”²⁷

In general terms, the Canadian standard for a 'workers compensation program' is that workers will have their earnings insured by their employers up to approximately \$6,000.00 per month, or \$72,000.00 per year. If the worker is disabled to the point where the full, insured value is awarded, the worker will receive a monthly payment in excess of \$4,000.00 per month, non-taxable, indexed and not subject to claw back.

For example, listed below is the March 2012 WorkSafe BC online calculator citing a 100% disabled person making \$74,000.00 per year:

(<https://online.worksafebc.com/anonymous/wageratecalculator/default.asp> **Weekly Benefit (Wage Rate) Calculator for Year 2012**

²⁶ Statistics Canada – Low (Canadian) Income - <http://www.statcan.gc.ca/pub/75f0002m/75f0002m2007004-eng.pdf>

²⁷ http://en.wikipedia.org/wiki/Workers'_compensation

Gross Earnings (Annualized)		\$74,000.00
Deductions		
Income Taxes:	\$15,323.18	
CPP:	\$2,217.60	
EI:	\$786.76	
	<hr/>	
Total Deductions:	\$18,327.54	\$(18,327.54)
		<hr/>
Net Income:		\$55,372.46
Earnings greater than \$73,700.00 are not insured.		

Approximate Weekly Benefit (Wage Rate) \$955.74

The results of this calculation are an approximation of the benefit level that would be paid on a WCB claim 10 weeks or greater in duration. The results may not reflect the actual benefits paid on a particular claim. Individual benefit payments may be impacted by a number of additional factors that the WCB is required to consider. These may include, but are not limited to, adjustments of annual income, non standard work weeks, existing WCB pensions, overpayments on previous claims, statutory maximum and minimum payments, etc.

The resulting amount is approximately \$4,100.00 per month, classified as an insurance payout. It is tax-free and indexed. Furthermore, this amount is not subject to any claw back due to other income. Using this amount, a worker in his/her twenties will receive payments by age 65 of over \$2,000,000.00 in today's money. Subsequently, workers are deemed to go on the organization's pension plan, the costs of which have not been included in this position paper.

Since not all monthly payments under a workers' compensation program are for a full disability, partial payments are calculated using a standard method which is also tax free, indexed and free from any claw back.²⁸

These monthly insurance amounts are considered a 'base' to allow the disabled worker to reach an income level similar to an amount the worker would have earned, but for their disability. That income level may be a combination of their monthly insurance benefits and additional income, such as other wages or insurance programs.

²⁸ WorkSafe BC compensation calculations - http://www.worksafebc.com/publications/policy_manuals/Rehabilitation_Services_and_Claims_Manual/volume_1/assets/pdf/rscm_ii_appx5.pdf

4.30 Employers' Duty to Provide Workers' Compensation Benefits

Canada has strict laws governing employers and their requirement to “insure” their employees’ wages against workplace injuries and workplace diseases that reduce their ability to attain the previously mentioned, projected career earning potential. For young Canadian workers who are 100% disabled, the insured amount required by an employer may be over 2.0 million dollars (in today’s dollars), tax free, throughout the worker’s lifetime. As the insurance payout can be very high, individual employers may not be able to pay this amount. Therefore, employers are required to pay into worker compensation programs. This provides security for both the employer and the employee.

However, the Federal Government often finds itself in the position where it can self-insure risks. Accordingly, the Federal Government may write laws to exempt itself from statutory requirements imposed on private Canadian companies. This appears to be the case regarding Canadian Forces members’ disability benefits, where the government has attempted to find funding after the individual members have been disabled. Nevertheless, it is the duty of the Canadian Government to provide the same level of disability benefits to all federal employees, including Canadian Forces members, despite the funding formula used. When Canadian Forces members are employed by the Canadian Government, there needs to be in place a proper disability compensation program; either funded through an insurance program or with funds allotted for these benefits, which includes forward funding for the life-times of the disabled members.

The argument that the Canadian economy currently is in a downturn, and tax revenue is low, cannot be considered a valid reason to provide lower than standard disabled workers' compensation benefits to Canadian Forces members over their lifetimes. At best, inadequate disability compensation for soldiers is seen as an imprudent austerity measure; at worst it is a reckless abandonment of the Government’s obligation. At issue is the level of compensation, not just the funding arrangements – prepaid insurance versus a forward funding model.

Given the Federal Government statement listed below and posted on the Human Resources and Skills Development Canada website, it is clear that the government accepts its duty to provide workers' compensation benefits to federal employees, including Canadian Forces members. The issue for Canadian Forces members appears to be the level of compensation applicable.

“Despite everyone's best efforts, accidents can happen in any workplace. Workers' Compensation programs protect employees from the financial hardships associated with work-related injuries and occupational diseases. While these programs are largely administered by provincial and territorial governments in Canada, the Labour Program is responsible for claims that involve Federal Government employees - both inside and outside of the country - who are injured on the job, become sick from an occupational disease or are slain while on duty. We also administer claims submitted by certain merchant seamen and federal penitentiary inmates.” - February 2012²⁹

4.40 Advertising of New Veterans Charter [NVC] Benefits

In 2011, the Royal Canadian Legion publicly represented the government's position on recent changes to Canadian Forces members' disability benefits by placing a number of advertisements stating the perceived positive aspects of the NVC.³⁰ These ads gave the impression that many NVC disability benefits were universal, and paralleled the benefits commonly provided by traditional workers' compensation programs, or were available in the work place to other federal employees – such as an extended LTD program and a proper pension at age 65. The reaction from many veterans' advocacy groups was swift, and referred to this advertising as “overselling” at best and “disingenuous by intent” at worst.³¹ The Equitas Society has invested a lot of effort in determining the true value of these programs, and has discovered the following:

²⁹ Human Resources and Skills Development Canada website:
http://www.hrsdc.gc.ca/eng/labour/workers_compensation/index.shtml

³⁰ See Appendix C

³¹ Michael Blais, President of the Canadian Veterans Advocacy:
<http://www.canada.com/news/Injured+Afghan+veterans+changes+compensation+rules+betrayal+government/6191517/story.html>

4.4.1 Earnings Loss Benefits (LTD Benefits) for Disabled Canadian Forces Members – Under the NVC

The stated earnings loss benefits, or sometimes referred to as the LTD program, provides 75% of Canadian Forces members' wages paid during a members' rehabilitation training program. It is normally available for 2-4 years, and except in limited cases this is not a permanent monthly payment for Canadian Forces members. In fact, the first two years of this program is paid by SISIP³², a private insurance plan which the Canadian Forces members themselves are required to pay into³³. Although some severely disabled Canadian Forces members will receive this benefit to age 65, the number of members who are on the extended version of this program is low in comparison to the number of disabled Canadian Forces members who have made claims under the NVC (see below). The standard to qualify for this benefit to age 65 starts with a work related condition that leaves Canadian Forces members to be deemed totally and permanently disabled with a permanent physical or mental health problem that prevents him or her from performing any occupation.

As stated above, there are questions about how many Canadian Forces members actually receive even the minimum two year earning loss benefit. The 2010 Veteran Affairs Canada report entitled 'Evaluation of Disability Pension and Award – Final August 2010', states that between 2006 and April 2010 approximately 7.5% of the eligible disabled Canadian Forces members were placed on this program:

“As of February 2010, approximately 7.5% (1,327) of CF clients with a disability award were eligible for or had completed the Rehabilitation Program.”

Therefore, the earning loss benefits program (LTD) does not appear to be provided to the vast majority of disabled Canadian Forces members. Furthermore, most qualifying disabled Canadian Forces members will only receive this benefit for a short-term during his/her rehabilitation program; normally for a 2-4 year period.³⁴

³² <http://www.sisip.com/en/index.asp>

³³ Members must pay for a portion of this insurance policy

³⁴ Information obtained from the Office of the Veterans Ombudsman -2012

In conclusion, the Earning Loss Benefit is really a temporary training wage and is a taxable benefit. Canadian Forces members must apply and be approved for this benefit. It should be noted that the first two years of the program is funded by a private insurance plan, which the members contribute into.

4.4.2 Permanent Impairment Allowance & Permanent Impairment Supplement

This program is paid to severe cases of disability at a \$500.00, a \$1000.00, or a \$1700.00 level per month to age 65. The Permanent Impairment Supplement program provides another \$1,000.00 to the very worst cases of the Canadian Forces members on the Permanent Impairment Allowance.

However, according to the following statement quoting the Veteran Affairs Canada report 'Evaluation of Disability Pensions and Awards – Final August 2010', very few Canadian Forces members actually make it into these two permanent impairment programs.

“Under the Rehabilitation Program, VAC has created the category Totally and Permanently Incapacitated (TPI) clients, defined as Veterans —incapacitated by a permanent physical and/or mental health problem that prevents them from performing any occupation that would be considered suitable gainful employment. From April 2006 to October 2009, 269 clients had been deemed to be TPI, but only three clients (0.02% of disability award recipients) had been awarded the PIA as of March 2009.”

With regard to the Permanent Impairment Allowance, the previously mentioned Queens University 2011³⁵ study made the following relevant comment:

“It should be noted that as of the writing of this paper only 16 veterans, out of the over 20,000 who served under the NVC, have received the Permanent Impairment Allowance.”

³⁵ <http://www.queensu.ca/dms/publications/claxton/Claxton13.pdf>

The Equitas Society acknowledges that the number of disabled members on these programs will have risen in real numbers since 2009/2010, probably into the hundreds; however, even with increased numbers, these disability benefits are not universal as portrayed in the Royal Canadian Legion ads. Most disabled members will only receive a lump sum payout, in lieu of a life-long pension, and some members possibly will be retrained and provided a partial salary during that retraining period.

4.4.3 Supplementary Retirement Benefit

Some Canadian Forces members who are classified as totally disabled receive this onetime payment at age 65 years, which is 2% of their gross Earning Loss Benefit payable. Again, few Canadian Forces members get this benefit. This program also should not be confused with a proper pension program that provides a yearly payment of 2% of a person's annual income for every year they are on the program, to a maximum of 35 years, or 70% of the person's annual income paid out each year.

The Equitas Society has found that this program has little value to disabled members who received a lump sum payment, plus possibly a couple of years of Earning Loss Benefits during a training program. Also, it is not a support program for severely disabled members who will lose their Earning Loss Benefits at age 65.

4.4.3.1 Canadian Forces Income Support (CFIS)

This tax-free monthly benefit is basically for those severely disabled members who will lose their Earning Loss Benefits at age 65, and who will, through this program, be paid \$1,277.70 per month as a single veteran and \$1,943.50 per month as a veteran with a spouse/partner. The issue with this program is that all other income is clawed back from this payment. Thereby, the maximum a disabled member can make on this program is always at a value below the poverty line.

4.4.3.2 Rehabilitation Program

This program pays the cost of education fees for a member, or their spouse, up to a maximum of about \$20,000.00.³⁶ These fees are paid during the previously mentioned re-training period. The Equitas Society has found value in this program.

4.4.3.3 Health Benefits

This program allows certain disabled members to pay the premium and then receive various health and dental plan coverage benefits under the Public Service Health Care Plan. The Royal Canadian Legion advertising refers to members having 'access' to health care, and have simply left out the fact that the disabled members have to pay for the premium for these health care plans themselves.

4.4.3.4 Counselling Services

Defined counseling services such as financial advice, family and employment advice are provided with ceilings. For example, disabled members who receive a lump sum payout are advised that they can receive up to a maximum of \$500.00 towards financial advice to help them invest their settlement payment. As discussed later³⁷, this amount is totally inadequate to accomplish its stated goal of providing members with the financial knowledge required to invest a significant sum of money over an extended draw-down period.

4.5 Duty to Accommodate

Throughout Canada employers have a legal obligation to accommodate persons with disabilities, and employers have a duty to accommodate injured workers within their own organization. However, Canadian Forces members with a certain level of disability are forced to be released from military service at a lesser standard compared to other federal workers who are released from their jobs. Many disabled Canadian Forces members, including reserve members, wanting to compete for available federal jobs are required to leave the military first before applying for any federal jobs, but only once

³⁶ Information from the Office of the Veteran Ombudsman -2012

³⁷ See Pt. 2 Appendix G

outside of the federal civil service. Priority is given, in some cases, to these disabled Canadian Forces members, but there is no flow-through process to other federal jobs for them as serving members. It should be noted that the #1 issue for many disabled Canadian Forces members is their need to make an income after being released from the Canadian Forces. A flow-through process from the Canadian Forces to other federal jobs would dramatically reduce the stress levels of Canadian Forces members who are facing a medical release. This would provide other government departments with skilled loyal employees, and reduce the strain on other assistance programs. In this model disabled members are seen as an asset, not a liability.

It appears that the Federal Government is fully aware of the duty to accommodate persons with disabilities as per the following Treasury Board of Canada Secretariat web-site statement. However, there appears to be a different standard for Canadian Forces members, and that different standard (CF members are being released from their jobs at a lower standard than other federal workers) should be factored into internal government 'transfers' to other equal paying jobs within the federal civil service:

Policy on the Duty to Accommodate Persons with Disabilities in the Federal Public Service

Preamble

The Treasury Board and the Public Service Commission are committed to developing an inclusive, barrier-free work environment in which all persons have equal access to opportunities in the federal Public Service, appointments are based on merit and all employees feel included and valued. This policy outlines the principal steps necessary to attain the goal of a representative Public Service that includes persons with disabilities.

This policy is consistent with fundamental Canadian legal principles. The Canadian Charter of Rights and Freedoms guarantees certain democratic rights to all persons and prohibits discrimination on the basis of physical or mental disability. In several cases, Canadian courts have emphasized that accommodation is an essential means of ensuring the equal participation of all persons in all sectors of Canadian society.

Under the Canadian Human Rights Act, employers must accommodate individuals and groups of individuals to the point of undue hardship considering issues of health, safety and cost.

The Employment Equity Act requires the reasonable accommodation of persons with disabilities and others within the federal workplace. The Act also requires employers to identify and remove barriers to the employment of persons in designated groups.

Under the Employment Equity Act, the Treasury Board and the Public Service Commission share employer responsibilities to the extent of their authority under the Financial Administration Act and the Public Service Employment Act. This policy therefore sets out the requirements for the Treasury Board, the Public Service Commission and their delegates. - February 2012³⁸

4.6 Imposing the NVC – Issue of Fundamental Justice

The way in which the NVC was imposed on the Canadian Forces has been a contentious issue for disabled Canadian Forces members. First, these members believed that they were signing a legal agreement with the government when they signed on for their contract period within the Canadian Forces. Many Canadian Forces members have commented that the nature of the Canadian Forces disability benefits was a factor in their agreeing to become members; thus, agreeing to take the related risks of the military. They considered both their income requirements and the projected financial needs of their families in the event that they be injured or killed in the line of duty.

Second, during a time of war, in 2006 - the same year as Canadian Forces members were placed in a well known, high casualty area (Southern Afghanistan), the government changed the terms of their engagement contract regarding disability benefits without effective consultation with the affected stakeholders.³⁹ Furthermore,

³⁸ Treasury Board of Canada Secretariat: <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?evttoo=X§ion=text&id=12541>

³⁹ Canada's Role in the Afghanistan War – Wikipedia - http://en.wikipedia.org/wiki/Canada's_role_in_the_Afghanistan_War

there was no "grandfathering" provision, which is normal when contractual changes are made to an existing employee agreement which reduces employee benefits. In many cases, members enlisted with the Canadian Forces on the basis that they would receive a pension for injury or disability. Many of those members are subsequently learning that the deal they thought they agreed to is no longer being honoured.

The fact that members do not have a union, and therefore had their terms of employment changed under the above mentioned conditions in a unilateral and arbitrary way, violates principles of fundamental justice for disabled Canadian Forces members with settlements from 2006 onward.

4.7 Right to Appeal to the Courts

The way disabled members are being treated by Veteran Affairs Canada has been topical of late; however, the main issue is the fact that members are limited to seeking redress of their settlements within a 'closed loop' system. Both the *NVC* review and appeal process re-visits the *NVC* and the applicable 'table of disability'. The *NVC Review & Appeal Act/Regulations* also purports to use the *Crown Liability and Proceedings Act* to block members from asking the courts to rule on their settlement amounts, and the overall validity of the *NVC*. Although a proper workers' compensation program may prevent employees from suing their employer, there is a strong argument that the *NVC* does not meet this standard, and therefore members can look to the courts for a financial remedy through a *Charter* challenge. In broad terms, this is the action the law firm Miller Thomson LLP is planning.

5.0 Regular Canadian Forces Members

It is acknowledged that many Canadian Forces members who are retired, and serving members with high pensionable time, are content with the *NVC*. These members tend to be older members who have received a lump sum payout in addition to a normal pension based upon their many years of service. They do not rely on the *NVC*.

The Canadian Forces members who are most upset with the *NVC* are those younger members who have compared their benefits under the *NVC*, as amended by *Bill C-55*, to the previous *Pension Act*. As previously stated, the number one issue on the minds of disabled members is how they are going to support themselves and their families given their reduced earning capacity due to their disabilities.

Without listing specific examples, Canadian Forces members classified as 100% disabled have provided the Equitas Society with a forward projection of their disability benefits using both the *NVC* and the *Pension Act*. They have demonstrated that they are financially disadvantaged by around 30% over their lifetime under the *NVC*.

Their claim is backed up by the 2011 Queen's University study that found Canadian members will only receive approximately two thirds of the disability compensation under the *NVC* compared to the previous *Pension Act*, focusing only on veterans with severe disabilities—those with a disability assessment of 78 percent or greater. This study took into account “all” benefits provided to seriously disabled members, including but not limited to the permanent impairment award and the minimum income guarantee.

A 2010 Veteran Affairs Canada report entitled, ‘Evaluation of Disability Pension and Award – Final August 2010’, also provides examples of disabled members receiving compensation under the *NVC* and previous disability programs. This evaluation also concludes that disabled members will receive between 30 to 65 percent less under the *NVC*. The report emphasizes that disabled members will receive a large financial compensation package by their third year, and will receive better re-training support. It can be assumed that the argument behind the *NVC* is that ‘upfront money’ and retraining is better for the disabled member even though the total financial benefit is significantly reduced. This may be true in some cases; however, given low returns on investments and poor employment opportunities due to the current economy, many disabled members are saying that the promised overall benefits of the *NVC* are deficient.

One of the main disadvantages of the *NVC*, as amended by *Bill C-55*, is the fact that the minimum income guarantees (Earning Loss Benefit) of 75% of a member's income (minimum of \$40,000.00) is not an insured benefit. This minimum income guarantee is part of a rehabilitation program, which gives the disabled member an income guarantee only during the period of the rehabilitation program, which also can include tuition payments. Once the rehabilitation program is completed, however, the income guarantee benefits end. Often this program can end after two years. Some disabled members are deemed never to be able to work, and their income guarantee benefits are limited to age 65. In addition, the minimum income guarantee program is taxable, and is subject to claw back of all other income of the disabled member, including other insurance payouts purchased by the member prior to their disability. Thus, the *NVC* minimum income guarantee program cannot be considered the same as a workers' compensation program that pays a tax-free, indexed, non-clawed back monthly payment of over \$4,000.00. As such, only the lump sum payout can be considered a lifelong generator of income for many disabled members. By contrast, the previous *Pension Act* did mirror other workers' compensation programs, and provided a monthly pension payment for disabled members.

It is important to remember that many terms used in the *NVC*, as amended by *Bill C-55*, mimic terms used in actual workers' compensation programs. However, the *NVC* differs greatly from other workers' compensation programs. As a result, while the *Pension Act* can be referred to as a workers' compensation program, the *NVC*, as amended by *Bill C-55*, does not qualify to be called a normal, or standard, workers' compensation program. As previously stated, there is real concern regarding the low number of disabled members who actually qualify for the Earning Loss program for at least 2 years, let alone the very few who receive this benefit to age 65. Therefore, any reference to members being paid 75% of their wage as a disability benefit under the *NVC* has to be qualified. The representation that many disabled members are receiving a monthly benefit for life equal to 75% of their wage is simply not true. At present the majority of these disabled members are left to derive an annual income from the investment of their lump sum payout and their own reduced ability to work and earn

income. The cases presented to the Equitas Society show that this is easier said than done.

Given that these lump sum settlements are the main financial support method to compensate these disabled members, the overriding issue of the amount of the lump sum payout is crucial to disabled members. Many disabled members are concerned that their one-time payout was disproportionately small because the method of settlement doesn't factor future wage losses, loss of capacity, or future cost of care.

Remedy

Veterans Affairs Canada, in association with other veteran organizations, may have proposed solutions for the shortcomings of the *NVC*. The Equitas Society in no way wishes to 'claim jump' any well thought out answers to the problems mentioned above. However, without a pending, and timely, solution to these problems, a simple way to upgrade the *NVC*, would be to make it equal to other workers' compensation programs. This would involve creating a permanent, tax-free, and indexed monthly payment to disabled members to provide them the same overall disability benefits that other disabled federal employees would receive over their natural lifetime. Regarding severely disabled members on the Earning Loss benefit program, which ends at age 65, the *NVC* should provide this benefit for life and remove the small pension payout (2% of Earning Loss payable). Further, the current Earning Loss benefit program when used as a long-term benefit needs to be tax free, indexed and free from claw back provisions.

Another remedy for many disabled members is to place them directly into other federal jobs without their having to apply for such positions after being 'medically released' by the Canadian Forces because their mental or physical health does not allow them to remain employed by the Canadian Forces. In addition, many members have stated that they would benefit from employment integration into equal paying jobs through an employment placement program for disabled members.

6.0 Reserve Canadian Forces Members

Reserve members are divided into three classes. Class A reservists parade at their local unit and receive one-half day's pay per week, unless they attend other exercises. Class B reservists on contracts less than 180 days will work full time in the Canadian Forces, but at a reduced rate of pay compared to regular members. Class B reservists on contracts for 180 days or greater, will work full time in the Canadian Forces at a regular member's pay scale. Class C reservists are embedded into the regular forces at full pay for a defined period of time. The reservists who served in the Afghanistan War and in Bosnia were on Class C contracts. When these reservists returned from these war zones, they went from Class C to Class A reservists. Thus, the reserve members need to re-enter the work force outside of any Class A duties.

When a disabled regular member is released from the Canadian Forces, they are eligible for severance pay, their pension payments, a lump sum payout, the Earning Loss program and other programs. If a disabled regular member is not released from the Canadian Forces, they have a job, plus their lump sum payout.

When a disabled reserve member is changed in status from Class C to Class A, they have to take their disability into the civilian workplace and try to obtain a job with all their new service-related disabilities. For example, many Class C reserve members had ambitions to be police officers, or corrections officers, when they returned from Afghanistan. However, due to their disabilities, they no longer qualify for these types of jobs. The Class C reserve members who were significantly injured in Afghanistan received a lump sum payout and some received the Earning Loss Benefit for a period of time, often for just two years. Compensation for these members is crucial - they are making the same sacrifices as regular force members, but are being disregarded upon termination of their contract.

It has become clear that disabled reserve members simply do not receive proper compensation under the *NVC*. They can receive as little as 10% of what other forms of disability settlements would provide.

The following examples are illustrative:

Member A (information provided by the member) ⁴²

In 2008, a reservist in his thirties broke his left femur and his right talus (ankle) as result of an incident on the battlefield in Afghanistan. He was serving on a class C contract. His left femur was operated on immediately in Kandahar; the fracture was repaired by an external fixator. The external fixator was secured to his left femur through 4 incisions that were made into his left thigh. That leg was operated on again in Germany by removing the external fixator and drilling out the bone marrow to insert a rod which is the entire length of his femur. The rod was secured by two bolts, one in the top near his hip and one in the bottom near his knee. As a result of the first operation, his left leg was somewhat weaker than his right leg, making it difficult to climb stairs and hills. There is some nerve damage to his thigh region from the incisions; the sensation remaining is numb and slightly painful at the same time when in contact with something (touch, pants, other objects, etc.).

This injured veteran's right talus bone was fractured into several pieces (too many to count on the X-rays). It was placed in an external fixator and a cast until he reached a hospital in Canada due to the complex nature of the surgery. The external fixator was secured using 4 pins fastened to bones in his foot. It was repaired using approximately 10-12 pins. The effective use of his right ankle is limited, there is daily pain as a result of the injury and it prevents him from doing most recreational activities. Although he is able to walk, it is with difficulty, and prolonged use has a negative impact on range of motion and use. There has been residual swelling in the ankle since the injury and pain originating from the holes drilled into the bone from the external fixator.

⁴² Member A has not been through the *NVC* review or appeal process

His career aspirations prior to the injury were to remain in the military and be employed either full-time or part-time. Other career aspirations were the correctional service, the police service, the sheriff's department or perhaps as a firefighter, as he was in peak physical condition. He was able to complete the Army Fitness Training Program with little difficulty and had completed half the JTF-2 preliminary fitness training manual prior to his deployment. His physical condition now will preclude him from entering those lines of work, as he is unable to run at all, nor climb stairs without assistance or to climb hills without several rests.

Member A was denied any settlement whatsoever for his left leg, and received only a 5% disability award for his right leg. This resulted in a payment of \$13,500.00, with no other payments or benefits. This soldier is currently putting himself through university, with no financial support from Veteran Affairs Canada. It is estimated that if this member were able to legally challenge his proposed payout sum, the courts would likely award at least \$200,000.00 (see appendix E) for his disability taking into account his loss of longer term earning ability and need for future care.

Member B (information provided by the Member)⁴³



Photograph taken of Member B by Afghan War correspondent Michael Yon. For full story see: <http://www.michaelyon-online.com/whispers/page-2.htm> or <http://www.michaelyon-online.com/from-canada-a-thank-you-to-u.s.-service-members.htm>

In 2010, Class C reserve member B was serving his second tour of duty in Afghanistan. He was required to attend a routine training session at the Kankala Range, Daman District, Kandahar, Afghanistan, OP Athena.

Member B was to train with his platoon, which had recently fallen victim to an Improvised Explosive Device (IED) strike on December 30, 2009. In that incident, four members were killed and five members were seriously wounded. Journalist Michelle Lang was also killed.

⁴³ Member A has not been through the NVC review or appeal process

During this training session, C19 Remote Weapons Systems (claymore mines) were being discharged. Member B knew the training range had been set-up improperly and was being operated improperly. Member B was able to make this determination based on his military training of live firing ranges and his experience on other live fire ranges.

After a C19 exploded at close range, member B began to move to a position of cover behind an armoured vehicle. Member B stopped to help another member take cover. At that moment, another C19 went off. The pellets travelled in the wrong direction and came back on the attending members. Another member and Member B were critically injured. Member B was hit with numerous pellets, one of which went through his body armour and through his chest. Several other members were also hit, including three who were airlifted to the Role 3 Hospital due to injuries.

Member B's rib was fractured, his lung was collapsed, and his kidney, spleen and pancreas were damaged. Both Member B and the other seriously injured member were the first members to be airlifted by helicopter from the training range to Kandahar for emergency medical treatment. Member B was conscious during this flight as his friend, also severely injured, died en route.

At the Kandahar Air Field, Role 3 Hospital, Member B underwent emergency surgery where an 11 inch incision was made in his abdomen. As member B had lost 1.5 litres of blood, his life was in danger due to blood loss. The surgeons removed his left kidney, his spleen and the tail of his pancreas. Member B was listed as very seriously injured - the final category of trauma before death. As a result of this operation, Member B had tubes into his chest to deal with the lung injury and tubes into his abdomen to deal with toxic fluids leaking out of the remaining portion of his pancreas.

Member B was transported by air with an American Critical Transport Team, and accompanied by a US journalist, who described Member B as the only truly critical patient on the flight (see above photograph). This team took Member B to the Bagram Air Base. Member B was then transported by air to the Landstuhl Regional Medical

Center in Ramstein, Germany. In Germany, Member B had additional operations and his abdomen was eventually closed up.

Member B was flown to Canada by a Canadian Air Force aircraft, with a full medical team. Once in Canada, Member B was admitted into the burns and plastics unit at a leading Canadian hospital. Later in that hospital, the pellet that damaged him was removed.

At this time Member B had numerous tubes inserted for drainage in his abdomen. However, he started to have pancreatic burn. Enzymes from his pancreas were leaking into his abdomen, a potentially serious condition. Member B was immediately taken for an oral scope, during which time doctors implanted a shunt to help with drainage. Member B still had abdominal drainage tubes and was in a lot of pain. After being released from hospital he was re-admitted after experiencing severe abdominal pain. Tests determined that he had an abdominal staph infection caused by the staphylococcus aureus bacteria, which required a lengthy hospital treatment of intravenous antibiotics.

He sustained significant internal injuries (removed spleen & kidney, partially removed pancreas, fractured rib, collapsed lung, and a severe abdominal infection), all which have left him with life-long medical and health issues.

A Canadian Forces, Board of Inquiry has been convened, and will report to the Federal Government on the incident in which Member B sustained his injuries. Two Canadian Forces members have been charged with unlawfully causing bodily harm and negligent performance of their military duty in regard to Member B's injuries.⁴⁴

As result of his injuries, Member B made the following claim to Veteran Affairs Canada under the *NVC*:

⁴⁴ <http://news.nationalpost.com/2011/06/29/two-canadian-soldiers-charged-in-death-of-colleague-in-afghanistan/>

- 1) Loss of spleen
- 2) Left pneumothorax
- 3) Fractured left 12th rib
- 4) Gastric ulcer
- 5) Damaged pancreas
- 6) Loss of left kidney
- 7) Reduced quality of life

Also covered in this claim is the associated pain & suffering, and the issue of post traumatic stress.

As the *NVC* has a 2006 liability cap of \$250,000.00 for a 100% disability, in 2010 it was approximately \$275,000.00. Since lump sum payments are prorated based on a disability assessment, the amount can be much less than the maximum. The lump sum payment is meant to be invested by the member and the derived income is to support members with their disabilities. Veteran Affairs Canada awarded Member B \$41,500.00 based on:

- 1) Loss of spleen = 0%
- 2) Left pneumothorax = 0%
- 3) Fractured left 12th rib = 0%
- 4) Gastric ulcer = 0%
- 5) Damaged pancreas = 0%
- 6) Loss of left kidney = 13%
- 7) Pain & suffering = 0%
- 8) Post traumatic stress = 0%
- 9) Reduced quality of life = 2%

Total: 15% of \$275,000.00 = \$41,500.00

Based on information from a Canadian Bank during 2011, when converted to a 25-year annuity, this settlement amount would equal a payment of approximately \$140.00 per month indexed at 3% per year, but taxable. The Equitas Society contacted WorkSafe BC⁴⁵ in 2011 and determined that the BC provincial workers' compensation program would pay for the same disability approximately \$1,400.00 per month, which would be both tax-free and indexed for long-term inflation.

Based on this preliminary worker compensation assessment⁴⁶, the settlement awarded under the *NVC*, as amended by Bill C-55, is less than 10% of what a provincial workers' compensation program would award. Converted to cash, Member B will receive \$630,000.00 less under the *NVC* than he would through other workers' compensation programs, using workers' compensation payments to only the age of 65.

Remedy

The two examples provided above exemplify that some disabled reserve members are not properly compensated using the *NVC*, as amended by Bill C-55. Some internal Federal Government documents have come to light stating that reserve members may be eligible for workers' compensation benefits through the Federal Government *Employees Compensation Act*, RSC 1985, c G-5 (see Appendix D). There appears to be much debate on whether this program is still current, has ever been used in recent years, if it is actually applicable to Class C reserves and if reserve members would have the option to retroactively claim for their disabilities under this Act. Nevertheless, the Equitas Society would support exploring this option. However, should no real value be found in this program, then the same remedies for regular members should be applied to reserve members.

⁴⁵ <http://www.worksafebc.com/>

⁴⁶ Full Worksafe BC assessment required for final compensation benefits

7.0 Understanding Disabled Benefits for Workers

The Equitas Society recognizes how complex worker disability benefits are to understand and administer. For example, the table in Appendix A of this position paper - provided by the Office of the Veterans Ombudsman - demonstrates the complexity of this process by showing the relationship between the various benefit programs available to Canadian Forces members using the *NVC*.

Moreover, the *NVC* constitutes a vast change in the way disabled workers are compensated – upfront cash and re-training in lieu of long term financial support. In fact, it could be said that the *NVC* is an experiment. To truly understand the impact of the *NVC*, however, one first needs to understand how traditional workers' compensation programs operate. As this position paper has outlined, it is an accepted norm in the Canadian workers' compensation system that over 2.0 million dollars, in today's money, of financial assistance is required for a completely disabled worker over their life-time, based on a person receiving benefits in their twenties. Persons with lesser disabilities still require a large financial commitment.

When a cash payout system such as the *NVC* is used instead of a long-term care program, the payouts often can appear like “lotto winnings”. Some people can actually become envious of such payouts. However, for a proper understanding of lump sum payouts, the current cash payout system used by Veteran Affairs Canada needs to be compared to the other institution which uses such a system – the courts.

8.0 Court Actions

The *NVC* is a major departure from the two most traditional ways of compensating disabled persons; the civil litigation process, and workers' compensation programs. Also, the total settlement process for disabled soldiers appears to violate basic laws that protect workers from being ‘fired’ due to a work related disability, without the employer accommodating the worker with another position, or if unable to accommodate, placing

the employee into a workers' compensation program that is equal to what other Canadian workers would be provided.

The courts have a well thought out process for calculating lump sum payouts for disabled persons. The courts include general damages, specific damages, past wage loss, future earning loss, future care, and fund management fees. As per Appendix F, the resulting lump sum payout for a severely disabled person in their twenties may reach as high as 8 million dollars. The *NVC* charter doesn't take into account the factors which the courts consider before awarding a lump sum settlement. A compensation case search of moderately and partially disabled persons (found below in Appendix F) demonstrates that, in considering the disabled member examples laid out in this paper, the courts have awarded larger lump sum amounts in situations where injuries are similar. The *NVC* lump sum payouts provide significantly less in financial compensation than the traditional court derived lump sum settlements.

For workers injured and disabled in the course of their employment, the Canadian standard is that they will receive both short-term and long-term financial compensation. The concept of lump sum payouts (and much less than the courts would provide) in lieu of ongoing financial support is a huge change in worker compensation philosophy. It is a change which may reduce employer forward funding obligations for disabled workers, but nonetheless a change not fully supported in law. If a responsible person wishes to liquidate their liability at the date it is incurred, they must fully compensate the injured person they are responsible for. The *NVC* falls far short of this standard.

Appendix G describes examples where the *NVC* may not comply with basic laws regarding Canadian human rights, disabled worker rights and the employer's duty to accommodate disabled workers. It could be strongly argued that the *NVC* creates a disposable employee once injured in the workplace. This is a position not supported by Canadian labour organizations, or the public in general.

Although the various Acts that create the *NVC* settlement process are based in current law, as a first principle the Government of Canada must pass laws which are

constitutional in full compliance with the *Charter*. Courts have never been shy about striking down non-compliant laws.

9.0 In Summary

- a) In 2006, the Federal Government passed the *NVC*, legislation which drastically altered the way in which disabled soldiers are compensated. The intent of the legislation, at least in part, was to provide speedier benefits and better retraining programs for disabled Canadian Forces members.
- b) Unfortunately, while the *NVC* is adequate for some disabled members, it has proven to be ineffective - and insufficient, in some cases grossly insufficient - for other disabled members. Actual cases provided to the Equitas Society and a Queens University⁴⁹ study demonstrate that the *NVC* reduced benefits for severely disabled members by about one third, as compared to what they would have received under the previous legislation, the *Pension Act*.
- c) A Study by Veteran Affairs Canada shows examples of moderately disabled Forces members who have had their financial support reduced by two thirds, compared to the previous compensation available under the *Pension Act*, which loosely parallels other existing worker compensation programs.
- d) The Equitas Society has identified cases where the compensation paid under the *NVC* is woefully inadequate. Example #1, one veteran returned home from Afghanistan with a shattered bone in his upper left leg and broken bones in his right ankle. After major surgery he was left with an inability to run or climb, and walks with a limp. In spite of this clearly ongoing disability, which disqualifies him from many fields of employment, his total compensation was a mere \$13,500.00. Example # 2, another veteran returned home from Afghanistan with the loss of his spleen, a left pneumothorax, a fractured left 12th rib, a gastric ulcer, a

⁴⁹ <http://www.queensu.ca/dms/publications/claxton/Claxton13.pdf>

damaged pancreas, and the loss of his left kidney. Through the New Veterans Charter this member was provided only \$36,000.00 for the loss of his kidney, \$5,500.00 for a reduced quality of life and nothing for his other injuries including nothing for the removal of his spleen.

- e) Instead of providing disabled members with a comprehensive disability assessment (as would any private insurer or, indeed, any provincial workers' compensation program), the regulations of the *NVC* simply have a table of disabilities which is referred to without any reference to the real world implications of individual member's disabilities.
- f) After failing to properly assess individual members' disabilities, the Veterans Affairs Department in applying the *NVC* has failed to compensate members over the course of their lifetime for the reduction in their ability to earn a living compared to what they could have earned before their injuries.
- g) The *NVC* needs to be amended to ensure that wounded or injured members are fairly treated. It must provide the same kind of "worker's disability insurance" as is available to every other Canadian worker through provincial or federal workers' compensation programs. The fact that their government deploys Canadian Forces members in "harm's way" without a proper disability compensation program is considered unconscionable and needs to be fixed immediately.
- h) In addition, a major amendment is needed to the methodology of assessing disability, and then to the provision of long-term benefits, so as to ensure that injured Canadian Forces members are protected during the entire period of their disabilities.
- i) Benefit improvements to the *NVC* should be available to all members who have made a disability claim since April 2006.

10.0 Author

Jim Scott holds a Bachelor of General Studies Degree from the University of the Fraser Valley, and has worked as both an airline captain and a police sergeant. Mr. Scott has experience serving as a local airline union chairperson and employee pension chairperson, dealing with labour issues and pension benefits. Mr. Scott is the President of the Equitas Society, formed to help disabled members fund a legal action, through the law firm Miller Thomson LLP, to seek equal disability benefits as compared to existing workers' compensation programs throughout Canada.

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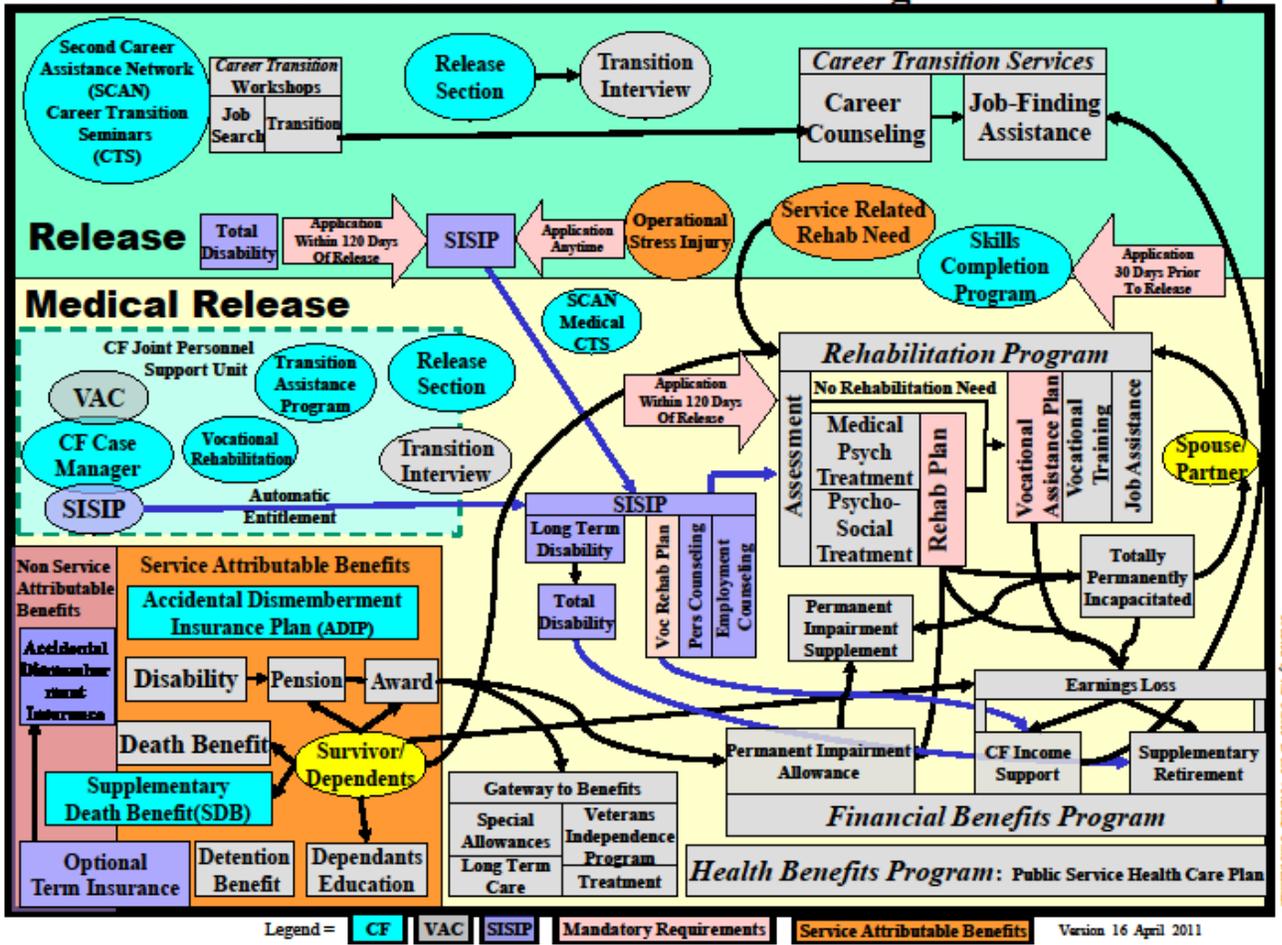
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Appendix A – VAC Benefit Relationship Chart – Provided by Office of the Veterans Ombudsman

Canadian Forces/Veterans Affairs Canada Program Relationships



Appendix B - Page 51 & 52 of VAC Report, “Evaluation of Disability Pensions and Awards - Final – August 2010”

Case Scenario 3 – Moderately Disabled Client 40% disability In this scenario, the CF client has assessed disabilities totaling 40%. As a CF member, the client’s indexed monthly salary as of March 31, 2010, was \$4,663. This Veteran is married and both the Veteran and his spouse are 35 years of age at the time the application for disability benefits and other programs is made. The life expectancy of the Veteran is 72 years

and the spouse 79 years. The Veteran released voluntarily from the CF and has been found to have a rehabilitation need that qualifies him for the Rehabilitation Program. He has 12 years of service and is in receipt of Canadian Forces Superannuate. **Pre-NVC:** The purpose of the disability pension is to compensate for service-related disability or death. The monthly pension rate for a single pensioner at 40% is \$959.13. The present value of a pension paid over a 38 year period is \$476K (assuming life expectancy to age 72). The present value of additional pensions for the spouse amounts to \$119K. The present value of the survivor pension paid to the spouse for 6 years after his death amounts to an additional \$52K. Prior to the *NVC*, no other benefits or services are available to assist the client and his family adjust to their new life circumstances.

NVC: The lump sum disability award is paid to provide recognition and compensation for the non-economic effects of service related disability or death. The rate for a 40% disability award is \$110,431.88. In addition to these payments, the Veteran receives medical, psychosocial and vocational rehabilitation services according to his rehabilitation plan. It is assumed this client participates in medical/psychosocial rehabilitation for 1 year (determined to be \$5,619/year), both medical/psychosocial and vocational rehabilitation for 1 year, and vocational rehabilitation only for 1 year (determined to be \$3,452/year). Participation in the Rehabilitation Program also opens the door to the Financial Benefits Program, which compensates for the economic impact a service-related injury has on the Veteran's ability to earn income. Assuming his participation in the Rehabilitation Program lasts 3 years, the present value of the Earnings Loss benefit can amount to an additional \$86K. If the client spends a longer period of time in the Rehabilitation Program, his eligibility for the earnings loss benefit will continue. If there is a need related to the client's rehabilitation plan, the spouse and children may also receive psychosocial rehabilitation services. It is expected that, as a result of these services, the family is benefiting from a better quality of life due to medical and psychosocial rehabilitation as well as increased household income in addition to the disability and financial benefits paid. For a point in time comparison of financial expenditures pre-NVC and NVC for the duration that a client is in

Rehabilitation, the client would receive \$43K in benefits pre-NVC and \$241⁵⁰ in NVC benefits. Evaluation of Disability Pensions and Awards 52 Final –August 2010

Pre-NVC Total Value

Payment	Present Value
Disability Pension (40%)	\$959.13
<i>Paid over 38 years</i>	\$476,003.29
Additional Pension for Spouse	\$476,003.29
<i>Paid over 38 years</i>	118,999.58
Survivor Pension	599.46
<i>Paid over 6 years in 38 years</i>	51,646.81
Total	\$ 646,649.68

NVC Total Value

Payment	Present Value
Disability Award (40%)	\$110,431.88
<i>One time lump-sum</i>	<i>\$110,431.88*</i>
Earnings Loss	2,378.13
<i>Paid over 3 years</i>	86,000.36
Rehabilitation <i>Medical/psychosocial and vocational – 3 years</i>	20,380.34
Total	\$ 214,366.09⁵¹

***Total (\$110,431.88) if client does not participate in Rehabilitation Program or Financial Benefits Program**

Note: Tables reproduced to fit this page style (portrait vs. landscape)

⁵⁰ Appears to be an error in the VAC Report – should be \$214K

⁵¹ May be an error in the VAC Report – could be \$216,812.58

Appendix C – 2011 Ads Promoting the NVC

Advertisement



THE ROYAL CANADIAN LEGION

WHERE THE LEGION STANDS

PRIMER ON NEW VETERANS CHARTER (NVC)

There has been extensive coverage in the media concerning the New Veterans Charter (NVC). A comparison is made between the Lump Sum Disability Award paid out under the NVC and the Monthly Disability Pension paid out under the Pension Act (PA).

A fairer evaluation should include all the benefits that are accessible under the Canadian Forces Members and Veterans Re-Establishment and Compensation Act, commonly known as the New Veterans Charter (NVC). It should also include an overview of additional benefits available under the Service Income Security Plan (SISIP). Implemented in April 2006, after lengthy consultation, the NVC offers Job Placement assistance, Rehabilitation Services, Financial Benefits, Health Services, Education Assistance, and Disability Benefits to current or former members of the Canadian Forces (CF), including certain Reservists, and in some cases, their families.

Financial Benefits include the following:

- A tax exempt **Disability Award (DA)** paid in a lump sum as compensation for pain and suffering for service-related disability. The basic rates are legislated and adjusted yearly based on the Consumer Price Index. The DA is not subject to any SISIP offset. In the case of a service-related death, spouses and dependent children would qualify for a DA.
- **Earnings Loss Benefit (ELB)** is a taxable monthly benefit that equals 75% of gross pre-release salary, minus the monthly amounts of other income from prescribed sources such as SISIP, Canada Pension Plan (CPP) or Canadian Forces Superannuation (CPSA). This offset does not include the DA. ELB can be provided on a temporary basis during a period of participation in an approved Rehabilitation program, or until age 65, if deemed "Totally and Permanently Incapacitated" for the purpose of suitable and gainful employment, or until the day of the Veteran's non service related death if Veteran has not reached age 65. ELB is also payable to a spouse and dependent children in the event of a service related death.
- **Permanent Impairment Allowance (PIA):** a monthly taxable benefit to compensate for lost job opportunities due to injury. Can be paid out to a Veteran who has a severe and permanent impairment and has received a DA, and has been approved for the Rehabilitation program for that condition. Current payments range from approximately \$536/month to \$1,609/month;
- **Supplementary Retirement Benefit (SRB):** a taxable lump-sum payment payable at age 65, representing 2% of the total ELB that would have been payable to an eligible Veteran or survivor without regard to any income offsets. The SRB is payable to a spouse in the case of a service related death. Since SRB is payable on the basis that a Veteran "would have been receiving ELB", Veterans are encouraged to apply for ELB even if they received other income which raised their total income above the maximum limit of 75% of gross pre-release salary. SRB could be \$30,000 or more; and
- **CF Income Support (CFIS):** a non-taxable benefit available after applicant has completed Rehabilitation and deemed employable. A Veteran must demonstrate that he/she is no longer eligible for ELB, meets the Canadian residency requirement, meets the criteria related to employment and job placement and is deemed eligible to receive CFIS benefits. Monthly benefits currently range from approximately \$1,277/month for a single veteran to \$1,943/month for a married veteran, and an additional amount of \$308/month for each dependent child.

Rehabilitation includes one-on-one case management, medical services, mental health services and various programs to help a Veteran establish a civilian career. All medically released CF members are eligible for Rehabilitation, including any former member who has an injury or illness from his/her military service that is making their transition to civilian life difficult or impossible. **There are three types of Rehabilitation:**

- **Medical Rehabilitation:** includes psychiatric treatments, prescription medicine, surgery, physiotherapy, etc.;
- **Psychosocial Rehabilitation:** includes counselling group therapy, life skills training to restore independent living; and
- **Vocational Rehabilitation:** includes one-on-one career counselling, including support for training costs.

There are other programs available under the NVC such as Health Benefits, Education Assistance, Job Placement, and Group Health Insurance, etc.

Additionally, disability benefits are provided by the Canadian Forces (CF/DND) through the **Service Income Security Insurance Plan (SISIP)** **Accidental Dismemberment Insurance Plan (ADIP)** and the **Long Term Disability (LTD)** plan. The ADIP Award, which can be as high as \$250,000, is payable in addition to any Disability Award or Earnings Loss Benefit paid by VAC. The LTD plan provides replacement income protection to any CF member released for medical reasons or if he/she becomes totally disabled. The LTD benefit equals 75% of a CF member's salary on release, less other sources of income, such as ELB.

The Legion acknowledges that:

- there are gaps in the NVC;
- the NVC was adopted without clause by clause review in Parliamentary Committee and in the Senate because of a perceived urgent need to better look after modern Veterans and their families, and to facilitate their transition to civilian life; and
- The Legion went along with the introduction of the NVC on the basis that it would be a "Living Charter" and improvements would be made when required.

The NVC Advisory Group (NVCAG) has made a number of recommendations concerning gaps in the NVC. This report **HONOURING OUR COMMITMENT TO VETERANS AND THEIR FAMILIES** is available at the Legion web site under Service Bureau / Advocacy.

The Parliament Standing Committee on Veterans Affairs (ACVA) has some recommendations to fix the gaps in the NVC in a recent report **A TIMELY TUNE-UP FOR THE LIVING NEW VETERANS CHARTER** (also available on the Legion web site).

The recommendations of the NVCAG and ACVA are consistent with Legion Resolutions that were adopted in Winnipeg in June 2010 at the Dominion Convention.

The Government just announced improvements to the ELB (minimum annual income of \$40,000), wider access to the PIA, and critical injury allowance of \$1,000 (taxable) per month for life. Other improvements should be introduced in the near future.

WE CARE FOR ALL VETERANS OF ALL AGES AND THEIR FAMILIES.

Appendix D – Defence Minister MacKay’s E-mail on Federal Workers Compensation

From: *dnd_mdn@forces.gc.ca [mailto:dnd_mdn@forces.gc.ca]*

Sent: *January-11-11 9:48 AM*

To: *XXXXXXXXXXXXXXXXXXXX*

Cc: *CIMS_OPER@pm.gc.ca*

Subject: *RE: ** Reservists get short-changed*

The Government Employees Compensation Act (GECA) provides benefits for all employees of the Federal Government except members of the Regular Force of the CF and the Royal Canadian Mounted Police. The objective of GECA is to provide compensation for loss of earnings, medical care, or other related benefits to federal employees, including CF reservists, who are injured in the course of their employment or become disabled by reason of an industrial disease due to the nature of the employment. GECA is administered through Human Resources and Skills Development Canada, in conjunction with provincial workers’ compensation programs. The benefits are provided at the same rate and under the same conditions as the provincial workers’ compensation laws. For federal employees working within the province of Quebec, GECA is administered through CSST.

GECA/CSST requests that the Reserve Force member’s Commanding Officer (the employer) initiate the claim under GECA/CSST. When the Commanding Officer is made aware of a reservist injured in the performance of duty, he or she is then required to complete the appropriate provincial Employer’s Report of Accidental Injury/Disease form and forward it to one of the regional offices of GECA/CSST.

Commanding Officers are advised in the instructions of Department of National Defence DND 2398 (the form to apply for injury compensation under

Compensation and Benefit Instruction CBI 210.72) that it is their responsibility to ensure that the injured or ill member has been provided with all the information required to make an informed decision with regard to the application under GECA/CSST.

As the benefits under GECA and the Reserve Force Compensation, paid under CBI 210.72, are interrelated and paid from federal sources, care must be exercised to ensure that members do not receive duplicate benefits for an injury or disability. In recent months, it has become apparent that the relationship between the administration of CSST and Reserve Force Compensation will require clarification, and the CF is actively engaged in pursuing this discussion.

I trust that the information I have provided is helpful, and thank you again for writing. I would also like to take this opportunity to thank you for your service in defense of Canada.

Sincerely,

Peter MacKay

Minister of National Defence

c.c. Office of the Prime Minister

Appendix E - Disability Case Law Review (by Miller Thomson LLP)

Issue:

What would the rough quantum be for a civilian similarly injured to the same extent as the Canadian Forces members' case examples presented in the Equitas position paper.

Analysis:

What would the rough quantum be for a civilian similarly injured to the same extent as the Canadian Forces members' case examples presented in this position paper.

There were two case examples presented.

Member A suffered the following injuries and consequences, the compensation of which totaled \$13,500:

- broken left femur;
- broken right talus (ankle);
- some nerve damage to thigh resulting from surgical incisions;
- effective use of right ankle is limited, prevented from doing most recreational activities;
- now walks with difficulty;
- unable to run at all, and needs assistance or rests to climb stairs; and

career aspirations were to remain in the military or become a corrections officer.

Member B suffered the following injuries and consequences, the compensation of which totaled \$41,000:

- loss of left kidney;
- loss of spleen;
- collapsed lung;
- fractured rib;
- gastric ulcer;
- damaged pancreas and;
- associated pain and suffering.

Quantum: Member A

As every case is unique, and finding the perfect case with the same combination of injuries is not easy, I have decided to find cases dealing with a broken/ fractured femur alone. I have then located cases dealing with a broken ankle. Together, my aim is to produce a rough but realistic assessment of what Member A ought to be entitled to were the same injuries to be remedied in court.

Femur:

In a semi-recent decision from our Supreme Court, *Cuppen v. Queen Charlotte Lodge Ltd.*, 2005 BCSC 880, a plaintiff who broke his right femur after a boat he was on veered suddenly to the left and caused the plaintiff to hit one of the boat's side-railings, was awarded, at the parties agreement, \$100,000 in non-pecuniary damages and a further \$235,000 in loss of opportunity due to the plaintiff being "somewhat less able to engage in promotional activities and may generate a somewhat lower level of sales than he would, had he not been injured.": at para. 84. The plaintiff required three surgeries, the chronology of treatment being described at para. 6 as follows:

[6] Mr. Cuppen was airlifted to Vancouver where his fracture was set. On June 26th he required further surgery. He was bed-ridden for the first few weeks after the two operations, was then in a wheelchair for a month and a half, and on crutches for the next few months. Through the fall of 2001 he attended physiotherapy. Eventually he was able to get around with a cane. By June 26, 2002 he was still experiencing pain over the implant to his femur. He required a third operation in December, 2002 to remove the pins and plate. After the third operation he again attended physiotherapy. He has recovered, although he is not able to attend all social functions that he would normally attend as the principal sales person and marketer for his business.

The *Cuppen* decision was affirmed on appeal: 2006 BCCA 443.

In *Tourigny v. McSween*, 1997 Carswell BC 2591 (B.C.S.C.), the plaintiff was injured while riding his motorcycle and upon colliding with the defendant's vehicle. The plaintiff suffered a fractured right femur and an open fracture of his right patella (knee cap). The circumstances following the accident were described at para. 20:

[the plaintiff] suffered a fractured femur and open fracture of the right patella. He was taken by ambulance to Vancouver General Hospital, where surgery was performed. A metal rod was inserted essentially from the area of his hip to his knee. He was hospitalized for eleven days. He was on crutches for approximately six weeks after the motor vehicle accident and later used a cane for approximately one month.

Non-pecuniary damages were assessed at \$40,000 (\$53,704.12 in 2012) and \$20,000 for future income loss (\$26,852.06 in 2012). This award followed a finding that the plaintiff was earning more after the accident than he ever earned before the accident. On appeal, the trial judge's finding of 50% liability on the plaintiff was reversed and the defendant was found to be 100% at fault.

In *Martin v. Pilot Insurance Co.*, 1991 Carswell Ont. 2045 (Ont. C.J.), the plaintiff pedestrian was struck by a vehicle in a hit and run. The 17 year-old plaintiff sustained a broken left femur, a laceration to the back of his thigh, a concussion, laceration to his head, resulting headaches, and some minor injuries to his fingers. The plaintiff required two surgeries, the second to remove the pin used in the surgical repair of his femur. It was held that the injuries had largely resolved and only minor residual effects remained. The plaintiff had pre-existing personality problems. The plaintiff was awarded \$40,000 in non-pecuniary damages (\$58,878.05 in 2012) and \$33,153.30 for loss of future income (\$48,800.04 in 2012).

In a medical malpractice decision where it was held that "the acts or omissions of Dr. Korkola provided a causal link to the "injury" – i.e. the osteotomy, and the subsequent chronic osteomyelitis that [the plaintiff] suffers from" following the fracture of his femur in a motor bike accident, the Court in *Morin v. Korkola*, 2011 ONSC 1393 provides the

following quantum assessment table displaying cases involving fractured femurs and the resulting non-pecuniary awards:

[89] In assessing what is fair and reasonable for non-pecuniary damages a review of cases dealing with fractures to the femur provide a starting point for assessing damages.

Dollar amount of damages	Facts	Citation
\$120,000	52 year old plaintiff – fractured femur leading to knee problems and knee replacement surgery	<i>Cartner v. Burlington (City)</i> (2008), 54 M.P.L.R. (4 th) 70 (S.C.) aff'd [2010] ONCA 407
\$75,000	56 year old plaintiff – one month in hospital – problems with alignment and replacement of a screw with intramedullary nail	<i>Cole v. Deep River (Town)</i> (2003) 36 M.P.L.R. (3 rd) 69 (S.C.)
\$65,000	78 year old plaintiff – open reduction surgery with internal fixation – retrograde nail and screws – six weeks in hospital	<i>Singer v. Hamilton (City)</i> (2007) 161 A.C.W.S. (3 rd) 506 aff'd (2009) 179 A.C.W.S. (3 rd) 230 (C.A.)
\$65,000	57 year old plaintiff – requiring open reduction surgery and internal fixation	<i>Vointsev v. Irina International Tours Ltd.</i> [2007] O.J. No. 5034 (S.C.)
\$85,000	47 year old plaintiff with ongoing mobility and pain problems – possibility of arthritis and knee replacement in the future	<i>Bannon v. Thunder Bay (City)</i> [2002] O.J. No. 3296 (S.C.)
\$110,000	29 year old plaintiff – severe fracture of the femur in several places – 13 inch scar – six months in hospital	<i>Zicari v. Young</i> 2001 BCSC 1549 (CanLII), 2001 BCSC 1549
\$145,000	28 year old plaintiff – four months in hospital – homecare for one year – possibility of osteoarthritis	<i>George v. Middlemiss</i> [1994] B.C.J. No. 1685 (S.C.)

	and future surgery	
\$45,000	Plaintiff university aged – fracture and requiring knee surgery – use of a knee brace for four years – ongoing pain and mobility issues	<i>Treberg v. Jarvis</i> [2007] N.J. 2007 NLTD 125 (CanLII), (2007), 268 Nfd. & P.E.I.R. 42 (SC – Trial Div) varied on other grounds 2009 NLCA 51 (CanLII), (2009), 289 Nfd. & P.E.I.R. 167 (C.A.)

[90] After considering the evidence, the submissions of counsel, and cases on femur fractures, I am satisfied that \$75,000 is the appropriate level of non-pecuniary damages for Andrew.

Ankle:

Turning to the authorities quantifying damages associated with broken/ fractured ankles, I find the following cases instructive.

Bains v. Hill, [1992] 5 W.W.R. 172 (B.C.C.A.) is a slip and fall case where the plaintiff sustained a fractured right ankle and ligament strains requiring surgery. The prognosis as to complete recovery was found to be “doubtful”. In overturning the trial judge and awarding non-pecuniary damages of \$35,000, the Court of Appeal opined at the plaintiff’s future abilities:

It is apparent from the medical records that Mrs. Bains has experienced pain, discomfort and a restriction on her activities which may be permanent. Her enjoyment in walking and shopping has been largely reduced. She underwent a surgical procedure in August, 1990 which caused some discomfort at the time. She may in the future face an ankle fusion - an operation which eliminates pain at the cost of movement.

This award in 2012 dollars is \$50,714.29. As for loss of capacity, the Court of Appeal awarded \$33,000 (\$47,816.33 in 2012).

Belanger v. Michipicoten (Township), [1996] O.J. No. 275 (Ont. S.C.J. (Gen. Div.)) is another slip and fall case where a 34 year-old plaintiff suffered a severe fracture to her

left ankle with ligament damage and required surgery with six screws. The plaintiff used crutches followed by a cane for about two months and then undertook physiotherapy. The plaintiff experienced daily pain and was left with scarring. The plaintiff's active lifestyle was curtailed. General damages were assessed at \$50,000 (\$68,579.55 in 2012).

In *Bell v. Stubbins* (1991), 7 B.C.A.C. 177 (B.C.C.A.) the principle injury suffered by the plaintiff was a fractured right ankle. The Court said:

This fracture was reduced with the use of two screws or pins. The reduction produced good alignment from side-to-side but the fracture fragment was displaced anteriorly. The medical witnesses agreed that the plaintiff had been left with some restriction of motion and had suffered a permanent loss of flexion. As a result of this injury, he was unable to participate in sporting activities to the extent he had enjoyed prior to the accident.

The medical evidence indicated two possible prognoses. The first was that the plaintiff's ankle was currently functionally sound and that the symptoms would significantly improve upon the removal of the pins. The plaintiff would be left with an ankle that was not particularly painful and incompatible only with a job that involved constant heavy lifting and with sports requiring constant flexion of the ankle, such as tennis. ...

The second prognosis was that the plaintiff's symptoms were the result of degenerative arthritis which was present and would worsen over time. Dr. Brunton stated that the plaintiff would be left with increasing pain upon use and that the restriction on his possible activities would be much greater than indicated by Drs. Molaro and Claridge. The possibility of degenerative arthritis worsening was over 90 percent.

While the trial judge's instruction on capacity was inadequate, necessitating a new trial, the Court of Appeal in *Bell* instructed that on the first prognosis (as above), an appropriate award of non-pecuniary damages would be around \$25,000 (\$36,798.78 in

2012) and on the second prognosis, an appropriate award of non-pecuniary damages would be around \$50,000 (\$73,597.56 in 2012).

In *Cann (Guardian ad litem of) v. Foster*, [1998] B.C.J. No. 1071 (S.C.) the plaintiff was run over by a truck and had her ankle crushed. The injury required “an open reduction-internal fixation of the injury in hospital. The plaintiff had no previous injury to her ankle. She remained in hospital for one week. The surgery left a large scar.” The plaintiff later had the screws removed from her ankle. Over 4 ½ years after the accident the plaintiff continued to experience swelling, pain and numbness; occasionally her ankle gave out. The plaintiff was awarded \$45,000 (\$59,752.48 in 2012) in non-pecuniary damages “in keeping with similar awards for an injury of this type and permanency” and \$15,000 (\$19,917.49 in 2012) for loss of capacity (plaintiff was back on track with school, but did have a permanent impairment restricting her choice of work).

In *Druet v. Sandman Hotels, Inns & Suites Limited*, 2011 BCSC 232, the plaintiff fractured her ankle in a slip and fall requiring three surgeries. The injuries and consequences were described as follows:

[11] [The plaintiff] suffered a bimalleolar ankle fracture. She had open reduction surgery. The break was fixed with metal screws. The metal screws were removed by a further operation. She had ongoing complaints of stiffness and lack of range of motion. She had a lack of dorsiflexion and could not invert or evert her right hind foot very well. In June 2008 she had scar tissue surgically debrided and a gastrocnemius recession was performed.

[12] By 2009 Druet’s condition was stabilized, but she had stiffness and arthrofibrosis of her right ankle, related to her bimalleolar ankle fracture. She is not considered at high risk for future injuries, provided she stays within reasonable restrictions.

[13] She walks with a slight limp and can no longer run as she once did, but can walk significant distances, which she does with walking partners. She has some concerns about the work she does as a nurse, but is still

able to perform the work required to the satisfaction of her current employer.

In *Druet*, the plaintiff was awarded \$55,000 in non-pecuniary damages and nothing was awarded for loss of capacity.

Non-pecuniary damages for a broken ankle requiring surgery likely fall in a range of \$50,000 to \$65,000.

Femur and Ankle:

In *Hildebrand v. Musseau*, 2010 BCSC 1022 the plaintiff's injuries from a dirt biking accident were stated as follows:

[3] The defendant acknowledges that the plaintiff suffered the following injuries because of the accident:

- a fractured right ankle which required surgery;
- a fractured right wrist which required surgery; and
- a fractured left femur which required treatment with a splint.

[4] In addition to the fractures, the plaintiff states that because of the accident he suffered:

- multiple abrasions and contusions to his body; and
- soft tissue injuries, in particular related to his left shoulder, posterior rib, back and neck.

In *Hildebrand* non-pecuniary damages were reasoned as follows:

[216] The plaintiff is a young man who suffered three different broken bones in his body. He lost eight and a half months of work convalescing. He had surgery to repair his broken bones and eventually had further surgery in which to remove plates and screws. He was initially confined to

a wheelchair, then walked with crutches and eventually a cane. Many of his recreational activities were curtailed, some of which have been curtailed permanently, particularly if they relate to high impact-type activities. He has lost some range of motion in his right ankle which is unlikely to improve. The prognosis for osteoarthritis in the right ankle in the long-term is moderate. His injuries have prevented him in part from pursuing some renovations he wished to do in his home. The plaintiff's injuries, particularly his right ankle and right knee, affect his ability to carry heavy loads, climb stairs and ladders, squat or kneel for extended periods of time.

[217] The plaintiff, at the time of the accident, was aged 21 and had recently been certified as a journeyman auto body repair technician, a trade to which he appears to be well-suited.

[218] He has a permanent disability as it relates to his ankle which prevents him from pursuing activities that he pursued prior to the accident and he may have wished to pursue in the future.

[219] I assess non-pecuniary damages in the amount of \$135,000.00.

Quantum: Member B

Again, there is some difficulty in finding a precedent on “all fours” with Member B’s circumstances.

Spleen & Kidney:

The decision of McLachlin J. (as she then was; now Chief Justice of Canada) in *Peterson v. Phillips*, [1983] B.C.J. No. 1062 (S.C.) is instructive, notwithstanding many of Member B’s other injuries are non-existent in the *Peterson* decision.

In *Peterson*, the male plaintiff, age 12, was struck by a truck, resulting in “serious internal injuries which necessitated surgery and resulted in the loss of his spleen, of part of his pancreas and, at a later date, his right kidney.” Noting that the plaintiff is now more vulnerable to infections and heart disease, as well as a reduced life expectancy, among other limitations, McLachlin J. assessed non-pecuniary damages at \$55,000 (\$117,359.15 in 2012) and, owing to lack of evidence of actual work limitations, awarded \$10,000 (\$21,338.03 in 2012) for loss of capacity.

In *Kinsman v. Patterson*, [1983] N.S.J. No. 197 (Nova Scotia-Trial Div.) one of four plaintiffs involved in a motor vehicle accident suffered a multitude of injuries. This plaintiff, age 59 and employed as the fruit and vegetable manager at the Groceteria at the Canadian Forces Base Cornwallis, spent 12 days in hospital following the following injuries (para. 18):

When he arrived at the Berwick hospital he was suffering from hypovolemia and severe shock. He received transfusions in order to resuscitate him. Following this his spleen was removed as was one kidney. He also suffered a gross retroperitoneal haematoma on the left side, several fractured ribs, laceration to the left eyebrow and bruising and abrasions to his left knee as well as a fracture of the transverse process of the third lumbar vertebra. For his operation he underwent general anaesthesia.

Non-pecuniary damages were set at \$22,500 (\$48,010.56 in 2012) and loss of capacity was valued at \$36,000 (\$76,816.90 in 2012), based on an annual salary of \$8,000 per year (\$17,070.42 in 2012) increasing with raises.

Kidney:

In *Tier v. Wierzbicki* (1972), [1973] 3 O.R. 193 (Ont. H.C.J.) the 12 year old plaintiff was run over by a horse, where he lost his right kidney. Other consequences included:

large bowel became distended and failed in its functions to propel onward its contents. Surgical procedures were followed by way of needle puncture

to evacuate colonic gas. His dislocated colon was replaced in its normal position and a tube caecostomy carried out with a specially trimmed large de Pezzer catheter brought out through a stab wound in the lower right abdominal quadrant.

The plaintiff was hospitalized for 21 days. After recognizing the reality that life with one kidney can seriously jeopardize one's life, the judge awarded \$25,000 in general damages (\$140,930.23 in 2012).

In *Maidment (Guardian ad litem of) v. Klim*, [1981] B.C.J. No. 867, (B.C. S.C.), the plaintiff was involved in a motor vehicle accident and suffered a broken wrist, three broken ribs, and a loss of a kidney and was hospitalized for six days. The plaintiff recovered well and was awarded \$27,500 (\$70,316.46 in 2012) in non-pecuniary damages (but no award for loss of capacity).

In *Trites v. White*, [1988] B.C.J. No. 1123 (S.C.) the plaintiff was injured in a motor vehicle accident while a passenger in his wife's car. The plaintiff lost one kidney due to the accident and also suffered a resulting back injury. It was indicated that the back injury would interfere with heavy labour. The plaintiff was awarded \$32,500 (\$56,271.43 in 2012) in non-pecuniary damages and \$12,500 for loss of capacity (\$21,642.86 in 2012) (retraining money). Note, this case only deals with the loss of a kidney and some back injury. This case falls short of Member B's injuries.

Spleen:

In *LeDuc v. Lenken Management Ltd.*, [1982] B.C.J. No. 550 (S.C.), after noting the difficulty in finding quantum assessments regarding the loss of one's spleen, the judge valued the non-pecuniary damages attributable to the loss of a spleen as \$17,500 (\$40,170.45 in 2012).

Following the *LeDuc* judgment, the judge in *Melnuk v. Harvilla*, [1984] B.C.J. No. 1360 (S.C.) awarded \$17,500 (\$35,409.02 in 2012) for the loss of the spleen.

Appendix F

Damage Awards for Catastrophic Injuries and Post-Traumatic Stress Disorder (Prepared by Miller Thomson LLP)

1. Summary of Task

Research and Determine the following:

- the maximum amount that can be awarded for non-pecuniary damages;
- examples of total damage awards for catastrophic injuries; and
- examples of non-pecuniary damage awards for post-traumatic stress disorder (“PTSD”).

2. Short Answer

The following are the research findings:

- The maximum amount that can be awarded for non-pecuniary damages is \$345,100.
- Total damage awards for catastrophic injuries can be several million dollars.
- Non-pecuniary damages for PTSD range in the low tens of thousands of dollars.

3. Discussion

(a) **Case Summaries: Awards for Catastrophic Injuries**

(i) *Saether v Irvine*, 2011 BCSC 1497

Plaintiff, a 26-year-old parts-man for an automobile dealership, suffered injuries as a result of an assault. Defendant forcefully struck plaintiff in the head with a golf club, crushing plaintiff’s skull, and forcing bone fragments into plaintiff’s brain tissue. Plaintiff’s injuries were profound and catastrophic. He suffered a severe traumatic brain injury, and had to undergo two separate brain surgeries. His recovery following the second surgery was long, difficult, and limited. Initially, he required tube-feeding and

complete personal care. His speech was impaired and breathing was such that he required a surgery for respiratory support. He had profound left-side paralysis. He developed pneumonia. Slowly his consciousness returned. He recovered most of his speech ability, and he regained the ability to eat and control his bodily functions. However, his paralysis did not resolve. He spent four months undergoing intensive therapy at a rehabilitation centre. He was unable to live on his own, and moved into a basement apartment in his mother's home. He had cognitive difficulties, memory problems, problems with mobility and other physical problems, and was easily fatigued. He also suffered from substantial bouts of fatigue, depression, and ongoing anxiety. His condition was likely to be permanent. Plaintiff was left with a relatively isolated, lonely life, severely compromised physically, intellectually, emotionally, and socially. Plaintiff's situation warranted damages toward the very upper end of the range. He was left with no residual earning capacity. His future care requirements were significant. Williams J. awarded plaintiff general damages in the amount of \$300,000, as well as \$1,375,000 for loss of future earning capacity, and \$1,075,000 for cost of future care.

(ii) *Schweize v Fredericton (City), 2008 NBQB 192*

Plaintiff, a 26-year-old seasonal railway worker, was injured as a result of a diving accident. Plaintiff suffered a fractured spine and a spinal cord injury, and was rendered paraplegic. Plaintiff also suffered fractures to his hand, forearm, and a closed head injury. Prior to the accident, plaintiff was athletic, loved life, and lived it to its fullest extent. Plaintiff's injuries had a permanent devastating impact on his life. He required care with most aspects of daily living. His lung capacity and ability to breathe deeply had been affected, putting him at greater risk of developing pneumonia. He suffered from muscle spasms that would likely worsen with time. He would be susceptible to bed sores, especially if he did not receive adequate attendant care. However, given his injuries, he coped remarkably well. He participated in wheelchair rugby, attended university on a part-time basis, and socialized with his many friends. Clendening J. dismissed plaintiff's claim, but provisionally assessed general damages at \$300,000, as well as \$1,060,000 for loss of future earning capacity, and \$1,513,900 for costs of future care.

(iii) *Gordon v Grieg, 2007 CanLII 1333 (ONSC)*

Plaintiff suffered catastrophic injuries in a motor vehicle accident. Plaintiff was not wearing a seatbelt, and he was thrown from the vehicle. Plaintiff was left a paraplegic, left with no feeling below T5-T6 level of his spine. Plaintiff underwent surgery to repair his spinal fractures. Rods were inserted to brace his spine. He had loss of bladder and bowel control. After the surgery, plaintiff gradually advanced from having no ability to control his lower body, to being able to pull himself up to a hands and knees position, to being able to lift one leg up from the other when lying on his side, and to being able to crawl. Plaintiff worked extensively on a tremendously aggressive rehabilitation program. Even so, he was left with dramatic limitations. If not for his positive attitude, he would be far more confined to a sedentary life. It was highly unlikely that plaintiff would be able to work at an income-generating career at all. His limitations would put heavy demands on any prospective employer to adjust workplace environments to accommodate the plaintiff. The need for bowel treatments three days a week would make it impossible to attend a work site for the commencement of a regular working day. His natural abilities were focused on hands-on work. He did not like academic schoolwork. Any work he might seek would require him to be using his mental faculties in ways that had not been acceptable to him. Sales work might be a career that he could undertake naturally, but his physical restrictions make it virtually unlikely that he would be so employed. His condition left him susceptible to bowel and bladder problems for the rest of his life. Plaintiff suffered spasticity as a regular complication of his attempts to move. He was at risk of long-term kidney damage and deep vein thrombosis, as well as osteoporosis. Urinary tract infections were a constant possibility. Glass J. awarded plaintiff general damages in the amount of \$310,000, as well as \$2,298,320 for loss of future earning capacity, and \$8,880,000 for costs of future care.

(iv) *Chow v Hiscock, 2005 BCSC 1933*

Plaintiff, aged 19, suffered catastrophic injuries as a result of an assault. The brutal unprovoked assault caused a severe brain injury, and left the plaintiff in a permanent, semi-vegetative state. He was left unable to speak, could not swallow properly, was completely paralyzed on his right side, and was left with spasticity and only limited

control of his left side. He was incontinent and incapable of sitting up by himself. He required constant care and supervision so that he did not choke or fall sideways and lose his airway. He appeared to be able to recognize his mother and his family. He could smile or look sad, could say “Ah” when excited, could reach out his left arm, and could grasp things with his left hand. However, he would live in a semi-vegetative helpless state requiring 24 hour a day care, 365 days a year. There was no more serious case. Prior to this incident, he was bright, engaging, full of joy of life, and had much to give. Koeningsberg J. awarded plaintiff maximum general damages in the amount of \$306,500, as well as \$1,227,000 for loss of future earning capacity, and \$4,126,406 for costs of future care.

(b) Case Summaries: Awards for PTSD

(i) Piresferreira v Ayotte (2008), 72 CCEL (3d) 23 (ONSC)

Plaintiff, a 60-year-old account manager, suffered damages as a result of assault, wrongful dismissal, and intentional infliction of emotional distress. During an argument, her supervisor accused her of not doing her job. When plaintiff tried to show her supervisor an email on her blackberry to show that she had done what she was asked to do, her supervisor pushed her, and then threatened to issue a performance improvement plan (“PIP”) for plaintiff, and shortly thereafter did so. He offered no apology to plaintiff. Plaintiff reported the assault to her Human Resources representative, and her supervisor received only a minor disciplinary reproach. Her supervisor and employer then moved immediately to impose the PIP, including an onerous schedule of frequent meetings with plaintiff’s supervisor. Plaintiff felt completely betrayed. She became lethargic, depressed, cried a lot, had disturbed sleep, became preoccupied with what had happened, and had negative and at times suicidal ideations. She lost her self-confidence, she lost her capacity to enjoy family and friends, and she lost her ability to get any satisfaction out of activities she had enjoyed previously. She went on sick leave and then long-term disability due to PTSD, depression, and anxiety symptoms that included irregular heartbeat and palpitations, she had not suffered anxiety or depression before the incidents leading to this lawsuit, and these conditions and plaintiff’s PTSD were caused by the actions of the defendants.

Although it was not established that plaintiff would have developed debilitating symptoms of anxiety or depression but for the incident, there was a possibility that her pre-existing condition would have affected her in the future, and both her condition and other contingencies may have impacted her ability to continue working in her pre-accident job. Plaintiff continued to suffer from disabling symptoms of depression and anxiety that had not noticeably ameliorated over time. The impact on her ability to work was devastating for a person who defined herself very much through her work and took great pride in her successes in the workplace. Plaintiff's depression and anxiety also reduced the pleasure she could experience in all other aspects of her life. After reducing by 10% for the contingencies related to plaintiff's pre-existing health condition and other issues, Aitken J. awarded plaintiff general damages in the amount of \$45,000, as well as \$194,540 for loss of future earnings capacity.

(ii) *Leung v Foo, 2009 BCSC 747*

Plaintiff, a 30-year old café owner, suffered injuries when the vehicle in which she was a passenger lost control and left the roadway. She suffered pain on her left side, had headaches, nightmares, fatigue, difficulty sleeping, and pain in her upper and lower back, neck, arm, and hand. She also developed a phobia of driving. Plaintiff was referred to physiotherapy, and it was suggested that she may need to seek psychiatric treatment. Plaintiff suffered from depression and had ongoing pain in her back and arms, and ongoing headaches. She was later diagnosed with a disc bulge in her lumbar spine. Although she was recommended to undergo psychological treatment for probable PTSD, plaintiff did not seek this treatment until six months after the recommendation, which was 2½ years after she first began to experience psychological difficulties. The effects of the plaintiff's ongoing soft tissue injuries interacted with her PTSD, causing stress, anxiety, and depression. She had ongoing pain, emotional problems, fatigue, difficulty working, was socializing less than before the accident, and had a strained relationship with her boyfriend. Her injuries impacted on her personal life and work life. Her pain and emotional problems caused her stress and caused challenges in achieving her business goals. Although her symptoms continued, if she dedicated herself to the recommended exercise regime and continued to get the help of

health professionals, it was expected that she would make a full recovery within six to 18 months of trial. By failing to have undertaken the exercise program, and for the six-month delay in seeking the recommended psychological treatment, plaintiff had failed to mitigate her damages, and her non-pecuniary damage award was reduced by 10%. Plaintiff would benefit from additional psychological counseling, personal training sessions, chiropractic treatment, and medicine. Cohen J. awarded plaintiff general damages (after reducing by 10% for failure to mitigate) in the amount of \$58,500, and also awarded \$12,327 for cost of future care.

(iii) *Irvine v Smith, 2008 CanLII 5586 (ONSC)*

Plaintiff, a road crew construction worker, suffered psychological damages when the defendant's son deliberately jumped in front of the plaintiff's vehicle, and, as a result, was killed. Plaintiff was left suffering from PTSD. However, this condition was relatively mild in nature, and had improved over time. He felt it necessary to leave his job on a road crew because he was uncomfortable working so close to traffic. However, he later secured a job as a delivery driver. Rady J. dismissed the plaintiff's claim, but provisionally assessed plaintiff's general damages at \$40,000.

(iv) *Arnold v Cartwright Estate, 2007 BCSC 1602*

Plaintiff, a yardmaster for a railway, suffered traumatic effects after witnessing a horrific traffic accident and its aftermath. Plaintiff suffered from PTSD. He suffered for a few months after the accident, and his symptoms were relatively minor. The symptoms were not disabling. Plaintiff also suffered from panic attacks. The panic attacks were more serious than the PTSD. Symptoms of the attacks included anxiety while driving, flashbacks of the accident, and sleep difficulties. These symptoms lasted for between 12 and 18 months, but the attacks were not disabling. Butler J. awarded plaintiff general damages in the amount of \$10,000.

Appendix G - Examples of NVC Infringement on Traditional Canadian Rights (Prepared by Miller Thomson LLP for this position paper)

1. Human Rights Act/Duty to Accommodate

The duty to accommodate the specific needs of an individual is mandated by statute in Canada. The *Canadian Human Rights Act*⁵² requires employers to accommodate those needs, subject to *bona fide* occupational requirements. The onus, in those circumstances, is on the employer to show that accommodation would create 'undue hardship'. This is reflective of our society's stated desire to protect the disabled. The duty of employers to accommodate is beyond the scope of this discussion paper, however under the *Canadian Human Rights Act*, the Canadian Forces are *statutorily exempt* from this duty when they rely on the principle of 'universality of service'.⁵³

The effect of this statutory exemption is to remove the Canadian Forces' duty as employer to accommodate its employees. On this basis, medical release of an injured or disabled soldier is rendered legally justifiable. When an employee who is injured on duty can be released from their employment without accommodation, and that right is written into statute, the duty on the employer to compensate that employee should be higher, not lower. The employee has no recourse to the duty of accommodation, and has a reduced capacity to find alternate employment. Practically speaking, they are disabled and fired in the same transaction.

2. Divisible Injuries?

Section 45(2) of the New Veterans Charter reads:

A disability award may be paid under paragraph (1)(b) only in respect of that fraction of a disability, measured in fifths, that represents the extent to which the injury or disease was aggravated by service.

⁵² R.S.C. 1985, c. H-6

⁵³ *Canadian Human Rights Act*, s. 15(9)

What this seems to say in legal terms is that the injury is “divisible”. That is to say that “portions” of the injury can be attributed to specific events, in this case, those related to Canadian Forces service, whereas other “portions” are viewed as frailties of the individual for which no compensation is payable.

Superficially, this is an appealing concept. But it necessarily requires a high degree of information about the member’s original medical condition. Those records may or may not exist. Further, the nature of the injury may not lend itself to ready apportionment. Many industrial diseases, mesothelioma⁵⁴ for example, are not sufficiently understood by science to permit causation determinations to be made. The lack of specific medical records in many cases, and the difficult causation issues in others lead to a high degree of arbitrariness by officials tasked with making this determination.

For these and other reasons, the concept of “divisibility” has been abandoned in personal injury litigation in many jurisdictions, notably British Columbia. The British Columbia Court of Appeal recently stated as follows:

We are also unable to accept the appellant’s submission that “aggravation” and “indivisibility” are qualitatively different, and require different legal approaches. If a trial judge finds on the facts of a particular case that subsequent tortious action has merged with prior tortious action to create an injury that is not attributable to one particular tortfeasor, then a finding of indivisibility is inevitable. That one tort made worse what another tort created does not automatically implicate a thin or crumbling skull approach (as in *Blackwater*), if the injuries cannot be distinguished from one another on the facts. Those doctrines deal with finding the plaintiff’s original position, not with apportioning liability. The first accident remains a cause of the entire indivisible injury suffered by the plaintiff under the “but for” approach to causation endorsed by the Supreme Court

⁵⁴ Mesothelioma has a long and troubled history in civil litigation. Experts have long been unable to attribute the onset of mesothelioma to a specific exposure to asbestos, or even to say positively whether it is caused by single or cumulative exposure. These issues have been struggled with extensively in the United Kingdom: see, for example, *Fairchild v. Glenhaven Funeral Services Ltd*, [2002] UKHL 22 and subsequent case law. The author notes that the mesothelioma causation debate has not come to the fore of Canadian legal study largely because employment-related asbestos exposures are dealt with under provincial workers’ compensation programs.

of Canada in *Resurface Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333. As noted by McLachlin C.J.C. in that case, showing that there are multiple causes for an injury will not excuse any particular tortfeasor found to have caused an injury on a “but-for” test, as “there is more than one potential cause in virtually all litigated cases of negligence” (at para. 19). It may be that in some cases, earlier injury and later injury to the same region of the body are divisible. While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up.⁵⁵

[Emphasis added]

Thus, the approach in the NVC which purports to sever responsibility for injuries aggravated in service is incompatible with current legal theory and precedent.

Conversely, the drafters of the NVC chose to apply the principle of indivisibility when it presents a financial benefit to the payers. Section 56(2) of the NVC reads:

No disability award shall be granted in respect of an injury or a disease, or the aggravation of an injury or a disease, if the Minister determines that the injury or disease, or the aggravation, is inseparable – for the purpose of assessing the extent of the disability – from an injury or a disease, or the aggravation of an injury or a disease, for which a pension has been granted under the *Pension Act*.

This section appears to declare an injury indivisible (or “inseparable”) from a similar injury for which an award has been made under the *Pension Act*. The service-related aggravation scale used in section 45(2) is abandoned and no compensation is payable. The “indivisible” (or “inseparable” concept appears to have an inconsistent application, and the application chosen is inevitably to the soldier’s disadvantage. A preferable approach would be to use the concept of indivisibility in a consistent way, and in a way that benefits, rather than disadvantages, soldiers.

⁵⁵ *Bradley v. Groves*, 2010 BCCA 361 at para. 37. The unsuccessful appellant in *Bradley* applied for leave to the Supreme Court of Canada. Leave was denied: 2011 CanLII 20960.

3. Re-application/Re-assessment

Section 48 of the NVC permits an increase in the extent of the assessed disability of a member. This is theoretically a useful section, because it permits VAC to recognize the changing circumstances. Practically, however, it has not proven to promote fair treatment of members. The ability to re-assess has in many cases resulted in a very meagre assessment being made at first instance, with the hope that the condition will improve. Often it doesn't improve, and the member is faced with persuading a case-worker that an increase is appropriate.

This problem is particularly pronounced in cases involving PTSD. It is not clear whether it is a formal or informal policy of VAC, but our experience has been that all PTSD sufferers are dealt with in the same way: the soldier establishes PTSD, and is assessed at 10% with instructions to follow up in a year for possible re-assessment. This assessment has been made in cases where the soldier is almost bed-ridden and suicidal. For fair compensation to be a possibility, individual assessment is needed in all cases by a representative familiar and sympathetic to the issues associated with PTSD. Further, the policy of making an objectively inadequate initial assessment with a re-assessment prolongs the process and does not benefit the member. Arguably, it is also contrary to the statutory requirement that the Minister and his delegates give the applicant the benefit of every reasonable doubt.⁵⁶

4. Structured Settlements

The NVC permits members to choose between a lump-sum payment or annual payments. As shown by numerous anecdotal examples, the lump-sum payments payable under the NVC result in miniscule annual payments, particularly when compared to the lifetime value of pensions awarded under the *Pension Act*. For members who choose⁵⁷ structured payments, the net effect would be a revised *Pension Act*, featuring greatly reduced compensation- as noted, the maximum principle available

⁵⁶ NVC, section 43

⁵⁷ And a choice would be necessary, because the NVC automatically deems an election of lump-sum payment unless the applicant otherwise advises: NVC, s. 52.1(3)

under the NVC is approximately \$285,000. The reduction in compensation under the NVC is particularly apparent when compared on an annual basis to the *Pension Act*.

A further difficulty for soldiers who elect a structured settlement is that no adequate adjustment is made for inflation and the diminishing value of their remaining settlement payments.⁵⁸ Although interest is payable on structured settlement payments, the meagre interest rate specified⁵⁹ is unlikely to exceed real-world inflation. Combined, the option of structured settlement is very unattractive to soldiers, and in our experience it is rarely, if ever, exercised.

5. Management Fees

For members who receive a lump-sum payment representing a disability in excess of 5%, a subsidy for financial advice is available up to a maximum of \$500.⁶⁰

The expectation that seriously injured soldiers, many of whom are under 25 and have little or no financial experience, can manage a fund which needs to provide for many years is entirely disconnected with reality. The expectation that such a soldier can do so with only \$500 worth of professional assistance is similarly unrealistic.

A person's need for financial assistance in managing a lump-sum award is necessarily case specific. Some soldiers will have a financial background; many more will not. Some will have the sophistication to make the decisions which impact the management of a fund which must last a long time; many more will not.

To address the problem of unsophisticated inexperienced people being tasked with the management of large amounts of money, the Law Reform Commission of British Columbia published the *Report on Standardized Assumptions for Calculating Income Tax Gross-Up and Management Fees in Assessing Damages*⁶¹ (the "Report"). The

⁵⁸ Section 54.1-54.3 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Regulations* (the "Regulation") deal with adjustments and interest but not inflation.

⁵⁹ Section 54.2

⁶⁰ VAC website

⁶¹ British Columbia. Law Reform Commission. *Report on Standardized Assumptions for Calculating Income Tax Gross-up and Management Fees in Assessing Damages*. Vancouver: The Commission, 1994. Available at: <http://www.bcli.org/sites/default/files/LRC133->

Report assesses the amount required for management fees on the basis of the beneficiary's need for assistance, the amount awarded, and the draw-down period.

The Report has been widely cited in British Columbia jurisprudence.⁶² To use an example, consider a 22-year old soldier who is awarded the maximum award-\$285,000. Assume the soldier has cognitive difficulties and needs Level 4 financial assistance (as defined by the Report) for his award to last the rest of his life. The Report provides for a financial management fee of 14.9% (or \$42,465 in 1994 dollars). Assuming the same soldier would receive the VAC maximum of \$500 for financial advice, he receives approximately 1.17% of what the Report recommends.

6. Miscellaneous

(a) Section 54(1)

Section 54(1) of the NVC purports to limit total compensation to 100% of the maximum award, regardless of the proven total disabilities of the soldier. This section reads:

For the purposes of section 45, 47 or 48, if a member's or a veteran's extent of disability, in respect of the aggregate of all of the member's or veteran's disability assessments and deemed disability assessments, exceeds 100%, no disability award shall be granted in respect of any percentage points exceeding 100%.

This section disadvantages our most disabled soldiers. Even if we assume for discussion's sake that soldiers who have a disability assessment equal to or less than 100% are fairly compensated, those with a disability assessment greater than 100% are plainly being undercompensated. This lessens the compensation available to those who need it most.

Standardized_Assumptions_for_Calculating_Income_Tax_Gross-up_and_Management_Fees_in_Assessing_Damage.pdf

⁶² The Report has also been commented on by the Supreme Court of Canada: *Townsend v. Kroppmans*, 2004 SCC 10.

Further, as discussed in Appendix F, catastrophic injuries regularly attract liability in the millions. Capping the financial recovery of a catastrophically injured soldier at approximately \$285,000 is arbitrary and inadequate. The maximum payout under the NVC does not even cover what courts routinely award as *non-pecuniary* damages- that is, loss that is not quantified, such as reduction in quality of life.

(b) Section 50

Section 50 of the NVC deals with the situation where a member or veteran has died before an application for compensation is made, or when an application is pending. The difficulty with this section is it provides for *ministerial discretion* with respect to the payment of an award to which the deceased member or veteran was entitled. The use of the word “may” was chosen to describe the minister’s choice of whether or not to pay the award to the member or veteran’s survivor or dependant; the word “shall” should have been chosen. The idea that a delay in application for compensation to which the member or veteran is otherwise entitled should disentitle his/her dependants because of the member or veteran’s death is unpalatable to the survivors of deceased members, and likely to the Canadian public.

(c) Section 88(2)(c)

Section 88 of the NVC reads:

(1) In this section “overpayment” means any compensation, or a part of it, that was paid to a person or their estate or succession and to which the person or the estate or succession had no entitlement.

(2) If, through any case, an overpayment is paid to a person or their estate or succession, the overpayment is a debt due to her Majesty by the person or their estate or succession, and may be recovered

(a) by deduction from any future payments made under this Act to the person or their estate or succession;

(b) in accordance with section 155 of the *Financial Administration Act*, or

(c) by proceedings in any court of competent jurisdiction.

This section appears to preserve the right of the government to *sue a soldier* if overcompensation is paid, regardless of the cause. Neither misrepresentation nor fraud is a stated requirement- overpayment by any cause is sufficient to trigger the cause of action.

By contrast, the government has attempted to statutorily insulate itself from claims for underpayment.⁶³

⁶³ *Crown Liability and Proceedings Act*, R.S.C. 1985, C. c. 50, s. 9