

1500 – 148 Fullarton Street
London, ON N6A 5P3
www.shillingtonmccall.ca

INSURANCE LAW BULLETIN

November 2021 – Kerry Figliomeni & Samuel Kirwin

CERB & CRB – Not Deductible from SABS IRBs *Foster v. Aviva General Insurance Company* - Reconsideration

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Introduction

On November 17, 2021, the Licence Appeal Tribunal released its reconsideration decision in the case of *Foster v. Aviva General Insurance Company* (“*Foster*”) ONLAT 19-014657/AABS-R. The LAT reversed its decision of first instance and has now held that the Canada Recovery Benefit (“CRB”) and the Canada Emergency Response Benefit (“CERB”) are **not deductible from income replacement benefits** (“IRBs”), as available under the *Statutory Accident Benefits Schedule* (“SABS”).

During the COVID-19 pandemic the federal government introduced the CERB and CRB to provide financial support to Canadians. When the initial decision in this case was released on September 15, 2021, it stood for the assertion that the CERB and the CRB were deductible from the SABS IRBs. The decision has been widely relied upon as having IRB cost saving implications. Unfortunately, it has now been reversed by the reconsideration decision.

Facts

The accident benefits application arose when Avia denied Jason Foster IRBs and other benefits claimed in relation to his injuries from a motor vehicle accident on May 8, 2019. Prior to the accident Mr. Foster worked as a drywall tapper and plasterer. Despite the accident, Mr. Foster continued working part-time until April 14, 2020 when he lost his employment due to the pandemic.

The Adjudicator in the initial decision ultimately found that Mr. Foster was entitled to a \$400/week IRB, plus interest, from when his employment ceased until the end of the first 104 weeks of disability. The Adjudicator reasoned that the CRB and the CERB amounted to remuneration from employment and were therefore considered “gross employment income” pursuant to s. 4(1) of the SABS. As such, 70 percent of the CRB and the CERB were deductible from Mr. Foster’s IRBs pursuant to s. 7(3)(a).

Given that a person on the CERB could qualify for \$500 per week, the finding that the CERB was a deductible benefit significantly reduced the amount of IRB exposure to the insurer.

Reconsideration Decision

Mr. Foster was granted a reconsideration of the Adjudicator's decision. The basis for reconsideration was that the Adjudicator made an error of law in determining that the CRB and the CERB qualified as "gross employment income" under s. 4(1) and that they were therefore deductible from the IRB pursuant to s. 7(3)(a). Surprisingly, Aviva agreed that it was an error of law to treat the CRB and the CERB as gross employment income.

The Vice Chair in the reconsideration decision confirmed that it was in fact an error of law to find that the CRB and the CERB qualified as "gross employment income". There were multiple reasons why they could not be classified as such; firstly, IRBs are calculated with respect to employment income, whereas the CERB is paid equally without reference to the individual's pre-pandemic income; secondly, the benefit is not determined by employment status since the person receiving the CRB and the CERB need not have been employed prior to receiving it; thirdly, the CRB and the CERB are not related to salary or wages since it is the Canada Revenue Agency, not the employer, who pays them; fourthly, the CERB ought not to be treated the same as Employment Insurance since it is paid under the *Canada Emergency Response Benefit Act*, not the *Employment Insurance Act*.

Essentially the Vice Chair's finding that the CRB and the CERB are not "gross employment income" meant that they could not be deducted from the IRBs under s. 7(3). At the outset of the reconsideration decision Mr. Foster was entitled to IRBs in the amount of \$400/week from the time his employment ceased to the end of the first 104 weeks of disability.

Conclusion

The decision of first instance attracted a significant amount of attention and was widely relied upon by insurers to reduce the amounts of IRB payable to insureds. The fact that it has been reversed means that moving forward **insurers should not deduct CRB and CERB from IRBs**. Further, insurers may be required to reimburse any CRB or CERB amounts deducted from the IRBs. As a result, **it may be prudent to review any such open files to determine whether such deducted amounts ought to be reimbursed.**