

# Ontario Network of Injured Workers' Groups submission

IN UNITY THERE IS STRENGTH

Deeming laws and practices as violations of the rights of people with work-acquired disabilities in Canada

Submission to the 22nd Session of the UN Committee on the Rights of Persons with Disabilities held 26 August to 20 September 2019 in Geneva, Switzerland

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## 1. Introduction

The Ontario Network of Injured Workers' Groups (ONIWG) was founded in 1991. It brings together 22 local groups from across Ontario to focus on systemic issues facing injured and disabled workers. We are a democratic organization and volunteer led with no staff or significant funding. This is our second submission to the UN Committee on the Rights of Persons with Disabilities. Our previous submission was sent on October 6th, 2016. We also plan to share this submission with the UN Special Rapporteur on the Rights of Persons with Disabilities as a follow-up to her official visit to Canada of April 2-12, 2019.

ONIWG is a provincial voice for workers who have been injured or made ill on the job. We are injured workers (and their families) who have had first-hand experience with the employment injury benefit system in our province, administered by the Workplace Safety and Insurance Board (WSIB). We see how the system fails too many workers across the Canadian province of Ontario. We refuse to accept the unfair system, and we take united action to demand human rights for people with work-acquired disabilities.

Whether it be through research and submissions to the WSIB and the government, or through organizing rallies and public mobilizations on the streets, ONIWG is committed to advocating for the human rights of all injured workers with work-acquired disabilities.

## 2. Executive summary

Employment injury benefits systems in Canada create harm and damage the human dignity of people with work-acquired disabilities. That people depend upon these "workers' compensation" programs and their legal design as the "exclusive remedy" for all types of workplace injuries amplifies the adverse impact they can have upon human dignity. Canada has failed to meet the internationally-recognized social security standards on employment injury in several areas. Among the most pressing of these human rights problems is the practice of the "deeming" of people with disabilities by the workers' compensation system. ONIWG makes this submission to the Committee on the Rights of Persons with Disabilities to report on the law and practice of deeming. We hope by providing detailed information about "deeming" that the Committee will be in a better position to raise this issue as a human rights concern with the Government of Canada.

This submission encourages the Committee to focus attention on the human rights of people with disabilities in Canada in the context of employment injury benefit systems. Employment injuries are traumatic injuries or diseases resulting from employment which result in temporary or permanent incapacity or death. The focus of this submission is the problem of permanent incapacity as a work-acquired disability. People with these types of work-acquired disabilities are entitled to receive income security going forward from the employment injury benefit system as it is one essential type of social security.

Deeming was introduced into Canadian law starting in 1979. It is a departure from human rights norms on income security. Deeming allows the adjudicators of employment injury benefits to cut income security benefits. These decisions are based on laws that permit the assumption of employment when in practice injured workers have not secured any employment and remain unemployed. Deeming permits dramatic cuts to employment injury benefits, as we will show in this submission. Deeming causes economic hardship for people with disabilities while employers pocket the savings. Cost-containment for the business community is prioritized over a human right to essential income security.

Deeming laws are based upon stigmatizing people with disabilities. In Canada, stigma is institutionalized in law based on the idea that people need to be incentivized to return to the job market. The long-term use of employment injury benefits is a strong stigma in Canadian society. Systematically, this stigma marginalizes people with work-acquired disabilities. The legal idea of the malingering injured worker plays a critical role in this.

Employment injury benefits are critical lifelines to ensure that people living with work-acquired disabilities are able to live a life with integrity and dignity. Employment injury benefits have for over 75 years been recognized by the UN multilateral system as an indispensable and irreplaceable type of income security that is an essential element of social security. The ILO's Philadelphia Principles on Income Security provide a baseline defining what constitutes dignified treatment in employment injury benefits systems. These long-standing principles have been recognized by more recent ILO international labour standards as well as several observations by expert UN human rights bodies.

### 3. Reference to the specific articles of the Convention

Deeming in Canada violates Articles 4, 8 and 28 of the UN Convention on the Rights of Persons with Disabilities as well as the overall human right to social security. This submission asks the UN Committee on the Rights of Persons with Disabilities to identify the Canadian laws and practices of deeming in employment injury benefit systems as a human rights violation. We offer seven (7) recommendations for consideration by the Committee to ensure protection of the rights of people with work-acquired disabilities.

In Canada, provincial governments operate employment injury benefit systems. These programs are for compensating workers for work-related injuries and are the oldest form of social insurance in North America, dating back to the early 1900s. These programs provide a liability shield to employers and also crucially provide an income replacement benefit for work-acquired disabilities. Permanently disabled workers are particularly dependent upon the employment injury benefit systems as an income security system.

The 1980s ushered in a period of neo-liberal ideology across North America, including Canada. Key legal changes altered Canada's employment injury disability benefits in all provinces. Damaging restrictions on permanent disability pensions were enacted. Each province in Canada changed laws to restrict the benefits for work-acquired disabilities. New rules for benefits were created that focused on reducing costs and returning to the job market. Provinces now "incentivize" workers to return to work and were empowered in law to reduce or terminate benefits. People facing permanent disabilities also became stigmatized and lost income security. Stigmatization remains for people using benefits.

#### Article 4 – General Obligations

Article 4(1) of the CRPD notes "States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of

disability.” Article 4(1)(c) also states that States Parties must undertake “To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes”.

Canada fails to protect and promote the human rights of people with work-acquired disabilities, contravening Article 4 of the Convention. The human right to social security, specifically the right to income security for the contingency of employment injury, is not protected in Canada due to the conditions under which benefits may be suspended under the various provincial workers’ injury compensation laws, including in Ontario.

The Ontario Network of Injured Workers’ Groups recently published a report entitled Phantom Jobs and Empty Pockets: What really happens to workers with work-acquired disabilities? This report explains the challenges facing injured workers due to the law and practice of deeming. We cite parts of our Phantom Jobs study in this submission.

“Phantom Jobs” is the common phrase used to describe deeming in Canada. The story of April, an injured worker, explains how deeming works in the province of Ontario.

After her injury, April was unable to return to her job as a book binder, where she used to make \$112 per day after taxes. WSIB (the Workplace Safety and Insurance Board—the Ontario authority responsible for employment injury benefits) decided that she had the skills and ability to work as a receptionist. Although April is applying for many receptionist jobs, no one is hiring her. Still, the WSIB deems her to be earning \$98 per day as a receptionist. Since she was earning a net wage of \$112 per day as a book binder, her WSIB benefits are reduced to \$11.90 per day.

In this example, April’s income security benefit is reduced from 85% of her previous earnings of \$112 per day as a book binder to 85% of her lost earnings AFTER she is “deemed” by the authorities as employed as a receptionist. This calculation is made in two steps by the Workplace Safety and Insurance Board in the following manner:

Step One:  $\$112 - \$98 = \$14$  as a result \$14 is April’s new lost earnings each day

Step Two:  $\$14 \times 0.85 = \$11.90$  as the legislated income replacement rate is 85%.

This process of “deeming” is the attribution of a “phantom job” to people having work-acquired disabilities. In the case of April, she never did find work as a receptionist. This is a key part to understanding deeming: The calculation was simply an administrative determination by the Workplace Safety and Insurance Board. April’s legal entitlement to income security benefits should be \$95.20 per day (85% of \$112). Because the WSIB has “deemed” her as employed in the labour market, however, she receives \$11.90 per day. Converted to a monthly rate, this leaves April with only \$257.00 of income per month.

In Ontario, the WSIB refers disabled benefit claimants to a specialized service called Work Transitions. Similar services exist in other Canadian provinces. Work Transitions assesses each claimant and provides a “work transition plan” to promote the public policy that claimants return to the active labour market. Roughly 4,350 workers with disabilities are referred into Work Transitions each year. Public data does not provide a precise number of the workers that are “deemed” by the WSIB. In the ONIWG Phantom Jobs report, we estimate that it may be more than half of these 4,350 cases.

Article 8 – Awareness-raising (stereotypes, prejudices and harmful practices)

Under Article 8(1)(b) of the CRPD, State Parties agree to adopt immediate, effective and appropriate measures “To combat stereotypes, prejudices and harmful practices relating to persons with disabilities” and to combat stereotypes “in all areas of life”.

Canada has failed to combat stereotypes about people with work-acquired disabilities. In fact, in law and in practice, the Canadian laws and policies on employment injury benefits promote the stigmatization of people with

work-acquired disabilities. This stigma is institutionalized in employment injury law through the legal assumption that claimants must coercively be “incentivized” to return to work. Canada is in violation of Article 8 of the Convention through these laws and administrative acts of commission.

A clear illustration of how stigmatization has been institutionalized for people with work-acquired disabilities in Ontario is found in a recent decision of the Ontario Superior Court of Justice. In this case, Dean Ferreira was a labourer at a wall forming business. At the age of 31 he was injured at work after receiving a blow with a hammer to his knee, suffering a soft tissue injury that developed into a series of complex medical issues including a chronic pain disorder and psychiatric illness. The original injury was in April 2005. After a long series of appeals and obligatory medical examinations that continued until July 2015, the Workplace Safety and Insurance Appeals Tribunal held that Mr. Ferreira was not entitled to loss of earnings benefits after September 2, 2005. In its decision, the Tribunal attacked Mr. Ferreira’s credibility, finding that his statements were being exaggerated, embellished with overstatements of his pain and impairment.

As the WSIAT (the appeals tribunal) had ignored all medical evidence in the case, the decision was appealed to the Ontario Superior Court of Justice. The Superior Court of Justice in a decision of May 5th, 2019, found the Tribunal decision to be unreasonable and ordering a new hearing. The decision chronicles how deeply stigma has been institutionalized in Ontario. The notion of “malingering” is integrated in the evaluation of claims, even where there is no medical evidence that disputes that a disability exists.

A selection of the higher court’s reversal decision describes this process of stigma:

52. The essence of a chronic pain disorder of the kind that the Applicant is suffering from is that there are psychological factors that contribute to the symptoms experienced. Assessing whether someone is suffering from the disorder or simply malingering a psychiatric illness is an essential aspect of making the diagnosis in question. All of the medical professionals who assessed the Applicant made the diagnosis and did not express a concern that he was malingering or that further tests needed to be administered to see if he was malingering. The Tribunal made its own observations and decided that malingering was a concern and that the Applicant was exaggerating and embellishing his condition. It did not have the medical expertise to make this assessment, and there was no medical opinion before it that it could rely on in support of its conclusion.

The decision of the Ontario Superior Court of Justice does not contest the use of the “malingering” concept. The court ruled the Tribunal erred without medical support for a finding of malingering. The decision illustrates the depth of institutionalized stigma in the employment injury benefit system in Ontario. Malingering as a concept is written in law.

Stigmatizing people with work-acquired disabilities is an important factor for deeming. When disabled claimants are deemed employable, a fear of “malingering” helps justify the decision. If someone is deemed as employable but is unemployed, for example, this stigma is legal evidence to explain why they are not working. The use of malingering is pervasive in Canadian workers’ compensation. It is used to restrict benefits to cut costs for employers and it is written into provincial laws. The human values and assumptions that underlie the notion of malingering have undercut human rights in Canadian society.

Article 28 – Adequate standard of living and social protection

Article 28(1) of the CRPD says that “State Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families ... and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.” Furthermore, Article 28(2) reads “State Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right....”

Canada has failed to ensure income security in cases of employment injury for people with work-acquired permanent disabilities. International human rights principles of social security on employment injury benefits,

elaborated clearly in the Philadelphia Principles on Income Security which have been accepted broadly across the UN human rights system are violated due to deeming laws and practices in provincial employment injury benefit systems. The first Guiding Principle of income security is that “Income security schemes should relieve want and prevent destitution by restoring, up to a reasonable level, income which is lost by reason of inability to work....” The practice of deeming in Canada violates internationally-recognized safeguards of income security by imposing severe conditions that arbitrarily suspend the income benefits of people facing work-acquired disabilities. Income security benefits are in principle to be set based on one’s prior income lost, meaning social assistance is not an equal substitute. The result is that provincial employment injury benefit systems are causing declining standards of living in Canada as deeming impacts people with work-acquired disability exclusively.

The Phantom Jobs report illustrates how deeming creates declining standards of living for injured workers in Ontario. Here is the story of Harvey, a highrise window cleaner.

Harvey worked as a highrise window cleaner. In 1995, the clips on his ladder extension broke, and he fell 44 feet. His right foot took the full impact of the fall, shattering his ankle and turning his heel into dust. A year later, he managed to return to his job on a rebuilt foot.

In July 2009, though, Harvey sustained another injury to the same foot. He couldn’t walk and needed another surgery. Harvey was still waiting to see a surgeon when the WSIB deemed him able to work as a parking lot attendant or light assembler – jobs that were not actually suitable or available to him. With his phantom job and deemed wage, Harvey’s compensation was reduced to \$419 per month (less than \$20 per day, much less than he earned before his injury). He and his wife, Evelyn, were forced onto social assistance. Harvey had never been put in this kind of position before. He started working at the age of 15 and was proud of that. At 18, he started his career as a highrise window cleaner and loved every moment of it. He felt ashamed that he was no longer able to provide for his family. Their debt grew larger with each missed rent and utility payment and they were forced to rely on food banks.

Harvey has now had four surgeries on his foot. The financial fallout from his phantom job began while waiting for the first surgery. His ankle still has an S shape to it, and he requires a custom brace, orthotic shoes and boots, a four-post cane, and a mobility scooter. He rates his pain at 8 out of 10 every day. Harvey and Evelyn’s life will never return to what it was before the workplace accident. Their financial future is one of unending poverty, brought on by the WSIB’s practice of deeming. Harvey didn’t just lose his ability to work; he lost the ability to live his life as he’d planned. As Evelyn says, “the WSIB is a ‘safety net’ full of holes big enough to drop a highrise window cleaner and his spouse through.”

The laws and practices of deeming in Canada create poverty among people struggling with work-acquired disabilities. Deeming happens in all provincial systems. It denies people the right to basic income security for the contingency of employment injury. It is important to note that several disability rights organizations are working with legislators to try to stop the practice of deeming. One Private Member’s Bill was introduced in the Legislative Assembly of Ontario, receiving its first reading on 27 May 2019. It would amend Section 43 of the Workplace Safety and Insurance Act to end deeming.

The systemic impact of deeming in Ontario can in part be observed in statistics from two major social assistance programs: Ontario Works, a general social assistance program, and the social assistance program for people with disabilities, Ontario Disability Support Program. In Ontario, hundreds of people claiming social assistance benefits each month also report receiving WSIB benefits, an indicator that WSIB income deeming is keeping people with work-acquired disabilities below poverty thresholds for social assistance. In the period from 2003 to 2017, the average reported monthly cases of the claimants receiving WSIB benefits was 657 for Ontario Works and 3,264 for ODSP.

#### 4. Proposed recommendations

The following recommendations have been developed in consultation with injured workers in Ontario. We ask the Committee to study and consider these suggested recommendations for Canada. These seven (7) recommendations aim to support the fundamental protection of the human right to income security for all people with work-acquired disabilities. These recommendations are followed by questions for the Government of Canada that, if answered, can help legislators implement the changes.

Recommendation 1 – Ensure that employment injury benefit systems are based upon human rights values exclusively, not the values of cost-containment for employers. Integrate human rights values into the administration of employment injury benefits.

The Government of Canada last studied the action required to implement the ILO's international labour standards on employment injury benefits in 1972. Considering the Philadelphia Principles of Income Security (Recommendation No. 67) as well as other internationally-recognized human rights of people with disabilities and the human right to social protection, when will the Government of Canada update this report to study the current laws and practices in all provinces as they pertain to protecting income security in cases of work-acquired disability?

Recommendation 2 – End the deemed wage loss system. Prohibit cutting benefits for people with work-acquired disabilities based on the notion of employment prospects with no actual employment. Base benefits exclusively on actual pre-injury wage loss.

What actions have been taken by the Government of Canada to ensure that people with work-acquired disabilities receive adequate income security? What actions have been taken by Canada to monitor and protect against abuses in workers' compensation at the provincial level, including the practice of deeming?

Recommendation 3 – End the stigmatization of the use of employment injury benefits faced by people with work-acquired disabilities. Challenge the assumptions that people with disabilities must be incentivized to return to work with an income penalty. Remove "malingering" as a notion from Canadian society and from each of the provincial laws.

What actions have been taken by the Government of Canada to ensure that people with work-acquired disabilities are not stigmatized in Canadian society? Has the government studied the impact of the provincial laws on the concept of malingering? In Canada, are laws on return to work being used to unjustly end entitlements to income security benefits by people with work-acquired disability?

Recommendation 4 – Provide a transparent accounting of all claimants that have been deemed in all provinces. Revise past benefit reductions for people with work-acquired disabilities who have had income benefits reduced due to "deemed" job assessments.

How many people with work-acquired disabilities in Canada have been deemed as being employed or employable under provincial systems when the person has held no actual work or employment? How many of these cases of deeming have resulted in the re-evaluation of earnings and reduced income security benefits?

Recommendation 5 – Assess and eliminate disparities based on gender, race and immigration status in the administration of benefits for persons with disabilities. Take special measures to end hardships faced by immigrants due to deeming practices.

Among the people having been deemed by the provincial systems, what disparities exist based on the gender, language spoken or immigration status of the claimant? What actions have been taken to ensure the protection of these groups where disparities in access to income security benefits exist? What actions have been taken to ensure the basic human right to income security for employment injury of migrant workers who may lose their Canadian work visas after having a work-related injury while in Canada as temporary foreign workers?

Recommendation 6 – Maintain adequate funding for the legal aid services to injured workers. Stop the cuts to legal aid as proposed by the province of Ontario in June 2019, cuts disproportionately targeting legal aid clinics for injured workers with disabilities.

What actions have been taken by the governments of Ontario and Canada to study the impact on people with disabilities of the proposed deep cut in funding to legal aid services? How does Ontario plan to ensure future access to justice and income security benefits for people with work-acquired employment injuries?

Recommendation 7 – Devise just financing mechanisms that satisfy the human rights obligation to ensure income security for people with work-acquired disabilities. In order to balance the conception that premiums for employment injury benefits are burdens to society, governments should recognize in policy that these income security premiums, even when paid by employers, are valued by Canadians as public goods and a part of the total wages and benefits earned by workers in the course of work and employment.

What actions are being taken in Canada to ensure financing mechanisms that protect and sustain the human right to income security for all people with work-acquired disabilities? How is the Government of Canada raising awareness of compulsory social insurance as a public good human rights obligation in general as well as a human rights entitlement for people with work-acquired disabilities?