



# SEF 44 Family Endorsement Protection Deductibility of Collateral Benefits

A NEW BRUNSWICK PERSPECTIVE

Prepared By  
Monika M.L. Zauhar and Steven Pearce\*  
*Cox & Palmer*

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[Cox & Palmer](#)  
Barristers and Solicitors  
Suite 400, Phoenix Square  
371 Queen Street  
Fredericton, NB E3B 4Y9

**Monika M.L. Zauhar**  
Tel: (506) 453-9610  
[mzauhar@coxandpalmer.com](mailto:mzauhar@coxandpalmer.com)

**Steven Pearce**  
Tel: 506 453 7771  
[spearce@coxandpalmer.com](mailto:spearce@coxandpalmer.com)

[www.rmc-agr.com](http://www.rmc-agr.com)

\* Monika M.L. Zauhar is a Partner in the Atlantic law firm of Cox & Palmer. She has been practicing since 1991 predominantly in the areas of Insurance defence litigation and Administrative law.

Steven Pearce is an articling student with the firm.

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## I. INTRODUCTION

The principle of recovery in a tort action is to compensate the injured party as completely as possible for the loss suffered as a result of the negligence of a tortfeasor. Typically the plaintiff is not entitled to recover twice for any loss arising from the injury (known as a limitation on double recovery). However the common law, in limited circumstances, permits exceptions to the rule against double recovery for certain collateral benefits. One such exception is where lost income is claimed by a plaintiff against a defendant, and where benefits are paid from an alternate source as income as a result of the plaintiff's disability.

### a. What is SEF 44 Coverage?

SEF 44 insurance coverage refers to "Standard Endorsement Form 44" coverage that may be purchased in addition to a regular automobile insurance policy. It is a Family Protection Endorsement designed to provide insurance coverage to named insureds, as well as their family, for injuries or death resulting from motor vehicle accidents involving uninsured or inadequately insured motorists. The purpose of this coverage is to provide the insured with excess coverage as a "last ditch" or "safety net", without providing a windfall.<sup>1</sup> Generally, where you have a claim under SEF 44 coverage, you are dealing with very serious injuries where plaintiffs are receiving loss of income benefits from other sources, such as Section B [AB] benefits, CPP benefits and private long term disability benefits. Clause 4 of the standard SEF 44 policy is entitled "Amount Payable per Eligible Claimant" and provides for specific deductions in the quantification of the amount payable by an SEF 44 insurer. For example, the Standard Endorsement Form requires that the coverage of an underinsured be depleted prior to a payout under the Family Protection Endorsement. The interpretation of clause 4 of the SEF 44 policy has differed across jurisdictions and levels of Court, causing some degree of concern and confusion over how these contracts should be applied going forward. This article intends to focus on the development and what could certainly be considered somewhat of a disconnect of the law regarding the deductibility of collateral benefits from SEF 44 claims across Canada.

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<sup>1</sup> *Campbell-MacIsaac v. Deveaux* (2004), 224 N.S.R. (2d) 315 (CA) at para 58 [*Campbell-MacIsaac*].

## II. NBEF 44 FAMILY PROTECTION ENDORSEMENTS

This article considers the wording of the New Brunswick SEF 44 policy as a starting point in this analysis, however, SEF 44 Endorsements in most Canadian Jurisdictions use similar standard phrases. However, where a claim is made under an SEF 44 policy, careful consideration should be given to the specific clauses and wording of the SEF 44 policy under consideration. The following provisions of the New Brunswick Standard Endorsement Form 44 are relevant to a determination of the deductibility of collateral benefits under Family Endorsement Coverage<sup>2</sup>:

### 2. INSURING AGREEMENT

In consideration of the premium charged and **subject to the provisions hereof**, it is understood and agreed that the Insurer shall indemnify each eligible claimant for the amount that such eligible claimant is **legally entitled to recover** from an inadequately insured motorist as compensatory damages in respect of bodily injury or death sustained by an insured person by accident arising out of the use or operation of an automobile.

### 4. INSURING AGREEMENT

- a) The amount payable under this endorsement to any eligible claimant shall be ascertained by **determining the amount of damages the eligible claimant is legally entitled to recover from the inadequately insured motorist and deducting from that amount the aggregate of the amounts referred to in paragraph 4(b)** but in no event shall the insurer be obligated to pay any amount in excess of the limit of coverage as determined under paragraph 3 of this endorsement.
- b) the amount payable under this endorsement to any eligible claimant is excess to **any amount actually recovered by the eligible claimant from any source** (other than money payable on death under a policy of insurance) and is excess to **any amounts the eligible claimant is entitled to recover (whether such entitlement is pursued or not) from:**
  - vi. any automobile accident benefits plan applicable in the jurisdiction in which the accident occurred;
  - vii. any policy of insurance providing disability benefits or loss of income benefits or medical expense or rehabilitation benefits;

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<sup>2</sup> *Economical Mutual Insurance Co. v. Lapalme*, 2010 NBCA 87 at para 22 [*Lapalme*].

- viii. any Worker's Compensation Act or similar law of the jurisdiction applicable to the injury or death sustained.

[...]

## 9. SUBROGATION

Where a claim is made under this endorsement, the insurer is subrogated to the rights of the eligible claimant by whom a claim is made, and may maintain an action in the name of that person against the inadequately insured motorist and the persons referred to in paragraph 4(b).

## 10. ASSIGNMENT OF RIGHTS OF ACTION

Where a payment is made under this endorsement, the insurer is entitled to receive from the eligible claimant, in consideration thereof, an assignment of all rights of action whether judgment is obtained or not, and the eligible claimant undertakes to cooperate with the insurer, except in a pecuniary way, in the pursuit of any subrogated action or any right of action so assigned. *[Emphasis Added]*

### a. The Family Protection Endorsement Explained

Clause 2 of the SEF 44 obligates the insurer to indemnify each eligible claimant for the compensatory damages he or she is legally entitled to recover from an inadequately insured motorist.<sup>3</sup> The term "legally entitled to recover" has received a great deal of judicial scrutiny with respect to the point in time when a claimant is entitled to recover damages. Is this at the time of the accident, at the time an action is filed, at the time of Trial, or at the point in time where a judgment is rendered?

Clause 4(a) of the SEF 44 establishes that the insurer will pay the amount of damages the eligible claimant is "legally entitled to recover" from the tortfeasor less the aggregate of the amounts outlined in Clause 4(b). Clause 4(b) creates two classes of deductions:

- 1) any amount "actually recovered from any source"; and
- 2) any amount an insured is "entitled to recover" from a specific list of sources (Note that, CCP benefits are not mentioned in the list of sources).

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<sup>3</sup> *Ibid* at para 2.

The ambiguity surrounding the distinction between “actually recovered” and “entitled to recover” has played an important role in the jurisprudence with respect to the deduction of collateral benefits to be received by the plaintiff at some point in the future.

Clause 9 sets out that that the insurer has the right to bring a subrogated action against the tortfeasor and against the providers of the collateral benefits set out in clause 4(b). Clause 10 entitles the insurer to an assignment from the insured where payment is made under the SEF 44 endorsement.

Although the above clauses may appear relatively straightforward, they have been subject to extensive judicial interpretation. A review of the development of the jurisprudence is important in understanding the discrepancies in the application of the above SEF 44 clauses and in determining the direction in which Courts are headed.

### III. Background Decisions

#### **a. *Melanson v. Co-operators General Insurance Co. (1998), 192 N.B.R. (2d) 273 (NBCA)***

In *Melanson*<sup>4</sup>, the plaintiff was awarded damages for injuries from a motor vehicle accident. The plaintiff was unable to return to work as a result of her injuries and qualified for Canada Pension Plan (“CPP”) disability benefits, long term disability benefits from a workplace Blue Cross Insurance policy, and section B benefits from her own automobile insurer. The defendant was underinsured, and the plaintiff made a claim for the deficiency between the amount of her judgment and the tortfeasor’s insurance limit pursuant to her S.E.F. 44 coverage. The insurer denied her claim on the grounds that she had already received Canada Pension Plan (“CPP”) benefits and other benefits pursuant to a workplace Blue Cross insurance policy. The insurer took the position that these payments fell under a clause in the policy which entitled it to deduct from benefits payable any sums payable from “other contracts of insurance,” including future disability payments. The Trial judge ruled that the insurer was required to pay the deficiency, subject to deductions for CPP and Blue Cross payments made. This decision also established that the amount owing by an insurer was to be crystalized as of the date of the judgment against the tortfeasor.

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<sup>4</sup> *Melanson v. Co-operators General Insurance Co. (1998), 192 N.B.R. (2d) 273 (NBCA) [Melanson]*.

The Court considered the Blue Cross Policy a policy of indemnity. Under the Blue Cross policy, the plaintiff's disability payments were to be suspended from the date of crystallization until the plaintiff reached the age of 64 because her claim against the tortfeasor covered her loss of income during that period. Accordingly, the Court determined that the remainder of the Blue Cross Policy payments (for one year until the plaintiff turned 65) would then be payable to the plaintiff's insurer because it was subrogated to her rights under the SEF 44 policy. The Trial Judge also found that future CPP and Blue Cross benefits were not deductible from the amount payable by the insurer.

The insurer appealed the Trial judge's decision which prohibited the deducting of future Blue Cross and CPP payments, as well as the Trial Judge's determination of the assessment date for liability, arguing that its liability should have been determined as of the start date of Trial to provide for a longer period in which the insured could actually recover from other sources, therefore allowing for greater deductions from any payout under the policy by the insurer. The appeal was dismissed and the Court agreed that only past CPP benefits (those "actually recovered") could be deducted, however, future benefits that the plaintiff is "entitled to recover" from the sources listed in clause 4(b) could be deducted.

**b. *Somersall v. Friedman*, 2002 SCC 59 ("*Somersall*")**

The decision of the Supreme Court of Canada in *Somersall*<sup>5</sup> was rendered five years after the decision in *Melanson*<sup>6</sup> and effectively changed the crystallization date from the date of the judgment in *Melanson*, to the date of the accident.

In *Somersall*, the plaintiffs were insured under a policy of motor vehicle insurance which contained a Family Protection Endorsement, providing the plaintiffs with underinsured driver coverage. The terms of the endorsement required that the plaintiffs be "legally entitled to recover" funds from an underinsured driver in order to recover benefits through the endorsement. The plaintiffs were involved in a motor vehicle accident with the underinsured defendant and suffered serious injuries. A settlement was reached between the plaintiffs and the underinsured defendant, whereby the defendant would admit liability for the

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<sup>5</sup> *Somersall v. Friedman*, 2002 SCC 59

<sup>6</sup> *Melanson*, *supra* note 4.

accident and the plaintiffs agreed that their claims would not exceed the defendant's policy limit of \$200,000 (the "Limits Agreement"). The plaintiffs then attempted to recover the remainder of their damages from their SEF 44 insurer in accordance with the terms of the endorsement. The insurer denied coverage, claiming the insured was not "Legally Entitled to Recover" under the policy as a result of the Limits Agreement and relied on its subrogation rights to cross-claim against the defendant.

The SEF 44 insurer brought a Motion to determine whether the Limits Agreement precluded the insureds from pursuing an SEF 44 claim because they were not "legally entitled to recover" from the defendant. The insurer argued that the plaintiffs' release of any claim against the defendant over \$200,000 rendered them not "legally entitled" to recover beyond that amount and therefore ineligible to recover by way of clause 2 of the SEF 44 policy. Contrary to the reasoning of *Melanson*, the Supreme Court of Canada held that the date of the motor vehicle accident, which gave rise to the underlying loss was the relevant date for the determination of legal entitlement against the underinsured motorist, for Clause 2 purposes.<sup>7</sup>

Despite not overruling the *Melanson* decision with respect to the deductibility of collateral benefits, the decision in *Sommersall* has been applied in varying manners by Courts of Appeal across the country, as discussed below.

#### IV. Canadian Court of Appeal Decisions

##### ***a. MacNeill v. Co-operators General Insurance Co., 2003 PESCAD 9 ("MacNeill")***

In *MacNeill*<sup>8</sup>, the plaintiff was driving a vehicle owned by his employer and was acting in the course of his employment when he suffered injuries in an accident. The plaintiff received Workers' Compensation benefits as an injured worker under the Prince Edward Island *Workers' Compensation Act*<sup>9</sup>. The tortfeasor was insured to a limit of \$200,000 and the plaintiff's coverage included an SEF 44 policy for \$1M. The lower Court determined on a motion that the SEF 44 insurer was entitled to deduct Workers' Compensation benefits paid

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<sup>7</sup> *Lapalme*, *supra* note 2 at para 2.

<sup>8</sup> *MacNeill v. Co-operators General Insurance Co., 2003 PESCAD 9 [MacNeill]*.

<sup>9</sup> *Workers' Compensation Act*, RSPEI 1988, c W-7.1

to the date of the judgment, as well as the present value of any future Workers' Compensation benefits to be paid. The Court also determined that the Workers' Compensation Board ("WCB") did not have the right of subrogation against benefits paid under to the SEF 44 endorsement.

As an intervener in the proceedings, the WCB appealed the Motion judge's decision, making the argument, in accordance with the *Melanson* decision that, an SEF 44 insurer could not deduct future benefits. The PEI Supreme Court Appeal Division restricted the interpretation of the *Melanson* decision and found that an SEF 44 insurer could *only* deduct Blue Cross and CPP benefits paid up to the date of judgment. The Court confirmed the decision of the Motion's judge and found that under the SEF 44 endorsement in question, the benefits paid by the Workers' Compensation Board were deductible by the insurer.<sup>10</sup>

The Court was reluctant to follow the *Melanson* decision with respect to the deductibility of future benefits because *Melanson* had been overruled by the Supreme Court of Canada in *Sommersall* on the issue of determining the date of crystallization of legal entitlement. *Sommersall* had found that the date of crystallization of entitlement was the date of the accident, whereas *Melanson* had previously found that the date of crystallization was the date of judgment. Although *Sommersall* had not overruled *Melanson* on the issue of deductibility of benefits, the Court in *MacNeill* was not willing to follow the *Melanson* decision.<sup>11</sup>

This decision raised an important practical concern with a Court allowing the deduction of future benefits which "might" be paid, as opposed to future benefits that "will" be paid.<sup>12</sup> It is obvious that there can never be certainty with respect to the payment of future benefits and it would therefore be unfair for the present value of Workers' Compensation benefits to be deducted from a current claim if those benefits were to be terminated at some point in the future. The Court deals with this concern by stating at paragraph 63 of the *MacNeill* decision that "the onus of proof is on the insurer to *prove* that there is a future stream of Workers' Compensation benefits payable to the injured worker before any deduction can be

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<sup>10</sup> *MacNeill*, *supra* note 8 at para 62.

<sup>11</sup> *MacNeill*, *supra* note 8 at para 60.

<sup>12</sup> *Ibid* at Para 63

made for the present value of these benefits.”<sup>13</sup> As seen below, the issues raised in *MacNeill* have been addressed further by various levels of appellate Courts in other Canadian jurisdictions.

***b. Campbell-Maclsaac v. Deveaux, 2004 NSCA 87 (“Campbell-Maclsaac”)***

The Nova Scotia Court of Appeal tackled the issue of deductibility of collateral benefits in the 2004 Court of Appeal decision in *Campbell-Maclsaac*<sup>14</sup>. In *Campbell-Maclsaac*, the plaintiff dentist was not able to work again as a result of injuries sustained in a motor vehicle accident. The tortfeasor’s insurance policy was limited to \$1M in coverage. The plaintiff carried an SEF 44 endorsement with a \$6M limit in addition to a long term disability policy that provided for monthly payments until she reached the age of 65 and weekly section B indemnity benefits. At Trial, the evidence showed that the present value of the long term disability policy was \$1.2M and the present value of the section B benefits was \$80,000. The SEF 44 insurer argued that it was entitled to deduct past *and* future long term disability and section B benefits. The trial judge did not consider whether the SEF 44 insurer was subrogated to the plaintiff’s rights against Canada Life and was entitled to an assignment of their future benefits.<sup>15</sup> It was found that the insurer that only section B benefits paid to the date of the Trial could be deducted by the insurer. The Trial judge referred to the Canada Life benefits as “collateral” benefits and cited a number of cases indicating that collateral benefits were not deductible benefits.<sup>16</sup>

On appeal, the Court made the following statement in finding that the SEF 44 insurer could deduct past and future section B and Canada Life benefits:

From these and other authorities, I conclude that the SEF 44 endorsement is an indemnity policy which is intended to cover Dr. Campbell-Maclsaac up to the extent of her loss, such that she is to receive no more and no less than full indemnity. She can in no way profit from the insurance. Any analysis and interpretation of the SEF 44 endorsement and its provisions must be consistent with those principles, that is, that an insured is not to profit from

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<sup>13</sup> *Ibid* at Para 63

<sup>14</sup> *Campbell-Maclsaac*, *supra* note 1.

<sup>15</sup> *Campbell-Maclsaac v. Deveaux*, 2003 NSSC 111 at para 190.

<sup>16</sup> *Ibid* at para 63.

the insurance and therefore is not entitled to double recovery.<sup>17</sup>

The Court went on to state that the collateral benefits rule enunciated by the trial judge is only to be applied in tort cases and not contractual cases where the actual provisions of the contract between the parties must be considered.<sup>18</sup> The Court followed the *MacNeill* decision in finding no basis for distinguishing benefits paid before the date of judgment and benefits paid after the date of judgment.<sup>19</sup> In *Campbell-MacIsaac*, section B benefits were specifically listed in clause 4(b)(vi) and Canada Life benefits were specifically listed in clause 4(b)(vii) of the SEF 44 policy; accordingly, the Court found that past and future benefits to be paid from both sources were to be deducted from a claim payable as they fit within the meaning of clause 4(b) as amounts “actually recovered” and amount “entitled to recover.”

**c. *Economical Mutual Insurance Co. v. Lapalme*, 2010 NBCA 87 (“*Lapalme*”)**

The decision in *Lapalme*<sup>20</sup> concerned the deductibility of CPP benefits from a damage award under an NBEF 44 plan for injuries sustained in a motor vehicle accident. Clause 4 of the NBEF plan was at the heart of the New Brunswick decision, but the decision would be persuasive with respect to other similarly worded SEF 44 policies across Canada. According to clause 4, the amount payable by the NBEF 44 insurer was the aggregate of the amounts actually recovered by the eligible claimant from all sources and the amounts that he or she is entitled to recover from specific sources, deducted from the amount of damages assessed against the inadequately insured motorist. Clause 4(b)(vii) provided for the deduction of amounts that an eligible claimant had not actually recovered but was nonetheless entitled to recover under “any policy of insurance providing disability benefits”.

In *Lapalme*, the plaintiff settled her claim against the tortfeasors for their insurance policies limit of \$200,000 and all parties, including the SEF 44 insurer, agreed to the minutes of settlement.<sup>21</sup> The plaintiff’s SEF 44 coverage limit was \$1M. The plaintiff was eventually approved for CPP disability benefits and the SEF 44 insurer filed a Motion for a

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<sup>17</sup> *Ibid* at Para 57.

<sup>18</sup> *Ibid* at Para 66.

<sup>19</sup> *Ibid* at Para 77.

<sup>20</sup> *Lapalme*, *supra* note 2.

<sup>21</sup> *Ibid* at para 11.

determination of whether they were entitled to deduct past and future CPP benefits from the SEF 44 claim. It was noted that the wording of the policy did not refer to past and future benefits, but instead referred to amounts actually recovered and amounts entitled to recover.

This decision determined that CPP benefits received from the date of the accident until date of adjudication were deductible from the amount of damages assessed based on the crystallization date set out in *Melanson*. This is significant because the Court narrowly interpreted the SCC decision in *Somersall* with respect to the relevant date for quantification of benefits payable and found that while the date of accident is the relevant date for determination of the legal entitlement to recover against an underinsured motorist, the relevant date for quantification of that entitlement is the date where a Court determines liability and quantum of a claim.<sup>22</sup> Chief Justice Drapeau found that clause 4 did not provide for any deduction of CPP disability benefits, including unrecovered pre-adjudication CPP disability benefits that an insured was entitled to recover or CPP disability benefits that they may be entitled to recover in the future. Interestingly, these findings challenge decisions of both the Nova Scotia Court of Appeal<sup>23</sup> and the Prince Edward Island Court of Appeal outlined above.<sup>24</sup>

The Court explicitly disagreed with the decisions in *Campbell-MacIsaac* and *MacNeill* where there was no distinction drawn between amounts eligible claimants are entitled to recover and amounts eligible claimants had actually recovered.<sup>25</sup> The Court found that CPP benefits did not fall within the specified list of deductible benefits set out in section 4 of the SEF 44 policy and determined that benefits not within the specified list were only deductible if actually received between the date of the accident and the date of adjudication. The Court did not make a determination on the deductibility of benefits to be received in the future which are specified in section 4 as deductible.

Unfortunately, the decision in *Lapalme* does not appear to have cleared up the confusion surrounding the deductibility of collateral benefits under SEF 44 policies; the Court

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<sup>22</sup> *Somersall*, *supra* note 5.

<sup>23</sup> *Campbell-MacIsaac*, *supra* note 1.

<sup>24</sup> *MacNeill*, *supra* note 8.

<sup>25</sup> *Lapalme*, *supra* note 2 at para 70 and 90.

expressed strong sentiments against other Canadian Courts of Appeal decisions, while avoiding a definitive determination on the issue. Furthermore, the decision in *Lapalme* has not been cited by a reported decision in any jurisdiction outside of New Brunswick, and the opinions expressed in this paper are not intended to be opinions regarding the law in jurisdictions such as Ontario, where the deduction of specific collateral benefits has been codified.<sup>26</sup> It will be interesting to note *Lapalme*'s impact of on the law of these jurisdictions going forward.

## V. General Principles

### a. The *Contra Proferentem* Rule

*Contra Proferentem* is Latin for the legal doctrine meaning “against the offeror.” Black’s Law dictionary defines it as a doctrine where, in interpreting documents, ambiguities are to be construed unfavourably to the drafter.<sup>27</sup> The Supreme Court of Canada has repeatedly emphasized that “although effect must be given to unequivocal contractual wording, adhesionary contracts of insurance, such as the NBEF 44, stand to be interpreted ‘contra proferentum, or in favour of the insured’ where general rules of contract interpretation fail to resolve the ambiguity at the root of the dispute between the parties... Correlatively, coverage provisions attract a broad construction, while exclusion clauses are to be read narrowly.”<sup>28</sup>

It is possible that the decision in *Lapalme* could add to the confusion of how Courts will treat the enumerated sources of collateral benefits in clause 4 of the SEF 44 Endorsement. In *Lapalme*, the principles of the *Contra Proferentem* doctrine were applied to determine that CPP benefits were not included in clause 4(b)(vii). However, Chief Justice Drapeau went on to make the following statements, beginning at paragraph 29 of the decision:

29 The NBEF 44 is a carefully drawn document. As such, it needs to be interpreted having regard to what it actually states; **Courts have no business rewriting the endorsement in favour of either the insurer or the insured** unless, of course, a claim of rectification has been pleaded and established, which is not the case here.

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<sup>26</sup> *Insurance Act*, RSO 1990, c I.8 s 267.8(1).

<sup>27</sup> *Black’s Law Dictionary*, pocket ed, *sub verbo* “contra proferentem”.

<sup>28</sup> *Lapalme*, *supra* note 2 at para 19.

30 Clause 2 ("Insuring Agreement") is a coverage provision: it sets out the parameters of the insurer's basic indemnification obligation under the NBEF 44. Subject to the endorsement's other provisions, the clause obligates the insurer to indemnify each eligible claimant for the compensatory damages he or she "is" legally entitled to recover from an inadequately insured motorist. In *Somersall v. Friedman*, the majority applied the insured-favouring principles adumbrated in the preceding paragraph and held the date of the motor vehicle accident giving rise to the underlying losses was the relevant date to determine whether the eligible claimant "is" legally entitled to recover from the inadequately insured motorist. If there is entitlement at that time, the threshold condition set by Clause 2 is met and any subsequent extinguishment of entitlement is inconsequential. Happily for the eligible claimants in *Somersall v. Friedman* (and perhaps their lawyers' insurer), the majority's interpretation allowed the continued prosecution of the contested SEF 44 claims. An overarching issue in the present appeal is whether that indisputably insured-favouring interpretation of Clause 2 brings about the insurer-favouring understanding and application of Clause 4 advocated by Economical.

31 Clause 4 ("Amount Payable Per Eligible Claimant") speaks to a matter not explicitly and specifically addressed in Clause 2: the quantification of the indemnity provided under the NBEF 44, a process that requires an assessment of damages followed by a deduction of the aggregate of amounts from collateral sources in accordance with Clause 4's specifications. This process was not in issue in *Somersall v. Friedman*.

It appears that the Court has applied the *Contra Proferentem* doctrine regarding the deductibility of CPP benefits on one hand, but on the other, has given full effect to the wording of the policy and refused to interpret the endorsement in favour of either the insurer or the insured. It is possible that the application of the above doctrine in *Lapalme* could be interpreted in a manner that was not intended by the Chief Justice, and could result in the inconsistent application of the principles of the decision going forward.

#### **b. Deductibility of Collateral Benefits**

Based on the wording of the standard SEF 44 policy, possible sources of reduction/deduction are as follows<sup>29</sup>:

- Insurance of inadequately insured motorist

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<sup>29</sup> N.B.E.F. No. 44 Family Protection Endorsement.

- Insurer of person jointly liable with the inadequately insured motorist
- Uninsured motorist coverage of a motor vehicle liability policy (*Section D*)
- Any automobile accident benefit plans (*Section B*)
- Any policy of insurance providing disability benefits or loss of income benefits or medical expenses or rehabilitation benefits
- Workers' Compensation benefits
- Any family protection coverage of a motor vehicle liability policy

It is clear from the above jurisprudence that the approach to reducing a claim by these sources of reduction, whether they are benefits *actually received* as of the judgment date, or are *future benefits to be received* by the plaintiff varies significantly across jurisdictions. According to *Lapalme*, in New Brunswick, CPP benefits do not fall within these enumerated sources and are only deductible where they are actually recovered *prior to* a determination by the Court of a plaintiff's entitlement to damages. There continues to be confusion surrounding the deductibility of future benefits under the above enumerated sources, as Chief Justice Drapeau took care in not to expressing an opinion with respect to the precedential value of the Court of Appeal decisions in *Campbell-MacIsaac* and *MacNeill* to New Brunswick.<sup>30</sup> The approach of the Chief Justice Drapeau was understandable given that the decisions in *Campbell-MacIsaac* and *MacNeill* could be distinguished from the situation in *Lapalme*, because they dealt with the deductibility of benefits from the enumerated list in clause 4 and not the deductibility of CPP benefits. It would be understandable if the Court was making the conscious decision to wait for the opportunity to rule on the specific issue of deductibility of future enumerated benefits before expressly criticizing the decisions in *Campbell-MacIsaac* and *MacNeill*.

## VI. Questions Left Undecided

The decision in *Lapalme* should *not* be interpreted as endorsing the reduction of an SEF 44 claim for future benefits under the above enumerated sources. The decision prevented the reduction of the claim for future CPP benefits by applying the *Contra Proferentem* doctrine to determine that they did not fall within this list of sources, but left the determination of the

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<sup>30</sup> *Lapalme*, *supra* note 2 at para 95.

deductibility of any future benefits from this list of sources for a later date. In fact, although the comments of Chief Justice Drapeau, with respect to the Nova Scotia and PEI Court of Appeal decisions appear to diminish the likelihood of a forthcoming decision allowing future benefits under the enumerated heads to be deducted, the Court has been careful not explicitly take a position on the issue.<sup>31</sup> It is not clear where the law on this issue is going, but the door has been left open after *Lapalme* to argue that future benefits from sources enumerated in clause 4(b) are to be deducted.

In coming to a determination on the issues before it, the New Brunswick Court of Appeal referred to excerpts from the *Campbell-MacIsaac* decision which addressed the practical problems associated with a finding that future benefits should be deducted from an award under an SEF 44 policy.<sup>32</sup> Practical issues discussed in determining what approach might be most appropriate and fair to the parties include:

1) *Problems with attempting to calculate the present value of future benefits.*

In most cases, the plaintiff would not have immediate entitlement to the present value amount of an expected future benefit. Therefore, it can hardly be right for the insurer to seek to acquire to its benefit that same present value.<sup>33</sup>

2) *Standard of proof*

Normally, when a defendant seeks to deduct the present value of a future stream of benefits to which the plaintiff may be otherwise entitled, from an amount they are obligated to pay, Courts have required the defendant to prove the plaintiff's future entitlement on a very high degree of probability. Courts have not yet been asked to decide whether this same degree of probability should be applied to an SEF 44 insurer.<sup>34</sup>

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<sup>31</sup> *Lapalme*, *supra* note 2 at para 70 and 95.

<sup>32</sup> *Ibid* at para 67.

<sup>33</sup> *Campbell-MacIsaac*, *supra* note 1 at Para 83.

<sup>34</sup> *MacNeill*, *supra* note 8 at para 89-91.

### 3) *Other uncertainties*

“All actuarial calculations contain assumptions about the future which may or may not prove to be accurate and therefore introduce the risk that the amount set off as a present value will not reflect the amount ultimately received.”<sup>35</sup>

Despite the thoughtful analysis of Justice Drapeau in *Lapalme*, a strong argument can be made in the future for the deduction of enumerated benefits *regardless* of the practical concerns outlined above, by requiring future benefits to be held in trust for the benefit of the SEF 44 insurer. In the New Brunswick Court of Appeal decision in *Brown v. Smith*<sup>36</sup>, a decision rendered seven years prior to *Lapalme*, the same Court agreed with a decision of a Motion’s judge to require the imposition of such a trust for the payment of Section B loss of income benefits received by the plaintiff from the date of Trial until the plaintiff reached the age of 65. The above concerns could be lessened by applying the principles in *Brown v. Smith* to situations involving SEF 44 insurers.

## VII. Conclusion

The New Brunswick Court of Appeal’s decision in *Lapalme* clearly prohibits the deduction of future CPP benefits from claim under SEF 44 Family Endorsement coverage, the Court came to this determination by finding that CPP disability benefits are not included in the enumerated sources under section 4 of the policy. Although the New Brunswick Court expressed a strong sentiment against deducting future benefits received under the enumerated sources in section 4, the *Lapalme* decision did not specifically comment on the decisions from other Courts of Appeal and cannot be interpreted to block their deduction from the outset.

Regardless of the Court’s reluctance to comment on the applicability of the decisions in *Campbell-MacIsaac*<sup>37</sup> and *MacNeill*<sup>38</sup> to the New Brunswick jurisdiction, the issue of the

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<sup>35</sup> *Campbell-MacIsaac*, *supra* note 1 at Para 86.

<sup>36</sup> *Brown v. Smith*, 2003 NBCA 31.

<sup>37</sup> *Campbell-MacIsaac*, *supra* note 1.

<sup>38</sup> *MacNeill*, *supra* note 8.

deductibility of future collateral benefits should be dealt with by the Supreme Court of Canada. Despite the discrepancies in decisions across jurisdictions, strong arguments for the deductibility of future collateral benefits from SEF 44 Family Endorsement Coverage claims remain.

#### VIII. Deductibility: Questions to Ask

[Note: the list of comments below is not intended to be an exhaustive list of necessary considerations]

1. What is the extent of the injuries to the claimant?
2. What is the tortfeasor's coverage limit?
3. Is the claimant an eligible claimant under the relevant S.E.F. No.44 Policy?
4. Is the claimant receiving or entitled to receive benefits from any other source as a result of their injuries?
5. What is the present value of these benefits?
6. Are any of the benefits being received included in the enumerated sources set out in Clause 4 of the claimant's S.E.F. No.44 Policy?
7. Can the practical benefits of deducting these benefits be avoided by implementing a trust account or some other safeguard to protect the insured, should their benefits be discontinued in the future?

[Cox & Palmer](#)  
Barristers and Solicitors  
Suite 400, Phoenix Square  
371 Queen Street  
Fredericton, NB E3B 4Y9

**Monika M.L. Zauhar**  
Tel: (506) 453-9610  
[mzauhar@coxandpalmer.com](mailto:mzauhar@coxandpalmer.com)

**Steven Pearce**  
Tel: 506 453 7771  
[spearce@coxandpalmer.com](mailto:spearce@coxandpalmer.com)

[www.rmc-agr.com](http://www.rmc-agr.com)