



Accommodate disabled employees or pay, courts say

The right of disabled workers to be treated equally by employers received two major endorsements this spring from Ontario's courts.

In two separate judgements, the Ontario Superior Court and the Ontario Court of Appeal lashed out at employers who fail to provide equal benefit arrangements or severance pay for their disabled employees.

In the first case, the Ontario Superior Court sharply reprimanded a major automobile manufacturer for firing

an employee with chronic fatigue syndrome (CFS). It then awarded the worker a record \$500,000 in punitive damages. The case involved an employee with 14 years of experience who was diagnosed with CFS. After going on long-term disability (LTD) leave for two years, he returned to full-time work but again experienced symptoms of the illness. He missed days from work and also fell asleep at his work station. The company did not respond to his requests to accommodate his illness and, later, fired him.

In his judgement, Justice John McIsaac ruled that the employee was a victim of harassment and discrimination and said the company should have recognized his illness as a disability.

"Just because (the employee) did not carry a white cane, use a hearing aid or get around in a wheelchair, did not make him any less deserving of workplace recognition of his debilitating condition," Justice McIsaac asserted. *"Despite his many years of affliction, he continually had*

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Overstating pension assets earns charges

The Financial Services Commission of Ontario (FSCO) has laid 12 charges of overstating pension assets against a prominent actuary and his firm.

Both the firm and the consulting actuary are accused of using "smoothing", the rounding of investment gains and losses over a five-year period to inflate the value of a client's pension plan. Smoothing was a common practice prior to the 2001 market meltdown and was used to help employers establish a consistent pension contribution level during periods of market fluctuation.

The actuarial firm was hired in 2002 to conduct a triennial solvency

valuation of two different pension plans of a speciality steel manufacturer. Approximately 1,800 unionized workers were enrolled in the two plans. The FSCO alleges that the actuary overstated the market value of the plans' assets by more than 40 per cent. *"The result of the misstatement was that the report showed a solvency funding excess rather than a solvency deficiency, thereby eliminating the employer's need to make the required contributions to the plans and making the members' pension less secure,"* the FSCO charged.

The employer filed for bankruptcy protection in 2003.

In a 2002 report to the employer, the consulting actuary stated that the two pension plans would have a surplus of \$52 million at wind-up. A later review by a second actuarial firm indicated that the plan actually had a funding deficiency of \$15 million.

The actuary and his firm face potential fines of up to \$1.2 million.

For plan sponsors, the FSCO action is a reminder that regulators are prepared to use legal muscle to back their calls for stricter governance practices. It also serves as a warning to use only the most conservative actuarial assumptions during plan valuations. ■

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to earn any accommodation reluctantly granted by the employer. This ignores the fundamental principle of human rights law that accommodation is a right, not an indulgence granted by one's employer or, worse yet, an act of charity."

The judge went on to charge that the "company's misconduct was planned and deliberate and formed a protracted corporate conspiracy against the employee."

"All the employee was seeking from the employer was reasonable accommodation for his disability and, as a result, was terminated," Justice McIsaac said.

"His condition was incompatible with the 'lean' and efficient operation demanded by the employer. The workplace trumped his human rights."

In addition to the \$500,000 damage award, the court awarded the employee an amount covering two years of severance pay.

The company plans to appeal the ruling.

Terminated disabled workers qualify for severance

In the second case, a well-known Toronto hospital was ordered by the Ontario Court of Appeal to provide a severance package to a disabled employee who could no longer continue her occupation. The ruling voided Ontario Employment Standards Act rules allowing employers to deny severance pay to

ill or disabled workers whose ability to return to work is "frustrated by their medical condition."

The case involved a nurse who was injured in a water skiing accident. Despite several attempts to return to work, she was unable to do so and was subsequently fired without severance pay.

In its decision, the Court considered a number of complex arguments on the nature of severance pay. The hospital argued that severance pay is "forward looking" and designed to be a compensation bridge for employees seeking to find a new job following their termination. Since the nurse could not do her job, she would not likely return to the workforce and, therefore, would neither need nor qualify for a severance pay "bridge".

The nurse's counsel argued that severance arrangements are "retrospective" and intended to reward long-serving employees for their years of service with their employer.

The Court agreed with the nurse, stating that the Employment Standards Act's provisions denied disabled workers equal treatment and compensation in employment, a violation of the Canadian Charter of Rights and Freedoms.

In addition, the Court challenged the hospital's position that a disabled person could not be expected to return to work in some capacity.

"It cannot be said as a matter of logic and common sense that employees whose

employment has been frustrated are not likely to work again," said Justice Russell Juriansz. *"The position of the hospital reflects a stereotypical presumption about the adaptability, industry and commitment to the workforce of persons with disabilities severe and enduring enough to frustrate their employment. This generalization can only have the effect of perpetuating and even promoting the view that disabled individuals are less worthy of recognition and value as human beings."*

The Court went on to stress that there was no logical connection between the concept of providing severance pay to a long-serving employee who managed to return to work and was then terminated and not paying severance to one who did not return to work due to his/her disability but was still terminated.

In addition, Justice Juriansz said, *"Employees with permanent disabilities may undergo retraining and acquire new skills, devices or techniques of accommodating special needs."*

Almost to reinforce his point, the former nurse eventually found full-time work with a respiratory services supplier.

For plan sponsors, these rulings should reinforce some basic messages. In the first case: be prepared to accommodate a worker's disability, even if it doesn't meet the sponsor's traditional concept of that term. In the second: provide disabled workers with the same legal and compensatory rights as other workers even in cases of employment termination. ■

Alberta launches drug savings agency

Alberta has introduced legislation to establish a special commission to hold the line on prescription drug costs in that province.

Under Bill 206, the new Alberta Pharmaceutical Savings Agency will co-ordinate the purchase of prescription drugs in the

province, implement reference-based pricing and least-costly alternatives, review alternative medications and develop public education programs on the appropriate use of prescription medicines.

The 12-member panel will include representatives from the Alberta

Legislature, various consumer and community groups, unions, pharmacists, doctors and the judiciary. ■

Vitamins, OTC drugs must meet prescription criteria, Tax Court says

The Tax Court of Canada says that vitamin supplements can qualify as medical expenses, provided they are backed by a doctor's prescription and their dispensing officially recorded by pharmacists.

In a December 2004 judgement, the Court indicated that quasi-restricted products like certain vitamin supplements qualify as medical expenses in cases "where a medical practitioner prescribes one of these products to a patient, the dispensing of the prescribed substance will require the intervention of a pharmacist acting in that professional capacity, including the creation of the usual record to indicate that the prescription had been filled."

The case involved a man with chronic heart disease who had been prescribed a number of vitamin supplements by his doctor. However, since all of them except one, L-Carnitine, could be purchased without a prescription, the Canada Revenue Agency disallowed his claim for the vitamins to be considered a medical expense.

In his review of the case, Justice B. Paris stated that: "Unless legislation requires that a pharmacist keep a record of the sale of a particular medication, the cost of the medication will not be a medical expense under the Income Tax Act, regardless of how it is sold or treated within a particular pharmacy."

The judge stressed that the term "record of sale" means the standard information recorded when prescription medications are dispensed. This includes data such as the names of the patient, prescriber and dispensing pharmacist, the medication's drug identification number (DIN), dosage requirements, strength, quantity, prescription number and other key information. A sales receipt, invoice or similar documentation does not qualify as record of sale, Justice Paris stressed.

Since L-Carnitine can only be acquired through a prescription, the man's claim for that supplement was allowed. ■

Changes to Saskatchewan PBA

Saskatchewan has introduced the first changes to its Pensions Benefit Act (PBA) in 13 years.

Effective June 1, 2005, pension plan members will be allowed to make voluntary ancillary contributions to purchase additional features, such as flexible pension benefits, at retirement. The optional ancillary contributions will be exempt from locking-in provisions and the 50 per cent employer cost rule.

The Saskatchewan reforms also revise the benefits payable upon the death of a member. Under the new rules, if a member dies before he/she becomes eligible to receive a pension, his/her spouse will be entitled to receive a pension based on its entire commuted value, not just the value from 1993 onwards.

In addition, if a member dies after becoming eligible for a pension, his/her spouse will be entitled to receive the income based on the date of the member's death, not the date the member would have qualified to receive the benefit. The surviving spouse will also have the option to transfer the pension's commuted value to another plan on either a locked-in or non-locked-in basis, or receive the value of the pension as a lump sum. If no choice is made within 180 days of the member's death, the pension must pay a lump sum to the spouse automatically.

Under the new rules, a spouse can waive his/her right to receive a death benefit and later revoke that waiver prior to a member's death.

The June 1 law also allows members to receive their pension as a lump sum when the commuted value totals less than 20 per cent of the yearly maximum pensionable earnings (YMPE) of the year in which pension payments are to begin. Lump sum settlements can also occur when a pension's annual income does not exceed four per cent of the YMPE. ■



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Quebec pension bill expands retiree and non-union member rights

Retired members of defined benefit pension plans in Quebec must be consulted before employers suspend plan contributions, according to a new law passed by the Quebec National Assembly.

Effective April 28, 2005, Bill 195 gives both active and non-active members, including retirees, beneficiaries and non-unionized workers, the right to endorse any plan amendments that may affect employer contributions. The endorsement must occur at either an annual meeting or a special meeting of a plan sponsor's benefits committee. Approval must involve the majority of the votes cast by the various eligible employee groups.

Until now, only unions representing active members or employers involved in multi-employer plans could consent to contribution suspensions.

While the new law is expected to curtail the appropriation of pension surpluses by employers, it will confirm their right to take contribution holidays when they have received the approval to do so by the various employee and retiree groups within a plan. ■

Biggest and best

Coughlin & Associates Ltd. has been confirmed as Ottawa's largest employee benefits consultant. A survey by the Ottawa Business Journal indicates that, with 79 employees, Coughlin is the largest benefits specialist in terms of number of people employed. The ranking does not include the 28 people based in the company's Winnipeg operation.

The *Business Journal* listing of the largest employee benefits firms follows.*

Name of company	Number of Ottawa employees	Year established in Ottawa
1. Coughlin & Associates Ltd.	79	1958
2. Cowan Wright Beauchamp Ltd.	65	1982
3. Mercer Human Resources Consulting	60	-
4. Johnson Inc.	16	1990
5. Carleton Financial Group	10	1997
6. Aon Consulting	8	1985
7. Health Benefits Consulting Inc.	7	1985
8. Lee-Power & Associates Inc.	7	1970
9. Rice Financial Group Inc.	7	2000
10. MD Benefits Group	2	1993

* List current as of March 31, 2005.

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Provincial budget highlights

Spring is the time when many provincial legislatures unveil their spending plans for the coming year. While Ontario and Quebec introduced less controversial plans than in 2004, both still managed to raise eyebrows with some of their budget plans, as did the province of Manitoba.

In **Ontario**, the government announced that it would seek ways to encourage greater investment in infrastructure projects from private pension funds and plan sponsors. When in opposition, the members of the current government criticised such private-public partnerships as "privatization by stealth." The government plans to invest an additional \$4.8 billion in health care from 2005 to 2008.

In **Quebec**, up to 45,000 seniors receiving the maximum Guaranteed Income Supplement (GIS) will no longer have to pay for prescription medications. Until now, GIS recipients had to pay at least \$200 per year for their drugs through the Quebec Pharmacare program. The province plans to pour an additional \$826 million into health care, including additional support for caregivers of the mentally or physically disabled.

In **Manitoba**, registered nurses can now order diagnostic tests, prescribe drugs and perform some medical procedures, provided they meet certain qualifications. ■



Health Canada hosts hearings on cox-2 drugs

Health Canada will hold public discussions on the safety of pain medications featuring cox-2 inhibitors.

The two-day forum, June 9 and June 10, 2005, mirrors similar meetings hosted by the US Food and Drug Administration (FDA) when the safety of popular arthritis medications such as Bextra, Vioxx and Celebrex was challenged.

The meetings will feature a panel of experts who will ask representatives of the various pharmaceutical manufacturers about the risks and benefits of their respective products.

It is the first time the public has had an opportunity to present their views to Health Canada experts.

Health Canada faces a number of lawsuits from those who allege that it failed to take tough action when some cox-2 medications were linked to increased incidents of heart attacks and strokes, especially among the elderly.

The government agency pulled Bextra from the market in April when concerns about the drug's safety were raised. Merck & Co., the manufacturer of Vioxx, voluntarily withdrew its popular arthritis medicine from the market in late 2004. (See the April 2005, March 2005 and December 2004 editions of the *Coughlin Courier* for background.)

Cox-2 inhibitors were originally introduced to the market as safe alternatives to traditional ASA-based arthritis medications, which were often associated with intestinal bleeding, discomfort and other symptoms.

In March of this year, the FDA's meetings concluded with recommendations to continue the sale of cox-2 medications, provided they are accompanied by highly visible "black box" warnings, similar to those seen on cigarette and alcohol packaging. ■



PPN update

The Drug Store Pharmacy, at 296 Bank Street in Ottawa, has joined the Coughlin & Associates Ltd. Preferred Provider Network. Their phone number is 613-234-0927.

A solid gold retirement plan

A gold watch used to be the symbol of a solid and well-deserved retirement.

Now, RRSP investors can back their registered retirement savings with gold, provided it meets established standards for purity.

The recently passed federal budget amends Income Tax Act regulations to allow investment-grade gold and silver bullion, coins, bars and certificates to be included in tax-deferred income plans such as registered retirement savings plans (RRSPs).

Gold must have a purity level of at least 99.5 per cent while investment-grade silver must be 99.9 per cent pure. Bullion coins must be minted by the Royal Canadian Mint and have all or substantially all of their fair market value based on their precious metal content. Bullion bars must be produced by refineries accredited by the London Bullion Market Association and bear the hallmark of the refiner. Certificates must be issued by federally or provincially regulated financial institutions and be tied to the precious metal holdings of the issuer.

All of the precious metal investments must be purchased either through the producer of the investment or an accredited financial institution. ■

FAST FACTS

According to reports published in the *Globe & Mail*, only 35 per cent of workplaces have programs for those returning to work following mental illness.

Depression and other mental illnesses are the leading cause of short and long-term disability claims. ■

An article in *The Canadian Medical Journal* suggests that one anti-cholesterol drug is much the same as another. A McGill University study of the leading brands sold in Canada says that less expensive drugs were found to be as effective in reducing cholesterol as their pricier counterparts. Prices for the medications ranged from 85 cents to \$2.25 per day. The study tracked more than 18,000 patients in Ontario, Quebec and British Columbia. A total 17.8 million anti-cholesterol prescriptions with a value of \$1.4 billion were filled in Canada last year. ■

Accidents in the workplace account for 10 per cent of all major trauma hospitalizations, according to a report released by the Canadian Institute for Health Information (CIHI). Falls were the leading cause of the serious injuries, representing 43 per cent of reported events. Vehicular accidents followed at 20 per cent. ■

Average CEO compensation of 198 companies on the S&P/TSX Index in 2004: \$5.5 million. Increase from 2003: 57 per cent. Average bonus paid to CEOs: \$813,716. Increase from 2003: 24 per cent. ■

The funding position of the average US defined benefit pension plan has slipped to 73 per cent, compared to 141 per cent just six years ago, according to Sean McShea, head of Ryan Labs, a major Wall Street investment analysis firm. Increased contributions and a reduction in benefits are required to avoid a major pension crisis, Mr. McShea says. ■

Britons will have to increase their savings rate to 10 per cent of income and expect to see their retirement limit move from the current level of age 63 to 68 just to maintain today's level of benefits, according to actuarial research conducted for the UK national pension program. Increased life spans and a reduction in the retirement age over the past 20 years are blamed for the benefit shortfall. ■

The Canadian Cancer Society reports that 145,500 new cases of cancer will be diagnosed this year while 69,500 people will die from the disease. With baby boomers entering the age when cancers tend to be diagnosed, incidents – and deaths – from the disease are expected to increase steadily over the next several years. New cancer diagnoses have outpaced the population growth rate by two to one since the start of the decade, the Society says. ■

The top 10 per cent of Canadian tax filers were responsible for 52 per cent of personal income tax collected in 2002, says Statistics Canada. In 1990, that group accounted for 46 per cent of collections. ■

Average federal tax collected per \$100 of income

-- in 2002: \$11.18
-- in 1990: \$12.25 ■

An Ipsos-Reid poll of 1,500 members of employer-sponsored benefit plans suggests that the majority of workers feel that those with unhealthy lifestyles should pay more for their benefits coverage. According to results published in the *Globe & Mail*, 54 per cent of respondents feel that those who don't exercise or are seriously overweight should pay more since they are more likely to need medical services. Almost 70 per cent of respondents said smokers should pay more for their health care coverage. ■

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