COUGHLIN COURIER

SEPTEMBER, 2004

# Share the surplus, Supreme Court says

*Employers that wind up pension plans are required to share their pension surpluses with affected employees, the Supreme Court of Canada says.*

In a unanimous ruling on July 29, the Court endorsed earlier decisions by lower courts and the Superintendent of Financial Institutions indicating that terminated employees have a right to a portion of any surplus of a pension plan being wound up. The Court also confirmed lower court rulings stating that members affected by a partial wind-up are to be dealt with as if they had been involved in a full wind-up of the plan.

The case dates to 1996 when 146 employees of Monsanto Canada Inc. were terminated and their defined benefit pension plan wound-up following a corporate re-organization. While their plan did not have any provisions for the distribution of any surpluses upon its closure, rulings by the Superintendent of Financial Services as well as the Ontario Division Court and the Ontario Court of Appeal indicated that the employees had a right to $3 million of the plan's actuarial surplus of more than $19 million.

While the decision effectively settles the question of whether employees have a right to a share in pension plan surpluses, it does not provide specific direction on how the employees' shares should be allocated. Plus, companies that have terminated workers, wound-up their pensions and already used plan surpluses may be faced with the prospect of paying back millions of dollars from their general revenues to fund the distribution of past surpluses. As a result, additional lawsuits are expected as employers and employees attempt to carve out their share of pension plan surpluses, many of which were attached to plans that were terminated over a decade ago. In Ontario alone, 281 pension plans were partially wound-up since 1992, 208 of which involved surpluses. That province's Financial Services Commission is expected to rule on which of those plan wind-ups are covered by the ruling and how their surplus distributions are to be administered. It is now contacting plan administrators of partially wound-up plans and asking them to provide updated calculations of their surpluses and estimated timeframe for the distribution to plan members.

Some pension experts also warn that the Supreme Court ruling will now encourage employers to avoid plan surpluses at all costs, opening the potential for a repeat of the pension o crisis of 2001-2003, when many pension plans faced crippling liabilities following the collapse of equity markets. With no surpluses to fall back on during market downturns, many plans could face liquidity problems or fail to meet their obligations to pensioners. As well, industry analysts predict that employers will continue to avoid defined benefit pension plans, since these plans to tend to require large surpluses to fund future payouts to plan members.

Federal regulators at the Office of the Superintendent of Financial Institutions have also said that distribution of surpluses at partial termination may not be in the interests of all plan members and beneficiaries. They are expected to express their concerns to the federal Department of Finance.

While the Monsanto decision may settle one problem, it appears that it may have created a host of others that will have to be addressed in both the courts and parliament in the months ahead.

Watch for more information on this issue as it becomes available. ■

# Drug plan news

*Effective July 1, 2004, the **Quebec** drug plan increased its out-of-pocket maximum to $857.04 per member from $839.04. Its monthly deductible for members 65 and older climbed to $10.25 from $9.60 while its maximum co-insurance factor decreased marginally from 72 per cent to 71.5 per cent. As well, effective January 1, 2005, the annual limit for smoking cessation products will increase to $630 from $620.*

Also on July 1, the province of **Saskatchewan** changed its drug plan to reimburse only to the cost of the lowest priced drug proven to be effective for the condition being treated. Patients who wish to use more expensive drugs will be required to pay the difference. Doctors may request an exemption for medical reasons on a case-by-case basis. Similar policies are now in place in the provinces of British Columbia, Alberta and Nova Scotia.

On April 1, 2004, the **Manitoba** Pharmacare plan adjusted its deductibles as follows:

| Adjusted total family income | Deductible rate |
|---|---|
| Less than $15,000 | 2.32% |
| $15,000 to $40,000 | 3.48 |
| $40,000 to $75,000 | 4.00 |
| $75,000+ | 5.00 |

In **Ontario**, the Superior Court of Justice has upheld that province's College of Pharmacy policy banning loyalty programs for prescriptions and other pharmacy services. The College maintained that loyalty plans could be considered inducements to take prescription medications. As a result, plans such as Air Miles® or similar reward programs may no longer be offered when patients buy prescription drugs. Quebec and Newfoundland have similar regulations.

# No creditor protection for self-directed RRSPs

*The Supreme Court of Canada has ruled that self-directed registered retirement savings plans (RRSPs) are **not** exempt from seizure by creditors.*

The May 2004 ruling by the nation's highest court could affect the marketing strategies of Canadian financial institutions, many of which package their RRSPs as creditor-proof.

This case involved a Quebec man who established a self-directed RRSP in 1998 with a leading brokerage firm. However, in 1999, his bank issued a writ of seizure against those assets before they matured.

The core of the judgement revolved around the principle of "*alienation*", or segregation, of RRSP capital. According to the Court, the fact that the plan authorized the owner to make withdrawals negated the principle of capital "*alienation*", where an owner transfers assets to a trust and effectively loses control of how those assets are used until they are returned to him/her in the form of a retirement income.

"*Since the assets may be withdrawn in whole or in part before the maturity date of the plan, we must conclude that during this initial stage of the plan, the owner-annuitant has not divested himself of his assets in favour of patrimony...,*" the Court noted.

It went on to observe that self-directed RRSPs almost work in reverse of traditional retirement funding arrangements. "*Under (the rules of) these plans, decisions respecting investments are the exclusive prerogative of the owner-annuitant. The only restraints on the owner-annuitant relate to administrative formalities. The trust's only obligations are to carry out the owner-annuitant's instructions. This is different from the role of a trustee under the Quebec Civil Code where the trustee has the control and exclusive administration of the trust and the settler loses the ability to control and administer those assets,*" the Court said.

For both plan sponsors and members, the ruling underscores the need to be aware that if limited creditor protection is a key requirement, then self-directed RRSPs should be avoided.

The ruling is not expected to affect RRSPs, registered retirement income funds, registered pension plans, locked-in retirement accounts or life income funds where capital is "*alienated* “ and control of plan administration is held by a trustee entity other than an owner-annuitant.

For more information see *Bank of Nova Scotia v. Thibault* at www.lexum.umontreal.ca/csc-scc/ or, in English, www.lexum.umontreal.ca/csc-scc/en . ■

# Plan administrator liable for employee's miscalculation

*The New Brunswick Court of Queen's Bench found a pension plan administrator guilty of negligent misrepresentation when one of its benefits staff administrators misunderstood the term "actuarial reduction." The staff member's error resulted in a miscalculation of two employees' early retirement benefits, which in turn, led to the civil action.*

The case reinforces the need for plan administrators to provide accurate information when advising exiting members of their pension entitlements. ■

# Illinois to hire Canadian drug plan administrator

*The governor of Illinois says that his state plans to hire a Canadian benefits company to help its residents buy prescription drugs from Canada.*

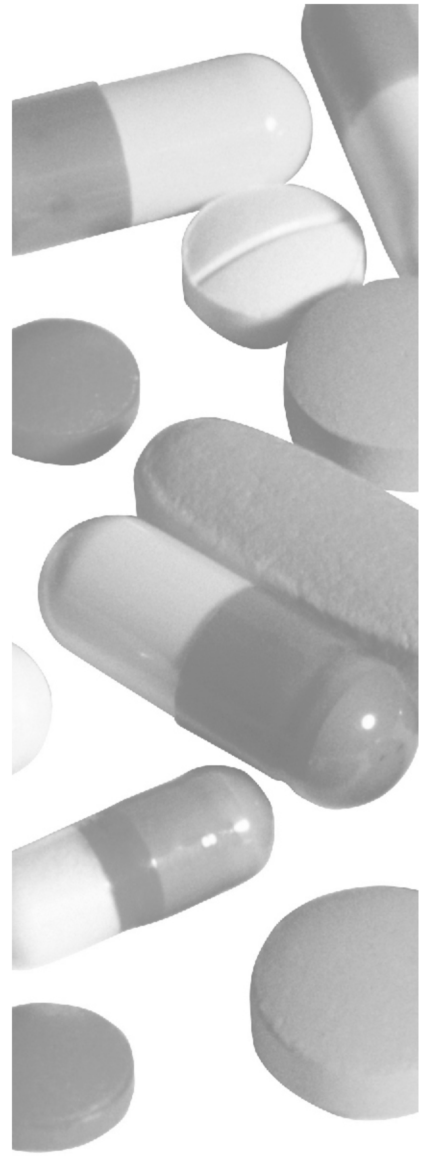
Defying US Food and Drug Administration (FDA) rules prohibiting the import of prescription drugs from foreign countries, Governor Rob Blagojevich says he hopes to hire a Canadian benefits manager to administer a program to import and distribute Canadian pharmaceuticals to state-approved pharmacies and wholesalers. Illinois hopes to capitalize on the lower prices of Canadian prescription medications that, on average, range from 30 to 50 per cent lower than their US counterparts, thanks primarily to bulk buying by the provinces and the lower Canadian dollar.

The state joins Minnesota, Wisconsin, New Hampshire, North Dakota and the District of Columbia in establishing mechanisms or websites where Americans can purchase prescription drugs from Canadian pharmacies. The state hopes to save almost $2 billion US a year by buying drugs from Canadian suppliers. It plans to offer the service first to seniors and, later, to state employees and retirees, social assistance recipients and others.

The FDA opposes the move, stating that Canadian drugs are not safe. ■

# PPN update

Care Pharma Drug Mart, of 767 Notre-Dame Street, Embrun is no longer a member of the Coughlin & Associates Ltd. Preferred Provider Network. ■



# When is intention an accident?

*The Ontario Superior Court has ruled that a paralysing basketball injury was indeed an accident and not the fault of the player.*

The case involved an individual who twisted his neck while playing basketball and dissected an artery, which resulted in a stroke and his paralysis. When he attempted to claim under his accidental death and dismemberment policy, his insurance company balked on the grounds that the player intended to turn his neck during the play, therefore making the incident a deliberate act rather than an accident.

In its ruling, the Court noted that a relatively minor strain such as twisting of the neck, could cause such a trauma to an artery wall. It also found that, while the claimant may have intended to turn his neck during the game, he did not expect that the action would cause the injury, thereby making the incident an accident.

The Court went on to state that if the insurance industry did not intend to cover losses from neck movements during basketball games, it should change the wording of their policies to exclude such situations.

The case in now under appeal. ■

## Collective agreements continue after bankruptcy

*The Ontario Court of Appeal has ruled that collective agreements do not terminate following a bankruptcy. The result: bankruptcy trustees must continue to adhere to the terms of collective agreements if they continue to operate a business under bankruptcy protection.* ■

# The secret to long life: be rich and live in Vancouver

*Money can't buy happiness but it can buy long life, a study by the Canadian Institute of Health Information (CIHI) suggests.*

According to the medical research organization, the top 20 per cent of income earners live almost five years longer than the lowest 20 per cent. According to CIHI research, men and women in the top quintile of income earners live an average of 78.1 and 82.3 years respectively compared to 73.1 and 80.7 for those in the lowest quintile.

The opportunity for more education and better health and lifestyle choices is believed to be the reason behind the "health-to-wealth" link.

The best place to expect to live long and prosper was Vancouver, according to Statistics Canada. A study by that organization indicates that residents of Vancouver can expect to live an average of 81.1 years. Torontonians followed close behind at 81.0 years. Among the 25 major cities studied, Sudbury ranked last at 76.7 years.

**City rankings by life expectancy are:**

| | |
|---|---|
| Vancouver | 81.1 years |
| Toronto | 81.0 |
| Victoria | 80.9 |
| Calgary | 80.0 |
| Edmonton | 79.8 |
| Québec | 79.8 |
| Kitchener | 79.7 |
| Ottawa-Gatineau | 79.5 |
| Montreal | 79.5 |
| Hamilton | 79.4 |
| Oshawa | 79.3 |
| Saskatoon | 79.1 |
| Sherbrooke | 79.1 |
| Halifax | 79.1 |
| London | 78.8 |
| Windsor | 78.6 |
| Trois-Rivères | 78.6 |
| St. Catharines-Niagara | 78.5 |
| Saint John | 78.3 |
| Winnipeg | 78.1 |
| Regina | 78.0 |
| Chicoutimi | 77.7 |
| St. John's | 77.4 |
| Thunder Bay | 77.3 |
| Sudbury | 76.7 |

## Canadians doubt the CPP will be there for them

*While plan members, employers and regulators begin to fight over the remains of dead pension plans, the majority of Canadians no longer believe that the Canada Pension Plan (CPP), the foundation of most employees' retirement strategies, will survive in its current form.*

According to a July 2004 Ipsos-Reid survey of 1,057 Canadians, only 45 per cent of respondents believed that the CPP and the medicare system will be around to serve them in the future. ■

## Oxygen equipment use rising

*A study conducted by the Institute for Clinical Evaluative Sciences indicates that the use of mechanical ventilation devices to deliver oxygen to patients is increasing rapidly.*

According to the study, which was published in the journal *Critical Care Medicine*, the number of patients requiring oxygen increased by nine per cent between 1992 and 2000. As well, both the duration of treatment and age of patients have also increased significantly, the study says.

The Institute expects the use of oxygen and related equipment to continue to increase sharply as the baby boom population ages. More than 60,000 Canadians required oxygen treatment last year.

For plan sponsors, the study could be a warning to expect increased claims for oxygen and related medical equipment in the coming years. Most extended health care plans cover oxygen administration and equipment. ■

# More selecting earlier retirement, StatsCan says

*More Canadians appear to be opting for earlier retirement, despite recent calls to eliminate mandatory retirement so that people may continue to work at older ages.*

A Statistics Canada survey of retirement trends from 1991 to 1995 and 1996 to 2000 indicates that the proportion of those electing to retire in their early 50s has jumped significantly, from nine per cent of total retirees a decade ago to 15 per cent in its most recent survey. The 55-59 age band also experienced an increase in retirees, albeit at a reduced rate from that reported in the earlier age band.

In total, 42 per cent of the labour force is retiring between the ages of 50 and 59 compared to 30 per cent in early 1990s.

The most popular retirement age band remains age 60 to 64, which is favoured by one-third of workers, Statistics Canada says.

The shift in retirement age trends is highlighted below:

| Age band | Per cent of retirees 1991-1995 | Per cent of retirees 1996-2000 |
|---|---|---|
| 50-54 | 9% | 15% |
| 55-59 | 24% | 27% |
| 60-64 | 37% | 31% |
| 65-69 | 22% | 19% |
| 70+ | 7% | 7% |

Public sector workers tended to retire earlier than either private sector workers or the self-employed, the labour force study indicated. The median retirement age for public service workers between 1996 and 2000 was 58.1, compared to 61.8 for their private sector counterparts and 65.0 for the self-employed.

By far, June was the preferred month for retirement; it was selected by over 20 per cent of retirees. December and July followed at just over 10 per cent each. February was the least popular month, logging only 4.4 per cent of retirements. ■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## Montreal protest addresses pension "discrimination"

*A 50-year-old City of Montreal food inspector raised eyebrows among meat packers when he wore a dress to work to protest perceived discrimination in his employer's pension rules.*

According to Patrick Le Lann, the fact that his employer's plan allows women to retire with full pension after 25 years of service discriminates against male workers, who have to work 30 years to receive the same benefit.

While the City removed gender distinction in its pensions in 1983, women hired prior to that time are still covered by the 25-year requirement.

"*The only reason I have to continue working is because I'm a man,*" Mr. Le Lann asserted during his protest. Mr. Le Lann has 26 years of service with his employer.

However, both his union and the Quebec Human Rights Commission refused to address his complaint, siting rulings from as far back as the 1970s that allowed women to have reduced work requirements since they tend to join the workforce at later ages and have their service interrupted by family responsibilities.

Mr. Le Lann has since abandoned his protest, along with the dress.

Despite the unique way Mr. Le Lann expressed his concern about his pension's terms, it did serve to reinforce the need for plan sponsors to outline clearly both *how* and *why* their pension plans work. ■

# FAST FACTS

Individuals with dental care insurance are almost twice as likely to visit a dentist than those with no dental coverage, the Canadian Dental Association (CDA) says. According to the CDA, 72 per cent of those with coverage received dental services in the past year while 7.3 per cent of those covered had not been to a dentist in the past five years. Among those with no dental coverage, only 47 per cent visited a dentist this past year while 17 per cent had gone more than five years without visiting a dentist. Three per cent had *never* been to a dentist. Roughly two-thirds of the population is covered by private dental plans. ■

The Canadian Armed Forces has raised its mandatory retirement age from 55 to 60. The change is designed to "*reflect changes in Canadian society*", according to the Ministry of National Defence. Over the past two decades, the average age of a recruit has jumped from age 20 in 1981 to 24.5 today which "*...does not permit the older entrants to serve enough time to maximize their pension.”* ■

The American Benefits Council predicts that health and retirement benefits of American workers will decline over the next 10 years, even if their pay increases. The Council says that fewer workers will receive post-retirement benefits from the companies. As well, the replacement of defined benefit pension plans by defined contribution or 401(k) plans will also curb the amounts set aside for workers' benefits. "*In almost every area -- retirement income, active and retiree health and long-term care -- the employee benefits system is headed for a crisis*", the Council says. ■

The province of New Brunswick has added language and family status (as in having or not having children) as areas protected against discrimination under that province's Human Rights Act. ■

Effective July 1, 2004, the Old Age Security benefit increased to $466.63 per month. The maximum Guaranteed Income Supplement increased to $544.59. ■

Average drug cost per prescription, according to ESI Canada, a major health care research firm and drug card provider:

| | |
|---|---|
| 2000: | $40.00 |
| 2001: | 45.42 |
| 2002: | 48.34 |
| 2003: | 51.83 |

**Total increase since 2000: 29.6 per cent.** ■

More than 1.4 million Canadians, 10 per cent of the work force, are on short or long-term disability leave for mental illness or addiction, according to the *Global Business and Economic Roundtable on Addictions and Mental Health*. The cost: over $30 billion annually. ■

The Yukon Territory has joined Ontario, Quebec and British Columbia in allowing the marriage of same sex couples. ■

Canadian median age (the exact point where one-half of the population is older and the other half is younger) in 1966: **25.4 years.** In 2001: **37.6 years.** ■

The Canadian Institute for Health Information reports that total prescription and non-prescription drug sales in Canada amounted to $19.6 billion last year, an 8.1 per cent increase from the previous year. Prescription drugs accounted for almost $16 billion of the nation's total drug bill. On a per capita basis, Nunavut had the lowest costs at $147 per person while Prince Edward Island topped the drug cost charts at $688 per person. ■

The Ontario Public Service Employees Union has stated that it will seek arbitration to determine if 15,000 community college workers and teachers must pay the new provincial health care levy. The province imposed the levy, which ranges up to $900 per year, to offset rising health care costs. However, since many old labour contracts contain provisions that passed these expenses on to employers, some groups have questioned whether these former provisions would still be in effect after two decades of non-use. ■

The government of New Brunswick has announced that it will provide survivor pension benefits to common-law partners of provincial employees, including those in same-sex relationships. ■