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2013 federal budget: a triumph of obscurities

Federal Finance Minister Jim Flaherty unveiled the federal government's 2013-14 budget on March 21. While heavily focused on skills training and industrial development, the document contained many relatively obscure but potentially significant reforms that could affect selected individuals or plan sponsors. Items of potential interest include the following:

- Increasing the Lifetime Capital Gains Exemption for small business owners, farmers and fishermen to $800,000. Subsequent increases to the exemption will be indexed to inflation.
- The GST/HST exemption on publicly funded health-related homemaker services for the ill, elderly or disabled will be expanded to include personal care services such as bathing, feeding, assistance with dressing and taking medication. Currently, the exemption only applies to homemaker services such as cleaning, laundering, meal preparation and child care.
- Reports, examinations, X-rays, laboratory tests and other services that are not performed for the protection, maintenance or restoration of an individual's health will no longer be exempt from the GST/HST. (For example, reports or examinations required for insurance purposes or to determine liability in a court will no longer be GST/HST-exempt.)
- The gross-up factor used to calculate the dividend tax credit from non-eligible corporate dividends will be reduced to 18 per cent from 25 per cent. As well, the corresponding dividend tax credit will be reduced from two-thirds of the gross-up amount to 13/18ths.
- Administrators of registered pension plans (RPPs) will be able to make refunds of member contributions in order to correct *"reasonable errors"* without first having to obtain approval from the Canada Revenue Agency. This provision will likely be used in situations where plan administrators have miscalculated a member's or employer's contributions in a particular year without necessarily exceeding the RPP contribution limit. This provision will become effective on January 1, 2014.
- The tax rates applied to estate trusts, testamentary trusts, and *inter vivos,* or living trusts, (a trust with a duration deemed at the trust's creation and that can entail the distribution of assets to a beneficiary during or after the trustor's lifetime) created prior to June 18, 1971, may be harmonized with other trusts. Currently, trusts created after June 18, 1971 are taxed at a flat rate of 29 per cent while those created before that date are taxed on a graduated scale applicable to individuals. This can create tax advantages for the older trusts.
- Employment Insurance premiums will increase by five cents per $100 of insurable earnings each year from 2013-14 to 2015-16. With projected improvements in employment, the rate will reduce in 2016-17 and 2017-18. The projected EI rates are:

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2013 federal budget: a triumph of obscurities

Year	Rate per $100 of insurable earnings
2013-14	$1.88
2014-15	$1.93
2015-16	$1.98
2016-17	$1.93
2017-18	$1.53

- The benefits provided by leveraged life annuities (insured annuities that are acquired with borrowed money that provide a guaranteed income to the investor until death, after which, the money invested in the annuity is returned as a tax-free death benefit) will be eliminated. (These investments tend to be used by closely-held private corporations to compensate retiring partners or executives.)
- The development of a single financial consumer code to replace the current mix of legislation and regulations surrounding financial products.
- Improving financial literacy among seniors.
- Continued encouragement of provinces to introduce pooled registered pension plans (PRPPs.) To date, no province has successfully introduced PRPP legislation. ❧

Family leave benefits extended

The federal government has passed legislation extending the Canada Labour Code's family leave provisions to cover parents of critically ill children as well as parents of children who have been victims of violent crime.

The new provisions include the following:

1. Employees who are parents of critically ill children will be permitted to take up to 52 weeks of unpaid leave. They will also be entitled to apply for 35 weeks of Employment Insurance benefits.
2. Where a child disappears as a result of a probable crime, the parent will be eligible for 52 weeks of unpaid leave. They will also be entitled to apply for 35 weeks of Employment Insurance benefits to a maximum of $350 per week.
3. Employed parents of children who have died as a result of a crime will be entitled to up to 104 weeks of unpaid leave. During that time, they will be entitled to apply for 35 weeks of Employment Insurance benefits to a maximum of $350 per week.

Employers are prohibited from taking punitive actions against employees who make use of these new leave of absence provisions. However, employers may ask for medical certificates or other reasonable evidence to prove that a child has a critical illness, disappeared, or has been a victim of crime.

Children must be under the age of 18.

To qualify for the benefits, employees must have six continuous months of employment with their employer. Employees who are charged with a criminal offence that led to their child's death or disappearance are not eligible for coverage.

The new rules apply only to federally regulated industries. ❧

Pensioners not entitled to full indexing

While a fully indexed pension may be a nice thing to have, full pension indexation is not a right, as the following court cases in Saskatchewan and Quebec prove.

Prove it in writing, Saskatchewan court says

In a March 2013 decision, the Saskatchewan Court of Appeal ruled that members of that province's public service pension plan are not eligible to automatically receive fully indexed cost of living adjustments.

The case involves an older pension plan that did not index pension benefits against inflation. However, over time, the employer did make ad hoc adjustments to the benefits to relieve the impact of inflation on members' benefits.

In 1997, the Saskatchewan legislature passed a law allowing automatic adjustments to the plan's benefits but only up to 70 per cent of the increase in the cost of living. However, members of the plan objected, arguing that the province had promised to treat pension members *"equitably and fairly"* and that it was an implied term of their employment contract that their pension benefits would be kept *"reasonably current"* and would include fully indexed pensions.

The case then went to litigation.

In its initial ruling, the Saskatchewan Court of Queen's Bench ruled that the members had not proven that they had a contractual right to receive fully indexed pensions, stating that they had *"developed a construct of the kind of pension plan they now wished they had. However, they have not established by evidence the legal foundation required to support such a conclusion…"* Further, it stressed, the court *"is required to rule upon legal, including contractual, rights, not upon expectations; upon legal entitlements, not aspirations."*

The judgement was appealled. However, the Saskatchewan Court of Appeal backed the lower court's findings, noting that the members could not provide any specific document that said plan members were entitled full indexation. In its review, the Appeals Court also relied on wording contained in the pension plan booklet that specifically stated that the plan was not indexed but was subject to review by the employer.

Only plan sponsor can approve pension indexing, Quebec court rules

The Quebec case involves a large educational institution with a pension plan that was administered by a pension committee comprised of plan members, retirees and members appointed by the school.

Before 2004, the pension had an indexing feature allowing pension payments to be increased by 50 per cent of the Consumer Price Index (CPI). As plan sponsor, the school had discretion to provide supplementary benefits covering the remaining 50 per cent of the CPI.

In 2002, the committee recommended that the plan be amended so that increases would be provided automatically on January 1 of each year beginning in 2004, provided the plan's actuary could confirm that the plan had sufficient reserves to support the payments.

The concept was then voted on and accepted by plan members. However, after the vote, the plan sponsor amended the plan to include a requirement that the automatic index payments would not be provided if the plan was not fully solvent.

A year later, a group representing the plan's pensioners contested the indexing rate. After three years of negotiation, the retiree group and the plan sponsor agreed on a plan that would allow the plan sponsor to take contribution holidays equivalent to its solvency payments in return for a retroactive pension increase. The new arrangement was again put to a vote in 2005. However, the plan sponsor again changed the plan to nullify the retroactive increases until it recovered its special solvency payments.

In 2007 and 2008, the pension plan had a solvency deficiency. As a result, no supplementary indexing payments were made.

The case then went to litigation.

In its presentation to the Quebec Superior Court, the retiree group said the solvency requirement had not been approved by plan members in the original 2002 vote, nor had the granting of priority of contribution holidays over the indexing payments to pensioners.

However the action was dismissed by the court. The case was appealled to the Quebec Court of Appeal.

In its review, the Court of Appeal noted that all information on the plan had been distributed to plan members by the pension committee, not the plan sponsor. Since the pension committee and the plan sponsor were two separate legal entities, the plan sponsor could not be liable for the pension committee's failure to explain the solvency requirements of the plan or the fact that the plan sponsor's right to take contribution holidays exceeded members' rights to receive a fully indexed pension.

In addition, it asserted, based on the pension's contractual terms, plan amendments did not have to be approved by its members, thereby making the earlier votes organized by the pension committee invalid and non-binding.

As a result, the plan sponsor's various amendments to the plan were upheld and its position as sole authority to amend the pension plan confirmed.

For pension plan members and administrators, these cases illustrate the importance of having solid contractual documentation to prove entitlement to any pension benefits or involvement in any decisions relating to the terms of pension payments. While the principles of equity, fairness or member representation may imply full entitlement or decision making power regarding specific benefits or payouts, without supporting documentation, including contracts, booklets or other reference material, they do not impose fiduciary obligations on pension plan sponsors. ❧

Provinces agree to cap six generic drugs

Each province and territory except Quebec has agreed to cap the price of six popular generic drugs at 18 per cent of their brand-name equivalents.

The drugs in question and their treatments are:

Drug	Treatment	Brand name equivalent
Atorvastatin	Cholesterol	Lipitor®
Ramipril	Blood pressure	Altace®
Vanlafaxine	Depression	Effexor®
Amlodipine	High blood pressure and angina	Norvasc®
Omeprazole	Gastrointestinal conditions	Losec®/Prilosec®
Rabeprazole	Gastrointestinal conditions	Pariet®/Aciphex®

The new price regime is effective April 1, 2013. ❧

Encouraging retirement could be discrimination

The Human Rights Tribunal of Ontario has awarded damages to a woman who was encouraged to retire by her employer.

The case involves a 60-year-old woman whose age and years of service with her employer qualified her to take early retirement. While she had not made up her mind about retirement, her supervisor began to make comments that seemed to encourage her to retire. He also attempted to have her meet his retired friends to "provide her with information" about retirement. In addition, he also appeared to discourage the woman from applying for other positions within her department.

Ultimately, the woman felt that she was being forced to retire and the employer's subsequent actions were based on the assumption that she would retire.

She then took her case to the Tribunal, alleging that she was a victim of age discrimination.

In reviewing her case, the Tribunal found that while it is not necessarily discriminatory to treat an employee differently once he or she announces his/her retirement date, treating a person differently because they were at or close to the retirement age amounted to age discrimination.

"Treating an employee as if the employee is going to retire imminently when the employee is not going to retiree imminently can infringe on a person's protected rights because the basis for the treatment is the employee's age," the Tribunal noted. *"Similarly, encouraging an older employee to take advantage of retirement options might result in discrimination because the message could be that the older employee is no longer valued as an employee."*

However, the Tribunal added, simply providing general information about an employee's retirement options is not discriminatory, particularly if the information is provided at the request of the employee.

For plan sponsors, the Ontario Human Rights Tribunal ruling underlines the importance of administering retirement programs prudently, particularly during periods of downsizing or corporate re-organization. While offering to support a decision to retire or responding to a request for further information is acceptable, encouraging an employee to retire, either directly or subtly, could result in litigation. ❧

Employers must accommodate disabilities to the point of *"undue hardship"*

An important consideration in disability cases is the contention that employers are required to accommodate an individual's disability *"to the point of undue hardship."*

While establishing what constitutes *undue hardship*, or at what point it is reached, is often debatable, maintaining open communications between plan sponsors and disabled members can be critical in avoiding unnecessary litigation or tensions between both parties. This was proven recently in a human rights case in British Columbia.

In this case, an individual who had been on disability for 30 months was terminated when the employer determined that her employment had been "frustrated" by her disability. On receiving her notice of termination, the disabled employee attempted to contact the employer to ask if she could be accommodated by working shorter shifts with modified duties. The employer declined but did not disclose the reason for the refusal.

Repeated attempts by the woman to enter into a dialogue with the employer were also declined.

The case then went to litigation.

In reviewing the case, the British Columbia Human Rights Tribunal noted that while it was possible that the woman's disability could not be accommodated, the employer had failed to inquire whether the woman could return to work. The fact that the employer failed to ask for an update on her medical information or to engage in discussion with her about her condition, proved that it had not accommodated the disabled employee to the point of undue hardship, the Tribunal said.

The Human Rights Tribunal then ruled in favour of the woman, including a $5,000 award for loss of dignity.

For plan sponsors, this case reiterates the need to take real steps to accommodate a disabled employee's return to work, even when prospects for the return may seem unlikely. A lengthy disability does not necessarily give an employer an absolute right to terminate the employment relationship.

Coughlin & Associates Ltd. offers disability management services to plan sponsors to help them manage their short and long-term disability programs, including employee accommodation and return to work protocols. For more information, contact Managed Care Consultant Joe Zadzora at 613-231-2266, Ext. 256 or email jzadzora@coughlin.ca ❧

There's no room for ignorance in LTD claims

Ignorance is no excuse when it comes to applying for Canada Pension Plan (CPP) disability benefits, the federal Court of Appeal has ruled.

The decision involves the case of a man who was diagnosed with schizophrenia in the 1980s and as a result of actions that took place during that time, experienced a number of serious injuries that resulted in his disability.

In 2007, he applied for a CPP disability benefit, however, he sought to make the benefit retroactive to the time when he was first diagnosed with his illness, stating that he lacked the physical and cognitive ability to apply for the benefit when he first became ill.

On reviewing his case, the Pension Appeals Board awarded him a 15-month retroactive benefit, the maximum allowed under CPP regulations.

He then appealled the ruling to the federal Court of Appeal.

In its review, the Court concluded that while the man did not know about his entitlement to CPP disability benefits at the time of his illness, he did not lack capacity to apply for the benefit or the ability to express intent to apply for the benefit. As well, during testimony, the man acknowledged that by the late 1990s, his medical situation had improved to the extent that he could have been able to express intent to apply for the disability support.

As a result, the Court of Appeal backed the Pension Appeal Board's initial award.

For potential applicants for long-term disability benefits and plan sponsors, the Appeals Court decision reinforces the key principle that disability benefits are adjudicated based only on existing medical evidence and the terms of the insurance contract. To expect adjudicators to award benefits without timely medical evidence, or to circumvent the terms and limitations governing the qualification period for medical evidence, is unrealistic. ❧

Air Canada gets a break on pension deficit payments

The federal government has granted Air Canada an additional seven years to eliminate its pension deficit.

But the reprieve comes with a price.

Under the terms of its agreement with the federal government, the troubled airline will have to make special payments of $150 million a year for the next seven years, in an effort to pare down its $4.2 billion pension deficit. The new payments by the airline are in addition to its regular pension payments.

In return for the seven-year payback extension, executive pay increases will be limited to the rate of inflation. No special bonuses can be paid to the company's executives.

In addition, the company cannot pay dividends, buy back its stock or make any pension plan improvements without regulatory approval.

The latest deal follows a 2009 agreement that granted the airline a moratorium on special pension contributions in that year and 2010 in return for $450 million in payments between 2011 and 2013. ❧

Pensions can be an important recruiting and retention tool, study says

Financial insecurity has made pension plans more attractive among Canadian workers, according to a survey of more than 1,500 employees conducted by Towers Watson, one of the world's largest human resources consulting firms.

According the study, more than one-third of survey respondents indicated that they would be willing to sacrifice a portion of their compensation, including bonuses, in return for enhanced retirement security.

The study indicates that, depending on age, between 62 and 71 per cent of employees with defined benefit (DB) pension plans cite their retirement program as a key reason for remaining with their employer. Those with defined contribution (DC) plans were less enthusiastic about their retirement arrangements. Never the less, between 30 and 50 per cent of those with DC plans cite their retirement plan for remaining with their employer. ❧

British Columbia changes its common-law property rules

The year 2013 is turning out to be the year of the common-law couple.

In January, Ontario led the way with a Court of Appeals ruling stating that common-law partners may not qualify to receive survivor pension benefits, even if they are living with their deceased partners at the time of their death.

In February, the Supreme Court of Canada upheld Quebec's laws mandating that common-law spouses do not have the same rights and responsibilities as married spouses and may not be entitled to alimony or a division of spousal assets on relationship break-up.

In March, it was British Columbia's turn when it implemented its new Family Law Act.

Under that province's new legislation, those living in a common-law relationship for more than two years, or who have had a child together, will be required to split their assets and debts on a 50-50 basis on break-up. In effect, those living in common-law relationships will have the same responsibilities and risks as married couples. The one major exception will be that pre-relationship or pre-marital assets will be protected from spousal claims at break-up. As a result, those who enter a relationship with a wealthier person will not be able to claim assets that the wealthier partner brought into the relationship.

Lawyers throughout the province are urging couples to formally list their assets or enter pre-nuptial agreements within two years of entering common-law relationships to avoid confusion or property division claims on break-up.

The new act is designed to encourage couples to settle such disputes outside of the courts. Post-marital property disputes were taking up as much as one-quarter of all court time in British Columbia.

For plan sponsors and administrators, the new law reinforces the need to be familiar with asset division rules on relationship break-up as each province adds its own interpretation to this contentious family law issue. ❧

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Fast facts

- A TD Insurance survey indicates that while 79 per cent of Canadians accept that insurance is an important part of an individual financial plan, 42 per cent admitted they would probably not purchase a new policy, thanks to today's uncertain economic climate. In addition, 21 per cent said they have cancelled their insurance coverage in recent years.
- Despite their worries about running out of money, 82 per cent of retired Canadians are happy with their current lifestyle, a BMO Financial Group survey says. According to the BMO poll, six in 10 say their current lifestyle matches their vision of retirement. Despite those positive feelings, 52 per cent of BMO respondents said they wished they had started saving for retirement at an earlier age.
- The PRPP story keeps repeating itself. On February 28, 2013, the government of British Columbia tabled legislation to introduce a pooled registered pension plan (PRPP) in that province. However, with the adjournment of the provincial legislature on March 14, the PRPP bill died on the order paper. With a provincial election expected in May, it is unlikely that the new pension bill will be re-introduced any time soon. Quebec had tabled similar legislation in the summer of 2012 but that initiative was interrupted by last year's provincial election. Quebec's new government says it may re-table that province's PRPP bill later in 2013. Now, Saskatchewan has announced that it will introduce PRPP legislation sometime during its 2013-14 budget year. The next election in that province is scheduled for November 2015.
- Effective January 1, 2014, premiums for the British Columbia Medical Services Plan will increase to $69.25 for single persons, $125.50 for two-person families and $138.50 for families of three of more people.
- Effective April 1, 2013, British Columbia will eliminate its Harmonized Sales Tax (HST) and revert to a separate provincial and federal tax system. The provincial sales tax (PST) will be seven per cent while the federal goods and services tax (GST) will be five per cent. Also on April 1, 2013, the province of Prince Edward Island will introduce a 14 per cent HST to replace its separate PST and GST tax structure.
- The Federal Court of Appeal has rejected an Ottawa couple's claim to have separate parental leave benefits for each of their twin daughters. The couple argued that by restricting parental leave benefits to only 35 weeks, the Employment Insurance rules discriminate against parents of multiple birth children. The couple felt they should be entitled to 70 weeks of EI benefits. The Court said the EI benefit is designed to compensate parents for the interruption of earnings following a birth, not the needs of the parents or the number of children resulting from a pregnancy.
- The value of employer-sponsored pension plans increased by 2.6 per cent in the third quarter of 2012, Statistics Canada reports. More than six million workers are members of employer-sponsored pension plans.
- How does your pension plan compare to that of a retired Pope? For the first time in 600 years, the world has an opportunity to check out the retirement benefits provided to retired pontiffs. According to data published in *Benefits Canada,* Pope Emeritus Benedict XVI can expect the following retirement benefits: A monthly pension of €2,500 or approximately $3,300 Canadian, plus living expenses including housing and housekeeping, plus healthcare. The former Pope retired at age 85. ❧

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