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Supreme Court confirms Ontario ruling limiting common-law rights

The Supreme Court of Canada has dismissed an application to review a January 2013 Ontario Court of Appeal ruling giving priority to separated spouses over common-law partners in the payment of pre-retirement death benefits under the Ontario Pension Benefits Act (PBA.)

The Supreme Court’s decision codifies this payment priority arrangement and reverses the traditional practice of paying pre-retirement death benefits to the common-law spouse living with the pension plan member at the time of death.

The ruling follows a complicated case involving a married couple that executed a will specifying that the wife would be the sole beneficiary of the man’s estate on his death. However, the couple separated in 1996 but did not formalize the separation through any legal documentation, such as a separation agreement. By 2000, the man began a common-law relationship with another woman. Despite that fact, in 2002, he designated his former wife and their children as beneficiaries of his pension plan.

In 2008, the man died and both the former wife and the common-law spouse claimed they were entitled to his pension’s death benefits. The case then went to litigation.

Since, technically, both women met the spousal definition under the PBA, the Ontario Court of Appeal had to focus its review on Section 48 of the Pension Benefits Act, which deals with the disbursement of benefits to spouses “*living separate and apart from the member.*” In its view, the terms and conditions in Section 48 of the PBA can only be met by a legally married or separated spouse, thereby giving priority to such spouses over common-law partners. (See January 2013 edition of the *Coughlin Courier* for background.)

With the refusal of the Supreme Court to review the case, pension plan administrators will be required to provide pension benefits to qualifying spouses rather than to common-law spouses living with a member, unless the spouses have specifically waived their entitlements to benefits under a pension plan. 🐼



Private drug plans “not sustainable,” Great-West Life executive says

Private drug plans are “not sustainable” in their current form, a Great-West Life executive told an Ottawa conference on universal pharmacare this past May.

In a blunt assessment of current group drug plan arrangements, Great-West Life Benefits Solutions Practice Leader Barbara Martinez told conference delegates that the high cost of new biologic drugs will force drug plans to radically alter their plan design and administration practices.

According to Ms. Martinez, the costs of routine maintenance drugs to control common medical conditions such as high blood pressure have increased by 58 per cent from 2005. While the cost of these maintenance medications has jumped to an average of \$525 per year, those charges are dwarfed by the expenses associated with new biologic and specialty drugs.

“The average annual cost of those drugs per person is \$15,000 a year compared to \$525 per year for maintenance drugs,” she said. “A single prescription costs more than \$2,200 on average. Costs for those drugs have increased by 325 per cent since 2005.”

The Great-West Life executive went on to assert that “most drug plans as they exist are not sustainable.”

While drug plans are considered insurance, the reality is that plan sponsors, not insurance companies, are paying individual drug benefits, she said.

“The truth is, your employer is really just paying your benefits,” Ms. Martinez said. “If costs escalate, the burden falls on employers, not insurance companies, which simply increase premiums to cover higher costs.”

However, she cautioned, increasing premiums or altering co-payment arrangements will not be enough to meet the impact of rising drug costs.

To address these concerns, Ms. Martinez proposed the adoption of formal case management systems to monitor and control the use of expensive medications by benefit plan members. Great-West Life has already introduced such a system for drug plans that it underwrites.

Under Great-West’s arrangement, a case manager is assigned to monitor an individual’s use of high cost biologic medications and his/her physician’s prescribing of the drug. The manager may also direct a plan member to the specific pharmacy where he/she may obtain a prescribed drug. (Prescription fees and ingredient cost mark-ups can vary widely by pharmacy. A case manager may require that a medication be purchased only at the most competitive pharmacy location.)

“I don’t think employers want to stop paying for drugs or take access away,” Ms. Martinez said. “We just need to find better ways to manage these costs.” ☺



2012 saw lowest drug cost increases in 16 years

In contrast to concerns that drug costs may be rising to unsustainable levels, the annual rate of growth in drug expenditures has shrunk to the lowest level since 1996, according to data published by the Canadian Institute for Health Information (CIHI).

In its report entitled *Drug Expenditure in Canada, 1985-2012*, the CIHI says total drug expenditure in Canada amounted to \$33 billion in 2012, a 3.2 per cent increase over the previous year.

Prescription drugs accounted for the bulk of drug spending, accounting for \$27.7 billion, or 84 per cent of total expenditure. Non-prescription drug sales amounted to \$5.3 billion.

When it comes to paying for prescription medications, private insurers and individuals covered \$15.4 billion, or 55 per cent, of prescription drug costs. Government plans, including drug subsidy programs, social security and provincial/territorial drug plans, covered \$12.3 billion, or 44.5 per cent of total prescription drug costs, the CIHI said.

On a per capita basis, at \$736, British Columbians spent the least amount on drugs. Nova Scotians led the country in drug expenditures with \$1,160 spent per person.

The implementation of generic drug pricing by provincial drug programs, the expiration of patents on major brand name drugs and increased use of generic medications are cited by the CIHI for the reduced pace of drug cost increases. 🌐

Provinces introduce drug cost containment policies

Four provinces have introduced measures to reduce drug costs in their jurisdictions. The reforms by province are:

- Effective April 1, 2013, **British Columbia** reduced the price of generic prescription drugs to 25 per cent of their brand equivalent from their former level of 35 per cent. The rate will drop to 20 per cent of the brand name price on April 1, 2014.
- The minimum dispensing fee in **Ontario** was increased on April 1, 2013 to \$8.62 from \$8.40 for most pharmacies. As well, professional allowances paid to pharmacists by pharmaceutical manufacturers were eliminated. The allowances have been reduced on a scheduled basis since 2010.
- Effective May 1, 2014, **Alberta** reduced its generic drug cap to 18 per cent of the brand name equivalent.
- **Saskatchewan** increased its provincial drug dispensing fee from \$10.25 per prescription to \$10.75 on May 1, 2013.
- **New Brunswick** limited its generic drug cap to 25 per cent of the brand name equivalent beginning June 1, 2013. In addition, the province increased its provincial drug dispensing fee to \$10.50 per prescription from \$10.40. 🌐

Bill would prevent genetic discrimination by insurers

Senate Opposition Leader James Cowan has introduced a bill that would outlaw genetic discrimination by insurance companies and employers.

With the introduction of new genetic tests to identify genes that could increase a person's risk of developing certain diseases or medical conditions, consumer advocates and other groups have expressed fears that disclosure of positive genetic test results by individuals to insurance companies could lead to discrimination.

The bill is designed to ensure that people are not treated differently when genetic tests indicate that they have a higher probability of being diagnosed with major illnesses.

If passed, the new law would amend the Canadian Human Rights Act and the Canada Labour Code to outlaw

discrimination based on genetic testing.

Canada has no laws that prohibit genetic discrimination. As a result, an individual could be denied insurance, or pay higher premiums for coverage, based on their higher probability of contracting an illness, even though they may not have the condition.

The Canadian Life and Health Insurance Association (CLHIA) has said that while the insurance industry should not require a person to undergo genetic testing to qualify for insurance coverage, insurers should have the right to request genetic test results if such testing has taken place and the results shared between an applicant and his/her doctor.

In the past, all three major political parties have supported measures to prevent genetic discrimination. 🌐

Expert Committee proposes third pension for Quebec

Quebec should introduce a new public pension plan to ensure that the province's workers will have improved income security after age 75, according to the province's Expert Committee on the Future of the Quebec Retirement System.

In its review of the province's retirement system, the Committee found that while today's two-tiered public pension system comprising the Old Age Security (OAS) program and Quebec Pension Plan (QPP) provided a good level of income replacement for lower income workers, it does a poor job of replacing incomes at or above average earnings levels. (The average earnings level in Quebec is \$39,000 per year.)

For example, it says, at the \$20,000 per year income level, the combined OAS and QPP replaces almost 90 per cent of pre-retirement earnings. At the \$40,000 salary level, the two public pension plans struggle to replace 51 per cent of income. At the \$60,000 per year level, the replacement income rate slips to just above 30 per cent.

However, the Committee projects that with the cost of living indexation formula used by the federal OAS plan, the income replacement rate of the dual pension plans will fall over the next 40 years from 51 per cent to 38 per cent for those at the average salary level. Unless they have a supplementary retirement income source, most Quebec workers will not have enough to live on at retirement, the committee warns.

"For workers whose incomes are average or above average, the protection provided by the public plans must be supplemented by supplemental pension plans or personal savings – or both – for them to reach the desired objectives with respect to financial security. In that regard, all workers are not adequately protected," according

to the Committee's report entitled *Innovating for a Sustainable Retirement System*.

Approximately 1.9 million Quebec workers, or 47 per cent of the Quebec workforce, do not participate in any type of group pension or registered retirement savings plan. In other words, almost half of Quebec's workforce will be totally dependent on the OAS and QPP for their retirement income in the coming years.

Compounding the problem: more people are retiring earlier and living longer, adding more strain to the already stretched OAS and QPP plans.



To address this problem, the Committee recommends the introduction of a third public pension system for the province. Under the third system, from age 18 to 74, employees would contribute 1.65 per cent of their earnings until they reach the year's maximum pensionable earnings (YMPE). Employee contributions would also be matched by employers, generating a combined total contribution of 3.30 per cent of the YMPE. Benefits would accrue at a rate of 0.5 per cent per year of service for a maximum total potential benefit of 28.5 per cent of credited earnings.

Retirement income benefits would not be available until age 75.

For an individual earning the same amount as the YMPE (currently \$51,100), the new pension's contributions would amount to \$843 per year. His/her employer would also contribute that amount to the plan. At age 75, he/she would earn a retirement income of \$14,564 per year in addition to the OAS and QPP. Payments would be indexed and guaranteed for life, with a minimum payment guarantee of at least five years.

"The proposal means that the Quebec retirement system would have a new component, situated on the second storey of the system's structure, next to the Quebec Pension Plan. As of age 75, all workers would have the benefits of a defined benefit pension. It would allow all to better manage the longevity risk by concentrating the need to use personal savings in a period from retirement to age 75," the report notes.

While the new regime would provide more realistic retirement income replacement levels than the current two-tiered arrangement, the openness of employers and employees to a new and significant payroll tax could be questionable. Quebec is already the most heavily taxed jurisdiction in North America.

If adopted, the new pension plan would be administered by the Régie des rentes du Québec, similar to the Quebec Pension Plan. Its assets would be managed by the Caisse de dépôt et placement du Québec.

The Expert Committee was established in 2011 and is chaired by Desjardins Group President Alban D'Amours. Its mandate is to study and recommend supplementary defined benefit pension plans for the province.

The Expert Committee's report can be found at www.rrq.gouv.qc.ca 

Tribunal orders employee reinstatement after 11 years

The Ontario Human Rights Tribunal has ordered an employer to reinstate an employee, including back pay, following an 11.5-year disability-related absence.

The case involved a woman who went on long-term disability leave in late 2001 for a general anxiety disorder that included medical diagnoses of depression and post-traumatic stress disorder. In April 2004, she was considered medically capable of returning to work but not in her original position. However, her employer said there was no suitable position for her and subsequently terminated her employment.

She then filed a complaint with the Ontario Human Rights Commission.

Due to changes in Ontario's human rights legislation and complaint procedures, the Tribunal was not able to review her case until 2009.

In its review of the case, the Tribunal found a suitable position was available as early as June 2003 but had not been made available to the disabled

employee. As a result, it ruled that the employer had breached its duty to "actively, promptly and diligently canvass possible solutions" to meet the disabled employee's need for accommodation.

In its summary, the Tribunal noted that the primary objective of human rights legislation is the make an individual "whole" following a violation of their rights. Since the woman could only find casual and part-time employment following her dismissal, it ruled that full reinstatement to a suitable position would be the only effective way of redressing her situation. As a result, the Tribunal ordered the following:

- full reinstatement in a suitable position;
- six months of training in the new position;
- payment of lost wages dating to the time in 2003 when the first suitable position became available;
- recognition of pensionable service dating back to 2003, including

payment of the employer portion of her pension plan contributions from that time;

- payment of the employee's out-of-pocket medical and dental expenses dating to her termination in 2004;
- compensation for the tax consequences related to her receipt of a lump sum payment at termination; and
- \$30,000 in damages to her dignity.

For plan sponsors in Ontario, the judgement by the Tribunal should serve as a strong reminder that human rights commissions and the judiciary take duty to accommodate provisions regarding the disabled extremely seriously. Failure to accommodate a disabled person to the point of "undue hardship" could result in substantial award settlements and the tarnishing of the plan sponsor's reputation. And, as proven by this case, the passage of time may only increase court awards. 🇨🇦



Michelin outlaws "spare tires"

Michelin North America has joined other large companies in making its US employees pay for their unhealthy lifestyles and medical conditions.

According to media reports, Michelin's male employees with waistlines exceeding 40 inches (35 inches for female employees), have high blood pressure or unacceptable blood glucose or triglyceride levels, will have to pay an additional \$1,000 for group health care coverage, beginning in 2014. In addition, employees will receive a \$1,000 credit on their annual health care deductibles if they meet defined health objectives in three or more specific categories.

The measure has been called "legal discrimination" by some employee rights groups. Michelin denies the charge, saying the policy is voluntary. Those who do not participate in the plan will not be eligible for the credit on the deductibles. 🇨🇦

Court allows insurance payout to insured wife's killer

The Ontario Court of Justice has ruled that a man who killed his estranged wife may collect the \$51,000 death benefit of a life insurance policy because he was mentally ill at the time he stabbed her to death.

The incident dates to 2006 when the Toronto man stabbed his 58-year-old wife 24 times while she slept and then bludgeoned her with a marble statue.

The man was tried for second degree murder but was found not criminally responsible for the crime due to mental illness. He had been diagnosed with and received periodic treatment for schizophrenia and mood disorders for several years prior to the incident.

Following treatment in a mental institution, the man was released in 2010. He then filed a death claim with the insurer. However, his son contested the claim. The case then went to litigation.

The Ontario Superior Court of Justice initially ruled that, based on the common-law practice that a person cannot benefit from the proceeds of

crime, he was not eligible to receive the benefit.

"[The man] committed second degree murder of his ex-wife. Even though he was found not criminally responsible, he still physically committed the crime," ruled Justice Andra Pollak.

The man then appealed to the Ontario Court of Appeal.



In its review of the case, the higher court reversed the first ruling, arguing that if a person is found *"not criminally responsible"* he/she did not intend to commit the crime or benefit from it.

"If a person found not criminally responsible on account of mental disorder

is not 'morally responsible' for his act, then there is no rationale for applying the rule of public policy," said Justice Marc Rosenberg.

As part of the ruling, the Court of Appeal dismissed an application by the provincial attorney general's office to forfeit the policy's death benefit to the province under the Ontario Civil Remedies Act (OCRA). That

act is designed to allow the province to seize proceeds from unlawful activity; for example, cash or other valuables found by police in drug raids. However, from the high court ruling, it appears that OCRA's jurisdiction does not cover proceeds from contractual benefits of lawful products such as life insurance.

The case has provoked considerable debate in the legal community and among insurance experts.

If an individual is not responsible for a crime leading to an insured person's death, can he/she apply to receive the death benefits from that person's life insurance policy? In this case, the moral and legal answers to that question appear to differ. 🇨🇦

PPN update

- **Heart Lake IDA Pharmacy** in Brampton, Ontario has joined the Coughlin PPN. They are located at 230 Sandalwood Parkway East. Their phone number is 905-846-3737.
- **Postmaster IDA Pharmacy**, located at 2540 Postmaster Drive in Oakville, Ontario, has joined the Coughlin & Associates Ltd. Preferred Provider Network. Phone: 905-469-9988.
- **National Pharmacy**, of 181 Old Highway 17 in Plantagenet, Ontario, has joined the Coughlin & Associates Ltd. Preferred Provider Network. Their phone number is: 613-673-4897.
- **Vital Pharmacy Remedy's Rx** has joined the Coughlin PPN. They are located at 3-224 Hunt Club Road in Ottawa. They can be reached at 613-971-0888.
- **Marcel Feldman Société Professionnelle**, 377 St-Philippe Street, Alfred, Ontario, is now a member of the Coughlin PPN. Phone: 613-679-2502. 🇨🇦

Change in dental implant handling procedures

Today, more people are turning to dental implants to replace missing teeth.

Some plans exclude this dental service altogether. However, many allow it under a plan's alternate benefits clause (ABC). Under the ABC, the cost normally applied to a partial denture or bridge is applied to implant-related procedures, up to the annual plan maximums.

Dental implants are normally done in two stages. The second stage usually takes place roughly six months after the completion of the first stage. It is only at the completion of the second and final stage that the claims adjudication and reimbursement processes normally occur.

With the increase in claims activity involving dental implants, Coughlin has conducted a review of its processes for adjudicating and paying claims for this lengthy and sometimes complicated dental process.

Following a recent survey of the top seven insurers in Canada, Coughlin has found that the majority of the carriers that allow the alternate benefit clause to be used in lieu of implants provide reimbursement on a one-time basis only, once the final implant has been inserted.



On May 15, 2013, Coughlin adopted a similar protocol and now provides claims reimbursement only at the completion of the dental implant process.

For claimants, our new process means less paperwork and greater claims efficiency. However, they will not receive a reimbursement until the end of the implant process. No reimbursement will occur during the first stage. The actual payment amount that will be reimbursed will not be impacted. Should there be any negative financial impacts, other than waiting for payment, Coughlin is prepared to deal with these cases on an individual basis.

Claimants who have never submitted implant claims will not be aware of any change in our protocol. They will be advised of our payment procedures when they submit their initial estimate for review. For those who have already had an estimate approved, Coughlin will continue its current practice of paying a partial reimbursement after the first stage of the implant and the balance after the completion of the final stage of the implant process. 🦷

OMERS ponders benefits reduction

A growing pension deficit may force Canada's second largest pension fund to reduce its pension benefits.

The Ontario Municipal Employees Retirement System (OMERS) says it is considering a proposal to change its retirement calculation formula to cope with a \$10 billion pension deficit.

According to reports, the plan is considering reducing its pension calculation formula to 1.85 per cent of earnings times years of service from the current level of 2.0 per cent. Under that arrangement, members would

have to work 38 years in order to receive a pension equal to 70 per cent of their pre-retirement income. Today, members have to work 35 years to receive that amount.

If implemented, the new formula would become effective in 2015.

The revised calculation formula would not affect current retirees and would have minimal, if any, impact on those nearing retirement. However, the reform would reduce the benefits of future employees as well as younger members who joined the plan recently.

The OMERS plan is administered on a joint employer-employee basis by a 14-member board with equal representation between employers and plan members. The proposal to consider reducing the benefits originated with three employer representatives.

The plan manages approximately \$60 billion in assets. It represents 429,000 active and retired members and 900 municipal employers. 🦷

Fast facts

- Effective April 1, 2013, the colleges governing traditional Chinese medicine in the provinces of Ontario and Newfoundland & Labrador published their lists of practitioners authorized to provide acupuncture services. As a result, per insurance industry practice, acupuncture claims originating in those provinces that feature practitioners that are not registered with their respective governing college will be declined. The policy applies to insured and self-insured benefit plans.
- The province of Ontario has announced that the practice of kinesiology will now be regulated. The provincial College of Kinesiologists is in the process of developing regulations and professional standards for the paramedical practice. A list of recognized practitioners is expected to be published later in 2013. Once the list is published, only claims from recognized kinesiologists will be accepted by insurers.
- The province of Manitoba has extended provincial health care coverage to seasonal agricultural workers. The new provision affects approximately 400 seasonal workers, most of whom come from Mexico, the Caribbean and Latin America.
- Both Quebec and Alberta have tabled legislation to introduce pooled registered pension plans (PRPPs) in 2014. The plans are designed to allow those employed by small businesses that do not have employer-sponsored retirement savings plans to save for retirement. The plans will also allow employees to keep their retirement savings plans or transfer them to new employers when they change jobs. In addition, the Ontario government says it will consult with interested groups on the possible introduction of PRPPs in that province. No implementation date has been announced.
- Manitoba Telephone Services (MTS) says it will contribute \$130 million to its pension plan and repay its \$70 million short-term debt following the sale of its Allstream division. Allstream was purchased by Accelero Capital, an Egyptian-based investment group. With the additional funding, the MTS pension plan will have a solvency ratio of 85 per cent.
- The Ontario government has introduced legislation to increase its Employer Health Tax (EHT) exemption from \$400,000 to \$450,000 of total remuneration paid to Ontario employees, beginning January 1, 2014. The change affects approximately 12,000 small businesses in the province.
- The average weekly earnings of non-farm employees increased by 3.1 per cent this past year to \$909 in February 2013, or \$47,268 annually.
- A Randstad survey of 7,000 people employed by 150 of the largest employers in Canada indicates that almost one-third of Canadian workers are likely to leave their current job in the next two years. Of those indicating that they are ready to move on, 54.4 per cent indicated that the desire for more money and better benefits was the major reason for their decision.
- A BMO Wealth Institute survey indicates that 60 per cent of Canadians are financially unprepared to deal with a major life event such as the death of a spouse, divorce, disability or retirement.
- The impact of the 2008 market crash and recession may have turned Americans into savers. According to the Bank of America's *Merrill Edge Report*, those with \$50,000 to \$250,000 in investable assets have now made saving for retirement a top priority. Members of Generation Y (those age 18 to 34) are the most aggressive at saving. On average, members of that group have already saved \$55,000 for retirement. They are also beginning to save for that day much earlier in life, at age 22, compared to age 35 for their baby boomer parents.
- A UNICEF study ranks Canada at 27th out of 29 developed countries for childhood immunization. In total, 84 per cent of Canadian children receive childhood vaccinations. That compares to 90 per cent in Britain. The relatively low level of vaccinations places a large portion of the population at risk for serious illnesses such as polio, measles and other deadly diseases. General ignorance about vaccinations as well as highly publicised anti-vaccine statements by celebrities are blamed for the low immunization rate.
- Ireland has passed legislation increasing the eligibility age to receive that country's State Pension to 66 beginning January 1, 2014. In addition, the qualification age will increase to 67 in 2021 and 68 in 2028. 🇮🇪

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