COUGHLIN COURIER

DECEMBER, 2004

Auditor-General slams federal drug spending

Federal Auditor-General Sheila Fraser has lashed the federal government for overspending on prescription drugs.

In a November 23 report, the auditor-general says the government spends "*tens of millions of dollars more than necessary because it does not take advantage of well-known cost saving measures.*"

According to Ms. Fraser, the federal government's bill for prescription drugs for members of the military, veterans, RCMP, prison inmates and aboriginals jumped from $350 million in 2000-01 to $438 million in 2002-03, a 25 per cent hike.

The auditor-general sited a number of problems in the government's various drug benefit programs including a lack of an overall drug management strategy among federal departments, poor supervision of pharmacy dispensing fees and practices, and routine processing of non-prescription medications such as vitamins, ASA, cold medicines and even shampoos under the plan.

"*Overall, federal organizations are currently not very effective in controlling costs,*" the Fraser report says. "*While we noted some efforts to contain costs, federal organizations were not systematically pursuing well-established strategies being used elsewhere.*"

In her 36-page report on the federal drug plan, Ms. Fraser frequently uses the Quebec, British Columbia and Ontario provincial drug benefit plans as examples of cost efficiency.

Borrowing from those plans, the auditor-general recommended the following:

- the development of a common drug formulary among all federal drug benefit programs;
- establishing processes to ensure that exceptions to the formulary are clear and trackable;
- establishing *generic substitution* or *equivalent lowest price* protocols;
- using a single federal schedule for dispensing fees (the government pays $6.54 to $9.53 per prescription while most provincial drug plans feature a single maximum dispensing fee);
- reducing the processing of over-the-counter drugs under the plan;
- extensive auditing of pharmacies and rigorous recovery of prescription overpayments to pharmacists; and
- bulk purchasing of prescription drugs, as is done by the provinces. ■

Which province's pension laws apply on wind-up?

A 12-year battle between the Ontario and Quebec courts over members' pension benefits following a partial wind-up has moved to the Supreme Court of Canada.

The case involves a 1992 partial wind-up of a Stelco Inc. pension plan that involved members in a number of provinces. Since Stelco is Ontario-based, the plan was wound-up based on the Ontario Pension Benefits Act. Section 74 of that act says members whose age plus years of service total 55 can receive an additional early retirement income in the form of grow-in benefits. Grow-in benefits are designed to provide a bridge benefit for older members nearing their normal retirement date, as they are likely to be the most severely affected by a plan wind-up.

In winding-up the plan, Stelco did not give grow-in benefits to plan members in Quebec since that province's pension laws do not allow the bridge benefits. Stelco's Quebec members then filed suit against the steel maker, claiming they were entitled to the benefits based on Section 74 of the Ontario law. Stelco countered, stating that Quebec courts had no jurisdiction in the matter and, if they did, the grow-in benefits would not apply to Quebec residents.

➤ *continued on* ***page 2***

Tighten drug price guidelines, Review Board says

The Patented Medicine Prices Review Board says that it may seek to tighten its powers in an effort to stem rapidly rising drug costs.

In an address to pharmaceutical manufacturers, Review Board Chairman Robert Elgie expressed alarm that pharmaceutical prices appear to be poised for an almost across-the-board increase.

"*According to the information provided to us, manufacturers of approximately 35 per cent of the patented drug products under our jurisdiction have informed the trade of price increases in 2004,*" he said. "*In the case of private plans and other provincial plans that reimburse based on pharmacists' actual acquisition costs, the impact of these price increases is being felt now.*"

Under the Patent Drug Act, pharmaceutical manufacturers are required to inform the Review Board twice each year of their pricing strategies for the previous six-month period. However, Dr. Elgie feels that the current mandate of reviewing drug prices after they come into effect limits the Review Board's ability to protect consumers from unwarranted price hikes. The board chairman hopes to replace the current structure with one that would allow the Review Board to force pharmaceutical companies to justify price increases before they become effective.

"*If the board is only able to review price increases after the fact, can consumers be confident that they are protected from excessive drug pricing?*" he asked.

Examples of the problem can be seen in Ontario and Quebec, which have not changed their drug formularies in 2004, despite the fact that drug manufacturers have increased prices to wholesalers and pharmacists, Dr. Elgie noted. The differences between the provincial formulary prices and those charged to pharmacists and wholesalers are inevitability borne by consumers and private health care plans.

The increasing tension between Canadian drug price regulators like the Patented Medicine Prices Review Board and pharmaceutical manufacturers caps a year which saw US-based drug manufacturers threaten to cut supplies to Canadian drug wholesalers and distributors to bring Canadian prices more in line with those of the US, which are among the highest in the world. (See the June 2004 and December 2003 editions of the *Coughlin Courier* for background information.)

More information on this issue will be provided as it becomes available. ■

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While Stelco won the first round of the dispute in the Quebec Superior Court, the situation changed in the second round when the Quebec Court of Appeal ruled that Quebec's pension laws did apply to plan members living in that province. However, for Quebec plan members, the victory turned out to be a hollow one when the same court ruled that Section 74 of the Ontario Pension Benefits Act did not apply to Quebecers.

The members have now appealed that decision to the Supreme Court of Canada.

For plan sponsors, the case has potential to further complicate pension wind-up regulations. If the Supreme Court rules in favour of the Stelco plan members, organizations may find themselves applying the laws and benefit entitlements of an organization's home province throughout the country. While, in this case, such a ruling would benefit Stelco members in Quebec, it would not necessarily apply in all cases. For example, a partial wind-up occurring in Quebec could result in Ontario workers not qualifying for certain benefits, based on Quebec's pension rules. The potential for more cross-jurisdictional disputes could be heightened. On the other hand, if the Court favours Stelco, organizations would continue to apply the rules of each of the country's various jurisdictions during a full or partial wind-up, resulting in benefit delays and potential disputes among members.

Can the Supreme Court come up with an ironclad ruling for Stelco? Watch for more details as they become available. ■

Arbitrators can award punitive damages, court says

An Ontario court has ruled that arbitrators have the right to award punitive damages.

The ruling follows a case where a community college professor was charged and later dismissed for distributing anti-Semitic literature, eight years after the alleged incident took place.

When he grieved his dismissal, a three-member arbitration board reinstated him, ruling that the eight-year gap between the occurrence of the incident and his firing prejudiced the professor's ability to defend himself. However, when his union asked that he be awarded $10,000 in punitive damages for defamation and mental distress, the board declined, stating it did not have such jurisdiction.

The union filed suit, stating that the professor's claim for wrongful dismissal and its resulting mental distress arose "*expressly or inferentially from the collective agreement.*" The court agreed, noting that "*since the manner in which the grievor was dismissed gave rise to the allegation…the issue of aggravated damages and/or punitive damages is a dispute between the parties arising directly or inferentially from the collective agreement and therefore within the exclusive jurisdiction of the board of arbitration.*"

For plan sponsors and members, the ruling means that arbitration hearings now have a new dimension: they not only are forums for dispute settlement; they can also be arenas for financial restitution in serious cases involving aggravated or punitive damages. ■

FSCO outlines post-Monsanto surplus distribution rules

Plan sponsors involved in partial wind-ups of pension plans since 1988 will shortly receive a bulletin from the Financial Services Commission of Ontario (FSCO) outlining their responsibilities following the Supreme Court of Canada's Monsanto decision.

In July, the Supreme Court ruled that plan members had a right to receive a portion of the surplus of a pension plan on full or partial wind-up. (See the September 2004 of the *Coughlin Courier* for background information.)

The FSCO rules can be summarized as follows:

1. If a plan sponsor's wind-up report indicated there was no surplus and all outstanding questions were resolved, then the partial wind-up will be considered complete.
2. If the report indicated that there was a surplus and the superintendent approved the wind-up, the partial wind-up will be considered complete when the asset distribution occurs.
3. If the wind-up report indicated a surplus but did not contain a distribution proposal, or the proposal was never approved, further filings relating to the surplus distribution will be required.
4. Any FSCO hearings that were suspended pending the Monsanto decision will now resume.

More information can be found at the FSCO website at: www.fsco.gov.on.ca under *Pensions*. ■

Ancient law used to provide AD&D benefits to 5-year-old

A Toronto judge has cited an ancient Roman law to provide a $10,000 accidental death and dismemberment (AD&D) benefit to a five-year old boy who was born weeks after his father died in a car accident.

Ontario Superior Court Justice Louise Gauthier ruled October 29, 2004 that a boy who was a fetus at the time of his father's death still qualifies as a beneficiary under the accidental death and dismemberment provisions of his father's auto insurance policy.

Using the *Digest of Justinian*, an ancient Roman code, the judge ruled that awarding death benefits to the boy was "*consistent with the principle of the unborn child, subsequently born alive to take a benefit which it would have been entitled to if (already) born alive.*" (Justinian ruled the Eastern Roman Empire from 518 to 527 AD.) The use of the ancient law supported an obscure concept known as *legal fiction* which provides certain rights to unborn children; in this case, "*the right of a child to recover a loss arising from a wrong done while the child was conceived but not yet born.*"

The case arose when the insurer rejected the AD&D dependant life claim, stating that the boy did not qualify as beneficiary since he was not a person at the time of his father's death. The judge's ruling overturns that decision.

In her ruling, Justice Gauthier stressed that her decision does not confer legal rights on the unborn. However, it is likely to raise many questions regarding both when and how the *legal fiction* concept can apply to life and accident insurance benefits. ■

Debates rage over province's new health premium

The new Ontario Health Premium (OHP) continues to spark debate over who is responsible for paying the levy.

While Premier Dalton McGuinty has gone on record saying that the May 2004 provincial budget measure was intended to be a personal rather than a corporate levy, unions, employers and labor arbitrators continue to argue over who should pay the annual health premium, which can range up to $900 per person.

At the centre of the debate: is the levy a *tax* or a *premium*? Some labor groups have argued successfully that the premium is simply a restoration of the former Ontario Health Insurance Plan (OHIP) individual premium, which was eliminated 15 years ago by a former government. In effect, restoring individual premiums for health care services re-activates dormant labor agreement clauses that mandated the paying of those premiums by employers. (See the November 2004 edition of the *Coughlin Courier* for background information.) If the premium is simply a new tax, then the terms of the dormant clauses may not apply. This principle has also been argued successfully.

To date, three arbitration boards have ruled in favour of employers and one has ruled in favour of employees.

In one ruling, arbitrators debated the language of one collective agreement that stated that if the province reverts to individually paid health premiums, the employer would resume making premium payments on the behalf of its employees. In this case, the arbitration board noted that the new Ontario Health Premium was *not* a reversion to the former regime of individually paid premiums but an added tax since *the Employer Health Tax (EHT), which was originally designed to replace individual premium regime, continues to be collected by the province* (ie. there are now two taxes for the same service.) In another case, arbitrators felt that since health care services would not be denied to an individual who failed to pay the OHP, it could not be considered a premium. In both these cases, the rulings favoured the employer.

In the one ruling favouring employees, the arbitrators took the position that the new levy was an individual health care premium; it was just being collected through the payroll tax system rather than being billed on an individual basis.

In the other case favouring employers, the arbitration decision revolved around employees' legal entitlement to additional compensation resulting from the new tax.

At the moment, the issue of the payment of provincial health care premiums appears to be favouring employer positions that circulate around the argument that *a tax is a tax is a tax*. While neither the government, which campaigned on a platform of no tax increases, nor employee representatives with collective agreements mandating employer payments of health care premiums may be pleased with this strategy, it is proving to be an effective approach for employers. ■

Court rules in favour of retroactive same-sex survivor benefits

Survivors of same-sex relationships are entitled to receive Canada Pension Plan (CPP) benefits, the Ontario Court of Appeal says.

In a November 26 decision, the Appeal Court ruled that limiting payments to same sex partners of deceased plan members violates their equality rights under the Charter of Rights and Freedoms.

The ruling overturned an earlier federal government decision limiting the awarding of same-sex survivor benefits only to the partners of those who died from January 1, 1998 onwards. That policy sparked a class action suit from gay rights advocates and widows of same-sex partners who had died prior to that date.

In the judgement, the court allowed CPP survivor benefits to be available to same-sex partners retroactively to April 17, 1985, the date equality guarantees were included in the Charter of Rights and Freedoms.

The federal government maintained that only Parliament has the right to determine the dates its laws become effective.

In its decision the court stated, "*Excluding many of those who were intended to be included is not rationally connected to the objective of the law, which is to end the discriminatory exclusion of same-sex partners from CPP benefits.*"

The federal government has not said if it intends to appeal the decision to the Supreme Court of Canada. ■

Health Canada asks for more data on Celebrex®

Health Canada has requested Pfizer Inc. to provide more data on the potential hazards of Celebrex®, its leading arthritis pain medication.

The request follows the voluntary withdrawal from the market of Vioxx®, a similar medication produced by rival Merck & Co. (See the November, 2004 edition of the *Coughlin Courier* for background information.)

Vioxx® was withdrawn when clinical trails linked it to increased incidents of heart attacks and strokes among repeat users of the medication, particularly the elderly. Like Vioxx®, Celebrex® is a COX-2 inhibitor, which suppresses the release of agents that lead to inflammation among arthritis patients.

According to the November 5, 2004 of *The Globe and Mail*, up to 20 Celebrex® users have died in recent years. However, it has not been proven that they suffered from adverse reactions to the drug.

Pfizer says that Celebrex® has been proven safe in studies involving more than 30,000 patients. Like Vioxx®, Celebrex® is one of the top-selling medications in Canada.

More than four million Canadians have been diagnosed with arthritis and muscoskeletal disease. ■

Warning: Keep your beneficiary designations up-to-date

Beneficiary designations on financial assets like pensions, life insurance policies and registered retirement savings plans is one area that can easily be overlooked or forgotten, especially after the turmoil of a separation or divorce.

For those who fail to update such beneficiary designations, the Saskatchewan Court of Queen's Bench made things clearer in a series of rulings following a six-year dispute among an insured's surviving ex-spouses.

The case involved man who had separated from his wife in 1995 to enter a common-law relationship with another woman. In 1996, he named the common-law partner as his spouse on his employee pension plan, even though he was still legally married to his wife. He never changed that designation despite the fact that, in 1997, the common-law relationship failed.

When he died in a car accident in 1999 both his ex-wife, whom he had since divorced, and his former common-law spouse claimed beneficiary rights under the pension plan.

The case required the court to establish a clear definition of the term *spouse* under the federal Pension Benefits Standards Act (PBSA) and establish which beneficiary takes precedence when there are conflicting beneficiaries.

Using the PBSA, the Saskatchewan court re-affirmed the spousal definition as "*a person who is married to the member or who is a party to a void marriage, or a member of the opposite sex living in a conjugal relationship with the member at the relevant time and having done so for at least a year.*"

At dispute was the question of *the relevant time.* Does it mean the time of beneficiary designation (when he lived in the common-law relationship) or at the time of death (when he was single but still had not changed the earlier designation)?

In this case, the court ruled that *to receive survivor benefits, a person must be the spouse at the time of death.* Since his former common-law partner was no longer his spouse at the time of death, she could not be the beneficiary.

But in the absence of a spouse at death, who would receive the benefits? Going back to the time the spousal designation was made, the court felt that, since the ex-wife was still married to the man, the spousal designation of the common-law partner was invalid, thereby making the ex-wife the only beneficiary. Using case law, the court reinforced its point stating, "*Unless the designation has been revoked, the former spouse will inherit, even where there is no evidence of the deceased's intention or where there is a prior separation agreement.*"

The moral:

- always keep your financial assets up-to-date;
- when you make a beneficiary designation, be sure that the status of your relationship to that person is clear and unencumbered contractually;
- be sure to formally document any revocations of a beneficiary; and
- remember that legislated standards and designations will take precedence, even over your own wishes.

If you are uncertain about the validity of your beneficiary designations, be sure to contact your financial advisor, legal counsel or plan administrator. ■

FAST FACTS

The Canadian Revenue Agency (CRA) reports that the yearly maximum pensionable earnings (YMPE) for Canada Pension Plan contributions for 2005 will be $41,100, up from the 2004 level of $40,500. The basic personal exemption remains unchanged at $3,500. The combined employer-employee contribution rate also remains unchanged at 9.9 per cent of an employee's income. ■

The province of Saskatchewan has joined Quebec, Ontario, British Columbia, Yukon, Manitoba and Nova Scotia in accepting same-sex marriage. The reform follows a November 5, 2004 ruling by that province's Supreme Court endorsing the new marriage definition. ■

Effective January 1, 2005, Nova Scotia residents requiring long-term care services will no longer have to pay for their health care costs. The $45 million initiative affects 6,600 residents of nursing homes, residential care facilities and community care centres. Individuals will still have to pay for their accommodation costs in the provincially funded facilities, which can range from $43 to $77 per day. ■

A survey of 180 Canadian employers indicates that just over one-third of respondents provide automatic pension indexing. In contrast, 40 per cent of surveyed organizations employing fewer than 1,000 people said they did not provide any pension indexing in the past 10 years. The majority of organizations that provided indexing based their increases on a range of 40 to 60 per cent of the change in the Consumer Price Index. ■

An increasing number of younger men are using erectile dysfunction (ED) drugs like Viagra®, Cialis® and Levitra®, says ESI Canada. According to that pharmacy benefit manager, the percentage of men age 20 to 55 using ED medications jumped from 31.6 per cent in 1999 to 52.6 per cent in 2004 -- a rise of over 66 per cent. Meanwhile, the use of ED drugs by men age 56 to 70 dropped dramatically in the same period, from 68 per cent to 47 per cent. Increased awareness is largely attributable for the increase in ED use among younger men. No reason was given for the decline in older ages. ■

The total amount contributed to registered retirement savings plans in 2003: $27.6 billion.

Median contribution: $2,100.

Number of people making RRSP contributions, according CRA tax data: 5.9 million.

The Conference Board of Canada reports that group health benefits costs rose from three per cent of payroll in 1990 to six per cent in 2003. Rising drug costs accounted for the largest portion of the increases, the Board says. ■

Number of workers who sought care from a physician for reasons other than a routine check-up or maternity follow-up in 2004: 54 per cent

(Source: Public Health Agency of Canada) ■

A Saskatchewan study of more than 38,000 people with Type 2 diabetes suggests that the 3.2 per cent of the province's residents that have the disease account for more than 15 per cent of its health care costs. The province spends an average of $3,524 per diabetes patient in hospital, drug, physician and day surgery costs. The study suggests that half of those with the disease develop cardiovascular problems and 20 per cent go on to have ophthalmic disorders. Poor nutrition and lack of exercise are considered leading causes of the disease. The results appeared in the June 2004 edition of the *Canadian Medical Association Journal.* ■

A Saskatchewan study of 790 adults conducted by the Institute for Work & Health indicates that depressed people are more likely to report severe neck and lower back pain. The study suggests that early identification of pain problems in depressed patients could lead to better outcomes. ■

PPN update

The Drugstore Pharmacy at 455 McNeely Avenue is located in Carleton Place, not Ottawa as reported earlier. Their telephone number is (613) 253-2390.

Nelson Medical Pharmacy is now known as **Main Street Pharmacy.** Their telephone number remains 238-1881.

Riverside Pharmacy on Ridgewood Avenue in Ottawa, is no longer in operation. ■