COUGHLIN COURIER

AUGUST 2006

AT A GLANCE ...

COUGHLIN & ASSOCIATES LTD.

FEATURE

Rulings boost terminated employee entitlements

The rights of terminated employees received a strong boost from Ontario courts this spring. In two separate cases, the province's Court of Appeal backed employees' rights to receive pension and long-term disability benefits after their employment had been terminated.

Case 1: Terminated employees have the right to sue for lost pension benefits

In the first case, a senior employee of a major insurance company was awarded over $135,000 in damages when the company failed to continue his pensionable service during a two-year notice of severance period.

The employee was a 30-year member of a company that had merged with a larger insurer in 2003. At that time, he was notified that he would work for a two-month notice period and then receive 22 months of income in lieu of notice. However, the offer did not provide a pension service accrual for the 22-month period. Had he been credited with the 22 months, the employee would have been eligible for a full pension with 30 years of accredited service. As a result, the employee declined the severance package and sued the former employer for wrongful dismissal.

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Rulings boost terminated employee entitlements

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While the employee and the former employer agreed that his lost pension benefits would have amounted to over $333,000 during the 22-month notice period, the two parties differed on the definitions of *active employment*. The insurance company argued that since the 22-month payment constituted notice in lieu of service, the employee was not actively employed and, therefore, only eligible for 28.3 years of pensionable service.

The Court of Appeal disagreed stating that when an employee is dismissed without cause, the employer is liable for damages for breach of contract, *"which is measured by wages, salary and other benefits that would have been earned during the notice period."* As a result, the employee could claim for the loss of the pension benefits.

The Court went on to state that since there was nothing in the pension plan that deprived the employee of his right to seek damages for the loss of the pension benefits, the argument for the active service requirement was *"unpersuasive."* It went on to cite earlier Supreme Court of Canada rulings that *"place the employee in the position that he or she would have been in had the contract been performed -- the proper measure of damages for breach of contract."*

In summary, the Court stressed that employment contracts, which include pensions and other benefits, *"require clear language to limit a terminated employee's common-law rights."* In this case, those rights involved an employee's right to sue for breach of contract.

The moral: Unless the pension plan clearly outlines where terminated employees' rights to damages are limited, employees' common law rights to make such claims will prevail.

Case 2: LTD benefits extend beyond termination notice period

In the second case, an employee of a large Ottawa-based technology company successfully sued her employer for disability benefits after the notice of termination period had expired.

This scenario involved a woman who was terminated after less than 21 months of service with the company. She was paid 12 weeks of salary in lieu of notice with all benefits ending at the completion of the notice period. When she became disabled during that period, she was unable to claim for disability benefits beyond that time. She then sued for wrongful dismissal.

Since she originally had been induced to work for the company, the Court of Appeal increased her termination notice period from 12 weeks to nine months. Plus, it extended her compensation and benefits entitlements, including her right to claim for long-term disability (LTD), to nine months. It then awarded her the amount equal to the full period of her disability, which amounted to one year. In effect, she received an amount equal to her salary for the extended notice period to the date of her disability plus an amount equal to LTD entitlement for one year. In addition, since the LTD benefits would not have been subject to taxation had they been received through an insurance plan, the amount awarded for her LTD settlement was increased to cover the taxes that the employee would have to remit to the government at tax time.

The company plans to appeal to the Supreme Court of Canada.

The moral: While disability contracts have traditionally not extended beyond the notice of termination period, they could be lengthened to cover disabilities that continue beyond that time. As well, when inducing a person to join your organization, it would be advisable to negotiate a termination agreement that limits benefits coverage to the notice period.

Alberta pharmacists can prescribe drugs

The Alberta cabinet has approved regulations making that province's pharmacists the first in Canada to be able to prescribe certain drugs and medications.

The new rules, which go into effect later this year, will allow pharmacists to prescribe most drugs, except narcotics, barbiturates, anabolic steroids and those that have to be administered by injection.

The province hopes to streamline the drug delivery system by increasing the number of professionals available to prescribe medications to patients.

Pharmacists who wish to prescribe medications will have to complete various training programs approved by the Alberta College of Pharmacists before they will be allowed to do so.

Supreme Court allows damage award for LTD claim cut

The Supreme Court of Canada has awarded damages to a British Columbia woman for mental distress she suffered when her insurer cut her long-term disability (LTD) benefits.

The Court ruled on a case involving a Vancouver woman who went on disability leave after being diagnosed with fibromyalgia and chronic fatigue syndrome in 1991. In 1997, the insurance company notified her that benefits would cease as she was videotaped driving, shopping and moving in and out of a vehicle for *five full days*. This, the company said, qualified her to do *"light or sedentary"* work, as defined by her policy's *"any occupation"* definition. When the company cut the LTD payments in 1998, the woman began the litigation process.

On investigation, it was found that the insurer's private investigator had conducted its surveillance for only five hours on each of the three days and one hour on the fourth day. As well, independent medical opinion confirmed that her medical conditions had continued. The insurer relied solely on the advice of its own consultants and experts to back the claim denial.

In the end, the fact that the insurance company could not provide independent medical evidence to back its claim denial proved decisive.

"The five-year denial by the insurer of disability benefits without medical support for denial is, to say the least, inappropriate," Chief Justice Beverley McLachlin wrote. She also described the company's tactics as *"troubling."*

In awarding the damages, which amounted to $20,000, the Chief Justice stressed that *"Damages for mental distress for breach of contract may be recovered where they are established on the evidence and shown to have been within the reasonable contemplation of the parties at the time the contract was made. Here, given the nature of a disability contract, it would have been within the reasonable contemplation of the parties … that mental distress would likely flow from a failure to pay the required benefits."*

While the ruling opens the door to additional claims for mental distress and damages resulting from the denial of disability claims, it also reinforces the requirement that such claims be backed by clear medical evidence. This may provide more empirical grounds for damage awards than traditional punitive damage claims.

HEALTH & CLAIMS

Quebec introduces limited private health coverage

The Quebec National Assembly has introduced legislation to allow private health insurance plans to cover the costs of basic medical procedures when the public system cannot provide them in a timely manner.

The new law attempts to conform to the June 2005 Supreme Court of Canada ruling that struck down Quebec laws preventing private health insurance from paying for medical services when wait times for surgery or other services increase a patient's risk of mortality or permanent injury. (See the July 2005 edition of the *Coughlin Courier* for background information.)

Under the proposed legislation, if wait times for cataract surgery, hip or knee replacements exceed six to nine months from diagnosis, patients will have the right to be treated in private clinics affiliated with public hospitals. The public system will pay the bill. If patients want to be treated sooner than six to nine months, they can use unaffiliated private clinics and pay through private insurance plans.

At the moment, the availability of private medical services will be restricted only to cataract, hip and knee surgeries. The Assembly will review the inclusion of other services such as herniated discs, bariatric surgeries and other treatments, later this year.

While conforming to the Supreme Court's earlier ruling, the Quebec government continued to assert its

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Canada one of few that may survive demographic "*wake-up call*"

Canada is one of only three western countries that will likely survive the coming demographic explosion in retirees with its credit rating still intact, the Standard & Poor's credit rating agency says.

With the baby boom generation now reaching retirement age, industrial nations will face financial pressures as health and social service systems buckle under the strain of aging populations and labour shortages.

In a study of the world's 32 leading industrial nations, the agency predicted that only Canada, Denmark and Austria will be able to maintain investment grade ratings. While it predicts that by 2050, up to 44 per cent of the Canadian population will be age 60 or older, Canada's healthy economy, low debt-to-GDP ratio, liberal immigration policies and healthy funding of its public pension plan will help the country weather the financial turbulence that will result when such a large portion of the population is dependent on its retirement and social programs.

Our national credit rating will likely reduce from its current level of AAA to AA, the study says. Denmark and Austria will face similar reductions. The other western nations will see their ratings reduce to speculative levels or worse, Standard & Poor's forecasts.

Of particular concern is the United States, the world's largest economy. If predictions hold, it could have a debt to gross domestic product (GDP) ratio several times greater than today's level of 49 per cent.

"For many countries, it's a wake-up call to the creeping effect of demographic realities," a Standard & Poor's spokesman said. *"The basic demographic root of the problem is a shrinking labour force compared with the number of people who will be collecting age-related benefits."*

However, the wisdom of making such long-term predictions was demonstrated less than a month after the study was released.

At home, there is speculation that the government of Prime Minister Stephen Harper is considering reducing Canada Pension Plan contribution levels for both employers and employees as part of his government's drive to address the fiscal imbalance between the federal and provincial levels of governments.

According to reports issued in *The Globe and Mail*, the reduction in the contributions to the public pension plan will form part of the Conservative Party platform to reduce the income stream going to the federal government

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preference for a public health care program.

"Private insurance is not the solution for the health care system," Health Minister Philippe Couillard said. *"We don't want to create conditions that will increase privatization of public health care services."*

As part of its reforms, the Quebec government reserved the power to suspend the rights of physicians who opt out of the public system. As well, private hospitals and clinics that keep patients overnight will have to meet strict accreditation standards, including a controlling interest requirement of 50 per cent by Quebec doctors.

Changes to Quebec Prescription Drug Insurance Plan

Quebec's Public Prescription Drug Insurance Plan introduced the following changes effective July 1, 2006:

- the monthly deductible will increase to $12.20 from $11.90;
- the monthly co-insurance will be reduced to 71 per cent from 71.5 per cent; and
- the maximum annual contribution will increase to $881.04 from $857.04.

These changes will primarily affect those over age 65 and those who do not have a drug plan available through their work.

Canada one of few that may survive demographic "wake-up call"

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while boosting income and transfers to the provinces. As well, in its spring 2006 budget, the federal government said it was considering channelling part of the federal surplus into the Canada and Quebec Pension Plans.

The long-term impact of these reforms on the country's fiscal position is still to be determined. However, the change does underline the point that political considerations could override economic ones at any time.

Today, Canadians are required to direct 4.95 per cent of their salary to a maximum of $42,100 to the Canada/Quebec Pension Plan. That rate is matched by their employers, bringing the total contribution level to 9.9 per cent of salary.

Meanwhile, internationally, the British government has announced that it will begin increasing its retirement age to 68 in 2024 from today's level of age 65. The United Kingdom joins a number of other western powers that have raised their retirement age minimums to delay the impact that mass retirements will have on their public pensions.

Italy has raised its age for a full pension to 60 from 57. Belgium is in the process of moving its retirement point to age 60 from 58, while Germany is debating raising its retirement age to 67 from 65. The United States is already gradually increasing its retirement line to 67.

But don't call it two-tier

An Ontario government agency has recommended that certain cancer drugs be made available to those who are willing to pay for them privately.

Cancer Care Ontario, an agency that advises the province on all aspects of cancer care, has sent a letter to 14 hospital presidents recommending that drugs such as Avastin, Erbitux and other medications that have been approved for use in Canada but are not funded by the Ontario Health Insurance Plan (OHIP), be made available privately.

In its letter to the hospital presidents, the arms-length agency says it hopes to consult with hospital executives to *"put in place a set of principles and guidelines surrounding the administration of IV agents in hospitals that are not paid for in Ontario but where patients are either prepared to pay or have third-party coverage to allow for such payment."*

If adopted, the Cancer Care Ontario recommendations would open the door to private health insurance coverage in the province. In effect, patients would be able to buy certain cancer drugs on the market while the public system would still cover the costs of administering them.

The drugs in question are costly. For example, Erbitux costs as much as $25,000 for a four-month supply while Avastin can cost up to $36,000 for a three-month treatment. Both have been approved as cancer treatments by Health Canada.

Saskatchewan already has a program in place similar to that proposed by Cancer Care Ontario.

PENSIONS

Pension trustees face charges

The trustees of Canada's largest multi-employer pension plan have been charged by the Financial Services Commission of Ontario (FSCO) with mismanaging more than $225 million in pension assets.

The FSCO laid 15 charges against the trustees of the Canadian Commercial Workers Industry Pension Plan for *"failing to exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person."*

The financial regulator alleges that the trustees violated pension law by allowing up to $166 million to be invested in Caribbean real estate companies and vacation properties owned by one individual. Under the province's Pension Benefits Act, it is illegal to invest more than 10 per cent of a plan's assets with one or two associated persons or affiliated companies.

The pension plan has approximately $1.4 billion in assets. It provides pension benefits to 310,000 members.

Charged are the former and current heads of the United Food and Commercial Workers (UFCW) Union, the secretary-treasurer of a large UFCW local, and the plan chairman. All represented employee groups. Also charged are five senior executives of major grocery retailers who represented the employer groups.

If convicted, each trustee could face fines of up to $100,000 per charge.

PENSIONS

CBC pensioners launch class action suit

The beneficiaries of the Canadian Broadcasting Corporation (CBC) pension plan have launched a class action suit against the public broadcaster.

The suit, which was certified by the Ontario Superior Court this past May, alleges that the Corporation violated an earlier surplus allocation agreement to give 30 per cent of its share of any surplus from regular triennial valuations to pensioners and beneficiaries.

Under the agreement, 60 per cent of any surplus generated from employer and employee contributions was to go to the Corporation (the remaining 40 per cent was to be directed to active employees.) Of the 60 per cent available to the Corporation, 30 per cent was to be allocated to CBC pensioners. Instead, the suit alleges, the broadcaster used the available surplus to take contribution holidays and *"therefore used the available surplus entirely for its own benefit."*

At stake is an actuarial surplus worth $156 million as of its last valuation in December 2002. The Corporation's 60 per cent share of that amount would total $93.6 million. The pensioners' 30 per cent allocation would add up to $28 million.

Pension underfunding keeps Congress working through holiday

The pension funding crisis ruined the July 4 celebrations of US law makers this year as both the US House of Representatives and the Senate grappled with the issue of how to get employers to fund their pension commitments.

Despite intentions to resolve the issue by the Independence Day holiday, the US Congress was unable to draft an agreement that would find a way to help troubled plan sponsors fund as much as $450 billion in pension obligations. America's defined pension plans are underfunded by that amount.

The Pension Benefit Guaranty Corporation (PBGC), which insures private pension plans similar to the way the Canadian Deposit Insurance Corporation and ASSURIS insure bank accounts and life insurance plans in Canada, estimates that over $100 billion of the funding deficit originates with companies with serious financial difficulties. The problem: the PBGC already has a $23 billion deficit from the poorly funded pension plans it has had to take over in recent years. Without a lot more funding, potentially as much as $120 billion, Americans' pension *safety net* could unravel, possibly leaving millions without a pension income.

More than 44 million Americans rely on employer pension plans for their retirement benefits.

Reduce claims. Get dirty.

Want to reduce health claims?

Get dirty!

Studies published by the *Scandinavian Journal of Immunology* suggest that soaring rates of allergies, asthma, diabetes, rheumatoid arthritis and some autoimmune diseases may be a result of our being too clean.

According to the article, humans' immune systems are not being challenged enough by dirt and disease early in life, which results in the body overreacting to small irritants like dust and pollen.

The findings are based on comparative studies of the immune systems of laboratory rats against those of their cousins in the wild. The wild rats had four times the immunoglobulins of the laboratory rats raised in clean environments. As well, the immune systems of the wild rats easily rejected germs and other minor environmental irritants that *"drive lab rats crazy."*

Unofficial studies of human populations may support the *get dirty* theory. According to Allergy & Asthma Care of Long Island, children who grow up with two or more pets in the home tend to have fewer allergies. As well, allergy and asthma rates in less developed areas such as Africa are far lower than cleaner centres in first world countries.

So, the next time the dog rolls on the carpet or your children come home filthy, smile. They're helping your family to stay healthy.

FAST FACTS

The province of Manitoba has announced that, effective May 10, 2006, residents of that province will be able to pay the provincial Pharmacare deductible in monthly instalments, provided their monthly drug expenses account for at least 25 per cent of their monthly income. Eligibility for the arrangement is not affected by age, family status or disease being treated.

Nortel Networks plans to change its pension plan to a capital accumulation plan beginning in January 2008. The company also plans to eliminate post-retirement health care benefits for workers who were under age 50 with less than five years of service on July 1, 2006. The changes were part of a company-wide economy measure that will result in the elimination of 1,100 jobs in North America.

The Standard Life Assurance Company has joined the majority of its peers and has opted to demutualize. A total of 98 per cent of the company's voting policyholders supported the measure. The company will now be listed on the London Stock Exchange, beginning this summer.

A total of 44 per cent of Canadian companies say they are having difficulty attracting or retaining employees, *The Globe and Mail* reports. Booming Alberta had the greatest challenge, with 97 per cent of organizations facing hiring or turnover problems. And the problem is not expected to get better soon. Organizations surveyed expect about 43 per cent of their employees to choose early retirement, the newspaper says. Approximately half of the work force is comprised of baby boomers over age 40.

The Kaiser Family Foundation reports that a survey of 163 Fortune 500 companies suggests that many employers plan to reduce or eliminate retiree benefits within the next five years. Fourteen per cent of companies surveyed say they plan to cut benefits for future retirees over age 65. An additional six per cent hope to eliminate health care benefits to existing retirees.

Japan will be forced to reduce the amount it pays to beneficiaries of its government pension plan unless it increases its fertility rate, newspapers in that country report. With over 21 per cent of its population age 65 or older, Japan has the highest ratio of senior citizens of any country in the world, placing a strain on its public pension plan. The country's fertility rate, the number of children a woman bears per lifetime, is 1.25, well below the population replacement rate. Last year, the country experienced its first population decline since 1945.

Average number of Canadian childbirths per woman, 1950-2000:

1950	3.73
1960	3.61
1970	1.97
1980	1.63
1990	1.70
2000	1.58

(Source: UN Population Division)

The average number of toxins, including carcinogens, hormone disruptors and neurotoxins found in the blood and urine of selected children tested in five centres across Canada by Environmental Defence: 23. The average number, including DDT and PCBs, found in adults: 32.

Number of Canadians expected to die from cancer in 2006: 68,300.

Number of casualties *world wide* from terrorist attacks, 1998-2003, according to the US Department of State Office for Counter-terrorism: 21,997

Number of deaths in *Canada* from cardiovascular disease in 2003: 73,825.

PPN UPDATE

Luke's Pharmacy has changed its name to **Blossom Park Pharmacy.** They have moved to 2928 Bank Street in Ottawa. Their phone number remains 613-736-7366.

The Drugstore Pharmacy, at 401 Bank Street in Almonte, has joined the Coughlin & Associates Ltd. Preferred Provider Network. Their phone number is 613-256-6884.