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Federal pensions not covered by *Monsanto* ruling

Federally regulated pension plans do not have to distribute plan surpluses at wind-up, according to the Federal Court of Appeal.

In a judgement that caught pension plan administrators and regulators by surprise, the federal court ruled that the Supreme Court of Canada's 2004 decision allowing portions of pension plan surpluses to be distributed to plan members on full or partial wind-up does not apply to pension plans operating under the federal Pension Benefits Standards Act (PBSA).

The case involved employees of a federally regulated shipping company. From 1997 to 2000, the company initiated a number of structural changes to its operations that ultimately resulted in the termination of a number of employees and the partial termination of the company's pension plan. When the firm filed its termination reports, it did not provide a pay out of a portion of the pension surplus to affected employees. The Office of the Superintendent of Financial Institutions did not take steps to ensure that a distribution of the surplus occurred.

The employees then filed suit, using the Supreme Court decision in the *Monsanto* case as precedent. (In the *Monsanto* case, the Supreme Court ruled that Section 70 of the Ontario Pension Benefits Act (OPBA) allowed for the distribution of plan surpluses to terminated employees on full or partial wind-up of pension plans. However, the Monsanto company's plan was governed by the OPBA, not the PBSA.)

In its initial ruling, the Federal Court said that plan surpluses could be distributed under the federal PBSA. However, the Appeals Court disagreed, citing that the definitions of the terms *"wind-up"* and *"termination"* differed between the OPBA and the federal PBSA.

While the Ontario pensions act tends to treat the two terms as occurring simultaneously, the federal PBSA treats plan terminations and wind-ups as two distinct actions that occur at different time periods. According to the Appeals Court judgement: *"the PBSA defines a 'surplus' to mean the amount by which the assets of a pension plan exceed its liabilities (the pensions owed to members.) Assets and liabilities cannot be determined until a plan is wound-up. As such, the existence of any actual or real surplus is determined at some point after the termination of a plan and the distribution thereof would be the final step in the wind-up process. Accordingly, the federal scheme appears to preclude a right to a distribution of a surplus from being a right on termination…"*

For plan sponsors, the Appeals Court ruling reinforces the need for them to know whether their plan administration falls under federal or provincial regulation, particularly if they are contemplating a full or partial plan wind-up. As well, if they do operate under a provincial pension law other than the Ontario Pension Benefits Act, plan sponsors should establish whether their province's pension regulations more closely follow the Ontario or the federal pension regulations model.

It is still to be determined whether the decision will be appealed to the Supreme Court of Canada. ❧

Superintendent can order partial wind-ups, Court says

Ontario's Superintendent of Financial Services has the right to order the partial wind-up of pensions governed by that province's Pension Benefits Act, the Ontario Superior Court says.

In a case involving 73 management employees of *Hydro One* who were terminated between 2000 and 2002 during a corporate re-organization, the Ontario Superior Court ruled that a pension plan could be partially wound up, even when the number of terminated employees is not considered *"significant."*

The employees, who were members of a pension plan covering 3,913 active members, sought to have their pension partially wound-up and asked the Superintendent to make an order for the partial wind-up under the terms of the Ontario Pension Benefits Act (OPBA). The Superintendent declined, stating that the 73 employees did not constitute a significant number to warrant the action. The case ultimately ended up in Ontario Superior Court for a decision.

In its ruling, the Superior Court reviewed the definition of the term *"significant"*. While it conceded that 73 members of management out of a plan population of 3,913 may not be considered a significant ratio in its own right, the 73 terminated employees were a significant number when compared to the total management population of 379 people. As a result, a partial wind-up of the plan was ordered. As well, the 73 affected members could be entitled to their portion of the plan's surplus, based on the 2004 *Monsanto* ruling by the Supreme Court of Canada.

For pension plan sponsors, the Superior Court ruling could mean that their pension plans could face partial wind-up during corporate re-organizations even when the number of terminated employees may not be considered significant. ❧

Mandatory retirement at 65 stays, Supreme Court says

Mandatory retirement is now history, right?

Not necessarily.

The Supreme Court of Canada has ruled that Potash Corporation did not violate a New Brunswick employee's rights when it forced him to retire at age 65.

According to the nation's highest court, the mining company could force the 65-year-old miner to retire because it provided its employees with a *"bona fide"* pension that included a minimum service requirement.

The case dates to 2004 when the employee was forced to retire at age 65. The employee filed a complaint with the New Brunswick Human Rights Commission, which held that he was a victim of age discrimination. The case then proceeded to the provincial court, which overturned the Commission's ruling, stating that New Brunswick's Human Rights Act prohibits companies from imposing mandatory retirement *unless the companies offer pension plans containing mandatory retirement provisions.* The case then moved to the New Brunswick Court of Appeal, which ultimately agreed with the lower court.

The employee then appealed to the Supreme Court of Canada.

The Supreme Court ruling adds a marked complication to the common perception that mandatory retirement has been outlawed. If provincial human rights legislation allows forced retirement in situations where plan sponsors provide *bona fide* pension plans to employees, then pension plan members could find themselves pensioned-off at age 65.

In addition to a minimum service requirement, a *bona fide* pension *"must be a legitimate plan, adopted in good faith and not for the purpose of defeating protected rights,"* according to Supreme Court Justice Rosalie Abella.

Along with New Brunswick, the human rights acts of the provinces of Alberta, Prince Edward Island and Newfoundland and Labrador allow mandatory retirement when plan sponsors offer pension plans based on retirement at age 65.

For plan sponsors, the Supreme Court ruling will require them to carefully review the human rights legislation of plan members' home provinces when they are faced with situations potentially involving mandatory retirement at a specified age. ❧

US bans genetic discrimination

The US Congress has passed legislation banning insurers from adjusting premiums or denying coverage based on an individual's genetic profile. As well, employers are prohibited from using genetic information to hire, terminate or promote employees.

The Genetic Information Non-Discrimination Act (GINDA), which has been signed by President George W. Bush, is designed to allay fears by Americans that their genetic information may be used against them. More than 90 per cent of those surveyed in a John Hopkins University study expressed such fears. A total of 63 per cent said they would not take genetic tests if employers or health insurance companies could gain access to the results.

The fears of the survey respondents were not necessarily misplaced, according to many academics and human rights activists.

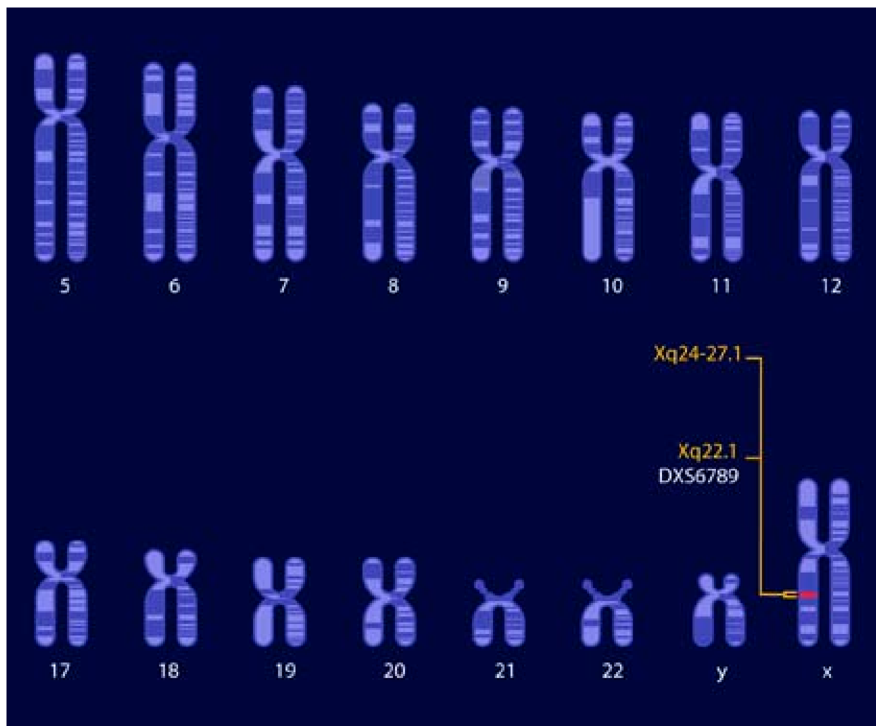
In 2001, employees of the Burlington Northern Railway were submitted to genetic testing without their consent to establish if symptoms of carpal tunnel syndrome were caused by a genetic mutation. As well, during the 1970s, many states passed laws requiring companies to test job applicants for sickle cell anemia, a disease that afflicts those of African descent, which resulted in many carriers of the disease being denied employment.

Many activists have expressed concerns that genetic testing could be used to deny long-term disability and life insurance coverage to those who may be genetically prone to cancer, heart disease or other illnesses.

While closing the door on genetic testing, the bill does not prevent insurers from taking blood samples from life and health insurance applicants and testing for signs of illness, disease, or drug abuse using conventional methodology.

Penalties for breaking the law range from $250,000 to $300,000 per violation.

Canada has yet to enact similar legislation. ❧



Registered plans now have bankruptcy protection

If you're facing bankruptcy, you can now rest assured that your registered retirement savings plans (RRSPs), registered retirement income funds (RRIFs) and deferred profit sharing plans (DPSPs) are safe from creditors.

Effective July 8, 2008, Canada's bankruptcy laws were changed to allow these registered savings programs from being claimed by creditors during bankruptcy proceedings. Until now, only registered pension plans, segregated funds and life insurance policies enjoyed creditor protection.

Provincial legislation already protects these assets from claim in the provinces of Saskatchewan, Prince Edward Island and Newfoundland and Labrador. The new federal law extends this protection across the country.

To prevent fraud or potential hiding of assets, deposits placed in registered plans in the 12 months prior to a bankruptcy may still be subject to claim by creditors. ❧

When is *accommodation* too much?

When it comes to excessive absenteeism by an employee or plan member, when does a plan sponsor's duty to accommodate an individual's illness or disability end and its right to terminate the person begin?

It's a question faced by many employers and plan sponsors every day.

The Supreme Court of Canada provided some clarity on that issue recently when it upheld a provincial utility's decision to terminate an employee who suffered from a number of physical and psychological illnesses, including a personality disorder and depression.

The case involved a worker with the provincial utility that had missed 960 days of work over the past 7.5 years of her employment, or almost half of her eligible work time. The employer had attempted to accommodate her situation in a number of ways, including light duties and gradual return to work programs. However, none were successful.

After being absent for more than five continuous months, her physician recommended that she stop working indefinitely until certain workplace conflicts could be resolved. As part of its disability management protocol, the employer then requested that the individual receive a psychiatric evaluation. The psychiatrist's conclusion was that the worker's medical condition would not likely improve and that she would likely continue to present an absenteeism problem. The company then terminated her employment.

The worker then filed a grievance with her union. However, the employer's decision was upheld by a labour arbitrator and, later, the Quebec Superior Court.

The employee's case was more favourably received by the Quebec Court of Appeal, which held that earlier Supreme Court rulings had required employers to *"establish that it was impossible to accommodate the grievor in order to justify the termination."* As well, the Appeals Court said that the original arbitrator should not have considered the individual's entire case history of absenteeism and the employer's attempts at accommodation but, instead, should have *"focused exclusively on whether it was impossible to accommodate the grievor at the time the decision to terminate her employment was made."*

The case was then appealed to the Supreme Court of Canada.

"Impossible" standards

In its review, the high court conceded that the case required it *"to take another look at the rules protecting employees in the event of non-culpable absenteeism and the rules governing contracts of employment,"* and in particular *"the interaction between the employer's duty to accommodate a sick employee and the employee's duty to do his or her work."*

Among its findings was that the Quebec Court of Appeal's interpretation of earlier Supreme Court rulings on the rights to accommodation imposed *"impossible"* standards on employers since, under previous Court rulings, employers were required to prove it was ***impossible*** to accommodate an ill employee without suffering undue hardship.

In its ruling, the Supreme Court changed its focus from defining the term *"impossible"* to establishing a definition of *"undue hardship"* on the part of employers.

"What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances," the Court noted. "The goal of accommodation is to ensure that an employee who is able to work can do so. This means that the employer must accommodate the employee in a way that while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship."

General labour law still applies

In its ruling, the Supreme Court suggested that the limit to accommodation begins when the employer has to fundamentally change the conditions of employment or the basic employment relationship in order to help an employee perform his or her duties.

"The employer does not have a duty to change working conditions in a fundamental way but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work," the Court said. ***"In a case involving chronic absenteeism, if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her***

work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship."

The Supreme Court ruling went on to affirm that the duty to accommodate should not override the basic employment contract. In other words, the employee must be able to exchange his or her labour for remuneration.

"The duty to accommodate is therefore compatible with the general labour law rules, including both the rule that employers must respect employees' fundamental rights and the rule that employees must do their work," it said. *"The employer's duty to accommodate ends where the employee is no longer able to fulfil the basic obligations associated with the employment relationship for the foreseeable future."*

In the case of the utility worker, the Court concluded that her termination was based *"less on the employee's handicap…than her inability to fulfil the fundamental obligations arising from the employment relationship."*

Punitive damages defined

The Supreme Court's pro-employer decision was reinforced in its July 2008 judgement reversing the damage award provided to an autoworker who was dismissed by his employer after 14 years of service.

In this case, the employee, who suffered from chronic fatigue syndrome, was dismissed when he continued to have a high absentee rate even after he had returned to work following long-term disability leave. When asked by his employer to meet with an occupational medicine specialist appointed by the company, he refused. He was then terminated. The case then moved to litigation.

The initial award of the lower court set a Canadian record. It awarded punitive damages amounting to $500,000, plus a nine-month extension of the employer's 15-month notice period.

While the Ontario Court of Appeal later reduced the damage award to $100,000, the settlement still ranked on the high side by Canadian standards. The employer then appealed to the Supreme Court of Canada.

In its July decision, the Supreme Court disallowed the awarding of punitive damages, stating that *"punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own."* Since the employer had *"in no way shown an egregious display of bad faith,"* it restricted the award only to the employer's initial settlement of 15 months pay in lieu of notice, rejecting both the damage award and the nine-month extension of the notice period.

According to the Supreme Court, when damages are awarded *"no extension of the notice period is to be used to determine the proper amount to be paid."* Plus, it asserted, damage awards should not amount to "double punishment" where a wrong doer is punished while the victim is also rewarded.

Lastly, it also supported the employer's right to require ill employees to provide doctors' notes or undergo medical examinations as part of a disability management process.

"The need to monitor the absences of employees who are regularly absent from work is a bona fide work requirement in light of the very nature of the employment contract and responsibility of the employer for the management of its workforce," the Court ruled.

In light of these two rulings by the Supreme Court, it appears that plan sponsors may assume the following when dealing with cases of excessive employee absences resulting from illness or disability:

1. While employers still have a duty to accommodate an individual's illness or disability by providing counselling, alternative work programs, return-to-work arrangements or other support, they do not have to do so at the cost of *"undue hardship"* on the organization.
2. Ultimately, general labour laws still rule. Employers must respect employees' rights and employees must be able and willing to work in exchange for pay. If that basic principle cannot be respected, the relationship can be terminated.
3. Employers have a right to ask for medical information and/or confirmation of the medical condition that results in the excessive absence of an employee.
4. If the breakdown of the employment relationship results in litigation and damages are assessed against the employer, the damages awarded must be based on conduct that is worthy of punishment. Plus, damage awards must not amount to *"double punishment"* where the employer is penalized while the employee is also rewarded at the same time. ❧

As the boom fades, "Y" will shine

Much attention has been paid to the employee benefits requirements of baby boomers, those born between 1946 and 1964. As the largest demographic segment of the population, it is natural that boomers receive so much attention, particular as their age, health, income and retirement prospects begin to affect employee benefit plans.

But what about the generation of new hires that will replace them?

As baby boomers begin to leave the workplace in the coming years, the role, concerns and impact of Generation Y, those born between 1977 and 1994, will gradually come to dominate employee benefit plan design and administration.

But it would be a mistake to assume that Generation Y will simply be a younger version of the baby boom generation. Plan sponsors would be wise to begin to prepare for the entry and eventual dominance of *"the next generation."*

Here are some important facts about Generation Y, as outlined by Karen Kesteris, Green Shield Canada's director of marketing and product development:

They're fatter: In 2004, 29 per cent of 12 to 17-year-olds were obese, compared to 14 per cent in 1978 when many boomers were teens and young adults.

They may be diabetic: Incidence rates of type 2 diabetes have jumped by 15 times since 1990. Many members of Generation Y may already have, or may be prone to, this illness.

They're depressed: After oral contraceptives, anti-depressives are the most frequently used medications of Generation Y. More than 25 per cent of all drugs used by this group fall into this category. Their use of anti-depressives is expected to increase as they age.

They don't want to pay: Unless they actually have a need for a specific benefit, Generation Y is not likely to want to pay for it. Flexible benefit plans or health care spending accounts may be more appealing to this group.

They're flexible part-timers: As a product of a time when employers shunned full-time positions in favour of part-time work and the contracting-out of jobs, Generation Y has learned to adapt to, and even prefer, less structured workplaces with less formal benefits arrangements. They may even have two or three jobs going at the same time.

They're on-line all the time: They grew up with computers and cell phones that do everything. They know technology and expect to be served and have access to benefits information quickly and electronically.

They come with no dependants: Don't forget, the stereotypical member of Generation Y didn't leave home until age 30, and even then only after his/her baby boomer parents forced the issue. Like young workers of all generations, the average member of Generation Y is single with no dependants. Dependant coverage will not likely be an issue for a while — at least until they reach the "settling down" stage of life. ❧

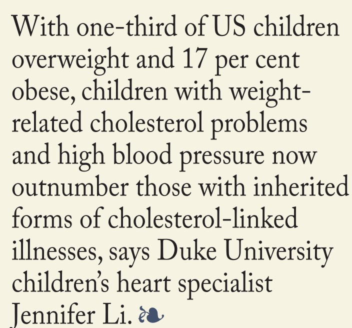
Give kids cholesterol drugs, doctors urge

A group of US physicians is recommending that children as young as eight years of age be given cholesterol medications to ward-off future heart problems.

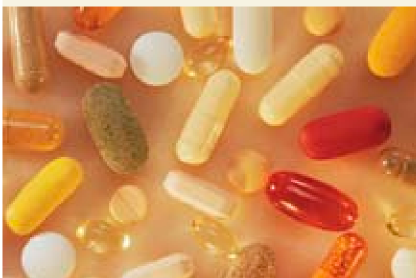
The American Academy of Pediatrics urges more aggressive action be taken to reduce the risk of heart attacks and strokes among today's children when they reach adulthood.

According to the pediatricians, children today have too much "bad" cholesterol in addition to higher risk factors such as obesity, high blood pressure, poor diets and inactive lifestyles.

The group also recommends that cholesterol testing begin as early as age two and no later than age 10. It also recommends that children be given low fat milk beginning as early as age one.



With one-third of US children overweight and 17 per cent obese, children with weight-related cholesterol problems and high blood pressure now outnumber those with inherited forms of cholesterol-linked illnesses, says Duke University children's heart specialist Jennifer Li. ❧



Fast facts

- As 2009 approaches, plan members and employees should expect to hear a lot more about tax-free savings accounts. According to a market survey of 250 Canadian employers, 43 per cent expect to establish group versions of these plans in the new year.

  Under the recently passed budget legislation, individuals will be allowed to contribute up to $5,000 per year to these registered savings accounts. While they will not be able to claim tax deductions for their contributions as they can with registered retirement savings plans (RRSPs), they will not be taxed when they withdraw funds from their accounts. Capital gains will also be tax-exempt.

- The government of Newfoundland and Labrador has passed legislation requiring pension plan sponsors to fully fund any deficits on wind-up. The new law is retroactive to April 1, 2008.

- General Motors has announced that, effective January 1, 2009, it will eliminate health care coverage for its retired salaried employees over the age of 65. To offset the cuts, affected workers and surviving spouses will receive increases in their pension income payments.

- Only 29 per cent of Canadian companies report that they include retirement forecasts in their employee knowledge transfer and training plans, says the Institute for Corporate Productivity. *"For all the public gnashing of teeth about the impending retirement of those knowledgeable, hard-working baby boomers, relatively few organizations are doing much about it,"* it says. *"They're going to wind up in a mad bar-the-doors scramble in the near future if they don't start trying to tap the knowledge of their most knowledgeable boomers."*

- A sign of the times: Sales of Lipitor, the world's top-selling drug, increased by nine per cent from last year, according to Pfizer Pharmaceutical. Lipitor is used to treat high cholesterol. Total sales of the medication exceeded $3 billion US.

- Effective July 1, 2008, the earnings exemption for employed senior citizens collecting the Guaranteed Income Supplement (GIS) increased from $500 annually to $3,500 per year. More than 100,000 low-income seniors will be affected by this change.

- Recent market melt downs and a slowing economy have sponsors of defined benefit plans worried, according to a recent study by Morneau Sobeco. According to the actuarial firm's *60 Second Survey,* 75 per cent of plan sponsors say they are concerned or very concerned about the financial status of their pensions. More than half say they are ready to take remedial action, such as changing the investment strategy or converting their plans to defined contribution arrangements.

- The percentage of Canadian businesses reporting difficulty recruiting new employees, according to a Bedford Consulting Group survey of 300 companies: 70 per cent. The percentage of those expecting the talent shortage to get worse: 62 per cent. The percentage that say the

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Fast facts (continued from page 7)

problem is affecting their bottom line: 50 per cent. The percentage who say they have a formal program to attract new employees: 40 per cent.

- California has passed legislation to prevent health insurance providers from paying bonuses or other rewards to employees who find ways to cancel or terminate policyholders' health care coverage. The law was passed when it was found that at least two major health insurers paid bonuses to employees who found ways to prevent policyholders from collecting benefits at the time of claim. This often involved reviewing patient medical records to find undisclosed medical conditions, which were then used to justify policy cancellation.
- Remaining life expectancy of 65-year-old men and women in 1940: 11.9 and 13.4 years, respectively. The projected remaining life expectancy of 65-year-olds in 2040, according to the American Academy of Actuaries: 18.8 and 20.9 years, respectively.
- Any coffee lover will tell you that the beverage holds the secret to life. Now that feeling may be proven to be true, at least for women. A 24-year US survey of 86,000 women and 43,000 men indicates that mortality risks were 26 per cent lower among women who consumed four to five cups of coffee per day, compared to those who didn't drink coffee. Women who drank two to three cups per day experienced a 17 per cent lower risk. There was no measurable difference in mortality risks among men, regardless of consumption patterns. The results of the study were published in the June 2008 edition of the *Annuals of Internal Medicine.*
- Percentage of American population that smoked in 1965: 42 per cent. In 2008: 21 per cent.

PPN update

The **Wal-Mart pharmacies** at the following locations have joined the Coughlin & Associates Ltd. Preferred Provider Network:

450 Terminal Avenue, Ottawa Phone: 613-562-3225

3001 Richelieu Street, Rockland Phone: 613-446-7137

450 McNeely Avenue, Carleton Place Phone: 613-253-5023 ❧

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Mark Hogan, Brent Moore & Ken Kaitola

Editor: David Whitbread
Graphic Designer: Victor Lima