

# Pension and Benefits

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This is a summary of Pension and Employee Benefits matters of interest.

## Benefit plans can discriminate against marijuana: *Canadian Elevator Industry Welfare Trust Fund v Skinner*, 2018 NSCA 31

In *Canadian Elevator Industry Welfare Trust Fund v Skinner*, the Nova Scotia Court of Appeal considered what constituted discrimination in the denial of access to coverage for medicinal marijuana, emphasizing the deference that courts and tribunals will give to the administrator of a benefit plan in choosing what drugs the plan will cover. The case denied a human rights claim by an elevator mechanic for discrimination, overturning a Human Rights Board of Inquiry. Mr. Skinner, the elevator mechanic, needed medical marijuana to treat a disability. The Court held that the fact that his Welfare Trust Plan did not reimburse him for the costs of medical marijuana did not amount to discrimination.

### Background

Mr. Skinner was a member of the International Union of Elevator Constructors and had access to a health and welfare plan (the “Plan”). Mr. Skinner got into a car accident in 2010. His accident caused a chronic pain condition, along with anxiety and depression. He tried taking narcotics and anti-depressants to deal with these conditions, but the medications did not work, and caused adverse side effects. As a result, in 2012, his psychologist suggested that he start using medical marijuana. His medical marijuana was initially paid for by medical benefits under his no-fault car insurance policy. However, these benefits only lasted for two years. In May of 2014, he requested coverage for his medical marijuana from the Board of Trustees who administered the Plan.

The Board of Trustees, despite acknowledging that marijuana was the most effective medication for Mr. Skinner, denied him coverage. The reason they denied him coverage was that the Plan dictated that, for a drug to be covered, it had to be approved by Health Canada and assigned a “Drug Identification Number” or “DIN”. Marijuana did not fall into this category, and so he was denied coverage. The Human Rights

Board of Inquiry then found that Mr. Skinner had been discriminated against on this basis.

## **The Decision**

The Court of Appeal, in reviewing the Human Rights Board of Inquiry's decision, asserted that the issue in the case was not about whether it is legal to prescribe medical marijuana, or about whether Mr. Skinner needs it. Rather, the Court of Appeal believed that the case was only about whether the Welfare Plan had to reimburse Mr. Skinner for his costs because to refrain from doing so would violate the *Human Rights Act*.

The Court of Appeal came to the conclusion that there was no connection between Mr. Skinner's disability and the decision to deny him coverage, and that as a result there was no violation of the *Human Rights Act*. According to the Court of Appeal, refusing Mr. Skinner a drug not approved by Health Canada did not amount to discrimination because no one in the Plan received medical marijuana, and furthermore no one in the plan received drugs that were not approved by Health Canada. The Plan did not exclude these drugs *because of* Mr. Skinner's disability. If it had, then he would have grounds for a complaint. Because the Plan did not exclude marijuana on this basis, Mr. Skinner had no claim.

The Court went on to say that, if they had come to the opposite conclusion, this would have meant that human rights tribunals and courts would be policing the choices made by private benefit plans to include or exclude certain kinds of coverage. While the Human Rights Board of Inquiry thought this was acceptable, the Court of Appeal clearly believed it was a bad outcome.

It was held by the Court that Mr. Skinner was not discriminated against by virtue of the fact that the Plan did not cover the use of medical marijuana. Because the Plan did not exclude the drug simply to discriminate against Mr. Skinner, but rather on other bases, he lost on appeal.

## **Conclusion**

The main takeaway from the case is that courts are hesitant to utilize human rights legislation to dictate what benefit plans will cover and what they will not. The conclusion that the Court arrives at is that, were courts and tribunals to adopt this role, private benefit plans would be prevented from excluding any drug from the ambit of their coverage. This decision is welcome news for the many multi-employer health and welfare plans that must deliver benefits within the context of expanding health costs and limited employer contributions.

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## **Ontario Introduces New Funding Requirements for Defined Benefit Pension Plans**

On April 20, 2018, the Government of Ontario filed long anticipated amendments to the general

regulations under the *Pension Benefits Act*, which significantly change the funding requirements for defined benefit pension plans. The regulations are the product of a public consultation begun by the Ontario government, initially announced in the 2015 Ontario Economic Outlook and Fiscal Review.

These amendments largely reflect funding changes proposed by the Ministry of Finance and posted to the Regulatory Registry in December of 2017. A summary of some of the more significant changes brought about by these amendments is set out below.

### **New Solvency Funding Requirements**

For actuarial valuations with an effective date on or after December 31, 2017, defined benefit plans will no longer be required to fund to a 100% solvency funding target. As previously announced by the Ontario Government, defined benefit plan sponsors will only be required to make special payments on account of solvency deficiencies when the plan's solvency funded status falls below 85%. Special payments in respect of such reduced solvency deficiencies arising after December 31, 2017 will still be required to be amortized over a five year period.

### **Decrease in Amortization Period of Going Concern Special Payments**

For actuarial valuations with an effective date on or after December 31, 2017, going concern unfunded liabilities will now have to be amortized over a ten year period (rather than the current 15 years).

### **Introduction of Provision for Adverse Deviation ("PfAD")**

The funding of a plan's annual normal cost and going concern liabilities is being strengthened through the introduction of a provision for adverse deviation ("PfAD"). The PfAD will require a plan's normal cost and special payments in respect of any going concern unfunded liability to be increased according to a formula which takes into account a number of factors, including whether the plan is open or closed to new members and the plan's asset allocation.

### **Increased Pension Benefit Guarantee Fund Assessments**

Assessments in respect of the Pension Benefits Guarantee Fund (the "PBGF") will be increased, effective January 1, 2019, to reflect the increase in PBGF benefits announced in Ontario's 2018 budget.

### **Restrictions on Benefit Improvements**

Amendments to the *Pension Benefits Act* introduced through the 2018 Ontario Budget include a provision restricting amendments to defined benefit plans providing defined benefits in prescribed circumstances. Under the new funding regulations, the prescribed circumstances rendering a benefit improvement amendment void are where either of the plan's going concern or solvency ratio is at or below 80 per cent.

## **Contribution Holidays:**

The regulation includes new rules governing contribution holidays. In general terms, contribution holidays will be available where a plan's PfAD is fully funded and no special payments are being made to the plan, provided that the contribution holiday will not result in the plan's transfer ratio below 1.05.

## **Member Statements**

The statements required to be provided to members, deferred vested members and pensioners will have to include additional disclosures, including a description of the difference between going concern and solvency funding, and a statement that contributions for the provision for adverse deviations are required to be made to the plan.

## **JSPPs and SOMEPPs**

These new funding requirements will not apply to jointly sponsored pension plans that are exempt from solvency funding requirements under the general regulations, nor to specified Ontario multi-employer pension plans.

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