KOSKIE MINSKY

JUSTICE MATTERS

Pension and Benefits

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

Ontario Enacts the Financial Services Regulatory Authority of Ontario Act, 2016

On December 8, 2016, the *Building Ontario Up for Everyone Act (Budget Measures), 2016* ("Bill 70") received Royal Assent. Among other things, the omnibus budget legislation enacts the ***Financial Services Regulatory Authority of Ontario Act, 2016***, (the "FSRA Act") setting out the framework for the creation of the new Financial Services Regulatory Authority ("FSRA").

By way of background, the Minister appointed an expert advisory panel to review the mandates of both FSCO and the Financial Services Tribunal. In a final report released to the public in June 2016, the panel concluded that "radical change" was necessary to establish a world-class financial services and pensions regulator in Ontario, and made 44 recommendations which focused on the creation of a single integrated organization that would replace FSCO.

Under the FSRA Act, the FSRA will consolidate various regulatory functions related to pensions, insurance, trust companies, credit union, caisses populaires, co-operatives, and mortgage brokers into one body, just as FSCO did. This structure is in stark contrast to what was proposed by the 2008 expert commission in Ontario, which urged the creation of an independent single-purpose pension regulator. It remains unclear from the FSRA Act whether the FSRA will have an independent division which regulates pension administration, as well as separate divisions which regulate market conduct and prudential oversight. Subject to the approval of the Minister, the FSRA Act provides the board of directors of the FSRA with powers to make by-laws governing the management of the FSRA, among other administrative and structural issues.

A separate division focused on pension administration recognizes the unique nature of pensions, and courts have repeatedly recognized the need for specialized expertise in the pension field. However, under the proposals of the expert advisory panel, these divisions would still function within one regulatory authority that is tasked with overseeing a number of mandates. There remain concerns that the authority

of the pension regulator may be constrained by the FSRA's overall mandate. If implemented, the proposed creation of various divisions within the FSRA, while a positive structural change to the current regulation of pensions in Ontario, falls short of the recommendations of the 2008 expert commission.

While the final report also outlined recommendations for changes to the FST, these were not addressed in Bill 70 and it is unclear whether these will be implemented in addition to the FSRA Act establishing the new FSRA.

The FSRA Act lacks sufficient detail on a number of things, including the FSRA's mandate and principles by which it operates, and the tools and means the agency will have at its disposal. These will likely be set out in the by-laws made by the board of directors of the FSRA. As such, more details are required before the actual impact of the FSRA on pension regulation in Ontario can be determined.

Federal Government Announces that Employees will not be Taxed on Employer-Provided Health and Dental Benefits

Last week, Prime Minister Trudeau announced that the upcoming budget will not include a provision to tax employees on their employer-provided health and dental benefits. The question remains, however, whether the rumoured tax is really off the table for good or whether it is still in consideration as part of an ongoing review of tax and healthcare policy.

The current federal government never actually publically proposed the idea. Early last December a National Post reporter broke the **story** that, as part of a review of over 150 tax credits, the federal government was considering eliminating the current tax exemption for employer-provided health and dental benefits.

Currently, health and dental benefits paid by employers are not taxable benefits to their employees, allowing employers to provide more competitive compensation relative to its actual cost. In contrast, those who do not receive supplementary health coverage through their employers must use after-tax dollars to purchase the same benefits.

That difference in cost of coverage is one reason why many believed the government was considering eliminating the tax exemption. Minister of Finance Bill Morneau has **said** that some of the goals of his Ministry are to "make the tax code simpler," to "ensure that there's tax fairness," and to eliminate tax credits that unevenly benefit high-income Canadians. Between September and December last year, officials at Finance Canada have been working with a panel of seven outside experts on a full analysis of current tax credits, including who benefits from them and their overall efficacy. Finance Canada has said that it will not release the final report until the federal budget, which is usually in late February or March.

In addition, the **Naylor Report**, commissioned by the Standing Committee of Health, has recommended that tax reforms be used to raise funds for necessary healthcare innovation, such as a **possible** national **pharmacare** system.

As a bit of history, the federal government released a budget with a $29.4 billion deficit for the 2016-2017 fiscal year but promised to find $3 billion by eliminating inefficient tax credits. For reference, the government takes in about $2.9 billion less annually than it otherwise could if it taxed all health and dental benefits.

There are a number of implications to eliminating the tax exemption:

1. This would likely reduce the number of employers providing benefits, or reduce the amount of benefits provided. According to **two** **studies**, when Quebec lowered the tax deduction on these benefits in 1993, the number of group plans provided by employers dropped by 20%.
2. The lack of coverage would disproportionately affect lower-income workers, as they would be less able to afford the cost of health and dental benefits out-of-pocket.
3. It would cause a shift in the insurance industry, as individuals would not be able to rely on the group "buying power" or leverage of their union or employer to negotiate lower rates with insurance companies.
4. Those with pre-existing conditions or who are older would have a much harder time finding equivalent coverage.
5. Many young and healthy individuals would likely forego buying insurance. The studies examining the Quebec tax concluded found that 85% of those who lost employer-provided health coverage did not purchase individual coverage.

For now, after a long period of silence on the issue, the government has committed itself to leaving the tax exemption alone in the upcoming budget in the face of widespread opposition to the move.

Denying access to medical marijuana can be discriminatory

In *Skinner v. Board of Trustees of the Canadian Elevator Industry Welfare Trust Fund*(2017 CanLII 3240 (NS HRC)) , the Nova Scotia Human Rights Commission has confirmed that denying access to medical marijuana can be discriminatory in certain contexts.

Mr. Skinner was involved in a motor vehicle accident while working at ThyssenKrupp Elevator Canada in August, 2010. Afterwards he developed chronic pain, anxiety, and depression disorders and was unable to work. After seeking to manage his medical conditions by way of more conventional drugs, he was prescribed medical marijuana. The marijuana was initially covered by his motor vehicle insurance, but when that was depleted he sought coverage for the drug under the Canadian Elevator Industry Welfare Trust Plan ("the "Welfare Plan"), which was administered by the Board of Trustees for the Canadian Elevator Industry Welfare Trust Fund (the "Trustees"). The Trustees considered Mr. Skinner's request twice, and both times denied it based on the fact that 1) medical marijuana was not an approved drug under the Welfare Plan terms as it did not have a drug identification number, and 2) that his medical expenses should be covered by a provincial medicare plan rather than by the Welfare Plan.

Mr. Skinner then appealed under the *Human Rights Act* (the "Act") to the Human Rights Commission, who referred the complaint to a board of inquiry.

The board of Inquiry recognized the current complexity of the legal regime presently covering marijuana in Canada, citing numerous cases and legislation and acknowledging that none were "directly applicable" to the human rights arena. Previous cases had all concerned the interpretation of the particular statutory or contractual obligations at issue. In this case, the issue was focused on the reasonableness of the complainant's request for coverage and prior cases on medical marijuana were of limited guidance.

In this context, the board of inquiry took the time to analyse the importance of marijuana to the complainant. It had "significantly improved" the complainant's functioning as well as reducing the other medications he had been taking beforehand. In the board of inquiry's interpretation, all but one of the many medical and expert opinions presented to the board supported Mr. Skinner's use of medical marijuana and agreed that it improved his functionality.

In Nova Scotia, much like the rest of the country, a complainant alleging discrimination under the Human Rights Act must first establish that there is a *prima facie* case of discrimination. In Nova Scotia, this requires 1) a distinction 2) based on a statutorily-listed characteristic 3) that imposed a burden, obligation, or disadvantage to the complainant compared with other individuals. The board of inquiry found no direct discrimination in the Welfare Plan, but concluded that Mr. Skinner had been discriminated against as a result of the adverse impact that denying access to marijuana would have on him specifically.

The board of inquiry identified the purpose of the Welfare Plan as the economic, efficient and sustainable management of the health and welfare benefits available to the beneficiaries of the plan. Relying on this purpose, the substantive treatment of beneficiaries was scrutinized: not on the basis of whether other

beneficiaries had received coverage for medical marijuana, but rather on the basis of whether other beneficiaries had received coverage of specially-requested, medically-necessary prescription drugs. This denial of coverage was a disadvantage which, coupled with the fact that the Trustees had considered the complainant's disability, was sufficient to amount to a *prima facie* finding of discrimination.

The respondents had little evidence to refute this finding and the board of inquiry determined that the Trustees were required to accommodate the complainant's request for coverage of his medical marijuana prescription.

This thorough decision is a useful roadmap for dealing with the complex intersection of human rights complaints, private benefit plan analysis, and the status of medical marijuana coverage. The board of inquiry was careful to clarify that this decision did not imply that other benefit plans must cover medical marijuana or other prescriptions, as well as reiterating that this decision was based on the specific lack of statutory or other limitations. Nevertheless, this case adds to the growing list of court and arbitrator decisions concerning an employee claiming a right to medical marijuana usage and may lead to additional human rights complaints by employees who wish to have their medical marijuana prescription covered by their occupational benefit plan.

This edition of Pension and Benefits was produced and edited by the following members of the Pension and Benefits Law Group at Koskie Minsky LLP

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