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Pension, Benefits & Executive Compensation Law

Legal Update November 2018

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Agenda



Medical and Recreational Marijuana Update



Post–Age 65 Benefit Plans



Disability Coverage After Termination of Employment



Sharing of Parental Employment Insurance Benefits



Benefit Plan Distinctions Based on Hire Date (Quebec)

Medical and Recreational Marijuana Update

Medical
Marijuana
Background

Status of
Legislation
on
Legalization
of
Recreational
Marijuana

New Case
Law

Medical Marijuana Background

The *Controlled Drugs and Substances Act* (CDSA) made it illegal to possess, produce, import/export or otherwise traffic marijuana. The *Access to Cannabis for Medical Purposes Regulations* (ACMPR) under the CDSA set out an exception for medical marijuana.



Cannabis Act came into force on October 17, 2018. Cannabis removed from CDSA and the ACMPR revoked. Regulatory system to access medical cannabis generally remains in place under the *Cannabis Regulation*.
A review is expected within 5 years.



Herbal medical marijuana has still not been approved by Health Canada under the *Food and Drugs Act* (FDA), but certain pharmacological cannabinoids have been. *Cannabis Act* lets existing health products (i.e. drugs) containing cannabis to remain on the market. Dual-licensing regime under the *Cannabis Act* and the FDA is being established for health products.

Status of Legislation of the Legalization of Recreational Marijuana – Federal Bill C-45, *Cannabis Act*

**June 20, 2018:
Bill C-45 approved
by Senate**

**June 21, 2018:
Royal Assent given
to Bill C-45**

**October 17, 2018:
Sale and use of limited
quantities of cannabis legal**

Provinces are generally acting on their own to address issues such as: distribution, sale, minimum age, no smoking zones, etc.

Marijuana and the Workplace



Canadian Elevator Industry Welfare Trust Fund v. Skinner (2018)

Appeal to the Nova Scotia Court of Appeal from a 2017 Board of Inquiry decision

- Nova Scotia Human Rights Tribunal found denial of coverage for medical marijuana to be discriminatory pursuant to the Nova Scotia *Human Rights Act*

Facts

- Marijuana was the only effective drug to treat Mr. Skinner's disability
- Trustees could make exceptions for medically necessary drugs but refused to and relied on fact that medical marijuana has no DIN

The Court of Appeal overturned Board of Inquiry

- Exceptions were only made for medically necessary drugs that also had a DIN
- The disadvantage resulted from Mr. Skinner's response to drugs covered by the Plan, not his disability
- The Board's analysis would empower disability claimants to expand benefit plans based on their own medical needs

Re CIBC v. United Steelworkers (Arbitrator Parmar, 2017)

Grievance

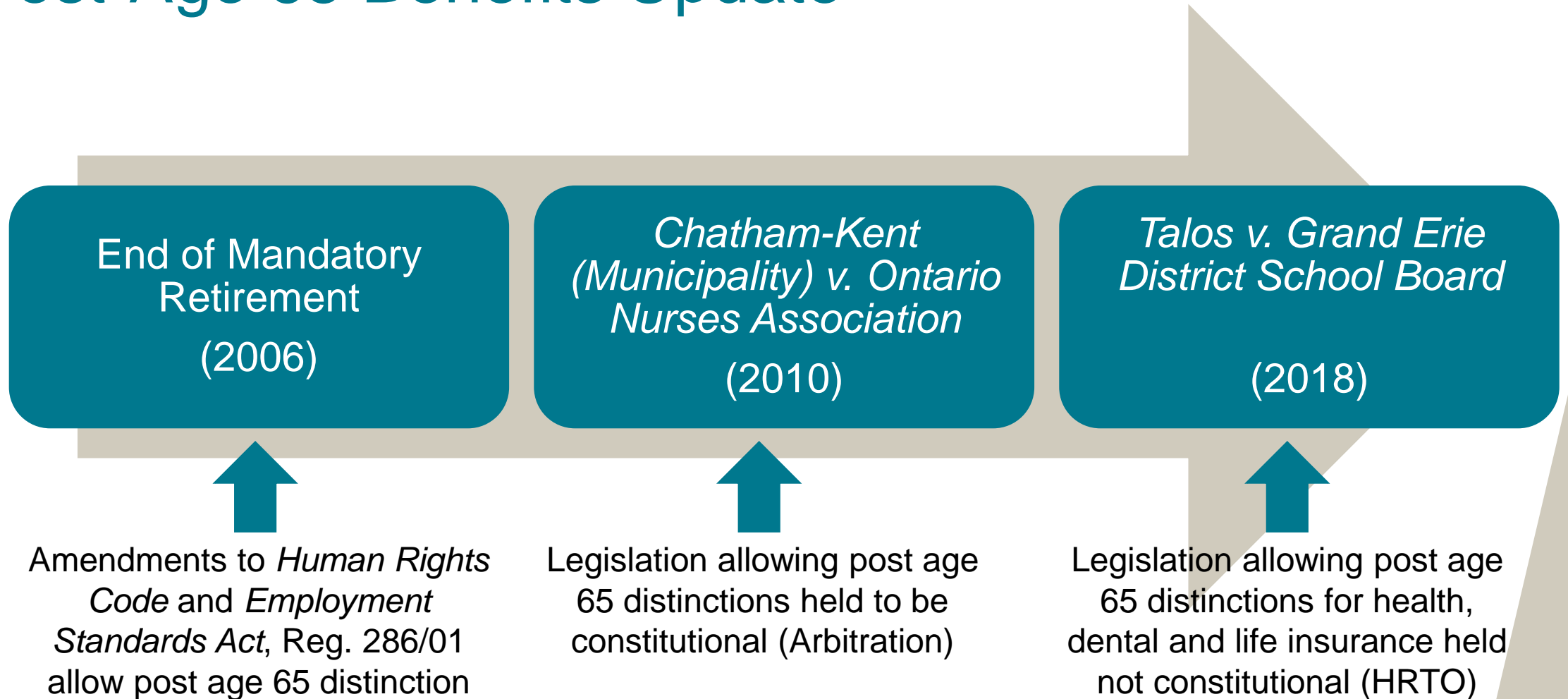
- Allegation that CIBC violated collective agreement and *Canadian Human Rights Act* based on denial of coverage for medical marijuana under benefits plans
- Insurer denied coverage on basis that medical marijuana does not have a DIN

Facts

- Marijuana was the only effective drug to treat Mr. Merling's disability without side effects
- Collective agreement required employer to make "premium contributions under the personalized employee Flexible Benefits Program as outlined in the current "Benefits & You" booklet" and "All matters regarding eligibility for or within or interpretation of the benefits plans ... shall be determined solely by the insurers"

The arbitrator had no jurisdiction to arbitrate the grievance

Post-Age 65 Benefits Update



Post-Age 65 Benefits Update

Talos v. Grand Erie District School Board

- Facts:
 - Secondary School Teachers >65 had received lump sum in lieu of benefits (health, dental, life)
 - Funding allocated to Board by Provincial Gov't for benefits used on other priorities
 - Pay in lieu removed in bargaining
 - Talos' spouse was < 65, did not have own coverage and was undergoing cancer treatments
 - LTD not raised as an issue

Post-Age 65 Benefits Update

- Ontario ESA/Human Rights age-based exclusion does not support a complete defence to an age discrimination claim
- But ... *Talos* decision ≠ no distinctions post age 65 permitted
- In certain environments, the workplace parties may agree to provide different benefits over and under age 65 for life and health and dental
- LTD benefits are likely distinguishable from life, health and dental benefits with cessation at age 65 very common especially for workplaces with registered pension plans
- Evidence of age-based costs and prevalence shifted from 2010 to 2018

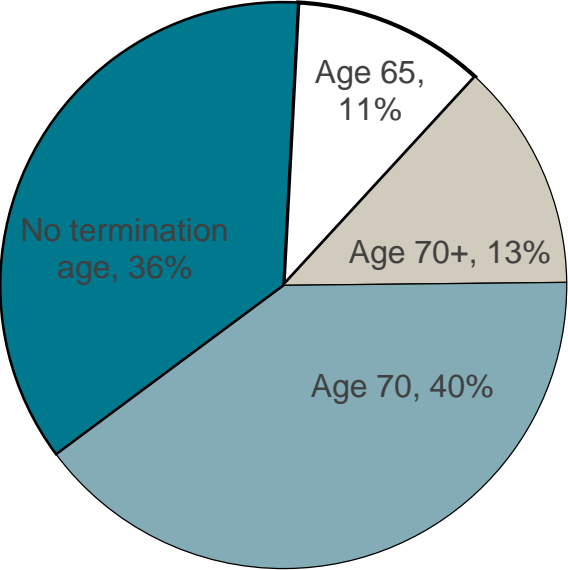


Legal conclusions shifted accordingly

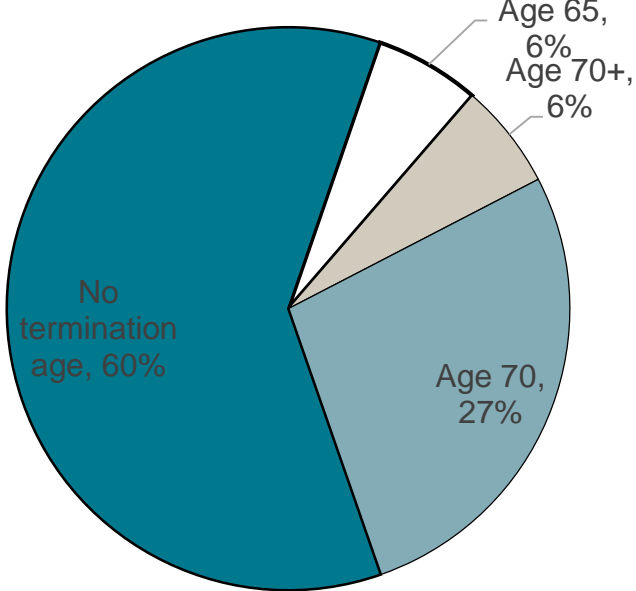
Post-Age 65 Benefits Update

Termination Age Distribution

Basic Life Insurance



Extended Health



Data Source: Mercer Plan Design Database

Post-Age 65 Benefits Update

Possible Legislative Responses

Bona fide benefits plan exception (most other Canadian jurisdictions have some variant of this approach)

IBEW, Local No. 2007 v. Epcor Utilities Inc. (2017 ABCA) permitted LTD coverage to end upon eligibility for retirement on a “full pension”

Status Quo

Talos v. Grand Erie District School Board likely to govern issue of constitutionality

Actuarial basis exception to allow differential benefits levels or termination of coverage dates based on age

Evidence-based adjudication on merits

Disability Coverage on Termination of Employment

Employment Standards Act, 2000

Common Law notice period

Post-Resignation Coverage?



Termination of Employment
(Not-For-Cause)

Resignation

Termination of Employment (Not-For-Cause)

Employment Standards Act, 2000

- Continuation of premiums/coverage for notice period only (up to 8 weeks in most cases)
- Cannot contract out of legislation
- Does not apply to severance entitlement

Common Law

- Common law reasonable notice or employment contract entitlement
- Address disability coverage in release
- Unless coverage expressly ceases or continuation permitted under policy, risk that employer self-insures coverage
 - e.g. *Alcatel Canada Inc. v. Egan* (2006)

Termination of Employment (Resignation)

Maclvor v. Pitney Bowes (2018)

Facts

- Mr. Maclvor suffered traumatic brain injury and back injuries during company event
- Mr. Maclvor was not aware of the permanent disabling nature of his brain injury
- Resigned from employment as responsibilities were reduced due to inability to meet performance expectations
- Obtained employment elsewhere but soon was terminated due to inability to perform job requirements
- Insurer agreed that Mr. Maclvor was continuously totally disabled from date of injury on a permanent basis

Termination of Employment (Resignation)

Maclvor v. Pitney Bowes (2018)

Key Issue: Does LTD coverage end when an employee resigns from employment?

- Court interpreted termination of coverage language to limit claims arising post-employment but not to limit claims arising in the course of employment
- Claim made approx. 2 years after resignation from employment
- Express exclusionary language required to deny coverage for undiscovered disability claims
- Court also extended claim period and 1-year limitation period.

Potential application: Likely limited in scope but potential cost significant.

Sharing of Parental Employment Insurance Benefits

Benefit	Current Rules	EI Parental Sharing Benefit
Standard (55%)	Either parent may take up to 35 weeks	Total available leave increases to 40 weeks if each parent takes at least 5 weeks
	The other parent can take any remaining time	
Extended (33%)	Either parent may take up to 61 weeks	Total available leave increases to 69 weeks if each parent takes at least 8 weeks
	The other parent can take any remaining time	

Effective for births or adoption placements on and after **March 17, 2019**.
Top Up Plan and “Job Protected Leave” implications. Further details to come.

Benefit Plan Distinctions Based on Hire Date (Quebec)

Bill 176, An Act to amend the Act respecting labour standards and other legislative provisions mainly to facilitate family-work balance

- Prohibits different treatment of employees in respect of pension and other employee benefit plans based solely on employees' date of hire
- Grandfathering provisions apply to distinctions in place on June 11, 2018
- Brings an end to “two tier” pension and benefit programs unless in place on June 11, 2018
- Applies only to provincially regulated Quebec-based employees

Q&A

Questions and Answers