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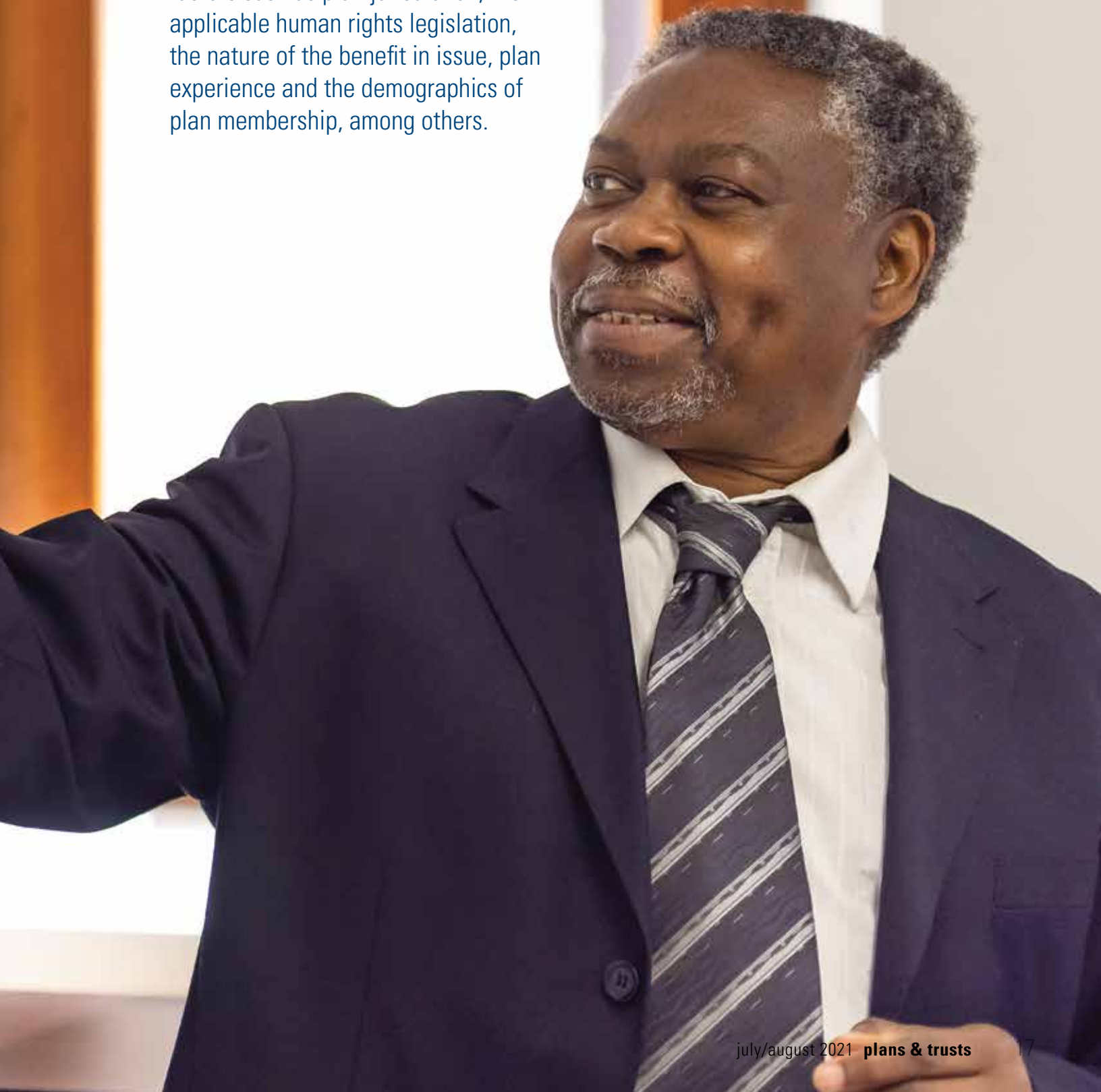
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## Evolving Law: Can Benefit Plans Contain Certain Age-Based Distinctions?

by | **Allen Furlong** and **Megan Kaneen**

Legal challenges have benefit plans questioning certain age-based distinctions, including a maximum age for receiving extended health care (EHC) or disability benefits. The outcome may depend on plan-specific factors such as plan jurisdiction, the applicable human rights legislation, the nature of the benefit in issue, plan experience and the demographics of plan membership, among others.



**R**ecent legal decisions have raised questions about whether benefit plans can contain certain age-based distinctions, including a maximum age for receiving extended health or disability benefits. These distinctions have traditionally been accepted as standard industry practice, and limits are a common term in benefit plans. Given the longstanding nature of many of these plans, it is fair to wonder: Why are these age distinctions suddenly under review if nothing in the plans has changed?

The answer is that the law evolves over time, and these recent decisions questioning age limits for benefits reflect that evolution. In particular, this questioning has been triggered by recent challenges under the Canadian Charter of Rights and Freedoms to the human rights legislation that permits benefit plans to make age-based distinctions in the first place. In this article, we will first discuss how human rights legislation relating to benefits has been subject to charter challenges, then consider in more detail the ac-

tuarial case of age limits with respect to benefit plans and, in particular, the provision of long-term disability (LTD) benefits.

## The Law

### *Age Distinctions Historically Permitted by Human Rights Legislation*

Each Canadian jurisdiction has its own human rights legislation. These human rights acts (or human rights codes, as they are frequently called) typically prohibit an organization from discriminating against a person in respect of employment or any term or condition of employment based on a prohibited ground of discrimination. The terms and conditions of an individual's employment include the benefits that the individual receives or is eligible to receive through an employer-sponsored benefit plan. The prohibited grounds of discrimination include race, religion, marital or family status, age, disability, sexual orientation, gender identity or expression, and political belief.

Applied to a benefit plan, this rule against discrimination would prohibit the plan from drawing distinctions regarding benefit entitlement on the basis of any prohibited ground of discrimination in the applicable human rights code, including age. However, in many codes, exceptions from the rule are permitted for pension and employee benefit plans. Specifically, human rights codes often permit pension and employee benefit plans to discriminate on the basis of age, marital status, sex or disability. Age distinctions in particular have historically been thought of as standard industry practice and, generally speaking, a component of a group benefit plan that enables it to be financially viable.

### *Types of Exceptions—Reasonability Requirements Versus Blanket Exceptions*

While human rights codes commonly set out exceptions to permit discrimination by pension and benefit plans, the codes are not identical across the country. In some statutes, the exception turns on a reasonability requirement that requires an analysis of the distinction that is being drawn. Put differently, some human rights acts or codes require there to be a reasonable basis upon which an age limit in a benefit plan has been imposed. However, in other human rights codes, the exception is framed as a blanket exception. This means that the age distinction in issue is permitted simply because it is made within a benefit plan or because it is made with respect to a certain type of benefit. Typically where there is a blanket exception, no deeper analysis of the reasonability of the distinction is required. For example, where age dis-

## Takeaways

- Recent legal decisions have raised questions about whether benefit plans can contain certain age-based distinctions, including a maximum age for receiving extended health care (EHC) or disability benefits.
- Each Canadian jurisdiction has its own human rights legislation that typically prohibits employers from discriminating against a person based on a prohibited ground of discrimination. However, many codes allow exceptions for pension and employee benefit plans, often on the basis of age, marital status, sex or disability.
- Life insurance, EHC and dental benefits have short-term liabilities and losses that are clearly defined and measurable. Disability benefits, on the other hand, have longer term liabilities where benefits are paid to claimants periodically over time and rely on a contractual benefit period to define the loss.
- While legal challenges are on the rise, the outcome with respect to any particular plan may depend on a number of plan-specific factors such as the jurisdiction of the plan, the applicable human rights legislation, the nature of the benefit in issue, the demographics of plan membership, the unionized or nonunionized environment, and plan experience.

crimination is permitted in a bona fide or good faith group benefit plan, an age-based limit would likely be permitted on its face without further investigation as long as the plan is a legitimate plan adopted in good faith and not for the purposes of defeating protected rights (see *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45).

## The Challenges

### Charter Challenges

It is these blanket exceptions in the various human rights codes that are starting to be challenged pursuant to the Canadian Charter of Rights and Freedoms. Specifically, claimants are arguing that the blanket exceptions in some human rights codes do not pass equality provisions of the charter.

The most discussed recent case that raises the issue is *Talos v. Grand Erie District School Board* (2018 HRTO 680). This case involved a teacher who continued to work past age 65 but was no longer entitled to health benefits. In that decision, the Ontario Human Rights Tribunal considered a provision of the Ontario Human Rights Code which, when read in conjunction with the Employment Standards Act, 2000, created a blanket exception for discrimination in a benefit plan for persons over age 65. Having considered actuarial evidence (discussed in more detail later in this article), the tribunal determined that this blanket exception was contrary to the charter and, thus, it would not apply the exception if it subsequently considered the merits of Talos' complaint (the case subsequently settled).

Similarly, in *Bentley v. Air Canada and Air Canada Pilots Association* (2019 CHRT 37), the Canadian Human Rights Tribunal considered blanket exceptions in the Canadian Human Rights Act that permitted a member's LTD benefits to cease at age 60 (when the member became entitled to an unreduced pension). The blanket exceptions in issue specifically permitted age-based differentiation in disability plans where the disability benefits payable cease at age 65 or normal pensionable age, whichever occurs first. In this instance, the tribunal found that the blanket exceptions did not violate the charter (this decision was under appeal at the time of writing).

Note that in the case of an age limit imposed in a benefit plan, a determination that a blanket human rights code exception violates the charter would mean that the age distinction in the plan could not be justified solely on the basis that

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the differentiation is permitted by that particular exception. However, that does not necessarily mean that the age distinction being drawn in the benefit plan is not a reasonable limit. To make that determination, it would be necessary to look at not only the distinction being drawn but also the provisions of the applicable human rights code, the remedy granted by the decision maker, the characteristics of the particular benefit plan and the type of benefit.

### LTD Benefits

In this sense, LTD benefits in particular have a unique context to consider. Because of that unique context (which is discussed in more detail in the next part of this article), tribunals and courts may be more inclined to accept age limits in relation to LTD plans. In *Talos*, the tribunal explicitly clarified that the decision did not address LTD insurance, and other recent decisions respecting challenges to age distinctions in benefit plans have discussed age as a significant actuarial factor with respect to LTD benefits. The next part of this article will explore further the relationship of age and cost in relation to benefit plans, the actuarial evidence provided in *Talos* and the unique case of LTD benefits.

## The Actuarial Realities

### How Do We Distinguish Based on Age in Benefits?

For benefits coverage, distinctions are made based on age for two primary purposes: pricing and eligibility.

In *pricing*, the age of the insured person is used to estimate the cost of insurance for an individual or group of plan mem-

bers. The strong relationship between the age of the insured person and the expected cost of insurance is an important principle underlying certain benefit plans, and it is explored further later. Age is also used in determining *eligibility*, most commonly by establishing a termination age for plan members and maximum ages for insured dependents.

**Age of the Insured Person and Cost of Coverage—Generally**

To assess a fair and competitive price for these benefits, underwriters collect age (and other) data to understand the expected cost of the coverage.

The relationship between age and cost is most evident in life insurance, for example. The risk of death (and ultimately a benefit payout for an insured person) increases with age. See Figure 1. Without distinctions based on age, an insurance company could not differentiate in price between a 22-year-old and an 82-year-old, though the expected cost to the insurer for the 82-year-old is nearly 100 times greater. In quoting a prospective client, it would be difficult to assess whether the proposed rate is reasonable and competitive. If carriers were to assume average rates for applicants, younger clients could be turned off by cost and forgo insurance, while older clients would be incentivized to buy more, given the significant discount. It’s difficult to imagine a system where insurers simultaneously underprice and attract older populations and overprice and deter younger populations.

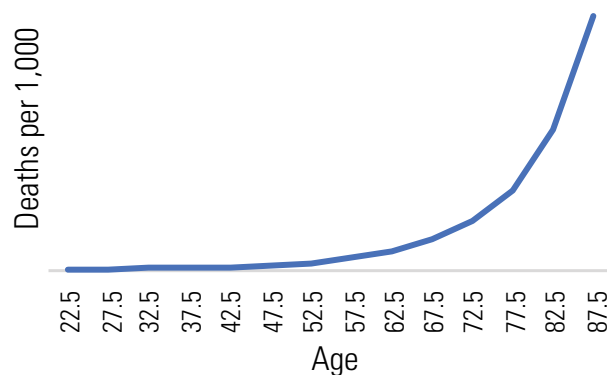
Similarly, we can also look at the relationship between age and expected cost for other benefits such as extended health care (EHC), dental and disability, though considerations will differ by benefit (and are further complicated by the integration with public programs). The *Talos* decision, for example, discussed these relationships with respect to age distinctions for life, EHC and dental benefits.

**Actuarial Considerations in Talos**

In *Talos*, actuarial evidence addressed whether (1) it is cost prohibitive to provide life insurance, EHC and dental benefits beyond age 65; and (2), if so, can these benefits be changed to make them not cost prohibitive?

While determination of whether certain coverage is cost prohibitive is an assessment made by each individual plan sponsor (taking into account the unique context of their plan), in this case the actuarial analysis that was relied upon by the tribunal demonstrated that costs decreased beyond age 65 in Ontario, on average, for EHC coverage due to in-

**FIGURE 1**  
**Mortality by Age**



Source: Statcan Table: 13-10-0710-01 (formerly CANSIM 102-0504) All Canada 2019.

tegration with public coverage. For dental, costs decreased beyond age 65, on average, due to decreased utilization. The evidence in *Talos* also highlighted that both plans were likely already covering the most expensive individuals (those approaching age 65) and, therefore, the age distinction at issue became more difficult to support in these circumstances.

Though not the same source used in *Talos*, Figure 2 supports a similar conclusion. But it also highlights that the age and cost profile will differ by province due to the integration of varying public coverage and would therefore have to be considered separately.

For life insurance, the evidence in *Talos* demonstrated that, for the same amount of coverage, cost did in fact increase with age. It was also demonstrated, in response to the second question, that the amount of life insurance coverage could be reduced for plan members beyond age 65 so that the cost of coverage is no longer prohibitive (wherever that threshold may be for a particular plan sponsor).

As noted earlier, the tribunal in *Talos*, however, expressly noted that its decision did not address LTD insurance. We turn now to consider the unique issues arising with LTD.

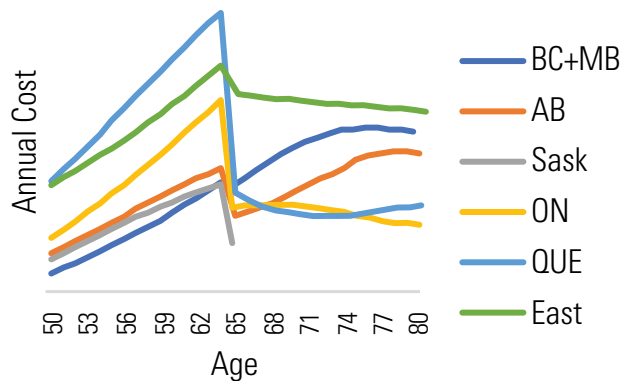
**Why Is Disability Different?**

Life insurance, EHC and dental have short-term liabilities and losses that are clearly defined and measurable. Disability



FIGURE 2

## EHC Cost by Age



Source: CIA Extended Healthcare and Dental Experience: A Report on a Post-employment Benefits Experience Study 2016 (graduated tables).

benefits, on the other hand, have longer term liabilities where benefits are paid to claimants periodically over time and rely on a contractual benefit period to define the loss. Unlike these other benefits, the cost of disability insurance depends on *both* the current age of the insured *and* the point at which benefits (once incurred) cease to be paid. While short-term disability (STD) is often limited by a maximum benefit period of weeks or months, LTD more commonly extends to a specified age (typically to age 65).

What we know from our research is that (1) higher incidence of disability and (2) lower recovery rates both contribute to a higher cost of LTD insurance for older populations. As illustrated in Figure 3, the cost of LTD increases with age.

The slight decrease in cost as an insured person approaches the termination age is *only* due to limiting the benefit period to which a claimant is eligible to receive benefits (i.e., a 62-year-old can only receive a maximum of three years of benefits).

Figure 3 also illustrates that a change to the termination age would be expected to not only extend eligibility to members at older ages but also increase the cost of insurance for covered persons *at all ages*. In other words, the cost of LTD coverage for a particular individual depends both on the age of the insured person *and* the contractual termination age. Extending LTD coverage to plan members over age 65 is likely to import increased cost for plan members under 65 as well.

In addition to the increase in cost, elimination of the termination age for LTD requires consideration of other factors.

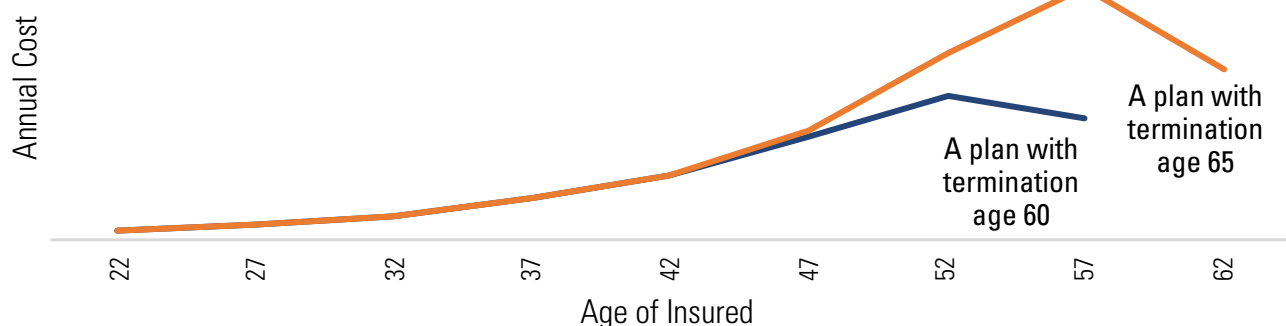
#### Are Carriers Willing to Offer This Coverage?

There are few carriers in the market actively offering LTD insurance to plan members over age 65. When they do, it's typically a limited benefit extending only to age 70. A common response to a request for this coverage is that there is insufficient credible data to accurately price such coverage, while the potential cost could be significant.

Removing termination age on disability benefits may also challenge an insurer's ability to define the risk. The *insurability* of a loss generally requires the loss to be significant, unbiased and well-defined. There's no question that the loss of employment income is significant. However, the importance of the wage replacement of LTD coverage beyond a specified termination age will be different on a case-by-case basis, depending on a variety of factors. For

FIGURE 3

## The Impact of Termination Age on the Cost of LTD



example, an insured person's retirement savings, pension plan eligibility, accrual of pension eligibility while disabled and other retirement income available may each impact the need or desire to have LTD coverage.

Disability insurance, in its current form, is designed to protect an insured person from the loss of employment income due to a qualifying disability while the individual would otherwise be working. Without a termination age, the challenge is assessing when an individual would "otherwise be working" and how benefits should interact with all other sources of income available to a claimant. Without this clarity, the risk would be difficult for an insurer to assess.

#### ***Could Such a Change Result in Some Plan Sponsors Forgoing Coverage Altogether?***

Due to the lack of data and the complexity of this change, how much would insurers charge for this coverage, and would cost cause LTD coverage to become untenable for some plan sponsors? With an increase in cost, some plan sponsors may choose to forgo LTD coverage, reduce the amount of coverage for plan members or offload some of the cost to plan members. Where the LTD benefit is member paid, many plan members may prefer not to pay the increased premium.

#### ***How Do We Address the Block of Existing Disability Claimants?***

Finally, we also have to consider multiple stakeholders in this discussion. To this point, the discussion has focused on prospective pricing for future claimants. However, there are many people already receiving disabil-

## BIOS

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ity benefits from plans funded by premiums paid in the past. Insurers may not be able to afford extending benefits for these claimants beyond their contractual termination age without additional funding.

### **Concluding Thoughts**

Over the past few years, we have seen a number of charter challenges to human rights code provisions that permit benefit plans to set a maximum age for plan members to receive certain

benefits. While these challenges are on the rise, the outcome with respect to any particular plan may depend on a number of plan-specific factors such as the jurisdiction of the plan, the applicable human rights legislation, the nature of the benefit in issue, the demographics of plan membership, the unionized or nonunionized environment, and plan experience.

As the number of Canadians working past age 65 continues to increase, challenges to termination ages for dis-

ability and other benefits will likely continue to arise. In particular, consideration of termination age in relation to LTD is challenging given the unique nature of that benefit. Designing LTD coverage without a termination age would need to take all of the above considerations and more into account. It also would require an approach that does not consider LTD insurance in isolation but that has regard to all of the other related programs and resources available to plan members ☯

