

## Member's Quarterly

Winter 2019 Edition

## Feature

**UPDATE – Footing the Bill: Employee Benefits Plans and Medical Marijuana***Medical Marijuana not required to be covered by health plan*

We had previously discussed the decision of Nova Scotia Human Rights Board of Inquiry in *Skinner v Board of Trustees of the Canadian Elevator Industry Welfare Trust Fund*, 2017 CanLII 3240 (NS HRC).

This decision raised concerns amongst employer and health plan administrators when the Nova Scotia Human Rights Board of Inquiry found that denial of coverage of medical marijuana was discriminatory.

In brief, Mr. Skinner was a unionized elevator mechanic with ThyssenKrupp when he was involved in a motor vehicle accident. As a result of the accident, he suffered both physical and mental disabilities, including chronic pain, anxiety and depression. Following unsuccessful treatment from narcotics and other conventional drugs, Skinner was prescribed medical marijuana. Initially the medical marijuana was covered by his employer's motor vehicle insurer until it reached the maximum coverage amount. Skinner then applied for coverage under both his employee benefits plan, administered by the Board of Trustees of the Canadian Elevator Industry Welfare Trust Fund (the "Trustees"), as well as workers' compensation. Mr. Skinner's multiple claims for coverage were all denied on the basis that marijuana was not approved by Health Canada under the *Food and Drugs Act*; does not have a drug identification number and is therefore not an approved drug under the plan. Mr. Skinner filed a human rights complaint alleging discrimination in the provision of services on the basis of physical and mental disabilities.

The Nova Scotia Human Rights Board of Inquiry (the "Board") found that the Trustees violated the Nova Scotia *Human Rights Act* (the "Act") when it denied Mr. Skinner coverage for medical marijuana. The Board determined that while the plan's exclusion of medical marijuana was not designed to treat certain beneficiaries differently than others, it allowed some to have coverage for medically necessary drugs but not others, which resulted in a disadvantage to Mr. Skinner based on a prohibited ground.

In light of this decision, the Trustees appealed the decision to the Nova Scotia Court of Appeal. The Trustees argued there was no *prima facie* discrimination; the Board applied the wrong test for discrimination; and that there was no connection between the denial of Mr. Skinner's coverage and his disabilities.

The Court in its decision, *Canadian Elevator Industry Welfare Trust Fund v Skinner*, 2018 NSCA 31, found that the Board failed to apply the correct test for discrimination. The Court found that the benefit under the plan was prescription drugs approved by Health Canada, rather than medically necessary prescription drugs. The Board erred in finding that the plan provided for the broader benefit of medically necessary prescription drugs and then relied on this in error to find that denial of coverage for medical marijuana due to lack of Health Canada approval was a distinction under the *Act*. Furthermore, the Court found that the Board incorrectly applied the test for discrimination outlined by the Supreme Court of Canada in *Battlefords and District Co-operative Ltd. v Gibbs*, [1996] 3 SCR 566, when it considered both the purpose and the services and in doing so, eliminated the requirement that the distinction be based on disability.



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The Court of Appeal opined that in order to find discrimination, it is necessary to find a connection between the denial of coverage and the disability. The Court concluded that the Board's finding of a distinction based on the particular needs of Mr. Skinner resulted in an analysis that failed to require a connection between his disability and the adverse effect.

The Court further concluded that the existence of a protected characteristic is not sufficient to establish the connection required to prove *prima facie* discrimination. Ultimately, the Court of Appeal concluded that the Board's decision was unreasonable.

From a practical perspective, as noted by the Court of Appeal, if the analysis employed by the Board remained, employers and plan administrators would be required to justify every denial of medication coverage and all denials of coverage would be subject to a human rights complaint. Luckily, such an assessment is not required.

Mr. Skinner also sought coverage for medical marijuana under the workers' compensation scheme. He was denied coverage by the Workers' Compensation Board and then again by the Workers' Compensation Appeals Tribunal. Mr. Skinner appealed the denial of coverage to the Nova Scotia Court of Appeal which dismissed his appeal in *Skinner v Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2018 NSCA 23.

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