

NO BENEFITS PLAN CAN COVER THE SUN, MOON AND THE STARS: SHOULD THEY COVER MEDICAL MARIJUANA?

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These days, it seems that lawyers of all stripes, including *McMillan's Medical Marijuana Industry Group*, are turning their attention to the impacts of Canada's increasingly permissive marijuana laws. While medical marijuana has been legal for some time now, the legal regime that governs its use and the workplace ramifications of that use is still developing.

In [Skinner v Board of Trustees of the Canadian Elevator Industry Welfare Trust Fund](#),^[1] ("Skinner"), a Nova Scotia Human Rights Commission Board of Inquiry ("Board") has provided some guidance on how medical marijuana may intersect with benefits coverage. The Board concluded – on an interim basis – that the trustees of a benefits plan cannot exclude coverage of prescribed medical marijuana without an evidentiary foundation for doing so.

The Basics of *Skinner*

The complainant, Mr. Skinner, was an elevator mechanic involved in a motor vehicle accident ("MVA") while working in August 2010. To treat his resulting injuries, Skinner was prescribed medical marijuana in 2012. The cost of his herbal treatment was first covered under his employer's MVA policy. However, when the MVA coverage ran out, Skinner turned to his workplace benefits plan – the Canadian Elevator Industry Welfare Trust Fund ("Trust Fund") – for coverage.

The Trust Fund denied Skinner's request for two reasons: (1) medical marijuana was not approved by Health Canada under the *Food and Drugs Act*; and, (2) the Trust Fund's Trustees determined that any medical expenses caused by a compensable workplace accident should be covered by a provincial Medicare plan and, therefore, excluded under the Trust Fund's Plan.

Skinner, in response, alleged that the Trust Fund's refusal to cover his medical marijuana was discriminatory and complained to the Board.

The Board's Findings and Analysis

In assessing Skinner's complaint, the Board first examined whether the Trust Fund's Plan was discriminatory

under Nova Scotia's *Human Rights Act*. The Board found that excluding coverage of medical marijuana had the adverse effect of depriving Skinner of a medically necessary drug, even though the Plan covered other special requests for medically necessary drugs for other beneficiaries. As such, the Plan was *prima facie* discriminatory, albeit unintentionally and indirectly.

However, the Board made clear that while failing to cover a particular drug under a benefits plan may be discriminatory, the inquiry does not end there:

“While the board accepts that benefits plans cannot cover the sun, moon, and the stars, consideration of whether non-coverage of a particular drug, for a particular person, amounts to discrimination, does not mean that a benefits plan will immediately be required to cover all drugs prescribed to a person with a disability. Such reasoning is simplistic and ignores the complexity of human rights jurisprudence.”^[2]

Once *prima facie* discrimination was established (as Skinner had done), the Trust Fund could still provide a non-discriminatory justification for the Plan's coverage and demonstrate that doing otherwise would amount to undue hardship – as is required in most cases of alleged discrimination.

In *Skinner*, the Board found that the Plan's failure to cover medical marijuana was without justification. The Trust Fund could not lead evidence to justify why, had medical marijuana been covered, it would face undue hardship. For example, there was no evidence that premiums would go up or that the Plan would not be financial viable if medical marijuana was covered. Moreover, the Trust Fund lacked evidence that Skinner's medical marijuana could be covered under a provincial medical plan, as alleged.

Finally, in response to the Trust Fund's first line of argument – that medical marijuana was not approved under the *Food and Drugs Act*, the Board discussed the differences between public benefit programs and private workplace benefits. It wrote that public plans are not necessarily set up to maximize benefits since government decision-making must account for a wide array of factors. On the other hand, plans such as that operated by the Trust Fund are designed to provide the maximum level of benefits to employees that is possible while maintaining economic efficiency and sustainability.

Takeaways for Employers and Benefit Plan Administrators

While *Skinner* is only an interim decision and is subject to appeal, it is sound evidence that private benefits providers and administrators will need to come to grips with increasing use of medical marijuana. The Board made clear that private benefits plans will not be expected to cover everything and that there may be a sound rationale for excluding medical marijuana coverage. However, to exclude coverage without evidence of the need to do so, may risk allegations of discrimination. We anticipate that employers and benefit plan administrators will see increasing challenges to their decision about coverage of medical marijuana costs.

[1] *Skinner v Board of Trustees of the Canadian Elevator Industry Welfare Trust Fund*, 2017 CanLII 3240 (NS HRC)[ps2id id='1' target='']

[2] *Ibid*, para 142.[ps2id id='2' target='']

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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