Court of Appeal Overturns Ruling That Denying Coverage

June 04, 2018

As reported in our March 2017 bulletin, a Board of Inquiry of the Nova Scotia Human Rights Commission (the "Board") had concluded that a union insurance fund had discriminated against a disabled claimant when it denied his claim for medical cannabis. In a decision dated April 12, 2018, the Nova Scotia Court of Appeal (the "Court") overturned the Board's decision. The Court decided that the Board had erred in its analysis of whether non-coverage of prescribed medical cannabis constituted discrimination under the Nova Scotia *Human Rights Act*.

Background

The respondent in the appeal was Gordon "Wayne" Skinner. While working as an elevator mechanic, Mr. Skinner had been injured in a motor vehicle collision and was unable to return to work. The physical and mental injuries he suffered were treated with conventional drugs for several years; however, this was ultimately not effective and caused unpleasant side effects. For the following two years, Mr. Skinner lawfully obtained a prescription for medical cannabis and received coverage under his employer's motor vehicle insurance. When he reached the maximum coverage under such insurance plan, he sought coverage under the insurance plan provided to unionized employees in the elevator sector (the "Welfare Plan").

The Trustees of the Welfare Plan denied his medical cannabis claim under the terms of plan documents (including the fact that cannabis is not a drug that has been approved by Health Canada), and declined to exercise discretion to approve the claim. Mr. Skinner appealed to the Trustees several times and provided extensive medical documentation relating to his claim. He then filed a complaint with the Nova Scotia Human Rights Commission alleging discrimination on the basis of physical and mental disability. The Commission then referred the complaint to a hearing, in which the Board concluded that denying benefit coverage amounted to indirect discrimination. The legal analysis shifted to whether the Trustees could establish a defence of undue hardship. The Trustees led evidence that Mr. Skinner's claim would cost $60 per day, but the Board concluded that there was no evidence of undue hardship. Mr. Skinner was awarded coverage on an interim basis, as well as reimbursement for any lawfully obtained medical cannabis.

Court of Appeal Decision

In its decision, the Court asked, "Is it discriminatory for a private drug plan to limit reimbursement for the cost of drugs to only those approved by Health Canada?" As the Court noted, the case was not about whether it is legal to prescribe cannabis or whether Mr. Skinner needed cannabis; rather, the issue in question was whether denying coverage was a breach of the Nova Scotia *Human Rights Act*. The Trustees and the intervenors who participated in the appeal argued that the Board's interpretation would require benefit providers to undertake an individual assessment of the medical needs of every claimant, irrespective of the benefit plan coverage.

The Court determined that the Board did not properly apply the test for discrimination set out in the Supreme Court of Canada decision in *Moore*.1The Board had an overly broad interpretation of the purpose of the Welfare Plan, stating that it was to provide a "medically necessary prescription drug" regardless of whether it has Health Canada's approval, and regardless of the fact that the Welfare Plan excludes non-approved drugs. The Board effectively transformed the Welfare Plan from one which provides coverage for prescription drugs approved by Health Canada, to prescription drugs *personally beneficial* to each claimant.

The Court concluded that the fact that the Trustees knew of Mr. Skinner's personal circumstances was not sufficient to establish that disability was a "factor," as required to ground a case of discrimination. The Welfare Plan excluded any drug not approved by Health Canada (including medical cannabis) and therefore the exclusion was not "based on" Mr. Skinner's disability. The adverse effect on Mr. Skinner's arose because the drugs that are covered by the Plan were not effective for him personally.

Ultimately, the Court noted that the Trustees had an obligation to determine what benefits would be available and they chose Health Canada's approval as a limit for prescription drug benefits. If Mr. Skinner's argument that this choice affected him personally was accepted, it would mean that every under-inclusive benefits plan would result in discrimination — human rights boards and tribunals would become arbiters of private benefit plans, and benefit providers would have to conduct a medical assessment of each claimant, regardless of the limits on coverage.

1 *Moore v. British Columbia (Education)*, 2012 SCC 61 ("*Moore*").

By

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