The Legalization of Marijuana and Its Effect on Health and Welfare Plans

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GOAL

- October 17, 2018
  - Recreational Marijuana will become legal in Canada
  - The announcement has invited questions, fears and a considerable amount of litigation over coverage of medical marijuana by health and welfare plans

- Provide trustees of Canadian health and welfare plans with the tools to make and implement an informed decision about coverage of medical marijuana within the landscape of legalized recreational marijuana.
OVERVIEW

1. Canadian Legislative Schemes Governing Marijuana
   1. Medical Marijuana - Access to Cannabis for Medical Purposes Regulations
   2. Recreational Marijuana - Federal Legislation The Cannabis Act and Provincial Regulation

2. Canadian Jurisprudence on Denial of Coverage for Medical Marijuana

3. Cost Implications of Legalization of Recreational Marijuana on Health and Welfare Plans

4. Policy Considerations when it Comes to Coverage of Medical Marijuana by a Health and Welfare Plan

5. Implementing your Plan’s Decision Concerning Coverage of Medical Marijuana

6. Questions
CANADIAN LEGISLATIVE SCHEMES GOVERNING MARIJUANA
THE LAW GOVERNING MEDICAL MARIJUANA IN CANADA

Access to Cannabis for Medical Purposes Regulations ("ACMPR")

- Federal regulation that governs access to medical marijuana in Canada
- Enacted in 2016
- However, medical marijuana has been legal in Canada since 1999
- Will remain in place and continue to operate with legislative scheme for recreational marijuana
THE LAW GOVERNING MEDICAL MARIJUANA IN CANADA

- **Restrictions on production and distribution**
  - Limited to “Licensees” who have obtained licenses through health Canada
  - Commercial Producers and Distributers
  - Individual Use Producers
- **Restrictions on form of production**
- **Restrictions on who can “authorize” access to medical marijuana**
  - “Healthcare Practioners”
  - “Authorized” not “Prescribed” - Not a Drug - Mandatory Authorization
- **Requirements for “authorizations”**
  - Patient and healthcare practitioner details
  - Amount Prescribed
  - Duration of Prescription - < 1 Year
THE LAW GOVERNING MEDICAL MARIJUANA IN CANADA

Some things remain the same:

- Whatever steps your health and welfare plan chooses to take in response to legalization of recreational marijuana, it is eminently reasonable for any health and welfare plan to restrict coverage of marijuana to that which is obtained in accordance with Canada’s medical marijuana scheme.
THE LAW GOVERNING MEDICAL MARIJUANA IN CANADA

LEGAL ANSWER

● Legalization of recreational marijuana ought not to disrupt medical marijuana scheme

PRACTICAL ANSWER

● Legalization may have practical impacts on the medical marijuana scheme in terms of demand, social mores, production, costs and the creation of other legislation
THE LAW GOVERNING RECREATIONAL MARIJUANA IN CANADA

- **The Cannabis Act - Bill C-45**
  - Key piece of federal legislation
  - Royal Assent on June 21, 2018
  - Effective on October 17, 2018

- **Amendments to the Criminal Code**
  - Bill C-46
  - Impairment
  - Roadside Testing
  - Fines and Penalties

- **Provincial and Territorial Regulation**
RECREATIONAL MARIJUANA - THE CANNABIS ACT

OBJECTIVES

… to prevent young persons from accessing cannabis, to protect public health and public safety by establishing strict product safety and product quality requirements and to deter criminal activity by imposing serious criminal penalties for those operating outside the legal framework. The Act is also intended to reduce the burden on the criminal justice system in relation to cannabis.

(“Summary” Summary, An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts, Assented to June 21, 2018)
RECREATIONAL MARIJUANA - THE CANNABIS ACT

- Decriminalization of possession of less than 30 grams
- Prohibition of sale and distribution to under 18
- Limits on advertising
- Amendments to the Criminal Code
- Regulation of production and distribution
RECREATIONAL MARIJUANA - *THE CANNABIS ACT*

- Licensing application process to produce and distribute recreational cannabis
- Applications made under *The Cannabis Act* commencing October 17, 2018
- Existing “License Holders” under the medical marijuana regime *ACMPR* are automatically licensed under *The Cannabis Act*
RECREATIONAL MARIJUANA - PROVINCIAL AND TERRITORIAL REGULATION

- Pricing
- Distribution
- Taxation

Provincially and territorially regulated, and unique across the provinces and territories.

Details pending.
STATE OF THE LAW IN CANADA

DISCRIMINATION, HEALTH AND WELFARE PLANS AND MEDICAL MARIJUANA
HUMAN RIGHTS CLAIMS FOR MEDICAL MARIJUANA

- Uncertainties of effect of decriminalization of recreational marijuana on medical marijuana scheme
  - Easier access outside of medical scheme
  - Decreased stigma
  - Cost of recreational marijuana
  - Impact of cost of recreational marijuana on medical scheme
  - Requests for reimbursement from health and welfare plans
HUMAN RIGHTS LEGISLATION IN CANADA

- Provincially Legislated
- Similarity in Structure - Prohibit “discrimination” in respect of protected grounds under specified heads.
  - Prohibit discrimination in the provision of services on basis of disability
- Differences in definition of discrimination, and specific prohibitions
HUMAN RIGHTS CLAIMS FOR MEDICAL MARIJUANA


Services
1 Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

Constructive discrimination
11 (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member,
HUMAN RIGHTS CLAIMS FOR MEDICAL MARIJUANA


Discrimination in accommodation, service and facility

8  (1) A person must not, without a bona fide and reasonable justification,

   (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or

   (b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or class of persons.
HUMAN RIGHTS CLAIMS FOR MEDICAL MARIJUANA

Nova Scotia

Meaning of discrimination
4 For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

Prohibition of discrimination
5 (1) No person shall in respect of (a) the provision of or access to services or facilities; … discriminate against an individual or class of individuals on account of:
HUMAN RIGHTS CLAIMS FOR MEDICAL MARIJUANA

Alberta – Alberta Human Rights Act, RSA 2000, c A-25.5

Discrimination re goods, services, accommodation, facilities

4 No person shall

(a) deny to any person or class of persons any goods, services, accommodation or facilities that are customarily available to the public, or

(b) discriminate against any person or class of persons with respect to any goods, services, accommodation or facilities that are customarily available to the public,

because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or class of persons or of any other person or class of persons.
HUMAN RIGHTS CLAIMS FOR MEDICAL MARIJUANA

Manitoba – Human Rights Code, CCSM, c H175

"Discrimination" defined
9(1) In this Code, "discrimination" means

(a) differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit; or

(b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2); or

(c) differential treatment of an individual or group on the basis of the individual's or group's actual or presumed association with another individual or group whose identity or membership is determined by any characteristic referred to in subsection (2); or

(d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).
HUMAN RIGHTS CLAIMS FOR MEDICAL MARIJUANA

Manitoba, continued

Applicable characteristics

9(2) The applicable characteristics for the purposes of clauses (1)(b) to (d) are
(a) ancestry, including colour and perceived race;
(b) nationality or national origin;
(c) ethnic background or origin;
(d) religion or creed, or religious belief, religious association or religious activity;
(e) age;
(f) sex, including sex-determined characteristics or circumstances, such as pregnancy, the possibility of pregnancy, or circumstances related to pregnancy;
(g) gender identity;
(h) sexual orientation;
(i) marital or family status;
(j) source of income;
(k) political belief, political association or political activity;
(l) physical or mental disability or related characteristics or circumstances, including reliance on a service animal, a wheelchair, or any other remedial appliance or device;
(m) social disadvantage
HUMAN RIGHTS CLAIMS FOR MEDICAL MARIJUANA

Manitoba, continued

Discrimination In service, accommodation, etc.

13(1) No person shall discriminate with respect to any service, accommodation, facility, good, right, licence, benefit, program or privilege available or accessible to the public or to a section of the public, unless bona fide and reasonable cause exists for the discrimination.
STATE OF THE LAW IN CANADA: COVERAGE FOR MEDICAL MARIJUANA
CASE LAW UPDATE - COVERAGE FOR MEDICAL MARIJUANA

*Skinner 2018 NSCA 31*

- Nova Scotia Court of Appeal Decision
- Overturned decision of Human Rights Board of Inquiry.
- Board found that benefit plan administrator’s decision to deny coverage for plan member’s medical marijuana constituted discrimination on the basis of physical and mental disability and contrary to the Nova Scotia *Human Rights Act*.
- Court of Appeal overturned Board decision on the basis that the Board had applied the wrong test for discrimination.
CASE LAW UPDATE - COVERAGE FOR MEDICAL MARIJUANA

*Skinner* - Human Rights Board of Inquiry Decision

- Mr. Skinner had developed physical and mental disabilities as a result of a workplace injury.
- Conventional treatments for his disabilities were ineffective.
- He began using medical marijuana and sought reimbursement through his health and welfare plan.
- He was denied coverage.
- He filed a claim alleging that the benefit plan had discriminated against him based on his mental and physical disability.
- Board agreed with Mr. Skinner.
CASE LAW UPDATE - COVERAGE FOR MEDICAL MARIJUANA

Skinner 2018 NSCA 31

- Overturning the decision, the Court of Appeal reasoned that the Board had misapplied the test for discrimination by considering adverse impact in relation to Mr. Skinner’s individual circumstances, rather than in relation to a protected group.

- Reasons
  - Court of Appeal recognized that all health and welfare plans will necessarily make decisions about limiting reimbursible benefits.
  - Reasonable limits on reimbursible benefits are not, on their face, discriminatory.
  - Recognized that a limitation on drugs approved by Health Canada was a reasonable limit.
CASE LAW UPDATE - COVERAGE FOR MEDICAL MARIJUANA

*Skinner*, continued

- Court of Appeal expressly rejected the notion that human rights legislation required health and welfare plans to consider individual circumstances of each claimant prior to rejecting a claim for reimbursement.
CASE LAW UPDATE - COVERAGE FOR MEDICAL MARIJUANA

*Lawrence* 2018 HRTO 743

- Ontario Human Rights Tribunal summarily dismissed a complaint which alleged that a denial of coverage for marijuana by the Ontario Drug Benefit (“ODB”) Program was discriminatory.

- Complainant argued that as her medical condition made swallowing difficult, the denial of coverage for medical marijuana in bud form constituted “adverse effect discrimination”.
CASE LAW UPDATE - COVERAGE FOR MEDICAL MARIJUANA

*Lawrence*, continued

The Tribunal’s reasons:

[27] ... The Tribunal has already found that the respondent’s ODB program’s failure to cover medical marijuana is not for a *Code*-related reason. In her particular case, she is unable to point to evidence of differential treatment on the basis of her disability, as no one, even if they are able to swallow pills without difficulty, receives coverage for medical marijuana through the respondent’s ODB program. The applicant has not pointed to evidence which would indicate otherwise. Without establishing differential treatment, her Application has no reasonable prospect of success.
CASE LAW UPDATE - COVERAGE FOR MEDICAL MARIJUANA

Hamilton Professional Fire Fighters’ Association, 2016 CanLII 16885 (ONLA)

- Ontario labour arbitrator dismissed a grievance alleging that a denial of a claim for reimbursement of benefits for medical marijuana was contrary to the language of the health and welfare plan.
- The plan provided coverage for “a drug purchased on the prescription of a medical doctor”.
- The union argued that as the process for a physician to authorize a patient to obtain medical marijuana mirrored that to prescribe any other drug, the plan language covered medical marijuana.
- The employer argued that as medical marijuana did not have a drug identification number (“DIN”) it was not a drug, and was not covered by the plan language.
CASE LAW UPDATE - COVERAGE FOR MEDICAL MARIJUANA

*Hamilton Professional Fire Fighters’ Association*, continued

[T]he federal government has promulgated a regulatory schematic that provides for the legal sale of marijuana to Canadians for medical purposes. That regulatory framework is overseen by Health Canada and has certain aspects (i.e. a “medical document”) that effectively mirror the system associated with the regulation of the sale of prescription drugs to Canadians. At the end of the day, however, that regulatory framework is different than the framework associated with the drug approval process under the FDR. And, it is my view that a fair and straightforward reading of the relevant provisions of Schedule F suggests that the parties only intended that the extended health plan benefit coverage would apply to drugs that have been approved pursuant to the FDR.

Accordingly, in accordance with the express wording of the collective agreement, the particular claim of the grievor in the case at hand failed to satisfy the mandatory requirement of having a DIN; and therefore, Manulife and the Employer were justified in denying the claim.
CASE LAW UPDATE - COVERAGE FOR MEDICAL MARIJUANA

The Upshot

● Canada’s health and welfare plans have the right to decide which benefits are reimbursible.

● Subject to actual discrimination or other violations of Canadian law.
  ✅ Discrimination affects a protected group based on group characteristics.
  ✅ Not discrimination to deny an individual the benefit that best suits that individual.

● Reasoning is the same for medical marijuana. No special treatment.

● Canadian health and welfare plans have a choice to make about whether or not to cover medical marijuana.
IMPLEMENTING YOUR PLAN’S DECISION ABOUT COVERAGE OF MEDICAL MARIJUANA
IMPLEMENTING YOUR PLAN’S DECISION

Guidance from Canadian case law regarding issues to consider in implementation of your plan’s decision to cover medical marijuana

- Drug Identification Numbers ("DINs") - Exclude
- "Medically Necessary" - Exclude
- "Reasonable Treatment" - Exclude
- Caps on Coverage - Limit
IMPLEMENTING YOUR PLAN’S DECISION

Drug Identification Number ("DIN")

- Canada’s Food and Drug Act R.S.C., 1985, c. F-27) and Food and Drug Regulations (C.R.C., c. 870).

- Extensive regulatory oversight designed to govern safety, consistency, effectiveness, advertising, labelling and quality control of all “drugs”.

- Require a DIN to sell a “drug” in Canada.

- Obtaining a DIN requires evidence of effectiveness.
IMPLEMENTING YOUR PLAN’S DECISION

Drug Identification Number (“DIN”)

- *Hamilton Professional Fire Fighters’ Association* - Arbitrator upheld ability of plan to exclude coverage of medical marijuana by requiring a DIN for all drugs.

- *CIBC v United Steelworkers*, 2017 CanLII 76019 (ON LA) - insured challenged insurer’s decision to deny reimbursement for medical marijuana on the basis that had no DIN. Same argument as *Hamilton*. Dismissed on other basis.

- No signs of stopping.
IMPLEMENTING YOUR PLAN’S DECISION

“Medically Necessary”

- Express exclusion for certain treatments.
- Multiple interpretations:
  - Medical consensus
  - Reason for prescription
- In *Skinner* the Board rejected the medical consensus view in favour of the reasons for the prescription view, finding that a prescription for pain was “medically necessary”. Decision was, in part, based on the fact that the plan language included examples of “medically necessary”.
- Complex and may require further clarification within plan language.
IMPLEMENTING YOUR PLAN’S DECISION

“Reasonable Treatment”

- Express exclusion for certain treatments.
- Whether treatment is a “reasonable treatment” for the particular symptoms. Multiple ways to approach this question:
  - Empirical evidence
  - Adverse effects
  - Interactions with the claimant’s other medical conditions
- Potentially broad exclusion. May require restriction with plan language.
- May invite inquiry into claimant’s medical information.
- Privacy issues.
IMPLEMENTING YOUR PLAN’S DECISION

Caps on Coverage

- Limit financial impact of medical marijuana on the plan.
- Cost of medical marijuana from ACMPR licensed producers varies significantly ($5.00/gram - $15.00/gram).
- ACMPR limits dose to 5 grams/day. Average medical document, 3 grams/day.
- Rough monthly cost/claimant = $900.00
- Annual caps - Maximum annual caps for marijuana.
- Dosage caps - Maximum amount covered/medical document.
IMPLEMENTING YOUR PLAN’S DECISION

Excluding Medical Marijuana Coverage
- Narrow language
  - “Drug” defined based on DIN
  - “Medically Necessary” based on medical consensus
  - “Reasonable Treatment” based on empirical evidence

Limited Coverage
- Clear caps for medical marijuana

Full Coverage
- The unknown effects of legalization of recreational marijuana on requests for coverage of medical marijuana.
POLICY CONSIDERATIONS AND FUTURE DIRECTIONS
POLICY CONSIDERATIONS

- Other Canadian Plans
- Opioid crisis
- Medical opinions
- Costs
- Legalization and DINs
POLICY CONSIDERATIONS

Coverage of Medical Marijuana by Health and Welfare Plans

- **Sun Life**
  - March 2018
  - Coverage limited to specific conditions and symptoms

- **Loblaws/Shoppers Drug Mart**
  - April 2017
  - Annual Cap of $1,500.00

- **LIUNA Local 625**
  - May 2017
  - Annual Cap of $3,000.00
POLICY CONSIDERATIONS

Opioid Crisis

- Impact on plan members – Marijuana is less addictive and less harmful to plan members than opiates.
- Encouraging return to work.
- Both opioids and marijuana are routinely prescribed (or authorized) for pain management.
POLICY CONSIDERATIONS

Medical Opinions

● Clear definition of “medically necessary” within the meaning of the plan is necessary
  ✗ Purpose for prescription or medical consensus?

● Privacy considerations relating to condition(s) marijuana is intended to treat

● Is medical marijuana is a reasonable treatment (i.e. not a trial or experiment, is supported by empirical evidence)?

● Look behind “passive prescriptions”, i.e. situations where insured’s request for medical marijuana is based solely on self-report that it provides symptom relief
POLICY CONSIDERATIONS

Costs

- Cost is currently an issue for individuals
- Medical marijuana is more costly than opiates, but this could change as more licensed producers enter the market
  - This will depend in part on who can sell and distribute medical marijuana
- Cost controlling measures:
  - Coverage caps
  - Dosage caps
- The future cost remains to be seen
POLICY CONSIDERATIONS

Legalization and DINs

- medical marijuana does not have a DIN. However, legalization of recreational marijuana could lead to the creation of a DIN for marijuana, impacting exclusions in certain benefits plans

- Defined as Drug vs. Medication

- Express exclusion in plans?
QUESTIONS