
MEDICAL CANNABIS EXCLUSION FROM BENEFIT PLAN NOT DISCRIMINATORY

*By Barry W. Kwasniewski**

A. INTRODUCTION

On October 26, 2018, the Human Rights Tribunal of Ontario (the “Tribunal”), in *Rivard v Essex (County)*,¹ dismissed an application alleging that a denial of coverage under an employer’s benefit plan for medical cannabis expenses was a breach of the Ontario *Human Rights Code* (“Code”)² on grounds of discrimination on the basis of disability. In finding that the application should be dismissed on the basis that there was no reasonable prospect of success, the Tribunal clarified that the denial of coverage must be connected to the disability in order to potentially constitute a violation of protected rights under the Code. As the denial of medical cannabis coverage was not due to the applicant’s disability but rather the terms of the benefit plan, such denial was not discriminatory under the Code.

B. BACKGROUND

The applicant, Rebecca Rivard, was a dependant of an employee of the Corporation of the County of Essex (“Essex”) and had made a claim under Essex’s health benefit plan for the cost of fulfilling a prescription of medical cannabis. This coverage was denied by Green Shield Canada Inc (“Green Shield”), the administrator and adjudicator of the benefit plan for Essex. Accordingly, the applicant alleged that Green Shield had discriminated against her in the provision of services on grounds of disability, which is a protected ground within the Code. The Tribunal, in its decision, added Essex as a respondent because

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¹ *Rivard v Essex (County)*, 2018 HRTO 1535.

² *Human Rights Code* (Ontario), RSO 1990, c H.19.

Essex, as the plan sponsor, had a service relationship with the applicant in her position as a dependent of an employee of Essex.

C. ANALYSIS AND DECISION

The Tribunal found that there was no reasonable prospect of success regarding the applicant's claim against both Green Shield and Essex. The Tribunal reasoned that Green Shield could not be held liable for potentially discriminatory terms of the benefit plan because the terms of the benefit plan were wholly decided by Essex while Green Shield, by contract, was merely the administrator and adjudicator of the plan. Whereas the Tribunal commented that the applicant could have alleged that Green Shield had breached the Code with respect to its administration of the benefit plan, since such an allegation had not been made, the application against Green Shield was dismissed.

In dismissing the application against Essex, the Tribunal clarified that in order for the denial of coverage to amount to a breach of the Code, there must be a link between the decision to deny the applicant's claim for benefits and her disability. Essex submitted that the only reason that the applicant's claim for coverage had been rejected was that medical cannabis did not meet the qualifying criteria to be eligible for reimbursement, which was that the drug was required to have a Drug Identification Number ("DIN"). Because medical cannabis does not have a DIN, which must be assigned by Health Canada, the applicant's claim for coverage was rejected. The Tribunal also agreed with Essex's submission that the applicant had no reasonable evidence that would link the denial of the claim for coverage to the applicant's disability, and as such the application had no reasonable prospect of success.

The applicant additionally argued that the denial of coverage was a breach of Code because (1) other insurance companies have added medical cannabis to their benefit plans, and (2) Essex was biased against cannabis use. The Tribunal rejected both arguments for the same reason that these two allegations failed to connect the denial of coverage with her disability, and therefore would not constitute a breach of the Code.

D. EXTENDED HEALTH CARE BENEFIT INSURANCE PLANS: MEDICAL CANNABIS COVERAGE

Not all group health insurance plans provide coverage for medical cannabis, although over the past year several large insurance companies have started to include coverage for medical cannabis in their extended health care benefit plans. For example, Sun Life Financial and Green Shield Canada Inc. began providing coverage over medical cannabis in March 2018.³ Also, in September 2018, Manulife implemented a medical cannabis program to members of participating plans that would provide coverage for services regarding the referral for and distribution of medical cannabis as well as case management of plan members who are found to be eligible for the drug treatment.⁴

The conditions of coverage may vary depending on the insurer. For instance, Green Shield currently offers coverage for medical cannabis to certain plan members who have been prescribed the drug for one of three medical conditions: chronic neuropathic pain; spasticity due to multiple sclerosis; and nausea and vomiting due to cancer chemotherapy.⁵ Meanwhile Sun Life Financial only provides coverage for medical cannabis that is used in specific instances of cancer, multiple sclerosis, rheumatoid arthritis, HIV/AIDS, and individuals requiring palliative care.⁶ Other terms such as maximum monetary limit of reimbursement and the requirement to purchase the medical cannabis from a Health Canada licensed producer may apply to the coverage for medical cannabis.⁷

E. CONCLUSION

Depending on the benefits provider, charities and not-for-profits that do not currently cover medical cannabis as a part of their employee benefit plans may have discretion in determining whether they would like to offer such coverage. An increasing number of insurance companies are including medical cannabis

³ See Sun Life Financial, “Medical Cannabis – Announcing optional coverage available starting March 1, 2018” (2018) at 1, online (pdf): *Sun Life Assurance Company of Canada* <https://www.sunlife.ca/static/canada/Sponsor/About%20Group%20Benefits/Focus%20Update/2018/747/747_Focus.pdf> [Sun Life] and Green Shield Canada Inc, “More on the New Medical Cannabis (Marijuana) Coverage Option – Now Available” (2018), online (pdf): *Green Shield Canada* <[https://assets.greenshield.ca/greenshield/GSC%20Stories%20\(BLOG\)/the%20Advantage/2018/english/The%20advantage_March%202018_EN.pdf](https://assets.greenshield.ca/greenshield/GSC%20Stories%20(BLOG)/the%20Advantage/2018/english/The%20advantage_March%202018_EN.pdf)> [Green Shield].

⁴ Manulife, “Manulife’s medical marijuana program – FAQ” (2018) at 4, online (pdf): *Manulife* <http://events.snwebcastcenter.com/manulife/GBRS/Prod/Media/Mailing/PDF/MM_FAQ.pdf>.

⁵ Green Shield, *supra* note 3 at 1.

⁶ Sun Life, *supra* note 3 at 2.

⁷ For example, see Green Shield, *supra* note 3 at 1; Manulife, *supra* note 4 at 5.

as a part of their benefit plans, subject to certain restrictions. Charities and not-for-profits considering adding medical cannabis to their employee benefit plans would need to engage with their insurance administrators to determine whether such a plan is available, as well as other details. However it is important that charities and not-for-profits do not confuse their freedom to decide on the scope of a benefit plan coverage with their legal duties as employers under the Code to reasonably accommodate an employee who, for reasons of his or her disability, is prescribed medical cannabis. Whether or not a charity or not-for-profit chooses to provide coverage for medical cannabis under its employee benefit plan, the employer will be required to provide reasonable accommodation in accordance with legal obligations under the Code.⁸



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⁸ For more information regarding issues of cannabis in the workplace and the duty to accommodate, see Barry W. Kwasniewski, *Charity & NFP Law Bulletin* No. 431, “Managing Cannabis in the Workplace in Ontario” (23 October 2018), online: <http://www.carters.ca/pub/bulletin/charity/2018/chylb431.pdf>.