NOVA SCOTIA COURT OF APPEAL

Citation: *Canadian Elevator Industry Welfare Trust Fund v. Skinner*, 2018 NSCA 31

Date: 20180412
Docket: CA 460851
Registry: Halifax

Between:

Board of Trustees of the Canadian Elevator Industry Welfare Trust Fund

Appellant

v.

Gordon "Wayne" Skinner, the Nova Scotia Human Rights Commission, Benjamin Perryman and the Attorney General of Nova Scotia

Respondents

-and-

The Nova Scotia Private Sector Employers Roundtable, the National ME/FM Action Network and Twelve (12) Health and Welfare Trust Funds for Unionized Employees in Nova Scotia

Intervenors

Judge:	The Honourable Justice Peter M.S. Bryson
Appeal Heard:	October 2, 2017, in Halifax, Nova Scotia
Subject:	Human rights. Nova Scotia Human Rights Act. Pension Plans. Administrative law.
Summary:	Mr. Skinner was a member of the International Union of Elevator Constructors which made him eligible for health benefits under a Welfare Plan administered by the appellant Trustees. Mr. Skinner experienced chronic pain following a motor vehicle accident. Narcotic and anti-depressants were not effective for him and had negative side effects. His physician prescribed medical marijuana which was effective in managing Mr. Skinner's pain. His request for reimbursement of medical marijuana expenses was rejected

by the Trustees because the Welfare Plan did not cover prescription drugs not approved by Health Canada. Medical marijuana had not been approved. Mr. Skinner brought a human rights complaint based on his disability. The Human Rights Board of Inquiry found Mr. Skinner had been discriminated against. The Trustees appealed.

Issues: (1) Did the Board err in law in the test it applied for *prima facie* discrimination?

(2) Did the Board err in law when finding that the alleged discrimination was "based on" Mr. Skinner's disability?

Result: Appeal allowed. The Board erred in its application of the three-part *prima facie* discrimination test described by the Supreme Court in *Moore v. British Columbia (Education)*, 2012 SCC 61. Specifically, the Board erred in finding that non-coverage of medical marijuana discriminated against Mr. Skinner "based on" his disability. The Welfare Plan did not cover medical marijuana because it was not approved by Health Canada. All such Plans necessarily have limited benefits for those with a disability. It could not be automatically discriminatory for the Trustees to impose reasonable limits on reimbursable benefits. Mr. Skinner has access to all the medications available to any other eligible plan member. Mr. Skinner experienced an adverse impact because those medications were not effective for him personally—not because he fell within a protected group described in the *Human Rights Act*.

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Intervenors

Judges:	Beveridge, Farrar and Bryson, JJ.A.
Appeal Heard:	October 2, 2017, in Halifax, Nova Scotia
Held:	Appeal allowed without costs, per reasons for judgment of Bryson, J.A.; Beveridge and Farrar, JJ.A. concurring
Counsel:	Paul Cavalluzzo and Christopher Perri, for the appellant Hugh Scher, for the respondent, Mr. Skinner Kendrick Douglas and Kymberly Franklin for the respondent, Nova Scotia Human Rights Commission Peter McLellan, Q.C., Rick Dunlop and Richard Jordan, for the intervenor, Nova Scotia Private Sector Employers Roundtable

Ronald A. Pink, Q.C. and Jill Houlihan for the intervenors, Trust Funds (Atlantic Regional Council Carpenters Health and Wellness Trust; International Association of Heat & Frost Insulators, Local 116 Health and Welfare Trust; International Brotherhood of Electrical Workers, Local 625 Health and Wellness Trust; International Union of Operating Engineers, Locals 721, 902 and 904 Health and Wellness Trust; Labourers Atlantic Region District Council Health and Wellness Trust; United Association of Journeymen Plumbers & Pipefitters, Local 56 Health and Wellness Trust; United Association of Journeymen Plumbers & Pipefitters, Local 244 Health and Welfare Trust; United Association of Journeymen Plumbers & Pipefitters, Local 682 Health and Wellness Trust; Sheet Metal Workers' International Association, Local 56 Health and Wellness Trust; Sheet Metal Workers' International Association, Local 409 Health and Wellness Trust; Halifax Regional Police Association Medical Plan Trust Fund; and Halifax Professional Firefighters Benefit Trust)

John A. Campion and Stephanie Clark for the intervenor, National ME/FM Action Network (Network)

Benjamin Perryman, Board of Inquiry Chair, not participating

Edward Gores, Q.C., for the Attorney General of Nova Scotia, not participating

Reasons for judgment:

Introduction

[1] Is it discriminatory for a private drug plan to limit reimbursement for the cost of drugs to only those approved by Health Canada? Mr. Skinner claims it is, and a Human Rights Board of Inquiry agreed with him. The Board decided that non-coverage by the appellant Trustees of medical marijuana, prescribed for Mr. Skinner by his physician, constituted discrimination under the Nova Scotia *Human Rights Act*.

[2] The Welfare Plan's Trustees appeal to this Court, arguing that the Board erred in the test that it applied and in finding that any adverse effect suffered by Mr. Skinner was "based on" his disability. The Trustees worry that every denial of health benefits could trigger a human rights review with attendant obligations to justify or accommodate. They say that prospect is why the "based on" criterion exists and must be properly applied. The Nova Scotia Human Rights Commission and one intervenor support Mr. Skinner's opposition to this appeal. Several other intervenors argue in favour of the appeal's success.

[3] This case is not about whether it is legal to prescribe medical marijuana or about whether Mr. Skinner may have it or about whether he needs it. This case is only about whether the Welfare Plan administered by the Trustees must reimburse Mr. Skinner for his medical marijuana costs because not doing so would offend the *Human Rights Act*, R.S.N.S. 1989, c. 214.

[4] The Board began its decision by saying private Welfare Plans need not cover "the sun, the moon and the stars". But, by basing its decision on Mr. Skinner's personal needs rather than the statutory criteria, that is what the Board did in this case. For reasons that follow, the appeal should be allowed.

[5] We will begin by summarizing the material facts, the intervenor positions, the relevant standard of review and legal principles applicable to human rights claims generally. Then follows discussion of whether the Board applied the correct discrimination test and whether denial of medical marijuana to Mr. Skinner was "based on" his disability, as s. 4 of the Nova Scotia *Human Rights Act* requires. This latter discussion will also address prior jurisprudence in cases like this.

Background

[6] The Trustees manage a Welfare Trust Plan established in 1952 to provide health and related benefits for employees and former employees working in the unionized sector of the Canadian elevator industry. The Plan is funded by contributions from employers and employees in accordance with various collective agreements.

[7] Gordon (Wayne) Skinner is an elevator mechanic and a member of the International Union of Elevator Constructors, which makes him eligible for coverage under the terms of the Welfare Plan.

[8] In August 2010, Mr. Skinner had an automobile accident while driving his employer's vehicle. He lost consciousness, veered off the road, and collided with a tree and/or boulder. Unfortunately, Mr. Skinner now suffers from chronic pain disorder. He experiences anxiety and depression. He has not worked since the motor vehicle accident.

[9] At first, Mr. Skinner's medical conditions were treated by way of narcotics and anti-depressants. They were not effective and had serious side effects. In the summer of 2012, Mr. Skinner began using medical marijuana on the advice of his then treating psychologist. Initially, Mr. Skinner's marijuana was paid for as no fault medical benefits under his motor vehicle insurance policy. These benefits expired after two years.

[10] In the spring of 2012, Mr. Skinner asked the Workers' Compensation Board to pay his medical marijuana expenses under the Medical Aid Assistance program of the *Workers' Compensation Act*. His claim was denied, and Mr. Skinner appealed. That appeal found its way to this Court which dismissed it (2018 NSCA 23).

[11] In May 2014, pending his appeal of the Workers' Compensation Board denial of coverage, Mr. Skinner requested interim coverage for his marijuana from the Trustees under the Welfare Plan. Drugs not approved by Health Canada were not funded under the Welfare Plan. Medical marijuana had never been funded before.

[12] The Trustees considered Mr. Skinner's request on three separate occasions. They denied him coverage.

[13] The parties filed an Agreed Statement of Facts, which said this about use and approval of medical marijuana:

> [35] The Board of Trustees has never approved reimbursement for medical marijuana for any member of the Welfare Plan due to the fact that the drug is not an approved expense under the Welfare Plan as it has not been approved by Health Canada and is therefore not recognized by the Welfare Plan's pharmacy benefits management service provider, Express Scripts Canada.
>
> [. . .]
>
> [38] Medical marijuana is not listed on the Nova Scotia Formulary or the Formulary for any other Province in Canada. The reason for that is due to the fact that a drug cannot be added to a Provincial formulary unless it is first approved by Health Canada and assigned a DIN.
>
> [39] Health Canada, through the *Food and Drugs Act* and the *Food and Drug Regulation*, sets out the general framework for the authorization of drugs for sale in Canada. If Health Canada, upon reviewing and testing the submitted evidence of a drug manufacturer, is of the view that the overall benefits of the drug outweigh its risks, the product will be authorized for sale in Canada and be designated with a DIN.
>
> [40] Health Canada confirms that to date, marijuana is not an approved drug or medicine in Canada as it has not yet gone through the necessary rigorous scientific trials for efficacy or safety. As such, Health Canada does not endorse the use of marijuana and it has not assigned it a DIN. Relevant Health Canada publications confirming the above information are attached hereto as Exhibits 29 and 30.

[14] Nevertheless, medical marijuana may be prescribed to patients in particular circumstances. In Mr. Skinner's case, the Board found as a fact:

> [81] Based on the foregoing, the board finds as fact, on a balance of probabilities, that medical marijuana was the most effective medication for treating the complainant's chronic pain. The board further finds that conventional medications were not effective because they had too many undesired side effects. The board agrees with the respondent's submission that the complainant has not established that conventional medications were ineffective or contraindicated with any other condition or illness he has, such as Hepatitis C. Conventional pain medications were ruled out by the complainant's treating physician because they did not improve his functionality and caused undesirable side effects.

[15] Mr. Skinner challenged his denial of coverage under the Welfare Plan by bringing a complaint under the *Human Rights Act*. The Board determined that Mr. Skinner had been discriminated against:

> [202] In this case, the complainant has proven, on a balance of probabilities, that the Trustees' denial, of his request for coverage of medical marijuana under the Welfare Plan, amounts to a *prima facie* case of discrimination. The discrimination was non-direct and unintentional.
>
> [203] Nonetheless, the exclusion of coverage of medical marijuana for the complainant was inconsistent with the purpose of the Welfare [Plan] and had the adverse effect of depriving him of the medically-necessary drug prescribed by his physician, even though the Welfare Plan covered other special requests for medically-necessary drugs prescribed by physicians for other beneficiaries.

[16] The Trustees claim that the Board's decision was legally flawed in finding Mr. Skinner had established on a balance of probabilities that his disability was a factor in their decision to deny him coverage for medical marijuana. The Board erred in the test it applied and reached a conclusion outside an acceptable range on the applicable facts and law. Specifically, they say:

1. The Board erred by finding that by advising the Trustees of his disability Mr. Skinner had sufficiently proved that denial of coverage to him was "based on" his membership in a protected group in the context of adverse impact discrimination;
2. The Board erred by failing to properly distinguish the steps in the legal test for discrimination, including:
    a) By finding that the "starting point" for discrimination analysis was a review of the purpose of the Plan;
    b) By finding that the Trustees' denial of the request for accommodation was relevant to the *prima facie* discrimination test;
3. The Board improperly distinguished prior jurisprudence that non-coverage of medication by a benefit plan did not offend relevant human rights legislation;
4. The Board erred by effectively converting human rights decision makers into courts of appeal on operational decisions of health benefit providers.

[17] The Trustees conclude:

> 46. The position of the Appellant is that these errors resulted in a decision in which *prima facie* discrimination was found to be established in the absence of any evidence legally relevant to establishing that the disadvantage experienced by the complainant was based on his membership in a protected group and that lies outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[18] Mr. Skinner responds that the Trustees are taking a "narrow and formalistic" approach to the substantive equality required by human rights legislation. The Trustees failed to consider that their apparently neutral decision has had a differential impact on him because his chronic pain cannot be managed by conventional medications. He needs medical marijuana. The Board's decision should be upheld.

[19] Mr. Skinner is supported by the Nova Scotia Human Rights Commission which says the Board applied the correct *prima facie* test and that the Board reasonably found Mr. Skinner's disability was a factor in the denial of coverage for medical marijuana.

The Intervenors

[20] The parties are joined in this appeal by several intervenors.

[21] The Nova Scotia Private Sector Employers Roundtable is an informal association of private sector employers in the Province that "speaks for the interests of private sector employers . . . on issues relating to labour and employment, including human rights". These employers provide their employees with medical benefits through a variety of benefit plans. The costs are covered in whole or in part by employers. The Employers Roundtable supports the Trustees' appeal, primarily because they say Mr. Skinner's disability was not a factor in the denial of medical marijuana. They agree with the Trustees that the Board's expansion of health care benefits, based on individual needs rather than membership in an enumerated group as required in the *Act*, impermissibly transfers determination of plan limits to human rights tribunals, thereby rendering such plans "unmanageable".

[22] The Trustees are also supported by twelve Health and Welfare Trusts. Ten of these Trusts provide health care benefits, including prescription drug coverage, to qualifying members of unionized workers in the construction industry in the

Province. Each is jointly sponsored and trusteed by an equal number of employer and union representatives.

[23] The last two Health and Welfare Trusts are sponsored and trusteed by the relevant union. Each Health and Welfare Trust is comparable to the appellant Trust. Each trust is a creature of collective agreements negotiated between the relevant union and employer.

[24] The Health and Welfare Trust intervenors support the appeal for the reasons advanced by the appellant Trustees. They add that the Board's interpretation of the Welfare Plan's purposes was too broad and is unreasonable. The Health and Welfare Trusts join the Trustees and Employers Roundtable in deploring the precedential impact of the Board's decision, arguing that it will require an individual assessment of the medical needs of every Plan member, irrespective of the Plan's coverage.

[25] The National ME/FM Action Network advocates on behalf of those suffering chronic pain as a result of fibromyalgia and myalgic encephalomyelitis/chronic fatigue syndrome (ME/FM). The Network supports the Board's decision and Mr. Skinner's response to the appeal. The Network asks this Court to ". . . analyze and draw its conclusions . . . from the perspective of those who suffer chronic pain and therefore from the perspective of Mr. Skinner . . ." The Network invites the Court to consider the ". . . substantive inequality resulting from exclusions from needed benefits in unique situations and the differential outcome arising from . . . [the denial of] medical marijuana . . ."

Standard of review and interpretive principles

[26] Section 36(1) of the *Human Rights Act* permits an appeal on a question of law. Section 34A says that a board of inquiry's decision is "final".

[27] This Court has consistently held that a human rights board of inquiry's interpretation of the *Human Rights Act* is generally reviewed by the Court of Appeal on the standard of reasonableness: *Izaak Walton Killam Health Centre v. Nova Scotia (Human Rights Commission)*, 2014 NSCA 18, ¶ 12-15; *Tri-County Regional School Board v. Nova Scotia (Human Rights Board of Inquiry)*, 2015 NSCA 2, ¶ 12-13; *Foster v. Nova Scotia (Human Rights Commission)*, 2015 NSCA 66, ¶ 16; *Nova Scotia (Environment) v. Wakeham*, 2015 NSCA 114, ¶ 14-15, 21-22, 52-53.

[28] In *International Association of Fire Fighters, Local 268 v. Adekayode*, 2016 NSCA 6 at ¶ 31-40, this Court adopted the "reasonableness" standard of review, subject to a stricter standard of correctness where the "application or transference of constitutional principles" were in issue. In this case, the exceptions in *Adekayode* are not engaged and the standard of review is reasonableness.

[29] *Tri-County* described reasonableness in this way:

> [14] In *Izzak Walton Killam Health Centre v. Nova Scotia (Human Rights Commission)*, 2014 NSCA 18, this Court summarized Supreme Court descriptions of the reasonableness standard of review:
>
> > [14] Reasonableness is "... concerned mostly with the existence of jurisdiction, transparency and intelligibility within the decision making process. But it is also concerned with whether a decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, para. 47). The reviewing court should not conduct two separate analyses -- one for reasons and another for result. Rather the exercise is "organic"; the "reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes, (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, para. 14).

[30] The Court may only review findings of fact if there is no evidence from which that finding may be drawn. Such findings would be an error of law (*Adekayode*, ¶ 42).

[31] Human rights legislation enjoys a quasi-constitutional status and is interpreted in accordance with *Charter* values. It should be given a liberal interpretation to ensure the remedial goals of the legislation are best achieved. However, this does not permit interpretations inconsistent with the legislation (*New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45, ¶ 19; *Adekayode*, ¶ 53-60; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, ¶ 33).

[32] As *Adekayode* requires, the starting point is the definition of discrimination in s. 4 of the *Act*:

> **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.

[33] Absent contrary legislative intent, provincial human rights legislation should be interpreted consistently with other human rights statutes (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, ¶ 31). Summarising similar principles to those in the Nova Scotia *Act*, the Supreme Court in *Moore v. British Columbia (Education)*, 2012 SCC 61 described the test for discrimination in the British Columbia's *Human Rights Code*:

> [33] As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show:
>
> **[1]** that they have a characteristic protected from discrimination under the *Code*;
> **[2]** that they experienced an adverse impact with respect to the service; and
> **[3]** that the protected characteristic was a factor in the adverse impact.
>
> Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.
>
> [bold numbering and indentations added]

[34] The Court used similar language in *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 (¶ 24), adopting *Moore*.

[35] In *Bombardier*, the Supreme Court ordered the three criteria in this way:

> [35] First, s. 10 requires that the plaintiff prove three elements: "(1) a 'distinction, exclusion or preference', (2) based on one of the grounds listed in the first paragraph, and (3) which 'has the effect of nullifying or impairing' the right to full and equal recognition and exercise of a human right or freedom".

This language tracks the Quebec *Charter of Human Rights and Freedoms*.

[36] For the purposes of the *Act*, discrimination embraces both direct and indirect discrimination. Indirect discrimination occurs where otherwise neutral policies have an adverse effect on groups or individuals, based on grounds enumerated in the *Act*. It is unnecessary to establish discriminatory intent on behalf of the respondent (*Elk Valley*, ¶ 24; *Bombardier*, ¶ 32, 40). Both these principles of indirectness and lack of discriminatory intent are captured by the s. 4 statutory definition.

[37] A complainant must establish each element of the test on a balance of probabilities. Once a *prima facie* case of discrimination is established, the burden then shifts to the respondent to justify the discriminatory behaviour. Exceptions and justifications are set in s. 6 of the *Act*. This second exception/justification test is distinct from the *prima facie* test for discrimination. The burden of proof for the first rests with the complainant; the second, with the defendant (*Moore*, ¶ 33).

[38] In this case, the Trustees argued that there was no *prima facie* case of discrimination made out. They did not argue that any alleged discrimination was justified.

[39] To précis their position, the Trustees say that the Board's decision is legally flawed for two principal reasons. First, the Board applied the wrong test. Rather than applying the three-part *Moore* test, the Board adopted a test from an earlier decision of the Supreme Court in *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566. Second, there was no connection between any prohibited ground of discrimination and the denial of medical marijuana coverage for Mr. Skinner.

The Board applied the wrong *prima facie* test for discrimination

[40] All parties agree that Mr. Skinner has a protected characteristic under the *Act*; Mr. Skinner has a physical and/or mental disability. With respect to the second *Moore* test, the Board decided that non-coverage for medical marijuana, which had been prescribed by a physician, was sufficient to meet the standard of "disadvantage" or adverse impact. The third step asks whether a protected characteristic was a factor in the adverse impact.

[41] The Board was conversant with the *Moore* test which it cited. But the Trustees and their supporting intervenors are right that the Board did not begin its analysis with *Moore*.

[42] The Trustees say the Board should have applied the three-part test described (in slightly different order) in each of *Moore*, *Bombardier*, and *Elk Valley*. Instead, the Board began with the *Gibbs* test.

[43] In applying the *Gibbs* test in this case, the Board observed at ¶ 122:

> [122] To summarize, ***the starting point***, for answering whether a benefits plan is discriminatory under the *Act*, ***is a determination of the purpose of the plan in all of the circumstances***. The next step is a comparison of how the benefits are allocated to beneficiaries under the plan. The relevant analytical point of comparison is the benefits being received for the same purpose not the benefits being received for different purposes. This comparison should not be formulaic and should take into consideration substantive equality. In other words, the comparison should employ a broad and purposive interpretation of the *Act* that incorporates the possibility of both direct and adverse effects discrimination.
>
> [Emphasis added]

[44] *Gibbs* involved a claim of differential treatment of disabled persons. Those with physical disabilites received a more generous income replacement benefit than those with mental disabilities whose income replacement was terminated after two years unless the claimant was then institutionalized. The Supreme Court decided that the appropriate comparison of benefits was between the persons with mental disabilities and the disabled generally. The comparison could not be limited to others with mental disabilities. The purpose of the Plan's income replacement applied equally to all disabled persons, whether their disability was physical or mental. Income replacement benefits were allocated to the same purpose. Distinguishing between physically and mentally disabled persons imposed a disadvantage on the latter, resulting in unequal treatment based on disability.

[45] *Gibbs* considered the income replacement plan's purpose in order to establish an appropriate comparator:

> [33] In my view, *Brooks*, *supra*, ***provides a useful guide in determining the appropriate group to compare to mentally disabled employees*** in the case at bar. The first step is to determine, in all the circumstances of the case, the purpose of the disability plan. ***Comparing the benefits allocated to employees pursuant to different purposes is not helpful in determining discrimination*** -- it is understandable that insurance benefits designed for disparate purposes will differ.

> If, however, benefits are allocated pursuant to the same purpose, yet benefits differ as the result of characteristics that are not relevant to this purpose, discrimination may well exist.
>
> [Emphasis added]

[46] Likewise, in *Moore,* the Supreme Court referred to identifying what services were at play in order to find an appropriate comparator:

> [29] The answer, to me, is that ***the 'service' is education generally***. Defining the service only as 'special education' would relieve the Province and District of their duty to ensure that no student is excluded from the benefit of the education system by virtue of their disability.
>
> [30] To define 'special education' as the service at issue also risks descending into the kind of "separate but equal" approach which was majestically discarded in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). ***Comparing Jeffrey only with other special needs students would mean that the District could cut all special needs programs and yet be immune from a claim of discrimination***. It is not a question of who else is or is not experiencing similar barriers. This formalism was one of the potential dangers of comparator groups identified in *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396. (emphasis in original)
>
> [31] ***If Jeffrey is compared only to other special needs students, full consideration cannot be given to whether he had genuine access to the education that all students in British Columbia are entitled to***. This, as Rowles J.A. noted, "risks perpetuating the very disadvantage and exclusion from mainstream society the Code is intended to remedy" (see *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, at p. 1237; Gwen Brodsky, Shelagh Day and Yvonne Peters, *Accommodation in the 21st Century* (2012) (online), at p. 41).
>
> [Emphasis added]

The service and comparator group were related. The service was education generally and the comparator group meant all public school students.

[47] The Health and Welfare Trust intervenors suggest that the Board misunderstood and misapplied the *Gibbs* test by "skipping" the second step—comparison of benefits allocated to employees for the same purpose:

> 61. The reason for determining the purpose of the benefit plan and then comparing benefits allocated according to that purpose is to assess whether the plan makes a distinction in the benefits it provides based on irrelevant, personal characteristics protected in human rights legislation. This necessarily requires the identification of a group that receives the benefit and the group that does not.

[48] They develop this by reference to the Supreme Court's decision in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78 at ¶ 54:

> [54] Fourth, a claimant relying on a personal characteristic related to the enumerated ground of disability may invite comparison with the treatment of those suffering a different type of disability, or a disability of greater severity: *Hodge*, *supra*, at paras. 28 and 32. Examples of the former include the differential treatment of those suffering mental disability from those suffering physical disability in *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566, and the differential treatment of those suffering chronic pain from those suffering other workplace injuries in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54. An example of the latter is the treatment of persons with temporary disabilities compared with those suffering permanent disabilities in *Granovsky*, *supra*.

[49] Mr. Skinner replies that the Supreme Court has since distanced itself from a comparator analysis, citing *Withler v. Canada (Attorney General)*, 2011 SCC 12:

> [62] The role of comparison at the first step is to establish a "distinction". Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).
>
> [63] It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited.

[50] Mr. Skinner adds that the Supreme Court cautioned against a rigid use of "mirror" comparator groups which may fail to capture substantive inequality and become a "search for sameness."

[51] Nevertheless, as *Withler* and *Moore* demonstrate, differential treatment based on an enumerated ground endures, as does some kind of comparison which is inherent in "differential" treatment.

[52] What services may be available to a person with a disability is relevant to the second *Moore* question of establishing an adverse impact with respect to those services. The purpose of the Plan might also be relevant to a justification defence once *prima facie* discrimination has been established (*Quebec (Attorney General) v. A.*, 2013 SCC 5, ¶ 333). *Gibbs* can be understood within the *Moore* framework.

[53] Mr. Skinner suggests that the Board has to "fit the man into the Plan". The Trustees respond that such an analysis is an arbitration, not a human rights complaint. The question is whether the Plan is discriminatory, not whether Mr. Skinner can be "interpreted" into coverage ostensibly unavailable under the Plan.

[54] Before beginning its legal analysis, the Board spent some time reviewing the Plan and the discretion of the Trustees under it. The Board's discussion closely resembled that of a labour arbitrator reviewing the terms of an agreement or a court's judicial review. The Board concluded:

> [41] In summary, first, even though there is an argument to be made that a labour arbitrator could reasonably have found the Trustees' decision to be in non-compliance with the Welfare Plan and associated collective agreement, this board does not have jurisdiction to reach that conclusion; ***the board has proceeded on the presumption that the Trustees were correct in their interpretation and application of the Welfare Plan*** [. . .]
>
> [Emphasis added]

[55] Nevertheless, the Board's characterization of the Welfare Plan's purposes evolved. At first the purpose was ". . . to provide benefits to employees in the most efficient and sustainable manner as determined by the Trustees". This is consistent with the Board's acceptance of the Trustee's interpretation. Later the Board broadened the Welfare Plan's purposes:

> [156] Based on this framework, I find that the legal purpose of the Welfare Plan is to provide benefits to beneficiaries, but to do so in a way that is efficient, economical, and sustainable. This means that the purpose of the Welfare Plan is not to cover everything, but where the financial condition of the Trust Funds permits, ***the purpose of the Welfare Plan is to increase the pension and welfare benefits available*** to beneficiaries, subject to the caveat of sustainability and maintenance of appropriate reserves. ***In this sense, the purpose of the Welfare Plan is to maximize the pension and welfare benefits available to beneficiaries without compromising the financial viability of the Trust Funds.***
>
> [Emphasis added]

[56] The Trustees' fiduciary duty of interpretation and application vanishes in this formulation of the Plan's purposes. Untethered by that fiduciary obligation, the Board decided that the Plan's purpose in the context of this case was to provide a ". . . medically necessary prescription drug" regardless of whether it has Health Canada's approval, and regardless of the Trustees' decision to exclude such drugs.

[57] The Board reasoned:

> [157] [. . .] The analytical point of comparison is the drug coverage available to beneficiaries and not some other benefit.
>
> [158] In addition to maximizing benefits of beneficiaries, the Welfare Plan ***is also designed to take the special medical needs of beneficiaries into account***. While the Welfare Plan normally only covers generic drugs, it includes a process for covering name brand medication where the prescribing physician states on the prescription that "no substitution" is permitted: Exhibit 1, Agreed Statement of Facts, Exhibit Book, Tab 2, p 28. Where this occurs, the Welfare Plan covers the full cost for the brand name medication. ***This suggests that some beneficiaries get special coverage, based on their medical needs, when recommended by their physician***.
>
> [Emphasis added]

[58] Here the Board begins to expand the "service" or "benefit" available because exceptionally, some beneficiaries obtain "special coverage" if medically necessary and prescribed. That is an oversimplification, as we shall see.

[59] Having found medically required prescription drugs the "service" or "benefit" at issue, it was an easy matter to connect that service to Mr. Skinner, who had been prescribed medical marijuana. But there remained one hurdle—not all prescribed medications were covered:

> [159] The Welfare Plan's exclusion of medical marijuana was not designed to treat certain beneficiaries differently than others, but this exclusion had the substantive result or effect of treating the complainant differently. Whereas some beneficiaries receive coverage for their medically-necessary, prescription drugs, by special request, ***the complainant's special request for a medically-necessary, prescription drug, is excluded by the plan because the drug in question has not been formally approved by Health Canada even though it can be legally prescribed. This is a distinction within the meaning of section 4 of the Act.***
>
> [Emphasis added]

[60] The Board does not say how the foregoing constitutes a "distinction" within the meaning of s. 4 of the *Act*. Beneficiaries may indeed receive prescription drugs (instead of generic substitutes) if their physician so directs, *and* the drugs are approved by Health Canada. Mr. Skinner's drug did not have that approval. How is this a distinction within the meaning of s. 4 of the *Act*? The Board does not say.

[61] The Health and Welfare Plan intervenors elaborate:

> 80. A "distinction" in section 4 of the *Act* is one "based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5". What is the characteristic on which the distinction is based in this case? Mr. Skinner's complaint alleges discrimination on the basis of both physical and mental disability. He suffers from chronic pain, anxiety and depressive disorders (paras. 3 and 12). Is there differential treatment between members of the plan with chronic pain and those with other disabilities? Between those with mental and physical disabilities and those with a physical or mental disability alone? Between those with disabilities as compared to those without disabilities? The Board never says.

[62] The Board's elimination of Health Canada approval allowed it to conclude:

> [160] The exclusion of coverage resulted in a burden or disadvantage for the complainant. Unlike other beneficiaries, he was denied coverage of the drug his physician had prescribed, a drug, which on the facts of this case, was only prescribed after all conventional pain medication had been tried without success.

[63] It is inaccurate to say "unlike other beneficiaries, [Mr. Skinner] was denied coverage of the drug his physician had prescribed . . ." The evidence was that no one received payment for drugs not approved by Health Canada—prescribed or not. The Board's conclusion unreasonably equates physician prescribed medications, not approved by Health Canada, with medications that have that approval. The Board then connects denial of medical marijuana with a benefit which its says is a purpose of the Plan.

[64] The Board's interpretation transforms the benefit described in the Plan—prescription drugs approved by Health Canada—into prescription drugs personally beneficial to each claimant.

[65] Mr. Skinner says that the Board's conclusion better accords with the goal of achieving "substantive equality". When pressed in oral argument, Mr. Skinner's counsel described the real benefit here as "pain relief medication". He says this is what others got and he did not. But "pain relief" *per se* is not a benefit of the

Welfare Plan nor could it be, because that would depend on the efficacy of relief afforded to individual claimants. Inevitably for some, that would always remain an unfulfilled promise. A denial of such relief would not be "based on" disability but on the personal efficacy of the prescribed medicine.

[66] Nor does "substantive equality" require such an outcome. Substantive equality seeks to frustrate perpetuation of "prejudice or disadvantage to members of a group on the basis of personal characteristics within s. 15(1) [of the *Charter*]". It eschews stereotypes unrelated to a claimant's personal circumstances (*Withler*, ¶ 35-36; *Adekayode*, in the human rights context, ¶ 70-78). It is not a freestanding basis for impugning distinctions created by personal disadvantages. In all cases, the focus is on disadvantages based on enumerated grounds:

> [19] The first part of the s. 15 analysis therefore asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground. ***Limiting claims to enumerated or analogous grounds, which "stand as constant markers of suspect decision making or potential discrimination", screens out those claims "having nothing to do with substantive equality and helps keep the focus on equality for groups that are disadvantaged in the larger social and economic context"***: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 8; Lynn Smith and William Black, "The Equality Rights" (2013), 62 S.C.L.R. (2d) 301, at p. 336. Claimants may frame their claim in terms of one protected ground or several, depending on the conduct at issue and how it interacts with the disadvantage imposed on members of the claimant's group: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 37.
>
> (*Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30) [Emphasis added]

[67] The Health and Welfare Trust intervenors argue that the Board's articulation of the Plan's purposes unreasonably disregarded the clear language of the Plan and the necessarily limited reach of such plans.

[68] Initially, the Board acknowledged this limitation: "Medical marijuana was not covered for anyone; therefore, the complainant was not subjected to differential treatment". But the Board considered this a mere "formal" distinction and maintained that it was necessary to compare "drug coverage available to beneficiaries and not some other benefit". But the Board did not do that. Instead, it looked at coverage not available to beneficiaries, i.e. medical marijuana.

[69] The Health and Welfare Trustees conclude by arguing that the Board's erroneous consideration of the comparison step in *Gibbs* eliminates the required

link between differential treatment and a protected characteristic. In other words, the Board failed to show that an enumerated ground was a factor in any differential treatment experienced by Mr. Skinner.

[70] The Board's use of *Gibbs* ignored the required foundation of a distinction "based on" an enumerated ground and divorces its analysis of any adverse effect for Mr. Skinner from an enumerated ground. That brings us to the second issue.

Non-coverage of Mr. Skinner's medical marijuana was not "based on" disability

[71] Section 4 of the *Act* requires that an impugned "distinction" be "based on" an enumerated ground—in this case a "physical or mental disability". Some statutes use this language; others similar language (i.e. "because of" in the British Columbia and Ontario human rights codes, but characterized in *Moore* as "based on a prescribed ground"). Many cases equate "based on" with "factor".

[72] In *Nova Scotia Liquor Corporation v. Nova Scotia (Board of Inquiry)*, 2016 NSCA 28 at ¶ 46, this Court cited *Bombardier*, adopting the Ontario Court of Appeal's preferred language of "connection" or "factor". While the Supreme Court in *Bombardier* disapproved the language of "causal factor" it concluded:

> [52] In short, as regards the second element of *prima facie* discrimination, ***the plaintiff has the burden of showing that there is a connection between a prohibited ground of discrimination and the distinction***, exclusion or preference of which he or she complains or, in other words, that ***the ground in question was a factor in the distinction***, exclusion or preference. Finally, it should be noted that the list of prohibited grounds in s. 10 of the *Charter* is exhaustive, unlike the one in the *Canadian Charter: City of Montréal*, at para. 69.
>
> [Emphasis added]

[73] There must be a connection between the distinction and the adverse treatment or effect—s. 4 of the *Act* says so. So does the Supreme Court.

[74] In *Elk Valley*, the Chief Justice, writing for the majority, said that to find *prima facie* discrimination Mr. Stewart's addiction would have to be "one of the reasons" for adverse treatment, i.e. his termination. The protected ground need only be "a factor" in the impugned decision or adverse treatment. The question was whether a protected ground was a "factor"—there may be others—in the adverse treatment (*Elk Valley* at ¶ 43 and 46).

[75] The Board found that Mr. Skinner's disability was a factor in the decision to deny him medical marijuana:

> [182] The complainant has not established that the Trustees made their decision based on any stigma associated with his disabilities, but that is not the test. The test for *prima facie* discrimination only requires that a complainant's disability be a factor in, or connected to, a policy or decision. In my view, this arguably occurred at the time the Welfare Plan was created or at the time that the complainant applied for coverage of medical marijuana, but it definitely occurred at the time he appealed the denial of coverage and requested accommodation from the Trustees.
>
> [183] The Trustees had the authority to consider the complainant's request and to respond to it on a case-by-case basis or by changing the Welfare Plan. ***In denying the complainant's request, the complainant's disability was a factor in the Trustees' decision.*** This is sufficient to meet the "based on" criteria in section 4 of the *Act*.
>
> [184] In summary, the complainant has established, on a balance of probabilities, that the denial of coverage for medical marijuana amounts to *prima facie* discrimination. Unlike other beneficiaries under the Welfare Plan, the complainant's request for special coverage of a medically-necessary drug, prescribed by his physician, was rejected. This non-coverage had a severely negative impact on the complainant and his family, which amounts to a disadvantage. ***While the initial non-coverage was only arguably "based on" the complainant's disability, the Trustees' subsequent denial of the complainant's accommodation request, and decision to deny coverage on a case-by-case basis or to amend the Welfare Plan, was "based on" the complainant's disability***.
>
> [Emphasis added]

[76] The Board's conclusions here are unreasonable because they are factually and legally wrong; factually wrong because they are inconsistent with the evidence and contradict the Board's own findings; and legally wrong because knowledge or intention are unnecessary prerequisites of adverse effect discrimination and mere awareness cannot transform disability into a "factor" in a distinction already made, or an effect already present.

[77] The Board's focus on the Trustees' decision—and in particular what they knew and when they knew it—resembles a direct discrimination analysis. But the Board had already found that this was a case of indirect or adverse effect discrimination:

> [115] In this case, there is no direct or formal distinction being made between beneficiaries; the Welfare Plan does not cover medical marijuana for any person. ***If the Welfare Plan discriminates it does so in a non-direct or adverse fashion in the sense that an apparently neutral eligibility rule adversely affects the complainant.***
>
> [Emphasis added]

[78] While the Board acknowledged that *prima facie* discrimination may occur without differential impact being brought to the attention of the defendant, it used the Trustees' knowledge of Mr. Skinner's personal circumstances to establish the "factor" connection necessary to ground a case of discrimination.

[79] To recapitulate, the Board made three "findings" with respect to timing of the alleged discrimination. It could "arguably" have been when the Welfare Plan was created. It could "arguably" have been when Mr. Skinner applied for coverage. And it "definitely" occurred when he appealed the denial of coverage and requested accommodation from the Trustees.

[80] These findings are unsupported by the evidence. The parties agreed and the Board observed:

> [9] On May 22, 2014, the ***Trustees voted to deny the complainant's request, ostensibly for two reasons. First, medical marijuana has not been approved by Health Canada*** under the *Food and Drugs Act*, RSC 1985, c F-27 and as such it does not receive a drug identification number ("DIN"); accordingly, the Trustees reasoned, medical marijuana is not an approved drug under the terms of the Welfare Plan. ***Second, since the complainant's disabilities were the result of a compensable workplace accident***, the Trustees determined that ***any related medical expenses ought to be covered by a provincial medicare plan***, and were therefore excluded from coverage under the Welfare Plan. This decision was communicated to the complainant.
>
> [10] On May 27, 2014, the complainant sent the Trustees a second request for coverage along with further documentation. This request was added to the Trustees' June 26, 2014 meeting agenda. In the intervening period, the complainant submitted additional medical information to support his request. On June 26, 2014, the Trustees again voted to deny the complainant's request for coverage of medical marijuana. ***The reasons for denial were the same***.
>
> [Emphasis added]

[81] The first two tentative findings cannot stand because "arguably" is not a standard that discharges the evidentiary onus on Mr. Skinner. As the Employers Roundtable correctly submits, arguable means "questionable" or "open to dispute" and cannot satisfy a balance of probabilities threshold.

[82] The Welfare Plan was created in 1952. There was no *Human Rights Act* in 1952. Mr. Skinner's disability did not arise until 2010. It is impossible for his disability to have been a "factor" when the Plan was created.

[83] The finding that the Trustees' June 26, 2014 denial of coverage was definitely based on Mr. Skinner's disability is legally unreasonable because nothing changed between May 22 and June 26. On May 22, the Trustees knew that Mr. Skinner was disabled owing to chronic pain which was unresponsive to conventional treatment, but for which medical marijuana was effective (see Mr. Skinner's letter of May 7). That was also true on June 26. If the May 22 decision was not discriminatory, the June 26 decision could not be either. There is no evidence from which any rational inference could be drawn (*Adekayode*, ¶ 42).

[84] The Board does not explain how the Trustees' May 22 decision, when Mr. Skinner's disability was only "arguably" a factor in their decision, "definitely" became a factor on June 26. In *Bombardier*, the Supreme Court required that "evidence of discrimination, even if it is circumstantial, must nonetheless be tangibly related to the impugned decision or conduct" (¶ 88). To similar effect: *Kahkewistahaw First Nation v. Taypotat*, 2016 SCC 30, (¶ 34). There is no such evidence here. The Board's finding of discrimination on June 26 is arbitrary and unreasonable.

[85] The Board recognized that not all distinctions are legally discriminating and a connection to an enumerated ground was necessary to support such a "finding":

> [169] "Distinction" and "disadvantage," alone, are insufficient to meet the test for *prima facie* discrimination. As Abella J explained, in concurring reasons, in Sexton at para 49:
>
> > [T]here is a difference between discrimination and a distinction. Not every distinction is discriminatory. It is not enough to impugn an employer's conduct on the basis that what was done had a negative impact on an individual in a protected group. Such membership alone does not, without more, guarantee access to a human rights remedy. ***It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, that triggers the***

> ***possibility of a remedy. And it is the claimant who bears this threshold burden.***
>
> [Emphasis added]

[86] But Mr. Skinner's disability as a connecting factor gradually disappeared in the Board's analysis:

> [172] Applying the terms "factor" or "connection" is more difficult in cases, like this one, where the differential treatment resulted from non-direct or adverse effects. ***The concern in adverse effects cases is not that a person's enumerated ground was factored into a given decision, but that their particular needs were not factored in at all or at least not adequately enough.***
>
> [Emphasis added]

[87] Here, Mr. Skinner's "particular needs" become disassociated from the legislated requirement of enumerated grounds. Refusing Mr. Skinner a drug not approved by Health Canada does not differentiate him from others disabled by chronic pain. No beneficiary received medical marijuana. No beneficiary received drugs not approved by Health Canada. The Plan's exclusion of such drugs was not "based on" Mr. Skinner's disability. The Board's test for discrimination is therefore legally unreasonable because it fails to require a connection between the adverse effect and membership in an enumerated group.

[88] The Board cited *Bombardier* and *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (*Meiorin*) to support its connection of Mr. Skinner's disability with the adverse impact on him of non-coverage of medical marijuana.

[89] As the Trustees argue, *Bombardier* and *Meiorin* are ultimately not supportive of the Board's conclusion in this case. In *Meiorin*, an apparently neutral aerobic standard was applied to all those wanting to become forest firefighters. Ms. Meiorin proved that most women could not meet this standard, therefore, she established discrimination based on a prohibited ground—sex—so that the aerobic standard was *prima facie* discriminatory (*Meiorin*, ¶ 69).

[90] In its decision, the Board incorrectly compares Mr. Skinner to Ms. Meiorin:

> [174] [. . .] Thus, the allegation in *Meiorin*, like in this case, was one of non-consideration or under-consideration of the impact of a policy on an enumerated group.

[91] This is inconsistent with the Board's earlier finding that non-coverage of medical marijuana failed to consider Mr. Skinner's "particular needs" (*Moore*, ¶ 80).

[92] Mr. Skinner and the Board do not here focus on non-consideration or under-consideration of the Trustees' policy on *disabled persons* or persons suffering from *chronic pain*, but on *him*. The equivalent *Meiorin* comparison would be a failure by Ms. Meiorin to meet an aerobic standard that most women *could* meet. In other words, the standard would not take into account her "particular needs". But that is not the test. Ms. Meiorin needed to establish that most women could not meet the aerobic standards. Had she not done so, no discrimination would have been made out because her failure to meet the standard would have been personal to her and not linked to her membership in an enumerated group. So here, the adverse effect on Mr. Skinner of non-coverage of medical marijuana is not a result of his membership in a protected class of disabled persons suffering chronic pain. The disadvantage arises because the drugs available to Plan beneficiaries with his condition are not effective for him personally.

[93] Likewise, the Board's reliance on *Bombardier* is misplaced. In *Bombardier*, a Canadian pilot was seeking recurrent training from Bombardier under his U.S. pilot's licence. He needed a security clearance from U.S. authorities, but that was denied. Therefore, he could not receive training from *Bombardier* under his U.S. licence. The pilot brought a discrimination claim against *Bombardier*. The Supreme Court held that the pilot had not established *prima facie* discrimination, based on ethnic or national origin because he did not prove a connection between denial of training and a prohibited ground of discrimination:

> [52] In short, as regards the second element of *prima facie* discrimination, ***the plaintiff has the burden of showing that there is a connection between a prohibited ground of discrimination and the distinction, exclusion or preference of which he or she complains or, in other words, that the ground in question was a factor in the distinction***, exclusion or preference. Finally, it should be noted that the list of prohibited grounds in s. 10 of the *Charter* is exhaustive, unlike the one in the *Canadian Charter: City of Montréal*, at para. 69.
>
> [. . .]
>
> [80] Because Bombardier's decision to deny Mr. Latif's request for training was based solely on DOJ's refusal to issue him a security clearance, it is common ground that proof of a connection between the U.S. authorities' decision and a prohibited ground of discrimination would have satisfied the requirements of the second element of the test for *prima facie* discrimination. However, ***the***

> ***Commission did not adduce sufficient evidence to show that Mr. Latif's ethnic or national origin played any role in DOJ's unfavourable reply to his security screening request***.
>
> [81] As for the circumstantial evidence, we do not agree with the Court of Appeal that the inference drawn by the Tribunal was based solely on Ms. Bahdi's expert report. The Tribunal based its finding on all the evidence in the record. In our opinion, however, ***that evidence was not sufficient to support an inference of a connection between Mr. Latif's ethnic or national origin and his exclusion. It follows that the Tribunal's finding of fact was clearly unreasonable***.
>
> [Emphasis added]

Bombardier would have been aware of the adverse impact of its decision on Mr. Latif. That did not make it discriminatory.

[94] Even more recently in *Elk Valley*, the Supreme Court upheld a Tribunal's finding that the dismissal of an employee was not based on his drug addiction, but his failure to conform to the corporate policy of addiction disclosure. That policy implemented a safety protocol in a mining operation, designed to avoid accidents and assist employees with drug dependency, which they were required to disclose. The fact that Mr. Stewart suffered from an addiction and therefore fell within a protected category under the relevant legislation, did not in and of itself make his disability a factor for the purposes of assessing the propriety of his dismissal:

> [39] [. . .] Whether a protected characteristic is a factor in the adverse impact will depend on the facts and must be assessed on a case-by-case basis. The connection between an addiction and adverse treatment cannot be assumed and must be based on evidence. [. . .]
>
> [42] [. . .] the mere existence of addiction does not establish *prima facie* discrimination. [. . .]
>
> [*Elk Valley*, ¶ 39, 42]

[95] Similarly, awareness of Mr. Stewart's disability and the adverse effect of its decision did not render Elk Valley's decision discriminatory.

[96] As in *Bombardier* and *Elk Valley*, because the evidence did not establish that Mr. Skinner's disability was a factor in the Trustees' decision on May 22, there could be no evidence that their denial of coverage on June 26 was a factor in that denial. The Board's finding that the Trustees discriminated on June 26 is arbitrary, lacks evidentiary support and therefore is unreasonable. Moreover, the Board's

analysis which searches for Trustee knowledge of Mr. Skinner's disability is legally incorrect and therefore unreasonable.

[97] The Board also placed reliance on the discretion of the Trustees to make a different decision as proof that Mr. Skinner's disability was in some way connected to their decision to deny coverage. "In denying the complainant's request, the complainant's disability was a factor in the Trustees' decision". This was unreasonable. It collapses *qualification* for a benefit into the basis for denying it. Absent disability, Mr. Skinner is not entitled to any medication. That disability does not thereby become a means for indefinite extension of benefits, the denial of which is automatically discriminatory. As *Meiorin*, *Elk Valley*, and *Bombardier* exemplify, the mere existence of a protected characteristic does not in itself establish a connection.

[98] Nor does discretion alter the requirement to meet the third part of the *prima facie* test—was Mr. Skinner's disability a factor in non-coverage of medical marijuana? If the policy of not funding medical marijuana discriminated against Mr. Skinner owing to adverse effect, the Trustees' knowledge of that effect adds nothing. Except for possible justification, it lacks legal significance.

[99] As the Trustees and their supporting intervenors argue, the third *Moore* step could easily be circumvented by the beneficiary asking for "individual accommodation". He would then be relieved of any obligation to connect his request with an enumerated factor.

[100] By way of analogy, if Ms. Meiorin were unable to meet aerobic standards that most women could satisfy, she could still claim discrimination simply by disclosing that she personally could not meet those standards.

[101] The Board's decision also has the effect of reversing the burden of proof which rests with Mr. Skinner: "in denying the complainant's request, his disability was a factor in the Trustees' decision". Knowledge of adverse impact here converts a non-discriminatory decision into a discriminatory one. The corollary is that ignorance of adverse effect would obviate a finding of *prima facie* discrimination. Both propositions are clearly wrong.

[102] The Board's reasoning seems to be—because Mr. Skinner was denied coverage, his disability was a factor in the decision. Every person in Mr. Skinner's situation with a disability could make the same argument.

[103] It is not enough to conclude that Mr. Skinner experienced an adverse effect arising from non-coverage of medical marijuana under the Welfare Plan. It is necessary to link that exclusion with Mr. Skinner's membership in an enumerated group.

[104] The Board's decision is unreasonable because it fails to apply the legal requirement that the decision was "based on" Mr. Skinner's disability.

Prior jurisprudence

[105] The Trustees add that the Board's failure to properly apply the "based on" test connecting non-coverage of medical marijuana with Mr. Skinner's disabilities, is inconsistent with apposite case law. The Trustees say the Board marginalized relevant persuasive authority by distinguishing it on unreasonable grounds. The Trustees describe it this way in their factum:

> The Board then turned to a review of various decisions on the Ontario Human Rights Tribunal in which non coverage of a benefit for or medication by benefits plan had been held not to amount to a discrimination under Human Rights legislation. These decisions were found to be of "minimal value" to the Board's analysis on the following the grounds:
>
> (a) The Ontario Human Rights Code "does not expressly include direct and non direct unequal treatment in its prohibition" (though it is noted that the jurisprudence on this point is "quite similar" to that in Nova Scotia);
>
> (b) The allegations were against a public benefits plan, rather than a private employee benefits plan;
>
> (c) The decisions employed "erroneous reasoning" including that:
>
> (i) "In each case the Tribunal appears to have presumed that adverse effects discrimination cannot occur in the context of public benefits programs" and
>
> (ii) In each case, the Tribunal "provided almost no analysis of an individual complainant's disability nor the negative medical or personal effects of a non coverage of a drug".

[106] The cases which the Board distinguished were: *El Jamal v. Ontario (Minister of Health and Long-Term Care)*, 2011 HRTO 1952; *Kueber v. Ontario (Attorney General)*, 2014 HRTO 769; and *Marshall v. Ontario (Health and Long-Term Care)*, 2014 HRTO 1580. Respectfully, the Board draws distinctions without a difference.

[107] In *El Jamal*, the Ontario Drug Benefit Program did not fund Phosphate Novartis because it was not included in the Ontario Drug Benefits Program Formulary. The Tribunal accepted that Mr. El Jamal had a disability and had a need for the drug and was detrimentally affected by the decision not to fund it, but the question was whether Mr. El Jamal was treated differently from others and whether his disability was a factor in that treatment. Relying upon *Withler*, the Tribunal pointed out that a discrimination analysis is always a comparative one and will only be established where an applicant proves that he or she was treated differently based on a human rights related ground. Ms. El Jamal did not allege that he was denied medication available to others.

[108] In *Kueber*, the Ontario Ministry of Health and Long-Term Care declined to fund medical marijuana under the Ontario Drug Benefit Plan. The Tribunal dismissed the application because the three-part *prima facie* test was not made out. Ms. Kueber had a disability and the Tribunal assumed that medical marijuana was effective in treating her pain. The question was whether the refusal to fund medical marijuana was based on a protected ground in the Ontario Human Rights Code. This could not be established because medical marijuana was not approved by Health Canada. Disability was not a factor in the decision. The government also disputed its efficacy and safety.

[109] In *Marshall*, the Tribunal accepted that Mr. Marshall had a disability and had experienced a negative impact because he could not receive coverage for a drug that might be of benefit to him. The drug was not manufactured in Ontario, but Mr. Marshall had a prescription which could be filled in the U.S., and for which he sought reimbursement. His case foundered because there was no link between the respondent's actions and an enumerated ground in the code.

[110] In this case, the Board did not find the Ontario cases persuasive and dismissed them. The first reason for doing so was wording differences between the Ontario and Nova Scotia legislation because the former does not include indirect discrimination. The Board does not describe how those wording differences resulted in a different legal test. In fact, there is no legal difference. A leading adverse effects case is *O'Malley* which interprets the Ontario *Code*. As well, the Ontario legislation says discrimination must be "because of" certain enumerated grounds. That has been assimilated with the language of "factor" and "connection" (*Peel Law Association v. Pieters*, 2013 ONCA 396 at ¶ 59). Ontario, like Nova Scotia, requires a connection between an adverse impact and an applicant's disability. This is no material difference in the legislation.

[111] The Board is correct that Ontario cases are less forthcoming about the disabilities of the various claimants in those cases and the personal effects of non-coverage. But that alone is not a legally material distinction. The Board criticizes these decisions for not recognizing adverse effect discrimination. In doing so, the Board appears to assume that a complainant's disability need not be a factor in a respondent's decision or policy. Alternatively, the Board simply assumes that the mere presence of disability satisfies the "factor" test.

[112] And finally, the fact that the Ontario decisions involve public rather than private benefit programs is not a material distinction because the legislation in both provinces prohibits discrimination with respect to the provision of services, irrespective of public or private source. To the extent that this distinction acquires meaning, it more properly would belong to the justification stage and presumably would include questions such as: are resources inadequate, so as to justify a particular form of discrimination? The Ontario cases are not binding on the Board, but the Board's reasons for distinguishing them are unpersuasive.

Conclusion

[113] The Trustees had an obligation to determine what benefits would be available to those suffering a disability. They chose Health Canada approval as a limit to prescription drug benefits. Inherent in their choice is a limitation which would inevitably affect some less favourably than others. Mr. Skinner's argument means that the Trustees' exercise of their fiduciary duty of choice becomes in itself an act of discrimination.

[114] Benefit plans are necessarily limited in many ways. In this case, Mr. Skinner invokes one of those limits to claim *prima facie* discrimination. The logical consequence of his argument is that every under-inclusive benefits plan results in *prima facie* discrimination which the plan administrators must justify if a physician prescribes the medication because approved drugs are ineffective. Every request for medication not covered under a plan could be subject to a human rights complaint and require justification for refusal. Human rights boards would become arbiters of private benefit plans. Scarce plan resources would be consumed with justification hearings because justification would usually turn on the particular circumstances of each case.

[115] The Board's expansive interpretation of the Welfare Plan's purpose in this case would also require the Trustees to conduct a medical assessment of each claimant, irrespective of the terms of the Plan. The same would apply to other plans in similar circumstances.

[116] Mr. Skinner and the ME/FM Action Network dismiss these concerns as "hypothetical floodgate" arguments. They say this is a rare case. Two replies can be made. First, there is no principle of restraint in the Board's decision in this case which would limit disability claimants from expanding benefit plans based on their individual medical needs. The mere fact of their disability would automatically dispose of the third *Moore* "factor" requirement. Second, the arguments advanced and the Ontario cases cited, belie Mr. Skinner's submissions and show a real, not hypothetical, risk to benefit plans generally.

[117] This is not a rare case—it will apply in every instance where a physician prescribes a "necessary" drug not covered by a plan.

[118] Whether to provide a particular benefit, in this case a particular drug, could be based on many factors. Disability would be common to all applicants, because it is a prerequisite to any beneficial entitlement. That alone cannot make it a factor in the decision. As the Employers Roundtable argues, the Board's recognition that Welfare Plans need not cover the "sun, the moon and the stars" is an implicit admission that non-coverage decisions—and their effects—do not necessarily make disability a factor in those non-coverage decisions. But the Board's decision side-steps the third *Moore* criterion so that the existence of a disability by default makes disability a factor. The Board's decision provides no principled basis to exclude "the sun, the moon and the stars". And in this decision, the Board included them.

[119] This is a very unfortunate result for Mr. Skinner who says he cannot afford regular purchases of medical marijuana. As the Board implies in its decision, Mr. Skinner may have had greater success in an arbitration, unencumbered by the criteria of the *Human Rights Act*. The Workers' Compensation Board may yet reconsider. Apparently, some injured workers now do receive medical marijuana as medical aid. And Health Canada may come to approve some type of medical marijuana. But in the circumstances of this case, the Welfare Plan's non-coverage of drugs not approved by Health Canada does not contravene the *Human Rights Act*.

[120] I would allow the appeal and set aside the Board's finding of discrimination.

[121] There should be no costs.

Bryson, J.A.

Concurred in:

Beveridge, J.A.

Farrar, J.A.