Insurance Coverage for Medical Marijuana/Cannabis

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INTRODUCTION

The use of marijuana and cannabis for medical purposes has become a "hot topic" as of late, particularly as the Canadian govern sets to legalize recreational marijuana in July 2018. As a personal injury lawyer, I have noticed more and more clients turning away from "conventional" opioid, anti-inflammatory, and anti-depressant prescription medication for the treatment of pain, anxiety, post-traumatic stress disorder, and sleep disturbances, and other conditions in favour of medical marijuana. Some clients are bothered by the side-effects and addiction risks associated with many of these conventional drugs; other clients are simply interested in trying something that they perceive to be more "natural".

As the Canadian government prepares to legalize marijuana in July of 2018, the stigma associated with the use of marijuana, especially for medical reasons, is slowly diminishing. The question for many is no longer "if" they want to try cannabis as an alternative means of treatment, but "how" they might go about trying it. The new challenge will not be whether or not medical marijuana is accessible from a legal standpoint, but whether it will be accessible from a financial standpoint.

In this paper, I will briefly review what is required in order to legally obtain medical marijuana. I will also review some funding options that may be available to those individuals who are seeking out the treatment as a result of an injury sustained in a traumatic event, such as a car accident or slip/trip and fall.

By way of disclaimer, the author of this paper should by no means be seen as recommending the use of medical marijuana. Any personal injury victim (or otherwise) considering this form of treatment should consult with his or her physician to discuss the risks and benefits. This paper is legally, rather than medically, focused.

HOW TO GET A "PRESCRIPTION" FOR MEDICAL MARIJUANA/CANNABIS

The Law

In Canada, the *Controlled Drugs and Substances Act*[1] is the statute that prohibits illicit drugs. The current version of the *Access to Cannabis for Medical Purposes Regulations*[2], however, enacted in August of 2016, provides an exemption to the *CDSA.* Under the *ACMPR*, persons are permitted to possess fresh or dried marijuana[3], cannabis oil, or cannabis, if used for medical purposes and in accordance with the conditions set out in the ACMPR.

Pursuant to section 1(1) of the *ACMPR* a person may possess fresh or dried marijuana or cannabis oil if that person has obtained the substance for his or her own medical purposes (or for the medical purposes of someone for whom that person is responsible) from:

- a licenced producer;
- a health care practitioner in the course of treatment for a medical condition; or
- from a hospital.

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[1] S.C. 1996, c. 19 [the *CDSA*].
[2] S.O.R./2016-230 [the *ACMPR*].
[3] Spelled as "marihuana" in the *ACMP*.

A "health care practitioner" is defined in the *ACMPR* as "medical practitioner" (i.e. a licenced physician" or a "nurse practitioner").

In order to prescribe one of the substances, a document similar to a standard medical subscription must be completed by the health care practitioner. Pursuant to section 8(1) of the *ACMPR*, this "medical document", as it is called, must include:

- the practitioner's given name, surname, profession, business address and telephone number, the province in which they are authorized to practice their profession and the number assigned by the province to that authorization and, if applicable, their facsimile number and email address;
- the person's given name, surname and date of birth;
- the address of the location at which the person consulted with the practitioner;
- the daily quantity of dried marijuana, expressed in grams, that the practitioner authorizes for the person; and
- the period of use.

The College of Physicians of Surgeons of Ontario ("CPSO") has enacted a policy entitled "Marijuana for Medical Purposes"[4], which sets out the CPSO's expectations of physicians who are considering prescribing medical marijuana or cannabis. The CPSO Policy states, for instance:

> …As with any treatment, physicians are not obliged to prescribe marijuana if they do not believe it is clinically appropriate for their patient.
>
> …Given the potentially severe nature of these risks, physicians must not prescribe marijuana to patients under the age of 25 unless all other conventional therapeutic options have been attempted and have failed to alleviate the patient's symptoms.
> …

[4] http://www.cpso.on.ca/policies-publications/policy/medical-marijuana [the "CPSO Policy"].

> In keeping with these obligations, physicians who prescribe marijuana must advise patients about the material risks and benefits of marijuana, including its effects and interactions, material side effects, contraindications, precautions, and any other information pertinent to its use…
>
> As with any drug, physicians who prescribe marijuana must monitor patients for any emerging risks or complications. Prescribing must be discontinued where marijuana fails to meet the physician's therapeutic goals or the risks outweigh the benefits.

FUNDING THE COSTS OF MEDICAL MARIJUANA AND/OR CANNABIS

Costs of Obtaining the "Medical Document"

The cost of consulting with a physician to determine whether medical marijuana and/or cannabis would be an appropriate form of treatment and the cost of obtaining the "medical document", itself, are both covered under OHIP.

The CPSO Policy states[5]:

> The College considers the medical documentation authorizing patient access to marijuana to be equivalent to a prescription. Prescriptions, together with activities related to prescriptions, are insured services[6]. Accordingly, physicians must not charge patients for licenced producers of marijuana for completing the medical document, or for any activities associated with completing the medical document, including, but not limited to: assessing the patient; reviewing his/her chart; educating or informing the patient about the risks or benefits of marijuana; or confirming the validity of a prescription in accordance with the *ACMPR*.

Just like conventional medication, however, the cost of the substances *per se* is not covered by OHIP.

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[5] *Ibid*.
[6] The term "insured services" in the context of this policy refers to OHIP-insured services.

Costs of Obtaining the Medical Marijuana and/or Cannabis

As a reminder, this paper is *primarily* geared towards individuals who are considering turning to medical marijuana to treat conditions arising from traumatic and/or tortious events. Only the first sub-heading below may be applicable to other individuals.

a. Insurance Coverage under Extended Health Care Policies

Access to extended health coverage, whether it is through a group or private insurance policy, is not dependent upon having been involved in an accident or other traumatic event. In other words, this form of funding is available to anyone who has an extended health care policy (e.g. privately, through work, through a sports team, or through school).

The problem is that, at this time, most extended health care policies do not cover medical marijuana and/or cannabis. Most universities or companies that offer group health plans restrict what is considered to be standard or eligible drugs for which there is coverage under the plan. Typically, at the very least, the drug would have to be one that has a Drug Identification Number ("DIN"). A DIN is a number assigned by Health Canada to a drug product prior to being marketed in Canada.[7] Marijuana and cannabis do not currently have a DIN[8], whether they will once legalized remains to be seen.

With that said, there are signs of change. In 2015, a student successfully petitioned the University of Waterloo and obtained coverage for the cost of medical marijuana through

[7] https://www.canada.ca/en/health-canada/services/drugs-health-products/drug-products/fact-sheets/drug-identification-number.html.

the school's group health policy (issued by Sunlife).[9] The student had been diagnosed as a child with a chronic condition known as New Daily Persistent Headache. He argued that cannabis was the only thing that helped him concentrate long enough to get through his studies. Ultimately, the University agreed to extend coverage under its drug benefits policy for the use of cannabis for this particular student (but not generally to all of its plan members).

Similarly, this spring, Loblaw Companies Limited and Shoppers Drug Mart announced that effective immediately, they would be covering all medical marijuana under their employee benefit plan (provided through Manulife) up to a maximum of $1,500.00/year[10]. The coverage, however, is reportedly restricted to the treatment of spasticity and neuropathic pain associated with multiple sclerosis and nausea and vomiting in chemotherapy for cancer patients.

With more challenges to the policies and more exceptions being granted, the doors will slowly open to the extension of coverage for medical marijuana. For now, however, that coverage remains rare and restricted.

b. Insurance Coverage under Accident Benefits

When someone is injured in a motor vehicle accident, he or she will have access to accident benefits coverage, irrespective of whether that person was at-fault for the

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[8] https://health-products.canada.ca/dpd-bdpp/.

[9] http://www.huffingtonpost.ca/2015/03/16/medical-marijuana-insurance-sun-life-jonathan-zaid_n_6881578.html.

[10] https://www.thestar.com/business/2017/03/30/shoppers-loblaw-employees-covered-for-medical-marijuana.html.

accident and irrespective of whether that person held his or her own policy of automobile insurance. A review of the priority rules for which insurer will respond to an accident benefits claim is beyond the scope of this paper, but suffice it to say that medical and rehabilitative benefits will be available when a motor vehicle strikes another vehicle, a cyclist, or pedestrian and results in injury.

Many motor vehicle accident victims assume that the first "payor in line" to respond to claims for medication expenses is the accident benefits insurer, but that is incorrect. Pursuant to section 47(2) of the *Statutory Accident Benefits Schedule*[11]:

> Payment of a medical, rehabilitation or attendant care benefit or a benefit under Part IV is not required for that portion of an expense for which payment is reasonably available to the insured person under any insurance plan or law or under any other plan or law.

In other words, where an injured accident victim has access to a private or group extended health care policy, it is the insurer of that policy to which the expenses must first be submitted. Only if there is no coverage (or limited coverage) under that extended health care policy can the expenses be submitted to the accident benefits carrier for reimbursement under the "medical benefit".

Pursuant to section 15(1) of the *SABS*, the medical benefit shall pay for all reasonable and necessary expenses incurred by or on behalf of the insured person as a result of the accident for (*noting only the relevant sub-sections below*):

- (c) medication;

[11] O. Reg. 34/10 [the *SABS*].

- (h) other goods of a medical or rehabilitative nature that the insurer agrees are essential for the treatment of the insured person, and for which a benefit is not otherwise provided in this Regulation.

Subsection 15(2)(a) of the *SABS* provides an exception for goods that are "experimental in nature"; however, seeing as the Federal government has legalized the use of medical marijuana, it is hard to imagine that an insurer could successfully rely upon subsection 15(2)(a) to deny coverage.

Typically, when seeking reimbursement for the cost of a medical or rehabilitative good or service, an insured person must submit a Treatment and Assessment Plan ("OCF-18") to the insurer *before* incurring the cost. This provides the insurer with an opportunity to review the reason for the proposed treatment and the cost associated with same. The insurer then has an opportunity to approve or deny the claim, subject to certain procedures and timelines set out in the *SABS*.

Medication, however, is exempt from this procedure. No OCF-18 is required. Pursuant to subsection 38(2)(c)(i) of the *SABS*, an insurer is liable to pay an expense in respect of a medical or rehabilitation benefit that was incurred *before* the insured person submitted an OCF-18 if the expense was reasonable and necessary as a result of the impairment sustained by the insured person for "drugs prescribed by a regulated health professional." Under section 3(1) of the *SABS*, a "regulated health professional" means a member of a regulated health profession.

This exception to the usual process makes perfect sense for two reasons. First, the delay in taking medication, sometimes by even a day, can cause serious harm or risk. A delay in receiving massage therapy by a day or a couple of weeks, by comparison, is not likely to pose any real risk of danger or harm to an insured. Second, the exemption recognizes that it is one thing to allow a non-medically trained insurance adjuster to review a report or OCF-18 about the benefits of massage therapy and determine whether the treatment seems reasonable in the circumstances, but it would be far too risky to place any kind of judgement in the hands of an insurance adjuster about the need for prescription medication that the adjuster may know absolutely nothing about.

As such, the process for seeking reimbursement for medical marijuana and/or cannabis obtained in accordance with the *ACRMP* ought to be fairly simply. The insured simply fills out an Application for Expenses (a.k.a. Expenses Claims Form) ("OCF-6") and submits it to the insurer, along with a copy of the "medical document" and the invoice/receipt for the drugs. The standard package sent by the insurer following an accident includes the OCF-6. It is also available on-line.[12] It is a simple "fill in the blank" form that requires the identity of the expense, the date upon which it was incurred, and the cost – that's about it. The insurer has 30 days from the date upon which it receives the signed OCF-6 to reimburse the insured for the expense.

Since the use of medical marijuana and/or cannabis is still less common that conventional medication in the treatment of post-traumatic injuries and impairments, there have been very few decisions reported by the Financial Services Commission of Ontario ("FSCO")

or the Licence Appeal Tribunal ("LAT") addressing disputes over claims for these drugs under section 15 of the *SABS*. Briefly, these decisions include, but may not be limited to, the following:

- ***Doyon v. Allstate Insurance Company of Canada***[13]

Ms. Doyon was involved in a motor vehicle accident in 2009, which resulted in chronic pain and depression. She was prescribed medical marijuana by a chronic pain specialist, who did not testify at the Arbitration. Her family physician did testify and testified that he would not provide such a prescription; however, he also admitted that since using marijuana she did not require any other medical pharmaceuticals. The marijuana was largely purchased from "compassionate societies", which existed in a "grey zone" of the regulations that existed at the time, but which she testified offered more potent marijuana than that offered by Health Canada. Ms. Doyon was successful. Arbitrator Mongeon held:

> As a fact, I find that the Applicant has used 4 grams of marijuana per day since her prescription. The only evidence I have as to the price of marijuana is a Health Canada invoice found in Exhibit 8, which shows $5.00 per gram for 90 grams…
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> …If the Applicant used 4 grams of marijuana for each of those days at the Health Canada $5.00 per gram, that would be a total of $17,980.00. As the Applicant is only claiming $12,600.00 to November 30, 2014, I find that the amount claimed is reasonable. I accept as a fact that this is the amount that the Applicant incurred.

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[12] https://www.fsco.gov.on.ca/en/auto/forms/Documents/SABS-Claims-Forms/1227E.pdf.
[13] FSCO A15-002442 (31 August 2016).

- ***M.J. v. Pembridge Insurance Company***[14]

M.J. was involved in a motor vehicle accident in 2015. He sought reimbursement for the purchase of medical marijuana to treat his accident-related injuries. He did not, however, provide a "medical document" authorizing his possession of the marijuana. M.J. was unsuccessful. Adjudicators Flude and White held:

> …In order for the applicant [M.J.] to have legal access to medical marijuana, he needs a "medical document" as that term is defined in legislation. So far the applicant has not provided a medical document authorizing access to medical marijuana. To pay for medical marijuana in the absence of a medical document would, in the respondent's [accident benefits insurer's] submission, make it a party to trafficking in a controlled substance.
>
> We find in favour of the respondent on all of the issues.

- ***Biro v. Unica Insurance Inc***.[15]

Mr. Biro was involved in a motor vehicle accident in 2007. He produced and used marijuana for the treatment of his accident-related pain. He did not first obtain a prescription from a physician, however, until February of 2011. At that time, a physician had submitted an OCF-18 to the insurer, prescribing 3g/day for pain relief. Over the years, Mr. Biro increased his intake to up to 30 g/day, without any medical recommendation for same. Mr. Biro was successful, in part. Arbitrator Muzzi held:

> I see no justification in the *Schedule*[16] for lump sum payment sin medical benefits for illegal drugs and I decline to award any amounts related to those claimed expenses.
>
> Mr. Biro's legal and medically sanctioned consumption of marijuana did not begin until February 11, 2011…
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> The preponderance of the evidence indicates that 3 g per day of marijuana has been prescribed and the doctors indicated it was helpful to Mr. Biro to control

[14] [2017] ONLAT 1556 (CanLII).
[15] FSCO A09-001753 (8 June 2017).
[16] This is another commonly used short-form for the *SABS*.

> the pain associated with the injuries suffered in the accident. There was not any clear evidence around the cost of the medical marijuana. Mr. Biro testified that he and a previous counsel had estimated the cost to be approximately $1000 [per] month. There was also some evidence that 30 g would cost $300. These two amounts being similar and close to the $240 weekly amount claimed, I find that the daily 3 g of marijuana would cost $30. Therefore, Mr. Biro is entitled to $30 per day in a medical benefit for medical marijuana but only from February 11, 2011 and ongoing.

What insureds can ascertain from the above case law is:

- without a "medical document" signed by a health care practitioner, it is unlikely the marijuana will be covered under the medical benefit;
- the amount that will be covered will likely be the dosage that has been prescribed, even if a higher dosage is, in fact, being consumed;
- it is important to adduce evidence (e.g. actual receipts and invoices) as to the actual cost of the drugs if full reimbursement is sought.

c. Out-of-Pocket Expense Claim in a Tort Action

As a last resort, where a tort action is being advanced, it is possible to seek reimbursement by way of an out-of-pocket expense claim. A tort action is a lawsuit that is brought by an injured person (the "Plaintiff") against the alleged wrongdoer (the "Defendant"). Personal injury tort actions may arise, for example, from motor vehicle cases, slip and falls, medical negligence, assault, etc. One of the headings of damages (compensation) that may be advanced in a tort case is a claim for out-of-pocket expenses reasonably incurred as a result of the tortious incident.

These claims are the last resort, such that reimbursement should first be sought by way of insurance coverage through an extended health policy or accident benefits claim. In the

context of a motor vehicle case, under the current *SABS*, the average level of coverage[17] for medical and rehabilitation benefits (combined with attendant care benefits) is $65,000.00 for up to five years post-crash (whichever limit is reached first). So, in a case where the Plaintiff has exhausted the $65,000.00 accident benefits coverage but continues to pay for the medical marijuana, he or she can advance that out-of-pocket expense in the tort claim.

The main difficulty with tort out-of-pocket expense claims is that, but for the rare exception, reimbursement will only ever come at the very end of the case when it resolves by way of a settlement or a Judgment. As such, the Plaintiff may be required to personally carry the costs for years, which can be a financial strain.

CONCLUSION

In conclusion, as medical marijuana and/or cannabis is increasingly sought out as a form of treatment of traumatic injuries, it will become more important for these individuals, their physicians, and their lawyers to understand the procedure for obtaining and covering the cost of a prescription. While funding options remain limited, there are signs that insurance providers are starting to "get with the times" and extend coverage, even on a restricted basis.

To learn more about or to contact Deanna S. Gilbert, visit https://www.thomsonrogers.com/directory/deanna-gilbert/.

[17] By "average level of coverage", this is referring to the category that is in the middle of injuries that would fall into the lower level of the Minor Injury Guideline and those that would fall into the higher level of catastrophic impairment. This coverage is also for adults. Different limits apply to minors.