

CARFRA & LAWTON
l a w y e r s

**THE NEW BRITISH COLUMBIA *HEALTH CARE COSTS RECOVERY ACT*,
S.B.C. 2008, c. 27**

The Insurance Bureau of Canada Agreement that had been in place for many years between the Ministry of Health in the Province of British Columbia and subscribing insurers, is soon to be replaced by legislation resulting in an expanded base for claims for cost recovery of health care services by the province, and onerous and potentially delay inducing requirements on the parts of litigants and insurers.

What follows is an overview of the new legislation, which shall focus on some of the highlights of particular sections of the Act with selective commentary. Please note that given the newness of the legislation, much of it is yet unclear in terms of application and impact. Moreover, there has not been a pronouncement about the staffing and implementation plans the government may have in place given what will be a massively increased reporting requirement on the part of litigants and insurers, and a correspondingly enormous administrative burden on the part of the province in responding to various notices, proposed settlements of claims, and judicial determination of claims.

What follows then are the highlights of the Act by section number. Please note that these materials are not intended to be an exhaustive review but rather comments on some first impressions of the legislation.

Section 1 – Definitions

This section of the Act provides definitions of words and phrases that appear in the body of the legislation.

“**Beneficiary**” – Beneficiary is stated to have the same meaning as in the *Medicare Protection Act*. That Act states that a beneficiary is a resident who is enrolled in the Medical Service Plan in British Columbia, or the children of such enrolled persons.

“Future Cost of Health Care Services” – this is a very broadly described definitional set of words and is designed to capture the total cost of all health care services that are provided or are reasonably expected to be provided to a beneficiary as a result of the direct or indirect result of personal injury.

“Health Care Practitioner” – a health care practitioner is a physician, or any other practitioner who is identified in the Regulations. Please note that this could include numerous allied practitioners such as physiotherapists, chiropractors, occupational therapists, psychologists, and others. We will have to await the Regulations to determine the full range of health care practitioners whose services once billed, become the subject of a claim for health care services.

“Health Care Services” – this definition includes health care service benefits that are provided under the *Hospital Insurance Act*, the *Medicare Protection Act*, the *Continuing Care Act*, and the *Emergency and Health Services Act*. These services would encompass ambulance, hospital, physician, and extended care facility or related facility fees, the latter for services to persons with forms of disability not requiring hospitalization.

The Health Care Services definition includes a description of the range of services which is extremely broad being characterized as “any other act or thing” drug, device, or similar matter associated with personal injury.

“Health Care Services Claim” – is a description of past and future costs of health care services attributable to personal injury.

“Past Cost of Health Care Services” – means any expenditure made in the past directly or indirectly related to the personal injury of the beneficiary.

“**Wrongdoer**” – means:

- (a) A person whose negligence or wrongful act or omission, causes or contributes to a beneficiary’s personal injury or death, and
- (b) A person who is responsible at law for the acts or omissions of a person referred to in paragraph (a), but does not include the beneficiary.

Please see my remarks in this regard under paragraph 17 of the legislation dealing with joint and several liability and my views on the operation and impact of the *Negligence Act* in British Columbia on the new legislation.

Section 2 – Beneficiary’s Right to Recover

A beneficiary may recover from a wrongdoer the past and future cost of health care services.

Section 3 – Obligation to Claim

A beneficiary must advance a claim for health care services in any proceeding brought as a result of bodily injury contemplated in the legislation. This section also provides that if a claim has not sought recovery of health care services costs, then the court must grant an amendment to permit such recovery.

Section 4 – Requirement to Notify Government of Claim

A beneficiary, a representative of a beneficiary, or a lawyer representing a beneficiary, must give notice to government within twenty-one days of a legal proceeding being commenced through which health care services may be claimed.

Section 5 – Final Disposition of Claim or Legal Proceeding

No final disposition of an action is permitted without a filed consent of the minister. Moreover the court cannot dismiss a health care service claim unless the court is satisfied that the government has been given reasonable opportunity to appear and make representations with

regard to the settlement application and that written notice under Section 4 has been provided to government and that written notice of the application for final disposition of the claim has also been given to government.

Section 6 – Government May Intervene in Proceeding or Assume Conduct of Claim

The government has the right to intervene in the proceeding on its own behalf for the recovery of the costs of health care services.

Section 7 – Government Has Subrogated Right

Government is subrogated to any right of the beneficiary to claim for the cost of past or future health care services.

Section 8 – Government Has Independent Right to Recover

The government can commence its own proceeding for past or future costs related to health care services. Additionally, once an action is commenced by a beneficiary, the government can “piggy-back” its claim onto such action even if a limitation period has expired for an independent claim by government had the beneficiary not brought an action.

Section 9 – Government Proceedings

The government does not have to obtain permission from a beneficiary to commence an action for recovery the cost of health care services.

Section 10 – Information from Insurer

An insurer must notify the minister that an insured has, or *may* (emphasis added) have, caused or contributed to the personal injury or death of a beneficiary. Thereafter if requested by the minister, the insurer must notify the government within 60 days of learning of such an event, in a prescribed form, which may include, depending on the request of the minister:

- (a) a copy of the insured person’s policies;

- (b) a copy of the police report;
- (c) a copy of any relevant pleadings.

Section 11 – Beneficiary’s Duty to Cooperate

The beneficiary has an obligation to cooperate with the government by providing copies of medical clinical records, submitting to independent medical examinations as often as the government considers necessary, and assisting bureaucrats, clerks, and other representatives of government in advancing a claim for health care services.

Section 12 – Beneficiary’s Duty to Give Notice to Minister before Settlement

A beneficiary involved in any action against a wrongdoer must give notice to the minister before settling such a claim.

Section 13 – Settlement of Claims

A defendant in an action, or an insurer, must give notice of a proposed settlement and the minister must consent to it in writing in order for it to be effective. The minister can request documents to permit it to evaluate the propriety and quantum of the claim. If no notice is given to government then the government can pursue the person or insurer who is obliged to pay under the legislation. The defendant or insurer must give 60 days notice of the intended settlement application to government. A release is void unless notice is given to the government with respect to the settlement and the minister consents thereto.

This section may prove to cause delay to parties wishing to settle claims unless there is a sophisticated and speedy methodology established by government for the administration of settlement proposals. What this also means is that government must be given long notice of any settlement negotiations, or, I would suggest, any mediation of a claim. I would also suggest in these circumstances that if a Notice to Mediate is delivered under appropriate legislation in British Columbia, the government should be included in such Notice.

Section 14 – Orders for Information and Documents

Government on application by the minister may obtain an order of the court for the production of records and documents in the possession or control of any beneficiary where such documents bear on the government's right of recovery of health care services costs. Note in this regard that the *actual* costs of the government can be ordered to be paid by the beneficiary in the face of such an application.

Section 15 – Protection of Information

There is no waiver of privilege with respect to documents that are required to be produced under the legislation. There is also a statutory stipulation that the minister and government or their agents and legal counsel may only make use of the documents in the context of the claim for health care services costs under the legislation.

Section 16 – Minister's Certificates

A certificate stating the amount of the health care services is proof of the health care services. This wording does not afford an opportunity on the part of beneficiaries or "wrongdoers" under the legislation, to challenge the quantification of health care services. Of more concern is the fact that such a certificate can also be deemed under the legislation to be "conclusive proof of the past cost of health care services, the future cost of health care services, or both". In other words a certificate can arguably be granted by the government unilaterally stipulating what the future cost of health care services will be and there is presently no mechanism in the legislation to challenge the quantification of any amount in such a certificate.

Section 17 – Joint and Several Liability

This section I suggest must be read closely in the context of Section 1 of the *Negligence Act* of British Columbia. Section 17 states as follows:

If it is determined in a legal proceeding referred to in Section 3(1) [Obligation to Claim], 7(2) [Government has Subrogated right] or 8(2) [Government has

Independent Right to Recover], that the personal injury of a beneficiary was caused in whole or in part by the negligence or wrongful act or omission of 2 or more wrongdoers, those wrongdoers are jointly and severally liable for the percentage of the past and future costs of health care services attributable to the personal injury that is equal to the percentage of total fault for the injury that is determined by the court to be attributable to those wrongdoers.

Section 17 is designed to permit government to pursue “wrongdoers” for the cost of health care services equal to the percentage of the total fault of injury that is determined by the court to be attributable to the wrongdoers. Please note that the definition of wrongdoer excludes a beneficiary under the legislation. This section on its surface suggests that in the case of contributory negligence on the part of a beneficiary, the section will not result in any reduction of the amount payable by a wrongdoer for the cost of health care services. In my view, however, the provisions of the *Negligence Act* of British Columbia will also apply. There is nothing in the *Health Care Costs Recovery Act* that stipulates otherwise. In particular, Section 1 of the *Negligence Act* of British Columbia, R.S.B.C. 1996, c. 333 states as follows:

Apportionment of Liability for Damages

- 1(1). If by the fault of two or more persons damage or loss is caused to one of more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.
- 1(2). Despite sub-section (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.
- 1(3). Nothing in this section operates to make a person liable for damages or loss to which the person’s fault has not contributed.

In my view the interpretation of our *Negligence Act* in the context of decisions such as *Wells v. McBrine* (1986), 70 B.C.L.R. 34 (S.C.), has the result that should a beneficiary under the *Health*

Care Costs Recovery Act be at all contributorily negligent for the injury that resulted in the need for health care services, then liability will be several as among the beneficiary and any wrongdoers. What this means is that the wrongdoer would be required to pay only the amount of the health care services costs that is in proportion to that wrongdoer's degree of fault for the original claim of the beneficiary against the wrongdoers. The operation of the British Columbia *Negligence Act* differs from that in other provinces in that it creates several liability when the plaintiff, or for the purposes of our discussion, the "beneficiary" has been contributorily negligent. Whereas the *Health Care Costs Recovery Act* has a narrow definition of wrongdoer to exclude a beneficiary, the broader applicable *Negligence Act* simply refers to "persons" who may cause damage or loss and arguably such persons would include both beneficiaries, and wrongdoers. In my opinion therefore in the event of a case where a beneficiary has been contributorily negligent to any degree, then an insured wrongdoer will only have to pay the amount of health care services past or future, in proportion to the degree to which the insured wrongdoer was at fault.

Section 18 – Priority of Beneficiary's Payments

A beneficiary has priority over payments to the government where a judgment is obtained against a wrongdoer.

Section 19 – Government has Separate Appeal Right in Beneficiary's Proceeding

The government has the right to appeal to the Court of Appeal if it is not satisfied with a determination on the amount of health care services recovery in a given action.

Section 20 – Payments to Government

In a proceeding brought by a beneficiary for damages alleging fault of a wrongdoer the court must designate the amount of any award relating to a health care services claim when assessing damages.

Section 21 – Indemnification of Beneficiary for Costs and Expenses

Government must indemnify a beneficiary in the event that the government brings a claim for health care services and costs are awarded against the beneficiary.

Section 22 – Service of Notices to Government

This section stipulates where and how service of documents on government is made. It requires service on the Attorney General at the Ministry offices in Victoria and is sufficiently served if left during office hours with a solicitor on staff, or mailed by registered mail to the Deputy Attorney General. Section 7 of the Regulations also permits service by email to AGHCCRAService@gov.bc.ca.

Section 24 – Application of this Act

This is an important section because it stipulates that the Act does not apply to:

- (a) personal injury or death arising out of a wrongdoer's use or operation of a motor vehicle if the wrongdoer has, when the injury is caused, coverage under the universal plan of automobile insurance as set forward in the *Insurance (Vehicle) Act*;
- (b) *Tobacco Damages and Health Care Costs Recovery Act* litigation;
- (c) *Workers Compensation Act* based claims.

Please note however that there remain situations in which although a wrongdoer operating a motor vehicle may avoid the application of the Act, another wrongdoer – for example a commercial host who over serves alcohol to a driver of an automobile – would be subject to the operation of the Act.

Section 25 - Regulations

The Regulations address a number of procedural and substantive matters including:

- the definition of an insurer – as defined by the *Insurance Act*, captive insurers and certain reciprocal exchanges;
- that proceedings under the *Small Claims Act* are exempted from the Act;
- the prescribed forms;
- the range of categories of persons who are included under the definition of “health care practitioner” – occupational therapists are included;
- a significant expansion of enumerated “health care services” under the *Act*; in some cases very broadly and uncertainly described, such as “therapies”, “family support”, and “professional support”; and
- the terms and conditions under which a beneficiary’s lawyer may also act for government in advancing a claim for health care services – the government will agree to a 15% contingency fee to the lawyer.

CONCLUSION

There is little doubt that the expense and administrative work facing insurers will expand as a result of the implementation of this new legislation. What remains unclear is the degree to which government is presently ready to deal with the very significant increase in clerical and administrative tasks that will be created directly and indirectly with the new legislation. I have a concern that until jurisprudence evolves interpreting the Act, confusion and delays in settlement of claims will occur.

In addition, there is a question about the fairness of the calculation of the health care costs, whether they may be reasonable in any circumstance, and what a wrongdoer or insurer of a

wrongdoer may be able to do in the event that the costs are thought to be extravagant, unnecessary, or simply unreasonable.

Our office will be monitoring the implementation and operation of the legislation and we will provide our clients with updated information as soon as possible.

Dean Lawton, Partner.

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