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## **An Overview of the Health Care Costs Recovery Act**

Lunch 'n Learn Seminar

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***HEALTH CARE COSTS  
RECOVERY ACT, SBC 2008 c. 27  
(the “Act”)***

**Overview and Selected  
Commentary**

# Background

- The *Act* came into force April 1, 2009.
- Prior to the enactment of the *Act* the government and insurers had an informal gentleman's agreement for recovery of incurred hospital costs.
- The agreement was not legally enforceable.

- The *Act* provides the B.C. government with an enforceable mechanism to recover health care costs from the insurers of “wrongdoers” whose insured cause the injury of B.C. residents (can also be directly against wrongdoer).
- The *Act* imposes notice and procedural requirements upon claimants and insurers.
- It also imposes certain restrictions and obligations upon the court.

- The *Act* is similar to statutes in other jurisdictions but is broader in scope. The *Act* basically requires wrongdoers and/or their insurers to pay for all government funded health care services, **past** or **future**.

# Application

- The *Act* applies in relation to injuries suffered before and after April 1, 2009 (s. 24).
- Small Claims proceedings are exempt from certain provisions of the *Act* (no obligation on plaintiff to claim for health care services, court can dispose of claim without government, IR still has duty to notify government of claim (s. 10)).

- The *Act* does not apply in relation to:
  - MVA's where ICBC is the primary insurer;
  - Tobacco related wrongs; and
  - WCB matters.

# Excess and Out of Province Auto Insurers

- Insurers providing excess coverage over the ICBC statutory minimum are exempt from the *Act*.
- The *Act* does apply to claims arising from the fault of drivers insured by out of province insurers.

# Commencement and Cooperation by Plaintiff

## Beneficiary's Right to Recover (section 2)

- The *Act* gives individuals who receive, or could be expected to receive, health care services (“beneficiaries”) the right to recover the past and future costs of these health care services from wrongdoers.

## Obligation to Claim (section 3)

- The beneficiary or her legal representative must include a health care services claim as part of the personal injury action.

- Exceptions to s. 3
  - (1) health care already settled;
  - (2) government has started independent action
- Notice Requirement (s. 4)
  - Beneficiary must, within 21 days, provide notice to government of legal proceedings.

# Continued Obligations on Plaintiff

- Beneficiary is obliged (s. 11) to provide the minister with records or information pertaining to:
  - the nature and extent of injury
  - the treatment, current conditions and prognosis of the injury
  - rehabilitation
  - cause, origin and circumstances of the injury
  - health care services that have been received or may be required in relation to the injury
  - evidence relating directly or indirectly to the health care services claim

At the request of and as often as the minister considers necessary, Beneficiary is obliged to:

- allow a health care practitioner selected by the minister to examine the beneficiary
- allow any evaluation required by the minister to be performed
- obtain and provide to the minister a certificate or report of an attending health care practitioner as to the nature and extent of the beneficiary's treatment, current condition and prognosis and as to any other aspect of the beneficiary's injury and
- provide any other cooperation reasonably required

# Insurer's Obligations

## Pre-Litigation Notice (s. 10)

- The insurer of a person whose act or omission has or may have caused or contributed to the personal injury or death of a beneficiary must within 60 days after learning of the matter notify the minister (prescribed form in Regulations) and if requested by the minister, must provide:

- a copy of the insured person's insurance policy;
- if the matter was reported to the police, a copy of the police report (if obtained); and
- a copy of any affidavit pleading or application as they relate to the legal proceedings.

- The 60 days notice requirement does not apply to matters which the insurer learnt of prior to April 1, 2009.
- The obligation to give notice to the government arises whether or not an action is commenced.

# Rights of Government

## Government May Intervene in Legal Proceeding

The *Act* provides the government with 3 different modes of recovery:

1. a statutory right of subrogation (section 7)
2. empowers the government to assume conduct of the health care services claim (section 6(1))
3. empowers the government to commence legal proceedings in its own name for recovery of past and future costs (section 8)

# Government Rights continued...

- permits the government to seek an order establishing liability (section 8)
- permission or consent of the beneficiary is not needed for government to intervene in, or commence action (section 9)
- provides an extended limitation period

- It is not a defence to a legal proceeding commenced by the government in the government's own name that a claim for a beneficiary's personal injury has been adjudicated or settled unless:
  - a) claim or settlement included a health care services claim;
  - b) settlement met the requirements of section 13 (section 9); or
  - c) case was settled or adjudicated prior to April 1, 2009.

## Right of Appeal

- The *Act* provides the government with an independent right to appeal in its own name (the portion of the claim relating to health care services) (section 19).

# Settlement

- Beneficiary must, at least 21 days before the beneficiary or representative enters into any settlement relating to the personal injury, give notice to the government in the form prescribed by the Regulations (section 12).

- *Act* requires there to be a 21 day grace period between the date of notice to government and date of settlement.
- Therefore notices to mediate should be copied to the government, together with sufficient documentation to enable the health care services component of the claim to be assessed so that there is a prospect for ministry consent at the time of mediation.

## Settlement (section 13)

- An action must not be settled unless:
  - the person liable to make payments under the proposed settlement (i.e. defendant or its insurer) gives the minister notice of the proposed terms of settlement (in the form prescribed by the Regulation);
  - the amount of settlement attributable to the medical services claims is specifically identified;
  - the consent of the minister in writing to the proposed settlement, is obtained;

- the Minister may, before consenting, require the insurer to provide any records or information the minister considers necessary to evaluate the settlement of past and future costs of health care services; and
- the insurer must comply on or before the date specified in the request.

- If the person responsible to pay the proposed settlement fails to give notice as required in section 13, the government has the right to recover from that person the **total amount** of the past and future costs of health care services relating to the beneficiary's injury, **as a debt due** from that person to the government (section 13(5)).
- The joint and several liability provisions of section 17 do not apply. The tortfeasor and insurer are deemed to be liable for the entire health care services claim and not merely for the percentage attributable to the fault of the insured.

- The provisions of section 13 are punitive.
- The provisions of section 13 apply whether or not a legal proceeding has been commenced.
- Furthermore for the purposes of recovery under section 13(5) the ministers certificate setting out the cost of past and future health care services costs is **conclusive proof of such costs** (section 16).
- Any release issued without compliance with the notice of proposed settlement and obtaining of government consent is void (section 13(5)).

# Eve Of Trial Settlements

- Will not be binding without notice to and consent of the government.
- Consent will not be obtained unless sufficient notice and provision of sufficient documentation has been provided to the government.
- In the absence of sufficient and timely notice and provision of materials eve of trial settlements will be lost and trials will be forced to proceed, or alternatively, trial dates will be lost while awaiting minister consent.

- The *Act* does not impose any timeline within which the government must respond to proposed settlements.

# Obligations of the Court

Except in relation to claims commenced prior to April 1, 2009:

- A legal proceeding must not be discontinued or dismissed by consent unless consent of minister is filed with the court (section 5(1)).
- The court must not set aside, dismiss or strike out a health care services claim unless satisfied that the government has been given a reasonable opportunity to appear (section 5(2)).

- The court must not make an order disposing of a proceeding unless satisfied that government has been given the required written notice of the claim and of the application for the order of final disposition (section 5(3)).
- The court must, as part of any judgment awarded in a legal proceeding, designate the amount of the judgment applicable to the health care services claim (section 20(1)).

# Joint and Several Liability

- Section 17 provides that wrongdoers are jointly and severally liable for the percentage of past and future cost 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.**

# Minister's Certificate is Conclusive Proof

- Pursuant to section 16 of the *Act*, the minister's certificate is deemed to be **conclusive proof** of the past cost of health care services, and/or the future cost of health care services.
- The *Act* does not contain any provisions allowing the defendants, the beneficiary, or the insurer to challenge the minister's certificate of health care service costs.

# Implications For Underwriters

- The *Act* creates two new heads of recoverable damages: past and future health services costs.
- Will substantially increase the indemnity payable in bodily injury actions.
- Underwriters may wish to consider this significant increase in damages awards when setting casualty premiums or considering the extension of coverage to additional insureds.

# Implications For Claims

- New notice and procedural requirements will have to be woven into claims handling protocols and diarization procedures.
- Reports of circumstances potentially giving rise to a claim will require a careful review to ascertain whether the 60 day reporting requirement is triggered.

- Additional heads of damages will need to be considered when setting reserves. A schedule of costs attributable to MSP coverage services can be obtained from the website at

<http://www.health.gov.bc.ca/msp/infoprac/physbilling/payschedule/>

- Early production of MSP printout should be obtained to assist with reserve calculations.

- Early and complete production of clinical records will be required to assist with assessment of severity of potential future health services claim and for reserve updates. These will require careful analysis.
- Early examinations for discovery with a focus on injury recovery and prognosis.

# Application of the Act

## Important Dates

- Majority of *Act* applies to all ongoing claims, regardless of when they arose.
- Some of the notice requirements of the *Act* do not apply to claims commenced prior to April 1, 2009
- Lawsuits commenced after April 1, 2009 will be subject to the entirety of the *Act*, regardless of when the injury occurred.

- Considerable debate over the interpretation of the *Act*.

# Lawsuits Commenced Prior to April 1, 2009

- Plaintiff and defendant must still notify government of proposed settlement (prescribed form).
- Failure to provide notice could subject insured or insurer to penalty provisions of the *Act* (s. 13).

# Lawsuits Commenced Prior to April 1, 2009

- Debt owed by insurer under s. 13 may not be subject to policy limits.
- Section 13 only provides a penalty for failing to give “notice”. There is no penalty for not obtaining Minister’s consent, but any release is void without Minister’s consent (s. 13(8)).
- Court may dismiss claim without government consent if claim commenced prior to April 1, 2009.

# Lawsuits Commenced Prior to April 1, 2009

- Insurer has no duty to notify government of potential claim.
- Plaintiff has no duty to claim health care services claim or to notify government of claim (but still must notify government of proposed settlement).

# CONCLUSION

- Given the volume of claims which will require government review and consent there is reason for concern that
  - claims will become more costly
  - claims will be more difficult to resolve in a timely fashion;
  - however, given the punitive measures of section 13, an insurer cannot, without placing itself at considerable risk, proceed to settle the claim without obtaining, in advance, ministry consent and approval (with certain exceptions)
- The *Act* contains many ambiguities and monitoring of judicial pronouncements concerning it will be necessary.

Thank you!