BC 'wrongdoers' must pay back government's health care costs

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British Columbia's Health Care Costs Recovery Act comes into force on April 1. It will shift the burden of personal injury health care costs from the medical services plan to "wrongdoers" and their insurers. They will be forced to reimburse the government for essentially all government-funded health care costs incurred as a result of personal injury accidents. The increased exposure to defendants in serious claims could be in the hundreds of thousands of dollars.

WCB and ICBC claims are exempt from the Act, but claims arising out of most other injury accidents are not. As the Act applies retroactively to all injury claims outstanding on Apr. 1, the immediate concern for counsel will be how the Act impacts lawsuits commenced before that date. Counsel need to know what steps are required of parties to existing claims, and what results flow from taking (or failing to take) those steps. These questions are especially pertinent to claims set for mediation or trial immediately following Apr. 1.

While the Act exempts pre-existing lawsuits from some of the requirements that will apply to actions commenced after Apr. 1, most of the Act applies to all claims, regardless of when they arose. Perhaps the most significant requirements for counsel are that both plaintiffs (under s. 12) and defendants (under s. 13(1)(a)) must notify the government, and the government must consent, before cases can be settled. Once notified, the government can request information, and the parties must provide it. The government then has various means available to collect the money spent (or to be spent) on health care services.

The critical question for counsel will be what consequences flow from giving such notice. Under the Act, the government has three available remedies, including the right to intervene in or assume conduct of a health care services claim under s. 6, a subrogated right to sue under s. 7 and an independent right to recover under s. 8.

The most significant of these rights is the government's independent right to sue. The s. 6 rights are unlikely to arise in old lawsuits, as these actions will not include a health care services claim as

defined in the Act. The subrogated right to recover will allow the government to bring an action, but subjects it to any defences that would be available to a defendant in a direct claim by the injured party, including the expiry of B.C.'s two-year limitation period.

The independent statutory cause of action, however, allows the government to sue a wrongdoer in its own name for the cost of health care services provided to an injured beneficiary, and purports to apply whether the injury was caused "in whole or in part" by the wrongdoer. This suggests that the government might attempt to achieve full recovery on claims that would normally be subject to apportionment under the Negligence Act. Hopefully, the B.C. courts will take a fault-based approach to s. 8 claims, but it is not known how the government will initially approach the issue.

Also, rather than subjecting the government to the same limitation period as the plaintiff, s. 8(5)(a) provides a limitation period of six months after the expiry of the standard two-year limitation period (i.e. 30 months), which can be further extended under s. 8(5)(b). The upshot of s. 8(5)(b) is that where the government does not receive notice of the claim within two years of the injuries occurring, it will effectively be subject to a limitation period of six months from the date it first receives notice of the claim or information from the parties.

For pre-existing claims, s. 8(7) eliminates the extensions available under s. 8(5)(b) where the injured party's limitation period has expired before Apr. 1. The practical effect of s. 8(7) appears to be that claims that arose prior to Oct. 1, 2006 would be barred, claims that arose between Oct. 1, 2006 and March 31, 2007 would be subject to a strict 30-month limitation period and claims that arose on or after Apr. 1, 2007 would have a 30-month limitation period subject to the postponement provisions of s. 8(5)(b).

Given defendants' increased exposures and delays for all parties that will no doubt result when notice is given to the government prior to settlement, it might be tempting for parties to quietly settle claims and hope the government does not notice. The exemptions found in the transitional provisions in s. 24 of the Act would allow this to occur in actions commenced before Apr. 1. However, the consequences of doing so can be severe, and counsel should resist this temptation.

Failure to give notice to the government results in the "person who would be liable to make payments under the proposed settlement" (i.e. the defendant and/or their insurer), being liable under s. 13(5)(a) for the full amount of the health care services claim. Since this liability arises out of a bodily injury, it would be subject to a new two-year limitation period, likely from the date of the unauthorized settlement. As a result, while giving notice might result in having to defend a health care services claim, the consequences of failing to give notice are potentially much greater still.

A review of the Act raises many questions about how personal injury litigation in B.C. will be affected. One thing is certain, however - the Act begins a new chapter in B.C. personal injury litigation that will result in some interesting decisions in the coming year.