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HEALTH CARE COSTS RECOVERY LEGISLATION

SUBROGATION FOR MEDICAL COSTS IN BC AND ALBERTA

By

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I. INTRODUCTION

On April 1, 2009, the *Health Care Costs Recovery Act* SBC 2008, c. 27 (the "HCCRA") came into force in British Columbia ("BC"). Designed to replace the vague and probably unenforceable "Gentlemen's Agreement" entered into in the 1950s between the insurance industry and the government, the HCCRA is intended to shift the burden of health care costs from BC's publicly funded Medical Services Plan to the insurers of tortfeasors whose conduct resulted in the medical services costs.

At around the same time, other provinces were either contemplating or enacting similar statutes. This trend has continued, and the latest province to follow suit is Alberta, which, on May 31, 2012, brought into force the *Crown's Right of Recovery Act*, SA 2009, c.C-35 ("CRRA").

Both statutes exempt licensed auto insurers (ICBC and private excess auto insurers in BC and auto insurers who have contributed to the "aggregate assessment" in Alberta) from health services claims. However, it has come as a surprise to some in BC, and will no doubt be a surprise to some in Alberta, that auto claims involving out-of-province vehicles are not exempt from health care services claims in either province.

Further, both statutes clearly apply to all bodily injury claims arising under CGL and other policies. It is therefore essential that counsel and insurers handling BI claims, auto or otherwise, fully understand the applicable regime, at least in their own jurisdiction.

Further, because of the large amount of vehicle traffic between Alberta and BC, the prevalence of both plaintiffs' and defence counsel practicing on both jurisdictions, and the prevalence of insurers in each jurisdiction handling claims in the other, it is useful for anyone involved in bodily injury litigation to have an understanding of the similarities and differences between the HCCRA and the CRRA, so that common pitfalls can be avoided.

II. WHAT IS COVERED?

In BC, the HCCRA requires defendants and their insurers to reimburse the Crown for essentially all government funded health care services provided as a result of personal injury accidents. Covered services include the following:

(a) benefits defined in the *Hospital Insurance Act* (i.e. hospitalization costs);

(b) benefits defined in the *Medicare Protection Act* (i.e. medically required services such as doctor's visits and lab tests);

(c) payments under the *Continuing Care Act* (i.e. acute care facilities);

(d) expenditures under the *Emergency and Health Services Act* (i.e. EMS and ambulance); and

(e) any other health care related expenditures, including nursing, family support, occupational therapy, speech therapy, etc.

Section 16 of the HCCRA provides that a minister's certificate setting out the health care costs is conclusive proof of those health services. While this might be taken to suggest that the HCCRA creates some sort of strict liability regime, it is likely that while the printout cannot be challenged to the extent that the services were rendered and paid for, the services can be challenged based on

causation or reasonableness. See, for example, *MacEachern (Committee of) v. Rennie*, 2009 BCSC 652, where the court held as follows:

> Notwithstanding the filing of a certificate under s.16(1) of the Act, therefore, it is open to the defendants to contest whether all the health care services claimed in the Minister's certificate are attributable to the accident. In this case the defendants would argue that a portion of the plaintiff's health care costs between the time of the accident and the commencement of the trial are attributable to circumstances or conditions that pre-existed the accident.

Alberta's CRRA covers essentially the same services, including:

(a) in-patient and out-patient services provided in a hospital or other facility;

(b) health services as defined in the *Alberta Health Care Insurance Act*;

(c) transportation services, including air and ground ambulance services;

(d) public health services;

(e) mental health services;

(f) drug services;

(g) any good or service prescribed to be a health service by the regulations.

The CRRA contains a similar provision to s.16 of the HCCRA in s.9(3), which provides that the Director's certificate is conclusive proof of the cost of the services. However, s.9(2) provides that the certificate is proof, "in the absence of evidence to the contrary" of the services referred to in s.9(1)(a), which include only services made necessary as a result of a wrongdoer's wrongful act. Thus where the BC statute requires an implied limitation of s.16 in order to challenge the certificate (which it appears will be readily made by the courts), the Alberta statute is explicit in that regard.

The effect of both statutes is that essentially all health care services paid for by the BC and Alberta governments are now claimable by those governments against tortfeasors who caused the injuries that lead to the services. In many cases, this can result in thousands of dollars in additional exposure to insurers, while in the most serious cases, the additional exposure can be in the hundreds of thousands.

In BC, Workers Compensation claims, motor vehicle claims involving defendants insured within British Columbia and claims arising as a result of "tobacco related wrongs" under the *Tobacco Damages and Health Care Costs Recovery Act* are exempt from the HCCRA. The CRRA contains a similar exemption for auto defendants insured within Alberta, but does not exempt tobacco related wrongs, which are dealt with in separate sections of the statute. More significantly, WCB claims are not dealt with in the CRRA, although the government has been granted the authority, not yet exercised, to make regulations dealing with such claims.

All non-exempt claims for personal injuries are covered by both statutes, including auto claims against out-of-province drivers and claims covered by insurers who provide CGL coverage to insureds in BC and Alberta.

Both the HCCRA and the CRRA apply retroactively to health care costs incurred before the statutes came into force, and allow for the recovery of the cost of both past and future treatment.

III. ENFORCEMENT: GOVERNMENT REMEDIES

The HCCRA and CRRA are similar in their scope and intent. It is clear that each province has, as a matter of policy, determined that the cost of accident related health care is better borne by the insurance industry than by local taxpayers. Further, each province has established a statutory cause of action in favour of the government, as well as a general right of subrogation for health care costs. Where the statutes differ substantially is in the procedural requirements that must be met by all parties in either pursuing or resisting these remedies.

A HCCRA

In BC, the government has three separate rights of action, including:

i) the right to intervene in ongoing proceedings brought by an injured plaintiff and to assume conduct of the health care costs portion of the claim (s.6);

ii) the right to bring a subrogated action in its own name or the name of the injured party (s.7); and

iii) an independent right of action (s.8).

B CRRA

The Alberta statute also provides for a subrogated action under s.38, as well as an independent right to recover under s.2, which are similar to the rights conferred on the BC government by ss.7 and 8 of the HCCRA.

The CRRA does not contain a government right to intervene, but the recipient of health care services has a duty to co-operate with the government in proving the Crown's right of recovery. Failure to co-operate can result in the recipient being held liable for any health care costs that the government was unable to collect as a result.

IV. RETROACTIVITY AND LIMITS ON GOVERNMENT ACTION

Both the HCCRA and CRRA apply retroactively to health care costs incurred before the statutes came into force; however, the government's right of action is not unlimited in either BC or Alberta. Both statutes contain limitation periods applicable to government action, and because the HCCRA has now been in force for over three years, a body of case law has begun to develop. It is expected that additional decisions will be rendered in BC as time goes on, and that the CRRA will soon result in its own body of case law in Alberta.

A HCCRA

In order to provide for the enforcement of its retroactivity provisions, the HCCRA contains a convoluted, generally poorly understood system of shifting limitation dates for claims arising prior to the statute's coming into force on April 1, 2009. For claims arising after that date, the requirements of the HCCRA are relatively straightforward, though not always followed.

The number of pending claims that arose prior to April 1, 2009 is obviously shrinking. However, many such claims are still ongoing, and those tend to be of the more complex variety and involve more significant health care costs. It is therefore important to understand how the HCCRA impacts claims arising before April 1, 2009 as well as how it applies to new claims.

(a) Right to Intervene in or Assume Conduct of Proceedings (s.6)

Under s.6 of the HCCRA, the government has a right to intervene in actions containing health care services claims, and to assume conduct of and settle the health care services portion of an action.

It is implicit in the right to intervene, however, that a health care services claim has already been plead and currently exists in the action. Obviously, if the pleadings contain no claim for health care costs, then there is no action in which to intervene. In older actions where no other right is available due to limitation issues, the government has in some cases persuaded plaintiffs to seek amendments to their pleadings to include a health care services claim. Needless to say, defendants have not taken kindly to such attempts, and four reported decisions have dealt with this situation.

In *MacEachern (Committee of) v. Rennie*, 2009 BCSC 652, the plaintiff was injured on September 12, 2005 and commenced her action on June 21, 2007. The trial began on March 23, 2009, and on May 4, 2009, shortly before the end of the plaintiff's case, the plaintiff brought an application to amend the statement of claim to include a health services claim. The court found that s.3 of the HCCRA, which requires a plaintiff to plead a health services claim, does not apply to actions commenced before April 1, 2009. This led to the question of whether the HCCRA claim amounted to a new cause of action, a new head of damage or merely a particularization of an existing claim for special damages, as the answer to that question would impact the application. The court declined to decide this issue and refused to make the order on the basis that an amendment at such a late stage of the trial would significantly prejudice the defendants, who had already cross-examined most of the plaintiff's witnesses.

The issue arose again in *Gosselin v. Shepherd,* 2010 BCSC 755, where the plaintiff was injured on June 7, 2005 and commenced her action on March 1, 2007. The litigation continued past April 1, 2009, and eventually the plaintiff relied on s.2 of the Act in an attempt to add a health services claim to the statement of claim. Once again, the court declined to rule on the nature of the health services claim, though the judge did comment that the provisions of s.3 "strongly suggest" that the legislature intended the health services claim to be a new cause of action.

The court dismissed the application on the basis that the beneficiary's right to recover under s.2 of the HCCRA did not apply to actions commenced prior to the HCCRA coming into force, and therefore, the plaintiff had no right to include a health services claim. This result was followed in *Jack v. Tekavec*, 2010 BCSC 1773.

As a result, it now appears clear that amendments to add health care services claims to actions commenced before April 1, 2009 will not be allowed. The effect of these rulings is that the right to intervene will only arise in claims filed after that date, assuming that a health care services claim has been specifically plead.

In actions commenced after April 1, 2009, plaintiffs must include a health care services claim and therefore, the government's s.6 rights will usually be fully available. In such cases, if the plaintiff fails to include a health services claim and an application to amend is brought, the application will be decided based on more traditional considerations. Further, in newer claims the government has two additional remedies that were not available in the decisions discussed above due to limitation issues. The existence of such remedies will also be significant to future amendment applications. For example, in *Etson v. Loblaw Companies Ltd. (Real Canadian Superstore)*, 2010 BCSC 1865, the plaintiff failed to plead a health care services claim and applied at trial to amend the pleadings to include one. The court declined the amendment based on the *MacEachern* case, but specifically noted that the government had a separate right to pursue the health services claim under s.8, discussed below.

(b) Subrogated Right to Sue (s. 7)

The subrogation right under s.7 allows the government to bring a health care services claim in its own name or in the name of the injured party, with or without that party's consent.

However, because the right of subrogation flows directly from the injured party's rights, the government's right to pursue a health care services claim through subrogation will be subject to the same considerations applicable to the plaintiff's claim.

Under the general law of subrogation, the alleged wrongdoer would be entitled to any defences that he or she could raise in response to a direct claim by the injured party. Such defences would include the expiry of BC's two year limitation period for bodily injury claims. It is likely that this is the main reason that the government has pursued amendments to existing claims rather than commencing new actions in respect of injuries that occurred before April 1, 2009.

(c) Independent Right to Recover (s. 8)

The most significant of the government's recovery rights is an independent statutory cause of action created by s.8 of the HCCRA. This cause of action allows the government to avoid the limitation issues which can arise in the context of a subrogated claim.

Section 8 gives the government similar rights to those afforded by the s.7 right of subrogation, with two very significant differences. First, s.8 states that it applies whether the person is wholly or partially liable for the injuries, whereas a subrogation right would clearly be subject to apportionment for contributory negligence and severance of liability under the *Negligence Act*. This allows for the possibility that the government could attempt to achieve full recovery on claims that would normally be subject to apportionment, though defendants are expected to insist that the government can only recover based on an allocation of fault. This issue arises occasionally in cases involving contribution to the plaintiff's injuries by multiple parties, some of whom are exempt, such as multi-vehicle accidents involving drivers from inside and outside BC. The ministry's position on such claims has been that where one party is exempt, the other parties remain liable. The courts have yet to rule on this issue; however, it is perhaps only a matter of time before a health services claim arises that is large enough to force the issue.

The second significant difference between the subrogation right of s.7 and the independent right under s.8 is that s.8 provides for extended limitation periods applicable to such claims. The starting point under s.8(5)(a) is that the limitation period expires six months after the expiry of the two year limitation period applicable to the plaintiff's claim. This results in a 30 month limitation period in a "standard" claim, although the period would be extended in claims brought by minors, or other situations where postponement might be available under the *Limitation Act*. However, this period can be further extended in certain cases under s.8(5)(b), where the government does not receive notice before the expiry of the claimant's limitation period. The upshot of s.8(5) is that for most claims, 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 claims arising before the HCCRA came into force, s.8(7) eliminates the extended limitation periods where the two year limitation period applicable to the injured party's claim expired before April 1, 2009. The practical effect of this provision appears to be as follows:

(a) claims that arose prior to October 1, 2006 would be barred because the 30 month limitation period expired before April 1, 2009; and

(b) claims that arose between October 1, 2006 and March 31, 2007 would be subject to a strict 30 month limitation period.

Claims that arose on or after April 1, 2007 would be subject to a limitation date falling after the HCCRA came into force, and would be subject to the postponement provisions of s.8(5)(b).

The only caveat to the above is that these dates will not necessarily apply to claims involving minors, or in other postponement situations. Therefore, where an accident occurs prior to October 1, 2006 but involves a postponement of the limitation date, an analysis of the s.8(5) provisions will have to be undertaken based on the claimant's actual limitation date.

The limitation period applicable under s.8 came before the court in *HMTQ v. Beacon Community Services Society*, 2012 BCSC 144, in which the defendant applied to strike a claim by the province to recover health care costs under s.8 of the HCCRA. The 30 month period expired on May 4, 2009, and the government commenced the action on October 27, 2009. The defendants argued that the claim was out of time, based on the limitation provisions of s.8(5).

The Court determined that the 30 month limitation period set out in s.8(5)(a) applied because none of the notices referred to in the extension provisions of s.8(5)(b) had been given. As a result, the claim was dismissed. This judgment has been appealed, and it is unknown whether the appeal will proceed.

While the result in the *Beacon Community Services* case appears to be correct based on the provisions of s.8(5), it is unfortunate that the court failed to note s.8(7), which clearly applied to the claim. Had it done so, it would have been unnecessary to consider the extension provisions of s.8(5)(b), because the limitation period applicable to the plaintiff's claim had expired before April 1, 2009, and therefore, the 30 month period should have been final under s.8(7). In the event that the appeal proceeds, it is hoped that the Court of Appeal will address this provision as well.

B CRRA

Unlike the HCCRA, which is framed in terms of the beneficiary's rights and goes on to establish the government's recovery options, the CRRA, leaves no doubt as to its true purpose, which is to allow the government to recover its expenditures.

(a) Crown's Right to Recover (s.2)

Section 2 of the CRRA establishes the government's independent right to recover, which is similar to s.8 of the HCCRA.

Unlike the HCCRA, the CRRA deals directly with contributory negligence in s.2(2), and expressly states that the government's rights are subject to reduction for the contributory negligence of the injured person. Section 2(2) also appears to create joint and several liability as against multiple wrongdoers for the balance. Like the HCCRA, however, the CRRA fails to address the issue of multiple wrongdoers where one or more is exempt, and when a suitable case arises, the Alberta courts will likely be asked to address this issue.

The CRRA differs substantially from the HCCRA in terms of the limitation periods applicable to s.2 claims. Section 5 of the CRRA establishes the cause of action as of the date that the recipient receives health services for which there is a cost to the Crown. Section 7(a) establishes a limitation period that expires on the earlier of six months after the recipient's limitation period expires or six months after the government receives notice under s.12 (recipient's duty to notify following consultation with counsel) or 15 (insurer's duty to notify upon notice of circumstances in which the Crown's right of recovery may arise). In that respect, the limitation provisions of the HCCRA and CRRA are the same.

However, 7(b) of the CRRA establishes an ultimate limitation period of 10 years after the right of recovery arises. Therefore, unlike the HCCRA, which contains different limitation periods depending on when the cause of action arose, the CRRA contains one set of limitation periods based on when the government receives notice, subject to the 10 year ultimate limitation period. This limitation date is subject to the postponement provisions of Alberta's *Limitations Act* for minors and persons under disability.

(b) Subrogated Right to Sue (s.38)

The CRRA provides a subrogation right similar to s.6 of the HCCRA, but does not allow subrogation in the government's own name. Like the subrogation right in BC, the s.38 right would be subject to all limitation defences that a defendant would have against the recipient of the health services.

V. PROTECTING YOURSELF AND YOUR CLIENT: OBLIGATIONS OF PARTIES, INSURERS AND COUNSEL

Both the HCCRA and CRRA impose various obligations on the parties to an action. The HCCRA provisions, however, are somewhat more onerous, and the consequences for defendants and insurers who fail to meet them can be severe. A summary of the notice provisions is as follows:

A HCCRA

(a) Actions Commenced after April 1, 2009

- Injured parties have an obligation to include a "health care services claim" for the benefit of the government. Plaintiffs in such actions are required to notify the government within 21 days of commencing an action and provide the government with copies of the pleadings.
- Insurers must notify the government within 60 days of learning of new claims, and must provide information to the government upon the government's request. The government may apply to the court for information if it is not forthcoming.
- Plaintiffs must notify the government at least 21 days before entering into a settlement.
- Settling defendants and their insurers must provide notice to the government and obtain the government's consent before any settlement is entered, and must provide any information requested by the government before consent is given.
- Releases are void if not consented to by the government.
- Settled actions cannot be discontinued or dismissed without the consent of the government, and courts can no longer dispose of claims at trial unless the government has been notified and consented.
- Courts are required to make an award for the cost of health care services, which must then be paid to the government by the defendant.

The last item above is particularly significant, as a failure to give timely notice to the government before trial could result in an adjournment to allow the health services claim to be presented so that the court can make an award. While the delays associated with this are of concern to all parties, defendants also face the prospect of an adjournment mid-trial, after having cross-examined the plaintiff's witnesses in a different manner than if the health services claim had been properly presented. This was one of the concerns raised in the *MacEachern* case discussed above.

(b) Actions Commenced Before April 1, 2009

- Injured parties and insurers are exempt from the initial notice provisions, and obligation to include a health care services claim and insurers are exempt from the obligation to notify the government within 60 days of learning of new claims.

- Plaintiffs must notify the government at least 21 days before entering into a settlement.

- Settling defendants and their insurers must provide notice to the government and must provide information requested by the government before settlement.

- Government consent is technically required before any settlement is entered into, but no prescribed consequences exist for failing to obtain consent after notice is given.

- Courts are exempt from the prohibition against disposing of claims at trial unless the government has been notified and consented.

- Courts are exempt from the requirement that they make an award for the cost of health care services.

- Releases are void if not consented to by the government.

B CRRA

The notice provisions of the CRRA are similar to those found in the HCCRA, but the timing of such notices, particularly as they relate to settlements, are different.

Section 12 requires a recipient to provide certain prescribed information to the Crown "as soon as possible after the consultation" with counsel. Section 15 requires an insurer to do the same as soon as possible after being notified of circumstances in which the Crown's right to recover may arise. This is similar to the notice provision in BC in that it does not require proof or acceptance that any injury occurred, only that the insurer has received notice that a claim might arise.

The CRRA does not require a subrogated claim to be included in a claimant's action, but the Regulations provide for contingency fees and this, in conjunction with the notice requirements of s.12, suggest that the Crown will engage plaintiffs' counsel to pursue these claims on its behalf, in much the same manner as hospital services claims were pursued in the past. The CRRA contains no exemptions from the notice provisions, so it would appear that ss.12 and 15 apply to all claims, whenever they arose.

Presumably because a subrogated claim is not mandatory, the CRRA does not require an award to be made by the court in determining a bodily injury claim. Therefore, the Alberta courts are not faced with the additional administrative requirements that now exist in BC, nor do litigants face potential delays where the health services claim is not brought in a timely way.

Section 18 of the CRRA does, however, require that where a wrongdoer has insurance, the wrongdoer must notify the government "as soon as possible" after settlement or judgment. Therefore, where the health services claim is not brought in conjunction with the plaintiff's claim, defendants face the prospect of additional delays in dealing with the CRRA claim after the plaintiff's claim is determined.

C Priorities and Limits Cases

Both the HCCRA (s.18) and the CRRA (s.10) contain provisions granting priority to payments to beneficiaries/recipients of health services over payments to the government. Therefore, where an injured party's damages are high enough to place the defendant's insurance limits in jeopardy, the insurer can settle with the plaintiff for its policy limits, without requiring the plaintiff and the government to agree on any allocation.

Notwithstanding the above, neither statute exempts the defendant wrongdoer from personal liability to the government where all the insurance proceeds are paid to the claimant. As a result, it is essential in limits cases to ensure that the settlement documentation adequately protects the wrongdoer from further action.

In BC, s.13(8) of the HCCRA provides that a release entered into without the government's consent is void, and therefore, it is essential in every case, whether it involves limits or not, to secure that consent. However, in limits cases where no money is paid by the insurer to the government, it is especially important to obtain the government's consent to the release, to ensure that the defendant is fully protected.

In Alberta, notice after settlement is required under s.18 of the CRRA, and if an insurer pays its limits prior to giving such notice, obvious problems can arise. These can be avoided through the use of s.8 of the CRRA, which provides for settlements with the government, including settlements without payment. In limits cases, the prudent course of action will be to approach the government and seek a release of the wrongdoer without contribution to the health care services claim, prior to or in conjunction with settlement of the plaintiff's claim.

In BC, the government has approached limits settlements on a practical basis, and generally will consent to the settlement and release upon proof that the limits have been paid. In Alberta, it is expected that the same will occur, as collection of these amounts would involve additional litigation between the government and the wrongdoer. This would require the government to prove not only that the plaintiff's injuries were caused by the fault of the wrongdoer, but also that all costs claimed were both caused by the accident and reasonably incurred. Effectively this would require continued tort litigation potentially followed by collection proceedings. In all but the most serious cases, this would likely place an undue burden on government resources.

In limits cases, it is essential for defence counsel and their insurance clients to take the fairly simple steps outlined above. The practical approach taken to date by the BC government and expected to be taken by the Alberta government will generally allow for limits cases to be settled with minimal delays. The alternative is to expose otherwise insured defendants to personal liability, insurers to bad faith claims and counsel to professional liability claims.

VI. PENALTY PROVISIONS: CONSEQUENCES OF FAILURE TO COMPLY

A *HCCRA*

While the HCCRA exempts claims arising and actions filed before April 1, 2009 from some of the notice requirements that apply to claims arising after that date, the government's entitlement to recover health care costs is expressly made retroactive, and the majority of the HCCRA applies to all ongoing claims, regardless of when they arose (subject of course to the limitation and other defences discussed above). For lawsuits commenced both before and after April 1, 2009, perhaps the two most significant requirements under the HCCRA are as follows:

- both plaintiff and defendant must notify the government and obtain the government's consent to a proposed settlement before a case can be settled; and

- failure to give notice to the government results in the "person who would be liable to make payments under the proposed settlement" being liable under s.13(5)(a) for the full amount of the past and future health care services costs.

The second item above is particularly important for insurers and their counsel. In most cases it is understood, and many settlements expressly provide, that the "person liable to make payments" is in fact an insurer and not the defendant. On that interpretation, a strict reading of s.13(5)(a) suggests that a settling insurer's liability could attach without regard to limits, since there is no contractual relationship between the insurer and the government. Therefore, where the settlement amount is at or close to the policy limits, the implications of failing to give notice can be significant. There is no date by which an insurer must notify the government under s.13, but the notice must occur before the settlement is finally entered into, and must be in the form prescribed by the Regulations.

The ministry has been taking a hard line on settlements entered into without consent, and in 2012, the BC Provincial Court issued the first judgment based on a settling defendant's failure to give notice in an action commenced prior to the HCCRA coming into force. In *HMTQ v. Translink,* 2012 BCPC 304, the province sought to recover $25,000 from the defendants for the costs of past and future healthcare services received by a beneficiary. The action was brought under s. 13 of the HCCRA after the defendants failed to provide the ministry with notice of terms of the proposed settlement before it was entered into. The defendants argued that the HCCRA did not apply to actions commenced prior to its coming into force.

The Court determined that the relevant sections of the HCCRA make it "irresistibly clear" that the legislature intended to require notice of a proposed settlement to be provided to the minister whether or not a legal proceeding has been commenced in relation to the claim and whether or not the claim arose before the coming into effect of the HCCRA. As a result, the province was granted judgment for the total amount of past and future costs of healthcare services relating to the injury at issue.

This decision should serve as a dire warning to defence counsel. In the event that an insurer is exposed to payments it would not otherwise be required to make as a result of counsel's failure to advise of the notice requirements, the potential consequences are obvious.

The liability provision of s.13(5) does not refer to consent, and therefore, it does not appear that there is any penalty or additional exposure created if a plaintiff and defendant proceed with a settlement after notice to the government but without the government's consent. For actions commenced after April 1, 2009, notice and consent are inextricably tied together as the courts are unable to enter consent dismissal orders without proof of government consent. As most insurers will insist on a consent dismissal of the action as a term of settlement, the consent will have to be obtained. However, it does appear that in old actions, if a dispute with the government results in the inability to obtain consent, the parties will still be able to dispose of their claim without recourse to the government under s.13.

One caveat to be observed in such circumstances is that under s.13(8) of the HCCRA, a release entered into without the government's consent is deemed void. Therefore, if parties wish to settle actions commenced before April 1, 2009 without the government's consent, it could be necessary to structure the settlement agreement as a covenant not to sue rather than a traditional release, in order to prevent the unlikely scenario of a plaintiff taking further action unrelated to the government's claim (though a consent dismissal order would likely provide the necessary protection against such action). In practice, the ministry has taken a practical view of this issue, and where a dispute exists over the defendant's liability for health care costs, they will generally consent to a release that exempts their right to pursue a health services claim. This allows the plaintiff and defendant to settle their matter without undue delay, while allowing the ministry to deal with its health services claim.

While the consequences of settlement without notice are clearly visited on defendants, their insurers and potentially their counsel, plaintiffs' counsel should not assume that they are

immune from hazards created by the HCCRA. While there are no statutory consequences for a claimant's failure to cooperate or give notice, the failure of an injured plaintiff to comply with the HCCRA by giving notice and including a health services claim in the pleadings could expose plaintiff's counsel to a professional liability claim if the ministry's ability to claim is prejudiced by such failure.

It is therefore essential that both plaintiff and defence counsel understand the HCCRA regime and ensure that they comply on behalf of their clients to every extent possible.

B CRRA

Unlike the HCCRA, which imposes no penalties for an injured party's failure to provide notice or otherwise comply with the Act, the CRRA imposes both specific obligations and significant consequences on injured claimants who fail to comply with the regime.

Section 14(2) of the CRRA provides that a recipient of health care services fails to cooperate to the detriment of the government, the Crown has a right to recover from the recipient that portion of the health care costs that it was unable to collect from the wrongdoer.

Further, s.20 of the CRRA creates an offence, punishable by a fine of up to $10,000, against any person, including a wrongdoer, recipient or insurer, who fails to comply.

The CRRA contains no provisions dealing with settlement of claims as between plaintiff and defendant, and significantly, no consequences for any failure to notify before settlement. However, notice after settlement is required, and it will always be to the defendant's benefit to deal with the claim in a timely way. This is particularly true in limits cases. Further, the penalties for non-compliance can be significant, and needless to say, those consequences are likely to be visited on counsel in the event that the proper advice was not given.

VII. IMPACT ON OUT OF PROVINCE INSURERS

One of the issues frequently raised by insurers from outside BC is to what extent they are required to observe the early notice provisions of the HCCRA. The same question is expected to be asked by insurers from outside Alberta in relation to the CRRA.

Where an insurer is licensed to write policies in BC or Alberta, the issue does not arise as the notice provisions will surely apply to claims under those policies unless the claims are specifically exempt (e.g. in-province auto cases). Further, it is clear that when an insurer defends an action, they have attorned to the jurisdiction and will be bound by the settlement notice provisions of the HCCRA and CRRA. However, where an insurer is not licensed in the jurisdiction of the accident but their insured crosses the border and causes an injury to a beneficiary of health services, what obligations does the insurer have before litigation is commenced?

It is debatable whether the principle of extraterritoriality prevents the legislature of one province from regulating the behaviour of an insurer in another province or country by requiring it to give notice of a potential claim against it when it is unknown whether the injured party will even sue. The Supreme Court of Canada touched on the issue in *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, in the context of a claim for reimbursement of Ontario accident benefits paid in relation to an accident that occurred in BC. The Supreme Court of Canada stated as follows:

> It is well established that a province has no legislative competence to legislate extraterritorially. If the Ontario Act purported to regulate civil rights in British Columbia arising out of an accident in that province, this would be an impermissible extraterritorial application of provincial legislation…. (at para. 50).

A similar situation arises where the legislature of BC or Alberta purports to require an insurer in the United States (for example) to provide notice of a claim before any suit is filed.

Until the courts address the issue of whether an insured crossing the border establishes a sufficient connection between the jurisdiction and the insurer to subject them to the early notice provisions (which in auto cases will involve a consideration of the Power of Attorney and Undertaking that most auto insurers have filed with the Canadian Council of Insurance Regulators), insurers can only guess as to what their obligations might be.

However, giving notice costs little, and has the benefit of starting the government's limitation clock in both BC and Alberta. There is little downside to giving notice in either province, as notice must be given before the claim can be settled or determined at trial in BC, and after the claim is settled or determined in Alberta. In either case, the government will eventually be alerted to the claim, and can be expected to exercise its rights. Because of the postponement provisions contained in the limitation sections of both statutes, early notice will not create any additional exposure to wrongdoers or their insurers. In fact, it might occasionally allow a defendant to escape from a health services claim if the early notice is given and the government does not act. Therefore, the prudent course of action in both BC and Alberta is for the out-of-province insurer to give notice when the claim is reported, even though it might be arguable that such notice is not required.

VIII. SUMMARY AND CONCLUSIONS

In both BC and Alberta, the key to health care costs recovery legislation can be summarized in two words: Give Notice!

Both statutes require notice to the government by insurers upon being notified of a new claim. In BC, the notice must occur within 60 days. In Alberta it must occur as soon as possible after the recipient of health services consults counsel or the insurer receives notice of the claim. Because defence counsel are generally appointed after litigation is commenced and may not receive the assignment until two to three years after the loss, counsel handling claims for insurers must make it a practice to ask their clients if notice was given following the insured's reporting of the claim. If it was not, they should give that notice immediately.

Further, a second notice is required before settlement in BC and after settlement in Alberta.

In BC, while the consequence of failure to notify at the outset is potentially an extension of the limitation period, the consequence of failing to give notice before settlement is exposure to the full amount of the health services claim, even if early notice has been given and the claim is otherwise out of time. Therefore, it is essential that all settlements are made contingent on government approval under the HCCRA. The plaintiffs' bar in BC has come to accept this requirement, and most settlements are now made subject to HCCRA approval as a matter of course.

In Alberta, while failing to give notice after settlement results in no consequences specifically tied to the value of the health services, the CRRA provides for a fine of up to $10,000 for failure to comply, and the ultimate limitation period is 10 years. It is impossible to predict how often fines might be levied, but like s.13 of the HCCRA, the offence provision of the HCCRA is likely designed with the objective of deterring wrongdoers and their insurers from attempting to avoid payment by quietly settling claims without notice and hoping the government never finds out.

When defending a health services claim in BC (assuming proper notice has been given), the defence position will depend on when the claim arose and when the action was commenced, as follows:

(a) if the date of loss is prior to October 1, 2006, the government's rights are time barred and insurers are entitled to deny the claim and proceed with the settlement of the plaintiff's claim after s.13 notice is given.

(b) if the loss occurred between October 1, 2006 and March 31, 2007, the government is out of time and the claim can be denied after s.13 notice is given, unless the government commenced an action within 30 months of the loss (subject to postponement under the *Limitation Act*).

(c) If the claim arose after April 1, 2007 and the Plaintiff's action was commenced before April 1, 2009, the government has no right to intervene and is subject to a two year limitation period for subrogated claims. However, the limitation period for a s.8 claim is effectively 6 months after the government receives notice of the claim in one of the prescribed forms.

(d) If the claim arose after April 1, 2007 and the action was commenced after April 1, 2009, the plaintiff had an obligation to include a health services claim in the action, the government has all the rights contained in the HCCRA, and the limitation period for a s.8 claim is the later of 30 months after the loss (subject to postponement under the *Limitation Act)* and 6 months after the government receives notice of the claim in one of the prescribed forms.

In Alberta, the date the government receives notice will determine the limitation date on all claims under 10 years old. The government has no right to commence an action in respect of claims older than that. There are no transitional periods or shifting limitation dates.

Where the government receives notice before the plaintiff's limitation date, they are subject to a limitation period 30 months after the loss arose. If the government receives notice at some later date, they have six months from the date of notice, subject to the ultimate limitation period of 10 years.

In BC, the first three years under the HCCRA have presented some challenges. However, most counsel have developed an understanding of the statute and how it is applied. Further, the majority of currently pending actions have now been commenced after April 1, 2009, and the shifting limitation periods applicable to older claims are seen less and less frequently.

Because the Alberta statute is much clearer in its immediate application, and contains no right to intervene or requirement for notice before settlement, there should be less difficulty in integrating it into the everyday handling of personal injury cases in Alberta. As a result, many of the growing pains seen in BC may not occur. However, there is a potential for a non-cooperating plaintiff to be liable for their own medical costs, and it remains to be seen whether the government will attempt to fine anyone for failure to comply.

In both provinces, the bottom line is that counsel must be aware of the applicable regime and must comply with the governing requirements. By doing so, they will ensure that claims are appropriately, and most importantly from the insurance industry's perspective, finally, concluded.

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