B.C. introduces Bill 12: sweeping health care cost recovery legislation

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On March 14, 2024, the Government of British Columbia introduced *Bill 12: Public Health Accountability and Cost Recovery Act*. If passed into law in its current form, Bill 12 will mark a significant expansion of government health care cost recovery legislation that could create novel liability risks across a broad range of industries.

Background: Government health care cost recovery legislation

In recent decades, British Columbia has led the development of legislation facilitating the recovery of government funded health care costs associated with the treatment of injuries arising from statutorily defined "wrongful" conduct. To date, such health care cost recovery legislation has been targeted at only two industries – the tobacco industry and the opioid pharmaceutical industry. This omnibus health care cost recovery legislation creates an opportunity for this legislation to be applied across a range of industries.

In the mid-1990s, British Columbia passed a law that gave it a direct claim against manufacturers of tobacco products for the recovery of health care damages that were allegedly expenditures incurred by the government in treating individuals exposed to tobacco products. The first version of the legislation was determined to be unconstitutional, but a revised version, known as the *Tobacco Damages and Health Care Cost Recovery Act*, S.B.C. 2000, c. 30 (TRA) was confirmed to be valid by the Supreme Court of Canada (SCC) in 2000. The TRA contains a number of what were then novel features, designed to favour the government in its prosecution of claims under the legislation. For example, it provided for retroactive application, the imposition of joint and several liability across the tobacco industry, and the modification of important rules of evidence and causation that traditionally apply in civil litigation. These novel provisions allow for damages to be proved on an aggregate basis and provides that causation of harm is presumed shifting the onus on the manufacturer to rebut the presumption.

In 2018, British Columbia enacted a similar law, giving it a direct claim against manufacturers and distributors of opioids (ORA). The ORA included the same novel

provisions as the TRA, but went even further, by permitting “multi-Crown” class actions brought on behalf of other provinces and the federal government, imposing joint and several liability on corporate directors and officers, and creating a cause of action against “consultants” involved in the manufacture or distribution of opioids. A number of litigants have challenged the constitutionality of the ORA’s “multi-Crown” feature, which issue is being heard by the SCC on May 23, 2024.

Other provinces have followed British Columbia’s lead and enacted similar legislation in relation to the tobacco and opioid pharmaceutical industries.

Key features of the TRA and the ORA

The TRA and ORA both provide government plaintiffs with significant procedural and evidentiary advantages, akin to short-cuts through common law tort principles. The key elements were summarized by the British Columbia Court of Appeal in its decision at 2022 BCCA 366 (paras 77-85).

By way of summary, the TRA and ORA give the government a direct right of action against a manufacturer or distributor of a tobacco product or an opioid product (as the case may be) to recover health care costs it alleges were incurred by improper conduct of the manufacturer or distributor.

Once the statutorily defined wrong is established by the governmental plaintiff, the legislation requires the court to presume that:

a. People would not have been exposed to tobacco or opioids but for the improper conduct; and
b. That the exposure to the product caused harm to a portion of the population commensurate with the market share of the particular manufacturer or distributor.

The onus is then reversed upon the defendants to disprove the presumption of wrong-doing and presumption that any of its activities caused the harm alleged.

Furthermore, the ORA provides for joint and several liability among all defendants, along with their directors and officers, if they jointly breached a duty or obligation.

Bill 12: A further evolution

Bill 12 goes even further than the TRA and ORA and represents a leap forward in the evolution of government health care cost recovery legislation. When introducing Bill 12, the Attorney General of British Columbia explained: “This bill follows the success of the [TRA] and the [ORA] to provide a generally applicable litigation-based way for government to recover a broad range of health-related expenditures from wrongdoers.”

While Bill 12 is largely modelled on the TRA and ORA, it has several unique features in its current form. These include:

- **No subject matter limitation** – Bill 12 can in principle apply to *any* product or service.

- **Broadened scope of injury** – The definition of "disease, injury, or illness" suffered by health care recipients that can form the basis for future government claims is broadened under Bill 12 to expressly include both "problematic product use" and the mere *risk* of "disease, injury or illness".
- **Broadened scope of recoverable costs**: in addition to "health care benefits", the cost of emergency services and costs incurred by educational authorities such as schools may also be claimed.
- **Extended limitation period**: Bill 12 establishes a limitation period of fifteen years, which is subject to extension based on discoverability. This stands in contrast to the two-year limitation periods in both the TRA and ORA.
- **Simplified burden of proof**: In addition to permitting aggregate statistical evidence to be used, Bill 12 establishes that a certificate from a cabinet minister regarding the nature and cost of health care benefits "is conclusive proof" of these matters. This further departs from the ordinary rules of evidence in civil litigation.
- **Overriding prior adjudication/settlements**: In an action brought under Bill 12, defendants cannot argue that the government's claim has been subject to prior adjudication or settlement. The ability for the government to assert its direct cause of action, notwithstanding prior adjudication or settlement, presents a challenge in cases where plaintiffs have advanced a subrogated claim on behalf of the government.

What to expect next

If passed in its current form, the Government of British Columbia will have a sweeping legislative tool to pursue claims for damages in relation to commercial activity that, with the benefit of hindsight, may be considered a vice on society, notwithstanding that the commercial activity is undertaken legally pursuant to existing governmental regulation.

To-date, actions commenced pursuant to TRA and ORA remain in progress before the courts, with no court having reached conclusions regarding defendants' liability and damages, and it remains to be seen how this new legislative tool will be utilized. In a press release, Government of British Columbia has already indicated that one potential target of Bill 12 is social media platforms for the harms their algorithms have allegedly caused users. Generally, as governments try to offset the burden on the public health care system and other adjunct publicly-funded social services, they may consider industries with consumers heavily represented by vulnerable segments of society and are perceived to be contributing to population-wide adverse health and other outcomes.

Based on the current trend, we expect other provincial and federal governments may adopt similar legislation, as was the case with the TRA and ORA.

If nothing else, Bill 12 represents one step further in Canadian governments' attempt to effect regulation by threat of or actual litigation. No longer is special purpose legislation targeting specific industries the approach, instead, the passage of an omnibus health care cost recovery legislation adds another layer of risk to all businesses. Of course, this will only be true if this legislation is passed by the Government of British Columbia and if it withstands the inevitable constitutional challenge that has followed its predecessors.

For more information, please reach out to any of the key contacts listed below.

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