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Government Bill

2nd Session, 63rd General Assembly
Nova Scotia
69 Elizabeth II, 2020

An Act to Recover Opioid Damages and Health-care Costs

CHAPTER 4
ACTS OF 2020

AS ASSENTED TO BY THE LIEUTENANT GOVERNOR
MARCH 10, 2020

The Honourable Randy Delorey
Minister of Health and Wellness

Halifax, Nova Scotia
Printed by Authority of the Speaker of the House of Assembly

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An Act to Recover Opioid Damages and Health-care Costs

Be it enacted by the Governor and Assembly as follows:

1 This Act may be cited as the *Opioid Damages and Health-care Costs Recovery Act*.

2 **(1)** In this Act,

(a) "cost of health-care benefits" means the sum of

(i) the present value of the total expenditure by the Crown for health-care benefits provided for insured persons as a result of opioid-related disease, injury or illness or the risk of opioid-related disease, injury or illness, and

(ii) the present value of the estimated total expenditure by the Crown for health-care benefits that could reasonably be expected to be provided for those insured persons as a result of opioid-related disease, injury or illness or the risk of opioid-related disease, injury or illness;

(b) "Crown" means Her Majesty in right of the Province;

(c) "disease, injury or illness" includes problematic substance use, addiction and general deterioration of health;

(d) "health-care benefits" means

(i) insured hospital services and insured professional services as defined in the *Health Services and Insurance Act*,

(ii) health services as defined in the *Health Authorities Act*,

(iii) payments made by the Crown under the *Co-ordinated Home Care Act*, the *Health Authorities Act*, the *Homemakers' Services Act*, the *Homes for Special Care Act* or the *Social Assistance Act,*

(iv) a drug, device or service designated by the Minister under the *Fair Drug Pricing Act* to which some level of coverage applies under a program, and

(v) other expenditures by the Crown, made directly or through one or more agents or other intermediate bodies, for programs, services, benefits or similar matters associated with disease, injury or illness;

(e) "insured person" means

(i) a person, including a deceased person, for whom health-care benefits have been provided, or

(ii) a person for whom health-care benefits could reasonably be expected to be provided;

(f) "joint venture" means an association of two or more persons, if

(i) the relationship among the persons does not constitute a corporation, partnership or trust, and

(ii) the persons each have an undivided interest in assets of the association;

(g) "manufacture" includes, for an opioid product, the production, assembly and packaging of the opioid product;

(h) "manufacturer" means a person who manufactures or has manufactured an opioid product or a person who, in the past or currently,

(i) causes or caused, directly or indirectly, through arrangements with contractors, subcontractors, licensees, franchisees or others, the manufacture of an opioid product,

(ii) for any fiscal year of the person, derives or derived at least 10% of revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of opioid products by that person or by other persons,

(iii) engages or engaged in, or causes or caused, directly or indirectly, other persons to engage in promoting an opioid product, or

(iv) is or was a trade association primarily engaged in

(A) advancing the interests of manufacturers,

(B) promoting an opioid product, or

(C) causing, directly or indirectly, other persons to engage in promoting an opioid product;

(i) "opioid product" means any product that contains

(i) a drug set out in the Schedule, or

(ii) a drug prescribed by the regulations;

(j) "opioid-related disease, injury or illness" means disease, injury or illness caused or contributed to by an individual's use or exposure to an opioid product, whether the opioid product is

(i) in the form in which it was manufactured,

(ii) combined with another drug or substance, or

(iii) used, or in the case of exposure is present, in a form or manner other than

(A) as prescribed or advised by a practitioner, or

(B) as recommended by the manufacturer of that opioid product;

(k) "opioid-related wrong" means

(i) a tort that is committed in the Province by a manufacturer or wholesaler and that causes or contributes to opioid-related disease, injury or illness, or

(ii) in an action under subsection 3(1), a breach, by a manufacturer or wholesaler, of a common law, equitable or statutory duty or obligation owed to persons in the Province who have used or been exposed to or might use or be exposed to an opioid product;

(l) "person" includes a partnership, trust, joint venture or trade association;

(m) "practitioner" means a person who

(i) is authorized under the *Medical Act* or the *Veterinary Medical Act* to prescribe or advise on the therapeutic value, contents and hazards of a drug within the meaning of the *Pharmacy Act*, and

(ii) is not prohibited from prescribing a drug that is an opioid product;

(n) "promotion" includes, for an opioid product,

(i) the marketing of the opioid product, whether direct or indirect,

(ii) the distribution or sale of the opioid product, and

(iii) any research with respect to the opioid product;

(o) "type of opioid product" means an opioid product in the form of a pill, a capsule, an oral liquid, a powder, an injectable, a topical or a combination of any of these;

(p) "use or exposure", in relation to an opioid product, means ingestion, inhalation, injection, application or assimilation of the opioid product, whether intentional or otherwise;

(q) "wholesaler" means a person who distributes, sells or offers for sale opioid products

(i) to pharmacies, distributors or other persons for resale, or

(ii) to hospitals, facilities or care centres for patient use.

(2) The definition of "manufacturer" does not include

(a) an individual;

(b) a wholesaler or retailer of opioid products who is not related to

(i) a person who manufactures an opioid product, or

(ii) a person described in subclause (1)(h)(i);

or

(c) a person who

(i) is a manufacturer only because subclause (1)(h)(ii) or (iii) applies to the person, and

(ii) is not related to

(A) a person who manufactures an opioid product, or

(B) a person described in subclause (1)(h)(i) or (iv).

(3) In subsection (2), a person is related to another person if, directly or indirectly, the person is

(a) an affiliate, within the meaning of the *Companies Act*, of the other person;

(b) an affiliate, within the meaning of subsection (4), of the other person; or

(c) an affiliate of an affiliate of the other person.

(4) In clause (3)(b), a person is deemed to be an affiliate of another person if the person

(a) is a corporation and the other person, or a group of persons not dealing with each other at arm's length of which the other person is a member, owns a beneficial interest in shares of the corporation

(i) carrying at least 50% of the votes for the election of directors of the corporation and the votes carried by the shares are sufficient, if exercised, to elect a director of the corporation, or

(ii) having a fair market value, including a premium for control if applicable, of at least 50% of the fair market value of all the issued and outstanding shares of the corporation; or

(b) is a partnership, trust or joint venture and the other person, or a group of persons not dealing with each other at arm's length of which the other person is a member, has an ownership interest in the assets of that person that entitles the other person or group to receive at least 50% of the profits or at least 50% of the assets on dissolution, winding up or termination of the partnership, trust or joint venture.

(5) In clause (3)(b), a person is deemed to be an affiliate of another person if the other person, or a group of persons not dealing with each other at arm's length of which the other person is a member, has any direct or indirect influence that, if exercised, would result in control in fact of that person except if the other person deals at arm's length with that person and derives influence solely as a lender.

(6) For the purpose of determining the market share of a defendant for a type of opioid product sold in the Province, a court shall calculate the defendant's market share for the type of opioid product by the following formula:

$$dms = (dm / MM) \times 100\%$$

where

dms is the defendant's market share for the type of opioid product from the date of the earliest opioid-related wrong committed by that defendant to the date of trial;

dm is the quantity of the type of opioid product manufactured or promoted by the defendant that is distributed or sold within the Province from the date of the earliest opioid-related wrong committed by that defendant to the date of trial; and

MM is the quantity of the type of opioid product manufactured or promoted by all manufacturers or wholesalers that is purchased or dispensed within the Province for the purpose of providing health-care benefits from the date of the earliest opioid-related wrong committed by the defendant to the date of trial.

3 (1) The Crown has a direct and distinct action against a manufacturer or wholesaler to recover the cost of health-care benefits caused or contributed to by an opioid-related wrong.

(2) An action under subsection (1) is brought by the Crown in its own right and not on the basis of a subrogated claim.

(3) In an action under subsection (1), the Crown may recover the cost of health-care benefits whether or not there has been any recovery by other persons who have suffered damage caused or contributed to by the opioid-related wrong committed by the defendant.

(4) In an action under subsection (1), the Crown may recover the cost of health-care benefits

(a) for particular individual insured persons; or

(b) on an aggregate basis, for a population of insured persons,

who have suffered damage caused or contributed to by the use of or exposure to a type of opioid product.

(5) Where the Crown seeks in an action under subsection (1) to recover the cost of health-care benefits on an aggregate basis,

(a) it is not necessary

(i) to identify particular individual insured persons,

(ii) to prove the cause of the opioid-related disease, injury or illness in any particular individual insured person, or

(iii) to prove the cost of health-care benefits for any particular individual insured person;

(b) the health-care records and documents of particular individual insured persons or the documents relating to the provision of health-care benefits for particular individual insured persons are not compellable except as provided under a rule of law, practice or procedure that requires the production of documents relied on by an expert witness;

(c) a person is not compellable to answer questions with respect to the health of, or the provision of health-care benefits for, particular individual insured persons;

(d) notwithstanding clauses (b) and (c), on application by a defendant, a court may order discovery of a statistically meaningful sample of the documents referred to in clause (b) and the order must include directions concerning the nature, level of detail and type of information to be disclosed; and

(e) where an order is made under clause (d), the identity of particular individual insured persons must not be disclosed and all identifiers that disclose or may be used to trace the names or identities of any particular individual insured persons must be deleted from any documents before the documents are disclosed.

4 **(1)** In an action under subsection 3(1) for the recovery of the cost of health-care benefits on an aggregate basis, subsection (2) applies if the Crown proves, on a balance of probabilities, that, in respect of a type of opioid product,

(a) the defendant breached a common law, equitable or statutory duty or obligation owed to insured persons who have used or been exposed to or might use or be exposed to the type of opioid product;

(b) using the type of opioid product can cause or contribute to disease, injury or illness; and

(c) during all or part of the period of the breach referred to in clause (a), the type of opioid product manufactured or promoted by the defendant was offered for distribution or sale in the Province.

(2) Subject to subsections (1) and (4), a court shall presume that

(a) the population of insured persons who used or were exposed to the type of opioid product manufactured or promoted by the defendant would not have used or been exposed to the product but for the breach referred to in clause (1)(a); and

(b) the use or exposure described in clause (a) caused or contributed to disease, injury or illness or the risk of disease, injury or illness in a portion of the population described in clause (a).

(3) Where the presumptions under clauses (2)(a) and (b) apply,

(a) the court shall determine on an aggregate basis the cost of health-care benefits provided after the date of the breach referred to in clause (1)(a) resulting from use or exposure to the type of opioid product; and

(b) each defendant to which the presumptions apply is liable for the proportion of the aggregate cost referred to in clause (a) equal to its market share in the type of opioid product.

(4) The amount of a defendant's liability assessed under clause (3)(b) may be reduced, or the proportions of liability assessed under clause (3)(b) readjusted among the defendants, to the extent that a defendant proves, on a balance of probabilities, that the breach referred to in clause (1)(a) did not cause or contribute to the use or exposure referred to in clause (2)(a) or to the disease, injury or illness or risk of disease, injury or illness referred to in clause (2)(b).

5 (1) Two or more defendants in an action under subsection 3(1) are jointly and severally liable for the cost of health-care benefits if

(a) those defendants jointly breached a duty or obligation described in clause 2(1)(k); and

(b) as a consequence of the breach described in clause (a), at least one of those defendants is held liable in the action under subsection 3(1) for the cost of those health-care benefits.

(2) For the purpose of an action under subsection 3(1), two or more manufacturers or wholesalers, whether or not they are defendants in the action, are deemed to have jointly breached a duty or obligation described in clause 2(1)(k) if

(a) one or more of those manufacturers or wholesalers are held to have breached the duty or obligation; and

(b) at common law, in equity or under an enactment, those manufacturers or wholesalers would be held

(i) to have conspired or acted in concert with respect to the breach,

(ii) to have acted in a principal and agent relationship with each other with respect to the breach, or

(iii) to be jointly or vicariously liable for the breach if damages would have been awarded to a person who suffered damages as a consequence of the breach.

6 Statistical information and information derived from epidemiological, sociological and other relevant studies, including information derived from sampling, is admissible as evidence for the purpose of establishing causation and quantifying damages or the cost of health-care benefits respecting an opioid-related wrong in an action or a proceeding

(a) brought by or on behalf of a person in the person's own name or as a member of a class of persons under the *Class Proceedings Act*;

(b) brought by the Crown under subsection 3(1);

(c) referred to in subsection 14(1); or

(d) brought on behalf of the Crown, including a proceeding continued as described in Section 13.

7 (1) No action or proceeding that is commenced by the Crown or on behalf of a class or proposed class of which the Crown is a member or prospective member before, or within 15 years after, the coming into force of this Section in relation to the recovery of the cost of health-care benefits, or for damages, alleged to have been caused or contributed to by an opioid-related wrong, is barred under the *Limitation of Actions Act* or by a limitation period under any other Act.

(2) Any action or proceeding described in subsection (1) in relation to damages alleged to have been caused or contributed to by an opioid-related wrong is revived if the action or proceeding was dismissed before the coming into force of this Section merely because it was held by a court to be barred or extinguished by the *Limitation of Actions Act* or by a limitation period under any other Act.

8 (1) This Section applies to an action for recovery of the cost of health-care benefits, or for damages, alleged to have been caused or contributed to by an opioid-related wrong, other than an action for the recovery of the cost of health-care benefits on an aggregate basis.

(2) Where the Crown is unable to establish which defendant caused or contributed to the use or exposure described in clause (b) and, as a result of a breach of a common law, equitable or statutory duty or obligation,

(a) one or more defendants causes or contributes to a risk of disease, injury or illness by making a type of opioid product available to insured persons; and

(b) an insured person has used or been exposed to the type of opioid product referred to in clause (a) and suffers disease, injury or illness as a result of the use or exposure,

a court may find each defendant that caused or contributed to the risk of disease, injury or illness liable for a proportion of the damages or cost of health-care benefits incurred, equal to the proportion of its contribution to that risk of disease, injury or illness.

(3) In apportioning liability under subsection (2), a court may consider

(a) the length of time a defendant engaged in the conduct that caused or contributed to the risk of disease, injury or illness;

(b) the market share the defendant had in the type of opioid product that caused or contributed to the risk of disease, injury or illness;

(c) the degree of potency of the opioid product manufactured or promoted by a defendant;

(d) the amount spent by a defendant on promoting the type of opioid product that caused or contributed to the risk of disease, injury or illness;

(e) the degree to which a defendant collaborated or acted in concert with other manufacturers or wholesalers in any conduct that caused, contributed to or aggravated the risk of disease, injury or illness;

(f) the extent to which a defendant conducted tests and studies to determine the risk of disease, injury or illness resulting from use of or exposure to the type of opioid product;

(g) the extent to which a defendant assumed a leadership role in manufacturing or promoting the type of opioid product;

(h) the efforts a defendant made to warn practitioners and the public about the risk of disease, injury or illness resulting from use of or exposure to the type of opioid product;

(i) the extent to which a defendant continued manufacturing or promoting the type of opioid product after it knew or ought to have known the risk of disease, injury or illness resulting from use of or exposure to the type of opioid product;

(j) the extent to which a defendant continued promoting the type of opioid product after it knew or ought to have known that the amount or dosage of the type of opioid product promoted did not reasonably reflect the health needs of the population of insured persons who were likely to use or be exposed to the type of opioid product;

(k) affirmative steps that a defendant took to reduce the risk of disease, injury or illness to the public; and

(l) other considerations considered relevant by the court.

9 **(1)** A director or officer of a corporation who directs, authorizes, assents to, acquiesces in or participates in an opioid-related wrong committed by the corporation is jointly and severally liable with the corporation for the cost of health-care benefits, or damages, caused or contributed to by the opioid-related wrong.

(2) Subsection (1) applies whether or not an action against the corporation for recovery of the cost of health-care benefits, or for damages, has been commenced or concluded.

(3) A director or officer is not liable under subsection (1) if the director or officer proves, on a balance of probabilities, that the director or officer

(a) did not know, and in the exercise of reasonable diligence could not have known, that the corporation was committing an opioid-related wrong; or

(b) exercised reasonable diligence to prevent the corporation from committing the opioid-related wrong.

10 **(1)** This Section does not apply to a defendant in respect of whom a court has made a finding of liability under Section 8.

(2) A defendant who is found liable for an opioid-related wrong may commence, against one or more of the defendants found liable for that wrong in the same action, an action or proceeding for contribution toward the cost of health-care benefits, or the payment of damages, caused or contributed to by that wrong.

(3) Subsection (2) applies whether or not the defendant commencing an action or proceeding under that subsection has paid all or any of the cost of health-care benefits, or the damages, caused or contributed to by the opioid-related wrong.

(4) In an action or proceeding described in subsection (2), a court may apportion liability and order contribution among each of the defendants in accordance with the considerations listed in subsection 8(3).

11 **(1)** The Governor in Council may make regulations

(a) prescribing drugs for the purpose of subclause 2(1)(i)(ii);

(b) defining any word or expression used but not defined in this Act;

(c) respecting any matter or thing the Governor in Council considers necessary or advisable to effectively carry out the intent and purpose of this Act.

(2) The exercise by the Governor in Council of the authority contained in subsection (1) is a regulation within the meaning of the *Regulations Act*.

12 This Act has the retroactive effect necessary to give the provision full effect for all purposes, including allowing an action to be brought under subsection 3(1) arising from an opioid-related wrong, whenever the opioid-related wrong occurred.

13 Where a proceeding in relation to an opioid-related wrong is commenced in another jurisdiction within Canada on behalf of a class or proposed class of which the Crown is a member or prospective member and is ongoing when this Section comes into force,

(a) the proceeding continues in accordance with this Act;

(b) a procedure completed, and an order made, before this Section comes into force continues to have effect unless

(i) it would be inconsistent with this Act, or

(ii) a court orders otherwise;

and

(c) a procedure that began but was not completed before this Section comes into force must be completed in accordance with this Act.

14 **(1)** For the purpose of the *Class Proceedings Act*, the Crown may commence a proceeding in relation to an action under subsection 3(1) on behalf of a class consisting of one or more of the following:

(a) the Government of Canada;

(b) the government of a jurisdiction within Canada;

(c) a federal or provincial government payment agency that makes reimbursement for the cost of services that are in the nature of health-care benefits within the meaning of this Act.

(2) Nothing in subsection (1) prevents a member of the class described in that provision from opting out of the proceeding in accordance with the *Class Proceedings Act*.

15 **(1)** In subsections (2) and (3), "proceeding" means

(a) a proceeding in relation to an action under subsection 3(1), including a proceeding referred to in subsection 14(1); or

(b) a proceeding continued as described in Section 13.

(2) Notwithstanding any prior agreement that purports to bind the Crown in relation to compensation arising from an opioid-related wrong,

(a) the Crown is not barred from commencing, continuing or participating in a proceeding;

(b) the evidence that may be brought against a party to the agreement in the course of a proceeding is not limited; and

(c) the liability of, or the amount of compensation payable by, a party to the agreement in relation to an opioid-related wrong that is the subject of a proceeding is not limited.

(3) Where an agreement described in subsection (2) has been finalized by receiving the consent of all parties to the agreement and all necessary court approvals, if any, before the date this Act comes into force, any compensation received by the Crown under the agreement must be deducted from any compensation received by the Crown as a result of a proceeding.

(4) No compensation is payable by the Crown and proceedings must not be commenced or continued to claim compensation from the Crown or to obtain a declaration that compensation is payable by the Crown as a result of the voiding of an agreement described in subsection (2).

(5) A declaratory or other order of any court providing that compensation is payable by the Crown as a result of the voiding of an agreement described in subsection (2) is not enforceable against the Crown.

SCHEDULE

(a) anileridine;

(b) buprenorphine, including, but not limited to, buprenorphine hydrochloride;

(c) butorphanol, including, but not limited to, butorphanol tartrate;

(d) codeine, except for those products referred to in subsection 36(1) of the *Narcotic Control Regulations* (Canada) (CRC, c. 1041), including, but not limited to, codeine phosphate;

(e) diacetylmorphine;

(f) fentanyl, including, but not limited to, fentanyl citrate;

(g) hydrocodone, including, but not limited to, hydrocodone bitartrate;

(h) hydromorphone, including, but not limited to, hydromorphone hydrochloride;

(i) levorphanol;

(j) meperidine, including, but not limited to, meperidine hydrochloride;

(k) methadone, including, but not limited to, methadone hydrochloride;

(l) morphine, including, but not limited to, morphine hydrochloride and morphine sulfate;

(m) nalbuphine;

(n) normethadone, including, but not limited to, normethadone hydrochloride;

(o) opium, including, but not limited to, opium and belladonna;

(p) oxycodone, including, but not limited to, oxycodone hydrochloride;

(q) oxymorphone, including, but not limited to, oxymorphone hydrochloride;

(r) pentazocine, including, but not limited to, pentazocine hydrochloride and pentazocine lactate;

(s) propoxyphene;

(t) remifentanil;

(u) sufentanil;

(v) tapentadol, including, but not limited to, tapentadol hydrochloride;

(w) tramadol, including, but not limited to, tramadol hydrochloride.