Cassels

Bill 12 Updates: British Columbia Places Proposed Health Care Costs Recovery Legislation on Hold, Enters Negotiations with Social Media Companies

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On April 23, 2024, only three weeks after its second reading, the British Columbia provincial government (the Province) has announced a pause on Bill 12, the *Public Health Accountability and Cost Recovery Act* (Bill 12), while the Province engages in ongoing negotiations with social media companies.[1] In particular, the Province has cited the formation of the new BC Online Safety Action Table (the Action Table), which includes representatives from the Province as well as Meta, Snap, TikTok, and X, as a reason for the pause. The Province did not, however, make any further comments on its future plans for Bill 12.[2]

Bill 12 has previously been described by the Province as a tool to "recover a broad range of health-related expenditures from wrongdoers."[3] It goes much further than previous healthcare cost recovery legislation enacted by the Province, both in its scope and in incorporating changes to regular civil procedure. Taken together, Bill 12's provisions in their current form could create an almost indeterminate scope of liability that could apply to any goods and services for both real and potential harm, including mere risks of – or exposure to risks of – disease, injury, or illness.[4] Bill 12 would also statutorily limit certain defence by, among other things, facilitating large-scale aggregate damages awards in a class proceeding; adjusting the normal law concerning expert evidence in proceedings under this Act in the Government's favour; precluding defences based on past adjudication or settlements, and requiring that certain types of evidence be treated as conclusive of liability.

Key Features of Bill 12

Bill 12, like the *Tobacco Damages and Health Care Costs Recovery Act* (TRA) and *Opioid Damages and Health Care Costs Recovery Act* (ORA) on which it is modelled,[5] would:

- provide the Province and the federal government with a direct cause of action to recover the cost of very broadly defined health care benefits;[6]
- enable the Province to bring a class action on behalf of any or all of the provincial, territorial, and federal governments;[7]
- impose joint and several liability on all persons who have or are deemed to have jointly committed a health-related wrong, as well as full joint and several personal liability for corporate directors and

officers on a minimum standard of "acquiescence" to the wrong;[8]
- include evidentiary and causative presumptions that simplify the process for governments to prove their claims;[9] and
- apply retroactively and override the limitation periods set by BC's *Limitation Act*.[10]

Unlike previous healthcare cost recovery legislation, Bill 12 does not apply to any specific product or industry but rather is meant to be "generally applicable."[11] If passed, Bill 12 would impose a broad, sweeping scope of exposure that could apply to the providers of goods or services that "cause or contribute to" a "health-related wrong."[12] It defines "health-related wrong" as a breach of a common law, equitable, or statutory obligation or a tort that "causes or contributes to disease, injury or illness," which includes "physical or mental injury or illness," "problematic product use," "addiction," "general deterioration of health," and mere "risk of disease, injury or illness."[13] Bill 12 does not provide any further guidance for these potential harms, such as what constitutes "problematic" product use or compensable "general deterioration."

Bill 12 proposes to fix liability on individuals and businesses for impacts to any person who has received or could receive healthcare benefits. This includes liability for a breach of an obligation or a tort that results in a healthcare benefit recipient being exposed to risk of injury or using, possibly using, being exposed to, or possibly being exposed to goods, services, and by-products that "can cause or contribute to" injury.[14] Further, Bill 12 would require courts to presume a causal connection between exposure to risks and use of or exposure to products and injury.

Along with creating extraordinary liability, Bill 12 also provides for retroactive application[15] and a fifteen-year limitation period: far longer than the two-year limitation period the Province included in both the TRA and ORA.[16]

The Province has additionally built in a number of barriers to defending against or even settling an action brought under Bill 12. In particular, Bill 12 precludes defendants from arguing that a claim by a healthcare benefit recipient or a government has already been adjudicated upon or settled, displacing legal doctrines that prevent re-litigation of issues that have already been determined and are meant to ensure the finality of litigation.[17]

Finally, Bill 12 goes further than previous healthcare cost recovery legislation respecting the admissibility and effect of certain evidence. Bill 12 would allow aggregate, population-level statistical evidence to be used not only for establishing causation and quantifying damages, but also for establishing liability.[18] It would also provide governments with a significant degree of control in establishing the dollar value of a defendant's liability: Section 9 provides that evidence from the Provincial or federal government on the cost of healthcare benefits "is conclusive proof" of such costs in an action brought under Bill 12.[19]

Minimum Threshold for Liability

Should Bill 12 be passed in its current form, at a minimum, an individual director or officer of any company that "acquiesces in"[20] a breach of any duty or obligation by that company owed to any person "in" British Columbia[21] that contributes in any way to a present or future[22] "expenditure by the government,"[23] directly or indirectly, for "matters associated with disease, injury or illness"[24] would find themselves potentially individually liable in full to the governments of Canada and British Columbia by way of a class action, separate and distinct from any patients' personal claims (if any); and any settlements paid to individual plaintiffs would not offset any future exposure to government.

That director or officer's liability would be established if – in the event that a product is at issue and once more at a minimum – the company's breach occurred while the product was in "use" in British Columbia; it affected people who might be exposed to their product now or in the future; and that the exposure could contribute to disease, injury or illness. In coming to that conclusion, the Court is obligated to assume that (a) the breach, whatever it may have been, is the reason why the patient was or might be exposed to the product; and (b) that the exposure did actually contribute to the disease, injury or illness.

The amount of damages that director or officer could be ordered to pay once found liable would be established by a net present value[25] certificate drafted by the plaintiff government(s) that cannot be challenged,[26] and that the government can extrapolate from that certificate to a damages for a whole class of benefit recipients in the aggregate without any inquiry into individual issues.[27]

It may not be a great exaggeration to state that Bill 12 proposes to legislate that for the purposes of health care costs recovery, any product that *could* cause harm, *did;* and that the government will name its price once that has been established.

Going Forward

With actions brought under the TRA and ORA still ongoing, the introduction and second reading of Bill 12 signaled the Province's intent to continue pursuing damages linked to alleged healthcare wrongs through litigation. In its current form, Bill 12 stands to impose an unprecedented scope of liability for a potentially indeterminate range of commercial actors and has been met with concern from a wide variety of industry organizations.[28] Thus far, the Province has pointed to social media platforms, the vaping industry, and manufacturers of highly caffeinated energy drinks as possible targets for litigation under Bill 12[29] - although as noted above, there are no limitations to which industries the Province may target in the future under Bill 12, in its own right or on behalf of a collection of provincial Crowns.

The Province's recent announcement to put Bill 12 on hold focused exclusively on social media platforms. It

has not announced any plans to revise its language or to address widespread concerns about its broad scope. Bill 12 has not yet progressed to the Committee stage, where bills are subject to more detailed examinations and amendments.

Cassels will continue to monitor Bill 12 and provide updates on its progress.

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[1] British Columbia, Legislative Assembly, *Hansard Blue Legislative Assembly Draft Report of Debates*, 42-5, (2 April 2024) at 11:10 a.m.; British Columbia, Legislative Assembly, *Hansard Blue Legislative Assembly Draft Report of Debates*, 42-5, (2 April 2024) at 1:35 p.m. [*Second Reading Afternoon*]; British Columbia, Legislative Assembly, *Hansard Blue Legislative Assembly Draft Report of Debates*, 42-5, (3 April 2024) at 4:55 p.m.; British Columbia, Legislative Assembly, *Hansard Blue Legislative Assembly Draft Report of Debates*, 42-5, (4 April 2024) at 11:40 a.m.; British Columbia, Legislative Assembly, *Hansard Blue Legislative Assembly Draft Report of Debates*, 42-5, (4 April 2024) at 1:05 p.m.

[2] Office of the Premier, News Release, "Joint statement on Bill 12: B.C. to convene online safety action table" (23 April 2024), online: <news.gov.bc.ca/30757>.

[3] British Columbia, Legislative Assembly, *Hansard Blue Legislative Assembly Draft Report of Debates*, 42-5, (14 March 2024) at 10:15 a.m. [First Reading].

[4] Bill 12, s 4(1).

[5] SBC 2000, c 30; SBC 2018, c 35.

[6] Bill 12, ss 2 (1, 3-5), 3 (1, 3-5).

[7] Bill 12, s 15. The Province's constitutional capacity to enact this sort of clause is at issue in the national opioids class action, presently before the Supreme Court of Canada: *Sanis Health Inc., et al. v. His Majesty the King in Right of the Province of British Columbia,* 2023 CanLII 103769 (SCC). Note, however, that due to the drafting of the Bill, other provinces participating in the class action could only recover for breaches of duties owed to persons in British Columbia or in respect of torts committed in British Columbia (Bill 12, ss 2(1), 1 ("health-related wrong"), 15).

[8] Bill 12, ss 7, 13.

[9] Bill 12, ss 2, 4 (2-5), 5.

[10] Bill 12, ss 10, 14; RSBC 1996, c 266.

[11] First Reading.

[12] Bill 12, ss 2 (1), 3 (1).

[13] Bill 12, s 1 ("disease, injury or illness", "health-related wrong").

[14] Bill 12, ss 1 ("benefit recipient", "person", "product", "promote"), 4 (1), 5(1).

[15] Bill 12, s 14.

[16] Bill 12, ss 10, 14.

[17] Bill 12, s 6.

[18] Bill 12, s 8.

[19] Bill 12, s 9.

[20] Bill 12, s 13(1).

[21] Bill 12, s 1 ("health-related wrong").

[22] Bill 12, s 9(1)(b) and 9(2)(b).

[23] Bill 12, s 1 ("health care benefits", ss (a)(vi) and (a)(vii)).

[24] Ibid.

[25] Bill 12, s 1 ("cost of health care benefits").

[26] Bill 12, s 9.

[27] Bill 12, s 2(5) and (6).

[28] *Second Reading Afternoon* at 5:00 p.m.

[29] *Second Reading Afternoon* at 3:30 p.m., 3:35 p.m.
