Country Specific: Canada

Navigating Subrogation in Canada: A Look at Subrogation Rights on Medical Claims for Out-of-Province Insurers Arising from Motor Vehicle Accidents

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Introduction

Given the proximity between the two countries, at some point most American-based subrogation professionals will become involved with a claim containing a motor vehicle accident that occurred in Canada. An understanding of Canadian subrogation principles is therefore an invaluable asset to ensuring that claims are dealt with promptly and appropriately.

As a brief introduction to the topic, in Canada, subrogation is ruled by the common law, with some modifications made by statutes and contracts. In addition, motor vehicle accidents are largely governed by a "no-fault" scheme, which imposes limitations on the nature of claims that can be advanced arising from motor vehicle accidents.

Further, many American readers will be surprised to learn that in Canada subrogation actions are almost exclusively brought in the name of the insured, rather than in the insurer's name. Perhaps equally confusing, subrogated actions in Québec follow the opposite rule. They must be advanced in the name of the insurer.

In order to provide some clarity in respect of subrogation arising from motor vehicle accidents, this article will provide the legal foundation necessary to understand the subrogation rights (and limitations) as they apply to out-of-province insurers in three Canadian provinces: Ontario, British Columbia, and Alberta.

Some of the questions that will be answered include: what happens then when an individual who carries out-of-province insurance is involved in a motor vehicle accident in Canada; whether non-resident drivers are owed the same basic benefits as an insured of that province; whether an out-of-province insurer must provide these basic benefits, and if so, whether the out-of-province insurer may subrogate against the at-fault party to recover these expenses, notwithstanding that their policy and originating jurisdiction does not require that it provide these basic benefits.

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Ontario

The Provincial Insurance Regime

In Ontario, when a person is injured as the result of a motor vehicle accident, the Statutory Accident Benefit Schedule provides that his/

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her own insurer will pay for certain non-professional health benefits (e.g. physiotherapy, massage, etc.), which are in addition to professional health benefits as provided by the Ontario Health Insurance Plan ("OHIP").

Owners and lessees of motor vehicles are required to be insured to a minimum level, by insurers that are licensed to issue such policies in Ontario.[1] Insurers who operate outside Ontario may elect to file what is called an "undertaking," indicating that their insurance policies meet the minimum requirements of automobile policies in Ontario. In essence, insurers operating outside of Ontario who wish for their policies to meet minimum requirements for Ontario must file an undertaking agreeing to be bound by Ontario law as it applies to motor vehicle accidents.

Ability to Subrogate

In Ontario, the *Insurance Act*[2] *("OIA")* creates a comprehensive scheme setting out what benefits insurers must pay to their own insureds, and also sets out what can be claimed and recovered both by an injured party herself, and by her insurer.

Section 267.8(17) of the *OIA* prevents an insurer from subrogating for medical benefits that it has paid out under its policy. An insurer can only seek recovery of medical payments by way of the "Loss Transfer" regime, which allows recovery of all or part of such expenses from insurers for other vehicles involved in an accident. Insurers should also note that the Loss Transfer regime is based on strict statutory rules, rather than common law concepts of negligence or fault.

Motor vehicle property damage is given similar treatment. Section 263 of the *OIA* limits an insurer's right of subrogation only to recovery of loss of cargo, or situations where the collision did not involve at least one other insured vehicle.

Risks of Subrogation under OHIP

Where the automobile liability policy is not written in Ontario, there may be exposure to subrogated claims brought on behalf of the OHIP. OHIP is entitled to subrogate for health care expenses incurred by the public health system in connection with the treatment of the injured person. OHIP is entitled to recover the cost of health services up to the time of settlement and for future insured health care services against the out-of-province party.[3]

Releases signed by plaintiffs do not bind OHIP regarding potential subrogation, unless OHIP is aware of and agrees to the settlement reached. Sections 30 through 36 of the *Health Insurance Act*[4] (Ontario) and Regulation 552 prescribe OHIP's entitlement to be reimbursed for hospital and medical costs incurred in treating injured persons involved

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in accidents caused by another individual.

In order to avail themselves of particular protections under the OIA out-of-province insurers are advised to file the Protected Defendant Undertaking.[5] Insurers that file will be afforded protection from subrogation (in certain circumstances) from OHIP and from the "permanent serious impairment" threshold.[6]

British Columbia

The Provincial Insurance Regime

British Columbia has a universal compulsory automobile insurance regime that is administered by the Insurance Corporation of British Columbia ("ICBC"), which is a government corporation, and is governed by the *Insurance (Vehicle) Act ("IVA").*[7] The ICBC is involved in substantially every motor vehicle accident that occurs in British Columbia. Under this system, ICBC and out-of-province insurers are required to provide no-fault medical benefits to their own insureds as per section 88 of Part 7 of the Regulations to the *IVA* in connection with accidents occurring in British Columbia.

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Ability to Subrogate

To the extent that the benefits provided by an out-of-province insurer to its insured are similar in nature or character to the benefits listed under section 88 of the Regulations, they cannot be recovered from the at-fault party by way of a subrogated claim as per section 83(7) of the *IVA*. This is because section 83 provides for a deemed release from the benefits received, or would be entitled to receive, by the insured.

Alberta

The Provincial Insurance Regime

When an individual is injured in a motor vehicle accident in Alberta, they are owed certain medical benefits under section B of the *Alberta Insurance Act (the "AIA").*[8] These medical benefits are commonly referred to as "no-fault" benefits, as an individual's right to claim them

does not depend on whether or not they were at fault. However, not every out-of-province insurer provides these types of benefits as their respective originating jurisdiction may not have the same statutory requirements as Alberta.

Section 18 of the *AIA* provides that no insurer may insure a risk in Alberta unless the insurer holds a valid and subsisting license for a class of insurance that covers that risk. In order to be granted a license, the out-of-province company must file an application with the Minister. It is only when the Minister is satisfied that the requirements of the *AIA* are being met that a license will be granted. These requirements include providing the basic benefits that are required under the *AIA*.

Ability to Subrogate

Section 588 of the *AIA* holds that when an insurer provides accident insurance benefits or "basic coverage" (which includes Section B benefits and certain other benefits under section 573) the payment constitutes a release by the insured of any claim that the insured may have against any person who may be liable to the insured regarding the matter. As a result, an insurer cannot subrogate against a third party for the purposes of recovering the costs associated with providing these basic benefits.

Out-of-province insurers are bound to provide all accident benefits as required by the *AIA* regardless of the policy or the benefits that their originating jurisdiction requires. Furthermore, because of section 588, an out-of-province insurer cannot subrogate against the at-fault party to recover the costs of providing these guaranteed accident benefits.

Conclusion

Canadian subrogation laws can vary considerably between provinces, although concerning recovery of healthcare expenses arising from automobile accidents, there tends to be a common theme that some manner or another typically prohibits it.

Using this article as a starting point, subrogation professionals in North America must educate themselves on the rights and limitations to subrogating for a motor vehicle accident that occurs in a Canadian province.

Endnotes:

1. *Compulsory Automobile Insurance Act,* R.S.O. 1990, c. C-25, at s. 2.
2. R.S.O. 1990, c. I.8.
3. However, OHIP subrogation does not apply to future costs for non-professional health care benefits or services.
4. R.S.O. 1990, c. H.6.
5. For Protected Defendant Undertaking signatories, see: http://undertaking.fsco.gov.on.ca/protected_defendant.aspx.
6. O. Reg. 381/03, s. 1, at s. 4.1. This threshold prevents an individual from receiving damages for pain and suffering, unless it is established that the car accident caused, "permanent serious impairment of an important physical, mental or psychological function".
7. RSBC 1996 c. 231.
8. RSA 2000, c. I-3.

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