Chapter 19

OPIOID DAMAGES AND HEALTH CARE COSTS RECOVERY ACT

(*Assented to November 9, 2023*)

Summary

This Bill creates a cause of action for the Government of Nunavut in its own right against manufacturers and wholesalers of opioid products, and their consultants, for the recovery of the cost of health care benefits caused or contributed to by an opioid-related wrong.

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OPIOID DAMAGES AND HEALTH CARE COSTS RECOVERY ACT

The Commissioner, by and with the advice and consent of the Legislative Assembly, enacts as follows:

INTERPRETATION

Definitions

1. (1) In this Act,

"consultant" means a person who provides advisory services

(a) to a wholesaler in respect of the distribution, sale or offering for sale of an opioid product, or

(b) to a manufacturer in respect of the sale of an opioid product; (*consultant*)

"cost of health care benefits" means the sum of

(a) the present value of the total expenditure by the Government of Nunavut 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

(b) the present value of the estimated total expenditure by the Government of Nunavut 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; (*coût des prestations pour soins de santé*)

"Court" means the Nunavut Court of Justice unless the context requires otherwise; (*tribunal*)

"disease, injury or illness" includes problematic substance use, addiction and general deterioration of health; (*maladie, blessure ou affection*)

"health care benefits" means

(a) "insured services" as defined in subsection 1(1) of the *Hospital Insurance and Health and Social Services Administration Act,*

(b) "benefits" and "insured services", both as defined in section 1 of the *Medical Care Act*, and

(c) other expenditures, made directly or through one or more agents or other intermediate bodies, by the Government of Nunavut for programs, services, benefits or similar matters associated with opioid-related disease, injury or illness, including but not limited to expenditures for medical travel or medical evacuation; (*prestations pour soins de santé*)

"insured person" means

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

(b) a person for whom health care benefits could reasonably be expected to be provided; (*assuré*)

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

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

(b) the persons each have an undivided interest in assets of the association; (*coentreprise*)

"manufacture", in respect of an opioid product, includes the production, assembly and packaging of the opioid product; (*fabrication* ou *fabriquer*)

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

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

(b) for any fiscal year of the person, derives 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,

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

(d) is a trade association primarily engaged in

(i) advancing the interests of manufacturers,

(ii) promoting an opioid product, or

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

"opioid product" means any product that contains

(a) a drug or active ingredient set out in the Schedule, or

(b) a prescribed drug or active ingredient; (*produit opioïde*)

"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

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

(b) combined with another drug or substance, or

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

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

(ii) as recommended by the manufacturer of that opioid product; (*maladie, blessure ou affection liée aux opioids*)

"opioid-related wrong" means

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

(b) in an action under subsection 2(1), a breach, by a manufacturer, wholesaler or consultant, of a common law, equitable or statutory duty or obligation owed to persons in Nunavut who have used or been exposed to or might use or be exposed to an opioid product; (*faute liée aux opioïdes*)

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

"practitioner" means a person who

(a) is authorized under an enactment to prescribe or advise on the therapeutic value, contents and hazards of a pharmaceutical drug set out in the pharmaceutical drug schedules established under the *Pharmacy Act* or a combination of substances that includes a substance set out in those schedules, and

(b) is not prohibited from prescribing a drug that is an opioid product; (*praticien*)

"promote" or "promotion", in respect of an opioid product, includes

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

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

(c) any research in respect of the opioid product; (*promouvoir* ou *promotion*)

"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; (*type de produit opioïde*)

"use or exposure", in respect of an opioid product, means ingestion, inhalation, injection, application or assimilation of the opioid product, whether intentional or otherwise; (*consommation ou exposition*)

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

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

(b) to hospitals, facilities or care centres for patient use. (*grossiste*)

Interpretation: manufacturer

(2) The definition "manufacturer" in subsection (1) 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 paragraph (a) of the definition "manufacturer" in subsection (1); or

(c) a person who

(i) is a manufacturer only because paragraph (b) or (c) of the definition "manufacturer" in subsection (1) applies to the person, and

(ii) is not related to

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

(B) a person described in paragraph (a) or (d) of the definition "manufacturer" in subsection (1).

Interpretation: related

(3) For the purposes of subsection (2) or (6), a person is related to another person if, directly or indirectly, the person is

(a) an affiliate, as defined in section 1 of the *Business Corporations Act*, of the other person; or

(b) an affiliate of the other person or an affiliate of an affiliate of the other person.

Deemed affiliate

(4) For the purposes of paragraph (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 of persons to receive at least 50% of the profits or at least 50% of the assets on the dissolution, winding up or termination of the partnership, trust or joint venture.

Deemed affiliate: controlling influence

(5) For the purposes of paragraph (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 or group of persons deals at arm's length with that person and derives influence solely as a lender.

Presumption: consultant

(6) For the purposes of this Act, a consultant who provides services to a manufacturer or wholesaler is presumed to provide those services to any related manufacturer or wholesaler.

Determining market share: manufacturer

(7) For the purposes of determining the market share of a manufacturer for a type of opioid product sold in Nunavut, the Court must calculate the manufacturer's market share for the type of opioid product by the following formula:

$$DMS = 100\% \times (DM / MM)$$

where

(a) DMS is the manufacturer's market share for the type of opioid product from the date of the earliest opioid-related wrong committed by that manufacturer to the date of trial;

(b) DM is the quantity of the type of opioid product manufactured or promoted by the manufacturer that is distributed or sold within Nunavut from the date of the earliest opioid-related wrong committed by that manufacturer to the date of trial; and

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

Determining market share: wholesaler

(8) For the purposes of determining the market share of a wholesaler for a type of opioid product sold in Nunavut, the Court must calculate the wholesaler's market share for the type of opioid product by the following formula:

$$DMS = 100\% \times (DM / MM)$$

where

(a) DMS is the wholesaler's market share for the distribution or sale of the type of opioid product from the date of the earliest opioid-related wrong committed by that wholesaler to the date of trial;

(b) DM is the quantity of the type of opioid product distributed, sold or offered for sale by the wholesaler within Nunavut from the date of the earliest opioid-related wrong committed by that wholesaler to the date of trial; and

(c) MM is the quantity of the type of opioid product distributed, sold or offered for sale by all wholesalers within Nunavut for the purpose of providing health care benefits from the date of the earliest opioid-related wrong committed.

DIRECT ACTION BY GOVERNMENT

Direct action by Government

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

Action not subrogated

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

Action independent of recovery by others

(3) In an action under subsection (1), the Government of Nunavut may recover the cost of health care benefits regardless of whether 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.

Recovery for individuals or on aggregate basis

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

(a) for particular individual insured persons who have suffered damage caused or contributed to by the use of or exposure to a type of opioid product; 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.

Action brought on aggregate basis

(5) If the Government of Nunavut 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 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 in respect of the health of, or the provision of health care benefits for, particular individual insured persons;

(d) despite paragraphs (b) and (c), on motion by a defendant, the Court may order discovery of a statistically meaningful sample of the documents

referred to in paragraph (b), and the order must include directions concerning the nature, level of detail and type of information to be disclosed; and

(e) if an order is made under paragraph (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.

RECOVERY OF COST OF HEALTH CARE BENEFITS ON AGGREGATE BASIS

Proof

3. (1) In an action under subsection 2(1) for the recovery of the cost of health care benefits on an aggregate basis, subsection (2) applies if the Government of Nunavut 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 paragraph (a), the type of opioid product manufactured or promoted by the defendant was offered for distribution or sale in Nunavut.

Presumptions

(2) Subject to subsections (1) and (4), the Court must 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 paragraph (1)(a); and

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

Effect of presumptions

(3) If the presumptions under paragraphs (2)(a) and (b) apply,

(a) the Court must determine on an aggregate basis the cost of health care benefits provided after the date of the breach referred to in paragraph (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 paragraph (a) of this subsection equal to its market share in the type of opioid product.

Reduction or readjustment

(4) The amount of a defendant's liability assessed under paragraph (3)(b) may be reduced, or the proportions of liability assessed under paragraph (3)(b) readjusted among the

defendants, to the extent that a defendant proves, on a balance of probabilities, that the breach referred to in paragraph (1)(a) did not cause or contribute to the use or exposure referred to in paragraph (2)(a) or to the disease, injury or illness or risk of disease, injury or illness referred to in paragraph (2)(b).

LIABILITY

Joint and several liability

4. (1) Two or more defendants in an action under subsection 2(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 the definition "opioid-related wrong" in subsection 1(1); and

(b) as a consequence of the breach described in paragraph (a), at least one of those defendants is held liable in the action under subsection 2(1) for the cost of those health care benefits.

Joint breach

(2) For the purposes of an action under subsection 2(1), two or more manufacturers, wholesalers or consultants, regardless of whether they are defendants in the action, are deemed to have jointly breached a duty or obligation described in the definition "opioid-related wrong" in subsection 1(1) if

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

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

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

(ii) to have acted in a principal and agent relationship with each other in respect of 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.

CAUSATION AND QUANTIFICATION OF DAMAGES OR COST

Population-based evidence

5. Statistical information and information derived from epidemiological, sociological and other relevant studies, including information derived from sampling, is admissible as evidence for the purposes 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 in a class action or representative proceeding;

(b) brought by the Government of Nunavut under subsection 2(1); or

(c) brought on behalf of the Government of Nunavut, or on behalf of a class or proposed class of which the Government of Nunavut is a member or proposed member.

LIMITATION PERIODS

Limitation periods

6. (1) No action or proceeding that is commenced by the Government of Nunavut, on behalf of the Government of Nunavut, or on behalf of a class or proposed class of which the Government of Nunavut is a member or proposed member, for 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 *Limitations of Actions Act* or by a limitation period under any other Act, if the action or proceeding was commenced before the coming into force of this section or within 15 years after it came into force.

Certain proceedings revived

(2) An action or proceeding described in subsection (1) for 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 under or extinguished by the *Limitation of Actions Act* or by a limitation period under any other Act.

LIABILITY BASED ON RISK CONTRIBUTION, LIABILITY OF DIRECTORS AND OFFICERS AND APPORTIONMENT

Application

7. (1) This section applies to an action for 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, other than an action for the recovery of the cost of health care benefits on an aggregate basis.

Liability based on risk contribution

(2) The Court may find each defendant that caused or contributed to a 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, if the Government of Nunavut is unable to establish which defendant caused or contributed to the use or exposure described in paragraph (b) and, as a result of a breach of a common law, equitable or statutory duty or obligation,

(a) one or more defendants cause or contribute 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 paragraph (a) and suffers disease, injury or illness as a result of the use or exposure.

Considerations

(3) The Court may consider the following in apportioning liability under subsection (2):

(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 a 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, wholesalers or consultants 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) any affirmative steps that a defendant took to reduce the risk of disease, injury or illness to the public;
(l) any other considerations considered relevant by the Court.

Liability of directors and officers

8. (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.

Application

(2) Subsection (1) applies regardless of whether an action against the corporation for recovery of the cost of health care benefits, or for damages, has been commenced or concluded.

Defence of due diligence

(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.

Nonapplication
9. (1) This section does not apply to a defendant in respect of whom the Court has made a finding of liability under section 7.

Action or proceeding for contribution
(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.

Action or proceeding may be commenced even if damages or costs not paid
(3) Subsection (2) applies regardless of whether 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.

Apportioning liability and contributions: factors
(4) In an action or proceeding described in subsection (2), the Court may apportion liability and order contribution among each of the defendants in accordance with the considerations listed in subsection 7(3).

REGULATIONS

Regulations
10. The Commissioner in Executive Council may make regulations
(a) prescribing drugs or active ingredients for the purposes of paragraph (b) of the definition "opioid product" in subsection 1(1); and
(b) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act.

RETROACTIVITY

Retroactive effect
11. A provision of 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 2(1) arising from an opioid-related wrong, whenever the opioid-related wrong occurred.

PROCEEDINGS ALREADY COMMENCED

Proceedings already commenced
12. If a proceeding in respect of an opioid-related wrong is commenced in another jurisdiction within Canada on behalf of a class or proposed class of which the Government of Nunavut is a member or proposed member and is ongoing as of the date 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) the 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.

EXISTING AGREEMENTS

Definition: proceeding
13. (1) In subsections (2) and (3), "proceeding" means
(a) a proceeding in respect of an action under subsection 2(1); or
(b) a proceeding described in section 12.

Effect of existing agreements
(2) Despite any existing agreement that purports to bind the Government of Nunavut in respect of compensation arising from an opioid-related wrong,
(a) the Government of Nunavut is not barred from commencing 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 respecting an opioid-related wrong that is the subject of a proceeding is not limited.

Deduction of compensation
(3) If 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 section comes into force, any compensation received by the Government of Nunavut under the agreement must be deducted from any compensation received by it as a result of a proceeding.

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

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

SCHEDULE

(*subsection 1(1)*)

Opioid Products

A product that contains any of the following drugs or active ingredients is an opioid product for the purposes of this Act:

(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), 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.