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A RENEWED MEDICAL REVIEW COMMITTEE: A NEW LEGAL ACCOUNTABILITY FOR ONTARIO'S PHYSICIAN'S

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[http://www.gardiner-roberts.com/documents/articles/A Renewed Medical Review Committee.pdf](http://www.gardiner-roberts.com/documents/articles/A%20Renewed%20Medical%20Review%20Committee.pdf)

The Ontario Health Insurance Plan's billing audit process, as administered by the Medical Review Committee (MRC), has recently undergone substantial changes, due to legislative and policy amendments initiated by Ontario's current government. In keeping with these changes, the Ministry of Health has also announced its intention to aggressively pursue physicians for alleged or perceived improper billing practices. These legislative and policy changes are eroding physicians' rights to maintain a practice free from the threat of government regulators enforcing unfair policy.

If you think that you would never be the subject of an Ontario Health Insurance Plan (OHIP) audit, think again! More and more physicians are finding themselves faced with such a review. Some believe that the process affects only physicians who are inappropriately billing OHIP. This is a myth. Significant numbers of ethical physicians just like you are referred each year to the MRC, and 95% are ultimately ordered to repay substantial amounts of money to OHIP.

Dealing with an MRC review can occupy your time, energy and resources. Retaining legal representation in regard to such a review can be very costly. However, a cost-benefit analysis demonstrates the necessity of early, complete and intensive legal representation.

WHAT IS THE MRC?

The MRC is a committee of the College, but it is not a self-governing body. The MRC is a creature of government, not a creature of the profession.

Generally, an MRC review may occur where the General Manager believes

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that all or part of the services billed by the physician were:

- i. not rendered;
- ii. misrepresented, whether deliberately or inadvertently;
- iii. not “medically necessary;”
- iv. not “therapeutically necessary;”
- v. not performed in accordance with professional standards,
- vi. not submitted to OHIP in accordance with the Schedule of Benefits.
- vii. How Has the MRC Process Historically Evolved?

Since its original creation and inception, the MRC process has undergone various changes, including the erosion of rules of fairness that once protected the rights of physicians involved in the process. In past years, physicians and their lawyers have been successful in arguing cases “on the merits” and consequently, overturned decisions of the General Manager on various medico-legal grounds. In these cases, physicians like you simply refused to accept MRC recommendations, and “fought back” by adjudicating the recommendations to the fullest extent of the law. Such legal challenges helped to make “good law” for the entire profession, helped to guide committees of the MRC itself, and also helped to keep the entire audit review process fair and reasonable.

Unfortunately, recent changes to legislation, regulations and policy that began during the last term of the current provincial government have “rolled back” some of the fairness protections that had developed over the last 20 years.

HOW DOES AN MRC REVIEW PROCEED?

There are two types of MRC reviews. The first is the typical “full review,” and the second is the “expedited review.”

Full Review

You will receive notification from the College if the General Manager refers you for a full review. You are told which period of time is at issue (generally, 2-4 years) and which billing codes are the subject of the review. You are given a list of medical charts to produce to the MRC and asked to complete a “practice profile” document. An MRC inspector will attend at your practice to inspect your office and review your appointment books, accounts, and the medical records of patients who received insured services during the period under review. The inspector will also conduct an interview with you. Once the inspection is complete, the inspector submits a written report outlining his/her findings to the MRC.

Once the MRC has considered the report, the Panel decides whether further information should be obtained by interviewing you. In preparation for the interview, the MRC also requests further charts for each billing code that is in dispute.

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During the interview, the Panel will ask you specific questions arising from the contents of the inspector's report and their review of the charts, and with respect to the rules governing legal and ethical billing in Ontario. The Panel then decides, having regard to its application and interpretation of the Health Insurance Act and the Schedule of Benefits, whether or not it should recommend to the General Manager that you be required to repay OHIP, and if so, what amount. Although technically the General Manager has the legal authority to accept or reject a recommendation of the Panel, in reality, the General Manager "rubber stamps" most (if not all) recommendations of the MRC.

Expedited Review

Expedited reviews have the same objective as full reviews. Although expedited reviews were believed to be used where the amount in issue is expected to be less than \$20,000.00, we have seen this threshold amount increase to beyond \$100,000.00. Expedited reviews do not involve an inspection of your office or an interview with a Panel. A single member of the MRC conducts the review.

If you are not satisfied with the recommendation arising from an expedited review, for an administration fee of \$750.00, you can request a "reconsideration." However, the reconsideration does not stop the recovery from going into effect. OHIP will begin to deduct the monies allegedly owing from your billings each month while the reconsideration proceeds.

WHAT IS THE IMPACT OF THE RECENT CHANGES TO THE PROCESS?

As stated above, recent changes to the MRC process and applicable legislation, regulations, and policy have significantly increased your accountability and vulnerability.

Repayment Collection Policies

Recently amended collection policies now require that OHIP collect all monies owed to it, including costs and interest, within one year of an MRC recommendation, regardless of whether you appeal the decision of the General Manager of OHIP and regardless of the amount involved. This means that as soon as the General Manager affirms the recommendation, the money is owing and must be paid within one year. Even if you appeal, because of the length of time it takes to have an appeal heard, you will, in all probability, have completely repaid OHIP before your appeal is reached.

Regulation Respecting Payment of MRC Costs

The Ontario Government has also passed a regulation requiring you to pay the costs and expenses incurred by OHIP and the MRC throughout the review process. You will be required to pay these costs, in addition to your

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own costs, unless you are completely exonerated. What this means is that in addition to any repayment recommendation against you, you will also be on the hook for all associated expenses of OHIP and the MRC. These costs can total in excess of \$25,000.00!

These cost provisions are inherently unfair, most particularly in the case of a physician who has a relatively small repayment recommendation (i.e. \$25,000 - \$50,000). For the “privilege” of a fair review of what may be an arbitrary recommendation or decision, the physician’s costs sanctions could well equal or exceed the alleged repayment amount.

Regulation Respecting Interest

The Ontario Government has also passed regulations requiring you to pay interest at a Government-set rate (reviewed quarterly by the Government) that has accumulated on all outstanding amounts deemed owed to OHIP as a result of an MRC recommendation. Currently, this rate is 4%.

Most frustratingly, the “clock starts ticking” long before you know it. Interest is calculated from the beginning of the first day of the pay period following the end of the period reviewed by the MRC. In other words, interest is calculated retroactively, and is immediately payable on all outstanding amounts, notwithstanding a pending appeal of the General Manager’s decision! The significance of this is that interest begins to accrue long before a recommendation is made by the MRC, and even before you are informed that you must repay OHIP. Moreover, given the large sums of money normally recommended for repayment, accumulated interest can be in the range of tens of thousands of dollars.

Publication

While the authority of the General Manager to publish your name, specialty, locality and description of the review has existed since 1996, it has not been exercised. However, we understand that the Ministry now intends to publish some, if not all of this information. Further, it is possible that the General Manager will apply this authority retroactively, so that information respecting reviews that may have taken place as early as 1996 will be published in OHIP Bulletins available to the public and the profession. It is likely that this information would then be reported by the media, and has the potential to damage your professional reputation.

Treatment of Repayment Directives as “Fraud”

A recent article published in the Windsor Star quoted a spokesperson for the Ministry as saying: “the provincial government holds that a recommendation by the MRC is not an indication of a misunderstanding. It’s ‘fraudulent activity.’” As this quote indicates, the Ministry may be taking a firm and perhaps overzealous approach to “prosecuting” physicians for MRC matters in the future.

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College's "Zero Tolerance for Fraud" Policy

Your College Council recently adopted an internal policy respecting the imposition of penalties for findings of fraud by its Discipline Committee. The policy provides that in most cases of substantial, premeditated OHIP fraud, the penalty of revocation of your licence to practice should be the norm. As indicated by recent statements to the media, the Ministry's idea of what amounts to substantial and/or premeditated fraud appears to be extremely arbitrary. Moreover, the Ministry's opinion on the activity in issue, and the profession's view of the issue, may be entirely at odds. Usually, how you start this process is how you are going to finish.

WHAT IS OHIP'S RECOVERY PROCESS?

Once an order for repayment is made, the General Manager will arrange for repayment in full, or by post-dated cheques or by simply garnishing your monthly OHIP payments. As indicated, in addition to the amount of the recommended repayment, costs and interest will be added. Consequently, the recommendation for repayment and the actual amount owing can (and often do) amount to very different sums of money.

Further, as discussed above, it is the Ministry's policy to require that all outstanding repayments, inclusive of costs and interest be made within one year of the MRC's recommendation. This means that you cannot avoid or delay payment regardless of how large the amount involved. OHIP can (and will) "dry up" your monthly billings until the repayment is made.

Example Calculation:

MRC Recommendation:	\$250,000.00
Costs of OHIP, Ministry and MRC:	\$25,000.00
Interest at 8% over 4 years:	<u>\$80,000.00</u>
Total Payment	\$355,000.00 paid over one year!

WHAT CAN I DO ABOUT A RECOMMENDATION OF THE MRC MADE TO THE GENERAL MANAGER OF OHIP?

While the process does seem stacked against you, you do have appeal rights. As more and more of you grow frustrated with the "one-sided" legislative changes, we are beginning to see more challenges to its inherent unfairness.

The decision of the General Manager is not the end of the road. The decision may be appealed to the Health Services Appeal and Review Board (the Board). The Board, upon hearing the appeal, may uphold, modify, or reject the decision of the General Manager. Note again that the commencement of an appeal does not halt the recovery process.

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If you are not satisfied with the outcome of your appeal to the Board, you may appeal this decision to Divisional Court, a 3-person panel of the province's superior court. Unfortunately, this step may be necessary to obtain the justice you are entitled to. These recommendations often have greater ramifications than just the immediate impact on you. An unchallenged adverse decision could seriously affect the way in which you deliver service for the rest of your career.

WHAT ARE THE LEGAL COSTS ASSOCIATED WITH CHALLENGING MRC RECOMMENDATIONS?

It is difficult to determine with certainty the expense of challenging a recommendation of the MRC. Each case will turn on its own facts and some will be more complex and require more hearing (or trial) time than others. While an appeal is not an inexpensive process, it is often essential to protect your rights and reputation. Being in a position to afford this fight is something that all physicians should be concerned. You may be able to obtain supplemental professional defence insurance that will cover these types of costs. These types of insurance policies are discussed below.

MORE IMPORTANTLY, WHAT ARE THE COSTS OF NOT APPEALING A RECOMMENDATION OF THE MRC?

Although the costs of appealing a recommendation of the MRC may appear substantial, consider the costs of not doing so - they are staggering. For example, "surrendering" by not challenging a recommendation of the MRC may indicate that you accept liability for inappropriately billing OHIP. Not challenging a recommendation of the MRC implies that you accept the "unfairness" of the legislation and the process and that you are simply "paying up for a quiet life." By not challenging a decision of the General Manager of OHIP, you may be opening yourself up to further audits for periods not initially considered by the MRC. Remember, if you are found to be billing inappropriately for one period of time, OHIP may assume that they can recover more money from you for other periods of time.

Finally, not challenging a recommendation of the MRC will prevent precedent-setting decisions from being rendered. Successful challenges could be of great benefit to both you and your profession and help "guide" future panels of the MRC on questions of application and interpretation.

THE CONSEQUENCES OF THESE CHANGES COULD ADVERSELY AFFECT YOUR PRACTICE AND YOUR POCKETBOOK!

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WHAT IS MY BEST DEFENCE IF I AM REFERRED FOR AN AUDIT?

While it may seem trite, your best defence is simply being in a position to be able to make a defence. For everyone in the healthcare profession, there is a concern about the increasing costs associated with legal representation. That is why Professional Legal Expense Insurance (PLEI) was introduced.

You are likely familiar with the assistance provided through the Canadian Medical Protective Association (CMPA). While the assistance of the CMPA is invaluable, its scope may be limited and therefore it may not extend as far as you require to defend your billing practices. It is arguably unrealistic to expect the CMPA to fund appeals to protect your own financial interests, as it is the CMPA's focus to balance the interests of all members across the country and to reasonably control costs and dues.

As a member of the community of Ontario physicians, you need to realize that you have entered a whole new era of professional legal accountability. The stakes are extremely high. Fortunately, the PLEI coverage exists for legal issues such as MRC reviews.

Dentists across Canada were faced with their own set of professional difficulties. To satisfy their concerns, dental specialists formed an association and created an invaluable legal defence policy. The legal defence insurance coverage now available to dentists deserves closer examination by physicians in the context of these types of government decisions, especially if you wish to obtain the ability to fight back against unfair and punitive financial demands of the Ontario Government.

The programs offered by the CMPA are essential and vital to your practice. The PLEI program is not intended to replace anything the CMPA has to offer. Rather, you should view this supplemental legal defence insurance as a valuable addition to the assistance offered by the CMPA. As a member of the medical community, however, you should encourage any of the specialty or practice associations to which you belong to embrace the PLEI program, and make it available to each of the specialty or practice association members. The PLEI program is available to any physician in Canada. Apparently, when the program is endorsed and supported by an association, the costs of coverage are significantly reduced without any negative impact on coverage. Think of PLEI coverage as a small and very worthwhile investment to protect your practice and personal financial security.

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Who Should I Contact for More Information?

To inquire into the possibility of obtaining a supplemental legal defence insurance policy, you might consider contacting your own specialty association and suggesting that it inquire with:

Andrew Shim

Marsh Canada Limited
70 University Avenue, Suite 800 Toronto, Ontario M5J 2M4
Tel: 905-349-4875

S. Kari, "More MDs caught in OHIP fraud," The Windsor Star (16 April 2001) A1.

College of Physicians and Surgeons of Ontario, Report of the Ad Hoc Committee Report on Categorization of Misconduct/Consistency of Penalties (February 1, 2001).

Interest rates fluctuate pursuant to legislation, depending on the time of referral and MRC recommendation.

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