

SPECIAL ALERT – April 2010

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Bill 16 - Creating the Foundation for Jobs and Growth Act, 2010
OHIP Subrogation

The Provincial Government is addressing legislation, which will allow OHIP to subrogate (recoup) against municipalities for Health Care expenses incurred as a result of automobile accidents in which the municipality has been found at fault for non-repair of their roads. If passed, these expenses will have a significant impact on municipal liability claim costs in Ontario.

OHIP cannot presently subrogate these expenses. The current and proposed legislation, in part, is set out later in this article.

Subrogation is a term used to define the act of an Insurer recouping insurance proceeds paid to their insured when another party is liable. An example follows:

- Insurance company A pays for repairs to their Insured's garage when a neighbor, while cutting down a tree, damages the garage when a limb falls on it. Insurance company A is entitled to recover the payment for repairs to the garage from the insurer of the responsible neighbor.

As OHIP is a type of insurance, any health care expenses paid on account of injuries suffered in an accident can be subrogated against responsible (liable) parties. However, many years ago, through legislation, OHIP's right to subrogate its expenses incurred for treatments of victims of automobile related accidents were forfeited. Under current legislation, in lieu of subrogation rights, automobile insurers in Ontario agree to pay OHIP a portion of all liability premiums collected.

Therefore under current legislation, since municipalities have automobile policies, OHIP cannot subrogate against them for road maintenance liability claims.

Under the proposed legislation (Bill 16) to avoid subrogation the municipality must have an auto policy AND MUST be defended under that automobile policy. In road maintenance liability claims the municipality is defended by their municipal liability policy not the automobile policy. This would allow OHIP to subrogate health care costs against the municipality in all of these cases.

OHIP's expenses can be costly. In 2002, in the Leamington ats Antonio matter, which involved a severe brain injury to a teenaged boy, the OHIP expenses were \$1.2M. In today's world of inflating health care costs, \$5M is not out of the question.

The proposed legislation has already passed first and second reading on March 25, 2010 and April 22, 2010 respectively and has been referred to the Standing Committee of Finance and Economic Affairs. The addition of two words, "and defended", while subtle has overwhelming financial ramifications for municipalities.

An example is:

A driver of an automobile loses control and strikes a hydro pole, is severely injured having sustained a brain injury and will require long-term health care. The municipality having jurisdiction over the road is sued and found liable. The municipality was defended under its municipal liability policy.

Under the **present** legislation, OHIP cannot subrogate the expenses they incur since the injuries resulted from an automobile accident and the municipality has automobile insurance. It does not matter that the defence would be brought under the municipal liability policy.

Under the **proposed** legislation OHIP would be able to subrogate as the defence of the municipality for this type of claim would be brought under the municipal liability policy, not under their automobile policy.

The current legislation reads, in part, as follows (emphasis added):

Despite subsection (1), the Plan is not subrogated to the rights of the insured person, as against a person who is **insured under a motor vehicle liability policy issued in Ontario**, in respect of personal injuries arising directly or indirectly from the use or operation, after section 29 of the *Automobile Insurance Rate Stability Act, 1996* comes into force, of an automobile in Ontario or in any other jurisdiction designed in the *Statutory Accident Benefits Schedule* under the *Insurance Act*.

The proposed legislation reads, in part, as follows (emphasis added):

Despite subsection (1), the Plan is not subrogated to the rights of the insured person, as against a person who **is insured and defended by an insurer under a motor vehicle liability policy issued in Ontario**, in respect of personal injuries arising directly or indirectly from the use or operation of an automobile in Ontario or in any other jurisdiction designated in the *Statutory Accident Benefits Schedule* made under the *Insurance Act*.

In the table below we have set out examples of the impact the changes in this legislation will trigger. For this purpose, we have assumed the municipality is found to be liable.

Situation	Present Legislation	Proposed Legislation
An automobile driver is injured after losing control on an icy road	No OHIP subrogation	OHIP subrogation allowed
A pedestrian trips and falls due to a 1 ½" trip ledge on a sidewalk	OHIP subrogation allowed	OHIP subrogation allowed
A passenger in an automobile is injured when the driver loses control due to a pothole, and strikes an oncoming motorist	No OHIP subrogation	OHIP subrogation allowed

Conclusion and call to action

Municipalities already face significant pressure with respect to insurance claims and the resultant impact on insurance costs. The changes in Bill 16 described above are yet another example of where municipalities will face additional costs on insurance claims (and hence premiums) that were not there before. This impact will be significant. As a leader in supplying insurance programs and services to the public sector, including municipalities, Frank Cowan Company urges you to raise these concerns over this issue with your provincial member of parliament.