

NEWS RELEASE



November 13, 2008

Government told officials not to enforce laws against health user fees

Documents obtained by nurses under FOI reveal government policy has been to ask offending doctors and clinics to refund patients, but to take no action if they refuse

Internal Health Ministry documents reveal the BC government deliberately and consciously decided not to enforce laws that protect patients from user fees charged by doctors or private for-profit clinics for services covered by public health insurance.

The documents - released under the Freedom of Information Act - confirm exactly what the BC Nurses' Union has been alleging in ongoing legal action the union first launched in 2005. The government had no intention of defending patients when they were forced to pay illegal fees for medically-necessary procedures.

BCNU has asked under FOI for any subsequent version of the policy to indicate whether it has been changed or is still in effect, but no new policy has been produced.

The documents show explicitly that the government would not act to enforce its own laws because of political considerations.

BCNU president Debra McPherson says reading the documents was chilling. "Here are internal memos in which Health Ministry bureaucrats discuss how to respond to letters received from legal counsel representing BCNU in this matter. They say the government's policy was to write offending physicians and clinics asking them to refund these illegal fees to their patients, but to take no further action if they ignore the request or otherwise refuse to comply.

"This confirms that this government has no commitment to the values and principles of Canada's public healthcare system, which is based on the principle that healthcare should be available to everybody who needs it, regardless of the size of their wallet.

"They also show the government wrote to patients who complain and suggest they seek a refund of the illegal fees themselves. What an insult to patients, what an abdication of governmental responsibility," McPherson says.

One document is an email from Assistant Deputy Minister Craig Knight to then Deputy Minister Penny Ballem December 9, 2004. Another is a December 10, 2004 update apparently prepared for Knight for a meeting with Health Canada. It reads:

"In March/April 2004 the Ministry adopted revised procedures for dealing with reports of extra-billing, in essence these procedures require staff to follow up on complaints but stop short of any enforcement action. (emphasis ours)

"(After asking the patient for documentation and reviewing it) if it appears to be a case of extra-billing, MSP then writes to the doctor (normally the surgeon to remind him/her of the provisions of the (Medicare Protection Act) and to request a refund. However, MSP does not attempt any remedial action in the event the physician does not voluntarily rectify the situation."

../see page 2

The document acknowledges that before March 2004, MSP procedures included requesting repayment of any inappropriate charges and, if necessary, taking remedial action against physicians under the Medicare Protection Act with possible penalties of mandatory de-enrollment from MSP.

But that all changed after the government refused to bring into force the whole of Bill 92, which would have given the government the authority to take action against private clinics, as well as individual physicians. The government appeared to accelerate its support for the growth of patient-pay for-profit healthcare by deliberately looking the other way from illegal extra billing for medicare insured services.

Another document is a November 16, 2004 briefing note prepared for Stephen Brown, Assistant Deputy Minister, Medical and Pharmaceutical Services Division. It refers to possible action against a physician "*either for violation of the billing rules in Part 4 of the Act or for failure to respond in good faith to a communication from the commission. Such action could include de-enrolment for a specified period. However, such action would carry significant political implications....*" (emphasis ours)

"MSP's current approach, amended in March 2004, is to follow up on patient complaints of extra-billing as follows:

Write to the doctors involved to request refunds but do not attempt any remedial action in the event they do not voluntarily rectify the situation.

Write to the patients suggesting they seek refunds" (emphasis ours)

Says McPherson: "These documents show the government knew these fees violated their own laws, but the government consciously refused to act. The fundamental principle of medicare is that everybody pays for healthcare through our taxation system and nobody pays for services that are medically-necessary. The conscious betrayal of these principles by the BC government as revealed in these documents is quite frankly breathtaking.

In its legal case, BCNU has been seeking a BC Supreme Court order directing the government to enforce the laws of medicare, what the documents show the government has consciously and deliberately declined to do.

British Columbia Nurses' Union

4060 REGENT STREET, BURNABY, B.C. V5C 6P5
TELEPHONE (604) 433-2268 toll free 1-800-663-9991 FAX (604) 433-7945 toll free 1-888-284-2222



Chronology of BCNU legal action against Victoria over user fees and extra billing

January 2003 - BCNU legal counsel writes to then-Health Minister Colin Hansen and federal Health Minister Anne McLelland, pointing out violations of the Medicare Protection Act and Canada Health Act over user fees and extra billing by physicians at private clinics. The letters ask what the governments intend to do to enforce their laws.

May 2003 - Health Canada confirms it is withholding federal transfer payments from BC because of user fees charged for medically-necessary services at private for-profit clinics.

May 2003 - Health Minister Colin Hansen tells the legislature medically-necessary surgical procedures - no matter where they are performed - must be covered and paid for by the public purse and there can be no additional charges directly to the patient."

August 2003 - After BCNU complained to the Medical Services Plan, a union member receives a refund of \$3000 from a private for-profit clinic where she received medically-necessary knee surgery.

December 2003 - BC Government introduces Bill 92 to increase its ability to police the practices of private for-profit clinics and compliance with BC Medicare Protection Act and Canada Health Act

April 2005 - BCNU files petition in BC Supreme Court seeking a writ of mandamus ordering the provincial government to enforce Medicare Protection Act prohibitions against extra billing and user fees for medicare insured services

May 2005 - Ottawa fines BC another \$72,000 because of extra billing at private surgery clinics contrary to the Canada Health Act

December 2006 - BCNU files revised petition in BC Supreme Court with more evidence of Medicare Protection Act violations

October 30, 2007 - Government argues technical objections in Supreme Court claiming BCNU lacks the authority to bring the case to court

March 18, 2008 - Mr. Justice Kelleher rules that the case presents a serious issue and BCNU has demonstrated a genuine interest in the matter. When the case is re-filed, it will involve a number of individual patients.

November 13, 2008 - As part of a long attempt to secure disclosure of relevant documents, BCNU releases internal government memos obtained under the Freedom of Information Act that confirm the government has refused to enforce laws against user fees and extra billing even though it understands these fees violate its own laws.

The union is assisting patients in preparing a new court petition on the case which will be filed in BC Supreme Court shortly

British Columbia Nurses' Union

4060 REGENT STREET, BURNABY, B.C. V5C 6P5
TELEPHONE (604) 433-2268 toll free 1-800-663-9991 FAX (604) 433-7945 toll free 1-888-284-2222

What the documents say

1. A November 16, 2004 briefing note - prepared for Stephen Brown, assistant deputy minister, medical and pharmaceutical services division

This document shows:

- the government would not act to enforce its own laws because of "significant political implications."
- *"MSP's current approach, amended in March 2004, is to follow up on patient complaints of extra-billing as follows: Write to the doctors involved to request refunds but do not attempt any remedial action in the event they do not voluntarily rectify the situation."*
- *Write to the patients suggesting they seek refunds"*

2. A December 10, 2004 update prepared for Assistant Deputy Minister Craig Knight for a meeting on the subject with Health Canada

This document says:

- *"In March/April 2004 the Ministry adopted revised procedures for dealing with reports of extra-billing. In essence these procedures require staff to follow up on complaints but stop short of any enforcement action. (emphasis ours)*
- *"(After asking the patient for documentation and reviewing it) if it appears to be a case of extra-billing, MSP then writes to the doctor (normally the surgeon) to remind him/her of the provisions of the (Medicare Protection Act) and to request a refund. However, MSP does not attempt any remedial action in the event the physician does not voluntarily rectify the situation."*
- The document acknowledges that before March 2004 government policy was to request refunds and if necessary, "taking remedial action against physicians pursuant to the Medicare Protection Act (MPA)" including removing them from medicare rolls.
- But that all changed after the government refused to enact the whole of Bill 92, which would have given the government the authority to take action against private clinics, as well as individual physicians. Instead the government appeared to accelerate its support for the growth of patient-pay for-profit healthcare, by simply refusing to take action against illegal extra billing and user fees.
- The document includes form letters from Phillis Chully, executive director, Medical Services Branch. An "initial letter to patients" tells patients they should not have been charged fees and should request reimbursement from the doctor involved. A "letter to physician (normally the surgeon) asks the doctor to ensure that any charges not permitted are refunded to the patient. A "follow-up letter to patient" asks whether the patient asked for a refund, whether the patient received a refund and, if so, how much was received.

3. An email from Craig Knight, ADM to then Deputy Minister Penny Ballem December 9, 2004

The email refers to a call to Ballem and to then-Health Minister Colin Hansen, with plans for a "strategic discussion" with Health Canada. Documents indicating what that "strategic discussion" might have been or where it led has not been released.

Health Canada annually deducts transfer payments from BC for extra billing and user fees charged by practitioners and private for-profit clinics in the province.

British Columbia Nurses' Union

4060 REGENT STREET, BURNABY, B.C. V5C 6P5
TELEPHONE (604) 433-2268 toll free 1-800-663-9991 FAX (604) 433-7945 toll free 1-888-284-2222

**MINISTRY OF HEALTH SERVICES
INFORMATION BRIEFING DOCUMENT**

Cliff # 513285

PREPARED FOR: Stephen Brown, Assistant Deputy Minister - **FOR INFORMATION**

TITLE: Extra-Billing Inquiry

BACKGROUND:

- Since January 2003, the Victory Square Law Office (VSLO) in Vancouver has written to the Ministry several times in relation to alleged violations of the Medicare Protection Act and Canada Health Act rules regarding extra-billing. (A detailed chronology of this correspondence is attached.)
- In most/all of their communications, VSLO has been acting on behalf of the BC Nurses' Union (BCNU).
- The BCNU, in turn, has used the communications as a basis to publicly demand Government action regarding cases of apparent extra-billing at private surgical clinics. (Copies of two BCNU news releases, issued in 2003, are attached.)
- In one case of interest to VSLO (the ^{S22} case, cited in one of the news releases), the private surgical clinic refunded inappropriate charges when MSP contacted the surgeon. This occurred in August 2003.
- However, in another case ^{S22}, a different physician ^{S22} and clinic (False Creek) declined to provide a substantive response to MSP, arguing existing legislation does not require them to do so.
- On September 13, 2004, VSLO wrote to MSP (copy attached) saying:
"Clearly, the Ministry's involvement is necessary at this time to require ^{S22} and the False Creek Surgical Centre to reimburse the illegal charge made to ^{S22}. We would appreciate hearing, at your earliest convenience, the steps the Ministry has taken to pursue reimbursement of this charge and what the Ministry will do to conclude this matter."

DISCUSSION:

- MSP's current approach, amended in March 2004, is to follow up on patient complaints of extra-billing as follows:
 - Write to the doctors involved to request refunds but do not attempt any remedial action in the event they do not voluntarily rectify the situation.
 - Write to the patients suggesting they seek refunds.

- MSP has drafted a response (copy attached) to VSLO with respect to the S22 case. The response summarizes what MSP has done to date but is almost certain to prompt criticism from VSLO and the BCNU because it does not address their key question, "what the Ministry will do to conclude this matter."
- In the S22 case, MSP could in theory ask the Medical Services Commission (MSC) to consider taking action against S22 pursuant to section 15 of the Medicare Protection Act, either for violation of the billing rules in Part 4 of the Act or for failure to respond in good faith to a communication from the commission. Such action could include de-enrollment for a specified period.
- However, such action would carry significant political implications. Moreover, it is doubtful the MSC could successfully hold S22 accountable in the S22 case, as it was the False Creek Surgical Centre rather than S22 who charged the apparently illegal fee. The Medicare Protection Act does not give the MSC any remedial powers with respect to private surgical clinics.

FINANCIAL IMPLICATIONS

Not applicable.

CONCLUSION:

MSP requires direction as to how to handle VSLO's letter about the S22 case.

Program ADM: Stephen Brown
Title/Division: Assistant Deputy Minister, Medical and Pharmaceutical Services Division
Telephone: 952-3166
Program Contact: Phyllis Chuly, Executive Director, Medical Services Branch, MPS
Date: November 16, 2004
File Name with Path: S15

MSP Procedures for Dealing with Extra-Billing Complaints Update – December 10, 2004

1996 – 2003 (Procedures Approved by Medical Services Commission)

- In 1996, the Medical Services Commission (MSC) issued a Communiqué spelling out Medical Service Plan (MSP) procedures for handling complaints related to extra-billing. These procedures included requesting repayment of any inappropriate charges and, if necessary, taking remedial action against physicians pursuant to the *Medicare Protection Act (MPA)*. (See **Appendix A** for further details.)
- Between 2001 and 2003, MSP received an increasing number of reports from patients regarding apparent extra-billing contrary to the *MPA*.
- MSP attempted to handle such cases in accordance with the MSC's 1996 directions.
- While a few of the cases were resolved through full refunds, most reached an impasse, with physicians or clinics refusing to make refunds and claiming the *MPA* does not give MSP/MSC the power to pursue the cases.

2003 (Bill 92, *Medicare Protection Amendment Act, 2003*)

- Bill 92, which received Royal Assent on December 2, 2003, would have remedied apparent weaknesses in the *MPA* – e.g., it would have given the MSC/Government the power to require private clinics to comply with the *MPA*.
- On December 17, 2003, the Government decided not to proclaim this legislation.

2004 (Post Bill 92)

- In March/April 2004, the Ministry adopted revised procedures for dealing with reports of extra-billing. In essence these procedures require staff to follow up on complaints but stop short of any enforcement action.
- If necessary, MSP asks the complainant (patient) for copies of any materials needed to ascertain/document the facts of the case (e.g., the date and nature of the service, the name of the physician, and the amount of the charges).
- Based on this documentation MSP then confirms that
 - the patient is a beneficiary,
 - the physician is enrolled with MSP,
 - the service appears to have been medically necessary,
 - the service is not one for which patient charges have been approved under the *MPA*.
- If it appears to be a case of extra-billing, MSP then writes to the doctor (normally the surgeon) to remind him/her of the provisions of the *MPA* and to request a refund. However, MSP does not attempt any remedial action in the event the physician does not voluntarily rectify the situation.

- MSP also writes to the patients involved advising them of the provisions of the *MPA* and suggesting they seek refunds.
- MSP sends a follow-up letter to patients a few weeks later, asking them to confirm whether or not they received a refund.
- In communicating with physicians and patients, staff use approved template letters (included as **Appendix B**).

APPENDIX A

Excerpt from MSCommuniqué February 9, 1996 (CMQ96-002)

MSP Procedures for Handling Complaints of Billing Contraventions

MSP has adopted a procedure for addressing complaints about billing contraventions under the *Act*. Conditions for handling complaints include:

- All complaints will be investigated, and where deemed a contravention, the physician will be notified in writing.
- Repayment of funds will be requested.
- Follow-up contact will be made with the beneficiary.
- Each case will be dealt with on its own merits.
- Complaints will be handled by the select group of MSP staff to ensure consistency in treatment of complaints.
- Failure to correct the problem or repeated violations will result in action by the Commission under Section 14 [now 15] of the *Act*.
- Further action will include a 21 day notice of a hearing with possible penalties of mandatory de-enrollment from MSP. An appeal process is available to the physician.

APPENDIX B

Template Letters In Response to Patient Complaints of Extra-Billing
(Approved April 2004)

Initial Letter to Patient

DATE

CLIFF

Dear NAME:

Thank you for your letter of DATE, concerning charges you paid in relation to medical/surgical services you received from Dr. NAME on DATE.

Operating under the authority of the *Medicare Protection Act* (the Act) and the direction of the Medical Services Commission, the Medical Services Plan (MSP) pays for insured medical services (benefits) provided to residents of British Columbia. The Act establishes rules regarding billing for services provided by physicians who are enrolled with MSP. In general, patients (or their representatives) must not be charged for benefits. The Act also prohibits anyone from charging patients for *"materials, consultations, procedures, use of an office, clinic or other place, or for any other matters that relate to the rendering of a benefit"* unless specifically permitted by the Medical Services Commission.

Based on the information you have provided, it appears the services you received on DATE OF SERVICES, were MSP benefits and you should not have been charged in relation to them.

In light of this, you may wish to request reimbursement from Dr. NAME. MSP will follow up with HIM/HER as well, to request that HE/SHE review the billings for services to you and refund any inappropriate charges.

Thank you for bringing this matter to our attention.

Sincerely,

Phyllis Chuly
Executive Director
Medical Services Branch

bpc: MSP Claims Branch
Medical Services Branch Policy Development and Management (file)

Letter to Physician (normally to the surgeon)

DATE

CLIFF

Dear Dr. NAME:

The Medical Services Plan (MSP) has received information indicating you provided insured services to a MSP beneficiary, and that the beneficiary was charged in relation to these services. Specifically:

Beneficiary:	NAME
PHN:	#
Procedure:	SERVICE
Date of Service:	DATE
Amount Paid by Beneficiary:	\$

Operating under the authority of the *Medicare Protection Act* (the Act) and the direction of the Medical Services Commission, MSP pays for insured medical services (benefits) provided to residents of British Columbia. The Act establishes rules regarding billing for services provided by physicians who are enrolled with MSP. In general, patients (or their representatives) must not be charged for benefits. The Act also prohibits anyone from charging patients for *"materials, consultations, procedures, use of an office, clinic or other place or for any other matters that relate to the rendering of a benefit"*, unless specifically permitted by the Medical Services Commission.

In light of this information, I ask that you please review the details of the services you provided to MR/MS. NAME, as well as any related charges for these services, and ensure that any charges not permitted under the Act are refunded to the payer.

Thank you very much in advance for your cooperation in this matter.

Sincerely,

Phyllis Chuly
Executive Director
Medical Services Branch

bpc: MSP Claims Branch
Medical Services Branch Policy Development and Management (file)

Follow-Up Letter to Patient (sent 8 weeks after initial letter)

DATE

CLIFF

Dear NAME:

I am following up on my letter of DATE, regarding charges you paid in relation to medical/surgical services you received from Dr. NAME on DATE OF SERVICES.

It would be helpful to the Medical Services Plan if you could please respond to the following questions in the spaces provided and then return this letter to me:

1. Did you ask the physician for a refund of the charges you paid?

Yes____ No____

2. If so, did you receive a refund?

Yes____ No____

3. If so, how much did you receive?

\$_____

Thank you very much for your assistance with this matter.

Sincerely,

Phyllis Chuly
Executive Director
Medical Services Branch

bpc: MSP Claims Branch
Medical Services Branch Policy Development and Management (file)

Jim Redford
BC Ministry of Health Services
Victoria, British Columbia
Phone 250-952-2643 Fax 250-952-1391
mailto:jim.redford@gems8.gov.bc.ca

Original Message

From: Knight, Craig HLTH:EX
Sent: Thursday, December 09, 2004 8:06 PM
To: Ballem, Penny HLTH:EX
Cc: Moyes, Alan HLTH:EX; Redford, Jim HLTH:EX; Marshall, Rick HLTH:EX; Wheeler, Jan HLTH:EX
Subject: PG Update: Extra Billing meeting

Penny,

After I spoke with you and Minister Hansen on the phone today regarding my meeting next week with Health Canada on extra billing by private clinics, I spoke with Jim Redford about this. He is going to pull together for you and me, a list of the 2002/03 complaints we have received on this issue for that year, as well as a briefing note previously shared on the subject. Alan Moyes will be joining me in the meeting with the HC CHA people next week. Alan, Jim, Rick Marshall and me will be meeting next week to review the agenda we received from HC today for the meeting (see attached) and prepare for a strategic discussion with HC.



17-12-04 HC BC
Mtg Agenda.doc...

Same as attached. p. 30 per 3rd disclosure letter from MOH

Craig Knight
Assistant Deputy Minister
Strategic Policy, Legislation and IGR
O: 250-952-2159
C: S15

O/S Out of Scope