New interpretation of the Canada Health Act

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Introduction

On Jan. 10, 2025, the federal Minister of Health released long-awaited guidance on the delivery of insured health care services pursuant to the *Canada Health Act* (the CHA).

The Honourable Mark Holland, Federal Minister of Health (the Minister), issued a letter clarifying the Government's position that patients should not be charged for services provided by any health professional if those services would otherwise be covered when delivered by a physician. In practical terms, this means provinces and territories will be required to cover medically necessary services offered by other health professionals, including nurse practitioners.

The proposed CHA Services Policy (the Policy) will not officially come into effect until April 1, 2026 to give provincial and territorial governments adequate time to review their health care plans and make the necessary adjustments.

See here for our interview with CTV news on this development

Canada Health Act 101: how does the public health system work?

Before we explain why this letter came about, its important to take a step back and understand how the CHA and public health system works.

Public health funding in Canada is delivered primarily pursuant to the CHA, a piece of federal legislation originally introduced in 1984. The CHA sets out the requirements underpinning federal funding for hospital and physician services and national prohibitions on patient charges that may undermine universal access to care. While health care delivery is predominately a provincial or territorial responsibility, provinces must align their laws and regulations with the CHA's guiding principles.

The CHA requires the provinces and territories to establish provincial/territorial insurance plans to cover "medically necessary" services. The CHA does not define "medically necessary". The Supreme Court of Canada, in *Auton (Guard ad Litem of) v*

British Columbia (Attorney General), 2004 SCC 78, accepted the term "medically necessary" to mean, in a general way, a medical service that is essential to the health and medical treatment of the individual. Decisions over which services are covered are ultimately made by the province or territory in consultation with the medical profession. Once something is deemed "medically necessary", it is an insured service, and the patient cannot be charged privately for that service. The CHA alone does not forbid the provision of health services by private companies so long as eligible recipients are not charged for these insured health services.

Provided that the provinces and territories comply with the CHA and its accompanying regulations, transfer payments are made by the federal government to the provincial and territorial governments on an equal per capita basis to provide comparable health care services for all Canadians, regardless of where they live.

Why was the CHA Services Policy proposed?

Over the last several years, provinces have expanded the scope of practice for many regulated health care professionals, including nurse practitioners, pharmacists, and midwives, among others, to increase access to care for Canadians.

In many team-based primary care settings, for example, nurse practitioners have been practicing autonomously by diagnosing, treating, and referring patients, often mirroring the task of a primary care physician. Without provincial billing codes to charge for their services, nurse practitioners have had the option to work as salaried employees in the public health system or offer their services to Canadians on a private pay for service basis as independent contractors.

Nurse practitioners' private service offerings have been met with some criticism, with some members of the public questioning why the services were not being covered by our universal health care system.

The CHA Services Policy seeks to put an end to private pay practices when the service being offered is "medically necessary" and when provided by a "physician or a physician equivalent". Under the proposed Policy, patient charges for "medically necessary" services, whether they are provided by a physician, or any other health care professional are to be covered by the province's health insurance plan. The CHA Services Policy will require that once something is deemed "medically necessary", private pay is prohibited, regardless of health care provider. As before, if a service is not considered to be medically necessary (*e.g.* medical services for aesthetics or travel medicine), the province or territory need not cover it through its health insurance plan.

The scope of the "core basket of services" (being medically necessary services) covered by our universal health care system is not changing. The Policy also does not apply where a regulated health professional's scope of practice overlapped with physicians prior to the enactment of the CHA and whose services were not insured at that time.

Provinces and territories will have over a year to respond and incorporate the practice of nurse practitioners and other health care professionals as applicable into their insured service lists.

Practically speaking, if a province or territory violates CHA principles (*e.g.*, by allowing private payment for insured services), the federal government may reduce its transfer payments to that province/territory. The Minister of Health has stated that every dollar paid by Canadians for medically necessary services will be reduced from the transfer payment. This financial pressure encourages provinces and territories to maintain compliance with these federal health standards.

Further, the Minister states that the federal government will develop measures collaboratively with the provincial and territorial governments to collect information required to implement the CHA Services Policy. Reporting under the Policy will not be required until December 2028. The Minister reiterated in his letter that the goal of the CHA is not to levy penalties on provinces and territories by decreasing transfer payments, but is instead to work collaboratively to ensure access to medically necessary care.

What does this mean going forward?

The proposed CHA Services Policy is consistent with the general aim of the CHA: to ensure that all eligible residents of Canada have reasonable access to insured health services without direct charges at the point of service. What this means for Canadian patients is that regardless of whether they receive services from a physician or another regulated health professional, so long as that service is "medically necessary", it will be covered by the applicable provincial or territorial insurance plan.

It is not the first time we have seen changes surrounding government funding for health care services. During the pandemic there were several changes to virtual care service coverage, and we saw both public and private health care organizations pivot and adapt to help get patients access to the care they needed.

In his letter, the Minister continues to promote national dialogue on the integration of virtual care into provincial health insurance plans. Minister Holland also comments on the recent trend of private surgical clinics offering queue-jumping opportunities to patients who access care outside their home province for a fee and indicated that he has directed Health Canada officials to monitor the issue.

Healthcare organizations currently offering physician-equivalent services provided by nurse practitioners and other health care professionals will need to comply with any corresponding provincial changes by April 2026. Stakeholders should watch for changes to provincial directives and revisit their business models and consider whether the services they offer will be impacted by the Policy.

For assistance navigating the dynamic billing rules in Canada's public health system, please reach out to the key contacts below.

Special thanks to articling student Roya Shidfar for her assistance with this bulletin.

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