

## **M E M O R A N D U M**

TO: Ontario Health Coalition

FROM: SACK GOLDBLATT MITCHELL (Ext. 4897)

DATE: January 19, 2006 Matter No: 04-68

RE: Copeman Healthcare Inc.

---

### **A. Introduction and Summary of Opinion**

On January 11, 2006, Copeman Healthcare Inc. announced that it would be opening three new private clinics in Ontario to deliver physician and related health care services. You have asked for our opinion as to the extent to which this company's plans are lawful under the *Canada Health Act*, and contravene Ontario legislation concerning the provision of insured health care services.

For the reasons set out below, in our opinion, the company's business plan to charge patients substantial services and enrolment fees in exchange for access, or preferential access, to publicly funded health care services, would:

- i) put Ontario in breach of its obligations under the *Canada Health Act*, making it vulnerable to a reduction in federal funding. *Canada Health Act* criteria of *accessibility* and *universality* require provincial governments to ensure that no financial barrier exists to publicly funded health care services, yet this is precisely what Copeman service and enrollment fees would establish;
- ii) violate both federal and provincial prohibitions on *extra billing* and/or *user charges* for insured health care services where Copeman patients pay privately for insured health care services, such as those associated with conducting initial patient interviews or referring patients for specialist care;

iii) violate s.17(1)(c) of the Ontario *Commitment to the Future of Medicare Act* where Copeman clinic fees accord insured persons preferential access to insured health care services;

iv) violate s. 18(2) of the *Commitment to the Future of Medicare Act* concerning block fees if a Copeman clinic physician refuses to provide insured services to insured persons who decline to pay service and enrolment fees;

v) put physicians employed by Copeman clinics at risk of being charged with professional misconduct under the *Medicine Act* and guidelines established by the College of Physicians and Surgeons of Ontario, where, for example, fees are charged in return for a commitment by the physician to be available to provide services to a patient.<sup>1</sup>

The Minister of Health has apparently adopted a wait-and-see attitude to the announcement by Copeland Healthcare Inc. of plans to open clinics in Ontario.<sup>2</sup> However in our view, even at this stage, the company's conduct already appears to engage s. 17(1)(c) of the *Commitment to the Future of Medicare Act* by offering to accept payment for conferring preferential access to insured health care services.

## **B. The Facts**

According to information on the company's web site, Copeman Healthcare Inc. plans to charge patients a fee for medical services that are described as "enhanced medical services". These are to be bundled and paid on an annual basis. The basic annual services fee for each patient is \$2,300. A one-time enrolment fee of \$1,200 will also be charged "to offset the costs of intake, medical profiling and physician assignment."

The company describes these services and enrolment fees as relating to services not covered by OHIP. However, while this may be true to some extent, the Company's own materials indicate that a portion of these fees relate as well to the provision of insured health care services. For example, the company's promotional materials describe the benefits of enrolling with a Copeman clinic as including the "2 most important things in

---

<sup>1</sup> Throughout this opinion, we focus on the question of the services and enrolment fees that will be charged as these relate to physician services. It might also be helpful at some future date to consider the lawfulness of the Company's plans in light of provincial laws and regulations that pertain to the operation of private clinics.

<sup>2</sup> Ottawa Sun, January 11, 2006. *Turning health care into a private matter*. A spokesman for Health Minister George Smitherman is reported to have said that the Ministry of Health will be watching Copeman's operation closely. "We need to determine exactly how his operation will work," said David Spencer. "Is he charging only for uninsured services or is he charging for a mix of insured and non-insured services? Charging for access to insured services would be contravening the law. We're not supportive of pay-your-way-to-the-front-of-the-line."

healthcare: access to expertise; and all of the time you need with your doctor.” It also advertises that:

*At the Copeman Healthcare Centre you can make same-day appointments for anything that requires prompt attention, and you will always be able to talk to a physician when you call the centre. .... And if you need more specialized care, the Centre’s network of internationally renowned specialists will ensure you get the attention you need.*<sup>3</sup>

In simple terms, the company is offering to sell preferential access to physician and related services, including those that are insured by OHIP. This is made clear throughout the company’s material that repeatedly describes “immediate access to the Centre’s highly trained physicians” as a primary benefit of enrolling with a Copeman clinic. The company also claims that it can shorten wait times for any needed specialist, surgery or other follow-up care.<sup>4</sup>

It is reasonable to assume that the payment of services and enrolment fees will be made in accordance with the terms of a contract or agreement between the clinic and its patients, but the terms of such a contract are not posted to the company’s web site. Thus, we have assumed for the purposes of this opinion, the terms of such a contract will reflect the representations made by the company’s promotional materials, which are referred to and cited here.

While nothing in these materials explicitly indicates that the company will refuse to provide the same standard of care to persons who have not paid the \$3,500 services and enrolment fee, it would appear to be entirely inconsistent with the entire business plan of the company for it to provide the same services to individuals who have not, or cannot, afford to “join” a Copeman clinic. There is also no indication that payment of the services or enrolment fees is optional.

### **C. Does the Copeman Model Comply With The Universality and Accessibility Requirements of the *Canada Health Act*?**

The *Canada Health Act* relies upon federal spending powers to establish a Canada-wide, publicly funded, and single-tier health care system in which access to health care is based on need, not ability to pay. Under the Act, provinces are required to establish health care insurance plans that operate in accordance with the criteria and other requirements of the Act. Failure to comply with the Act’s five criteria may lead to a reduction of federal cash contributions to the province. The Act also prohibits extra billing and user charges in relation to the delivery of insured health care services. Failure to implement these prohibitions results in mandatory and offsetting reductions in federal cash transfers to the offending province.

---

<sup>3</sup> <http://www.copemanhealthcare.com/services.htm> as accessed Jan. 15, 2006.

<sup>4</sup> Idem.

Under the Act, "insured health services" includes both hospital and physician services. "Physician services" means any medically required services rendered by medical practitioners.

For present purposes two of the Act's five criteria – universality and accessibility - are of particular importance. These criteria are defined by the Act as follows:

In order to satisfy the criterion respecting **universality**, the health care insurance plan of a province must entitle one hundred per cent of the insured persons of the province to the insured health services provided for by the plan **on uniform terms and conditions**.<sup>5</sup>

In order to satisfy the criterion respecting **accessibility**, the health care insurance plan of a province

- (a) must provide for insured health services **on uniform terms and conditions** and on a basis that **does not impede or preclude, either directly or indirectly whether by charges** made to insured persons or otherwise, reasonable access to those services by insured persons;<sup>6</sup> .....

[emphasis added]

As noted above, according to Copeman promotional materials, preferential access to insured health care services will be accorded those who can afford the \$3,500 fees charged by the company. In other words, Copeman clients will purchase the right to advance to the head of the queue. By providing such preferred access based on the ability to pay rather than need, the Copeman scheme clearly offends the principles of universality and accessibility.

In this respect, the Ontario Health Insurance Plan (OHIP) will be billed for the health care services in question. Because preferred access to the insured services is only being offered to insured persons who pay substantial service and enrolment fees, these publicly funded services are not being offered to all insured persons on *uniform terms and conditions* as required by *Canada Health Act* criteria of universality and accessibility. Therefore, if OHIP funds are used to cover the costs of such health care services, Ontario would be in breach of its obligations under the Act and vulnerable to a reduction in federal funding on that account.

Accordingly, by providing more timely and/or higher quality insured health services to those who can afford to pay substantial services and enrolment fees, the Copeman clinic scheme violates the *Canada Health Act* criteria of universality and accessibility, and quite possibly the Act's prohibition on extra billing and user charges as well.

---

<sup>5</sup> Section 10

<sup>6</sup> Section 12(1)

**D. Does the Copeman Model Comply With the Requirements of the *Commitment to the Future of Medicare Act* and the *Canada Health Act* with respect to Extra-Billing and User Charges?**

Section 10(3) of the *Commitment to the Future of Medicare Act* bans extra-billing for insured health care services by prohibiting a physician from accepting payment or benefit for such services rendered to an insured person except from OHIP. For the purposes of the *Commitment to the Future of Medicare Act*, "insured services" are those referred to in the OHIP Schedule of Benefits.<sup>7</sup>

The company's promotional materials indicate that patients will be charged an enrolment fee "upon registration to offset the costs of intake, medical profiling and physician assignment", as well as the "costs of consolidating your medical history, developing your preliminary health plan (based on your history and health screening), and establishing your initial electronic medical record." However, many of these services are insured by OHIP and specifically described as constituent and common elements of insured services under the *Schedule of Benefits for Physician Services*.<sup>8</sup>

Furthermore, depending upon the way in which service fees are allocated, these may also represent extra billing.<sup>9</sup> Furthermore, unless the fees paid to a Copeman clinic can be fairly and fully allocated to uninsured services, they arguably should be considered charges, either in the form of extra billing or user charges, for insured services.

Moreover, as set out above, the federal government is obligated under *Canada Health Act* to claw back federal cash transfers to offset such extra billing or user charges.

Therefore in our opinion, on the basis of its own promotional materials, Copeman clinic enrolment fees represent, at least in part, extra billing for insured health care services in violation of the *Commitment to the Future of Medicare Act*. Furthermore, depending on how service fees are charged and allocated, these may also offend the prohibition on extra billing.

---

<sup>7</sup> The only exception to the prohibition of s. 10(3) are for services listed as excluded services by regulations to the *Health Insurance Act*, which may be provided to a patient by a physician for payment outside of OHIP.

<sup>8</sup> *Schedule of Benefits for Physician Services, under the Health Insurance Act effective October, 1 2005*. See pages 13 – 18 which describe various constituent and common elements of insured services, including such services as "Obtaining and reviewing information (including history taking) from any appropriate source(s) so as to arrive at any decision(s) made in order to perform the elements of the service": and "Keeping and maintaining appropriate medical records".

<sup>9</sup> *Idem*. For example, common elements of insured services include: "Being available to provide follow-up insured services to the patient and arranging for coverage when not available"; and "Conferring with or providing advice, direction, information, or records to physicians and other professionals associated with the health and development of the patient."

**E. Does the Copeman Model Comply with the Prohibition on Preferential Access to Insured Health Care Services under the *Commitment to the Future of Medicare Act*?**

Section 17 of the Commitment to the Future of Medicare Act

As noted, and advertised by the company, some portion of the fees charged to patients entitles them to access insured health care services of a higher quality, or in a more timely manner. In our view, such fees also offend the provisions of section 17 of the Act, which provides:

17. (1) No person or entity shall,

(a) pay or confer a benefit upon any person or entity in exchange for conferring upon an insured person **a preference in obtaining access to an insured service**;

(b) charge or accept payment or a benefit for conferring upon an insured person a preference in obtaining access to an insured service;

(c) **offer to** do anything referred to in clause (a) or (b).

Mandatory reporting

(2) A prescribed person who, in the course of his or her professional or official duties, has reason to believe that anything prohibited by subsection (1) has occurred shall promptly report the matter to the General Manager.

[emphasis added]

By the Company's own account, at least some portion of the services and enrolment fees entitles members to immediately access physician services. In our view, the only plausible interpretation is that such fees represent payment or charge in regard to securing or according a preference in obtaining access to an insured service. As such, anyone making or receiving such payments would likely violate s. 17(1) (a) or (b) of the Act.

While such offences would arguably not be committed until the actual payment is proffered and accepted, under section 17(1)(c) it is an offence for the clinic and its prospective patient to offer to make or receive the payments proscribed by this section.

Failure to comply with these provisions, and those set out under s. 20 which are described below, is an offence under s. 19 of the Act and is punishable by a fine that ranges from \$1,000 to \$25,000. Penalties for non-compliance by individuals, including both patients and physicians, may be as much as \$10,000, while companies are liable to fines as high as \$25,000.

In our view, the Company's promotional materials represent an offer proscribed by s. 17(1)(c), namely to sell preferential access to insured health care services, and

therefore constitute an offence for which it is liable to a fine of \$25,000. In this regard, the Minister need not wait until the Copeman clinics are in operation in order to proceed. Moreover, as soon the company accepts payment from any "client" both the client and the company would, in our view, likely be committing an offence under s. 17(1) (a) and (b) of the Act respectively.

**F. Does the Copeman Model Comply with the Prohibition under the *Commitment to the Future of Medicare Act* on Charging Block Fees as a Condition of Receiving Insured Services?**

As advertised by the Company, some portion of the services fees and enrolment fees entitle patients to a number of uninsured health care services. Under the *Commitment to the Future of Medicare Act*, physicians may bill for uninsured services, including by charging patients a block annual fee to cover the costs of such services.<sup>10</sup> However, the right to charge for such uninsured services is subject to certain limitations that are intended to prevent such charges from operating as a barrier to insured health care services.

Section 18 of the *Commitment to the Future of Medicare Act* provides:

18. (1) If regulations have been made under this section, a person or entity may charge a block or annual fee only in accordance with those regulations.

(2) A physician, practitioner or hospital **shall not refuse to render an insured service to an insured person** or refuse to continue rendering insured services to an insured person **for any reason relating to an insured person's choice not to pay a block or annual fee.**

(3) For the purposes of this section, the Lieutenant Governor in Council may make regulations governing block or annual fees, including the circumstances under which they may be charged and the information that must be provided to the person who is charged, but may not regulate the amount of such a fee. [emphasis added]

---

<sup>10</sup> S 18 (4) of the Act defines "block or annual fee" to mean,

... a fee charged in respect of one or more health services that are not insured services as defined in section 1 of the Health Insurance Act, or a fee for an undertaking not to charge for such a service or to be available to provide such a service or services if,

(i) the service or services are or would be rendered by a physician, practitioner or hospital, or the service or services are or would be necessary adjuncts to services rendered by a physician, practitioner or hospital, and

(ii) at the time the fee is paid it is not possible for the person paying the fee to know with certainty how many, if any, of the services covered by the block or annual fee the patient will require during the period of time covered by the block or annual fee, or

(b) has any other meaning that may be provided for in regulations made under subsection (3).

In our view, the Copeman scheme would likely offend s. 18(2) of the Act, by imposing payment of a block fee as a condition of rendering insured services, unless one assumes that the clinic will be as ready to accept patients who refuse to pay services and enrolment fees as it is those who will pay \$3,500 to become “members” of a clinic. It would be necessary, however, to have evidence that it in fact has turned away such non-subscribing patients before proceeding against the company for violating this provision of the Act.

Furthermore, we note that the provincial government has the authority under the *Commitment to the Future of Medicare Act* to regulate block fees, but has declined to do so. Thus, it is also open to the government to enact regulations which could directly prohibit any scheme charging for uninsured services with the purpose or effect of violating the criteria of the *Canada Health Act* or which is otherwise inconsistent with the principle that access to medical care should be based on need and not ability to pay. As well, filling any regulatory gap would obviate the need to prosecute clinics that devise any other schemes in an effort to circumvent the clear intent of the Act, namely to prevent block fees from operating as a barrier to publicly funded health care services.

### **G. Could the Fees charged by Copeman Clinics for Services Rendered by Physicians Represent Professional Misconduct by those Physicians?**

The billing practices of physicians are also governed by regulations to the *Medicine Act*<sup>11</sup> and guidelines established by the College of Physicians and Surgeons of Ontario (“CPSO”). Pursuant to *Medicine Act* regulations, a physician is guilty of professional misconduct if she or he engages in any of the following acts:

- **Refusing to perform a medically necessary service unless all or part of the fee is paid before the service is performed;**
- Charging a fee that is excessive in relation to the services performed;
- Charging a fee for an undertaking not to charge for a service or class of services;
- **Charging a fee for an undertaking to be available to provide services to a patient;**
- Conduct unbecoming a physician.

[emphasis added]

---

<sup>11</sup> Medicine Act, 1991: O. Reg. 856/93, s. 1 (1) defines various acts of professional misconduct for the purposes of clause 51 (1) (c) of the Health Professions Procedural Code, see s. 1(1), 19, 21, 22, and 23.



By explicitly linking the payment of clinic fees with a promise to ensure that clinic clients have “immediate access to the Centre’s highly trained physicians”, Copeman clinic physicians could, in our view, risk being found guilty of “charging a fee for an undertaking to be available to provide services to a patient”. Furthermore, by requiring payment of services and enrolment fees set at \$2,300 and \$1,200 physicians might also risk being charged for “refusing to perform a medically necessary service unless all or part of the fee is paid before the service is performed.

Furthermore, as described by the policies of CPSO:

“A physician can only charge patients directly for services that are not paid for by the Ontario Health Insurance Plan.

In many cases, an insured service is comprised of several constituent elements. A physician may not charge a patient for any of these constituent elements. Examples of constituent elements of an insured service include the referral of a patient to a specialist and the administrative processing for a new patient being accepted into a practice.”<sup>12</sup>

The enrolment fees charged by the Copeman clinic are described as charges “to offset the costs of intake, medical profiling and physician assignment”, and as being required to cover “the costs of consolidating your medical history, developing your preliminary health plan (based on your history and health screening)...” These would appear to clearly be charges for the constituent elements of insured services precisely of the character described by the CPSO as representing professional misconduct.

In addition, CPSO guidelines stipulate that:

“physicians who charge a block fee must also provide patients with the alternative of paying for each service individually at the time that it is provided”; and that

“a physician may not discontinue seeing a patient or refuse to see a new patient because that person chooses not to pay a block fee. In addition, a physician must not offer to or provide preferential services to a patient who agrees to pay a block fee.”

Nothing in the promotional materials available on the Copeman web site indicates that clinic patients would have the option of paying for uninsured services on a pay-as-you-go basis. Moreover, for the reasons noted, the Copeman scheme repeatedly offers to provide preferential services to patients who pay services and enrolment fees.

## **H. Conclusion**

The billing scheme associated with clinics that Copeman Healthcare Inc. has announced it plans to open in Toronto raise very substantial and serious issues

---

<sup>12</sup> The College of Physicians and Surgeons of Ontario: *Block Fees and Uninsured Services*, Policy #4-04 <http://www.cpso.on.ca/Policies/blockfees.htm>

concerning compliance with the *Commitment to the Future of Medicare Act*, the *Canada Health Act*, and CPSO professional misconduct regulations and policies.

Please do not hesitate to contact us if you have any questions.

SS:lr

F:\DOC\OHC\04-68\00060632.DOC