

Using the Law to Advance Health Equity: OHIP Eligibility of Ontario-born Babies of Uninsured Parents

Rebecca Cheff & Lauren Bates

Wellesley Institute works in research and policy to improve health and health equity in the GTA through action on the social determinants of health.

Written by Rebecca Cheff & Lauren Bates

Think Piece

© Wellesley Institute 2018

Copies of this report can be downloaded from www.wellesleyinstitute.com.

Statement on Acknowledgement of Traditional Land

We would like to acknowledge this sacred land on which the Wellesley Institute operates. It has been a site of human activity for 15,000 years. This land is the territory of the Huron-Wendat and Petun First Nations, the Seneca, and most recently, the Mississaugas of the Credit River. The territory was the subject of the Dish With One Spoon Wampum Belt Covenant, an agreement between the Iroquois Confederacy and Confederacy of the Ojibwe and allied nations to peaceably share and care for the resources around the Great Lakes.

Today, the meeting place of Toronto is still the home to many Indigenous people from across Turtle Island and we are grateful to have the opportunity to work in the community, on this territory.

Revised by the Elders Circle (Council of Aboriginal Initiatives) on November 6, 2014

10 Alcorn Ave, Suite 300
Toronto, ON, Canada M4V 3B2
416.972.1010
contact@wellesleyinstitute.com



TABLE OF CONTENTS

Introduction	1
Our Approach	2
What We Learned about Newborn OHIP Eligibility from the Law	3
Newborns	3
Primary Place of Residence	3
Continued OHIP Eligibility	5
The Implementation Challenge	5
Closing the Implementation Gap	7
The Importance of Good Implementation	7
References	8

Introduction

There have been several recent cases of Ontario-born babies of parents who are ineligible for the Ontario Health Insurance Plan (OHIP) not being registered for OHIP at the time of their birth in Toronto-area hospitals. This is particularly concerning, given that OHIP covers a newborn's important first visits to health care providers for screenings, well-baby checks and immunizations, as well as more intensive hospital care if needed.¹

Parents who are living in Ontario may not be eligible for OHIP for a number of reasons, such as being in the three-month OHIP wait for new residents or having precarious or no legal immigration status due to sponsorship or work permit breakdown, a denied refugee claim, or overstayed visa. Regardless, their Toronto-born children are citizens by birth.

It is not clear why these newborns are not being registered for OHIP in hospitals. However, cases are occurring at a number of Toronto-area hospitals, suggesting a systemic issue rather than isolated incidents. Service providers involved in the Health Network on Uninsured Clients have expressed concern and confusion about why this is happening. Impacted families are likely to experience fear and vulnerability when navigating registration processes, due to their precarious legal status. Some service providers are advocating for their individual clients and reaching out to hospital colleagues to look for solutions. To understand the root causes of these troubling cases of newborns being denied hospital OHIP registration, we began by documenting cases and understanding the law regarding OHIP eligibility for these newborns, which is summarized in this think piece. The companion Consultation Paper "Ensuring Equitable Access to OHIP Registration for Newborns" presents the findings of our consultations with hospital staff and focuses on identifying strategies for ensuring eligible newborns are registered for OHIP.

Drawing on this recent work regarding health care coverage for newborns, we also explore in this think piece how an understanding of the law can add more broadly to efforts to increase health equity. The law provides us with the fundamental rules, principles and rights within which the health care system operates. Within this context, planners and providers across Ontario's health care system are integrating a health equity lens into health care planning and delivery with the aim of ensuring all Ontarians can meet their health potential. As changes are made to improve access and outcomes, understanding the law can help health providers protect and advance the health care rights of patients. It can also inform more effective efforts to make systemic change. Understanding how the law affects persistent and emerging health inequity problems is an important, accessible and underused tool for change within the health care system.

Our Approach

To understand the OHIP eligibility of newborns, we identified and reviewed the relevant laws in Ontario and Canada using publicly available, online legal databases. In Canada, there is a commitment to providing public access to all laws and case law decisions, as a fundamental element of access to justice. These sources of law can be accessed through free and publicly available online databases including e-Laws for Ontario laws, Justice Law for federal laws, and CanLII for statutes and regulations from all Canadian jurisdictions as well as court judgements and tribunal decisions.² For those who are new to legal approaches, there are accessible guides to this type of research.³ From these publicly available resources, we can develop a basic, foundational understanding of areas of law relevant to the health care system, as this work demonstrates.

To review the law regarding the OHIP eligibility of newborns whose parents are ineligible, we examined relevant federal and provincial statutes and regulations, as well as related case law. The federal government sets out the purpose and requirements of health care policy through the *Canada Health Act*.⁴ Provincial governments are then responsible for administering provincial health care insurance programs.⁵ Ontario's *Health Insurance Act* provides a framework for the province's health insurance program, OHIP.⁶ We then reviewed the accompanying regulations. While statutes are passed by federal or provincial parliaments, regulations are created under the authority as assigned in their enabling Acts, and provide details for implementation of the statute. While both statutes and regulations have the full force of law, regulations are more easily created and amended. Regulation 552 under the *Health Insurance Act* outlines the specific OHIP eligibility requirements.⁷

After identifying and reviewing these relevant Acts and regulations, we searched for relevant case law. If an individual has applied and been denied OHIP, they can appeal the decision at the Health Services & Appeal Review Board (HSARB). Decisions of HSARB may be appealed to the Ontario Divisional Court.⁸ Using CanLII databases, we identified all HSARB and court case decisions that applied the relevant sections of the legislation and regulation that define OHIP eligibility. By reviewing the facts and decisions of each case, we were able to understand how the sections of the *Health Insurance Act* and regulations related to OHIP eligibility are being interpreted and applied. For health researchers and advocates, case decisions can also be a useful source for understanding the experiences of individuals related to law.

These multiple sources of law – the federal and provincial statutes (*Canada Health Act and Health Insurance Act*), the regulations, and the case law – are needed to clarify and understand the legal underpinnings of OHIP eligibility.

What We Learned about Newborn OHIP Eligibility from the Law

“Residency” is a central concept in determining eligibility for public health insurance in Canada, and is defined in the *Canada Health Act*, Ontario’s *Health Insurance Act*, and the accompanying regulations. The *Canada Health Act* states that all residents of provinces are insured persons, with some exceptions including residents who are in provincially defined waiting periods of up to three months.⁹ Ontario’s *Health Insurance Act* provides a right to publicly funded health care insurance to every person who is a “resident” of Ontario if they meet eligibility requirements, which are found in the Regulation.¹⁰

Newborns

While most new Ontario residents must wait three months before they can apply for OHIP coverage as a demonstration of residency, newborns are understandably unique. As a result, the Regulation states that all newborns are exempt from the standard three-month wait for OHIP coverage if they meet the requirements to be a “resident” *on the date of their birth*.¹¹

It is important to note that before 2009, newborns whose parents were uninsured would *not* have been eligible for OHIP at time of birth. Before 2009, to be exempt from the three-month wait, a newborn had to be “born in Ontario to an insured person.”¹² Changes to the regulation in 2009 indicate that there was a clear intent to broaden OHIP coverage, rather than restrict it only to babies born to insured parents.

Since 2009, a newborn’s OHIP eligibility is based on their residency at the time of birth, rather than whether their parent is insured. To be a resident, the Regulation states that a person must, at the time they apply for OHIP, meet two requirements:¹³

1. The person must have an “eligible status,” which includes Canadian citizenship. In general, all babies born in Canada are citizens and therefore meet this requirement.¹⁴
2. The person’s “primary place of residence” must be Ontario. For children under 16, this is the primary place of residence of the person who has lawful custody of the child.

Primary Place of Residence

As Canadian citizens, this population of newborns clearly meet the first requirement of being a resident by having an eligible status. The definition of “primary place of residence” is less straight-forward and more nuanced. Primary place of residence is defined in the Regulation as the *one* place where a person:

“has the greatest connection in terms of present and anticipated future living arrangements, the activities of daily living, family connections, financial connections and social connections.”¹⁵

To understand what this definition means for newborns and how parents would demonstrate primary place of residence, we looked at case law from the Health Services Appeal and Review Board (HSARB) and the courts to see how these bodies have understood and interpreted the Regulation's definition of primary place of residence. HSARB is an independent administrative tribunal that can change a decision made by OHIP administrators if it finds that the *Health Insurance Act* or its regulations have been misinterpreted.¹⁶ HSARB cannot however change the law itself. As an administrative tribunal, HSARB is intended to provide individuals with an accessible way to appeal decisions about OHIP. However, it is likely not an accessible process for families who fear identifying themselves due to precarious legal status. Likely due to these barriers to access, as well as the recency of the 2009 changes, there are no cases directly related to the eligibility of Ontario-born babies. Instead we looked at cases where HSARB made decisions about individual's primary place of residence.

While there are different components of the regulatory definition of primary place of residence, it is clear from the case law that there is not a single factor, piece of evidence or documentation that definitively establishes primary place of residence. Rather, HSARB considers the unique circumstances of each individual who is appealing OHIP decisions, and analyses the factors as a whole, based on the evidence put forward. Simply put in a HSARB case summary, "the Appeal Board looks for evidence of a person's ties to Ontario that demonstrate Ontario is the person's primary home."¹⁷

Some appellants provided financial records as evidence of residency. For example, the Canadian father of twins born to a surrogate in India was able to prove Ontario was his primary place of residency based on his property tax assessments, income tax assessments, and an employment insurance benefits letter.¹⁸ In contrast, financial documents were not on their own sufficient for a woman who was a permanent resident living in Ontario since 1968, who made trips to her country of origin, Italy. HSARB also relied on a testimony from her daughter, and letters from her friends, neighbours, church, and landlord to determine that Ontario was her primary place of residence.¹⁹

HSARB also commonly receives evidence regarding whether an appellant owns a home in Ontario; however, this factor by itself does not appear to be sufficient for determining primary place of residence. In one case, the fact that a Canadian man owned a residence in Ontario was not sufficient because he had close social ties, owned a home and had permanent resident status in the U.S.²⁰ Whereas another Canadian citizen who had permanent resident status, a wife and connections in the Bahamas, and who stayed with friends when in Ontario, was nevertheless able to demonstrate primary place of residency in Ontario due to his history of residence in Ontario, network of friends, financial ties and intent to move to Ontario with his wife.²¹

Another case dealt with "anticipated future living arrangements" – a possibly confusing factor for uninsured persons in the definition of primary place of residency. HSARB decided that an

appellant was eligible for OHIP, even though her intent to maintain Ontario as her primary place of residence in the future was “not as clear.” Due to the caregiving needs of her family in Canada and the U.S., HSARB decided it was “sensible and reasonable” for her to want “to be flexible regarding her living arrangements.” Her lack of clarity regarding her anticipated future living arrangements was not seen as a reason to deny her coverage.²²

From this review, it is clear that HSARB does not treat primary place of residence as a rigid checklist of requirements. This flexibility allows for an important consideration of individual context when making decisions about eligibility and allows for the inclusion of newborns of uninsured parents. On the other hand, the lack of simplicity and clarity that results from the absence of specifically defined requirements may create some challenges for uninsured parents. While the definition of primary place of residence appears broad enough to include these families, because of the barriers they face in accessing justice they may not ultimately benefit from this flexibility.

Continued OHIP Eligibility

This review of the law helped us identify the legal test for Ontario-born newborn eligibility when applying to OHIP: one parent must demonstrate primary place of residence. The Regulation also states that to *continue* to be recognized as a resident, a person must:

3. Be in Ontario for at least 153 days out of the first 183 days after becoming a resident. Newborns, who meet the requirements to be a resident at the time of their birth, are exempt however from this requirement.
4. Continue to have primary place of residence in Ontario and an eligible status (e.g. Canadian citizenship).
5. Be physically present in Ontario for 153 days in any given 12-month period.

From our reading, this provision is related to the requirements to *continue* having OHIP once a person has been approved. Arguably, this provision is not relevant to the initial eligibility of newborns at the time of birth. Their anticipated future living arrangements must be considered in assessing their primary place of residence and thereafter, as with all residents, they are responsible for demonstrating that they have met these requirements if OHIP has reason to believe they no longer do.

The Implementation Challenge

There seems to be a clear intent to provide OHIP to Ontario-born newborns whose parents have settled in Ontario and plan to stay, regardless of the parent’s legal status or OHIP coverage, particularly given the broadening effect of the 2009 amendments. At the same time, there seems to be an intent to not provide OHIP for newborns whose parents do not live in or plan to stay in Ontario.

Even though the law appears to be inclusive as is, recent cases of newborns being denied registration indicates that a problem exists. The problem is likely not then the law itself, which is arguably inclusive of this population of newborns, but rather a lack of clarity and understanding of the law. For example, in some initial accounts of cases which sparked this work, hospital staff thought that the mother's lack of eligibility meant the baby was automatically not eligible for OHIP. These initial accounts suggest a lack of understanding of the law which is likely compounded due to the lack of clear policy guidelines. This is addressed in our companion Consultation Paper "Ensuring Equitable Access to OHIP Registration for Newborns" which presents the results of our consultations with hospital staff.

The Ministry of Health and Long-Term Care (MOHLTC) has developed a factsheet to provide guidance regarding the OHIP eligibility of children whose parents are uninsured. From initial accounts, this factsheet appears to be the main document that hospital staff and service providers are relying on when making decisions about these cases.²³

It is possible that the factsheet may itself be contributing to a lack of clarity and comprehension of law. The fact sheet states that during the hospital registration process, parents will be asked to confirm that their newborn "has a primary place of residence in Ontario and will be physically present in Ontario for at least 153 days in any twelve-month period to retain health insurance coverage." This could be a source of confusion and misinterpretation for hospital staff, as the fact sheet does not include the regulatory definition of primary place of residency or provide examples of which types of documents could be provided by parents to demonstrate primary place of residency when in hospitals. As well, parents are being asked to confirm they will be physically present in Ontario for 153 days in a 12-month period. Given the precarious legal status of the parents, this may be misinterpreted as grounds for denying OHIP registration.

Misunderstandings and misinterpretations regarding the law is particularly concerning because of the lack of recourse available to families. Uninsured parents who have precarious or no legal status likely face barriers to justice due to their legal status. They may be fearful of challenging hospital decisions to refuse OHIP registration, going to Service Ontario to registering their babies, and using the formal HSARB appeal process. Given these barriers, it is particularly important that hospital staff are supported to apply the law.

Since the 2009 change to the regulations outlining OHIP eligibility, there seems to be an implementation gap. The law is arguably inclusive but also nuanced and open to misinterpretation. Existing government guidelines do not appear to be sufficient in clarifying this area of law for those responsible for implementing it.

Closing the Implementation Gap

While the law is not a frequently used tool for health care providers, it provides the framework in which the health care system operates. Understanding relevant areas of law, such as our rights to health care coverage, allows us to understand patients' enforceable, individual legal rights, which can be used to advance health and health equity. An understanding of rights allows individuals to advocate for themselves and it can help health care providers advance the individual rights of patients and improve access to coverage and care. It can also help us identify what further work needs to be done to realize and enforce existing legal rights and make broader change when patients are facing systemic barriers to justice. Using publicly accessible law databases, we were able to develop a foundational understanding of an area of law, which is a starting point for change. This work demonstrates how an understanding of the law allows us to take a rights-based approach to advance population health equity.

This review is a helpful starting point because it suggests that the existing law regarding newborn OHIP eligibility is arguably inclusive. Rather than focusing on changing the law, we can focus on how the law is communicated and implemented to ensure eligible newborns are not left without coverage. For service providers advocating with and on behalf of impacted families, this work can immediately clarify an area of law that is not currently clearly communicated through government documents. Given the systemic barriers that impacted parents face in accessing justice, there is also a need to clarify the law and broadly educate those who are responsible for implementing it. To build on the review of the law, we have consulted with hospitals to better understand how the law regarding newborn registration is currently being understood and implemented and how the implementation gap can be addressed; this is summarized in our companion Consultation Paper “Ensuring Equitable Access to OHIP Registration for Newborns.”

The Importance of Good Implementation

This example highlights more broadly the importance of good implementation of law and the problems that occur when the law is misunderstood and misapplied. It is important that efforts are made to ensure that those who are responsible for implementing the law, such as hospital staff who register babies for OHIP, understand the law. Good implementation of new laws is particularly important when communities face barriers to access to justice. With this example of the troubling pattern of denial of OHIP registration to newborns of uninsured parents, we see that a vulnerable population is inequitably impacted by the uneven implementation of the law, which is compounded by the lack of accessible recourse. It is important that governments consider the needs of diverse groups when implementing changes to law and policy, in order to avoid barriers to care and access to justice.

References

- 1 Campbell D. & Au., H. (2009). "Routine Health Care for Newborn Babies." About Kids Health. Retrieved from <http://www.aboutkidshealth.ca/En/ResourceCentres/PregnancyBabies/NewbornBabies/RoutineHealthCareforNewbornBabies/Pages/default.aspx>
- 2 All sources of law used for this work are publicly accessible for free online from the following:
Federal law: <http://laws-lois.justice.gc.ca/eng/acts/>
Provincial law: <https://www.ontario.ca/laws>
Case law: <https://www.canlii.org/en/>
- 3 For example, the University of Toronto Law Library provides guidance here: <https://library.law.utoronto.ca/step-2-primary-sources-law-canadian-case-law-0>.
- 4 *Canada Health Act*, R.S.C., 1985, c. C-6. [Canada Health Act].
- 5 *Canada Health Act*, s. 8(1).
- 6 *Health Insurance Act*, R.S.O. 1990, c.H.6 [Health Insurance Act].
- 7 *Health Insurance Act*, R.S.O. 1990, c. H.6, Regulation 552 "General", ["Regulation 552"].
- 8 *Health Insurance Act*, s. 24(1).
- 9 *Canada Health Act*, s. 2.
- 10 *Health Insurance Act*, R.S.O. 1990, c.H.6, s. 11(1) [Health Insurance Act].
- 11 General Regulation, s. 6(1).
- 12 *Health Insurance Act*, R.S.O. 1990, c. H.6, Regulation 552 "General", point in time March 30-31, 2009 [General Regulation 2009], s. 3(4).
- 13 General Regulation, s. 1.3(1).
- 14 *Citizenship Act*, R.S.C., 1985, c. C-29, s. 3(1)(a).
- 15 General Regulation, s. 1(1).
- 16 *Health Insurance Act*, s. 20(1)
- 17 *S.P. v. General Manager, Ontario Health Insurance Plan* (24 August 2010) HSARB (2010 CanLii 70800).
- 18 *M.J. and T.J. v. General Manager, Ontario Health Insurance Plan* (8 November 2011) HSARB [2012 CanLii 20348]
- 19 *S.P. v. General Manager, Ontario Health Insurance Plan* (24 August 2010) HSARB (2010 CanLii 70800).
- 20 *J.J.M. v. General Manager, Ontario Health Insurance Plan* (25 August 2011) HSARB.
- 21 *D.M.W. v. General Manager, Ontario Health Insurance Plan* (15 February 2011) HSARB.
- 22 *J.P. v. General Manager, Ontario Health Insurance Plan* (20 May 2011) HSARB.
- 23 Ministry of Health and Long-Term Care. 2011. OHIP Eligibility of Canadian-Born Children of OHIP-ineligible Parents. Retrieved from: http://www.health.gov.on.ca/en/public/publications/ohip/eligibility_2.aspx