

2004

S.H. No. 230887

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN

ELMER STANISLAUS MORRISON, By His Litigation Guardian
Joan Marie Morrison and **JOAN MARIE MORRISON**



PLAINTIFFS

- and -

THE ATTORNEY GENERAL OF NOVA SCOTIA, representing Her
Majesty the Queen in right of the Province of Nova Scotia,

DEFENDANT

TO THE DEFENDANT:

TAKE NOTICE that this proceeding has been brought by the Plaintiff against you, the Defendant, in respect of the claim set out in the Statement of Claim annexed to this notice.

AND TAKE NOTICE that the Plaintiff may enter judgment against you on the claim, without further notice to you, unless within TWENTY days after the service of this Originating Notice upon you, excluding the day of service, you or your solicitor cause your Defence to be delivered by mail or personal delivery to,

(a) the office of the Prothonotary at 1815 Upper Water Street in Halifax, Nova Scotia, and

(b) to the address given below for service of documents on the Plaintiff:

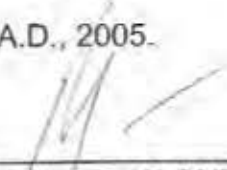
provided that if the claim is for a debt or other liquidated demand and you pay the amount claimed in the Statement of Claim and the sum of \$ (or such sum as may be allowed on taxation) for costs to the plaintiff or her solicitor within six days from the service of this notice on you, then this proceeding will be stayed.




ISSUED the

8th

day of September, A.D., 2005.



RAYMOND F. WAGNER
Solicitor for the Plaintiff
whose address for service is
1869 Upper Water Street
Halifax, NS B3J 1S9

for


DALE DUNLOP
Solicitor for the Plaintiff
whose address for service is
1485 South Park Street
Halifax NS B3J 2S9

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN

ELMER STANISLAUS MORRISON, By His Litigation Guardian
Joan Marie Morrison and **JOAN MARIE MORRISON**

PLAINTIFFS

- and -

THE ATTORNEY GENERAL OF NOVA SCOTIA, representing Her
Majesty the Queen in right of the Province of Nova Scotia,

DEFENDANT

Proposed Common Law Class Proceeding

STATEMENT OF CLAIM

PARTIES

1. The Plaintiff Elmer Stanislaus Morrison (Elmer Morrison) resides in St. Vincent's Guest House at 2080 Windsor Street, Halifax, Nova Scotia and is the spouse of the Plaintiff Joan Marie Morrison (Joan Morrison).
2. The Plaintiff Joan Morrison resides at of 6 Sumac Lane, Halifax, Nova Scotia and is the spouse of the Plaintiff Elmer Morrison.
3. The Defendant the Attorney General of Nova Scotia (Nova Scotia), through its various representatives, including but not limited to the Department of Health, was at all material times the party which determined whether Elmer Morrison and other proposed class members were eligible for subsidized care in long term care facilities. All agencies and departments of Nova Scotia are referred to herein as Nova Scotia, which, for the purposes of this action, includes all of its contractors,

sub-contractors, agents, servants, employees, assigns, appointees and partners.

4. The term health care costs when used herein, shall without limiting its generality, include the cost of physicians' services, hospital services, nursing care and personal care.
5. The Plaintiffs seek to certify this action as a class proceeding, and plead the Supreme Court of Canada's decision in *Western Canadian Shopping Centers Inc. v. Dutton*, [2001] 2 S.C.R. 534, and Rule 5.09 of Nova Scotia's *Civil Procedure Rules*, as providing the basis for such certification. The Plaintiffs state that there is an identifiable class that would be fairly and adequately represented by the Plaintiffs; that the Plaintiffs' claims raise common issues; and a class proceeding would be the preferable procedure for the resolution of such common issues.
6. The Plaintiffs propose to bring to a common law class proceeding, on behalf of themselves and on behalf of a class of other residents of long term care facilities in the Province of Nova Scotia and family members of residents of long term care facilities in the Province of Nova Scotia who have been required to pay for the health care costs of residents in long term care facilities, for the period between February 1, 2001 and the date on which the policy is rescinded. The proposed class will be further defined in the Application for Certification.

FACTUAL ALLEGATIONS

7. In or about February 2002, due to his age and infirmity, it was determined that Elmer Morrison required long term care. In accordance with the policy of the Nova Scotia Department of Health, Elmer Morrison and Joan Morrison submitted to a mandatory financial assessment by the Department of Health to facilitate Elmer Morrison's admission to a long term care facility.
8. A decision was made purportedly in accordance with the Department of Health's, "Community Supports for Adult Policies" that Elmer Morrison and Joan Morrison had sufficient income and assets such that, Elmer Morrison could only be admitted to a long term care facility on "a private pay basis".

9. In or about March 2002, Joan Morrison met with Henry Capstick, an employee of the Department of Health, at the Halifax Infirmary. Mr. Capstick advised that if Joan Morrison did not agree with the financial assessment as conducted by the Department of Health, she would be forced to pay for her husband's hospital care at the rate of \$250.00 per day. In the circumstances, Joan Morrison felt compelled to agree with Department of Health's financial assessment.
10. On or about the 1st day of April, 2002, Elmer Morrison entered "The Glades", a long term care facility located at 25 Alton Drive, Halifax, Nova Scotia. On or about the 1st day of May, 2002, Elmer Morrison moved to Saint Vincent's Guest House, a long term care facility located at 2080 Windsor Street, Halifax, Nova Scotia and has remained there ever since. Since April 1st, 2002, Joan Morrison has continued to reside in the former matrimonial home at 6 Sumac Lane, Halifax, Nova Scotia.
11. Elmer Morrison and Joan Morrison have been required by the Nova Scotia Department of Health to use both their income and their assets to pay for Elmer Morrison's long term care, including the cost of his health care on a private pay basis since April 1st, 2002.
12. Since the 1st day of April, 2002, Elmer Morrison and Joan Morrison have paid as directed by the Nova Scotia Department of Health, \$40,573.37 in 2002; \$55,104.34 in 2003; and \$58,554.52 in 2004 which includes the cost of health care for Elmer Morrison while he has been a resident in long-term care facilities. From July 1st, 2004, Saint Vincent's Guest House charged a daily rate of \$181.00 for "Nursing Care, Semi-Private Room" to Elmer Morrison and Joan Morrison until January 1, 2005 when the daily rate was reduced to \$77.00.

LIABILITY

Statutes Relied Upon

13. The Plaintiffs plead and rely on the *Proceedings Against the Crown Act*, R.S.N.S., c. 360, the *Health Services and Insurance Act*, R.S.N.S., c.197, the *Homes for Special Care Act*, R.S.N.S., c. 203, the *Canada Health Act*, R.S.C. C-6.,the *Canadian Charter of Rights and Freedoms, Constitution Act, 1982* Schedule B to *Canada Act 1982* (U.K.) 1982 c. 11, the *Social Assistance Act*, R.S.N.S., c. 432, the *Matrimonial Property Act* R.S.N.S., c. 275 and the *Survival of Actions Act*, R.S.N.S., c. 453.

Breach of Statutes

14. The Defendant in failing to provide for the cost of medically necessary health treatment for Elmer Morrison and members of the proposed class in similar situations, has violated a number of statutes, all of which are designed to ensure that Nova Scotians and other Canadians have access to health care services as required without reference to an individual's ability to pay for such services.

The Nova Scotia Acts

15. The *Health Services and Insurance Act* s. 3(2) decrees that all residents of the Province are insured upon uniform terms and conditions with respect to payment of the cost of insured professional services to the extent of the tariffs. Insured professional services are defined as those "services to which a resident is entitled to receive insurance under the provisions of the Act and the regulations". MSI administers the payment for professional services including any physician services provided, *inter alia*, in an institution.
16. Nursing care is defined under s. 2 (1) (i) of the *Homes for Special Care Act* as "the use of methods, procedures and techniques employed in providing nursing care by persons with technical nursing training beyond the care that an untrained

person can adequately administer.” The Province pays for nursing care within a hospital setting.

17. Personal care is defined under s. 2 (1) (k) of the *Homes for Special Care Act* as “the provision of room, board and supervision of, and assistance with, the activities of daily living of a person who is ambulatory or semi-ambulatory”. The Province pays for personal care within a hospital setting.
18. Regulations made pursuant to the *Homes for Special Care Act* mandate that residents such as Elmer Morrison receive regular treatment or observation by qualified medical practitioners. Elmer Morrison also receives regular nursing care of a type similar to that received in the hospital before his forced transfer to a home for special care. The failure of the Defendant to pay for physician, nursing services and personal care services delivered to Elmer Morrison and proposed class members simply because they are in homes for special care, violates the spirit and intent of the *Health Services and Insurance Act* that all Nova Scotians receive identical treatment with respect to insured services. The system as it has operated is in fact two-tier health care based on income.

The Canada Health Act

19. The *Canada Health Act* mandates that in order for a province to receive a full cash contribution annually from the Government of Canada, the province’s health insurance plan must meet certain minimum criteria, which include comprehensiveness, universality and accessibility.
20. In order to meet the criteria for comprehensiveness, the insurance plan must, among other things, cover all insured services provided by medical practitioners. The failure of the Defendant to pay for the services now provided to Elmer Morrison and proposed class members by medical practitioners violates the comprehensiveness requirement of the *Canada Health Act*.

21. In order to meet the criteria for universality, the insurance plan must entitle one hundred percent of the insured persons to the insured health services provided for by the plan on uniform terms and conditions. Requiring Elmer Morrison and proposed class members to pay for services that others receive free of charge violates the universality requirement of the *Canada Health Act*.
22. In order to meet the criteria for accessibility, the insurance plan must provide for the provision of insured services on uniform terms and conditions and on a basis that does not impede or preclude reasonable access to the insured services. Requiring Elmer Morrison and proposed class members to pay for services based on where those services are delivered, (i.e. hospital vs. home for special care), violates the accessibility requirement of the *Canada Health Act*.

Canadian Charter of Rights and Freedoms

23. The actions of the Defendant as described above have interfered with the Plaintiffs' and proposed class members' rights to life, liberty and security of the person as guaranteed by Section 7 of the Canadian *Charter of Rights and Freedoms*. By violating the various *Acts* in the manner set out above, the Defendant has failed to provide the Plaintiffs and proposed class members with the universal health care coverage that every Canadian is entitled to by law and expectation. In turn, the loss of universal health care coverage at a time when the Plaintiffs and proposed class members require it most has caused them profound psychological and emotional harm as it relates to their financial future and security of person. Such breach is not reasonably justified in a free and democratic society.
24. Section 15.1 of the *Canadian Charter of Rights and Freedoms* guarantees every Canadian the right to equal treatment before and under the law without discrimination based upon, among others, age or mental or physical disability.

The inability of Elmer Morrison and others in the proposed class to seek medically necessary treatment at a hospital or medical practitioner's office due to age or mental or physical infirmity should not deprive them of the right to such services delivered to them free of charge, as it is to those who suffer no such disability. Thus, the Defendant has violated the Plaintiffs' and the proposed class' s. 15 rights pursuant to the *Canadian Charter of Rights and Freedoms*. Such deprivation is not reasonably justified in a free and democratic society.

Discrimination Based on Marital Status

25. Section 15.1 of the Canadian Charter of Rights and Freedoms guarantees every Canadian the right to equal treatment before and under the law without discrimination. Joan Morrison and members of the proposed class have been subjected to discrimination on the basis of marital status, as a spouse of an individual requiring long-term health care. As spouses, they have been forced to provide their property and unfairly contribute to the subsidization of the cost of their spouses' nursing home care and health care in a manner that would not occur if they were in a relationship that was not spousal in nature. Discrimination based on marital status is an analogous personal characteristic of the type that Section 15.1 is intended to prevent. Thus, the Defendant has violated the Plaintiffs' and the proposed class' s. 15 rights pursuant to the *Canadian Charter of Rights and Freedoms*. Such deprivation is not reasonably justified in a free and democratic society.

Breach of Contract

26. Section 3 of the *Health Services and Insurance Act* creates a contract of insurance between every resident of Nova Scotia and the Defendant. In exchange for receiving considerable tax revenue from the residents the Defendant has agreed to provide those residents with medical and hospital services without need for further payment for those services. The contracts of

insurance are managed by Nova Scotia Medical Services Insurance (MSI) with respect to insured professional services and directly by the Defendant with respect to insured hospital services. The Plaintiffs and members of the proposed class state that the failure of the Defendant or MSI, which is a statutory creation of the Defendant and thus entirely within its control, to pay for what would otherwise constitute insured services simply because they are delivered in a home for special care, constitutes a breach of contract.

Joint Claim for Imposed Division of Matrimonial Assets

27. As of February 1st, 2001 every applicant for a position in a home for special care was mandated to complete a “universal classification” to determine care needs and ability to pay. The classification process forced every applicant to undergo a financial assessment as if that individual was applying for social assistance. The policy manual containing the rules for financial assessments is entitled, “Community Supports for Adults” and was prepared by the Department of Health even though the *Social Assistance Act*, is normally under the jurisdiction of the Department of Community Services. The universal classification system has no statutory or regulatory authority to support the policy change and as such the assessment process since February 1, 2001 is illegal.

28. The Plaintiffs and the proposed class state that the Policy Manual and its implementation violate the *Matrimonial Property Act* and the *Social Assistance Act*. Policy Manual Number 3.2 6 states, “Any income to which the applicant has the right of application under the *Matrimonial Property Act* is considered as income for the purposes of determining financial eligibility.” There is no provision in the *Matrimonial Property Act* that permits a third party to force what amounts to a division of matrimonial assets against the will of the couple to whom the *Act* applies. The circumstances of a spouse moving to a home for special care due to

medical reasons is not one that would trigger a divisions of assets under the *Matrimonial Property Act*.

29. The overall effect of the arbitrary and illegal policies of the Department of Health with respect to forced eligibility assessments is to inflate the income and assets of the applicant at the expense of the spouse remaining at home, causing that spouse undue and unnecessary financial and emotional hardship.
30. The inflation of the applicant's spousal assets and income violates Section 14(3) of the *Social Assistance Act*, which limits contributions by relatives to those seeking assistance to \$25.00 per week.

Survival of Actions

31. As a result of the activities of the Defendant, the proposed class members who have died in the relevant period set out above have claims that survive the proposed class members' deaths for the benefit of their respective estates pursuant to the provisions of the *Survival of Actions Act*.

REMEDIES SOUGHT


32. The Plaintiffs seek on behalf of themselves and the proposed class, remedies in damages, declaratory relief and *Charter* relief including:
 - (a) An order pursuant to Nova Scotia Civil Procedure Rule 5.09 (Rule 5:09) and the principles enunciated in *Western Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 certifying the action as a class action and naming the Plaintiffs as representative plaintiffs for the class; or in the alternative an order pursuant Rule 5.09 naming the Plaintiffs as Representatives for all other Plaintiffs in the within action;

- (b) Damages for breach of the contract of insurance between Elmer Morrison and the Defendant and damages for breach of the contract of insurance between the proposed class members and the Defendant;
- (c) *Charter* remedies under Section 24(1);
- (d) A declaration that current policies of the Defendant with respect to full payment of health care costs in homes for special care by those with the means to pay violate provisions of the *Health Services and Insurance Act*, the *Homes for Special Care Act* and the *Canada Health Act*;
- (e) A declaration that the assessment eligibility policy provisions of the Department of Health violate the *Social Assistance Act* and are thus void and unenforceable;
- (f) A declaration that the assessment eligibility provisions of the Department of Health violate the *Matrimonial Property Act* and are thus void and unenforceable;
- (g) A declaration that the eligibility assessment process as established in February 1, 2001 has no statutory basis and thus all assessments performed since that date are void and unenforceable;
- (h) An accounting of all costs paid by the Plaintiffs and the proposed class for residents in long term care facilities since February 1, 2001;
- (i) An order that the Defendant repay to the Plaintiffs and to the proposed class, the full amount of all costs paid by the Plaintiffs and the proposed class for residents in long term care facilities since February 1, 2001 as restitution, together with interest at a rate to be determined by the Court;

- (j) Alternatively, an order directing the repayment of, or damages for, any and all amounts paid by the Plaintiffs and the proposed class for all costs of residents in long term care facilities to the Defendant and to third party operators of long term care facilities since February 1st, 2001 in excess of the amount permitted under *the Social Assistance Act*, as determined by the Court;
- (k) General damages;
- (l) Special damages;
- (o) Aggravated damages in an amount to be determined by the Court;
- (p) Punitive and/or exemplary damages in an amount of to be determined by the Court;
- (q) The costs of providing appropriate notice to class members and administering this proposed class action for their benefit;
- (r) Interest pursuant to the *Judicature Act*;
- (s) Costs; and
- (t) Such further and other relief as this Honourable Court deems just.


PLACE OF TRIAL: Halifax, Nova Scotia

DATED at Halifax, Nova Scotia this 21st day of September, A.D., 2005.



Raymond F. Wagner
Wagner & Associates
1869 Upper Water Street
Halifax, NS B3J 1S9
Tel: (902) 425-7330
Fax: (902) 422-1233

Solicitor for the Plaintiffs



for Dale Dunlop
Walker Dunlop
1485 South Park Street
PO Box 36057
Halifax NS B3J 2S9
Tel: (902) 423-8121
Fax: (902) 429-0621

Solicitor for the Plaintiffs

To: The Attorney General of Nova Scotia

2004

S.H. No. 230887

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN

ELMER STANISLAUS MORRISON, By His Litigation Guardian
Joan Marie Morrison and **JOAN MARIE MORRISON**

PLAINTIFFS

- and -

THE ATTORNEY GENERAL OF NOVA SCOTIA,
representing Her Majesty the Queen in right of the Province of
Nova Scotia,

DEFENDANT

=====
STATEMENT OF CLAIM
=====

WAGNER & ASSOCIATES
Barristers and Solicitors
PO Box 756 RPO
1869 Upper Water Street
3rd Floor, Pontac House
Halifax, Nova Scotia
B3J 2V2

Attention: RAYMOND F. WAGNER
RFW/fi