

Form 4.03B

2004



Hfx No. 230887

**SUPREME COURT OF NOVA SCOTIA**

**BETWEEN**

**THE ESTATE OF ELMER STANISLAUS MORRISON, By His Representative Archibald Morrison, JOAN MARIE MORRISON, and THE ESTATE OF JOHN KIN HUNG LEE, By His Representative Archibald Morrison-and-ELIZABETH LEE**

**PLAINTIFFS**

- and -

**THE ATTORNEY GENERAL OF NOVA SCOTIA, representing Her Majesty the Queen in right of the Province of Nova Scotia, (Department of Health), THE MINISTER OF HEALTH FOR THE PROVINCE OF NOVA SCOTIA at the relevant time and THE EXECUTIVE DIRECTOR OF CONTINUING CARE FOR THE PROVINCE OF NOVA SCOTIA**

**DEFENDANTS**

**Proceeding under the *Class Proceedings Act*, S.N.S 2007, c. 28**

**Fourth-Fresh-as-Fifth Amended Statement of Claim-Amended July 25, 2012-August 25, 2020**

**PARTIES**

1. The Plaintiff Archibald Morrison, who represents the Estates of Elmer Stanislaus Morrison and John Kin Hung Lee and the members of the Residential Class as defined in paragraph 11, resides at First Street in Halifax, Nova Scotia and is the son of the late Elmer Stanislaus Morrison ("Elmer Morrison") who resided in St. Vincent's Guest House at 2080 Windsor Street, Halifax, Nova Scotia.
2. The Plaintiff Joan Morrison who represents herself and the members of the Spousal Class as defined in paragraph 11 resides at 6 Sumac Lane, Halifax, Nova Scotia and was the spouse of Elmer Morrison.
3. Elmer Morrison died on May 6, 2007. Joan Morrison is the sole executor and

beneficiary under the last will and testament of Elmer Morrison. Probate has not been taken out for Elmer Morrison's estate.

~~4. The Plaintiff Elizabeth Lee who represents herself and the members of the Spousal Class as defined in paragraph 11 resides at 30 Navara Crescent, Dartmouth, Nova Scotia and is the spouse of John Lee.~~

~~4.5. John Kin Hung Lee ("John Lee") died on or about January 28, 2009. Elizabeth Lee is the sole executor and beneficiary under the last will and testament of John Lee. Probate has not been taken out for John Lee's estate.~~

~~5.6. The Defendant, the Attorney General of Nova Scotia (Nova Scotia), through the Department of Health ("DOH"), was at all material times the party which determined whether seniors requiring public funding were eligible for admission to and subsidized care in nursing homes.~~

~~6.7. The Defendant, the Minister of Health at the relevant time, was at the material times in office when the wrongful decisions and actions complained of in this Action were first undertaken by the DOH.~~

~~7.8. The Defendant, the Executive Director of the Continuing Care Branch of DOH at all material times was the public official within DOH with executive responsibility for long term care programs and services for seniors, including care in nursing homes.~~

~~8.9. The term health care costs when used herein, shall without limiting its generality, include salaries, benefits and operational costs of resident care in nursing homes and may be related to: nursing, personal care, social work services and physical, occupational, recreational and other therapies.~~

~~9.10. The Plaintiffs seek to certify this action as a class proceeding and plead the *Class Proceedings Act*, S.N.S. 2007, c. 28, 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.~~

~~10. 11.~~ The Plaintiffs propose to bring to a common law class proceeding, on behalf of themselves and two classes of similarly situated persons:

A Residential Class:

Residents of nursing homes, or their estates if the resident has passed away, in the Province of Nova Scotia, who had been required to pay for the health care costs of residents in nursing homes for the period between February 1, 2001 and January 1, 2005.

A Spousal Class:

Spouses of residents of nursing homes, or their estates if the spouse has passed away, in the Province of Nova Scotia, who have been required to pay for the health care costs of residents in nursing homes for the period between February 1, 2001 and January 1, 2005.

## **FACTUAL ALLEGATIONS**

~~11. 12.~~ The DOH is responsible for the public administration of Nova Scotia's single-tier publicly insured health insurance program, commonly known as medicare, which is delivered through two health insurance plans established pursuant to the *Health Services and Insurance Act*, R.S.N.S., 1989, c.197, first enacted in 1958.

~~12. 13.~~ Medically required hospital services are funded under the Hospital Insurance Plan and medically required services provided by physicians and certain other health care professionals are funded under the Medical Services Insurance Plan.

~~13. 14.~~ Under the two plans, the full costs of insured health care services are covered for all residents of the province who are eligible for and obtain a valid Nova Scotia Health Care Card Number. Extra billing is not permitted and there are no premiums. Funding for the plans comes from the general revenues of Nova Scotia.

~~14. 15.~~ The DOH also has certain obligations related to the licensing and regulation of long term care facilities, including nursing homes, and for the long

term care of seniors, principally those 65 years and older, in those facilities pursuant to the *Homes for Special Care Act*, R.S.N.S., 1989, c. 203 (“HSCA”), first enacted in 1976.

~~15. 16.~~ Unlike the fully insured health care services provided in hospitals and by physicians under the medicare system, the costs of nursing home care in Nova Scotia are not fully paid for from public funds.

~~16. 17.~~ The DOH determines the per diem rate that each nursing home is permitted to charge pursuant to section 28B of the Regulations made under the HSCA having regard to the best interests of the resident.

~~17. 18.~~ Until February 1, 2001, admission to nursing homes and the payment for the care of seniors in nursing homes operated under a two-tier system with the following essential characteristics:

- (a) persons who had the financial capacity to pay the full per diem rate approved by the DOH and charged by the nursing home were obliged to do so on a private pay basis and retained the right to contract directly with a nursing home of their choice to be admitted and cared for without submitting to any financial or other assessment by the DOH; and
- (b) persons who did not have the financial capacity to pay for nursing home care could apply to have the DOH pay all or part of the per diem charges subject to a functional and financial assessment and would be placed on one or more waiting lists until a bed became available.

~~18. 19.~~ During the 1990s, approximately 20-25% of nursing home residents were admitted and cared for on a private pay basis and the DOH subsidized the remaining 75-80%.

~~19. 20.~~ In 1993 Nova Scotia imposed a moratorium on issuing new nursing home licenses, in part, to contain the growing public cost of subsidizing the care of seniors in nursing homes. With minor exceptions, the moratorium remained in place during all times material to this Action and has contributed to a relative scarcity of available nursing home beds.

~~20. 21.~~ As of March 2000, the approximately 5,800 licensed nursing home beds that had been in operation throughout the 1990s had only increased to 5,832 beds, distributed among 70 nursing homes, of which 22 were municipally owned, 20 private-for-profit, 21 non-profit charitable and 7 based in hospitals.

~~21. 22.~~ Also during the 1990s, the number of hospital beds available for acute care decreased significantly. A March 2000 report related to the utilization of both hospitals and nursing homes by a DOH Facilities Review committee found that:

- (a) between fiscal 1991-92 and 1999-00, the number of hospital beds in Nova Scotia declined by 37%, from 5,149 beds to 3,135 beds;
- (b) approximately 25% of people in hospitals, most of them seniors, did not require an acute level of care and could receive the health care services they required in nursing homes or through other long-term care programs; and
- (c) the single largest barrier to timely and appropriate discharge from hospitals lay in patients' access to nursing home beds which, in turn, was due to high demand for nursing home beds, 99% occupancy rates in nursing homes and increasing care needs of residents, particularly, seniors.

~~22. 23.~~ The Facilities Review report recommended that, because hospital beds are a very expensive resource, the DOH must make sure that hospital beds are used as efficiently as possible, so that they benefit all who need acute levels of care.

~~23. 24.~~ Effective April 1, 2000, responsibility for all Nova Scotia's continuing care programs and services for seniors was transferred to DOH from the Department of Community Services.

~~24. 25.~~ The additional responsibilities transferred to the DOH included the intake, placement and case management of seniors in nursing homes pursuant to the HSCA and Regulations and, in particular, in accordance with the Community Supports for Adults Policy Manual that had come into effect on April 1, 1998.

~~25. 26.~~ After exclusive responsibility for long term care programs and services for seniors was transferred to it in April 2000, to address the problems identified in the Facilities Review report, the DOH decided to implement, effective February 1, 2001, a single coordinated placement list and assessment process in each health district in the province.

~~26. 27.~~ The single placement list and assessment process that DOH purported to put into effect as of February 1, 2001 was, in fact, an early implementation the so-called Single Entry Access (“SEA”) system that the DOH implemented throughout the province in 2002.

~~27. 28.~~ Both the single placement list and assessment process and the later full implementation of the SEA system purported to make participation mandatory for private pay seniors as well as for nursing home applicants requiring public financial assistance.

~~28. 29.~~ The single placement list and assessment process and the later full implementation of the SEA system created a DOH controlled nursing home care rationing system which, in relation to private pay seniors:

- (a) prevented them from directly applying to and contracting with nursing home operators of their choice for nursing home admission and care;
- (b) forced them onto government controlled waiting lists behind persons who the DOH in its interests preferred to see obtain nursing home admission and care; and
- (c) compelled them (and, in many cases, by their spouses and other family members) to submit to an intrusive and psychologically stressful financial disclosure.

while, at the same time, continuing to require them to pay the full nursing home per diem charges, including health care costs.

~~29. 30.~~ The decision to implement the single placement list and assessment process and the later full implementation of the SEA system was made on behalf of the DOH by the Defendant, the Executive Director of the Continuing Care

Branch, in his then capacity as Senior Director of the Continuing Care Branch of the DOH, and was expressly approved by the Defendant, the Minister of Health at the relevant time.

30. 31. Both the Defendant, the Minister of Health at the relevant time and the Defendant, the Executive Director of the Continuing Care Branch, knew prior to February 1, 2001 that the HSCA, the Regulations and the Community Supports for Adults Policy Manual did not authorize the abrogation of a private pay senior's right to apply directly to and contract with an individual nursing home of his or her choice. They thereby knew that both the initial single placement list and assessment process and the later full SEA system were unlawful insofar as they purported to apply to private pay seniors.

31. 32. A January 22, 2001 DOH news release that announced the purported new approach to nursing home admissions stated:

Currently, an assessment of care needs, as well as a financial assessment, are [sic] required for seniors whose nursing home care is partially or fully funded by government, but seniors who are able to pay themselves are not required to be assessed. As a result, a private-pay senior may be admitted to a nursing home, without any assessment. He or she may also be admitted ahead of a government-assisted senior with a demonstrated need.....

"This has to change," said Mr. Muir. "We want our seniors to have fair access to the best possible care to meet their needs. By requiring that every applicant be assessed using the same criteria, everyone is on the same playing field and we can ensure beds go to those who need them most."

32. 33. Three warnings by the Auditor General -- before, during and after the Class Period -- that the HSCA and regulations were outdated and did not provide an adequate legal basis for the practices and programs carried out by the DOH, particularly, in relation to long term care of seniors in nursing homes, also make it clear that the Defendant, the Minister of Health at the relevant time and the Defendant, the Executive Director of the Continuing Care Branch, must be taken to have known that SEA system (including the initial version of it implemented on February 1, 2001) was an unlawful intrusion upon of the fundamental civil rights of private pay seniors.

~~33. 34.~~ A 2003 report of the Auditor General's audit of the DOH's long term care division (within the Continuing Care Branch headed by the Defendant, the Executive Director of the Continuing Care Branch) states:

In 1998, we noted that legislation surrounding nursing homes should be reviewed to ensure it better reflected current practices. The Homes for Special Care Act was proclaimed in the 1970's. DOH staff have [sic] informed us that new legislation is one of the Department's strategic priorities.

~~34. 35.~~ A 2007 Auditor General's report on a further audit of the Defendant, the Executive Director of the Continuing Care Branch's Continuing Care Branch stated:

DOH management informed us that many of the requirements in the Act and Regulations need to be updated as they do not reflect current standards. In addition, significant new DOH policies such as the Cost of Care Initiative and Single Entry Access are not reflected in the current legislation. Management has indicated they recognize the need to update the current legislation. However, DOH's focus on other significant initiatives in process has meant that updating legislation is not currently a priority for DOH. We emphasize the need to update legislation is urgent in this case as there have been significant changes in the program which are not in compliance with current legislation.

~~35. 36.~~ The urgency of the Auditor General's recommendations contrast starkly with the DOH's complete inaction on legislative updates, both after the 1998 audit and after the 2003 audit. The nine years of intransigence by the DOH in response to the first two Auditor General's reports, coupled with its outright contempt for the need for legality, apparent in its response to the 2007 audit, show that the unlawful conduct complained of in this Acton was arrogant, arbitrary and reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour which justifies the punitive damages award requested below.

~~36. 37.~~ In addition to knowing that it was unlawful to purport to make the waiting list and the intrusive financial assessment requirements mandatory for private pay seniors, both the Defendant, the Minister of Health at the relevant time and the Defendant, the Executive Director of the Continuing Care Branch were aware that



the requirements were likely to harm that class of seniors by impeding their timely admission into nursing homes of their choice and by causing psychological stress and worry to them and their family members.

~~37. 38.-~~ While the DOH, the Defendant, the Minister of Health at the relevant time and the Defendant, the Executive Director of the Continuing Care Branch were undoubtedly under significant pressure in 2000 to take action to address the problems related to the inefficient utilization of expensive public hospitals for the delivery of non-acute levels of health care services as described above, the existence of such pressure did not justify acting unlawfully and to the detriment of a vulnerable class of frail seniors and their families.

~~38. 39.-~~ The DOH -- and Nova Scotia itself -- had other options prior to February 1, 2001 and throughout the Class Period:

- (a) The DOH (and Nova Scotia) officials were well aware that most other provincial governments in Canada had for years been making the budgetary adjustments necessary to cover the health care costs of all seniors in nursing homes, typically as extended health care services related to their respective medicare plans. The amount it would have cost to fund the health care costs of nursing home care for all residents beginning in February 2001 would have been a small percentage (approximately 2%) of the overall DOH budget for that fiscal period. Given the substantial growth in the DOH's overall expenditures between 2001 and 2005, the amount required to fund those costs would have shrunk to increasingly smaller percentages in each successive year during the Class Period. In 2003, after the DOH had chosen to proceed to implement the single placement list and assessment process and to fully implement the SEA system in relation to private pay seniors without lawful authority, Nova Scotia chose to give a \$147,000,000 budgetary priority to an income tax cut.
- (b) If the DOH did not prefer to make the necessary budgetary adjustments required to begin paying the health care costs component of nursing home per diem charges as of February 1, 2001, the government of the day could

have sought to have legislation enacted which would have authorized it to encroach on the rights of private pay seniors to the extent necessary to make their mandatory participation in the SEA system lawful without paying the health care costs component of their nursing home care.

- (c) Alternatively, the DOH could have deferred the mandatory implementation of the SEA system in relation to private pay seniors until such date as it was willing to make the budget adjustments necessary to pay the health care costs component of their nursing home care.

~~39. 40.~~ The DOH finally did begin treating the full health care costs component of nursing home care for seniors as a publicly funded extended health care service on January 1, 2005, and began paying these costs on behalf of all nursing home residents who hold a valid Nova Scotia Health Care Card Number. This was achieved by the DOH by the relatively simple mechanism of requiring nursing home operators to show sub-totals for the health care costs and the accommodation costs components of their per diem rates.

~~40. 41.~~ However, prior to January 2005, with the exception of a \$12.75 per diem contribution to the health care costs of private pay seniors in nursing homes begun in April 2003, the Department of Health wrongfully failed to pay such health care costs on behalf of private pay seniors, including the Plaintiffs, Elmer Morrison, John Lee and Class Members, during that portion of the Class Period that coincides with their respective stays in one or more nursing homes in the province.

## **IMPACT ON PLAINTIFFS**

### **Morrison Plaintiffs**

~~41. 42.~~ In or about February 2002, due to his age and infirmity, it was determined that Elmer Morrison required nursing home care. In accordance with the policy of the DOH, Elmer Morrison and Joan Morrison submitted to a mandatory financial assessment by the DOH to facilitate Elmer Morrison's admission to a nursing home.

~~42. 43.~~ A decision was made purportedly in accordance with the DOH's "Community Supports for Adults Policies" that Elmer Morrison and Joan Morrison had sufficient income and assets such that, Elmer Morrison could only be admitted to a nursing home on "a private pay basis".

~~43. 44.~~ In or about March 2002, Joan Morrison met with Henry Capstick, an employee of the DOH, at the Halifax Infirmary. Mr. Capstick advised that if Joan Morrison did not agree with the financial assessment as conducted by the DOH, 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 the DOH's financial assessment.

~~44. 45.~~ On or about the 1<sup>st</sup> day of April, 2002, Elmer Morrison entered "The Glades", a nursing home located at 25 Alton Drive, Halifax, Nova Scotia. On or about the 1<sup>st</sup> day of May, 2002, Elmer Morrison moved to Saint Vincent's Guest House, a nursing home facility located at 2080 Windsor Street, Halifax, Nova Scotia and remained there until his death. Since April 1, 2002, Joan Morrison has continued to reside in the former matrimonial home at 6 Sumac Lane, Halifax, Nova Scotia.

~~45. 46.~~ Elmer Morrison and Joan Morrison were required by the Nova Scotia Department of Health to use both their income and their assets to pay for Elmer Morrison's nursing home, including his health care costs on a private pay basis from April 1, 2002 until December 31, 2004.

~~46. 47.~~ From the 1<sup>st</sup> day of April, 2002, Elmer Morrison and Joan Morrison paid as directed by the DOH, the applicable nursing home for the cost of Elmer Morrison's care. They paid \$40,573.37 in 2002; \$55,104.34 in 2003; and \$58,554.52 in 2004 which included the health care costs for Elmer Morrison while he was a resident in nursing homes.

~~47. 48.~~ Effective April 1, 2003 Nova Scotia introduced a \$12.75 per day health care costs subsidy applicable to Elmer Morrison and Class Members.

~~48. 49.~~ From July 1, 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.

~~49. 50.~~ Elmer and Joan Morrison paid a total of \$26,888.50 in 2005 and a total of \$27,253.50 in 2006 to Saint Vincent's Guest House for Elmer Morrison's accommodation charges. They paid Saint Vincent's Guest Home a further \$9,513.00 in 2007 for Elmer Morrison's accommodation charges until the time of his death.

### **Lee Plaintiffs**

~~50. 51.~~ In or about April 2004, it was determined that due to infirmity, John Lee required nursing home care. In accordance with the policy of the DOH, John Lee and Elizabeth Lee, the spouse of John Lee, submitted to a mandatory assessment by the DOH to facilitate John Lee's admission to a nursing home.

~~51. 52.~~ A decision was made purportedly in accordance with the DOH's "Community Supports for Adult Policies" that John Lee and Elizabeth Lee had sufficient income and assets such that, John Lee could only be admitted to a nursing home on "a private pay basis".

~~52. 53.~~ In or about April 2004, Elizabeth Lee met with an employee of the DOH for the purpose of completing the financial eligibility portion of John Lee's application for nursing home care. After the financial assessment was completed Elizabeth Lee was advised that failure to respond to the DOH in a timely manner could result in a hospital applying an overstay charge of \$205.00 per day.

~~53. 54.~~ On or about the May 17, 2004, John Lee entered Arborstone Enhanced Care, a long term care facility located at 126 Purcell's Cove Road, Halifax, Nova Scotia. On or about June 9, 2004, John Lee moved to Maplestone Enhanced Care, a long term care facility located at 245 Main Avenue, Halifax, Nova Scotia and remained there until March 21, 2005 when he moved to the Nova Scotia Hospital. He remained there until his death. Since May 17, 2004, Elizabeth Lee has continued to reside in the former matrimonial home at 30 Navara Crescent, Dartmouth, Nova Scotia.

~~54. 55.~~ John Lee and Elizabeth Lee were required by the DOH to use both their

income and their assets to pay for John Lee's nursing home care, including the cost of his health care on a private pay basis from May 17, 2004 until those assets were depleted on or about October 1, 2004.

~~55. 56.~~ In 2004 John Lee and Elizabeth Lee paid as directed by the DOH, \$7,587.00 to Arborstone Enhanced Care and \$22,326.87 to Maplestone which included the cost of health care for John Lee while he was a resident in nursing homes.

## **LIABILITY**

### **Vicarious Liability**

~~56. 57.~~ The Plaintiffs plead the doctrine of *respondeat superior* and state that the Defendant, the DOH is vicariously liable to the Plaintiffs and Class Members for the acts, omissions, deeds, misdeeds and liabilities of their contractors, sub-contractors, agents, servants, employees, assigns, appointees and partners.

### **Misfeasance in Public Office**

~~57. 58.~~ Prior to and throughout the Class Period DOH, the Defendant, the Minister of Health at the relevant time and the Defendant, the Executive Director of the Continuing Care Branch:

- (a) knew that there was no statutory authority for making participation in the single placement list and assessment process and the later full implementation of the SEA system mandatory for private pay seniors but nevertheless deliberately proceeded with their implementation in their capacities as public officials on behalf of the DOH knowing that they were unlawful; and
- (b) were aware that the implementation of the SEA system would likely harm the Plaintiffs and Class Members.

~~58. 59.~~ In the alternative, the Defendant, the Minister of Health at the relevant time and the Defendant, the Executive Director of the Continuing Care Branch:

- (a) were recklessly indifferent to the fact that there was no statutory authority for making participation in the single placement list and assessment

process and the later full implementation of the SEA system for private pay seniors but nevertheless deliberately proceeded with their implementation in their capacities as public officials on behalf of the DOH; and

- (b) were recklessly indifferent to the fact that the implementation of the single placement list and assessment process and the later full implementation of the SEA system would likely harm the Plaintiffs and Class Members.

~~59. 60.~~ The Plaintiffs and Class Members participated in the single placement list and assessment process and the later full implementation of the SEA system because they believed their participation was required by law.

~~60. 61.~~ As a result of their participation in the single placement list and assessment process and the later full implementation of the SEA system, the Plaintiffs and Class Members suffered injury and damage.

#### **Fraudulent Misrepresentation and Deceit**

~~61. 62.~~ Prior to and throughout the Class Period the Defendants:

- (a) made false representations and/or statements to the Plaintiffs and Class Members that their participation in the single placement list and assessment process and the later full implementation of the SEA system was mandatory;
- (b) knew that the representations and statements were false, or, alternatively made the representations and statements recklessly, without belief in their truth; and
- (c) made the representations and statements with the intention to deceive the Plaintiffs and Class members into believing that they were lawfully obliged to participate in the single placement list and assessment process and the later full implementation of the SEA system and to induce them to participate.

~~62. 63.~~ The false representations and/or statements materially induced the Plaintiffs and Class Members to participate in the single placement list and assessment process and the later full implementation of the SEA system.

~~63. 64.~~ As a result of their participation in the single placement list and assessment process and the later full implementation of the SEA system, the Plaintiffs and Class Members suffered injury and damage.

### **Negligence**

~~64. 65.~~ The Plaintiffs and Class Members were all residents or family members of residents of nursing homes during part or all of the Class Period which were regulated by the DOH in their best interests and were thereby in a special relationship of close proximity with the DOH, as a result of which, the DOH owed duty of care to avoid reasonably foreseeable harm to the Plaintiffs and Class Members.

~~65. 66.~~ Prior to and throughout the Class Period the DOH negligently made untrue, inaccurate or misleading representations to the Plaintiffs and Class Members that their participation in the single placement list and assessment process and the later full implementation of the SEA system was mandatory.

~~66. 67.~~ The DOH knew the identity of the Plaintiffs and Class members when it made the representations.

~~67. 68.~~ The DOH made the representations for the specific purpose of inducing the Plaintiffs and Class Members to participate in the single placement list and assessment process and the later full implementation of the SEA system.

~~68. 69.~~ The Plaintiffs and Class members participated in the single placement list and assessment process and the later full implementation of the SEA system in reliance on the truth and accuracy of the representations and such reliance was reasonable in the circumstances.

~~69. 70.~~ As a result of their participation in the single placement list and assessment process and the later full implementation of the SEA system, the Plaintiffs and Class Members suffered injury and damage.

## **Waiver of Tort**

~~70.71.~~ As a result of the Defendants' decisions and actions complained of herein, the Plaintiffs and Class Members reserve the right to elect at the trial of the common issues to waive the torts pleaded herein and have damages assessed in an amount equal to the total amount paid to nursing homes for health care costs by the Plaintiffs and Class Members during the Class Period.

~~71.72.~~ The Plaintiffs and Class Members claim that such an election is appropriate for the following reasons, among others:

- (a) absent the Defendants' tortious conduct the DOH would not have been able to implement its single placement list and assessment process and SEA system beginning in February 2001;
- (b) the amounts paid for health care costs by the Plaintiffs and Class Members conferred benefits on the DOH in a manner in which the DOH cannot in good conscience retain them;
- (c) the Defendants engaged in wrongful conduct by putting the DOH's single placement list and assessment process and SEA system in place without lawful authority to do so; and
- (d) the integrity of the public administration of statutory programs would be undermined if an accounting were not required.

## **Breach of Fiduciary Duty**

~~72.73.~~ The DOH owed the Plaintiffs and Class Members a fiduciary duty to act in their best interests in making and implementing decisions relating to their admission to and health care in nursing homes, including the determination of the costs of and sources of payment for such health care services, because it exercised:

- (a) discretion over the licensing of nursing homes, including how many nursing home beds were allowed to operate in Nova Scotia from time to time;



- (b) substantial influence over seniors' admission to and level of care in all nursing homes in Nova Scotia;
- (c) discretion to determine the components to be included in and amount of the per diem rates charged by nursing homes;
- (d) a statutory duty to act in the best interests of nursing home residents in determining nursing home per diem rates;
- (e) discretion to determine the components and proportion of nursing home per diem charges to be paid on a private pay basis by each resident senior and to determine the corresponding components and proportion to be publicly funded;
- (f) a major, concurrent and potentially conflicting mandate as the single payer under the single-tier, publicly funded medicare system in Nova Scotia;
- (g) knowledge of and control, to the exclusion of the Plaintiffs and Class Members, over the operational and budgetary aspects of both the two-tier long term care system (which includes nursing homes) and the single-tier medicare system, including over the efficiencies, benefits and savings to be realized through integration between the two systems; and
- (h) knowledge that the Plaintiffs and Class Members were highly reliant upon and vulnerable to its decisions and actions relating to all aspects of the health care of seniors under both its long term care mandate and its medicare mandate.

73. 74. The Department of Health breached its fiduciary duties when it chose to prefer its own interests as the sole administrator and single payer of the single-tier medicare system over those of the Plaintiffs and Class Members by:

- (a) unlawfully purporting to take exclusive control as of February 1, 2001 over private pay seniors' access to nursing home care to solve problems and realize benefits and savings in the utilization of publicly funded hospitals while at the same time failing to act fairly and consistently and in the best interests of private pay seniors by then beginning to pay the health care

costs component of nursing home care equally and universally on behalf of all residents;

- (b) forcing some of the Plaintiffs and Class Members to move from hospitals where their health care costs were fully insured into nursing homes where their health care costs became the responsibility of the Plaintiffs and Class Members; and
- (c) such other breaches of fiduciary duties as may appear.

### **Equitable Fraud**

~~74. 75.~~ Having regard to the fiduciary and/or special relationship between the DOH and the Plaintiffs and Class Members described above, the conduct of the DOH in unlawfully purporting to take complete control as of February 1, 2001 over the access by the Plaintiffs and Class Members to health care services in nursing homes as if the nursing homes were fully integrated with and part of the single-tier publicly funded health care system, while, at the same time, continuing to require the Plaintiffs and Class Members to pay for such health care services on a private pay basis was unconscionable and constituted an equitable fraud committed against the Plaintiffs and Class Members.

### **Unjust Enrichment**

~~75. 76.~~ The DOH received a direct benefit equal to the total amount of health care costs paid by the Plaintiffs and Class Members to nursing homes during the Class Period.

~~76. 77.~~ By compelling the Plaintiffs and Class Members to pay for their health care costs and by refusing to pay for the Plaintiffs' and Class Members' health care costs in nursing homes during the Class Period, the DOH has been enriched and the Plaintiffs and Class Members have suffered a corresponding detriment.

~~77. 78.~~ There is no juristic reason for the DOH's enrichment and the detriment of Plaintiffs and Class Members. In particular there is no juristic reason why the Plaintiffs and Class Members were required to pay for health care costs in nursing homes during the Class Period but not afterwards. Further, there is no

juristic reason why other Nova Scotia residents capable of receiving health care in doctors' offices or in hospital inpatient and outpatient facilities during the Class Period received health care services at no direct cost to themselves while the Plaintiffs and Class Members did not receive similar health care services in nursing homes at no cost to themselves.

~~78. 79.~~ As a result of Nova Scotia's unjust enrichment:

- (a) an amount equal to the total amount of health care costs paid by the Plaintiffs and Class Members to nursing homes during the Class Period is held by Nova Scotia in a remedial constructive trust in favour of the Plaintiffs and Class Members; or
- (b) an amount equal to the total amount of health care costs paid by the Plaintiffs and Class Members to nursing homes during the Class Period is subject to an equitable lien in favour of the Plaintiffs and Class Members; or
- (c) The Plaintiffs and Class Members are entitled to a money judgment equivalent to the total amount of health care costs paid by the Plaintiffs and Class Members to nursing homes during the Class Period.

### **Canadian Charter of Rights and Freedoms**

~~79. 80.~~ 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 actions and decisions of the Defendants complained of herein violated the Plaintiffs' and Class Members' s. 15(1) rights pursuant to the *Canadian Charter of Rights and Freedoms*. Such deprivation is not reasonably justified in a free and democratic society.

~~80. 81.~~ The actions of the Defendants have resulted in the Plaintiffs and Class Members receiving unequal treatment before the law and being discriminated against. The Plaintiffs and Class Members suffered from elder age and/or disability such that they required nursing home care. These traits are enumerated grounds protected by *Charter*. Age and/or disability forced the Plaintiffs and Class

Members away from their families and into the SEA system. Under the SEA system, they were required to pay for their own health care costs. Others, whose age and/or disability did not force them into the SEA system, had their health care costs universally covered. Their spouses did not have to contribute to their health care costs. The Defendants' policy created a distinction which perpetuated the disadvantages faced by the elderly and/or disabled Class Members. The Defendants' policy further stereotyped in a manner that did not correspond to the actual characteristics or circumstances of the Class Members.

~~81. 82.~~ The Plaintiffs state the Spousal Class Members make no allegations of any breach by the Defendants of any rights the Spousal Class Members may have pursuant to Section 15(1) of the Canadian *Charter of Rights and Freedoms*.

~~82. 83.~~ As a result of the matters set out above the Plaintiffs and Class Members have suffered loss and damage.

~~83. 84.~~ As a result of the activities of the Defendants, the Class Members who have died in the relevant period set out above have claims that survive the Class Members' deaths for the benefit of their respective estates pursuant to the provisions of the *Survival of Actions Act*, R.S.N.S. 1989, c. 453.

## **REMEDIES SOUGHT**

~~84. 85.~~ The Plaintiffs seek on behalf of themselves and the Class Members, remedies in damages, declaratory relief and *Charter* relief including:

- (a) An order pursuant to section 7(1) of the *Class Proceedings Act*, S.N.S. 2007, c. 28 certifying the action as a class action and naming the Plaintiffs as representative plaintiffs for the class;
- (b) For section 15 *Charter* breach: A restoration of the health care costs paid by residential class members, General Damages, Aggravated and Exemplary Damages, Interest and Costs pursuant to Section 24(1) of the *Charter* for all residential class members except for the estates of such class members;

- (c) A declaration that the policies and/or practices of the DOH in effect during the Class Period with respect to full payment of health care costs in nursing homes by those with the means to pay were in excess of the authority provided by the *Homes for Special Care Act*;
- (d) An accounting of all costs paid by the Plaintiffs and the Class Members for residents in long term care facilities since February 1, 2001;
- (e) An order that the Attorney General repay to the Plaintiffs and Class Members, the total amount of all health care costs paid by the Plaintiffs and Class Members for residents in nursing homes during the Class Period as restitution and/or disgorgement, together with interest at a rate to be determined by the Court;
- (f) General damages;
- (g) Special damages;
- (h) Aggravated damages in an amount to be determined by the Court;
- (i) Exemplary damages in an amount to be determined by the Court;
- (j) The costs of providing appropriate notice to Class Members and administering this proposed class action for their benefit;
- (k) Interest pursuant to the *Judicature Act*;
- (l) Costs; and
- (m) Such further and other relief as this Honourable Court deems just.

**PLACE OF TRIAL:** Halifax, Nova Scotia

**DATED** at Halifax, Nova Scotia this 8<sup>th</sup> day of September, A.D., 2005.

**AMENDED** at Halifax, Nova Scotia this 30<sup>th</sup> day of November, A.D., 2007.

**FRESH AMENDED** at Halifax, Nova Scotia this 25<sup>th</sup> day of July, A.D., 2008.

**SECOND AMENDED** at Halifax, Nova Scotia this 24<sup>th</sup> day of December, A.D., 2008.

**SECOND FRESH AMENDED** at Halifax, Nova Scotia this 26<sup>th</sup> day of March, A.D., 2009.

**THIRD AMENDED** at Halifax, Nova Scotia this 2<sup>nd</sup> day of November, A.D., 2011.

**FOURTH FRESH AMENDED** at Halifax, Nova Scotia this 25<sup>th</sup> day of July, A.D., 2012.

**FIFTH AMENDED** at Halifax, Nova Scotia this 25<sup>th</sup> day of August, A.D., 2020.

**Signature**

Signed this 25<sup>th</sup> day of August, 2020.



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Raymond F. Wagner

**Wagners**

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Solicitor for the Plaintiffs

**To: The Attorney General of Nova Scotia**

**The Minister of Health for the Province of Nova Scotia**  
at the relevant time

**The Executive Director of Continuing Care for the  
Province of Nova Scotia**