

**IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON**

BETWEEN:

ELDER ADVOCATES OF ALBERTA SOCIETY and JAMES O. DARWISH, Personal
Representative of the Estate of JOHANNA H. DARWISH, deceased

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA and
ALBERTA HEALTH SERVICES

Defendants

COMMON ISSUES

1. The Legislative Framework

- 1.0 Did the Government voluntarily undertake to establish a legislative framework embodied by the *Alberta Health Care Insurance Act* and the regulations made thereunder, the *Nursing Homes Act* and the regulations made thereunder, and the *Hospitals Act* and the regulations made thereunder, to deliver health related services and benefits to residents of Alberta, and to pay for such services and benefits out of public funds?
- 1.1 Pursuant to the legislative framework for long-term care in Alberta, are the Regional Health Authorities responsible for the delivery of health care services and accommodation and meals in Long Term Care Facilities?
- 1.2 Pursuant to the legislative framework for long-term care in Alberta, do the Regional Health Authorities deliver health care services and accommodation and meals in Long Term Care Facilities either directly or indirectly through agents acting on their behalf?
- 1.3 Pursuant to the legislative framework for long-term care in Alberta, do the Regional Health Authorities, or the Government, or both, exercise exclusive powers over auditing, monitoring and financial reporting with respect to health care benefits paid to Long Term Care Facilities and the money paid by the Class Members for accommodation and meals?
- 1.4 Pursuant to the legislative framework for long-term care in Alberta, do the Regional Health Authorities discharge their responsibilities as agents of the Government?

2. Long Term Care Facilities

- 2.0 Are nursing homes and auxiliary hospitals funded by the Government on the same basis?
- 2.1 Are nursing homes and auxiliary hospitals treated by the Government in the same way for the purpose of gathering statistics?
- 2.2 Has the Government used funding methodologies and policy directives to create one integrated system for the delivery of long-term care in Alberta?

3. The Meaning and Calculation of the “Accommodation Charge”

- 3.0 What is the meaning of “accommodation and meals” in the definition of “accommodation charge” in s. 1(a) of the *Nursing Homes Act*?
- 3.1 What is the meaning of “accommodation charge” in s. 3(1) of the *Nursing Homes Operation Regulation*?
- 3.2 Does s. 3(1) of the *Nursing Homes Operation Regulation*, when read with s. 8(2) of the *Nursing Homes Act*, prescribe an accommodation charge that is permissive and discretionary?
- 3.3 Should the words “in respect of nursing home care” contained in the definition of “benefits” in s. 1(d) of the *Nursing Homes Act* be given a broad interpretation of the widest possible scope?
- 3.4 Referring to the definition of “basic care” in s. 2 of the *Nursing Homes General Regulation*, AR 232/85, what services, costs or expenses are properly included within the meaning of:
 - a) accommodation and meals;
 - b) facilities services;
 - c) necessary nursing services;
 - d) personal services;
 - e) therapeutic and special diets as required;
 - f) drugs and medicine specified by the Minister for use on a routine or emergency basis as prescribed by a physician;
 - g) routine dressings as required;
 - h) life enrichment services?
- 3.5 Does s. 3(1) of the *Nursing Homes Operation Regulation*, when read with s. 8(2) of the *Nursing Homes Act*, mean that the Defendants are solely responsible for paying for the cost of items (b) through (h) of basic care?
- 3.6 What is the legal effect, if any, of *Ministerial Directive D-317*?

- 3.7 Are auxiliary hospitals and general hospitals “approved hospitals” within the meaning of section 37(1) of the *Hospitals Act*?
- 3.8 Is “standard ward hospitalization” an “insured service” within the meaning of sections 36(h) and 37(1) of the *Hospitals Act*?
- 3.9 What services, costs or expenses are included within the meaning of “services rendered by persons who receive remuneration for those services from the hospital” in s. 36(j)(ix) of the *Hospitals Act*?
- 3.10 Does the *Hospitals Act* require auxiliary hospitals and general hospitals to provide “standard ward hospitalization” at no cost to patients in such hospitals?
- 3.11 Do ss. 5(1)(d) and 5(8) of the *Hospitalization Benefits Regulations*, when read with section 3(1) of the *Nursing Homes Operation Regulation* and s. 8(2) of the *Nursing Homes Act*, prescribe accommodation charges that are permissive and discretionary?
- 3.12 Does “accommodation and meals” in s. 2(a) of the *Nursing Homes General Regulation* have the same meaning as “accommodation and meals” in s. 36(j)(i) of the *Hospitals Act*?

4. **Determining the Accommodation Charge**

- 4.0 Did the Government owe a duty of care with respect to operational decisions/actions to the Class Members?
- 4.1 If so, what was the nature and extent of the Government’s duty of care with respect to operational decisions/actions?
- 4.2 When the Government set the maximum Accommodation Charge in 2003, did it have a proper basis for determining what the Accommodation Charge should consist of?
- 4.3 When the Government set the maximum Accommodation Charge in 2003, did it have a proper basis for determining how to calculate the Accommodation Charge?
- 4.4 Did the Government act recklessly when it increased the maximum Accommodation Charge in 2003 pursuant to AR 260/2003 or the Letters?
- 4.5 Did the Government act in bad faith when it increased the maximum Accommodation Charge in 2003 pursuant to AR 260/2003 or the Letters?
- 4.5(a) Did the Government expect that effective August 1, 2003, the maximum Accommodation Charge would be charged across the Province?

- 4.5(b) In 2003, did the Government make reasonable attempts to match the revenue received from the Accommodation Charge on a province-wide basis to the cost of accommodation and meals on a province-wide basis?
- 4.5(c) Does a nexus exist between the maximum Accommodation Charge that took effect August 1, 2003 and the cost of accommodation and meals on a province-wide basis?
- 4.5(d) Has the cost of accommodation and meals changed on a province-wide basis since August 1, 2003? If so, how?
- 4.6 Did the Regional Health Authorities take adequate and proper steps to determine the cost of accommodation and meals in their regions?
- 4.6(a) Did the Regional Health Authorities act recklessly or in bad faith by charging, either directly or indirectly through their agents, the maximum Accommodation Charge throughout the Province (apart from the limited number of hardship exceptions)?
- 4.7 Was the Minister of Seniors and Community Supports vested with lawful authority as of August 1, 2003 to make determinations with respect to the Accommodation Charge?
- 4.7(a) In or about August of 2003, did the Minister of Seniors and Community Supports purport to make determinations with respect to the Accommodation Charge?
- 4.8 Did the Government's agents or employees who were responsible for publishing the Letters have lawful authority to nullify or abridge the permissive and discretionary language of s. 3(1) and s. 3(5) of the *Nursing Homes Operation Regulation* and s. 8(2) of the *Nursing Homes Act* with respect to the Accommodation Charge?
- 4.9 In the Letters, did the Government's agents or employees publish accommodation rates that were fixed and mandatory?
- 4.10 If so, did the Government's agents and employees act in bad faith?
- 4.11 In the Letters, did the Government's agents or employees instruct the Regional Health Authorities and operators of Long Term Care Facilities to charge the maximum Accommodation Charge?
- 4.12 If so, did the Government's agents and employees act in bad faith?
- 4.13 In the Letters, did the Government's agents or employees instruct the Regional Health Authorities and operators of Long Term Care Facilities to charge the Class Members for the following services as part of the Accommodation Charge: meal preparation and meal service, extra bathing when required, housekeeping services,

utilities, bed linens and towels, facility laundry services, facility maintenance, facility upgrades, facility management and facility administration?

4.14 If so, did the Government's servants and employees act in bad faith?

5. **Administration of the Money**

5.0 Did the Defendants owe the Class Members a duty of care to exercise all reasonable care, skill and diligence with respect to the administration, monitoring and auditing of

- (a) the health care benefits paid by the Government to the Regional Health Authorities;
- (b) the health care benefits provided by the Regional Health Authorities to Long Term Care Facilities, and
- (c) the money paid by the Class Members in respect of the Accommodation Charge?

5.1 If so, what was the nature and extent of the Defendants' duties of care?

5.2 Did the Government or the Regional Health Authorities take reasonable and prudent steps to ensure that money paid by the Class Members for the Accommodation Charge was used to pay for accommodation and meals only and not for health care costs?

6. **Breaches of Duty**

6.0 Did the Defendants breach any duties of care owed to the Class Members?

6.1 Did the Government breach any fiduciary duties owed to the Class Members?

7. **Restitution**

7.0 Have the Defendants been unjustly enriched as a result of their actions?

7.1 If so, is there a juristic reason for the Defendants to retain such enrichment?

7.2 Are s. 3(1) of the *Nursing Homes Operation Regulation*, ss. 5(1)(d) and 5(8) of the *Hospitalization Benefits Regulation*, and the Letters *ultra vires* and inoperative?

7.3 Do s. 3(1) of the *Nursing Homes Operation Regulation*, ss. 5(1)(d) and 5(8) of the *Hospitalization Benefits Regulation* and the Letters purport to authorize the imposition of charges or fees against the Class Members for services other than the cost of accommodation and meals?

7.4 Has payment of the Accommodation Charge relieved the Defendants from inevitable expenses they were required to incur pursuant to the *Nursing Homes Act* and the *Hospitals Act*?

8. Contractual Relations between the Class Members and the Health Authorities

8.0 Is there an agreement, express or implied, between the Class Members and the Regional Health Authorities with respect to the provision of accommodation and meals to the Class Members?

8.1 If so, what terms, if any, should be implied from the legislation?

8.2 Did the agreement between the Class Members and the Regional Health Authorities contain a term, express or implied, that the Class Members would pay for accommodation and meals only and not for the cost of health care services?

8.3 Has there been a breach of the Regional Health Authorities' agreements with the Class Members?

9. Charter of Rights and Freedoms

9.0 Do s. 19(2) of the *Canada Health Act*, s. 3(1) of the *Nursing Homes Operation Regulation*, s. 8(2) of the *Nursing Homes Act*, ss. 5(1)(d) and 5(8) of the *Hospitalization Benefits Regulation* and the Letters violate the rights of the Class Members protected under s. 15(1) of the *Charter*?

9.1 Did the Government act in bad faith by establishing a differential entitlement to statutory Health Care benefits, whereby financial burdens for health care costs have been imposed on the Class Members but not others?

9.2 If s. 19(2) of the *Canada Health Act*, s. 3(1) of the *Nursing Homes Operation Regulation*, s. 8(2) of the *Nursing Homes Act*, ss. 5(1)(d) and 5(8) of the *Hospitalization Benefits Regulation* and the Letters violate the rights of the Class Members protected under 15(1) of the *Charter*, and if the violations are not saved by s. 1 of the *Charter*, are the Class Members entitled to damages pursuant to s. 24 of the *Charter* and, if so, how are such damages to be measured?

10. Damages

10.0 Are the Class Members entitled to damages, and how are such damages to be measured?

10.1 Are the Class Members entitled to a money judgment or other relief as against the Defendants? If so, what relief should be provided?

10.2 Should the Court issue an order for an accounting and restitution? If so, why and what are the particulars?

- 10.2(a) If the Class Members are entitled to damages or restitution, should the cost of accommodation and meals be determined on a province-wide basis, on a regional basis, or individually, and with what frequency?
- 10.2(b) What was the cost of accommodation and meals on a province-wide basis (or alternatively on a regional basis) as of August 1, 2003 and annually thereafter?
- 10.3 Can the Court assess damages globally for the Class Members? If so, what is the damages assessment?
- 10.4 Should the Defendants pay exemplary or punitive damages to the Class Members? If so, in what amount?
- 10.5 Should the Defendants pay the costs of administering and distributing the recovered damages? If so, what amount should the Defendants pay?
- 10.6 Are the Defendants obligated to pay pre-judgment interest? If so, at what annual or compound rate, on what amount and what is the amount of pre-judgment interest?