

AMENDED THIS 1st DAY OF March A.D. 2010  
PURSUANT TO RULE        UNDER ORDER-CONSENT-DATE  
26 DAY OF February A.D. 2010

CLERK OF THE COURT



Action No. 0503 13196

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

BEFORE ME:

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

"Brought under the Class Proceedings Act"

**FRESH STATEMENT OF CLAIM No. 2**

1. In this Fresh Statement of Claim No. 2:

- a) "Long Term Care Facility" means a "nursing home" as defined by s. 1(j) of the *Nursing Homes Act*, R.S.A. 2000 c. N-7 and an "auxiliary hospital" as defined by s. 1(c) of the *Hospitals Act*, R.S.A. 2000 c. H-12. They are collectively referred to as "Long Term Care Facilities;"
- b) "Patient" means any person admitted into a Long Term Care Facility and/or a patient in a general hospital in Alberta who has been assessed as requiring auxiliary hospital or nursing home level care;
- c) "Accommodation Charge" means the maximum accommodation charge defined, permitted or prescribed by any one or more of s. 3(1) of the *Nursing Homes Operation Regulation*, A.R. 258/85 as amended; s. 8(2) of the *Nursing Homes Act*, and ss. 5(1)(d) and 5(8) of the *Hospitalization Benefits Regulation*, A.R. 244/90 as amended;

- d) “Accommodation Fee” means the amounts paid by paid by the Class members purportedly pursuant to any one or more of the Accommodation Charge, the Letters, and/or contractual agreements with the Health Authorities or their agents as defined in paragraphs 10 and 11 below; and
- e) “Health Care” means those services and benefits which the Defendants are legally required to deliver to eligible Patients and to pay for out of public funds pursuant to the terms of the *Nursing Homes Act* and the *Hospitals Act*;

2. The Elder Advocates Of Alberta Society (“EAAS”) is a non-profit society incorporated pursuant to the *Societies Act*, R.S.A. 2000, c. S-14, as amended.

3. Johanna H. Darwish, was born September 19, 1910. She resided in the City of Edmonton in the Lynnwood Long Term Care Facility from March 1994 until her death on February 22, 2006. The Lynnwood Long Term Care Facility is operated by the Defendant Alberta Health Services through its agent, The Capital Care Group, which is a wholly-owned subsidiary health corporation of Alberta Health Services.

4. James O. Darwish is the natural son of Johanna H. Darwish and until her death on February 22, 2006, was her Guardian and Trustee by Order of the Honourable Madam Justice J. B. Veit dated January 26, 1994. James O. Darwish is the executor of the estate of Johanna H. Darwish, deceased.

5. EAAS and James O. Darwish, Personal Representative of the Estate of Johanna H. Darwish, deceased, bring this action pursuant to the *Class Proceedings Act*, S.A. 2003, c. C-16.5, as amended, on behalf of all Patients and the estates of such Patients who, since August 1, 2003, have been charged the Accommodation Charge, save and except for all such Patients who:

- a) at any time since August 1, 2003, have received:
  - i) Assured Income for the Severely Handicapped (AISH);
  - ii) Supports for Independence (SFI);
  - iii) the full Supplementary Accommodation Benefit;

- iv) benefits to pay the accommodation charge from the Worker's Compensation Board, the Department of Veteran Affairs (Canada), the Department of National Defence (Canada), the First Nations and Inuit Branch of Health Canada, or the Royal Canadian Mounted Police; or
  - v) a waiver, in its entirety, of the Accommodation Charge increase which took effect August 1, 2003 pursuant to A.R. 260/2003 for reasons of financial hardship.
- b) were ineligible to receive "insured services" under s. 38 of the *Hospitals Act* or "benefits" under s. 9 of the *Nursing Homes Act* during the period of time they were charged the Accommodation Charge.

6. The Defendant, Her Majesty the Queen in Right of Alberta ("the Crown"), through the Department of Alberta Health and Wellness, administers and operates a plan to provide and pay for Health Care benefits and services.

7. The Crown funds public Health Care services by paying money to Alberta Health Services, a body corporate and a regional health authority pursuant to the *Regional Health Authorities Act*, R.S.A. 2000 c. R-10.

8. Effective April 1, 2009, pursuant to Ministerial Order #93/2008, East Central Health, a body corporate and a regional health authority pursuant to the *Regional Health Authorities Act*, changed its name to Alberta Health Services. Further, Alberta Health Services assumed all of the liabilities and responsibilities of Aspen Regional Health Authority, Calgary Health Region, Capital Health, Chinook Regional Health Authority, David Thompson Regional Health Authority, East Central Health, Northern Lights Health Region, Palliser Health Region and Peace Country Health (hereafter the "Predecessor Health Authorities"). Alberta Health Services and the Predecessor Health Authorities are hereinafter collectively referred to as the "Health Authorities".

9. Prior to April 1, 2009, the Predecessor Health Authorities, and subsequent to April 1, 2009, Alberta Health Services, were responsible for delivering Health Care services in Long Term Care Facilities. The Health Authorities were obligated by the *Regional Health Authorities Act* to deliver Health Care services to the Class members as agent for the Crown.

10. The Health Authorities discharged their obligation to deliver Health Care services and accommodation and meals to the Class members either directly or indirectly through

- a) wholly-owned subsidiary health corporations; or
- b) operators who have entered into nursing home contracts with the Health Authorities pursuant to s. 2 of the *Nursing Homes Act*.

11. The entities referred to in paragraph 10 (a) and (b) herein deliver Health Care services and accommodation and meals to the Class members as agents for and on behalf of the Health Authorities.

12. The Health Authorities are responsible for monitoring the delivery of Health Care services and accommodation and meals in Long Term Care Facilities.

13. Pursuant to the statutory regime in force in Alberta, the Defendants are responsible for paying for the cost of delivering Health Care services to the Class members.

14. The Crown and the Health Authorities at all times material hereto knew or ought to have known that the services provided by persons who received remuneration for those services from Long Term Care Facilities included: meal preparation, facility housekeeping services, facility maintenance services, facility administration services and facility laundry services.

15. Auxiliary Hospitals and Nursing Homes form part of an integrated system for providing long term care in Alberta. The Defendants fund Auxiliary Hospitals and Nursing Homes on the same basis and make no distinctions between them for statistical or reporting purposes.

16. Pursuant to s. 5(1)(d) of the *Hospitalization Benefits Regulation*, A.R. 244/90, Patients in auxiliary hospitals are responsible for paying the Accommodation Charge defined by and permitted under the *Nursing Homes Act* and the regulations made thereunder.

17. Pursuant to s. 5(8) of the *Hospitalization Benefits Regulation*, Patients in a general hospital who have been assessed as requiring auxiliary hospital or nursing home level care are responsible for paying the Accommodation Charge defined by and permitted under the *Nursing Homes Act* and the regulations made thereunder.

18. Pursuant to s. 8(2) of the *Nursing Homes Act*, operators of Long Term Care Facilities are prohibited from charging Patients in nursing homes amounts in excess of the amounts prescribed in the applicable regulations for an “accommodation charge”. Section 1(a) of the *Nursing Homes Act* defines “accommodation charge” as “the charge in respect of nursing home care payable by a resident for accommodation and meals in a nursing home or an approved hospital referred to in section 10(2)”.

19. The Defendants have exclusive decision-making power and discretion over all aspects of Health Care funding for Long Term Care Facilities and the disposition of such funds.

20. Pursuant to ss. 13 and 14 of the *Regional Health Authorities Act*, the Defendants set the parameters for and exercise exclusive control and discretion over all aspects of auditing, monitoring and financial reporting with respect to, *inter alia*,

- (i) the Health Care benefits paid by the Crown to the Health Authorities on behalf of the Class members, and the disposition of such benefits;
- (ii) the Health Care benefits paid by the Health Authorities to Long Term Care Facilities on behalf of the Class members, and the disposition of such benefits;
- (iii) the cost of Health Care services provided to the Class members;
- (iv) the Accommodation Fees paid by the Class members and the disposition of such monies; and
- (v) the cost of accommodation and meals.

21. The Class members have no control over, or input into, the auditing, monitoring or financial reporting with respect to any of the matters described in paragraph 20, above.

22. The Class members receive no financial statements or financial reports from the Defendants. They have no ability to track how the monies they pay as Accommodation Fees are spent.

23. The Defendants at all times knew, or ought to have known, that the Class members were relying upon them to care for them and to protect their right and entitlement to publicly funded Health Care services and benefits.

### **The Accommodation Charge**

24. In 2003, pursuant to s. 24 (g) of the *Nursing Homes Act*, the Crown, by the Minister of Health and Wellness, was responsible for making regulations “respecting the determination of accommodation charges”.

25. Effective August 1, 2003, pursuant to the *Nursing Homes Operation Amendment Regulation*, A.R. 260/2003, the Crown, by its Minister of Health and Wellness, increased the maximum Accommodation Charge to the following rates:

- a) \$39.62 per day for residents of standard wards;
- b) \$42.00 per day for residents in semi-private rooms; and
- c) \$48.30 per day for residents in private rooms.

26. The Accommodation Charge increases in paragraph 25 (a) and 25 (b) represent a 40% increase over previous rates. The increase in paragraph 25 (c) represents a 48% increase.

27. At the same time that the Crown increased the Accommodation Charge to be paid by the Class members, the Defendants reduced or failed to fully fund the cost of providing Health Care services to the Class members which the Defendants were legally obligated to pay for.

28. In particular, effective August 1, 2003, the Crown increased the maximum permissible Accommodation Charge to be paid by the Class members by a factor of 40 – 48%. At the same time, the Defendants decreased Health Care funding to Long Term Care Facilities that the Defendants were legally obligated to pay by 5.35% at a time when Health Care costs were increasing.

29. From the fiscal year ended March 31, 2002, to the fiscal year ended March 31, 2005, Health Care funding from the Crown to the Health Authorities increased by 27% (from \$4,169,939,000 to \$5,299,508,000). During the same period of time, Health Care funding to Long Term Care Facilities remained essentially flat (there was an insignificant increase of .58% from \$574,365,000 to \$577,699,000).

30. Effective October 1, 2007, pursuant to the *Nursing Homes Operation Amendment Regulation*, A.R. 186/2007, the Crown, by its Minister of Seniors and Community Supports, increased the maximum Accommodation Charge to the following rates:

- a) \$41.50 per day for residents of standard wards;
- b) \$44.00 per day for residents in semi-private rooms; and
- c) \$50.75 per day for residents in private rooms.

31. Effective November 1, 2008, pursuant to the *Nursing Homes Operation Amendment Regulation*, A.R. 165/2008, the Crown, by its Minister of Seniors and Community Supports, increased the maximum Accommodation Charge to the following rates:

- a) \$44.50 per day for residents of standard wards;
- b) \$47.00 per day for residents in semi-private rooms; and
- c) \$54.25 per day for residents in private rooms.

32. The Accommodation Charge increases were prescribed when the Crown was aware of a “past practice” on the part of Long Term Care Facilities to apply Accommodation Fees “to subsidize health care and off set care funding” contrary to the *Hospitals Act* and *Nursing Homes Act*. Notwithstanding the Crown’s knowledge of this practice, neither the Crown nor the Health Authorities made efforts through their reporting and monitoring processes to determine the actual cost of accommodation and meals. Save for an extremely limited number of exceptions, the Class members were charged, and paid, the maximum Accommodation Charge.

33. In violation of the *Hospitals Act* and the *Nursing Homes Act*, the Accommodation Charge bore no reasonable nexus to the actual costs of accommodation and meals, and in fact greatly exceeded the actual cost of accommodation and meals, as a result of which the Class members subsidized the cost of Health Care provided to them.

**Breach of Fiduciary Duty**

34. The Class members are frail, elderly, and have chronic disabilities. They are incapable of caring for themselves or living on their own. They are among the most vulnerable members of our society. A physician has determined that each Class member requires long term care.

35. The Class members are completely at the mercy of the Crown because, *inter alia*:

- a) The Crown, in its sole discretion, voluntarily undertook to establish a legislative scheme for providing publicly funded Health Care services;
- b) The Class members rely completely on the Crown to preserve and protect their entitlement to publicly funded Health Care services;
- c) The Crown has decision-making power and discretion over all aspects of funding for Long Term Care Facilities, including the amounts paid by the Class members as the Accommodation Charge and the amounts paid by the Defendants as Health Care costs;
- d) There are no practical alternatives for the provision of long term care to the Class members other than Long Term Care Facilities;
- e) The Class members rely on the Crown for their care;
- f) The Crown has taken, or alternatively directed or permitted the taking of money from the Class members in respect of payments made by the Class members for the Accommodation Charge;
- g) The Crown sets the basic standards for care and housing for Long Term Care Facilities;
- h) The Crown defines the criteria for admission into Long Term Care Facilities, determines the Class members' eligibility for Health Care benefits, and controls the process whereby admissions into such facilities are made; and



- i) The Crown is responsible for monitoring the delivery of Health Care services and accommodation and meals at Long Term Care Facilities.

36. The Crown is in a position to unilaterally exercise its power or discretion so as to affect the Class members' practical interests as well as their legal right and entitlement to publicly funded Health Care services and benefits.

37. Each of the Class members stands in a relationship of trust and confidence with the Crown. They have a reasonable expectation that the Crown will act in their best interests.

38. Because of the unique discretionary powers that the Crown exercises on behalf of the Class members and the peculiar vulnerability of the Class members, the Crown owes a duty to the Class members which betokens loyalty and good faith, to avoid conflicts of interest and to act in the best interests of the Class members.

39. The Crown at all times knew, or ought to have known, that the Class members were relying upon the Crown to care for them, to protect their right and entitlement to publicly funded Health Care services and benefits, and to act in their best interests.

40. The Crown owed a fiduciary duty to the Class members with respect to the implementation and administration of the Accommodation Charge to ensure that the Accommodation Fee was fair, reasonable and justifiable, that the Accommodation Fee reflects the cost of accommodation and meals, that the Accommodation Fee was in their best interests, and that moneys paid pursuant to the Accommodation Charge would not be used to subsidize Health Care costs.

41. In breach of its fiduciary duties, the Crown failed to properly implement and administer the Accommodation Charge. In particular, the Crown, acting recklessly, arbitrarily and in bad faith:

- a) Had no rational basis for determining what accommodation and meals consist of;
- b) Had no rational basis for calculating the actual cost of accommodation and meals or the Accommodation Fee;

- c) Had no rational basis for separating or distinguishing Health Care costs, which are the responsibility of the Defendants, from accommodation and meals, which are the responsibility of the Class members;
- d) Failed to conduct any, or any proper, analysis to determine the actual cost of accommodation and meals in Alberta;
- e) By letter dated August 1, 2003, the Crown, by its Minister of Seniors and Community Supports did unlawfully and improperly advise the Predecessor Health Authorities that the Minister of Seniors and Community Supports was vested with the responsibility for setting and monitoring the Accommodation Charge when in fact, such responsibility was not transferred to the Minister of Seniors and Community Supports until April 1, 2005, pursuant to s. 3 of A.R. 39/2005, made pursuant to the *Government Organization Act*, R.S.A 2000, c. G-10;
- f) Failed to account or require an accounting to be provided to the Class members with respect to the disposition of monies paid by the Class members as Accommodation Fees;
- g) Failed to put in place any, or any proper, reporting, accounting and financial records and systems;
- h) Permitted or alternatively failed to prevent the Class members from being charged for Health Care costs which are the responsibility of the Defendants including, but not limited to, therapeutic and special diets, nutritional supplements, meal preparation and meal service, extra bathing when required, rehabilitation therapy and recreation and leisure programs, incontinence supplies including disposable diapers when required, facilities services including housekeeping, utilities, building maintenance, administration and facility laundry services; and
- i) Failed to protect the interests of the Class members.

42. As a result of the Crown's breach of its fiduciary duties and the Crown's *ultra vires*, arbitrary and bad faith actions:

- a) There was no reasonable nexus between the Accommodation Fee and the cost of accommodation and meals;
- b) The Accommodation Fee was not fair, just or reasonable, and was not in the best interests of the Class members;
- c) The Class members paid an Accommodation Fee that was contrary to the *Hospitals Act* and the *Nursing Homes Act*;
- d) The Class members' right and entitlement to publicly funded Health Care services and benefits was violated;

- e) Under the guise of the Accommodation Charge, the Class members paid an Accommodation Fee that included the cost of Health Care services and benefits they were entitled to receive at no cost; and
- f) The Class members have suffered damage and loss.

**Negligence: Breach of Duty of Care and Bad Faith**

43. The Defendants owed the Class members a duty to exercise all reasonable care, skill, and diligence with respect to auditing, supervising, monitoring and administering (i) the Health Care benefits paid by the Crown to the Health Authorities, (ii) the Health Care benefits provided by the Health Authorities to Long Term Care Facilities and (iii) the Accommodation Fee paid by the Class members, to ensure that the Accommodation Fee was fair, just, and reasonable, to ensure that the Accommodation Fee reflected the actual cost of accommodation and meals, and that Accommodation Fees paid pursuant to the Accommodation Charge would not be used to subsidize Health Care costs.

44. In breach of their duty of care, the Defendants, acting recklessly, arbitrarily, and in bad faith, failed to exercise any, or any sufficient, care, skill, and diligence with respect to auditing, supervising, monitoring and administering (i) the Health Care benefits paid by the Crown to the Health Authorities, (ii) the Health Care benefits provided by the Health Authorities to Long Term Care Facilities and (iii) the Accommodation Fees paid by the Class members. In particular, the Defendants, acting recklessly, arbitrarily and in bad faith:

- a) Had no rational basis for determining what accommodation and meals consist of;
- b) Had no rational basis for calculating the actual cost of accommodation and meals or the Accommodation Fee;
- c) Had no rational basis for separating or distinguishing Health Care costs, which are the responsibility of the Defendants, from Accommodation Fees, which are the responsibility of the Class members;
- d) Failed to conduct any analysis to determine the actual cost of accommodation and meals and levied, either directly or through their agents, the maximum Accommodation Charge across the Province of Alberta (save for a very few exceptions);

- e) Failed to account or require an accounting to be provided to the Class members with respect to the disposition of monies paid by the Class members as Accommodation Fees;
- f) Failed to put in place any, or any proper, reporting, accounting and financial records and systems;
- g) Permitted or alternatively failed to prevent the Class members from being charged for Health Care costs which are the responsibility of the Defendants including, but not limited to, therapeutic and special diets, nutritional supplements, meal preparation and meal service, extra bathing when required, rehabilitation therapy and recreation and leisure programs, incontinence supplies including disposable diapers when required, facilities services including housekeeping, utilities, building maintenance, administration and facility laundry services; and
- h) By letter dated August 1, 2003, the Crown, by its Minister of Seniors and Community Supports, did unlawfully and improperly advise the Predecessor Health Authorities that the Minister of Seniors and Community Supports was vested with the responsibility for setting and monitoring the Accommodation Charge when in fact, such responsibility was not transferred to the Minister of Seniors and Community Supports until April 1, 2005, pursuant to s. 3 of A.R. 39/2005, made pursuant to the *Government Organization Act*, R.S.A 2000, c. G-10.

### **Policy Decisions: Breach of Duty of Care and Bad Faith**

#### **The Letters**

45. On or about June 17, 2003, agents or employees of the Crown, acting within the scope of their employment, issued certain letters and documents to the Predecessor Health Authorities and to operators of Long Term Care Facilities purporting to direct the operators of Long Term Care Facilities to charge and collect, and the Class members to pay, the maximum Accommodation Charges permitted by s. 3(1) of the *Nursing Homes Operation Regulation*, as amended by A.R. 260/2003. The documents, all bearing the date of June 17, 2003, consist of:

- a) A Document entitled "Questions and Answers Long-Term Care Accommodation Charges," and
- b) A Letter June 17, 2003, to which was attached a "Backgrounder."

46. By letter dated August 1, 2003, the Crown, by its Minister of Seniors and Community Supports, directed the Predecessor Health Authorities to charge Class members the maximum Accommodation Charge.

47. The documents described in paragraphs 45 and 46 herein are hereafter collectively referred to as "The Letters".

48. The Letter and "Backgrounder" described in paragraph 45(b) were provided to the Class members in or about June or July of 2003 pursuant to instructions given by the Crown to the Predecessor Health Authorities.

49. In breach of its duty of care and acting recklessly, arbitrarily and in bad faith, the Crown, pursuant to the Letters, did unlawfully and improperly direct and instruct the Predecessor Health Authorities and their agents to charge the maximum Accommodation Charge, notwithstanding the permissive and discretionary language of s. 3(1) of the *Nursing Homes Operation Regulation* and s. 8(2) of the *Nursing Homes Act*, as a result of which the Class members, save for a limited number of exceptions, were charged the maximum Accommodation Charge without regard to the actual cost of accommodation and meals.

50. In further breach of its duty of care and acting recklessly, arbitrarily and in bad faith, the Crown, pursuant to the Letters, unlawfully and improperly directed and instructed the Predecessor Health Authorities and their agents to charge the Class members for Health Care costs set out in paragraph 44(g) herein in circumstances where:

- a) Such costs are Health Care costs pursuant to the *Nursing Homes Act* and regulations, the *Hospitals Act* and regulations, and Ministerial Directive D-317;
- b) The Crown understood and has since acknowledged that such costs and services were the responsibility of the Defendants; and
- c) The Crown understood and has since acknowledged that such costs were included as part of the block funding for Health Care provided by the Crown to the Health Authorities.

51. As a result of the negligent, *ultra vires* and bad faith actions of the Defendants:

- a) There was no reasonable nexus between the Accommodation Fee and the cost of accommodation and meals;
- b) The Class members paid an Accommodation Fee that was contrary to the *Hospitals Act* and the *Nursing Homes Act*;

- c) The Class members' right and entitlement to publicly funded Health Care services and benefits was violated;
- d) Under the guise of the Accommodation Charge, the Class members paid an Accommodation Fee that included the cost of Health Care services and benefits the Class members were entitled to receive at no cost as described in paragraph 41 (i) herein.

52. As a result of the negligent and bad faith actions of the Defendants, the Class members have suffered damage and loss.

### **Restitution**

53. The Accommodation Fees were paid by the Class members pursuant to one or more of s. 3(1) of the *Nursing Homes Operation Regulation* as amended, s. 8(2) of the *Nursing Homes Act*, ss. 5(1)(d) and 5(8) of the *Hospitalization Benefits Regulation*, the Letters, and contractual agreements with the Health Authorities or their agents.

54. The Class members, with very limited exceptions, paid the maximum rates permitted by s. 3(1) of the *Nursing Homes Operation Regulation*, A.R. 258/85 as amended, such that the Class members experienced a deprivation equal to the amount of the Accommodation Fees.

55. The payment of the Accommodation Fees constituted a corresponding benefit to the Defendants in that the payments relieved the Defendants from inevitable expenses they were required to incur pursuant to the *Hospitals Act*, the *Nursing Homes Act*, and *Ministerial Directive D-317*.

56. There exists no juristic reason for the Class members' deprivation and the Defendants' corresponding benefit because:

- a) Section 19(2) of the *Canada Health Act*, R.S. 1985, c. C-6, s. 3(1) of the *Nursing Homes Operation Regulation* as amended, s. 8(2) of the *Nursing Homes Act*, ss. 5(1)(d) and 5(8) of the *Hospitalization Benefits Regulation*, and the Letters, are of no force or effect in that they violate s. 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") in that they authorize the imposition of Accommodation Charges upon the Class members which may not be imposed upon other patients solely on the basis of the Class members' age and/or mental

and/or physical disabilities, are not justified under s. 1 of the *Charter*, and are of no force or effect by operation of s. 52 of the *Constitution Act, 1982*;

- b) Section 3(1) of the *Nursing Homes Operation Regulation* as amended, ss. 5(1)(d) and 5(8) of the *Hospitalization Benefits Regulation*, and the Letters are *ultra vires* and inoperative in that contrary to the *Nursing Homes Act*, and the *Hospitals Act*, they purport to authorize the imposition of charges or fees against the Class members for goods and services other than accommodation and meals, including but not limited to therapeutic and special diets, nutritional supplements, incontinence supplies including disposable diapers, meal preparation and meal service, extra bathing when required, housekeeping services, facility laundry services, utilities, building maintenance, facility management, and facility administration, all of which are the financial responsibility of the Defendants;
- c) The Letters are *ultra vires* and inoperative in that there was in fact no obligation on the part of Long Term Care Facilities to impose the maximum Accommodation Charges, there was no obligation on the part of the Class members to pay them;
- d) The Crown's Minister of Seniors and Community Supports had no lawful authority in August of 2003 with respect to setting and monitoring the Accommodation Charge; and
- e) The contracts between the Class members and the Long Term Care Facilities either were invalid to the extent that they purported to charge the Class members for goods and services that are not accommodation and meals, or were mistakenly interpreted as requiring the Class members to pay for such charges.

### **Breach of Contract**

57. Every Class member entered into an agreement, either directly or through legal representatives acting on their behalf, with the Health Authorities or their agents with respect to the provision of accommodation and meals to the Class members.

58. Each and every agreement between the Class members and the Health Authorities or their agents contained an express or implied term that the Class members would only be responsible for paying user charges permitted by law, namely user charges reflecting the actual cost of "accommodation and meals" in accordance with the *Hospitals Act* and the *Nursing Homes Act*. The agreements did not authorize the imposition of user charges prohibited by the *Hospitals Act* and the *Nursing Homes Act*, such as user charges reflecting the costs of services provided by employees of the Long Term Care Facilities and other user charges reflecting the costs of Health Care.

59. The Health Authorities or their agents breached their agreement with the Class members by charging the Class members for Health Care costs including, but not limited to, therapeutic and special diets including nutritional supplements, meal preparation and meal service, extra bathing when required, rehabilitation therapy and recreation and leisure programs, incontinence supplies including disposable diapers when required, facilities services including housekeeping, utilities, building maintenance, administration and facility laundry services, as a result of which the Class members have suffered damage and loss.

#### **Section 15(1) of the Charter**

60. Section 19(2) of the *Canada Health Act*, s. 8(2) of the *Nursing Homes Act*, s. 3(1) of the *Nursing Homes Operation Regulation*, ss. 5(1)(d) and 5(8) of the *Hospitalization Benefits Regulation* and the Letters, violate s. 15(1) of the *Charter*, in that they impose or authorize a discriminatory obligation on the part of the Class members to pay Health Care costs. These costs were imposed by the Defendants solely on the basis of the Class members' age and/or mental and/or physical disabilities.

61. The basis for the differential treatment is arbitrary and an affront to the needs and circumstances of the Class members.

62. The infringement of the Class members' equality rights guaranteed by s. 15(1) of the *Charter* is not demonstrably justified in a free and democratic society.

63. An award of damages restoring the Accommodation Charges paid by the Class members would be a just and appropriate remedy pursuant to s. 24(1) of the *Charter*.



64. The Plaintiffs propose that the trial of this action be held at the City of Edmonton, in the Province of Alberta and believe that the trial of this matter will take in excess of twenty-five days.

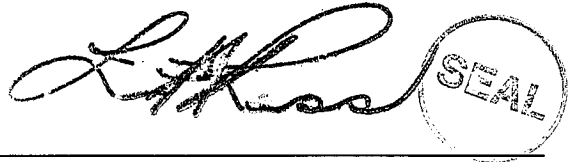
**WHEREFORE THE PLAINTIFFS CLAIM:**

- a) An Order certifying this action as a class proceeding;
- b) An Accounting and Order of restitution to the Class members with regard to accommodation charges paid by or on behalf of the Class members since August 1, 2003;
- c) In the alternative, an award of Damages equivalent to excess accommodation charges paid by or on behalf of the Class members since August 1, 2003;
- d) In the further alternative, an Order of restitution for unjust enrichment;
- e) In the further alternative, an Accounting and Order of restitution for the Class members on account of the money they have spent for Health Care services since August 1, 2003;
- f) In the further alternative, an award of Damages equivalent to the money spent by the Class members for Health Care services since August 1, 2003;
- g) In the further alternative, Damages for breach of contract in an amount to be determined at trial;
- h) In the further alternative, an aggregate monetary award pursuant to Division 2 of the *Class Proceedings Act*;
- i) Exemplary and punitive damages in an amount to be determined by this Court;
- j) A Declaration that 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, are inconsistent with s. 15(1) of the *Charter* and, to the extent of the inconsistency, of no force or effect;
- k) A Declaration that s. 3(1) of the *Nursing Homes Operation Regulation*, ss. 5(1)(d) and 5(8) of the *Hospitalization Benefits Regulation*, and the Letters, are *ultra vires* and of no force or effect;
- l) Damages pursuant to s. 24(1) of the *Charter*;
- m) Damages in such amount as this Court finds appropriate for the cost of administering the plan of distribution of the recovery of this action;

- n) Interest pursuant to the *Judgment Interest Act*, R.S.A. 2000, c. J-1 as amended;
- o) Costs on a solicitor and client basis or alternatively enhanced party/party costs, with full indemnity for disbursements and GST; and
- p) Such further and other relief as this Honourable Court may consider appropriate.

**DATED** at the City of Edmonton, in the Province of Alberta, this 29<sup>th</sup> day of July, 2005 **AND DELIVERED** by Parlee McLaws LLP, 1500, 10180-101 Street, Edmonton, Alberta T5J 4K1, solicitors for the within Plaintiff whose address for service is in care of the said solicitors.

**ISSUED** out of the Office of the Clerk of Court of Queen's Bench of Alberta, Judicial District of Edmonton, this 29th day of July, 2005.



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Clerk of the Court

**NOTICE TO THE DEFENDANTS**

Action No. 0503 13196

TO: HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA, and  
ALBERTA HEALTH SERVICES

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

You have been sued. You are the Defendant. You have only 15 days to file and serve a Statement of Defence or Demand of Notice. You or your lawyer must file your Statement of Defence or Demand of Notice in the office of the Clerk of the Court of Queen's Bench in Edmonton, Alberta. You or your lawyer must also leave a copy of your Statement of Defence or Demand of Notice at the address for service for the Plaintiff named in this Statement of Claim.

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

"Brought under the Class Proceedings Act"

**WARNING:** If you do not do both things within 15 days, you may automatically lose the lawsuit. The Plaintiff may get a Court judgment against you if you do not file, or do not give a copy to the Plaintiff, or do either thing late.

**FRESH STATEMENT OF CLAIM No. 2**

This Statement of Claim is filed by:

Parlee McLaws LLP  
Barristers & Solicitors  
Patent & Trade-Mark Agents  
1500, 10180-101 Street  
Edmonton, Alberta T5J 4K1  
Allan A. Garber  
Telephone: (780) 423-8500  
Facsimile: (780) 423-2870



Solicitor for the Plaintiff who resides at Edmonton, Alberta.

And whose address for service is c/o the said Solicitor and is addressed to the Defendant whose residence so far as known to the Plaintiff is Edmonton, Alberta.

**Parlee McLaws LLP**  
Barristers & Solicitors  
Patent & Trade-Mark Agents  
1500, 10180-101 Street  
Edmonton, Alberta T5J 4K1  
Attention: Allan A. Garber  
Telephone: (780) 423-8544  
Facsimile: (780) 423-2870

File Number: 65353-1/AAG