

ONTARIO  
SUPERIOR COURT OF JUSTICE



BEFORE ME:

LINDSAY McCREITH and SHONA HOLMES

**Plaintiffs**

- and -

**THE ATTORNEY GENERAL FOR THE PROVINCE OF ONTARIO**

**Defendant**

**STATEMENT OF CLAIM**

TO THE ATTORNEY GENERAL

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiffs' lawyer or, where the plaintiffs do not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date

Sept 5/07

Issued by

  
Local Registrar

Address of 393 University Avenue  
court office 10<sup>th</sup> Floor  
Toronto, Ontario M5G 1E6

TO:

THE ATTORNEY GENERAL FOR THE PROVINCE OF ONTARIO  
**c/o Crown Law Office (Civil Law)**  
Ministry of the Attorney General  
720 Bay Street, 8<sup>th</sup> Floor  
Toronto, Ontario  
M5G 2K1

Defendant

**CLAIM**

1. The Plaintiffs claim:
  - a. A declaration that subsections 10(1) and 10(3) of the *Commitment to the Future of Medicare Act, 2004*, S.O. 2004, c. 5 and subsections 14(1), 14(2), 15(1), 15(2), 15.1(1) and 15.1(2) of the *Health Insurance Act*, R.S.O. 1990, c. H.6 are inconsistent with section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11 (the “*Charter*”), that they cannot be saved by section 1 of the *Charter* and that they are therefore of no force or effect pursuant to section 52 of the *Constitution Act, 1982*;
  - b. A declaration that subsections 3(3) and (3.1) of the *Independent Health Facilities Act*, R.S.O. 1990, c. I.3 are inconsistent with section 7 of the *Charter* to the extent that they apply to the provision of magnetic resonance imaging, that they cannot be saved by section 1 of the *Charter* and that they are therefore of no force or effect pursuant to section 52 of the *Constitution Act, 1982*;
  - c. A declaration that the penalties in subsections 19(1), (2) and (4) of the *Commitment to the Future of Medicare Act, 2004*, S.O. 2004, c. 5 are inconsistent with section 7 of the *Charter* to the extent that they apply to subsections 10(1), 10(3) of the Act, that they cannot be saved by section 1 of the *Charter* and that they are therefore of no force or effect pursuant to section 52 of the *Constitution Act, 1982*;
  - d. A declaration that the penalties in subsections 44(1) and 44(2) of the *Health Insurance Act* are inconsistent with section 7 the *Charter* to the extent that they apply to subsections 14(1), 14(2), 15(1), 15(2), 15.1(1) and 15(2) of the Act, that they cannot be saved by section 1 of the *Charter* and that they are

therefore of no force or effect pursuant to section 52 of the *Constitution Act, 1982*;

- e. A declaration that the penalties in subsections 39(1), (4) and (5) of the *Independent Health Facilities Act* are inconsistent with section 7 of the Charter to the extent that they apply to the provision of magnetic resonance imaging in contravention of subsections 3(3) and (3.1) of the Act, that they cannot be saved by section 1 of the *Charter* and that they are therefore of no force or effect pursuant to section 52 of the *Constitution Act, 1982*;
- f. Costs of this action; and
- g. Such further and other relief as this Honourable Court deems just.

### **The Parties**

2. The Plaintiff Lindsay McCreith is a 66-year-old retired collision repair shop owner who resides in the Town of Newmarket, Ontario.

3. The Plaintiff Shona Holmes is a 43-year-old self-employed family mediator who resides in the City of Hamilton, Ontario.

4. The Plaintiffs bring this action in their personal capacities and as public interest litigants.

5. The Defendant the Attorney General of Ontario is responsible for the design and administration of a single-payer healthcare system under which Ontario residents are prevented from accessing essential, medically necessary services outside of the system as a result of the legislative provisions being challenged in this action.

6. As a result of the Defendant's monopoly over essential, medically necessary healthcare services in Ontario and its delay in providing such services, Mr. McCreith and Ms. Holmes were required to endure significant financial, emotional and physical hardship to access such services in the United States.

### **Ontario's Healthcare Monopoly**

#### ***Ontario Health Insurance Plan***

7. Access to medically necessary services in Ontario is regulated by a number of statutes including the *Health Insurance Act*, R.S.O. 1990, c. H.6, the *Commitment to the Future of Medicare Act, 2004*, S.O. 2004, c. 5 and the *Independent Health Facilities Act*, R.S.O. 1990, c. I.3.

8. The *Health Insurance Act* establishes the Ontario Health Insurance Plan ("OHIP"), which purports to insure virtually all Ontario residents for the cost of "core medical services" including most hospital, health facility, physician and healthcare practitioner services (hereinafter "OHIP-eligible services"). All services are required to be rendered under the conditions and limitations prescribed by the Act and the regulations made under the Act.

9. The legislation being challenged in this action has the effect of creating a government monopoly over essential medical services. This legislation also has the effect of eliminating the supply of, and suppressing the demand for, essential health services outside the government monopoly healthcare system.

#### ***Government Healthcare System Delay***

10. The Ontario government controls the supply of medical services available in and outside of the government healthcare system through its legislation, regulation and policies governing physicians, hospitals, healthcare facilities, medical education and training,

physician licensing and standards and public expenditures on healthcare and through the administration of the healthcare system by the Ministry of Health and Long-Term Care.

11. Lengthy wait times for many OHIP-eligible services, and a shortage of professionals, facilities, specialized equipment and operating time, are chronic and widespread features of the government healthcare system in Ontario.

12. Ontarians are commonly required to wait for months for diagnostic tests. According to data collected by the Ontario Ministry of Health and Long-Term Care in February/March 2007, one in ten patients waiting for a magnetic resonance imaging (hereinafter "MRI") scan waited in excess of 15.4 weeks.

13. Ontarians are commonly required to wait hours for emergency treatment. According to Ontario government data submitted to the Canadian Institute for Health Information (hereinafter "CIHI") in 2005 – 2006, half of Ontario emergency department patients waited 1.2 hours or more for an initial physician assessment. One in ten waited for over 3.6 hours before being assessed by a physician.

14. Ontarians are also required to endure long waits for specialist consultations. According to a 2006 study published by the Fraser Institute, 50% of Ontario patients waiting for a specialist appointment in one of 12 major medical specialties experienced a wait time of 7.4 weeks or longer after referral from a general practitioner, a delay that is exacerbated by the fact that many Ontarians do not have access to a general practitioner/family physician.

15. Ontarians are required to wait months more for surgical treatment *after* consultation with a specialist. According to the CIHI, in August/September 2006, 50% of patients waited in excess of 11 weeks for cataract surgery, 13.6 weeks for hip replacement surgery and 16.7 weeks for knee replacement surgery after consultation with a specialist. One in ten patients waited in excess of 32.1 weeks for cataract surgery, 40.1 weeks for hip replacement surgery and 50.4 weeks for knee replacement surgery after consultation with a specialist.

### ***Effect of Long Wait Times***

16. Wait times in the government monopoly healthcare system are unreasonable and unacceptable by generally accepted medical standards of practice as well as by patient standards.

17. Waiting for medical treatment often causes physical suffering, including severe pain and impairment.

18. Waiting for medical diagnosis and treatment can also cause serious psychological suffering beyond ordinary stress or anxiety.

19. Delays in diagnosing and treating medical problems can lead to profound physical consequences, including a deterioration of general health, permanent disability and death.

20. Lengthy waiting periods also result in lost work productivity and impair the ability of individuals to earn a livelihood when they are unable to work due to disability or the need to care for family members.

### ***Barriers to Claiming Government Funding for Out-of-Province Treatment***

21. Ontario residents may, in some cases, be reimbursed for a portion of the cost of non-emergency treatment rendered outside Ontario pursuant to subsection 28.4(2) of *Health Insurance Act* Regulation 552.

22. Subsection 28.4(2) is portrayed as serving as a “safety valve” to ensure that Ontario residents obtain the treatment that they require in the event of delay in the Ontario government system; however, such treatment will only be reimbursed: (a) if an Ontario physician submits an application on a patient’s behalf indicating that out-of-country treatment is necessary to avoid “a delay that would result in death or medically significant irreversible

tissue damage” and; (b) if the approval of the Ontario Health Insurance Plan General Manager is obtained *prior* to obtaining the treatment in question.

23. In practice, subsection 28.4(2) is of no benefit to the vast majority of patients on government healthcare waiting lists due to:

- a. the limited circumstances in which it applies;
- b. an approval process that is onerous and in some cases arbitrary, as reported by the Ontario Ombudsman;
- c. the fact that a large component of waiting time is for specialist consultations and diagnostic tests rather than “treatment”; and
- d. the approval process can take longer than the anticipated time to be spent on a medical waiting list.

### ***Prohibitions on Private Healthcare***

24. Notwithstanding the unwillingness or inability of the government to provide essential, medically necessary services in a timely manner and the restricted application of the “safety valve” purportedly provided by subsection 28.4(2) of *Health Insurance Act* Regulation 552, Ontarians are prohibited from accessing essential, medically necessary services in the private sector.

25. As set out in more detail below, subsections 14(1), 14(2), 15, 15.1, 44(1) and 44(2) of the *Health Insurance Act*, subsections 10(1), 10(3) and 19(1), (2) and (4) of the *Commitment to the Future of Medicare Act, 2004* and subsections 3(3) and 3(3.1) of the *Independent Health Facilities Act*, R.S.O. 1990, c. I.3 prohibit the following aspects of private healthcare:

- a. physician billing of patients for OHIP-eligible services (“direct billing”);
- b. physician billing for OHIP-eligible services in excess of the amount potentially available from OHIP for the service (“extra billing”);
- c. private medical insurance for OHIP-eligible services; and
- d. facility fees in respect of MRIs provided in independent health facilities.

26. As a result, the aforementioned provisions deny Ontario residents the opportunity to access reasonable, practical and medically necessary alternatives to unacceptable government healthcare waiting lists and thereby deprive Ontarians of the right to life, liberty and security of the person as guaranteed by section 7 of the *Charter*.

**(A) Prohibition on Direct Billing**

27. Subsection 10(3) of the *Commitment to the Future of Medicare Act, 2004* and subsections 15(1) and 15.1(1) of the *Health Insurance Act* have the effect of preventing Ontarians from being able to access medically necessary services outside of the government healthcare system.

28. Subsection 10(3) of the *Commitment to the Future of Medicare Act, 2004* prohibits physicians and certain other healthcare practitioners from accepting payment for services from any source other than OHIP. The subsection provides:

**Physicians and designated practitioners**

**10 (3)** A physician or designated practitioner shall not accept payment or benefit for an insured service rendered to an insured person except,

(a) from the Plan, including a payment made in accordance with an agreement made under subsection 2 (2) of the *Health Insurance Act*;

(b) from a public hospital or prescribed facility for services rendered in that public hospital or facility; or

(c) if permitted to do so by the regulations in the prescribed circumstances and on the prescribed conditions. 2004, c. 5, s. 10 (3).

29. Subsections 15(1) and 15.1(1) of the *Health Insurance Act* also prohibit physicians and designated practitioners, respectively, from accepting payment for services from any source other than OHIP. These subsections provide:

**Billing – physicians**

15. **(1)** A physician shall submit all of his or her accounts for the performance of insured services rendered to an insured person directly to the

Plan in accordance with and subject to the requirements of this Act and the regulations, unless an agreement under subsection 2 (2) provides otherwise. 2004, c. 5, s. 36.

....

### **Billing – practitioners**

**15.1** (1) A designated practitioner shall submit all of his or her accounts for the performance of insured services directly to the Plan in accordance with and subject to the requirements of this Act and the regulations, unless an agreement under subsection 2 (2) provides otherwise. 2004, c. 5, s. 36.

30. By prohibiting Ontario physicians from receiving payment for OHIP-eligible services directly from patients, subsection 10(3) of the *Commitment to the Future of Medicare Act, 2004* and subsections 15(1) and 15.1(1) of the *Health Insurance Act* effectively prohibit the provision of essential medical services outside of the government healthcare monopoly, other than on a pro bono basis.

### ***Direct Billing Prohibition – Narrow Exemption***

31. The direct billing prohibition does not apply to the very small number of physicians and designated practitioners who practiced outside of the government healthcare system prior to May 13, 2004 and who elected to continue to do so within 90 days of the coming into force of the *Commitment to the Future of Medicare Act, 2004*. As set out in the section of this claim pertaining to extra billing, however, no physician or designated practitioner has any financial incentive to maintain this election due to the prohibition on extra billing.

### ***Direct Billing Prohibition -- Penalties***

32. Physicians and health care practitioners who treat patients outside of the government healthcare monopoly contrary to subsection 10(3) of the *Commitment to the Future of Medicare Act, 2004* are liable to be punished by way of a penalties of up to \$25,000.00 pursuant to subsections 19(1), 19(2) and 19(3) of the *Commitment to the Future of Medicare Act, 2004*, which provide:

**Offence**

19. (1) Every one who contravenes a provision of this Part or the regulations is guilty of an offence. 2004, c. 5, s. 19(1).

Penalty, individual

(2) Subject to subsection (3), an individual who is convicted of an offence under this section is liable to a fine of not more than \$10,000.00. 2004, c. 5, s. 19(2).

....

Penalty, corporation

(4) A corporation that is convicted of an offence under this section is liable to a fine not exceeding \$25,000.00. 2004, c. 5, s. 19(4).

33. Pursuant to subsections 44(1) and (2) of the *Health Insurance Act*, physicians and health care practitioners who treat patients outside of the government healthcare monopoly contrary to subsections 15(1) and 15.1(1) of the Act are liable to be punished by way of a prison term of up to 12 months and/or a fine of up to \$50,000.00 in the case of an individual and a fine of up to \$200,000 in the case of a corporation. Subsections 44(1) and (2) of the *Health Insurance Act* provide:

**General penalty, individual**

44(1) Every individual who contravenes any provision of this Act or the regulations for which no penalty is specifically provided is guilty of an offence and is liable,

(a) for a first offence, to a fine of not more than \$25,000.00 or to imprisonment for a term of not more than 12 months, or to both;  
 (b) for a subsequent offence, to a fine of not more than \$50,000.00 or to imprisonment for a term of not more than 12 months, or to both. 2002, c. 18, Sched. I, s. 8(22).

**Same, corporation**

(2) Every corporation that contravenes any provision of this Act or the regulations for which no penalty is specifically provided is guilty of an offence and is liable to a fine of not more than \$50,000.00 for a first offence and to a fine of not more than \$200,000.00 for a subsequent offence.

***Effect of Prohibition and Penalties with respect to Direct Billing***

34. The effect of subsections 10(3) and 19(1), (2) and (3) of the *Commitment to the Future of Medicare Act, 2004* and subsections 15(1), 15.1(1) and 44(1) and (2) of the *Health*

*Insurance Act* is to deny Ontarians the opportunity to purchase or otherwise access essential, medical services outside of the government healthcare monopoly.

35. As a result, Ontarians (with the exception of a small number of wealthy individuals who are able to pay for medical care outside of Ontario *on an ongoing basis*) are unable to avoid waiting lists in the government healthcare system and are thereby compelled by law to endure physical and psychological suffering and the risk of irreparable harm and death.

36. Whereas other provinces have enacted measures to discourage physicians from providing essential medical services outside of the government healthcare system or to regulate those who do so, Ontario is the *only* province that absolutely prohibits physicians from providing essential medical services outside of the government healthcare system (other than on a pro bono basis).

### **(B) Prohibition on Extra Billing**

37. As set out in the previous section, physicians and designated practitioners who billed patients directly prior to May 13, 2004 and who elected to continue to do so within 90 days of the coming into force of the *Commitment to the Future of Medicare Act, 2004* are exempted from the prohibition on direct billing of patients in subsection 10(3) of the Act.

38. While these exempted physicians may directly bill patients, they may not charge an amount that exceeds the amount potentially available from OHIP in respect of the service as a result of subsection 10(1) of the *Commitment to the Future of Medicare Act, 2004*, which provides:

#### **Persons not to charge more than OHIP**

10. (1) A physician or designated practitioner shall not charge more or accept payment or other benefit for more than the amount payable under the Plan for rendering an insured service to an insured person. 2004, c. 5, s. 10 (1).

39. Accepting an amount in excess of that potentially available from OHIP is also prohibited by subsections 15(2) and 15.1(2) of the *Health Insurance Act*, which provide:

**Requirements where Plan billed**

15 (2) Where a physician submits his or her accounts directly to the Plan under this section,

(a) payment shall be made,

(i) directly to the physician, or

(ii) as the physician directs in accordance with section 16.1;  
and

(b) the payment by the Plan for the insured services rendered to an insured person constitutes payment in full of the account. 2004, c. 5, s. 36.

Where s. 2 (2) applies

(3) Where an account is submitted to the Plan in accordance with subsection 2 (2) with respect to insured services rendered to an insured person, the payment by the Plan constitutes payment in full of the account. 2004, c. 5, s. 36.

....

**Requirements where Plan billed**

15.1 (3) Where a practitioner submits his or her accounts directly to the Plan under this section,

(a) payment shall be made,

(i) directly to the practitioner, or

(ii) as the practitioner directs in accordance with section  
16.1;

(b) in the case of a designated practitioner, the payment by the Plan for the insured services performed constitutes payment in full of the account;  
and

...

Where s. 2 (2) applies

(4) Where an account is submitted to the Plan in accordance with subsection 2 (2) with respect to insured services rendered to an insured person, the payment by the Plan constitutes payment in full of the account. 2004, c. 5, s. 36.

***Extra Billing Prohibition -- Penalties***

40. Physicians and healthcare practitioners who provide essential medical services to patients in contravention of subsection 10(1) of the *Commitment to the Future of Medicare Act, 2004* are liable to be punished by way of penalties ranging from \$10,000.00 to \$25,000.00 pursuant to subsections 19(1), (2) and (4) of the Act.

41. Pursuant to subsections 44(1) and (2) of the *Health Insurance Act*, physicians and healthcare practitioners who provide essential medical services to patients in contravention of subsections 15(2) and 15.1(2) of the Act are liable to be punished by a prison term of up to 12 months and/or a fine of up to \$50,000.00 in the case of an individual and a fine of up to \$200,000.00 in the case of a corporation.

***Effect of Prohibition and Penalties in respect of Extra Billing***

42. The effect of subsections 10(1) and 19(1), (2) and (4) of the *Commitment to the Future of Medicare Act, 2004* and subsections 15(2), 15.1(2) and 44(1) and (2) of the *Health Insurance Act* is to remove any financial incentive for the few physicians legally entitled to opt out of the government healthcare system to continue to do so. The prohibition thereby ensures that essential medical services will not be offered outside of the government healthcare system.

43. As a result, even in the absence of a prohibition on direct billing, Ontario residents are still denied the opportunity to access essential medical services outside of the government healthcare system and thereby avoid government healthcare waiting lists.

**(C) Prohibition on Private Health Insurance**

44. Subsections 14(1) and 14(2) of the *Health Insurance Act* prevent Ontario residents from obtaining or benefiting from insurance that covers any portion of the cost of essential

medical services outside of the government healthcare monopoly and thereby deny Ontario residents of ordinary means the ability to avoid waiting lists in the government system.

45. Subsection 14(1), which voids contracts of insurance in respect of services that are potentially covered by OHIP and prohibits patients and insurers from entering into such contracts, provides:

**Other insurance prohibited**

**14. (1)** Every contract of insurance, other than insurance provided under section 268 of the *Insurance Act*, for the payment of or reimbursement or indemnification for all or any part of the cost of any insured services other than,

(a) any part of the cost of hospital, ambulance and nursing home services that is not paid by the Plan;

(b) compensation for loss of time from usual or normal activities because of disability requiring insured services;

(c) any part of the cost that is not paid by the Plan for such other services as may be prescribed when they are performed by such classes of persons or in such classes of facilities as may be prescribed,

performed in Ontario for any person eligible to become an insured person under this Act, is void and of no effect in so far as it makes provision for insuring against the costs payable by the Plan and no person shall enter into or renew such a contract. R.S.O. 1990, c. H.6, s. 14 (1); 1996, c. 1, Sched. H, s. 10.

46. Subsection 14(2), which prohibits Ontario residents from benefiting from a policy of insurance in respect of services that are potentially covered by OHIP, provides:

**Resident not to benefit from prohibited insurance**

(2) A resident shall not accept or receive any benefit under any contract of insurance prohibited under subsection (1) whereby the resident or his or her dependants may be provided with or reimbursed or indemnified for all or any part of the costs of, or costs directly related to the provision of any insured service. R.S.O. 1990, c. H.6, s. 14 (2).

***Private Insurance Prohibition – Penalties***

47. Pursuant to subsections 44(1) and (2) of the *Health Insurance Act*, Ontarians who enter into or attempt to benefit from a policy of private insurance for essential medically necessary services (whether for themselves or for their family members) are liable to be punished by a prison sentence of up to 12 months and/or a fine of up to \$50,000.00. Corporations that attempt to provide private health insurance to Ontarians may be subjected to fines of up to \$200,000.00.

***Effect of Prohibition and Penalties in respect of Private Health Insurance***

48. By prohibiting insurance to cover the cost of services that are potentially available through the government monopoly healthcare system, subsections 14(1), 14(2), 44(1) and 44(2) deny Ontario residents of ordinary means the opportunity to access essential healthcare services that would be available in the absence of the other legislation being challenged in this action.

49. As a result, Ontario residents of ordinary means are unable to avoid waiting lists in the government healthcare system and are compelled by law to endure physical and psychological suffering and the risk of irreparable harm and death.

**(D) Prohibition of MRI Facility Fees**

50. MRIs may only be provided in a designated public hospital or in an independent health facility that is licensed to perform MRIs under the *Independent Health Facilities Act*, R.S.O. 1990, c. I.3 due to the operation of subsections 27(1), (2) and (3) of the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, and subsections 1(2), 3.1 and 5(2) of Ontario Regulation 107/96 under the *Regulated Health Professions Act, 1991*.

51. Subsections 3(3) and 3(3.1) of the *Independent Health Facilities Act* prohibit independent health facilities from receiving facility fees from OHIP-eligible patients in respect of OHIP-eligible services including MRIs. These sections provide:

**Licenses and facility fees**

....

3(3) No person shall charge a facility fee, or accept payment of a facility fee, for or in respect of a service provided to an insured person in an independent health facility operated by a person licensed under this Act, unless the fee is charged to, or the payment is received from, the Minister or a prescribed person. 1996, c. 1, Sched. F, s. 20(2)

**Regulation**

3(3.1) A regulation under subsection (3) shall not prescribe an insured person who receives an insured service as a person to whom a facility fee may be charged, or from whom a payment of a facility fee may be received, in respect of the service. 1996, c. 1, Sched. F, s. 20(2).

***Prohibition of MRI Facility Fees – Penalties***

52. Pursuant to subsections 39(1), (4) and (5) of the *Independent Health Facilities Act*, physicians and independent health facility operators who provide MRIs to patients in contravention of subsections 3(3) and 3(3.1) of the Act are liable to be punished, in respect of each day or part of a day on which the contravention occurs or continues, by a prison sentence of up to 12 months and/or a fine of up to \$50,000.00 in the case of an individual and by a fine of up to \$200,000.00 in the case of a corporation. Subsections 39(1), (4) and (5) provide:

**Offences**

39(1) Every person who contravenes section 3, 11, 35 or 37 is guilty of an offence. R.S.O. 1990, c. I.3, s. 39(1).

....

**Penalty, individual**

(4) Every individual who is convicted of an offence under this section is liable for each day or part of a day on which the offence occurs or continues,

(a) for a first offence, to a fine of not more than \$25,000 or to imprisonment for a term of not more than 12 months, or to both;

(b) for a subsequent offence, to a fine of not more than \$50,000.00 or to imprisonment for a term of not more than 12 months, or to both. 2002, c. 18, Sched. I, s. 12(6).

**Same, corporation**

(5) Every corporation that is convicted of an offence under this section is liable, for each day or part of a day on which the offence occurs or continues, to a fine of not more than \$50,000.00 for a first offence and to a fine of not more than \$200,000.00 for a subsequent offence. 2002, c. 18, Sched. 1, s. 12 (6).

***Effect of Prohibition and Penalties in respect of MRI Facility Fees***

53. The effect of subsections 3(3), 3(3.1), 39(1), 39(4) and 39(5) of the *Independent Health Facilities Act* is to prevent MRIs from being offered outside of the government monopoly healthcare system.

54. As a result of this legislation, individuals are prevented from using their own resources to look after their own health and many Ontarians are compelled to wait for months before serious symptoms such as pain, headaches and loss of vision can be diagnosed with any accuracy.

55. Accordingly, Ontario residents of ordinary means are unable to avoid waiting lists for MRIs in the government healthcare system, and are compelled by law to endure physical and psychological suffering and the risk of irreparable harm and death.

**Deprivation of Life, Liberty and Security of the Person**

56. The prohibitions on direct billing, extra billing, private medical insurance and MRI facility fees effectively grant the Ontario government a monopoly over healthcare in Ontario.

57. Ontario's healthcare monopoly makes it extremely difficult for individuals of ordinary means to access health services outside of the monopoly system. Only the very rich, who can afford to obtain health services outside of Ontario *on an ongoing basis*, are exempted from this impact.

58. Waiting lists are an integral and inevitable consequence of Ontario's healthcare monopoly.

59. With the exception of a small number of individuals who can afford (and are legally able) to travel outside of Ontario for medical treatment on an ongoing basis and who have medical conditions that permit travel, Ontarians are consigned to suffer on waiting lists for essential medical services.

60. Over the past decade, increases in government spending on Ontario's healthcare monopoly and numerous efforts to reform the system have failed to eliminate or significantly reduce waiting lists for essential medical services.

61. Waiting lists in Ontario result in serious physical and mental suffering for thousands of Ontarians. In many cases, inappropriate waiting times result in irreparable damage to health and well-being of patients and their families. In some cases, waiting causes death.

62. By creating a virtual monopoly over healthcare and thereby forcing many Ontarians to suffer on waiting lists, the prohibitions on direct billing, extra billing, private medical insurance and MRI facility fees in subsections 14(1), 14(2), 15(1), 15(2), 15.1(1), 15.1(2), 44(1) and 44(2) of the *Health Insurance Act*, subsections 10(1), 10(3) and 19(1), (2) and (4) of the *Commitment to the Future of Medicare Act, 2004* and subsections 3(3), 3(3.1) and 39(1), (4) and (5) of the *Independent Health Facilities Act* deprive Ontarians of the opportunity to secure timely access to essential health services and thereby violate the right to life and security of the person guaranteed by section 7 of the *Charter*.

63. The prohibitions on direct billing, extra billing, private medical insurance and MRI facility fees also deprive Ontarians of the right to make fundamental personal choices with regard to their life and health and therefore violate the right to liberty as guaranteed by section 7 of the *Charter*.

### **Infringement not in accordance with the Principles of Fundamental Justice**

64. The absolute prohibitions on direct billing, extra billing, private medical insurance and MRI facility fees in subsections 14(1), 14(2), 15(1), 15(2), 15.1(1), 15.1(2), 44(1) and 44(2) of the *Health Insurance Act*, subsections 10(1), 10(3) and 19(1), (2) and (4) of the *Commitment to the Future of Medicare Act, 2004* and subsections 3(3), 3(3.1) and 39(1), (4) and (5) of the *Independent Health Facilities Act* do not advance any valid public policy objective and are therefore inconsistent with the principle of fundamental justice that laws cannot not be arbitrary and irrational.

65. Furthermore, the experience of other industrialized democracies demonstrates that prohibitions on direct billing, extra billing, private health insurance and MRI facility fees are not necessary to preserve a sound universal public healthcare system (and are in fact counterproductive to this objective). Accordingly, the aforementioned prohibitions are also inconsistent with the principle of fundamental justice that laws should not be overbroad.

66. The prohibitions on direct billing, extra billing, private medical insurance and MRI facility fees deny Ontarians of ordinary means of the opportunity to use their own resources to avoid threats to their life and health as well as physical and psychological suffering associated with waiting for medical diagnosis and treatment. The prohibitions are therefore inconsistent with the principles of fundamental justice that individuals should not be deprived of the ability to safeguard their life and health and that laws should not be manifestly unfair.

67. The penalties in subsections 44(1) and 44(2) of the *Health Insurance Act*, subsections 19(2) and (4) of the *Commitment to the Future of Medicare Act, 2004* and subsections 39(1), (4) and (5) of the *Independent Health Facilities Act*, as they apply to the provision and receipt of essential medical care contrary to the prohibitions on direct billing, extra billing, private medical insurance and MRI facility fees, include prison terms of up to 12 months and fines of up to \$200,000.00 per offence. As such, these penalties are grossly excessive and inconsistent with the principle of fundamental justice that penalties should not be wholly disproportionate to the prohibitions to which they relate.

**Infringement cannot be saved by Section 1 of the Charter**

68. The prohibitions on direct billing, extra billing, private medical insurance and MRI facility fees in subsections 14(1), 14(2), 15(1), 15(2), 15.1(1), 15.1(2), 44(1) and 44(2) of the *Health Insurance Act*, subsections 10(1), 10(3) and 19(1), (2) and (4) of the *Commitment to the Future of Medicare Act, 2004* and subsections 3(3) and (3.1) of the *Independent Health Facilities Act* are not reasonable limits on the right to life, liberty and security of the person that can be demonstrably justified in a free and democratic society under section 1 of the *Charter* as legislation that prevents sick or injured individuals from using their own resources to access essential, medically necessary services outside of a government-run system, which fails to provide such services:

- a. is not rationally connected to any valid legislative objective;
- b. does not minimally impair the rights of Ontarians; and
- c. inflicts more harm on Ontarians than any benefits which may result from such legislation.

**Lindsay McCreith's Experience with Ontario's Healthcare Monopoly**

***Delayed Emergency Care***

69. On January 2, 2006, Mr. McCreith experienced a sudden onset of seizures, which he had never experienced before.

70. He was transported by ambulance to the emergency ward at a public hospital in Newmarket after being discovered unconscious by his wife and daughter.

71. After waiting for seven hours with paramedics standing by, he was examined and came under the care of an internist.

72. The internist ordered a computed tomography scan (“CT scan”), which revealed a large wedge shaped area of decreased density in Mr. McCreith’s right frontal lobe.

73. The internist advised Mr. McCreith that the large wedge shaped area was a brain tumour but that it did not need to be addressed.

74. Mr. McCreith was discharged on January 6, 2006 with a diagnosis of stroke and a prescription for anti-seizure medication.

### ***Delayed Diagnostic Services***

75. Mr. McCreith requested an MRI to rule out the possibility that the tumour shown in the CT scan was cancerous; however, the internist refused to order one.

76. Following Mr. McCreith’s discharge from hospital, Mr. McCreith attempted to appeal to the hospital’s patient advocate for assistance in arranging an MRI, but his telephone messages were not returned.

77. Mr. McCreith’s family physician requisitioned an MRI on January 12, 2006. Three weeks passed before Mr. McCreith was provided with an appointment date and the appointment that he was given was not until May 27, 2006, a wait of 4.5 months, or almost five months from the date of his seizure.

78. Due to the length of time Mr. McCreith would have to wait for an MRI in the government healthcare system, Mr. McCreith and his family investigated the possibility of obtaining an MRI outside the government system but were unable to find any alternatives in Ontario as a result of the legislative provisions being challenged in this action.

79. On February 2, 2006, Mr. McCreith’s daughter discovered the website of Timely Medical Alternatives (hereinafter “Timely”), a Vancouver-based company that assists patients in obtaining medical services outside of the government healthcare system.

80. Due to the legislative provisions that are being challenged in this action, Timely was unable to arrange for Mr. McCreith to obtain an MRI in Ontario; however, as Mr. McCreith was fortunate enough not to have any travel restrictions, they arranged for an MRI to be conducted in Buffalo, New York, the following day.

81. The MRI performed in Buffalo on February 3, 2006, for which Mr. McCreith paid US \$494.67, revealed that Mr. McCreith had a significant brain tumour.

***Delayed Access to Specialist Consultation***

82. Mr. McCreith's family physician was concerned about the MRI result and referred Mr. McCreith to a neurologist, who examined him on February 8, 2006.

83. The neurologist agreed that Mr. McCreith's brain tumour warranted assessment by a neurosurgeon in order to determine whether a biopsy would be necessary.

84. Mr. McCreith was referred to a neurosurgeon; however, he would have been required to wait for three months before the neurosurgeon could see him.

85. Unwilling to wait a further three months for a definitive diagnosis and to be advised of his treatment options and unwilling to risk the growth or spread of a brain tumour, Mr. McCreith returned to Buffalo to see a neurosurgeon.

86. The Buffalo neurosurgeon recommended a biopsy, which Mr. McCreith underwent in early March 2006.

87. During the biopsy, the tumour was determined to be a grade II astrocytoma and was surgically removed immediately thereafter.

### ***Denial of Out-of-country Funding by the Ontario Health Insurance Plan***

88. Had Mr. McCreith waited in Ontario's monopoly healthcare system for four and a half months for an MRI and a further three months for an appointment with a neurosurgeon for consideration of a biopsy, he would have had to endure at least seven and a half months of mental distress due to uncertainty about his diagnosis. He may also have suffered serious physical harm, including medically significant irreversible tissue damage or death.

89. Furthermore, it is probable that Mr. McCreith would have had to wait additional months to undergo a biopsy and obtain surgical treatment. The Ontario Ministry of Health and Long-Term Care "target" wait time for cancer surgery is 84 days.

90. The Ontario Health Insurance Plan has nevertheless refused to compensate Mr. McCreith for any portion of the US\$27,650 that he paid for his neurosurgical consultation, biopsy and surgery in Buffalo because he failed to seek pre-approval for the expense.

91. Prior to undergoing surgery in the United States, Mr. McCreith was not aware of the availability of out-of-country funding; however, given that Mr. McCreith was faced with a three-month wait to find out whether an Ontario neurosurgeon would recommend a biopsy to determine whether surgery was necessary, the process of submitting an Ontario physician-supported application and obtaining pre-approval from the OHIP General Manager would have delayed his surgery by at least three months.

### **Shona Holmes' Experience with Ontario's Healthcare Monopoly**

#### ***Delayed Diagnostic Services***

92. In March 2005, Ms. Holmes, who has a history of endocrine problems, began to experience headaches and vision disturbances as well as anxiety attacks, high blood pressure and fatigue.

93. Ms. Holmes' family physician ordered an MRI and referred Ms. Holmes to a neurologist and an endocrinologist on or about March 15, 2005. Due to Ms. Holmes' history of endocrine problems, it was necessary for her to see an endocrinologist for a complete diagnosis of her symptoms.

94. Ms. Holmes was faced with significant wait times for assessment of her symptoms; namely, over 7 weeks for an MRI, over four months for a consultation with a neurologist and over six months for a consultation with an endocrinologist.

95. The MRI conducted on May 6, 2005 showed an 8 – 9 mm tumour located between the optic chiasm and the pituitary gland.

96. Visual field testing conducted by Ms. Holmes' optometrist on May 24 and 30, 2005 confirmed a significant loss of vision in both eyes.

#### ***Delayed Access to Specialists***

97. Despite the reported presence of a significant tumour and a sudden loss of vision, Ms. Holmes' family physician was unable to expedite the specialist appointments previously scheduled for July 19 and September 19, 2005.

98. Concerned about her rapidly deteriorating vision, Ms. Holmes began to look outside of the government healthcare system. She eventually arranged to have her symptoms evaluated at the Mayo Clinic in Arizona as there were no alternatives available to her in Ontario.

99. Ms. Holmes underwent further testing and was examined by Arizona specialists, including an endocrinologist, a neurosurgeon and a neurologist, over the course of a week in June 2005. At that time, she had lost half the vision in her right eye and 25 percent in her left eye.

100. The Arizona specialists determined that Ms. Holmes' headaches and deteriorating vision were attributable to pressure being exerted on the optic chiasm by a Rathke's cleft cyst, a fluid-filled sac that grows near the pituitary gland at the base of the brain that can cause hormone and vision problems. They urged Ms. Holmes to have the cyst surgically removed immediately to avoid the risk of permanent blindness and death.

101. Upon receiving this diagnosis and recommendation, Ms. Holmes returned home to attempt to arrange to have the cyst-removal surgery performed in Ontario.

102. To Ms. Holmes' dismay, the Ontario neurosurgeon who Ms. Holmes saw on June 23, 2005 was of the view that further testing and a further consultation with a neurologist were necessary.

103. Ms. Holmes already had an appointment with an Ontario neurologist scheduled for July 19, 2005 from her family physician's original March 15, 2005 referral; however, she was concerned that she would be taking too much of a risk by waiting for another month while her vision continued to deteriorate. Furthermore, she was experiencing difficulty in scheduling the additional testing that had been recommended by the Ontario neurosurgeon on June 23.

104. Ms. Holmes and her family physician made exhaustive efforts to obtain an earlier appointment with a neurologist, to no avail.

105. On July 7, 2005, Ms. Holmes underwent repeat visual testing in Ontario, which showed that her vision had continued to deteriorate. The optometrist who ordered the testing advised her that the test results were consistent with a Rathke's cleft cyst and recommended that she undergo surgery immediately.

106. Confronted with the risk of going blind within weeks and possibly dying, Ms. Holmes reluctantly left her family and friends once again to return to Arizona to undergo the testing that had yet to be scheduled in Ontario and to prepare for surgery.

107. Ms. Holmes' Arizona neurosurgeon operated to remove the Rathke's cleft cyst on August 1, 2005.

108. Ms. Holmes' vision was fully restored within 10 days of the surgery.

109. A post-operative MRI and visual field testing confirmed that it had been necessary to remove the cyst to restore Ms. Holmes' vision.

***Denial of Out-of-Country Funding by the Ontario Health Insurance Plan***

110. Had Ms. Holmes waited for four months for a neurologist appointment and for six months for an endocrinologist appointment in the Ontario government healthcare system, her loss of vision would not have been diagnosed (let alone treated) until it was too late to address the problem.

111. With great financial and emotional difficulty, Ms. Holmes was able to significantly shorten the diagnostic process by travelling to Arizona (without her family members or friends to support her) when she finally realized that she could not afford to continue waiting for specialist consultations in Ontario.

112. Ms. Holmes' treatment in the United States was necessary to prevent medically significant irreversible tissue damage and possibly death.

113. Despite the urgency of Ms. Holmes' situation and the fact that her surgery was proven to be necessary to restore her vision, OHIP has denied Ms. Holmes' out-of-country services funding application on the basis that the surgery had not been recommended by an Ontario neurosurgeon *prior* to her decision to proceed with the surgery.

114. Had Ms. Holmes waited for the investigations and further appointments recommended by her Ontario neurosurgeon to proceed *in Ontario* prior to proceeding with surgery to remove her Rathke's cleft cyst, she would have lost her vision and could have died.

115. Ms. Holmes and her husband have incurred expenses in excess of CDN \$95,000 to obtain her diagnosis and treatment in Arizona. To pay off their debts, her husband has been forced to take on two jobs and Ms. Holmes has returned to work despite serious ongoing health problems.

***Plaintiffs' Charter rights infringed***

116. The Plaintiffs' rights to life, liberty and security of the person as guaranteed by section 7 of the *Charter* have been violated, and continue to be violated, as a result of their inability to consistently access timely medical care in Ontario and their inability to make fundamental personal choices concerning their health.

117. The Plaintiffs request standing to bring this action as public interest litigants as there is a serious issue as to the validity of subsections 14(1), 14(2), 15(1), 15(2), 15.1(1), 15.1(2), 44(1) and 44(2) of the *Health Insurance Act*, subsections 10(1), 10(3) and 19(1), (2) and (4) of the *Commitment to the Future of Medicare Act, 2004* and subsections 3(3), 3(3.1) and 39(1), (4) and (5) of the *Independent Health Facilities Act*, the Plaintiffs have a genuine interest in the validity of the legislation and there is no other reasonable or effective manner in which the issue may be brought before the courts.

118. The Plaintiffs propose that this action be tried at Toronto.

Date:

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Court File No:

07-CU-339454P03

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**STATEMENT OF CLAIM**

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