SUPREME COURT OF NOVA SCOTIA
Citation: Morrison Estate v. Nova Scotia (Attorney General), 2011 NSSC 479

Date: 20111222
Docket: Hfx. No. 230887
Registry: Halifax

Between:

The Estate of Elmer Stanislaus Morrison, by his Executor or Representative Joan Marie Morrison, Joan Marie Morrison, John Kin Hung Lee, by his Legal Guardian Elizabeth Lee and Elizabeth Lee

Plaintiffs

v.

The Attorney General of Nova Scotia, representing Her Majesty the Queen in right of the Province of Nova Scotia, (Department of Health), The Minister of Health for the Province of Nova Scotia at the relevant time and The Executive Director of Continuing Care for the Province of Nova Scotia

Defendants

LIBRARY HEADING

Judge: The Honourable Justice A. David MacAdam.

Heard: October 24, December 14 & December 22, 2011 in Halifax, Nova Scotia

Final Written Submissions: November 2, 2011

Subject: *Class Proceedings Act*, class actions, health law, public law, social assistance law, *Charter of Rights and Freedoms*

Summary: The court granted the plaintiff's motion for certification of the class of plaintiffs and causes of action as a class action, and, after an appeal, was subsequently required to determine whether the test for certification was met on each disputed claim (see 2010 NSSC 196 and 2011 NSCA 68.) Specifically, the court was required to address claims that the defendants' policies, actions and decisions respecting access to nursing

home care violated ss. 7 and 15 of the *Charter of Rights and Freedoms.*

Issue: Should the *Charter* claims be certified?

Result: There is a low threshold to establish the adequacy of pleadings. The defendants argued that the statement of claim did not make sufficiently clear which claims and remedies related to which defendants, nor as to which claimants were asserting which *Charter* claims. Even in view of the requirement for a generous reading of the pleading, a responding party is entitled to know what claims are being made against it. In this case, the claims were sufficiently particularized to allow the defendants to know the case to be met. The plaintiffs did not meet the onus of establishing a certifiable claim under section 7, having failed to plead any infringement of liberty or security of the person arising from the nursing home admissions system. The section 7 claim was therefore not certified. As to the section 15 claim, it was the plaintiffs' position that the alleged discrimination related to grounds of age and disability, not financial status, as claimed by the defendant. The plaintiffs had a certifiable claim for a potential section 15 claim in relation to healthcare costs that they were required to pay and which others who did not reside in nursing homes were not required to pay.

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Defendants

DECISION

Judge:	The Honourable Justice A. David MacAdam
Heard:	October 24, December 14 & December 22, 2011
Final Written Submissions:	November 2, 2011
Counsel:	Raymond F. Wagner and Michael Dull, for the plaintiffs Edward Gores, Q.C., Alison Campbell and Aleta Cromwell, for the defendants

By the Court:

[1] The plaintiffs commenced this proceeding as a common law class action by originating notice (action) and statement of claim dated September 8, 2005. Subsequently, the preceding was continued under the *Class Proceedings Act*, S.N.S. 2007, c.28. The plaintiffs allege that the defendants have violated a number of statutes, including the *Health Services and Insurance Act*, R.S.N.S. 1989, c. 197, the *Homes for Special Care Act*, R.S.N.S. 1989, c. 203, the *Canada Health Act*, R.S.C. 1985, c. C-6, the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being schedule B to the *Canada Act*, 1982, (U.K.), 1982, c. 11, the *Social Assistance Act*, R.S.N.S. 1989, c. 432, the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275 and the *Survival of Actions Act*, R S.N.S. 1989, c. 543.

[2] By a decision dated May 20, 2010, reported at 2010 NSSC 196, this court granted the plaintiff's motion for certification of the classes of plaintiffs and causes of action as a class action. Having found that the plaintiffs had met the onus under the *Class Proceedings Act* of establishing that the pleadings disclosed a cause of action against the defendants, this court determined that it was unnecessary to consider whether the plaintiffs had also established that all of the causes of action as alleged by the plaintiffs disclosed a cause of action against the defendants. The defendants appealed, alleging that the court had erred by failing to determine whether the causes of action alleging breaches of ss. 7 and 15(1) of the *Canadian Charter of Rights and Freedoms* had been established in the pleadings. In a decision reported at 2011 NSCA 68, the court determined that as the certification judge I was required to determine whether the test for certification was met on each disputed claim. The defendants, in their appeal, had apparently requested that the Court of Appeal make this determination. The Court of Appeal, at para 42, declined to do so, stating:

> 42 ...It is more appropriate for the Chambers judge to conduct the analysis having regard to the proper interpretation of s. 7(1)(a) as set out in these reasons. The Chambers judge did not consider the class **Charter** claims to determine whether they disclosed a cause of action. Whether the **Charter** claims meet the required threshold should be addressed by the Chambers judge who can provide reasons, which, if necessary, can be reviewed by this Court.

[3] The statement of claim has, since its initial filing, been amended several times. The most recent amendments were approved by order dated October 28, 2011. This statement of claim, titled the third amended statement of claim, contains in paras. 6 to 9, 30 and 80 to 87 the following:

> 6. The Defendant, the Attorney General of Nova Scotia (Nova Scotia), through the Department of Health ("DOH"), was at all material times the party which determined whether seniors requiring public funding were eligible for admission and subsidized care in nursing homes.
>
> 7. The Defendant, the Minister of Health at the relevant time, was at the material times in office when the wrongful decisions and actions complained of in this Action were first undertaken by DOH.
>
> 8. The Defendant, the Executive Director of the Continuing Care Branch of DOH at all material times was the public official within DOH with executive responsibility for long term care programs and services for seniors, including care in nursing homes.
>
> 9. The term health care costs when used herein, shall without limiting its generality, include salaries, benefits and operational costs of resident care in nursing homes and may be related to: nursing, personal care, social work services and physical, occupational, recreational and other therapies.
>
> 30. The decision to implement the single placement list and assessment process and the later full implementation of the SEA system was made on behalf of the DOH by the Defendant, the Executive Director of the Continuing Care Branch of the DOH, and was expressly approved by the Defendant, the Minister of Health at the relevant time.
>
> 80. The decisions and actions of the Defendants complained of herein have interfered with the Plaintiffs' and Class Members rights to life, liberty and security of the person as guaranteed by Section 7 of the Canadian *Charter of Rights and Freedoms*, Constitution Act, 1982 Schedule B to Canada Act 1982 (U.K.) 1982 c. 11, causing them serious psychological and emotional harm. Such deprivation is not in accordance with the principles of fundamental justice and is not reasonably justified in a free and democratic society.
>
> 81. The Defendants' action forced disabled seniors onto government controlled waiting lists, denied them the right to choose where to live, forced them away from their families, and compelled them to submit to an

intrusive and psychologically stressful financial disclosure. The Defendants caused the Plaintiffs and Class Members to suffer serious state-imposed psychological stress in a manner that breached their right to the security of the person.

82. Choosing where to reside is critical to a person's enjoyment of individual dignity and independence. The Defendants' actions denied the Plaintiffs and Class Members the right to live in a nursing home of their choosing. Under the SEA system, they were denied the right to contract with a residence of their choice. The Defendants affected an important and fundamental life choice of the Plaintiffs and Class Members and thereby breached their right to liberty.

83. The Defendants violated a principle of fundamental justice by using means that unnecessarily and disproportionately interfered with the rights of the Plaintiffs and Class members. Furthermore, their actions were inconsistent with the objectives that lay behind it. Furthermore, the Defendants acted without statutory authority to make a policy which infringed the *Charter* rights of the Plaintiffs and Class Members. The deprivation of liberty and security rights without statutory authority is in breach of the principles of fundamental justice.

84. Section 15.1 of the Canadian *Charter of Rights and Freedoms* guarantees every Canadian the right to equal treatment before and under the law without discrimination based upon, among others, age or mental or physical disability. The actions and decisions of the Defendants complained of herein violated the Plaintiffs' and Class Members' s. 15 rights pursuant to the *Canadian Charter of Rights and Freedoms*. Such deprivation is not reasonably justified in a free and democratic society.

85. The actions of the Defendants have resulted in the Plaintiffs and Class Members receiving unequal treatment before the law and being discriminated against. The Plaintiffs and Class Members suffered from elder age and/or disability such that they required nursing home care. These traits are enumerated grounds protected by *Charter.* Age and/or disability forced the Plaintiffs and Class Members away from their families and into the SEA system. Under the SEA system, they were required to pay for their own health care costs. Others, whose age and/or disability did not force them into the SEA system, had their health care costs universally covered. Their spouses did not have to contribute to their health care costs. The Defendants' policy created a distinction which perpetuated the disadvantages faced by the elderly and/or disabled Class members. The Defendants' policy further stereotyped in a manner that did

not correspond to the actual characteristics or circumstances of the Class Members.

86. The actions of the Defendants also required the Spousal Class to pay for the health care costs of their elder and/or disabled spouses. Members of the Spousal Class were elderly and/or disabled such that they required nursing home care were not required to pay for the health care costs of their spouse. The Defendants' policy created a distinction which perpetuated the disadvantages faced by the Spousal Class. The Defendants' policy further stereotyped in a manner that did not correspond to actual the characteristics or circumstances of the Spousal Class.

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

Background

[4] In their reply submission the defendants outline the background to this proceeding:

3. The Plaintiffs' claim impugns the changes made to nursing home care services in Nova Scotia by the Province during the period between February 1, 2001 and January 1, 2005.

4. One of those changes concerned how prospective nursing home residents entered nursing homes. Before the relevant period, individuals with financial means (private pay residents) could contract directly with nursing homes, while individuals without financial means had to seek government assistance (public pay residents) and were put on a waiting list after completing a physical care assessment and a financial assessment. Under the old system private pay residents were able to secure a placement in a nursing home before a public pay resident with a more urgent need. In effect, private pay residents were able to "jump the queue" ahead of public pay residents. This "Single Entry Access" system ended this disparity by creating one waiting list which required all prospective nursing home residents, whether public pay or private pay, to do both a care assessment and a financial assessment. The Plaintiffs' claims are brought on behalf of the private pay residents who allege that their ability to contract directly with nursing homes is a constitutionally protected right, regardless that the intent and purpose of the Single Entry Assess System was to ameliorate the disadvantage suffered by public pay

> residents with a greater need and less financial means than the private pay residents.
>
> 5. The other central change during the relevant time period concerned the per diem rate charged to nursing home residents. During this period the per diem rate included accommodation costs and "health care costs." Residents of Nova Scotia are covered by the provincial health insurance plan. However, the provincial plan only covers certain "insured services." The same coverage is provided to all Nova Scotians regardless of whether or not they live in a nursing home. However, some services are insured if those services are required while a person resides in a hospital that is not covered if a person resides outside a hospital (in a nursing home or other residence)...It is the cost of these uninsured services that made up the "health care cost" component of the per diem rate.
>
> 6. Public pay residents, because of an inability to pay, received financial assistance from the Province to cover the per diem rate. The class members, or private pay residents, paid the per diem rate themselves because their income or assets were such that they did not qualify for the Province's financial assistance. The effect of the Plaintiffs' *Charter* claims is to seek redress for the fact that their income, assets and ability to financially contribute to their care was relevant to residency in a nursing home.

The Parties

[5] The plaintiffs, citing *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, at para. 45, state that the Supreme Court of Canada has mandated a low threshold in assessing the adequacy of the pleadings in recognition that "a plaintiff should not be 'driven from the judgment seat' at this very early stage unless it is quite plain that his alleged cause of action has no chance of success". Counsel's submission continues:

> 11. The applicable test in determining the viability of a cause of action is whether, assuming all the facts in the pleadings are true and reading the claim generously, is it plain and obvious that no claim exists.
>
> *Hollick v. Metropolitan Toronto (Municipality)*, 2001 CarswellOnt 3577 (S.C.C.), at paras 14 & 25.

[6] The response of the defendants is that where there are multiple defendants, each defendant is entitled to know the case they have to meet. Counsel states:

> ...*Touche Ross Ltd. et. al. v. McCardle et. al.* (1987), 66 Nfld. & P.E.I.R 257 (PEISC), McQuaid J. discussed the purpose of a properly drafted statement of claim...
>
> > The essence of a properly drawn pleading is clarity and disclosure. With respect to a statement of claim in particular, the defendant, or each defendant if there be more than one, must know from the face of the record precisely what case he, or each of them, has to answer. He must not be left to speculate or to guess the particulars of the case alleged against him and of the remedy sought from him. He must not be left to ascertain this through some esoteric process of divination.
> >
> > Perhaps the best test of a well and properly drawn pleading is this, that a stranger to the proceeding, reasonably versed in legal terminology, might pick up the document and upon first reading readily ascertain the particulars of the cause of action, the specific nature of the defendant's alleged breach of duty or other deficiency, the precise nature of the remedy sought and the reason why such a remedy is, in fact, sought. Unless all of this information is patently and readily available on the face of the record, then, it seems to me, the pleading is, itself, defective.

[7] Defence counsel's submission then continues:

> 13. All of the *Charter* claims appear to be against "the Defendants" collectively. The *Charter* pleadings refer variously to "decisions and actions of the Defendants" (para. 80 and 84), "the Defendants' actions" (para. 88). To use the test suggested by MacQuaid J. in *Touche Ross*, a stranger to the proceeding, reasonably versed in legal terminology, would not be able to pick up this statement of claim and know which actions or policies of which defendant were impugned by each *Charter* claim....

[8] Counsel continues by analyzing the statement of claim as it references each of the defendants.

The Executive Director

[9] In respect to the executive director, the defendants note that the pleadings in respect to the *Charter* claims only identify the executive director as one of the

defendants and make no further reference to any action, or inaction, by the executive director. Counsel asks what the executive director would have done in his/her personal capacity that would be different from the actions of the Attorney General, representing the Department of Health.

[10] In reference to "the Defendants' policy" counsel's submission states it is not clear whether this means the policy of the executive director is different than the policy of the Province of Nova Scotia. It is submitted that as no specific action of the executive director is impugned, "no cause of action is disclosed against him".

The Minister of Health

[11] The defendants' submission states that the pleadings also do not make any specific allegations against the Minister with respect to the *Charter* causes of action, stating that it "is not evident how actions or policies of the Minister are alleged to breach any of the plaintiffs' Charter rights." As such the Minister is unable to respond to the *Charter* allegations because it is not possible to identify what specific allegations are made against the Minister.

The Attorney General

[12] Again counsel's submission is that there is no indication what actions or policies of the Attorney General caused breaches of the *Charter*. Counsel says that as the Attorney General does not know the case he has to meet, "the plaintiffs have not satisfied their burden of demonstrating that their pleadings disclose a Charter cause of action against this defendant."

[13] In respect to each of the defendants, counsel says it is also not evident what remedies are being sought against each particular defendant.

[14] The defendants also raise uncertainty as to which of the claimants are asserting which *Charter* claim. Counsel observes that there are two classes of claimants namely a residential class and a spousal class. The submission continues:

> However, the Statement of Claim suggests all *Charter* claims are made by the "class members," or alternately, "the Plaintiffs." At the same time, however, the

> Plaintiffs' Submissions suggests that not all class members share each cause of action:
>
> > 13. It is not necessary that all members of the class share a common cause of action. The shared interest of the various class members need only extend to the resolution of the common issues. Furthermore, "[t]he representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue."
> >
> > 14. It follows that the causes of actions, as they relate to section 7 and 15(1) of the *Charter*, do not have to be applicable to each member of the class in order to be the claims to be certified as part of the class proceeding. Likewise, it is not necessary for the Plaintiffs to demonstrate that each class member shares the same interest in the resolution of the common issues which stem from certified *Charter* claims. (Plaintiffs' Submissions, paras. 13-14) [citations omitted]
>
> It is not evident from the Plaintiffs' Submissions which claims are brought by which class. It is submitted that for this reason, in addition to the others set out in these submissions, the Plaintiffs have not demonstrated that their statement of claim discloses any *Charter* cause of action against any of the Defendants. Their failure in this regard must result in these claims not being certified pursuant to s. 71(a) of the *CPA*.

[15] On oral submission plaintiff's counsel agreed that the *Charter* claims are only being advanced by the residential class.

[16] In response the plaintiff's submission is that the position of the defendants is "incredulous" in suggesting that the defendants are not able to know what actions or policies they are alleged to have breached in respect to each *Charter* claim. The plaintiff's response also states:

> 1. The Plaintiffs' action impugns a policy which required elderly, disabled persons to pay for their own health care costs. It impugns a policy which denied these same persons the right to freely contract and live in a residence of their choosing. The specifics of the policy are pled in great detail.
>
> 2. The action seeks to hold accountable those responsible for the creation and implementation of the impugned policy by pleading that those responsible for the policy breached the Plaintiffs' *Charter* rights. The pleadings allege that the Executive Director, the Minister of Health, and the Department of Health were responsible for the creation and implementation of the policy alleged to have

> infringed on the Plaintiffs' *Charter* rights. This allegation is to be presumed to be true.
>
> ...
>
> 5. For example: the Defendants argue that they cannot determine which of the two classes are asserting the Defendants' policy denied them the freedom to live in a nursing home of their choice.
>
> 6. This argument is based on a restrictive reading of the pleadings. The statement of claim, when "read as a whole", would make it readily apparent to "a stranger to the proceeding, reasonably versed in legal terminology" that this allegation is applicable only to those Class Members who were required to live in nursing homes (the Residential Class). Failing to explicitly state the obvious does not make it "plain and obvious" that the claim will fail.

[17] The entitlement of parties to know the claims being made against them has been recognized in the number of cases. In *Mazzeo v. Kingston (City)*, (1996) O.T.C. 105, 1996 CarswellOnt 2210, Chadwick J. of the Ontario Court of Justice (General Division), on a motion to strike a statement of claim, observed at para. 18:

> The prayer for relief is vague and incoherent. By reading the prayer for relief one is unable to understand the nature or amount of the claims and against which defendants.

[18] In *Iovate Health Sciences Inc. v. NxCare Inc*., [2007] O.J. No. 4498, Allen J., of the Ontario Superior Court of Justice, on a motion to strike paragraphs in a statement of claim, stated at paras. 25 to 26:

> 25 Iovate argues the pleadings are sufficiently particularized to satisfy Rule 25.06 and points out the courts have held that on a motion to strike pleadings, pleadings should be read liberally and not be held to an unreasonable standard of clarity. I find, however, a liberal reading should not go so far as to rule out the necessity that it be clear to each defendant, from the face of the statement of claim, the particulars of the claims against them.
>
> 26 I agree with the Defendants that the allegations against the Former Employees in the impugned Paragraphs are broad and sweeping and contain no particular factual allegations against any of them individually. While Paragraph 36 contains a list of the types of confidential information allegedly misappropriated, it is not clear from the pleadings which particular employee is

> alleged to have misappropriated which confidential information and the use to which any particular employee might have put the confidential information. Neither could any of the Former Employees ascertain from the pleadings which remedy is sought against them in particular.

[19] To similar effect, Orsborn J. of the Newfoundland Supreme Court, Trial Division, in *Paragon Information Systems Inc. v. Hann*, [1998] N.J. No. 6, 159 Nfld. & P.E.I.R. 29, on a motion to strike the statement of claim as against the defendant corporation, commented at para. 18:

> 18 The statement of claim should also distinguish between defendants so that any particular defendant is not left to speculate on which claim it may be required to file a response.

[20] Orsborn J. again reviewed the necessity for parties to know the claims being made against them in *McNamara Construction Co., a division of Tarmac Canada Inc. v. Newfoundland Transshipment Ltd.*, [1999] N.J. No. 10, 172 Nfld. & P.E.I.R. 208, at paras. 14-15:

> 14 A primary purpose of pleadings is to enable the responding party to understand the case that is to be met - the essential allegations of fact and the legal claims asserted on the basis of such facts.
>
> 15 In *Petten v. E.Y.E. Marine Consultants (1994)*, 120 Nfld. & P.E.I.R. 313 (Nfld. S.C., T.D.), Green, J. (as he then was) spoke of the importance of clarity in pleadings. At pp. 340 - 341:
>
> > The basic notion behind rules 14.03, 14.11 and 14.24 is that pleadings should be so framed that they contain all material facts in a sufficiently clear, organized and concise form such that all the constituent elements of each cause of action being alleged are set out. The defendant is entitled to know the causes of action to which he or she must respond and the nature of the factual basis upon which each of the causes of action is alleged to be founded. This is merely an exemplification of one of the general themes of the Rules: conduct of proceedings must be characterized by disclosure so that other parties will not be taken by surprise. The defendant must not be left to speculate or guess the particulars of the case alleged against him or her or of the remedy sought: *Genge v. F.B.D.B.* (1990), 85 Nfld. & P.E.I.R. 275; 266 A.P.R. 275 (Nfld. T.D.).

> A corollary of these notions of clarity, conciseness and particularity is that, particularly in cases of multiple parties and multiple causes of action, the material facts must be pleaded in such a away that the defendant will be able to discern what facts are alleged to support which causes of action in favour of which parties. Again, the defendant must not be left to speculate as to whether particular factual allegations are relevant to one claim and not to another. In *Davey v. Garrett* (1878), 7 Ch.D. 473 (C.A.). Thesiger, L.J., expressed it thus at p. 489:
>
> > ... in any properly constituted system of pleading, if alternative cases are alleged, the facts ought not to be mixed up, leaving the defendant to pick out the facts applicable to each case; but the facts ought to be distinctly stated, so as to shew on what facts each alternative of the relief sought is founded."
>
> And at p. 186, James, L.J., said:
>
> > ...a defendant may claim *ex debito, justitiae* to have the plaintiff's case presented in an intelligible form, so that he may not be embarrassed in meeting it.""

[21] He then continued by citing the excerpt from McQuaid J. in *Touche Ross Limited v. McCardle*, *supra,* referred to above.

[22] Notwithstanding that on a motion to strike (or in this instance, on a motion to assert that the pleadings disclose a cause of action for purposes of certification as a class action) it is assumed that the facts in the pleadings are true, and the pleadings are to be read liberally, it remains necessary that each defendant know what they are alleged to have done, or not have done, as well as the legal basis of any claim made against them and the remedy being sought against them. It is not for the defendants to speculate on what the plaintiffs are alleging in respect to them.

[23] In paragraphs 6 to 8 and paragraph 30 of the statement of claim, the plaintiffs say that the Attorney General of Nova Scotia through the Department of Health was at material times the party that determined whether seniors requiring public funding were eligible for admission and subsidized care in nursing homes; that the Minister of Health was in office when the wrongful decisions and actions complained of were first undertaken by the Department of Health; and, at all material times the Executive Director was the public official within the Department

of Health responsible for long-term care programs and services for seniors, including care in nursing homes. The decision to implement and employ the single placement list and assessment process was made on behalf of the Department of Health by the Executive Director and was expressly approved by the Minister of Health. In oral submission, plaintiff's counsel says these are the actions by each of the defendants which breached the plaintiffs s. 7 and s. 15 *Charter* rights. Counsel says that on an application to determine adequacy of the pleadings, not only are the facts pled assumed to be true, but the claim is to be read generously. In this regard, they are to be read generously in respect to whether the claims against each of the individual defendants have been sufficiently particularized to meet the onus resting on the plaintiffs.

[24] Recognizing the onus resting on the plaintiffs, on a motion to certify a cause of action as a class action under the Act, I am satisfied that the claims against each of the individual defendants have been sufficiently identified in the statement of claim.

General

Section 7

[25] Section 7 reads:

> Life, liberty and security of person
>
> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[26] Citing *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 as authority, the plaintiffs say that their right to life, liberty and security of the person has been breached. In *Godbout*, *supra.*, the municipality by resolution required that all new permanent employees of the city had to live within the boundaries of the municipality as a condition of employment. Justice LaForest, in providing reasons of himself, and Justices L'Heureux-Dube and McLachlin (as she then was), held that the right to choose where to establish one's home falls within the scope of the liberty interest guaranteed by section 7 of the *Charter*. The remaining six members

of the court declined to determine whether section 7 was applicable, reaching a similar conclusion on the basis that there had been an infringement of section 5 of the *Québec Charter of Human Rights and Freedoms,* R.S.Q., c. C-12.

[27] Essentially the plaintiffs say that the creation of this single tier entry for admission to nursing homes meant that they were required to accept the first nursing home that became available to them, regardless of its location and regardless of whether there were nursing homes more convenient to their residence. As such they were denied the right to choose where to reside.

[28] The defendants say that *Godbout, supra.*, is here not applicable. No one, the defendants say, is being forced into any particular nursing home. Rather, all persons who wish to be accommodated and meet the requirements for admission to a nursing home are placed on a single list, to which the same criteria is applied. Also, an individual does not have to accept the offered placement.

[29] Effectively, those persons with private resources who could previously contract independently with a nursing home have now lost that advantage and are placed in the same situation as those persons who lack the personal financial resources but also required the services available in the provincial nursing homes. Everyone, in the defendant's submission, regardless of their financial resources, is being treated the same. As space becomes available in a nursing home, the next person on the list is offered admission.

[30] In my view this does not equate, in any way, with the circumstances in *Godbout, supra,*, where in order to work for the municipality it was necessary to reside within the municipality. The plaintiffs have not met the onus of establishing a potential section 7 claim for the purposes of certification within the class proceeding.

[31] In paragraph 80 the plaintiffs assert that the right to "life, liberty and security of the person" had been interfered with and this has caused them serious psychological and emotional harm. As there is no basis, at least in the statement of claim as presently amended, to maintain a section 7 breach on the basis of a denial of the plaintiffs' right to liberty, I am also not satisfied that there is any basis for either an interference with the "right to liberty" or "security of the person" in any of the circumstances set out in the statement of claim. The liberty interests of the plaintiffs were certainly not affected by anything done by any of the defendants, at

least, as appears in the present statement of claim. In paragraph 81 the plaintiffs assert that they have suffered "serious psychological and emotional harm" by being compelled "to submit to an intrusive and psychologically stressful financial disclosure." Even accepting this as true, for purposes of analyzing whether they have met the onus under section 7(1)(a) of the Act, no basis is asserted as to why this has resulted in the plaintiffs having suffered an interference with their "security of the person". In view of the fact that what was required of them was no different than what was required of all applicants for admission into nursing homes, and recognizing that individuals vary on how they respond and are affected by being required to submit to financial disclosure, no basis was suggested as to why for these plaintiffs there had been a violation of their section 7 *Charter* rights by being required to provide personal information that all other applicants were also required to provide.

[32] In written submissions the plaintiffs suggested that if a violation of liberty and/or security of the person was found, then the question of whether the deprivation had been in "accordance with the principles of fundamental justice" could be determined as this proceeding continued, through disclosure and discovery. In response, the defendants state that the pleadings must rely on the facts alleged rather than on facts to be discovered at some later stage of the proceedings. In support of this proposition they cite *City National Leasing Ltd. v. General Motors of Canada Ltd.*, (1984), 45 C.P.C. 174 (Ont. S.C.) at p. 179, where the plaintiffs had argued that certain facts might come out during discovery:

> That argument is not valid. The statement of claim, itself, must disclose a cause of action and cannot rely on facts that are not alleged but might be discovered at some later stage of the proceedings.

[33] The claim for breach of section 7 of the *Charter* is therefore not certified.

Section 15

[34] Section 15 reads:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[35] The defendants, in their prehearing submission, state that the analytical framework for a section 15(1) violation is as outlined in *R v. Kapp*, 2008 SCC 41, at para 17:

> ...(1) Does the law creates a distinction based on enumerated or analogous ground*?* (2) Does the distinction created disadvantaged by perpetuating prejudice or stereotyping?

[36] The defendants interpret the plaintiffs' claims in respect to a violation of section 15(1) as arising from the policy of requiring the plaintiffs to pay their healthcare costs while others had their own care costs subsidized by the Province. As such, they say, the differential treatment relates to the ability of the nursing home resident to pay, which they say is neither an enumerated or analogous ground. They also observe that a program benefit intended to ameliorate the disadvantaged may be protected pursuant to section 15(2). Counsel refers to *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37. In their submission counsel summarizes the decision in *Cunningham*, as confirming that s. 15(2) permits governments to assist individual groups without being paralyzed by the necessity of providing the same assistance to all. Ameliorative programs, by their very nature, confer benefits on one group that are not conferred on others.

[37] The defendants also say that the plaintiffs have not pled a stereotype or prejudice sufficient to satisfy the second stage of the *Kapp* analysis. They interpret the plaintiffs position as claiming, as a disadvantage, the fact that they do not receive the same financial assistance as do the public pay residents of nursing homes. This submission includes the assertion that the plaintiffs have not pled any fact which indicates how not receiving financial assistance perpetrates a prejudice or a stereotype resulting in discrimination.

[38] The plaintiffs, on the other hand, say the defendants have got it wrong. The differential treatment they are saying violates section 15(1) is based on age and/or disability. Persons who were not elderly and/or disabled such that they required nursing home care had their health care costs universally covered, while persons in

the position of the plaintiffs, requiring residence and receiving nursing home care, were required to pay their own health care costs. This submission asks, "(W)hy did persons, not needing nursing home care, have their healthcare costs covered, while persons in need of nursing home care had to pay?"

[39] The plaintiffs say that the defendants have misunderstood their claim and have incorrectly interpreted the distinction as being based on financial status. The disadvantage alleged is not the failure to receive financial assistance but rather the "mandated payment of health care costs which non-nursing residents had universally covered." Essentially the submission is that the distinction is based on age and/or disability, in respect to those for whom nursing home care is necessary, and that both of these are enumerated grounds protected by the *Charter*. Age and/or disability forced the plaintiffs and class members into a system under which they were required to pay their own health care costs. Others, whose age and/or disability did not force them into nursing homes had their health care costs universally covered. The policy thereby created a distinction which perpetuated the disadvantages faced by the elderly and/or disabled class members.

[40] In an earlier submission, counsel for the plaintiffs stated that "(u)nder the SEA system, the DOH failed to pay healthcare costs on behalf of private pay seniors." Later, in the same submissions, counsel states, "(t)his lawsuit seeks a remedy for private pay seniors who were unlawfully required to pay healthcare costs . . . ". It is clear that the distinction by the plaintiffs is not between the private pay residents and the public pay residents but rather between the private pay residents who were required to pay healthcare costs that others, who were not residents of nursing homes, were not required to pay.

[41] In their submissions the defendants ask, where in the statement of claim is it alleged which healthcare costs the plaintiffs were required to pay that others did not have to pay. The plaintiffs respond that in paragraph 9 of the statement of claim they use the term “healthcare costs”, which includes salaries, benefits and operational costs of resident care in nursing homes, “and may be related to: nursing, personal care, social work services and physical, occupational, or recreational and other therapies.”

[42] For purposes of determining whether the plaintiffs have met the onus, in respect to establish a potential cause of action relating to a breach of section 15 of the *Charter*, I am satisfied that the plaintiffs have identified the potential healthcare

costs that they say they were required to pay while others, whether or not they also were elderly and/or disabled, but not residing in nursing homes, were not required to pay.

The Remedy

[43] In the statement of claim, in paragraph 89, a number of claims of relief are made against the defendants, without indicating whether some of the *Charter* claims only relate to some of the defendants. Since each defendant is entitled to know the claims for relief being made against them, the statement of claim as presently drafted did not meet this requirement. However, counsel indicated that they would prepare an amendment stipulating the relief being claimed against each defendant, in respect to the *Charter* claims. Counsel for the plaintiffs agreed to submit a fourth amended statement of claim, to be filed and consented to as to form by defence counsel, stipulating the remedies in respect to each of the *Charter* claims. As a consequence I am satisfied that the fourth amended statement of claim will discloses a potential cause of action under s. 15(1) of the *Charter*.

Conclusion

[44] The cause of action alleging breach of s. 7 of the *Charter* is not certifiable under the Act.

[45] The cause of action alleging breach of s. 15(1) of the *Charter* is certified for the purposes of this proceeding as a class action.

[46] Judgment accordingly.

MacAdam, J.