

Action No.

IN THE COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL CENTRE OF CALGARY

BETWEEN:

**William Lloyd Murray, on behalf of himself and all of those members of a class  
having a claim against the Defendants**

Plaintiff

-and-

**Her Majesty the Queen in Right of Alberta as represented by the Minister of  
Health, the Calgary Health Region and John Doe and Jane Doe**

Defendants

**STATEMENT OF CLAIM**

**Nature of the Claim**

1. The Plaintiff brings this action on behalf of himself and the class as defined herein for declaratory relief and damages as a result of the Defendants' failure to provide access to public health care to him and the other members of the Class, in combination with the Defendants' statutory and other prohibitions on obtaining access to reasonable treatment alternatives outside of this system.

**The Parties**

2. The Plaintiff is an individual resident in the City of Calgary, Alberta.
3. The Defendant the Attorney General of Alberta on behalf of Her Majesty the Queen in Right of Alberta as represented by the Minister of Health ("Alberta Health") was at all material times under a public and statutory duty and assumed both operational and

policy responsibilities for providing adequate access to needed health services in the administration of the *Canada Health Act*.

4. The Calgary Health Region (“CHR”) is a regional health authority established pursuant to the *Regional Health Authorities Act*, R.S.A. 2000, c. R-10, as amended.
5. John Doe and Jane Doe (“the Bureaucrats”) are employees or agents of the CHR who were, at all material times, under a duty to ensure public access including access to all Albertans including the Plaintiff and the other Class Members, for needed publicly funded health care facilities operated by the CHR under funding provided by Alberta Health. The identities of the Bureaucrats, or any of them, is not currently known to the Plaintiff. CHR is vicariously liable for the actions and inactions of the Bureaucrats as described herein

### **The Class**

6. The Plaintiff brings this action on behalf of himself and all of those individuals resident in Alberta who during the Class Period:
  - a. were more than 55 years of age as of the date of any Access Denial (as defined herein);
  - b. were unable to obtain publicly funded hip resurfacing surgery in Alberta, as a result of any Access Denial;
  - c. were effectively prevented by provincial statute from obtaining access to this surgery outside of the government’s public health care monopoly; and
  - d. incurred, or hereafter will incur damages, including travel expenses, medical costs, rehabilitation costs and other special damages as a result of the Access Denial,

as set out in section 17 of the *Class Proceedings Act*. The period of August 4, 2004 to August 4, 2006 is the “Class Period”.

## **Background**

7. On or about May, 2003 the Plaintiff was encountering severe and worsening pain in his left hip. He was referred by his family physician to a specialist, Dr. J. Mackenzie who was asked to investigate deterioration in his left hip. In early 2004, or about 10 months later, the specialist diagnosed severe osteoarthritis in his left hip and urged that hip replacement or hip resurfacing surgery was needed in order to permit the Plaintiff to resume ordinary activities and obtain pain relief.
8. Traditionally, patients similarly situated to the Plaintiff have required traditional hip replacement surgery, which involves the removal of a portion of the thigh bone of the patient. As a result, traditional hip replacement surgery works less well in a younger or more active patient. As a result of the loss of more of the patient's bone, future revisions or surgeries become more difficult, and much rehabilitation is required to permit a return to activities, yet there is almost a certainty of a decrease in unrestricted activity and the new replaced hip can frequently dislocate.
9. Upon becoming aware of the shortcomings of traditional hip replacement surgeries, the Plaintiff requested a resurfacing procedure using the Birmingham prosthesis (the "Birmingham Procedure"), being a less invasive procedure pioneered in Birmingham, U.K., some 13 years ago. The resurfacing procedure involves the removal of much less bone, with only the diseased joint portion removed and the remaining portion then resurfaced with a metal cap, which then articulates with other metal within the hip joint.
10. At all material times, the Plaintiff desired, and was willing and able, to purchase adequate medical insurance to provide timely access to necessary services, but was prevented from doing so by legislation, described below.

## **The Claims**

### ***(a) Private Health Care Surgical Costs regarding left hip***

11. The Plaintiff sought to have his specialist perform the Birmingham Procedure on his left hip, but was advised by Dr. Mackenzie that the CHR had determined that the said procedure could not be performed as it was not a procedure authorized by the CHR. The Plaintiff was further advised that the decision not to permit the Birmingham Procedure was under review by a surgical committee of the CHR, on which the Bureaucrats were sitting.
12. On or about August 10, 2004, the Plaintiff was advised by Dr. Mackenzie of the decision of the Bureaucrats, and the CHR, was that only patients that were less than 55 years of age were authorized to receive the Birmingham Procedure. This decision (“the Access Denial”) was made for discriminatory reasons based on age, and not for any medical or surgical reasons based on the Plaintiff’s medical condition. The Plaintiff was born March 1, 1947 and was at the time of the Access Denial 57 years of age.
13. The Plaintiff was advised by his treating surgeon that apart from the CHR decision, there was no medical or surgical reason to deny access to the Birmingham Procedure. The Plaintiff was suggested to attend at the Health Resource Centre (“HRC”) in Calgary, Alberta, provided that the Plaintiff pay the surgical costs of the Birmingham Procedure. Without a publicly funded alternative, yet with the medical opinion being that the Birmingham Procedure was the best outcome from a medical position, the Plaintiff paid for the cost of the Birmingham Procedure on October 26, 2004.
14. HRC was, and is, a privately operated surgical facility whose publicly funded surgery is provided, in respect of authorized surgical procedures, from CHR, who in turn is funded by Alberta Health.

15. The costs incurred by the Plaintiff in paying for the Birmingham Procedure total \$22,456 in surgical costs and \$500 in post-operative physical therapy costs. Had CHR agreed to permit the Birmingham Procedure to be performed at a public facility, the Plaintiff would not have incurred these costs. The Defendants, in forcing the payment of the surgical costs by the Plaintiff, acted unlawfully. The Plaintiff has suffered damages as a result.

***(b) Cancellation of hip resurfacing surgery on right hip***

16. Subsequent to October 26, 2004 and his left hip surgery, the Plaintiff discussed his worsening pain in his right hip with Dr. J. Mackenzie. On March 23, 2005 the patient attended on Dr. Mackenzie who then determined that a Birmingham Procedure would be completed on the Plaintiff's right hip, with such procedure to be carried out at the HRC on April 26, 2005.
17. Subsequent to March 23, 2005 and in anticipation of the completion of that procedure, the Plaintiff paid the sum of \$22,500.00 to HRC, being the cost of the Birmingham Procedure, and knowing of the refusal of the CHR to pay for the cost of such procedure, as set out above.
18. On or about April 19, 2005, or within a week of the scheduled date of the Birmingham Procedure on the Plaintiff's right hip, he was advised by Dr. Mackenzie the procedure had been cancelled by the HRC without reasons. The Plaintiff immediately contacted HRC, who advised by HRC that Alberta Health had directed a change and sent an edict by letter to HRC that HRC stop the Birmingham Procedure for patients over the age of 55, regardless of whether the costs of such surgical procedure were paid by Alberta Health or the patient. This refusal, directed without lawful authority by Alberta Health and CHR, marked a second Access Denial.

19. Following this second Access Denial, and in early May, 2005 the Plaintiff contacted a skilled surgeon and initial originator of the Birmingham Procedure, a Mr. Treacy in Birmingham, U.K., in order to determine any medical reasons for the Access Denial. At Mr. Treacy's request, the Plaintiff completed a health questionnaire and forwarded copies of x-rays of his hips for review. Mr. Treacy is one of the two co-developers of the Birmingham Procedure and has conducted several thousand such surgeries.
20. After review of the submitted material, the Plaintiff was advised by Mr. Treacy that he was a candidate for the Birmingham Procedure. After the completion of the necessary medical information forms the patient was booked for surgery to be completed by Mr. Treacy at the Priory Hospital in Birmingham U.K., on May 24, 2005, with all associated travel expenses and surgical costs to be paid for at the Plaintiff's own cost.
21. Prior to May 24, 2005 the patient cancelled the surgery in the U.K., instead electing to proceed within Canada as detailed below.

***(c) The Out of Province Services Claim***

22. In late July, 2005 the Plaintiff was referred by his orthopaedic specialist, Dr. J. MacKenzie, to a waiting list for hip resurfacing surgery. Subsequently, the Plaintiff was scheduled for a Birmingham Procedure to occur on October 6, 2005 at the Peter Lougheed Centre, a public hospital in Calgary, Alberta operated by the CHR.
23. Thereafter, the Plaintiff was advised that the CHR would agree to fund the Birmingham Procedure on his right hip with the procedure being performed in Calgary at the HRC, and that the procedure could be conducted on August 30, 2005 (the "Surgical Date").

24. In preoperative preparation prior to the surgical date, the Plaintiff was asked to, and did attend pre-operative procedures including blood tests, x-rays and EKG and various informational sessions as directed by the HRC. The Plaintiff was asked for, and did, adjust his personal and business commitments to permit the surgery on his hip to occur as scheduled at 8:00 am on August 30, 2005.
25. At approximately 2045 hours on August 29, 2005, the Plaintiff was called at home by his orthopaedic specialist, Dr. J. Mackenzie and advised that CHR had cancelled his scheduled surgery, since he did not qualify to undergo the surgery, as he was in excess of 55 years of age.
26. Upon further investigation, HRC advised the Plaintiff that the CHR, Alberta Health, and the Bureaucrats, had determined that it would not pay for the right hip Birmingham Procedure, and therefore that the Plaintiff could not have any procedure performed, even at his own cost, and despite the fact that the success of the left hip Birmingham Procedure and the medical opinion from the originator of the said procedure all showed the Plaintiff was an acceptable candidate for surgery. This refusal marked a third Denial of Access.
27. As a result of this Access Denial, the Plaintiff traveled to Montreal, Quebec and had a hip resurfacing using the Depuy ASR prosthesis performed on October 28, 2005. The costs incurred by the Plaintiff in paying for the surgery in Montreal total \$15,514.83 in travel and accommodation costs, \$5,074.19 in surgical costs, \$500 in post-operative physical therapy costs, all arising from the cancelled surgery in Calgary. Had CHR agreed to permit the Birmingham Procedure to be performed at a public facility, none of the costs of the Plaintiff would have been incurred. The Defendants, in forcing the payment of the surgical costs by the Plaintiff, acted unlawfully. The Plaintiff has suffered damages as a result.

***(d) Inability to Access Medical Insurance***

28. The *Alberta Health Care Insurance Act* RSA 2000 c.A-20 prohibits the provision of commercial insurance for basic health services to Alberta residents, including the Class Members, for which coverage is provided by Alberta Health. Albertans, including the Plaintiff and the other members of the Class are thus effectively prevented from accessing health care outside of the government-run system.
29. The legislated absence of insurance coverage for medical treatment, the lack of available insurance coverage for medical treatment, accompanied by the refusal of Alberta Health to fund Birmingham Procedure treatment, effectively prevents access to treatment except at great personal expense, forcing the Plaintiff and other Class members to pay for health care services out-of-pocket within Alberta or by traveling to another jurisdiction, or both, or alternatively, causes yet another, fourth Access Denial.
30. The constitutional rights contained in Section 7 of the Canadian Charter of Rights and Freedoms (“Charter”) guarantees the Plaintiff and the other Class Members rights to life, liberty, and security of the person. The refusal of CHR and Alberta Health to provide timely access to medical treatment for himself and other members of the Class, alongside provisions of the Alberta Health Care Insurance Act which restrict access to treatment alternatives, deprive the Class members of their life, liberty, and security of the person in a manner not in accordance with the principles of fundamental justice.
31. Further, the constitutional rights contained in Section 15 of the Charter guarantee equality before and under the law and the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on age or mental or physical disability. The refusal of Alberta Health and CHR to provide timely access to



medical treatment for himself and members of his class, alongside provisions of the *Alberta Health Care Insurance Act* and other legislation which restrict access to treatment alternatives, unlawfully discriminate against the Class Members solely because of their age.

32. The Plaintiff and other Class members, and members of the general public in Alberta, even if they have the means to be able to purchase adequate medical insurance to guarantee timely access to quality health care, are prevented from doing so by legislation. That is unconstitutional.
33. The trampling of the rights of the Plaintiff and the other Class Members as set out above cannot be upheld as demonstrably justified in a free and democratic society.
34. The Plaintiff pleads and relies on the provisions of the *Class Proceedings Act*, the Canadian Charter of Rights and Freedoms, in particular section 7 and 15, the *Alberta Health Care Insurance Act* RSA 2000 c.A-20, the *Alberta Bill of Rights Act*, RSA 2000, c.A-14, and the *Health Care Protection Act*, RSA 2000 c.H-1.
35. In Plaintiff proposes the trial of the within action to occur in Calgary, Alberta. In the opinion of the Plaintiff, the common issue trial in the within action will not take more than 25 days to try.

WHEREFORE THE PLAINTIFF, ON HIS OWN BEHALF AND FOR THE MEMBERS OF THE CLASS, CLAIMS AGAINST THE DEFENDANTS, jointly and severally:

- a. A declaration that the Access Denial based on a patient's age is contrary to the Charter and unconstitutional;
- b. A certification of the within proceedings and a declaration of a "no cost" regime as against the Plaintiff, because this action is public interest litigation seeking the determination of constitutional rights as they apply to the general public;

- c. A declaration that the statutory prohibition on the purchase of private insurance for basic health services provided by Alberta Health, is contrary to the Charter and unlawful;
- d. A declaration that the relevant sections of the *Alberta Health Care Insurance Act* and the *Health Care Protection Act* which create a *de facto* government monopoly over the provision of necessary health care services to Albertans be declared unconstitutional and of no force and effect;
- e. An Order to declare that any decision to cause or contribute to an Access Denial purported to have been made by the Defendants and affecting a patient's human dignity, health, life, liberty and security of the person are unconstitutional and of no force and effect;
- f. Damages in the amount of those incurred to the date of this action, or hereafter incurred by any Class Member, including travel expenses, medical costs, rehabilitation costs and other special damages as a result of the Access Denial;
- g. General Damages for negligence and abuse of public office in an amount to be determined at trial;
- h. Costs; and
- i. Such further and other relief as this Court may deem just and fit.

**DATED** at the City of Calgary, in the Province of Alberta, this 4<sup>th</sup> day of August, 2006, **AND DELIVERED** by **SHEA NERLAND CALNAN LLP**, Barristers and Solicitors, 2800, 715 - 5th Avenue S.W. Calgary, Alberta T2P 2X6, solicitors for the within Plaintiff whose address for service is in care of his said solicitors.

ISSUED out of the Office of the Clerk of the Court of Queen's Bench of Alberta, Judicial Centre of Calgary, this 4<sup>th</sup> day of August, 2006.

Clerk of the Court

---

## NOTICE

### To the Defendant(s):

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 Calgary, 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.

**WARNING:** If you do not do both things within 15 days, you may automatically lose the law suit. 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.

Action No.

2006

---

IN THE COURT OF QUEEN'S  
BENCH  
OF ALBERTA  
JUDICIAL CENTRE OF CALGARY

---

BETWEEN:

**William Lloyd Murray, on behalf of  
himself and all of those members of a  
class having a claim against the  
Defendants**

Plaintiff

-and-

**Her Majesty the Queen in Right of  
Alberta as represented by the Minister of  
Health, John Doe, Jane Doe and the  
Calgary Health Region**

Defendants

---

### STATEMENT OF CLAIM

---

This Statement of Claim is issued by **Shea  
Nerland Calnan LLP**, Solicitors for the  
Plaintiff who resides at Calgary, Alberta and  
whose address is at:

2800, 715 - 5th Avenue S.W.  
Calgary, Alberta T2P 2X6

Attention: Norman D. Anderson/  
James G. Shea  
Telephone: (403) 299-9600  
Facsimile: (403) 299-9601

and is addressed to the Defendants who (so  
far as known to the Plaintiff) reside at  
Calgary, Alberta.

File No. 1-15197