

Court File No.

CV-15539424

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

ONTARIO MEDICAL ASSOCIATION

Applicant

- and -

**ONTARIO (MINISTER OF HEALTH AND LONG-TERM CARE)
and LIEUTENANT GOVERNOR-IN-COUNCIL OF ONTARIO**

Respondents



NOTICE OF APPLICATION

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing on a date and time to be fixed by the Registrar at the place of hearing requested by the applicant. The applicant requests that this application be heard at the City of Toronto.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but not later than 2 days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN 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 October 29, 2015

Issued by



Local registrar

Address of court office Ontario Superior Court of Justice
393 University Avenue, 10th Fl.
Toronto, ON M5G 1E6

TO: **Ministry of Health and Long-Term Care**
Legal Services Branch
56 Wellesley Street West, 8th Floor
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AND TO: **The Attorney General of Ontario**
Crown Law Office – Civil
720 Bay Street, 8th Floor
Toronto, ON M5G 2K1

AND TO: **The Attorney General of Ontario**
Constitutional Law Branch
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AND TO: **The Attorney General of Canada**
Suite 3400, Exchange Tower
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APPLICATION

1. The Applicant, the Ontario Medical Association (“OMA”), makes application for:
 - (a) A declaration that the failure to establish a binding dispute resolution mechanism to settle bargaining disputes between the Minister of Health and Long-Term Care (the “Minister”) and the OMA in respect of physician compensation and related accountabilities, and/or the Minister’s decision to refuse the OMA’s request for such a mechanism, violate section 2(d) of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”), and that these violations are not saved by section 1 of the *Charter*;
 - (b) A declaration that sections 1(1) and 37.9 of Regulation 552, made under the *Health Insurance Act*, R.S.O. 1990, c. H.6 (the “*HIA*”), as amended by Ontario Regulation 15/15, and/or the decision to unilaterally impose the reduction in fee-for-service and non-fee-for-service payments to physicians associated with this regulatory amendment, violate section 2(d) of the *Charter*, and that these violations are not saved by section 1 of the *Charter*;
 - (c) A declaration that sections 1(1) and 37.9 of Regulation 552, as amended by Ontario Regulation 15/15, and the associated payment reductions, are unconstitutional and of no force and effect;
 - (d) A declaration that sections 1(1), 37.10, and 37.11 of Regulation 552, as amended by Ontario Regulations 283/15, 302/15, and 303/15, and/or the decision to unilaterally impose the reduction in fee-for-service and non-fee-for-

service payments to physicians associated with this regulatory amendment, violate section 2(d) of the *Charter*, and that these violations are not saved by section 1 of the *Charter*;

- (e) A declaration that sections 1(1), 37.10, and 37.11 of Regulation 552, as amended by Ontario Regulations 283/15, 302/15, and 303/15, and the associated payment reductions, are unconstitutional and of no force and effect;
- (f) A declaration that the amendments dated January 15, 2015 and September 28, 2015 to the document published by the Ministry of Health and Long-Term Care (“Ministry”) titled “Schedule of Benefits - Physicians Services under the *Health Insurance Act* (October 1, 2005)” (the “Schedule of Benefits”), and/or the decision to unilaterally make such amendments, violate section 2(d) of the *Charter*, and that these violations are not saved by section 1 of the *Charter*;
- (g) A declaration that the amendments dated January 15, 2015 and September 28, 2015 to the Schedule of Benefits are unconstitutional and of no force and effect;
- (h) A declaration that the Minister’s decision to modify the “Managed Entry” process for Primary Care Patient Enrollment Models effective June 1, 2015 violates section 2(d) of the *Charter*, and that this violation is not saved by section 1 of the *Charter*;

- (i) A declaration that the modifications to the “Managed Entry” process for Primary Care Patient Enrollment Models effective June 1, 2015 are unconstitutional and of no force and effect;
- (j) A declaration that the Minister’s decision to implement the “New Graduate Entry Program” (announced October 23, 2015) violates section 2(d) of the *Charter*, and that this violation is not saved by section 1 of the *Charter*;
- (k) A declaration that the “New Graduate Entry Program” is unconstitutional and of no force and effect;
- (l) A declaration that the Minister is required under section 2(d) of the *Charter* to engage in a process of collective bargaining with the OMA on behalf of Ontario physicians in respect of physician compensation;
- (m) A declaration that the Minister has breached his agreement with the OMA called the “OMA Representation Rights and Joint Negotiation and Dispute Resolution Agreement” (the “Representation Rights Agreement”);
- (n) An order that the Minister establish a system of binding dispute resolution to resolve bargaining impasses between the Ministry and OMA in respect of physician compensation and related accountabilities;
- (o) An order that the Minister establish a binding dispute resolution process to determine physicians’ entitlement to compensation for their losses resulting from the Minister’s unlawful conduct, or, in the alternative, damages or such

other relief under section 24(1) of the *Charter* as this Honourable Court deems just;

- (p) The costs of this application; and
- (q) Such further and other relief as counsel may advise and this Honourable Court deems just.

2. The grounds for the application are:

I. The OMA's Representation of Members of Ontario's Medical Profession

- (a) The OMA is a not-for-profit corporation incorporated under the Ontario *Corporations Act*, R.S.O. 1990, c. C.38. It has represented the economic, clinical, and political interests of members of Ontario's medical profession since it was founded as a voluntary association in 1880. At present, the OMA has over 37,000 members, the majority of whom are practicing physicians;
- (b) One of the OMA's primary activities and, in fact, one of its principal reasons for existence, is the negotiation and implementation of Physician Services Agreements ("PSA"). PSAs are negotiated agreements between the OMA and the Minister that establish many important working terms and conditions for the OMA's members. One of the most important terms that the OMA and the Minister negotiate and establish in PSAs is the funding to compensate physicians for providing services to the people of Ontario;

- (c) Ontario physicians may only be compensated for providing insured services to insured persons by the Ontario Government, either directly by the Ontario Health Insurance Plan or indirectly by public hospitals.
- (d) Notably, the Minister has negotiated every past PSA *exclusively* with the OMA. Historically, the OMA has also been Ontario physicians' exclusive representative in respect of issues related to the Schedule of Benefits, which establishes the price for physicians' service under the Ontario Health Insurance Plan, and the other programs under which payments are made to physicians for providing medical services to the public. The OMA established the original Schedule of Fees upon which the Schedule of Benefits was based;
- (e) The OMA's status as the exclusive representative of Ontario physicians is recognized in the Representation Rights Agreement, the *Commitment to the Future of Medicare Act, 2004*, S.O. 2004, c. 5, and the *HIA*;

II. The Minister's Refusal to Negotiate with the OMA

- (f) The OMA and the Minister entered into the Representation Rights Agreement in late 2012. Notably, this was prior to the Supreme Court of Canada's January 2015 decisions in *Mounted Police Association of Ontario v. Canada (Attorney General)*, *Meredith v. Canada (Attorney General)*, and *Saskatchewan Federation of Labour v. Saskatchewan*;

- (g) The Representation Rights Agreement requires the Minister to consult and negotiate in good faith with the OMA for the purpose of entering into PSAs to establish physician compensation and related accountabilities;
- (h) The Representation Rights Agreement also establishes a Joint Process of Facilitation - Conciliation in respect of bargaining disputes between the parties. In the Facilitation - Conciliation process, neutral third parties attempt to help the OMA and the Minister resolve their differences and reach an agreement. However, the process does *not* include a *binding* mechanism to resolve bargaining disputes;
- (i) The last PSA expired on March 31, 2014 (“PSA 2012”). The OMA and Ministry representatives began meeting to establish a new PSA (“PSA 2014”) in January 2014. However, the parties were unable to reach agreement on the basic elements of PSA 2014 in bilateral negotiations, and consequently they participated in Facilitation - Conciliation in Fall 2014;
- (j) The parties were unable to reach an agreement in Facilitation - Conciliation. As a result, the Facilitation - Conciliation process ended and the Conciliator released a public report dated December 11, 2014 (the “Conciliation Report”);
- (k) On January 9, 2015, the Minister made a “final offer” to the OMA for a PSA with a three-year term, which it subsequently amended on January 14, 2015 (the “Final Offer”). The Final Offer had the following main elements:
 - (i) Total annual spending on physician services (the “Physician Services Budget”) would be capped at a growth rate of 1.25% per year;

- (ii) Over the course of the first two years of the agreement (2014/2015 and 2015/2016), the parties would implement specific measures to achieve \$530 million in savings;
 - (iii) If total actual spending on physician services *exceeded* the capped Physician Services Budgets for 2014/2015 and 2015/2016, then the excess expenditure would be recovered from physicians in 2016/2017. On the other hand, if actual spending was *less* than the Physician Services Budgets, then the difference would be paid out to physicians in a lump sum in 2016/2017;
 - (iv) A similar recovery mechanism based on 1.25% spending growth would apply in the third year of the agreement (2016/2017), but the Minister would also make a \$168 million lump sum payment available.
- (l) The Final Offer ignored the fact that the *actual* annual growth rate in Ontario's Physician Services Budget is far greater than 1.25% as a result of a host of factors over which physicians have no control, including, but not limited to, the natural growth and aging of Ontario's population. The Final Offer also established an artificial "starting base" for the 2013/2014 Physician Services Budget that was *lower* than actual spending in 2013/2014;
- (m) Taken together, these elements in the Final Offer contemplated a dramatic *reduction* in Ontario physicians' compensation over its three-year term;
- (n) On this basis, the OMA rejected the Final Offer on January 15, 2015. But, in an effort to facilitate further negotiations, the OMA immediately offered a two-year freeze in the price of physicians' services. The Minister never responded to the substance of this offer;

- (o) Instead, on January 15, 2015, the Minister announced that the Ministry would take unilateral steps to reduce spending in respect of physician services.

III. The Government Takes Unilateral Action to Reduce Physician Compensation

- (p) On January 28, 2015, the Government enacted Ontario Regulation 15/15, which amended certain provisions in Regulation 552. This regulatory amendment unilaterally imposed:

- (i) A 2.65% reduction to “fee-for-service” payments to physicians effective February 1, 2015; and,
- (ii) Amendments to the Schedule of Benefits dated January 15, 2015 that reduced the fees payable under the Ontario Health Insurance Plan for certain physician services effective April 1, 2015.

- (q) Notably, the Ministry also unilaterally applied the 2.65% payment reduction to other “non-fee-for-service” payments made to physicians under a variety of contracts and programs.

- (r) However, these actions are at odds with the substance of the Conciliation Report and the Final Offer, and the Minister never engaged in good faith consultations or negotiations with the OMA in respect of this regulatory change or the associated payment reductions (which are described in detail in Ministry INFO Bulletins # 11125, 4646, 4648, and 4652).

- (s) Furthermore, between January 2015 and October 2015, the Minister proceeded to unilaterally change many other working terms and conditions for physicians,

including other payments that physicians receive for providing services to the public. The Minister's unilateral actions in this regard include, but are not limited to:

- (i) The Minister made unilateral changes (effective June 1, 2015) to the "Managed Entry" program that applies to primary care physicians entering Primary Care Patient Enrollment Models. The effect of these changes is to substantially reduce: (1) how many physicians can provide primary care services to the public; (2) the practice options of primary care physicians; and (3) the compensation of physicians who provide primary care services;
- (ii) The Minister unilaterally announced and began to implement a "New Graduate Entry Program" that applies to new graduate primary care physicians. In combination, the elements of this program fundamentally change how new physicians are compensated; and,
- (iii) The Minister made unilateral amendments to a variety of contracts and programs that set the terms on which "non-fee-for-service" payments are made to physicians, including "template agreements" and "ancillary agreements";
- (t) All of these matters would normally be the subject of PSA negotiations. Furthermore, the Minister is expressly required to negotiate changes to all "template agreements" and some "ancillary agreements" with the OMA under the Representation Rights Agreement;
- (u) However, the Minister undertook these actions without engaging in any good faith negotiation or consultation with the OMA;

IV. The Government Unilaterally Imposes Further Significant Payment Reductions

- (v) On June 4, 2015, Ministry representatives advised the OMA that the Ministry was \$339 million “over budget” for 2014/2015. This was several hundred million dollars more than any estimate that had previously been shared with the OMA. Despite this, the Ministry representatives advised the OMA that the Ministry planned to recover this increased amount from Ontario physicians;
- (w) Moreover, the Ministry representatives advised the OMA that the Ministry would recover this amount from physicians in October 2015 despite the fact that the Final Offer stated that any recovery would not occur until 2016/2017;
- (x) On August 5, 2015, the OMA sent the Ministry a detailed letter setting out its objection to the new recovery plan. The Ministry did not respond to the OMA’s letter until September 8, 2015, at which time the Ministry simply confirmed that, effective October 1, 2015, it would impose an additional 1.3% reduction and other significant cuts to payments to physicians;
- (y) Then, beginning on September 18, 2015, the Government enacted Ontario Regulations 283/15, 302/15, and 303/15, all of which amended Regulation 552. This regulatory change unilaterally imposed *additional* payment reductions on physicians, including:
 - (i) An additional 1.3% reduction to “fee-for-service” payments to physicians effective February 1, 2015; and,

- (ii) Amendments to the Schedule of Benefits dated September 28, 2015 that further reduced the fees payable under the Ontario Health Insurance Plan for certain physician services effective October 1, 2015 and April 1, 2016.
- (z) However, the Minister never engaged in good faith consultations or negotiations with the OMA in respect of these regulatory changes, or the associated payment reductions (which are described in detail in Ministry INFO Bulletin #4657);
- (aa) Furthermore, the substance of Regulations 283/15, 302/15, and 303/15, and the associated payment reductions are at odds with the substance of the Conciliation Report and the Final Offer. In particular: (1) the Ministry has now recovered approximately \$695 million from physicians, which is far more than the \$530 million in its Final Offer; and (2) the Ministry implemented recovery measures effective October 2015, not in 2016/2017.

V. The Minister Seeks to Marginalize the OMA

- (bb) Since January 2015, the Minister has also engaged in a course of conduct that seeks to (1) marginalize the OMA in respect of physician services issues and (2) undermine the OMA's ability to act as physicians' representative. In particular:
 - (i) Ministry representatives have made public statements that criticize and mischaracterize the OMA's conduct and positions in respect of its interactions with the Minister and physician compensation issues. Specifically, Ministry representatives have repeatedly stated that the

OMA has refused to engage with the Minister respecting physician services issues. On several occasions, the Minister has made such statements in the Legislature and in comments to the media. However, in fact it is the Minister that has refused to respond constructively to the substance of numerous OMA submissions;

- (ii) Ministry representatives have bypassed the OMA to contact physicians and other physician groups (including various sections of members within the OMA) in respect of physician compensation and related issues that are normally the subject of PSA negotiations;
 - (iii) The Minister has begun to implement major reforms to the payment models in which primary care physicians practice. However, the Minister has not engaged in any consultations or negotiations with the OMA in this regard.
- (cc) During this period, Ministry representatives have engaged in *pro forma* consultations with the OMA as the Minister unilaterally determines working terms and conditions for physicians that are properly the subject of PSA negotiations;
- (dd) However, the Minister has never provided a meaningful substantive response to the numerous representations that the OMA has made concerning the Minister's course of conduct between January 2015 and October 2015;

VI. The Minister Rejects the OMA's Efforts to Correct the Power Imbalance

- (ee) As the Minister has adopted this new course of action since January 2015, the OMA has made a number of efforts to strengthen its capacity to represent

Ontario physicians. However, Ministry representatives have obstructed all of the OMA's efforts in this regard. In particular:

- (i) Beginning in April 2015, the OMA repeatedly requested that the Ministry grant it access to expenditure tracking data that would allow Ontario physicians to monitor and seek to control spending growth in line with the capped Physician Services Budget. However, Ministry representatives have refused the OMA's requests for such access;
 - (ii) On April 8, 2015, the OMA requested that the Minister appoint the Physician Services Payment Committee ("PSPC"), a bilateral OMA - Ministry committee mandated by the *HIA*. However, the Minister refused to appoint the PSPC. Further, in response to follow-up correspondence from the OMA, Ministry representatives suggested that the Government will amend the *HIA* to abolish the PSPC;
 - (iii) On May 19, 2015, the OMA asked the Minister to amend the Representation Rights Agreement to establish a *binding* dispute resolution mechanism for bargaining disputes over physician compensation and related accountabilities. The OMA made this request after the OMA Council overwhelmingly endorsed a resolution in favour of this amendment. However, the Minister refused to agree to a binding dispute resolution process for disputes over physician compensation.
- (ff) Taken together, the Minister's actions since January 15, 2015 have had a significant detrimental impact on physicians' sense of security in their working lives and their ability to practice in Ontario;
- (gg) The Minister's actions have also substantially undermined the OMA's capacity to represent its members;

VII. Violation of Section 2(d) of the *Charter* and the Representation Rights Agreement

- (hh) The Minister's course of conduct in respect of physician services issues since January 15, 2015 has violated Ontario physicians' freedom of association under section 2(d) of the *Charter*. It has also violated the express terms of the Representation Rights Agreement;
- (ii) More specifically, there is a significant power imbalance between the Minister and the OMA in respect of negotiations over physician compensation and related accountabilities. On numerous occasions, the OMA has informed the Minister of the urgent need to correct this balance. However, rather than work with the OMA to correct the imbalance, the Minister has sought to take advantage of it at every turn by taking the actions described above;
- (jj) Furthermore, the Minister has expressly refused to agree to a process of *binding* dispute resolution in respect of bargaining disputes with the OMA despite the fact that Ontario physicians are unable to engage in "strikes" or similar job action;
- (kk) Without access to a *binding* dispute resolution process for negotiation disputes, it is impossible for the OMA to have a meaningful process of collective bargaining with the Minister;
- (ll) In fact, the absence of a binding dispute resolution mechanism has allowed the Minister to embark on a course of action that marginalizes the OMA as

physicians' representative and permits the Minister to determine the working terms and conditions for Ontario physicians unilaterally and without any meaningful negotiation or consultations with the OMA;

- (mm) In doing so, the Minister has refused to engage in a process of meaningful collective bargaining with the OMA in respect of the changes to physicians' working terms and conditions that the Minister has unilaterally implemented since the expiration of PSA 2012. The main effects of the Minister's actions include substantially impairing physicians' ability to act collectively in respect of their working terms and conditions and imposing an immediate and significant reduction in physicians' income;
- (nn) The Minister has also consistently marginalized the OMA in respect of physician services issues and has sought to bypass the OMA as representative of Ontario physicians.
- (oo) The Minister's systematic efforts to diminish and deny the OMA's rights to represent Ontario's physicians, to publicly criticize the OMA, and to engage directly with the OMA's members and other physician groups in respect of physician compensation and related issues, have achieved their intended result, namely, to undermine the OMA's capacity to represent the collective interests of its members, and to make good faith dialogue between the Minister and the OMA impossible;

- (pp) In combination, these factors have substantially interfered with Ontario physicians' right to associate and act collectively in furtherance of their workplace goals;
- (qq) These violations cannot be justified under section 1 of the *Charter*;
- (rr) The Minister's actions described above have also breached the Representation Rights Agreement's express requirements that the Minister: (1) recognize the OMA as the exclusive representative of Ontario physicians; (2) negotiate in good faith with the OMA for the purpose of entering into PSAs to establish physician compensation; and (3) consult with the OMA regarding significant healthcare policy and system issues that affect physicians;
- (ss) *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rules 14.05 and 38;
- (tt) *Ministry of Health and Long-Term Care Act*, R.S.O. 1990, c. M.26;
- (uu) *HIA*;
- (vv) *Commitment to the Future of Medicare Act, 2004*, S.O. 2004, c. 5;
- (ww) *Independent Health Facilities Act*, R.S.O 1990, c. I.3;
- (xx) *Canada Health Act*, R.S.C., 1985, c. C-6; and
- (yy) Such further and other grounds as counsel may advise and this Honourable Court may deem just.

3. The following documentary evidence will be used at the hearing of the application:
- (a) The Affidavit of Dr. Atul Kapur, to be sworn;
 - (b) The Affidavit of Dr. Ved Tandan, to be sworn;
 - (c) The Affidavit of Dr. Jasmin Kantarevic, to be sworn;
 - (d) The Affidavit of Mr. Wojciech Roszuk, to be sworn;
 - (e) The Affidavits of such other individuals as counsel may determine to be appropriate; and,
 - (f) Such further material as counsel may advise and this Honourable Court may permit.

October 29, 2015

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ONTARIO MEDICAL
ASSOCIATION
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ONTARIO (MINISTER OF HEALTH AND
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PROCEEDING COMMENCED AT TORONTO

NOTICE OF APPLICATION

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