

Court File No. 586/03

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

IN THE MATTER OF the *Judicial Review
Procedure Act*, R.S.O. 1990, c. J.1, as amended;

AND IN THE MATTER OF the *Public Hospitals
Act*, R.S.O. 1990, c. P.40, as amended

BETWEEN:

**ONTARIO COUNCIL OF HOSPITAL UNIONS,
ONTARIO HEALTH COALITION and
ONTARIO PUBLIC SERVICE EMPLOYEES UNION**

Applicants

- and -

**TONY CLEMENT, MINISTER OF HEALTH AND
LONG-TERM CARE FOR THE PROVINCE OF ONTARIO and
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**

Respondents

NOTICE OF APPLICATION FOR JUDICIAL REVIEW

TO THE RESPONDENTS

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

THIS APPLICATION for judicial review will come on for a hearing before the Divisional Court on a date to be fixed by the Registrar at a place of hearing requested by the Applicant. The Applicant requests that this application be heard at 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 lawyers, or where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the office of the Divisional Court, 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 lawyers or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service in the office of the Divisional Court within thirty days after service on you of the Applicant's application record, or not later than 2 p.m. on the day before the hearing, whichever is earlier.

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 Legal Aid office.

Date: September 22, 2003

Issued by: Maria DiPaolo
Local Registrar

Address of Divisional Court Office:
Osgoode Hall
130 Queen Street West
Toronto, Ontario
M5H 2N5

TO: THE HONOURABLE TONY CLEMENT
c/o Ministry of Health and Long-Term Care
10th Floor
80 Grosvenor Street
Toronto, Ontario
M7A 2E1

AND TO: HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
Crown Law Office (Civil)
Ministry of the Attorney General
8th Floor
720 Bay Street
Toronto, Ontario
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APPLICATION

1. The Applicants make application for:
 - (a) an order quashing and prohibiting any approvals granted by the Minister of Health pursuant to s. 4 of the *Public Hospitals Act* and any other relevant sections of the Public Hospitals Act of any plans by the William Osler Health Centre or the Royal Ottawa Health Care group to permit for-profit corporations to design, build, finance, lease/own, maintain, operate, manage and use a hospital facility (the "P3 schemes");
 - (b) an order prohibiting any payment by the Minister pursuant to s. 5 of the *Public Hospitals Act* with respect to the P3 schemes;
 - (c) a declaration that any purported approval with respect to the P3 schemes contravenes and is *ultra vires* the *Public Hospitals Act* and the regulations;
 - (d) a declaration that any purported approval under the *Act* of the P3 schemes is null and void and of no force and effect;
 - (e) if required, interim declaratory and injunctive relief to preserve the *status quo* and enjoin the respondents from proceeding with or granting any approvals pending the final determination of this application on the merits;
 - (f) the costs of this application, fixed on a substantial indemnity basis;
 - (g) an order authorizing the applicants to bring this proceeding in their own name and on behalf of the members of Ontario Council for Hospital Unions and the Ontario Health Coalition;

- (h) such further and other relief as the circumstances of the case may require and the Court deem to be just; and
- (i) the costs of this proceeding on a substantial indemnity basis.

2. The grounds for the application are:

- (a) The Minister has signified an intention to approve and fund the design, construction, and project financing of a hospital, and the provision of building maintenance, laundry, materials management, housekeeping, portering, food services and security services in a hospital by for-profit private corporations for the William Osler Health Centre and, and the Royal Ottawa Health Care Group. (the " P3 schemes"). This will entail the ownership of the premises of public hospitals, and the operation of public hospital functions, by for-profit private corporations.
- (b) The *Public Hospitals Act* and its regulations vest the authority to govern and manage a public hospital under the *Act* in a board of directors constituted pursuant to the provisions of the *Act*; and require the board to manage and monitor activities in the hospital to ensure compliance with the *Act* and regulations, and to take such measures as the board considers necessary to ensure compliance. The P3 schemes involve the carrying out of specified functions of a public hospital by the for profit private corporation which is not an entity governed or managed by the board of the public hospital.
- (c) The *Act* and the regulations vest the direct and actual superintendence and charge of a public hospital in the administrator of the hospital. The P3 schemes involve the carrying out of functions of the administrator by the for profit private corporation.

- (d) The P3 scheme will make significant operations (including non-clinical services) of the public hospital subject to the control and governance of the for profit private corporation, and some subject to the control and governance of the public hospital. However, the Act and regulations contemplate a single board having governance and management of all of the functions of a public hospital, and a single administrator having superintendence and charge of the hospital.
- (e) The *Act* requires that a public hospital be a corporation without share capital incorporated under the *Corporations Act*. Any purported approval of the P3 would permit a for-profit corporation to operate the functions of a public hospital and the administrator of a public hospital.
- (f) Section 6 of the *Act* requires the board to carry out the directions of the Minister, and confers on the board the unrestricted power to carry out such directions. Any purported approval of the P3 would interfere with the ability of the Minister to make effective directions, and would limit the capacity of the board to carry out the Minister's direction, and would restrict the power of the board to carry out the directions.
- (g) Under s. 9 of the *Act*, where the public interest so requires, the Lieutenant Governor in Council may appoint a supervisor to assume control of the powers of the board, the administrator of the hospital, the corporation and its officers and members. Since a supervisor cannot assume the powers of the for profit private corporation under the *Act*, the P3 scheme frustrates the purposes and objects of the statute regarding the appointment of a supervisor.

- (h) The regulations require the board of a public hospital to establish and provide for the operation of an occupational health and safety program for the hospital, and the operation of a health surveillance program, including a communicable disease surveillance program in respect of all persons carrying on activities in the hospital. The P3 schemes will entail certain hospital functions being subject to the control and governance of the for profit private corporation. Any purported approval of such a scheme is inconsistent with these regulations.
- (i) The regulations required the board of a public hospital to establish a fiscal advisory committee which shall make recommendations to the board with respect to the operation, use and staffing of the hospital. As the P3 schemes will entail the private partner making decisions respecting hospital operations, usage and staffing, the scheme is necessarily inconsistent with the regulations.
- (j) In approving the P3 schemes, the Minister fetters his discretion with respect to the granting of approvals under s. 4; the making of financial payments or the imposition of terms and conditions on such payments or the termination of such payments under s. 5; and making of directions pursuant to s. 6 of the Act and s. 22.1 of the Hospital Management Regulation.
- (k) The *Act* (s. 11) vests the power to expropriate any real property necessary for the purpose of properly conducting the hospital in the board of the hospital. The P3 schemes will prevent the public hospital from exercising this power with respect to the lands and premises owned by the for profit private corporation.

- (l) In purporting to approve the P3 schemes under s.4, or funding under s. 5 of the *Act*, the Minister has exceeded his authority, failed to act in accordance with the requirements of the *Act* and regulations, and exercised his discretion in a manner which is inconsistent with objects and purposes of the *Act* and the regulations.
 - (m) Such further and other grounds as counsel may advise and this Honourable Court permit.
3. The following documentary evidence will be used at the hearing of the application:
- (a) the affidavit of Michael Hurley, sworn September 22, 2003;
 - (b) the affidavit of Natalie Mehra, sworn September 22, 2003;
 - (c) such further and other material as counsel may advise and the court permit.

DATE: September 22, 2003

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ONTARIO COUNCIL OF HOSPITAL UNIONS et al

v.

TONY CLEMENT, MINISTER OF HEALTH AND LONG-TERM CARE FOR THE PROVINCE OF ONTARIO et al

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SUPERIOR COURT OF JUSTICE
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Proceeding commenced at TORONTO

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FOR JUDICIAL REVIEW**

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