

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***British Columbia Nurses' Union v.
Attorney General of British Columbia,***
2008 BCSC 321

Date: 20080318
Docket: S068256
Registry: Vancouver

Between:

British Columbia Nurses' Union

Petitioner

And

**Attorney General of British Columbia
and Medical Services Commission**

Respondents

Before: The Honourable Mr. Justice Kelleher

Reasons for Judgment

Counsel for the Petitioner:

Marjorie E. Brown

Counsel for the Attorney General of B.C.:

Craig E. Jones
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Date and Place of Hearing:

October 30, 31, and
November 1, 2007
Vancouver, B.C.

[1] The British Columbia Nurses' Union (the "petitioner" or the "Union") has brought this petition in which it seeks orders by way of *mandamus* and declarations with respect to the Medical Services Commission. Its complaint is that the Commission has not been carrying out its statutory duty to enforce the **Medicare Protection Act**, R.S.B.C. 1996, c. 286 (the "**Act**"). This includes the duty under s. 5 of the **Act** to act in a manner consistent with the **Canada Health Act**, R.S. 1985, c. C-6.

[2] The application before me is by the respondent Commission and the Attorney General of British Columbia. It is brought pursuant to Rule 19(24) of the **Supreme Court Rules**, B.C. Reg. 221/90 and the inherent jurisdiction of the court. The respondents say three things:

1. the Union is not a legal entity and lacks the capacity to bring this petition;
2. the Union lacks standing to pursue its claim or if it is a matter of this court's discretion, should be denied standing; and
3. in any event, the petition does not articulate a reasonable claim.

[3] The Union's case is based on the **Act** and, in particular, ss. 5, 17 and 27.

[4] Section 17 provides:

General limits on direct or extra billing

17 (1) Except as specified in this Act or the regulations or by the commission under this Act, a person must not charge a beneficiary

- (a) for a benefit, or
 - (b) for materials, consultations, procedures, use of an office, clinic or other place or for any other matters that relate to the rendering of a benefit.
- (2) Subsection (1) does not apply:
- (a) if, at the time a service was rendered, the person receiving the service was not enrolled as a beneficiary;
 - (b) if, at the time the service was rendered, the service was not considered by the commission to be a benefit;
 - (c) if the service was rendered by a practitioner who
 - (i) has made an election under section 14 (1), or
 - (ii) is subject to an order under section 15 (2) (b);
 - (d) if the service was rendered by a medical practitioner who is not enrolled.

[5] The Union says that medical practitioners, because of s. 17, are not permitted to impose user charges or extra billings on patients in relation to the performance of any medical procedure that is a benefit under the **Act**. A benefit is any procedure for which the Medical Services Plan will render payment.

[6] Sections 5 and 27 of the **Act** provide:

Responsibilities and powers of the commission

- 5 (1) The commission may do one or more of the following:
- (a) administer this Act on a non-profit basis;
 - (b) receive premiums that are payable by beneficiaries;
 - (c) determine the services rendered by an enrolled medical practitioner, or performed in an approved diagnostic facility, that are not benefits under this Act;
 - (d) determine the manner by which claims for payment of benefits rendered in or outside British Columbia to beneficiaries are made;
 - (e) determine the information required to be provided by beneficiaries and practitioners for the purpose of assessing or reassessing claims for payment of benefits rendered to beneficiaries;

- (f) investigate and determine whether a person is a resident and, for this purpose, require the person to provide the commission with evidence, satisfactory to the commission, that residency has been established;
- (g) determine whether a person is a spouse or a child;
- (h) determine whether a person is a medical practitioner or a health care practitioner;
- (i) determine for the purposes of this Act whether a person meets the requirements established in the regulations for premium assistance;
- (j) determine whether a service is a benefit or whether any matter is related to the rendering of a benefit;
- (k) determine before or after a service is rendered outside British Columbia whether the service would be a benefit if it were rendered in British Columbia;
- (l) determine whether a diagnostic facility, or a benefit performed in an approved diagnostic facility, meets the requirements of the regulations;
- (m) monitor and assess the effectiveness and efficiency of benefits;
- (n) enter, with the prior approval of the Lieutenant Governor in Council, into agreements on behalf of the government with Canada, a province, another jurisdiction in or outside Canada or a person in or outside British Columbia for the purposes of this Act;
- (o) establish advisory committees, including pattern of practice committees, to advise and assist the commission in exercising its powers, functions and duties under this Act, and may remunerate members of a committee at a rate fixed by the commission and pay reasonable and necessary travelling and living expenses incurred by members of a committee in the performance of their duties;
- (p) authorize surveys and research programs to obtain information for purposes related to the provision of benefits;
- (q) enter into arrangements and make payment for the costs of rendering benefits that will be provided on a fee for service or other basis;
- (q.1) establish, subject to this Act and the regulations, rules to govern its own practices and procedures for the conduct of hearings under section 15 or 37, including the following:
 - (i) the conduct of negotiations or a pre-hearing conference for possible settlement of the issues before a hearing is commenced;

- (ii) the means by which particular facts may be proved or the mode in which evidence may be given at a pre-hearing conference or a hearing;
 - (iii) the time limits for the exchange of documents, reports and affidavits in preparation for a pre-hearing conference or a hearing;
 - (iv) the requirements for the attendance of witnesses, the conduct of witnesses or the compelling of witnesses to give evidence under oath or in some other manner;
- (q.2) require that a party to a hearing under section 15 or 37 submit a matter at issue in the hearing to non-binding mediation;
- (r) provide to a person or body prescribed by the Lieutenant Governor in Council, for the purpose of an audit or investigation of a practitioner's pattern of practice or billing, information concerning claims submitted by that practitioner to the commission;
- (s) apply section 26 for supply management and optimum distribution of medical care, health care and diagnostic services throughout British Columbia;
- (t) establish guidelines setting the number of practitioners that a beneficiary may consult respecting the same medical condition within the period specified in the guidelines;
- (u) exercise other powers or functions that are authorized by the regulations or the minister.
- (2) The commission must not act under subsection (1) in a manner that does not satisfy the criteria described in section 7 of the *Canada Health Act* (Canada).
- (3) The commission has, for the purposes of conducting hearings under this Act, the powers, privileges and protections of a commissioner under sections 12, 15 and 16 of the *Inquiry Act*.
- (4) The *Financial Administration Act* applies to the commission as though the commission were a division of the ministry that is administered by the minister.
- (5) Without limiting subsection (1) (n), the commission may, with the prior approval of the Lieutenant Governor in Council, enter into an information-sharing agreement with
- (a) Canada, a province or another jurisdiction in or outside Canada, or
 - (b) a public body as defined in the *Freedom of Information and Protection of Privacy Act*.
- (6) For the purpose of subsection (5), "information-sharing agreement" means a data-matching or other agreement to exchange personal or other

information for the purpose of administering medical or health care benefits provided under

- (a) this Act,
- (b) a prescribed enactment of British Columbia, or
- (c) a prescribed enactment of Canada, a province or another jurisdiction in Canada.

(7) The commission must prepare and file with the minister as soon as practicable each year a report for the fiscal year ending March 31 in that year respecting the work of the commission and its special committees, and the minister must lay the report before the Legislative Assembly as soon as is practicable.

...

Submission, assessment and payment of claims

27 (1) A practitioner who renders a benefit to a beneficiary must, for the purpose of assessing or reassessing the claim for payment, provide particulars of services and accounts to the commission that are required by this Act and the regulations in the manner the commission specifies.

(2) The commission must assess and, if appropriate, reassess the particulars of claims for payment and determine the amounts payable for them in accordance with this Act, the regulations and the appropriate payment schedule.

(3) The Lieutenant Governor in Council may prescribe the period of time within which

- (a) a claim for payment must be submitted to the commission,
- (b) a practitioner or beneficiary may request reassessment of a previously submitted claim, or
- (c) the commission can assess or reassess a claim.

(4) The commission must, to the extent authorized by the appropriation, pay for claims for benefits that the commission has assessed or reassessed and that comply with this Act, the regulations and the appropriate payment schedule.

(5) The commission is not liable for payment if a claim is submitted outside the period prescribed under subsection (3) but, in its discretion, may pay the claim.

(6) For the purposes of this section

- (a) a practitioner must provide the commission with any record that the commission considers relevant to substantiate a claim, including any medical or clinical record, in the care or control of the practitioner, and
- (b) a practitioner must retain records, including medical or clinical records, for a period specified by the appropriate licensing

body or, if the appropriate licensing body has not specified a period, for a period the commission specifies.

[7] The effect of these provisions is that the Commission is not permitted to pay medical practitioners for procedures performed under the **Act** if the practitioners (or anyone else for that matter) impose a user charge or extra billing in relation to the procedure. The Union refers to this as "double dipping". The **Act** does not permit payment by the Commission under the Plan when the patient is also required to pay.

[8] As well, the Union says, the facility where the procedure takes place cannot require payment by the patient for the use of the facility if the physician is receiving payment from the Medical Services Plan.

[9] The complaint of the Union, which is the basis of the petition, is the failure of the Commission to enforce these prohibitions. In other words, the petitioner says that the Commission has failed to put in place a process that would ensure the Commission not exceed its authority by making unlawful payments.

[10] The Union commenced the petition on April 21, 2005. However, it raised its concerns with the Government of British Columbia in January of 2003. It pointed out what it considered unlawful payments. The Union has written the Minister of Health Services on several occasions, bringing specific cases to the Government's attention.

1. The legal status or capacity of the respondent

[11] The position of the respondents is that the petitioner has no legal status or capacity to bring this petition.

[12] The difference between capacity and standing is explained in Thomas A. Cromwell, ***Locus Standi: A Commentary on the Law of Standing in Canada*** (Toronto: Carswell, 1986) at 3:

But capacity to sue may be distinguished from standing. Capacity has been defined as “the power to acquire and exercise legal rights” ... Problems of capacity to sue typically involve questions about whether the party is a “legal person”, that is, one having the general right to commence or defend judicial proceedings.

[13] Section 154 of the ***Labour Relations Code***, R.S.B.C. 1996, c. 244 provides:

154. Every trade union...is a legal entity for the purposes of this Code.

[14] The respondents argue that the Union has legal status but that this is explicitly restricted to the "purposes of this Code". The respondents argue that a union's capacity to sue and be sued is only with respect to matters related to the union's core function: to represent its members in collective bargaining and other labour relations matters.

[15] The respondents argue that the petition before this court does not relate to the purposes of the ***Labour Relations Code***. This is the limitation, say the respondents, implicit in the authorities. The respondents rely on ***Berry v. Pulley***,

2002 SCC 40, [2002] 2 S.C.R. 493 [cited to S.C.R.]. In that case, the issue was whether the union had the legal capacity to contract with its members and be sued for breach of that contract. The court reasoned there is a sophisticated statutory regime in place which recognizes trade unions as entities which have significant rights and obligations. The court went on at p. 513:

...the view has emerged that by conferring these rights and obligations on trade unions, legislatures have intended, absent express legislative provisions to the contrary, to bestow on those entities the legal status to sue and be sued in their own name. As such, unions are legal entities at least for the purpose of discharging their function and performing their role in the field of labour relations.

[16] The respondents rely as well on **Public Service Alliance of Canada v. Canada (Attorney General)** (2002), 222 D.L.R. (4th) 438, 68 O.R. (3d) 682 (Ont. C.A.) [cited to O.R.J.]. That court made much the same point at p. 690:

25. First, absent clear contrary legislation, the legal status of trade unions to assert their rights in court, including common law rights, is now beyond question, at least in matters relating to their labour relations function and operations.

26. Second, while that legal status is founded in each case on the relevant provincial or federal labour legislation governing the union, it does not depend on any provision specific to that legislation. While variations exist among jurisdictions, the legal status accorded to trade unions derives not from specific provisions in any particular piece of legislation, but from the reality that, throughout Canada, the world of labour relations is governed by sophisticated statutory machinery which requires that unions have sufficient legal personality to play their role in that world. Thus legislatures must be taken to have impliedly conferred on unions the legal status necessary for them to do so.

27. Third, this recognition of the broadening legal status accorded to trade unions is a reflection of the extraordinary evolution over the last half century of both their role and the complex labour relations regimes which now govern them and their activities. In order that unions be

able to properly fulfill the functions now expected of them, courts must treat them as juridical entities.

[17] It is noteworthy to me that in ***Berry***, the court said that unions are legal entities "at least" for the purposes of discharging their functions and performing their roles in the field of labour relations. The court did not define the limits of a trade union's legal status. Indeed, counsel were unable to provide any authority where a trade union has been held to lack the legal capacity to bring a petition or action of this kind.

[18] In any event, what the Union is doing in pursuing this position is well within what a democratic trade union normally does in our society. The courts have recognized that unions have a legitimate role to play in engaging in broader political and social processes of society. In ***Lavigne v. Ontario Public Service Employees' Union***, [1991] 2 S.C.R. 211, 81 D.L.R. (4th) 545 [cited to S.C.R.] the Supreme Court of Canada considered unions as self-governing and democratic institutions which play a variety of roles. Mr. Justice La Forest, with whom Sopinka and Gonthier JJA. concurred, referred to the difficulty of determining whether a particular cause is or is not related to the collective bargaining process. Unions commonly engage in advocating public policy with respect to the environment, daycare, women's rights and the like. Mr. Justice La Forest, at p. 338, referred to this as the "larger environment in which unions must represent their members".

[19] Mr. Justice Gans made the same point in **Payne v. Ontario (Minister of Energy, Science and Technology)**, [2002] O.J. No. 1450, (Ont. S.C.J.) (QL) at para. 15:

It has long since been recognized that unions have an interest in matters which transcends the "realm of contract negotiation and administration" (*Lavigne v. Ontario Public Service Employees Union* (1991), 81 D.L.R. (4th) 545 (S.C.C.) ("*Lavigne*") at 603). To borrow Chief Justice Dickson in *Slaight Communications Inc. v. Davidson* (1989), 59 D.L.R. (4th) 416 (S.C.C.) at 426, "... the interests of labour do not end at some artificial boundary between the economic and political". Inherent in this proposition is the notion that interests of labour are expansive and are meant to include more than, "mere economic gain for workers" (per Wilson, J. at 603 of *Lavigne*).

[20] What the Union is pursuing here is well within the normal role of a union as that term is defined in the **Labour Relations Code**. As the court stated in **Public Service Alliance**, unions have sufficient legal personality to perform their role in the world of labour relations. That role includes pursuing interests such as those forming the basis of this petition.

[21] I conclude that the Union has the legal capacity to bring this petition.

2. Standing

[22] There are two different tests for standing: the general test and the test for public interest standing: **B.C.F.L. v. British Columbia (Workers' Compensation Board)** (1988), 27 B.C.L.R. (2d) 175 (S.C.). In the present case, the petitioner asserts public interest standing.

[23] The test for establishing public interest standing was developed by the Supreme Court of Canada in a series of cases: **Borowski v. Canada (Attorney General)**, [1989] 1 S.C.R. 342, 75 Sask. R. 82; **Nova Scotia (Board of Censors) v. McNeil**, [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632; **Thorson v. Canada (Attorney General)**, [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1; and **Finlay v. Canada (Minister of Finance)**, [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321.

[24] Applying the tests developed in those cases to this case, there are three questions to be posed:

- (a) Is there a serious issue raised?
 - (b) Is the Union directly affected or does it have a genuine interest in the administrative authority challenged?
 - (c) Is there another reasonable and effective manner in which the issue may be brought before the court?
- (a) **Is there a serious issue raised?**

[25] There is no doubt that the petition raises a serious issue. The issue before me is not whether the petition will succeed. Rather, I must consider whether the facts alleged in the petition, which must be taken as proved for the purposes of this application, raise significant issues about the enforcement of the **Medicare Protection Act**.

[26] In **Canadian Council of Churches v. Canada (Minister of Employment and Immigration)**, [1992] 1 S.C.R. 236, 88 D.L.R. (4th) 193, the Supreme Court of Canada elaborated on how best to determine whether a serious issue has been

raised as to the legislation in question. The court held that issues of standing are often closely related to determinations of whether there is a reasonable cause of action, and established a relatively low threshold for success under this stage of the public interest test. In that case, the Canadian Council of Churches sought standing to challenge the constitutionality of amendments to the ***Immigration Act, 1976***, S.C. 1976-77, c. 52. The court held that some of the allegations made by the petitioner were so hypothetical in nature that it would be impossible for any court to evaluate them. Moreover, the statement of claim submitted by the petitioner closely resembled submissions that might be made before a parliamentary committee. Nevertheless, the court was prepared to accept that some aspects of the statement of claim raised a serious issue with respect to the validity of the legislation.

[27] In ***Finlay v. Canada (Minister of Finance)***, the Supreme Court of Canada emphasized that justiciability is central to the determination of whether an individual or group should be given public interest status. The court held that questions of law are clearly justiciable and will raise a serious issue even if they are embedded in political context. Le Dain J. surveyed the relevant authorities and concluded at p. 632 that:

where there is an issue which is appropriate for judicial determination the courts should not decline to determine it on the ground that because of its policy context or implications it is better left for review and determination by the legislative or executive branches of government.

[28] The respondent points to **Canadian Bar Association v. British Columbia**, 2006 BCSC 1342, 59 B.C.L.R. (4th) 38, aff'd on other grounds 2008 BCCA 92, to support its contention that no serious issue has been raised in this case. In that case, the Canadian Bar Association applied for standing to argue that the provision of legal aid in British Columbia was so inadequate that it was constitutionally invalid. However, as Chief Justice Brenner points out, the petitioner did not challenge any existing legal aid legislation in British Columbia, any government action, or even the expenditures being made for legal aid. Rather, the petitioner sought a review of the entire legal aid program to ensure compliance with the constitution. On this basis, the court concluded that the issue raised was not justiciable. Because there was no challenge to a governmental decision, act or statute, the case was found not to raise an issue with respect to the limits of statutory, administrative or executive authority.

[29] The case before me differs significantly from **Canadian Bar Association**. Here, the petitioner seeks standing to assert that the Commission has not been carrying out a statutory duty imposed by the **Medicare Protection Act**. The petitioner points to a precise piece of legislation that imposes a duty on the Commission and raises a justiciable issue. In **Canadian Bar Association**, the petitioner sought a declaration from the court outlining how the government should enforce the law. This is not appropriate. Here, however, the petitioner seeks a declaration that the Commission must enforce the law as it exists. This is entirely acceptable.

[30] Compliance with the **Act** is not a matter of administrative discretion. The Commission doubtless has a discretion to decide how to ensure compliance with the **Act** by medical practitioners. It does not have a discretion to decide whether to enforce the **Act**. In **Re North Vancouver (District of) v. National Harbours Board** (1978), 89 D.L.R. (3d) 704, 7 M.P.L.R. 151 (F.C.) [cited to D.L.R.], the court said at p. 712:

In my view, the Board has a public duty to administer, manage and control Vancouver harbour in accordance with s. 7 of the Act and By-law A-1. It does not have a discretion as to whether it will, or will not, perform that duty. It must perform it, otherwise the legislation and its scheme become useless. The board has, for the most part, and within the limits of the statute and by-laws, a discretion as to how it carries out its duty. A Court can compel a body, such as the Board, to carry out its duty. It cannot direct a body, whether it has discretion in respect of mode, as to how it shall carry out the duty.

[31] I am satisfied that the petition meets the first part of the test.

(b) Is the Union directly affected or does it have a genuine interest in the administrative authority challenged?

[32] In **Canadian Council of Churches**, the court explained that this second component of the test considers whether the public interest litigant has demonstrated a real and continuing interest in the issue.

[33] Deborah McPherson is the president of the petitioner. She deposes in her affidavit that the petitioner has 25,000 members who work in the provision of health care to British Columbia residents. The Union believes in the maintenance of a

universal public health care system. The issues raised in the petition reveal questions about that system.

[34] As the Union argues, the petition engages important labour relations issues for trade unions generally. Trade unions negotiate collective agreements in the context of a medical services plan that provides essential medical procedures to union members. Anything which degrades that plan, in the Union's view, will require additional costs to union members and undermine collective agreement benefits which not only this Union but all trade unions have negotiated. Health care benefits are an important part of collective agreements. As such the Union has a real and continuing interest in the issue of the public medical system.

[35] The real question, I conclude, is whether the applicant has demonstrated a real and continuing interest in the issue. In **Canadian Council of Churches**, the Supreme Court put it this way, at p. 254:

There can be no doubt that the applicant has satisfied this part of the test. The Council enjoys the highest possible reputation and has demonstrated a real and continuing interest in the problems of the refugees and immigrants.

[36] Similarly, in **Canadian Bar Association**, Chief Justice Brenner noted that the Canadian Bar Association has “long had a *bona fide* interest in the subject matter of legal aid, as well as in the legal issue of the constitutionality of the provision of legal aid.” While the action was dismissed on other grounds, Chief Justice Brenner found that the Association satisfied the second part of the public interest test.

[37] In the present case the continued viability of the **Medicare Protection Act** affects the Union and its members in a multitude of direct and indirect ways. The petitioner has had extensive involvement in the dispute. I am satisfied that the petitioner has a genuine interest in ensuring that the Commission remains accountable for its actions.

(c) Is there another reasonable and effective manner in which the issue may be brought before the court?

[38] Finally, public interest standing will only be granted if there is no other reasonable and effective manner in which the issue may be brought before the court. In both **Thorson** and **Borowski**, public interest standing was granted because the legislation was structured so that it was impossible for its validity to be challenged unless an individual citizen was given standing to do so.

[39] In **Canadian Council of Churches**, the Supreme Court of Canada affirmed that public interest standing should not be granted where it is shown that a private litigant could reasonably bring the issue before a court. At p. 252, the court held:

The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this court need not and should not be expanded. The decision whether to grant status is a discretionary one with all that that designation implies. Thus undeserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner.

[40] As set out in **Finlay**, this requirement addresses the concern that courts, in making their decisions, should have the benefit of contending points of view of those most directly affected. When making decisions, it is important that the court hear from those who will be the most impacted.

[41] The Union argues that individuals who accept treatment pursuant to an agreement to pay for services or a facility fee do not generally complain about the process. They have received a benefit for which they have agreed to pay, despite the contention of the Union that the payment may be unlawful. Litigation would function to strip the individual claimant of a benefit that he or she actively sought to obtain. As such, according to the Union, the petitioner is best situated to bring this action.

[42] However, the courts have generally stressed the importance of allowing those with a legitimate and well-funded private interest to bring an action, even where this means denying public interest standing to a large organization. In **Canadian Council of Churches**, the Supreme Court of Canada denied the petitioner public interest standing, rejecting the argument that individual refugees would have difficulty challenging the impugned legislation in court. The court emphasized that a great many refugee claimants appeal administrative decisions every year, and noted that in each of these cases the individual litigants provided a clear factual background upon which the court could ground its decision.

[43] Similarly, in **Canadian Bar Association**, the petitioner argued that those in need of legal aid were not in a financial position to mount constitutional challenges in court. The court rejected this argument, emphasizing the importance of the private litigant and suggesting that those without financial means to launch a constitutional challenge could team up with an organization or publicly minded counsel.

[44] In this case, the petitioner argues that the Commission has failed to perform a statutory duty imposed by the **Medicare Protection Act**, namely to ensure that physicians who impose a user charge are not also paid for procedures performed under the **Act**. Those directly affected by the Commission's failure to perform this duty include those patients who have accepted illegal treatment, as well as patients who have not accepted illegal treatment but who have suffered as a result of those who have infringed the **Act**, in the form of longer waiting times, delayed appointments, or reduced quality of care. Medical practitioners may also be directly affected by the Commission's failure to perform its statutory duty. As set out in **Canadian Council of Churches** and **Canadian Bar Association**, those private litigants who are directly affected by the Commission's actions are in a better position to initiate a lawsuit. In making decisions, the court benefits from a clear and concrete factual underpinning. A private litigant who is directly affected by proposed litigation can raise arguments and provide a more precise factual scenario than a public interest litigant. In evaluating whether to grant public interest standing, it is important to ensure that the views of public litigants do not displace the views of private litigants.

[45] I conclude therefore that there is another reasonable and effective manner in which the issue may be brought before the court. The petitioner must therefore be denied standing.

3. Rule 19(24) - there is no reasonable claim

[46] The respondents argue that even if the petitioner has capacity and is entitled to public interest standing, the petition sets out no reasonable claim and ought to be struck pursuant to Rule 19(24)(a) of the **Supreme Court Rules**. The respondents say that, first, *mandamus* cannot issue in the present case and, second, the declarations sought cannot be granted.

[47] Rule 19(24) reads as follows:

At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that

- (a) it discloses no reasonable claim or defence as the case may be,
- (b) it is unnecessary, scandalous, frivolous or vexatious,
- (c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
- (d) it is otherwise an abuse of process of the court,

and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[48] In consideration of an application under this Rule, the court must read the statement of claim “as generously as possible”: **Operation Dismantle v. The**

Queen, [1985] 1 S.C.R. 441 at 451, 18 D.L.R. (4th) 481. The court must also assume that the facts set out in the statement of claim are true: **Alford v. Canada (Attorney General)** (1997), 31 B.C.L.R. (3d) 228, 68 A.C.W.S. (3d) 826 (S.C.).

[49] The legal test for determining whether an action should be struck under Rule 19(24) is set out in **Hunt v. T&N plc**, [1990] 2 S.C.R. 959, 49 B.C.L.R. (2d) 273 [cited to S.C.R.]. In that case, the Supreme Court of Canada clarified that a statement of claim should only be struck if it obviously discloses no reasonable cause of action, that is, it contains a radical defect meaning that the action must necessarily fail. The court framed the test as follows, at p. 980:

[36] Assuming that the facts as stated in the statement of claim can be proved, is it “plain and obvious” that the plaintiff’s statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be “driven from the judgment seat”. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in R. 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff’s statement of claim be struck out under Rule 19(24(a)).

[50] At pp. 990 - 991 of **Hunt**, the court cautioned that an action should not be struck simply because it raises difficult issues, necessitates complex submissions, or requires novel arguments:

[55] The fact that a pleading reveals “an arguable, difficult or important point of law” cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way

can we be sure that the common law [...] will continue to evolve to meet the legal challenges that arise in our modern industrial society.

[51] The Supreme Court of Canada affirmed the approach taken in **Hunt** in **Odhavji Estate v. Woodhouse**, 2003 SCC 69, [2003] 3 S.C.R. 263. In that case, the court reiterated that the test for striking an action under Rule 19(24) is “stringent” and concluded that a statement of claim should be struck only when it is “certain to fail”. See paragraph 15 of the decision.

(a) Mandamus

[52] The petitioner seeks orders in the nature of *mandamus*. First, it seeks an order that the Commission take the steps that are necessary under s. 27(2) of the **Medicare Protection Act** to ensure that claims paid to practitioners are in compliance with s. 17(1) of the **Act**. Second, it asks that that the Medical Services Commission be ordered to take such steps as are necessary to meet its obligations under s. 5(2) of the **Act** when discharging its duties under ss. 5(1)(e), 5(1)(j) and 5(1)(q) of the **Act**.

[53] There are four pre-conditions to *mandamus*. They were described in **Karavos v. Toronto (City)**, [1948] 3 D.L.R. 294 at 297, O.W.N. 17 (Ont. C.A.). The applicant must demonstrate:

- (1) a clear, legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced...;
- (2) the duty whose performance it is sought to coerce by *mandamus* must be actually due and incumbent upon the officer at the time of seeking the relief, and the writ will not lie to

compel the doing of an act which he is not under obligation to perform...;

- (3) that duty must be purely ministerial in nature, plainly incumbent upon an officer by operation of law or by virtue of his office, and concerning which he possesses no discretionary powers...; and
- (4) there must be a demand and a refusal to perform the act which it is sought to coerce by legal remedy...(citations omitted).

[54] The respondent objects that seeking an order to “take such steps as are necessary” reveals the acceptance by the petitioner that even if it were correct in its interpretation of the **Act**, the Commission is free to decide how to ensure compliance with the **Act**. *Mandamus* could only issue if the petitioner could identify the particular way in which the Commission is bound to act.

[55] The other objection of the respondent is that demand and refusal are central pre-conditions of *mandamus*. Here, there has been no demand. The petitioner has never made a complaint or a request of the Commission.

[56] The respondent states that with respect to the claims of Ms. Lang and Ms. Schoof, the Union has not complained to the Commission that payments were improper. Similarly, the petitioner has not set out a demand or request that the Commission satisfy its obligations under the **Act**. Accordingly, there has been no refusal to do so.

[57] The respondents argue that the petitioner’s strategy has changed over time. When it initially contacted the Ministry, the petitioner focused on the amounts that were extra-billed, not on the fact that practitioners had been paid under the Plan for

the procedures in question and that this itself was objectionable. The petitioner's new theory is that the practitioners were not complying with the law when they submitted such claims and that the Commission is not complying with the law by paying them.

[58] The point of the respondents is that the demands and requests that the petitioner did make of the Ministry sought to achieve reimbursement for the extra-billed amounts not for the improper assessment or the assertion that the M.S.P. claim should not have been paid. According to the respondent, the petitioner cannot change history. Any demands made of the Ministry were an attempt to obtain reimbursement for extra-billed amounts, not an assertion that the Commission had failed to meet its statutory obligations.

[59] I am not persuaded that this matter falls to be determined under Rule 19(24)(a). As discussed above, the Supreme Court of Canada has established a relatively high threshold for striking pleadings at this stage. I do not think that the pleadings contain a "radical defect" such that the claim will necessarily fail.

[60] With regards to the particular arguments identified by the respondents, courts have left open the availability of *mandamus* to compel a public officer to exercise a duty. See **North Vancouver, supra** and **Friends of the Old Man River Society v. Canada (Minister of Transport)**, [1990] 2 F.C. 18, 68 D.L.R. (4th) 375 (C.A.).

Moreover, the Union did raise the Commission's failure to enforce the **Act** in its

letters to the Ministry. It brought to the attention of the Ministry the general concern of enforcement of the **Act**.

(b) The petitioner's applications for declarations

[61] The petitioner seeks the following declarations in its petition:

1. A declaration that, when paying claims for benefits rendered contrary to section 17(1) of the *Medicare Protection Act* ("MPA"), the Medical Services Commission is:
 - (a) not acting in accordance with its obligations under section 27(4) of the MPA to only pay for claims for benefits that comply with the MPA; and
 - (b) not acting in accordance with its obligations under section 27(2) of the MPA to assess claims for payment in accordance with the requirements of the MPA.

2. A declaration that,
 - (a) in acting under section 5(1)(e) to determine the information required to be provided by practitioners for the purpose of assessing or reassessing claims; and
 - (b) in acting under section 5(1)(j) to determine whether any matter is related to the rendering of a benefit; and
 - (c) in acting under section 5(1)(q) to enter into arrangement and make payment for the costs of rendering benefits provided on a fee for service or other basis,

in such a fashion that payment is made to practitioners for claims for benefits that are rendered in violation of section 17(1) of the MPA, the Medical Services Commission has failed to act in a manner that satisfies the criteria described in section 7 of the *Canada Health Act*, as required by section 5(2) of the MPA.

[62] The respondent makes three objections under Rule 19(24)(a). First, the petitioner argues that the declaration must be of a right in the petitioner: see

Holloway Equipment Ltd. v. Contractors Machinery & Equipment Ltd. [1993] AJ No. 673 (Q.B.) (QL). A similar provision from the **Alberta Rules of Court**, Alta. Reg. 390/68 was at issue in that case.

[63] The respondent argues that Rule 5(22) of the **Supreme Court Rules** requires that even a public interest litigant must, if challenged, demonstrate some right at issue.

[64] Since the petitioner is a public interest litigant it must concede that there is no right at issue. There is no claim of right and therefore there is no basis for declaratory relief.

[65] Second, the respondent argues the relief sought is retrospective. That is not permitted by the **Supreme Court Rules** either: **Rusche v. Insurance Corp. of British Columbia** (1992), 4 C.P.C. (3d) 12 at 16, 31 A.C.W.S. (3d) 380 (B.C.S.C.).

[66] Finally, the respondents submit that a declaration has no utility in that it will not settle the complaint of the petitioner. Here, the real issue is the direct billing of patients by practitioners or by clinics, whether an illegal amount is billed to the patient with respect to that service.

[67] According to the respondent, even if the petitioner were successful in having illegal M.S.P. claims denied, the direct billing of patients would remain unresolved.

[68] These objections are similar to the objections made to public interest standing. They are addressed in that context. Whether these are appropriate

matters for declaratory relief is a question for the judge who hears the petition. I do not consider it an appropriate matter for consideration under Rule 19(24)(a).

[69] It cannot be determined at this stage that the court lacks jurisdiction to issue orders of *mandamus* or the declarations sought. As such, the application under Rule 19(24)(a) is dismissed.

CONCLUSION

[70] I conclude that the Union has the capacity to bring this petition. I would not dismiss the petition under Rule 19(24). However, I conclude that for the reasons outlined, the petitioner is not entitled to public interest standing.

"The Honourable Mr. Justice Kelleher"