



No. VLC-S-S-111412
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DR. RENATE MATTHIAS

PLAINTIFF

AND:

BRITISH COLUMBIA MEDICAL ASSOCIATION
(CANADIAN MEDICAL ASSOCIATION – B.C. DIVISION)

DEFENDANT

Brought Pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, as amended

RESPONSE TO CIVIL CLAIM

Filed by: British Columbia Medical Association (Canadian Medical Association – B.C. Division) (the “Defendant”)

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 – Defendant’s(s’) Response to Facts

1. The facts alleged in paragraphs 2, 3, 11, 12, 19, 21, 22 and 23 of Part 1 of the Notice of Civil Claim are admitted, except in respect of paragraph 11, there are at present approximately 1200 non-member physicians.
2. The facts alleged in paragraphs 4, 5, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 18, 20, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36 of Part 1 of the Notice of Civil Claim are denied.
3. The facts alleged in paragraph 1 of Part 1 of the Notice of Civil Claim are outside the knowledge of the Defendant.

Division 2 – Defendant’s Version of Facts

The BCMA and the CMA

1. The Defendant, the British Columbia Medical Association (Canadian Medical Association – B.C. Division (the “BCMA”) was founded in 1900. It is a voluntary professional association of British Columbia’s physicians, medical residents, and medical students. The BCMA has over 11,000 members, with about 8500 in active medical

practice. This represents approximately 95% of practising physicians in British Columbia.

2. The purposes of the BCMA, as set out in s. 2 of the Constitution of the BCMA include but are not limited to:
 - (a) the advancement of the scientific, educational, professional and economic welfare of all members of the medical profession in British Columbia;
 - (b) the promotion of the highest quality of health care delivery for the people of British Columbia;
 - (c) the promotion of the integrity and honour of the medical profession;
 - (d) service and furtherance of the interests of the Canadian Medical Association (the "CMA") in British Columbia; and
 - (e) acting for members of the medical profession, or some of them, as an agent in collective bargaining regarding conditions in which medical services are rendered, remuneration for medical services and similar or related matters.
3. The BCMA does not act for the purpose of profit or gain.
4. The BCMA has a conjoint relationship with the CMA such that membership in the BCMA includes membership in the CMA. The BCMA is represented on the CMA Board of Directors and the CMA General Council.
5. The CMA, founded in 1867, is also a voluntary professional association that acts as the national voice of Canadian physicians. The CMA's mission is to serve and unite physicians and to be the national advocate for the highest standards of health and health care. The key functions of the CMA include advocating for health promotion and disease and injury prevention policies and strategies, advocating for access to quality health care, facilitating change within the medical profession and providing leadership and guidance to physicians to help them influence, manage and adapt to changes in health care delivery.

The BCMA as representative of British Columbia physicians

6. The BCMA is recognized by the Government of British Columbia as the sole and exclusive representative of physicians where the funding for services is, in whole or in part, provided by the Government either directly or indirectly.
7. Consequently, the BCMA negotiates for and on behalf of the collective and individual interests of physicians in relation to a variety of matters including but not limited to:
 - (a) fee for service items;

- (b) the rates for clinical services compensated under a services contract, salary arrangement or sessional contract;
 - (c) the terms and conditions which apply to physicians providing clinical services under a services of sessional contract or salary arrangement, including approved template contracts;
 - (d) funding for programs including, for example, programs intended to support the delivery of primary care, the delivery of specialty care, practice in rural areas and the collaboration between general practitioners and specialists;
 - (e) physician benefit programs, including the Continuing Medical Education Fund, the Canadian Medical Protective Association Rebate, Physician Disability Insurance, Parental Leave Program, the Physician Health Program and the Contributory Professional Retirement Savings Plan;
 - (f) physician representation on advisory committees to the Medical Services Commission;
 - (g) the improvement of billing criteria;
 - (h) the improvement of manpower in particular areas such as emergency and laboratory medicine;
 - (i) the development and implementation of standardized systems of electronic medical records as the principal form of patient record keeping;
 - (j) processes to assist physicians to improve their mode of compensation;
 - (k) processes to address quality of care concerns raised by physicians; and
 - (l) compensation for physician services related to WorkSafeBC, ICBC, Office of the Superintendent of Motor Vehicles, RCMP, BC Corrections, as well as services provided to the Crown and the Legal Services Society.
8. In specific response to paragraph 27 of the Notice of Civil Claim, the BCMA denies that the plaintiff is in a position of vulnerability as a result of the structure of negotiations adopted in British Columbia.

Other work of the BCMA and the CMA

9. In addition to acting as the representative of physicians in negotiations with Government, the BCMA provides other services and undertakes other work for the benefit of all physicians in British Columbia, whether members or non-members. For example, the BCMA, among other things:
- (a) funds a share of the annual costs of the Physician Health Program which offers help to BC physicians and their families for a wide range of personal and

- professional problems, including those of a physical, psychological and social nature;
- (b) funds half the cost of the Reference Committee, an advisory committee to the MSC to which physicians may refer disputes relating to their medical accounts with the Medical Services Plan;
 - (c) funds half the cost of the Patterns of Practice Committee, an advisory committee to the MSC which undertakes an ongoing review of physicians' practice and billing patterns;
 - (d) facilitates the setting of the fee schedule;
 - (e) provides assistance to physicians in dispute resolution processes with Government or Health Authorities;
 - (f) provides representation to and, in some cases pays the cost of participation on the Physician Services Committee, the Collaboration Committee, the Joint Agreement Administration Group and numerous other joint committees which deal with physician related issues;
 - (g) advises on the appointment of representatives and/or provides representation to advisory committees to the Medical Services Commission (the "MSC");
 - (h) develops policy on issues relating to the economics, organization and management of the health care system and health care generally;
 - (i) acts as a public health advocate;
 - (j) publishes the British Columbia Medical Journal;
 - (k) reviews and comments on Health Authority bylaws and rules as they apply to medical staff;
 - (l) consults Government on policy initiatives that will affect the provision of medical care by physicians;
 - (m) reviews and advises Government on proposed legislation which will affect physicians and patients in British Columbia, including privacy legislation;
 - (n) participates on provincial committees such as the Provincial Surgical Advisory Committee, the BC Injury Prevention Leadership and Action Network, and the BC Health Quality Network;
 - (o) researches and provides recommended fees for uninsured services;
 - (p) maintains archives and a medical museum;

- (q) supports the BC Medical Foundation Benevolent Fund; and
 - (r) provides bursaries for medical students.
10. The BCMA also provides certain services available only to members of the BCMA such as negotiation and legal review of individual contracts, access to an integrated life and health insurance and wealth management solutions and products, access to general insurance advice that includes discounted home, auto and office insurance, assistance and advice with press communications and continuing education programming.
 11. The CMA, like the BCMA, performs work for the benefit of all physicians in British Columbia, including policy development, advocacy and lobbying on federal government initiatives that have an impact on physicians, publication of the Canadian Medical Journal, establishment and maintenance of the CMA Infobase and funding for the Centre for Physician Health and Wellbeing.

Membership dues and administrative fees charged to non-members

12. In order to act as the negotiating representative for British Columbia physicians and to provide the other services set out above, the BCMA is required to expend funds for, among other things, staff salaries, office space, committee costs and consulting and professional fees and membership dues to the CMA.
13. The expenses of the BCMA are funded primarily from membership dues and administrative fees charged to non-members.
14. The cost of a regular membership in the BCMA for 2011 (exclusive of HST) is \$1,862, a portion of which is contributed to the CMA to fund the activities of the CMA.
15. Non-members who elect to access benefits negotiated by the BCMA are charged an administrative fee that is less than or equal to the membership dues that would be payable by that individual for membership in the BCMA for the year in which the entitlement to the benefit accrued.
16. Non-members who choose not to access the negotiated benefits are not charged any administrative fee by the BCMA.
17. The practice of charging administrative fees to non-members is authorized by contract.

History respecting membership and administrative fees charged to non-members

18. In or about 1986, the BCMA began to examine the issue of compulsory membership and/or compulsory payment of membership dues.
19. After a period of investigation, study, debate and review, the BCMA rejected a compulsory membership model as had been adopted in other provinces. Instead, the BCMA resolved to pursue a system of compulsory payment of membership dues to ensure that:

- (a) the BCMA would have the financial means to carry out its purposes, including continuing to act as the representative of physicians in British Columbia in negotiations with Government; and
 - (b) non-members who benefit from the work of the BCMA, including as representative for purposes of negotiation, contribute to the cost of securing those benefits.
20. The Physician Master Agreement entered into between the Government of British Columbia, the Medical Services Commission and the BCMA in or about December, 1993 provided, in s. 15.3:

It is understood and agreed that the BCMA may charge physicians who are not members of the BCMA an administrative fee when non-members apply for a negotiated benefit to which they are entitled. It is further understood and agreed that non-members will not be charged administrative fees which exceed the equivalent of dues and levies charged to BCMA members in the calendar year in which the non-member applies for a benefit or benefits.

21. This provision was continued in s. 18.3 of the Second Physician Master Agreement dated February 21, 2001.
22. The Amended Second Master Agreement entered into between the Government, the Medical Services Commission and the BCMA in or about April, 2006 provides, in Article 18:

18.1 The Government agrees to enter into a contract with the BCMA for the term of this Agreement to administer the physician benefit plans including the following terms:

...

It is understood and agreed that the BCMA may charge physicians who are not members of the BCMA an administrative fee when non-members apply for a negotiated benefit to which they are entitled. It is further understood and agreed that non-members will not be charged administrative fees that exceed the equivalent of dues and levies charged to BCMA members in the calendar year in which the non-member applies for a benefit or benefits.

23. This provision was continued in s. 7(1)(c) of the Benefits Subsidiary Agreement entered into between the Government, the Medical Services Commission and the BCMA in or about November, 2007, which continues in effect.
24. Further to the provisions of the Amended Second Master Agreement and the Benefits Subsidiary Agreement, the Government and the BCMA have entered into Benefits

Administration Agreements. The Benefits Administration Agreement dated June 12, 2008 provides, in s. 2.2(h) that the BCMA will collect administrative fees from eligible physicians who are not members of the BCMA, all in accordance with s. 7.1(c) of the Benefits Subsidiary Agreement.

25. The Physician Master Agreement, the Second Physician Master Agreement, the Amended Second Master Agreement, the Benefits Subsidiary Agreement and the Benefits Administration Agreement detailed above are referred to collectively herein as the "Agreements".
26. The administration fees authorized by the Agreements to be charged to non-members are distinct from the fees paid to the BCMA for costs incurred by the BCMA to perform the administrative services required of the BCMA under the Benefits Administration Agreement (defined as the "Administrative Costs").
27. The administration fees charged to non-members reflects a form of randing, designed to achieve the goals set out in paragraph 19 above. Namely, ensuring that the BCMA has the financial means to carry out its purposes and that non-members who benefit from the work of the BCMA contribute to the cost of securing those benefits.
28. The BCMA denies that the purpose of the system of randing applied to non-members is intended to punish non-members for electing not to join the BCMA. Further, the BCMA denies that it is in a position of power or that the Plaintiff is in a position of vulnerability in relation to the charging of administrative fees. The nature and extent of the administrative charges are prescribed by the Agreements.
29. In specific response to paragraph 26 of the Notice of Civil Claim, the BCMA denies that monies are advanced exclusively for the purposes alleged and says that the administrative fees are expressly authorized to be charged against benefit payments to non-member physicians in order to provide a funding source for the BCMA.

Administrative charges to non-members

30. The BCMA denies that the administrative fees charged to non-members are arbitrary, as alleged or at all.
31. Despite being authorized to charge administrative fees against all negotiated benefits to which non-members are entitled and subject only to the limitation that such fees shall not exceed the equivalent of dues and levies charged to BCMA members, the BCMA currently charges administrative fees to non-members as follows:
 - (a) 50% of the benefit entitlement plus applicable taxes, or the balance of equivalent BCMA membership dues in relation to the Contributory Professional Retirement Savings Plan, the Canadian Protective Association Rebate Program and the Continuing Medical Education Fund;

- (b) no administrative fees are charged to non-members in respect of the Physician Disability Insurance Program, the Parental Leave Program, the Pregnancy Leave Program or the Physician Health Program.
32. The BCMA denies that the administrative fees charged to non-members are excessive, as alleged or at all.
 33. The amount charged to non-members for administrative fees is always equal to or less than the equivalent BCMA membership dues that would be payable by the non-member physician in the year for which benefits are claimed.
 34. The amounts charged as administrative fees to individual non-member physicians varies depending on the individual circumstances of the non-member physician. The type and amount of benefits applied for as well as the BCMA membership class to which the non-member physician would belong all affect the amounts charged as administrative fees to individual non-member physicians.
 35. In the period 2000-2010, calculated on a cumulative basis where applicable:
 - (a) administration fees charged to individual non-members ranged from de minimis amounts (less than \$5.00) to a maximum of \$15,674;
 - (b) total benefits paid to individual non-members, net of administrative charges ranged from de minimis amounts (less than \$5.00) to a maximum of \$243,788.80;
 - (c) the relationship between total benefits paid to individual non-members and administrative fees charged to individual non-members ranged from a de minimis amount (less than 1%) to a maximum of 50%;
 - (d) the total of all administrative fees charged to non-members as a percentage of the total benefits paid to non-members was approximately 19%; and
 - (e) many non-members paid less in administrative charges to the BCMA than they would have paid had they elected to become members of the BCMA.
 36. In specific response to paragraph 36 of the Notice of Civil Claim, the administrative fees charged to the Plaintiff in the period 2000-2010 were \$11,047 against total benefits paid for CME, CPRSP and CMPA of \$63,570.80.
 37. In specific response to paragraph 35, the BCMA denies that the Plaintiff has suffered loss or damage as alleged or at all. The Plaintiff has received what the Government has agreed to pay by way of compensation and benefits, less administrative charges authorized by the Government to be charged against benefit entitlements for the purposes set out in more detail above.

Notice as to administrative charges

38. Non-member physicians are advised, prior to applying for benefit entitlements as to the amount and nature of the administrative charges.
39. The Contributory Professional Retirement Savings Plan Application, required to be completed and submitted in order to obtain benefits available under the Contributory Professional Retirement Savings Plan, advises applicants:

If you are a not a member of the BCMA in the year the entitlement is allotted, an administration fee of 50% of your entitlement plus HST, or the balance of your equivalent BCMA membership dues, is payable to the BCMA for each such year being claimed. The entitlement being claimed less the administration fees will be sent to the Financial Institution below. An administration fee receipt will be issued to you in February of the following year.
40. The Continuing Medical Education Fund Application and Canadian Medical Protective Association Rebate Application contain equivalent provisions.

Allegations of Agreements

41. The BCMA denies the allegations of agreement set out at paragraph 24 of the Notice of Civil Claim, except to the extent that such allegations accord with the express agreements between the BCMA and Government as amended from time to time including by way of a Memorandum of Agreement dated April 6, 2009.
42. Further, the BCMA says that any obligations to report regarding Administration Costs, the receipt of administrative fees charged to non-members or the payment out of benefits are owed by the BCMA exclusively to Government pursuant to the Agreements.
43. In specific response to paragraph 25, the Plaintiff is not a party to the Agreements and lacks standing to complain about a failure by the BCMA to comply with contractual obligations that may be owed to another.

Division 3 – Additional Facts

44. See Division 2 above.

Part 2: RESPONSE TO RELIEF SOUGHT

45. The Defendant opposes the granting of the relief sought in all paragraphs of Part 2 of the Notice of Civil Claim.
46. In respect of the relief claimed in Part 2, paragraphs 1, 2, 5 and 7, the Plaintiff is not a party to the Agreements and lacks standing to bring a claim for the relief sought in these paragraphs.

Part 3: LEGAL BASIS

Allegations of illegality, breach of public policy and violations of the *Charter*

47. The Agreements authorizing the BCMA to charge administrative fees to non-members are valid and enforceable and not contrary to public policy.
48. The requirement that non-members contribute financially to the BCMA by way of administrative fees acts to further the collective economic and other interests of physicians in British Columbia, whose association is compelled by their choice of profession and the adoption in Canada of a medicare system based on principles of universality, accessibility, comprehensiveness, portability and public administration. In these circumstances, application of a randing system to impose administrative charges on non-member physicians does not violate any individual rights or freedoms guaranteed by law.
49. In the alternative, the *Charter of Rights and Freedoms* has no application as the BCMA is not government and the act of charging administrative fees to non-members is not governmental in nature.
50. In the further alternative, the practice of charging administrative fees to non-member physicians is justified. The BCMA pleads and relies on s. 1 of the *Charter of Rights and Freedoms*.
51. In specific response to Part 3, paragraph 5 of the Notice of Civil Claim, the BCMA says that the funds collected from benefit entitlements to pay administrative charges for non-members are being used both as contemplated and as expressly authorized by the Agreements.
52. In further response to Part 3, paragraph 5 of the Notice of Civil Claim, the BCMA disputes that the system of randing employed in British Columbia has an impact on the ability to attract physicians to British Columbia or to retain physicians in British Columbia. Mandatory membership and/or the compulsory payment of membership dues by physicians to an equivalent professional organization is in place in every province in Canada.

Unjust enrichment claim

53. The BCMA denies that it has been unjustly enriched by the receipt of administration fees from non-members.
54. As more particularly set out above, the BCMA says that administration fees from non-members were received pursuant to the Agreements, each of which are valid and enforceable contracts entered into between Government and the BCMA from time to time and have been applied to support the work of the BCMA and the CMA, including work for the benefit of all physicians in British Columbia.

55. In these circumstances, the Plaintiff did not confer any benefit on the BCMA for which she has been correspondingly deprived without juristic reason.
56. In the alternative, the BCMA says it would be inequitable to order restitution of administrative fees received from non-member physicians, either in whole or in part, in the circumstances described herein.

Allegation of breach of trust

57. The BCMA denies that monies advanced by Government to the BCMA in respect of benefits for non-members are impressed with a trust, as alleged or that the funds at issue were advanced for the exclusive benefit of non-member physicians.
58. In charging administrative fees to non-members against benefit entitlements in the manner and in the amounts charged, the BCMA acted in accordance with the Agreements.
59. In the alternative, if monies advanced by the Government to the BCMA in respect of benefits for non-members are impressed with a trust, which is denied, the terms of the trust expressly authorize the charging of administrative fees to non-members in the manner and amounts charged. As such, the BCMA denies that it has acted in breach of trust by misappropriating or converting funds, as alleged or at all.
60. In the further alternative, the Plaintiff, either expressly or impliedly, represented that she had knowledge of, understood and consented to the administrative charges that would be withheld from her benefit entitlements, which representations were relied on by the BCMA such that the Plaintiff is estopped from claiming damages or restitution of such amounts.

Allegation of breach of fiduciary duty

61. The BCMA denies that it owes a fiduciary duty to the plaintiff as alleged or at all or that the BCMA has acted in breach of fiduciary duty or any other duty in charging and collecting administrative fees from non-member physicians.
62. In the alternative, if a fiduciary duty is owed by the BCMA to non-member physicians in relation to the charging of administrative fees, which is denied, the fiduciary duty arises by virtue of the Agreements appointing the BCMA as administrator, which Agreements authorize the BCMA to charge to administrative fees to non-member physicians. As such, the conduct of the BCMA in charging administrative fees to non-members does not constitute a breach of fiduciary duty and is not unlawful.
63. Further, amounts collected as administrative charges from non-members were applied to advance the purposes of the BCMA which operates for the general benefit of all physicians in British Columbia. As set out above, the BCMA does not operate for the purpose of profit or gain. As such, no order for equitable relief is justified in the circumstances.

64. In the further alternative, the Plaintiff, either expressly or impliedly, represented that she had knowledge of, understood and consented to the administrative charges that would be withheld from her benefit entitlements, which representations were relied on by the BCMA such that the Plaintiff is estopped from claiming damages or restitution of such amounts.

Limitation defence

65. The BCMA says that the claims of the Plaintiff in this proceeding are barred by the effluxion of time. The defendant pleads and relies upon the *Limitation Act*, R.S.B.C. 1996 c. 266 and upon the equitable doctrines of laches and acquiescence.

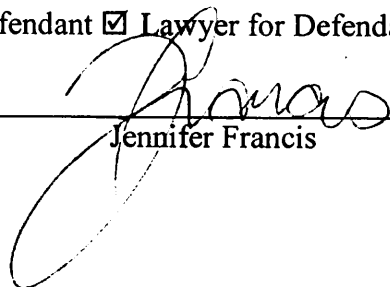
Defendant's address for service: Fasken Martineau DuMoulin LLP
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Dated: 15-Jun-2011

Signature of
 Defendant Lawyer for Defendant



Jennifer Francis

Rule 7-1(1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any part at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.

The Solicitors for the Defendant, British Columbia Medical Association (Canadian Medical Association – B.C. Division) are Fasken Martineau DuMoulin LLP, whose office address and address for delivery is 2900 - 550 Burrard Street, Vancouver B.C. V6C 0A3
Telephone: 604 631 3131 Facsimile: 604 631 3232. (Reference: Jennifer Francis/240164.00050)