FIN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Matthias v. British Columbia Medical Association,* 2013 BCSC 251

Date: 20130219
Docket: S111412
Registry: Vancouver

Between:

Dr. Renate Matthias

Plaintiff

And

British Columbia Medical Association (Canadian Medical Association - B.C. Division)

Defendant

Before: The Honourable Mr. Justice McEwan

Reasons for Judgment

Counsel for the Plaintiff:	D.M. Tevlin, D.B. Gleadle and C. Forguson
Counsel for the Defendant:	A. Borrell and J. Francis
Place and Date of Trial/Hearing:	Vancouver, B.C. November 14-16, 2011
Place and Date of Judgment:	Vancouver, B.C. February 19, 2013

I

[1] The plaintiff is a medical doctor and physician who practices in Vancouver, British Columbia.

[2] The British Columbia Medical Association (the "BCMA") is a voluntary professional association incorporated in British Columbia under the *Society Act.*

[3] The plaintiff is not a member of the BCMA. Pursuant to an arrangement between the BCMA and the government, however, she is obliged to deal with the BCMA in order to access certain benefits to which she is entitled as a medical practitioner in British Columbia. The BCMA charges fees to administer these benefits which the plaintiff considers excessive. She challenges the BCMA's authority to collect fees in the amounts it does, or at all.

[4] The plaintiff believes that as many as 1200 non-members are similarly affected and seeks to have this proceeding certified as a class proceeding.

II

[5] The government of British Columbia has for many years operated a publicly funded system for the provision of basic medical services. The legislative instrument through which this is effected is the *Medicare Protection Act*, R.S.B.C. 1996, c. 286 [*MPA*], and the Regulations passed under it.

[6] A feature of this system is that physicians provide services without charge to patients, but are remunerated from public funds in accordance with pay and benefits arrangements negotiated by the BCMA.

[7] The purposes of the BCMA are set out in section 2 of its constitution. They 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.

[8] The government, the BCMA, and an entity called the Medical Services Commission are parties to the Physician Master Agreement, which authorizes the BCMA to be the sole and exclusive representative of physicians in negotiations with the government. Section 3.2 reads:

> (a) The government hereby grants to the BCMA the sole and exclusive right, and the BCMA hereby undertakes the obligation, to represent the collective and individual interests of those physicians where the funding for their services is, in whole or in part, provided by the government either directly or through Agencies.
>
> (b) The government undertakes to include within funding contracts for physician services with Agencies, a clause requiring the Agency to advise physicians of their right to be represented by the BCMA, and to negotiate in good faith when establishing Local Contracts.
>
> (c) The government further undertakes that it will require Agencies to recognize the BCMA's right to represent those physicians who request the assistance of the BCMA in negotiating contractual arrangements with those Agencies.
>
> (d) The BCMA undertakes that, in exercising its representation rights, it will advise physicians that all matters within the ambit of this Agreement and/or within the ambit of any of the Physician Master Subsidiary Agreements, must comply with the provisions of this Agreement and the Physician Master Subsidiary Agreements.

[9] The BCMA is authorized to act on behalf of physicians in relation to several matters, including:

> ...
>
> (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 or 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 physician resources 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 change their mode of compensation; and
>
> (k) processes to address quality of care concerns raised by physicians.

[10] The benefits made available by the BC government through its contracts with the BCMA are the same for members and non-members. When the government granted the BCMA the sole and exclusive right to bargain, on behalf of doctors, the BCMA undertook an obligation to represent the collective and individual interest of *all* physicians, including non-members.

[11] All of the various agreements pertaining to physician pay and benefits are applicable to members and non-members on the same terms. These include the Physician Master Agreement (the "PMA"), the Benefits Subsidiary Agreement (the "BSA"), and the Benefits Administration Agreement (the "BAA"). The BCMA has summarized some of the pertinent obligations under these agreements as follows:

> (a) the BC government would advance monies to the BCMA in respect of each benefit plan; (BSA)
>
> (b) the monies advanced by the BC government to the BCMA were to be used solely to provide benefits and to fund the cost of administering such benefits;
>
> (c) the funds advanced included sufficient amounts to compensate the BCMA for the costs of administering the plans; (BAA, clause 3.3)
>
> (d) the BCMA was to administer the benefits with the same degree of care, skill and efficiency as would be employed by a prudent and reasonable benefits administrator performing the same services; (BAA, clause 2.3)

(e) the BCMA was entitled to reimbursement for its costs of administering the benefit plans from the BC government, but only such costs as were reasonable and reasonably comparable to the costs that would be charged by a prudent and reasonable professional benefits administrator performing the same services; (BAA, clause 3.1)

(f) the BCMA was required to us a portion of the funds advanced to provide benefits to non-members; (BSA, clause 7.1(b))

(g) the BCMA agreed to administer the benefit plans for non-members with the same standard of administration as for BCMA members; (BSA, clause 7.1(b))

(h) the BCMA was allowed to charge an administration fee to non-members which would not be more than the equivalent of dues and levies charged to BCMA members in the calendar year in which the non-member applies for benefits. (BSA, clause 7.1(c))

(i) the BCMA was required to report annually to the government on its expenditures related to the administration of the Benefit Plans to allow the BC government to meet its statutory obligations to account for the use of public money; and

(j) the BCMA benefits department was required to report the value of administration fees charged to non-members for each Benefit plan on an annual basis.

[from the BCMA's submission]

[12] The BCMA charges fees to its members. Non-members pay administration fees on certain benefits they claim at the time each claim is made.

[13] The plaintiff alleges that whenever she or any other non-member applies for such benefits, administration fees that are charged are arbitrary and excessive and bear no relation to the administrative cost of providing the benefit. She says that for any particular benefit payment the administration fee can exceed 50% of the amount of the benefit.

[14] The plaintiff says that the government could easily have undertaken the administrative work required to provide these benefits or it could have gone to public tender for a professional benefit administrator, but that instead is contracted with the BCMA.

[15] The plaintiff says that the BCMA has abused its position as the agent for all physicians in British Columbia, to charge fees that do not represent the true cost of

administration in relation to benefits paid to non-members, but amount to a source of substantial funding taken from those who choose not to pay membership dues.

[16] The plaintiff says that the arrangement places her, and all non-members, in a vulnerable position and has enabled the BCMA to abuse its position to punish her and other non-members for refusing to join.

[17] The plaintiff says that for at least the last 10 years she has suffered loss and damage because she has not received the benefits to which she was entitled, but has instead paid costs that have been excessive.

III

[18] The BCMA does not take issue with the central facts asserted by the plaintiff. It charges fees pursuant to s. 15.3 of the PMA, which authorizes the BCMA to charge non-member fees against the benefits that have been negotiated:

> 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.

[19] The BCMA says that similar provisions were included in the Master Agreement of 1993 and have been included in all subsequent agreements.

[20] The essential difference between the parties is over whether the amounts charged by the BCMA pursuant to its interpretation of this authorization are lawful and justified, or whether a reasonable administration fee for each benefit payment should be calculated on a different, reduced basis, such that the plaintiff and others in her position are entitled to reimbursement for the overcharge.

IV

[21] With that overview of the factual nature of the claim and the response to it, I think it may be useful to set out in somewhat more detail the legislative means by

which the BCMA has acquired the role of administering the benefits plans, and the series of contracts that are involved.

[22] The BCMA was founded in 1900 and says it currently has over 11,000 members, some 8,500 of whom are active practitioners.

[23] Its activities extend beyond its engagement in matters of compensation and benefits. In order to carry out its activities in these other spheres, and to negotiate with the government over compensation and benefits, the BCMA incurs administrative costs for staff salaries, office space, committees, consulting and professional fees. In turn, it pays dues to the Canadian Medical Association. These expenses are funded primarily by membership dues and non-member fees.

[24] The *MPA* establishes the Medical Services Commission (the "MSC") which consists of nine people, three nominated by the government and three by the BCMA, with a further three being jointly appointed. The MSC is the agency that pays medical practitioners in accordance with the negotiated payment schedules. The *MPA* sets limits on billing and sets out the authority to audit and otherwise administer the plan. The MSC is responsible for ensuring that the criteria of public administration, comprehensiveness, universality, portability and accessibility are met, as these are crucial to qualifying for Federal funding transfers under the *Canada Health Act*, R.S.C. 1985, c. C-6.

[25] One of those requirements is that there be reasonable compensation provided to medical practitioners. The BCMA has been accepted by government as the body it deals with in bargaining with medical doctors collectively. For the BCMA the work involved is extensive and the process can be protracted. Once an agreement is reached and the BCMA board has recommended acceptance, a majority of the membership must ratify the contract. If, in any negotiating period agreement cannot be reached, there is a dispute resolution process.

[26] The BCMA describes the various benefit programs that have been negotiated as follows:

(a) Physician Disability

28. The physician Disability Insurance Program ("PDI" or the "PDI Program") provides income replacement to a maximum benefit amount for eligible physicians who become disabled.

(b) Continuing Medical Education

29. The CME benefit provides for an allotment of monies used to reimburse physicians for eligible medical educational expenses.

(c) Canadian Medical Protective Association Rebate Program

30. The Canadian Medical Protective Association Rebate Program (the "CMPA Rebate") provides eligible physicians with partial reimbursement of membership fees payable by physicians to the Canadian Medical Protective Association (the "CMPA") for professional liability protection. The amount available to physicians pursuant to the CMPA Rebate is calculated by the following formula, subject to funding levels agreed to from time to time: Current Year CMPA premiums less 1985 CMPA Premiums = Current Year Rebate.

(d) Contributory Professional Retirement Savings Plan

31. The Contributory Professional Retirement Savings Plan (the "CPRSP") is a retirement savings program that provides funds on a dollar for dollar matching basis for eligible physicians to contribute to their retirement savings plan, subject to the available CPRSP funding, and subject to the specific terms, conditions, rules and eligibility criteria approved and published by the Benefits Committee, At present the CPRSP has two components: a basic benefit and a new Length of Service (LOS) benefit.

(e) Maternity Leave Program/Parental Leave Program

32. The Parental Leave Program currently in place provides up to $1,000 per week for up to 17 consecutive weeks, to eligible male and female physicians who have become parents of a newborn or newly adopted child or of a newborn through a surrogate mother.

(f) Physician Health Program of British Columbia

33. The Physician Health Program of British Columbia ("PHP") was established in 1979. It offers help to BC physicians, residents, medical students and their immediate families for a wide range of personal and professional problems (physical, psychological and social), including by way of a 24-hour Helpline or a PHP physician. The PHP also offers a variety of educational programs.

34. Funding for PHP was initially provided exclusively by the BCMA and the College of Physicians and Surgeons. However, a doubling of financial support for the PHP was negotiated in 2006. At that time, the BCMA obtained the government's agreement to match the funding provided to PHP by the BCMA and the College.

(g) General benefit of the Benefit Plans

35. The various benefit plans described above provide significant benefits to physicians each year, both BCMA members and non-members. By way of

> example, in the period April 1, 2010 to March 31, 2011, the benefit plans provided disability insurance coverage to 6,686 physicians; resulted in contributions to retirement savings for 10,065 physicians in an amount of $51,391,344; reimbursed 9,714 physicians a total of $10,077,268 in respect of medical education expenses; funded a parental leave of 227 physicians at a cost of $3,161,566 and reimbursed 9,000 physicians for CMPA membership dues in an amount of $13,847,236.
>
> [from the BCMA's submission]

[27] The BCMA does not charge non-member fees against all of these benefits. It charges them only against the CME benefit, the CMPA rebate and the CPRSP, described in items (b)(c) and (d) in paras. 29-31 of the insert in para. 26 above. Fees are charged at the rate of the lesser of 50% of the non-member physician's benefit entitlement, plus tax, or the balance of the equivalent BCMA membership dues for each year for which the benefits are claimed. Tax can reduce any given pay-out to less than 50% of the pertinent benefit, until the BCMA member fees equivalent is reached.

[28] The plaintiff submits that the particular effect of these charges in her case are illustrated by the following examples:

(1) The Continuing Medical Education Plan Benefit:

a. She applied for CME benefits on January 20, 2009. Her application at that time was for reimbursement of qualifying continuing medical education expenses incurred in the prior 4 years, from 2006 to 2009;

b. She applied for $1,150 in respect of qualifying CME expenses in 2006, and BCMA charged an administration fee of $603.75 (52.5%);

c. She applied for $1,400 in respect of qualifying CME expenses in 2007, and BCMA charged an administration fee of $603.75 (43.125%);

d. She applied for $1,400 in respect of qualifying CME expenses in 2008, and BCMA charged an administration fee of $735.00 (43.125%);

e. She applied for $1,400 in respect of qualifying CME expenses in 2009, and BCMA charged an administration fee of $349.65 (25%);

(2) The CMPA Rebate Program:

d. The reimbursement percentage to which a physician is entitled from the program is based on gross payments from

> the Ministry of Health or payment made under a service contract during hte previous calendar year as follows:
>
> (i) Gross Income over $30,000 - 100%
>
> (ii) Gross Income $15,001 to $30,000 - 75%
>
> (iii) Gross Income $10,001 to $15,000 - 50%
>
> (iv) Gross Income $5,001 to $10,000 - 25%;
>
> e. Gross Income less than $5,000 - none
>
> f. For the entire period during which the CMPA Rebate Program has been in effect, Dr. Matthias earned qualifying income sufficient ot receive a 100% rebate;
>
> g. For the past at least 10 years the defendant has charged Dr. Matthias unreasonable and excessive fees in respect of the CMPA Rebate Program and has failed to provide her the full amount of the benefit to which she has been entitled.
>
> (3) The Continuing Professional Retirement Savings Plan Benefit:
>
> f. Until the most recent claim period, the BCMA charged Dr. Matthias an administration fee of approximately $300 per year;
>
> g. In the most recent claim period, the BCMA charged Dr. Matthias an administration fee equal to 50% of her basic CRRSP benefit;
>
> h. In the current claim period she was charged $1,615 by way of an administration fee for her CRRSP benefit.
>
> [from the plaintiff's submission]

[29] The plaintiff also claims that she has been excessively charged under the Physician's Disability Insurance Program.

V

[30] The plaintiff's application sets out the relief she seeks in the following terms:

> At the application the plaintiff will seek an order:
>
> 1. certifying this action as a class proceeding;
>
> 2. defining the class (the "non-members") as all persons who at any time after January 1, 2002:
>
> (a) were licensed to practice medicine in the province of British Columbia; and
>
> (b) who, either personally or through a corporation, billed servcies under the British Columbia Medical Services Plan ("MSP"); and

(c) who were not members of the defendant ("BCMA"); and

(d) who were charged fees by BCMA;

3. appointing Dr. Renate Matthias as representative for the class;

4. certifying the following issues as common issues:

(a) were and are the non-members entitled to receive benefits from the BC government as compensation for the services they provide under the MSP?

(b) was the BCMA appointed by the BC government to administer benefits for the non-members (hereinafter referred to as the "benefits")?

(c) were monies advanced by the BC government to the BCMA to fund benefits?

(d) if monies were advanced by the BC government to the BCMA to fund benefits, was BCMA a trustee of the said monies for the benefit of the non-members?

(e) if monies were advanced by the BC government to the BCMA to fund benefits for non-members, was BCMA lawfully entitled to charge the non-members a fee to administer the receipt and distribution of such monies?

(f) if the BCMA was lawfully entitled to charge the non-members a fee to administer the receipt and distribution of such monies, what amount of fee was appropriate? In particular was BCMA lawfully entitled to charge a fee to non-members that was:

(i) no more than would have been charged by a prudent and reasonable benefit administrator for the same service?, or

(ii) set without reference to the fees that would be charged by a prudent and reasonable benefit administrator, but instead by reference to the fees that BCMA charged its members for membership dues?

(g) did the BC government agree to reimburse the BCMA for all or any administration expenses necessary to administer the benefits?

(h) did the BC government in fact reimburse the BCMA for all or any administration expenses necessary to administer the benefits?

(i) did the BC government limit by contract with the BCMA the administration costs properly chargeable by it to those costs which would be charged by a prudent and reasonable benefit administrator performing the same service?

(j) were the fees charged to non-members as a condition of receiving benefits comparable to fees which would be charged

by a prudent and reasonable benefit administrator performing the same service?

(k) is there a contract between the BC government and the BCMA which allows the BCMA to charge fees to the non-members up to the amount BCMA members paid for membership dues even if such fees were in excess of the fee that would have been charged for such services by a prudent and reasonable benefit administrator?

(l) if there is such a contract, are the class members party to or bound by such contract?

(m) is the BCMA required by contract with the BC government to report the administration fees charged to non-members, and if so what reporting has been completed and what are the reported amounts by period?

(n) what expenses have been incurred by the BCMA to administer the benefits?

(o) what administration fees have been charged to and paid by the non-members?

(p) has the BCMA charged non-members arbitrary or excessive administration fees for the benefits?

(q) has the BCMA been unjustly enriched by reason of arbitrary or excessive administration fees charged to non-members?

(r) if the BCMA is a trustee in respect of the receipt of and administration of the benefits, did the BCMA breach its duties as a trustee and what did the BCMA do in breach of its duties as trustee?

(s) in respect of the administration of the benefits, is the BCMA in the position of a fiduciary, and if so did the BCMA breach its duties as a fiduciary in respect of the non-members?

(t) if the BCMA charged arbitrary or excessive fees to non-members, was it done for an improper purpose, that is to punish class members for not joining the BCMA and/or to encourage them to join?

(u) if there was a breach of trust by the BCMA was it malicious, so as to attract aggravated and or punitive damages?

(v) if there was a breach of fiduciary duty by the BCMA was it malicious, so as to attract aggravated and or punitive damages?

(w) if the non-members are entitled to an order requiring BCMA to repay excessive administration fees, are the non-members entitled to interest?

> (x) if the BCMA charged arbitrary or excessive fees, is that contrary to public policy, including the right of freedom of association confirmed by section 2 of the S.2 of the *Canadian Charter of Rights and Freedoms?*
>
> (y) does the BCMA negotiate on behalf of the non-members and if so by what authority does it do so?
>
> (z) does the BCMA undertake work for the benefit of the non-members, and if so by what authority does it do so?
>
> > (aa) if the charging of fees to the class members is authorized by contract, as the defendant alleges, who are the parties to it, when was it created, and what are its terms?
> >
> > (bb) if the fees charged to the class members are distinct from and greater than the costs incurred, is there any right at law for the BCMA in institute a form of "randing" as alleged, or at all?
> >
> > (cc) are any of the claims made by the non-members statute bared by the effluxion of time?
> >
> > (dd) are any of the claims made by the non-members barred by the equitable doctrines of either acquiescence or laches?

[31] Part 2 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*Act*] sets out what is required for certification in s. 4(1):

> 4.(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if
>
> > (a) the pleadings disclose a cause of action,
> >
> > (b) there is an identifiable class of 2 or more persons,
> >
> > (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members,
> >
> > (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, and
> >
> > (e) there is a representative plaintiff who
> >
> > > (a) would fairly and adequately represent the interests of the class
> > >
> > > (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

> (c) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[32] The plaintiff submits that the objectives of the class proceedings must be kept in mind in assessing whether the criteria have been met. In *Abdool v. Anaheim Management Ltd.*, 1995 CanLII 5597, the Ontario Divisional Court, per O'brien J. at p. 7, described the purpose of the Ontario legislation as follows:

> It seems clear the three main objects of the class proceeding legislation are:
>
> (i) judicial economy, or the efficient handling of potentially complex cases of mass wrongs;
>
> (ii) improved access to the courts for those whose actions might not otherwise be asserted. This involved claims which might have merit but legal costs of proceeding were disproportionate to the amount of each claim and hence many plaintiffs would be unable to pursue their legal remedies;
>
> (iii) modification of behaviour of actual or potential wrongdoers who might otherwise be tempted to ignore public obligations.

[33] These observations have been quoted with approval in a number of British Columbia cases (See: *Endean v. Canadian Red Cross Society*, [1997] B.C.J. No. 1209 (B.C.S.C. per Smith J.) (appeal allowed with respect to issue of striking out pleadings on issue of claim of the tort of spoliation at [1998] B.C.J. No. 724, leave to appeal to S.C.C. granted, and appeal discontinued as a settlement was reached); *Hoy v. Medtronic Inc.*, 2001 BCSC 944; and *Brogaard v. Canada (Attorney General*), 2002 BCSC 1149.

[34] In *Brogaard*, the court observed, per Allan J.:

> [27] In *Hollick v. Toronto* (2001), 205 D.L.R. (4th) 19, 2001 SCC 68, at paras. 15 and 16, Chief Justice McLachlin, considering provisions of the Ontario class proceedings legislation similar to ours, underscored the intrinsic value of class proceedings:
>
> > ... class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of

> claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public.
>
> ... In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.
>
> It is particularly important to keep this principle in mind at the certification stage... Thus the certification stage is decidedly not meant to be a test of the merits of the action: Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action. (emphasis in *Hollick*.)

VI

[35] The plaintiff submits that she meets the criteria set out in s. 4(1) of the *Act.* She acknowledges that under s. 4(1)(a), the requirement that the pleadings disclose a cause of action, the burden falls on the party who seeks to maintain a class action. This reverses the burden in ordinary litigation which is normally on the party challenging the plaintiff's allegations. The principle was stated in *Elms v. Laurentian Bank of Canada*, 2001 BCCA 429 at para. 20:

> 20 It is common ground that the Chambers judge correctly stated that a court will only refuse to certify on the basis that the pleadings do not disclose a cause of action if it is plain and obvious that the plaintiff cannot succeed. The test under s. 4(1)(a) of the *Act* to determine whether a cause of action exists is similar to the test applied in application to dismiss a claim on the grounds that it fails to disclose a cause of action. The only difference between the two tests is that the onus to show a cause of action falls upon the party bringing the class action, rather than on the party challenging the proceeding. In his text, *Class Actions in Canada*, looseleaf, (Aurora, Ontario: Canada Law Book, 2001) at paras. 4.70-4.80, W. Branch correctly states the law in this regard as follows:
>
> > The court will presume the facts alleged in the pleadings are true, and will determine whether it is plain and obvious that no claim exists. This is not a preliminary merits test. As Mr. Justice Winkler stated in *Edwards v. Law Society of Upper Canada* (1995), 40 C.P.C. (3d) 316 (Ont. Class Proceedings Committee):
> >
> > > There is a very low threshold to prove the existence of a cause of action . . . the court should err on the side of protecting people who have a right of access to the courts.

Courts in B.C. have also adopted a low threshold for this requirement.

[36] Other than this shift in onus, the principles set out in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, per Wilson J. at para. 33 apply respecting pleadings:

> 33 Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C. O. 18, r. 19: 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 Rule 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).

[37] The threshold has been described as “very low” in *Brogaard*, at para. 30:

> It is beyond dispute that the Court will refuse to certify an action on the basis that the pleadings do not disclose a cause of action only if it is plain and obvious that the plaintiffs cannot succeed. ... The threshold is a very low one.

[38] In *Edwards v. Law Society of Upper Canada*, [1995] O.J. No. 2900, Winkler J. (as he then was), said:

> There is a very low threshold to prove the existence of a cause of action. ... “... the court should err on the side of protecting people who have a right of access to the courts.”

[39] In *Abdool*, Moldaver J. (then of the Superior Court) observed:

> The principles to be applied when considering whether pleadings support a legal cause of action are as follows:
>
> (a) All allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proved;
>
> (b) The defendant, in order to succeed, must show that it is plain and obvious beyond doubt that the plaintiffs could not succeed;
>
> (c) The novelty of the cause of action will not militate against the plaintiffs; and
>
> (d) The statement of claim must be read as generously as possible, with a view to accommodating any

> inadequacies in the form of the allegations due to drafting deficiencies.

[40] This passage has been approved in British Columbia by Smith J. in *Endean* at para. 26 and by Allan J. in *Brogaard* at para. 33. The court must, for the purpose of a certification application, assume the validity of the factual allegations set out in the pleadings.

[41] The plaintiff asserts the following claims in the Notice of Civil Claim:

(a) breach of trust;
(b) breach of fiduciary duty;
(c) conversion;
(d) violation of the *Charter of Rights and Freedoms;* and
(e) unjust enrichment.

[42] The plaintiff submits that these are all recognized causes of action and that they meet the low threshold required. The submission does not specifically link the facts alleged to the causes of action asserted, but it is clear on a reading of the facts asserted in the pleadings that the legislative scheme is questioned on the basis that "the BCMA has no authority to negotiate anything on behalf of the non-members" (para. 14 of the Notice of Civil Claim).

[43] As I have noted, the plaintiff asserts that the B.C. government could have chosen a different means of administering the plan, by doing so itself, or by dealing with some other administrative agency than the BCMA (para. 23 of the Notice of Civil Claim), and that the provisions of the Benefits Subsidiary Agreement permitting the BCMA to charge an administration fee *that would not be more than the equivalent dues charged to member*s (s. 7.1(c)) was not authorized by non-members and has placed in the hands of the BCMA a means of oppressing non-members (paras. 24(g) and 27 of the Notice of Civil Claim), which the BCMA has, in fact, used for that purpose. Paragraphs 28 -31 of the Notice of Civil Claim read:

> 28. Each time the plaintiff or any non-member applies for and qualifies for any benefit provided in the Benefit Plans, the BCMA withholds arbitrary and excessive administration fees.

> 29. The BCMA's withholding of arbitrary and excessive administration fees is an abuse of its position of power and trust and conduct intended to punish her and other non-member physicians for not joining the BCMA.
>
> 30. The BCMA is profiting from and abusing its position of power and trust as benefits administrator of all benefits for all physicians in British Columbia, including non-members.
>
> 31. The BCMA has a practice and policy of charging non-members an administrative fee, without any regard to the reasonable cost of administration of that certain benefit, such that usually a non-member is charged the same amount as s/he would have paid in dues and levies to join the BCMA.

[44] The plaintiff suggests it would be possible to posit a "prudent and reasonable professional benefits administrator" test against which the impositions of the BCMA could be measured:

> 32. In many cases the administration fee charged exceeds 50% of the value of the given benefit.
>
> 33. The amounts charged to non-members are not reasonable or reasonably comparable to the costs that would be incurred by a prudent and reasonable professional benefits administrator performing the same service.

[45] The plaintiff pleads that the fees she has actually been charged are excessive by that standard, and excessive in any event, because the objective is to punish non-members.

VII

[46] The plaintiff submits that there is an identifiable class of two or more persons as required by s. 4(1)(b) of the *Act*.

[47] In her submission the plaintiff suggested that there are approximately 3900 non-member physicians in British Columbia. The pleadings suggest that there are 1000. The Response to Civil Claim says that there are approximately 11,000 active members of whom 8,500 are in active practice. It is not necessary to reconcile the numbers to appreciate that there may be other people in a position to make a similar complaint, assuming they took a similar attitude to the fees charged.

VIII

[48] The plaintiff describes about 30 “common issues” as set out in para. 30, herein.

[49] Several of these are questions with straightforward, statutory answers. The plaintiff’s concern about the basis on which the fees are charged by the BCMA are “issues” identified in subparagraph (f), of which (g) and (h) are logically subsets. The entire list queries the government’s authorization of the BCMA to act as the agent through whom it chooses to deal with doctors. By positing a “prudent and reasonable benefits administrator” test as between non-members and the BCMA, the plaintiff seeks to cast the BCMA’s receipt of funds from the government as funds effectively held in trust or held by the BCMA as a fiduciary, to the extent that the fees could be shown to exceed those that such a person would charge.

[50] Section 1 of the *Act* defines common issues as:

> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[51] In *Campbell v. Flexwatt Corp.*, [1997] B.C.J. No. 2477 (BCCA) Cumming J.A. said:

> 53 When examining the existence of common issues it is important to understand that the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief.

[52] In *Harrington v. Dow Corning Corp.*, 2000 BCCA 605, Huddart J.A. said:

> [23] I would have thought that the word “issue” simply meant a point in question, a point affirmed by the plaintiff and denied by the defendant. If the point of fact or law is necessary to the successful prosecution of the cause of action (or in some circumstances to its defence), then its resolution will inevitably move the litigation forward. The degree of materiality and the interplay among the various common and individual issues is a matter for consideration under s. 4(1)(d) and thus s. 4(2), not a matter for consideration under s. 4(1)(c).

[53] In *Brogaard,* Allan J. said:

> [108] The question for determination at the certification stage is whether the resolution of a common issue is necessary to the resolution of each class member's claim and whether that common issue is a substantial ingredient of each of the class member's claim. The latter requirement is satisfied if the resolution of the issue, either for or against the class members, will advance the case or move the litigation forward and is capable of extrapolation to all class members. *Western Shopping Centres*, *supra*, at para. 39; *Hollick*, *supra*, at para. 18; *Harrington v. Dow Corning Corp.* (2000), 193 D.L.R. (4th) 67 (B.C.C.A.) at paras. 20-24, leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 21 (Q.L.); *Campbell v. Flexwatt Corp.* (1998), 44 B.C.L.R. (3d) 343 (C.A.) at para. 53, leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 13 (Q.L.).
>
> [109] ... I have already determined that those claims should not be struck for failing to disclose a cause of action. It is inappropriate at this stage to delve further into the merits of the plaintiffs' claims. The issue for consideration under this heading is whether the plaintiffs' pleadings, as they stand raise common issues.
>
> ...
>
> [111] ... Moreover, they may decide to amend their statement of claim to plead that those sections are also unconstitutional.
>
> ...
>
> [114] ... It is not uncommon to refine the list of common issues as the litigation progresses: *Hoy v. Medtronic, Inc.* (2001), 94 B.C.L.R. (3d) 169; 2001 BCSC 1343.

[54] The plaintiff's position is that a resolution of the common issues will advance the claim of each individual class member.

IX

[55] The plaintiff submits that a class proceeding is the preferable procedure in this case in accordance with the requirement of s. 4(1)(c). Section 4(2) set out several factors to be considered:

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including
>
> > (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members,
> >
> > (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions,

> (c) whether the class proceedings would involve claims that are or have been the subject of any other proceedings,
>
> (d) whether other means of resolving the claims are less practical or less efficient, and
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[56] The question of whether a class proceeding is the "preferable procedure for the fair and efficient resolution of the common issues" must be considered in light of the underlying purposes of the *Class Proceedings Act.* In *Campbell*, Cumming J.A. noted at para. 25:

> [25] ... The Legislature enacted the Class Proceedings Act on 1 August 1995 to make available in this province a procedure for the fair resolution of meritorious claims that are uneconomical to pursue in an individual proceeding, or, of pursued individually, have the potential to overwhelm the courts' resources. Class proceedings are an efficient response to market demand only if they can resolve disputes fairly. Trial court judges must be free to make the new procedure work for plaintiffs and defendants.

He said further at paragraph 65:

> [65] It is to be noted that a class proceeding does not have to be the preferable procedure for resolving the whole controversy, but merely the preferable procedure for resolving the common issues. Thus, fairness concerns about denial of individual discovery, and of the opportunity to seek contribution and indemnity become relevant only when issues are not common because they require examination of individual circumstances or defence claims not shared by class (or subclass) members. ...

[57] In *Endean*, Smith J. (as he then was) elaborated at para. 58:

> [58] ... [T]he object of the Act is not to provide perfect justice, but to provide a "fair and efficient resolution" of the common issues. It is a remedial, procedural statute and should be interpreted liberally to give effect to its purpose. It sets out very flexible procedures and clothes the court with broad discretion to ensure that justice is done to all parties. As was said in *Bendall v. McGahn Medical Corp.* (1993), 14 O.R. (3d) 734 at 747 (Ont. Ct. (Gen. Div.)):
>
> > Certification is a fluid, flexible procedural process. It is conditional, always subject to decertification.

[58] The plaintiff submits that the provisions of s. 7 of the *Class Proceedings Act* must be considered. It provides that the following matters are not a bar to certification:

> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> (b) the relief claimed relates to separate contracts involving different class members;
>
> (c) different remedies are sought for different class members;
>
> (d) the number of class members or the identity of each class member is not known;
>
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

[59] The plaintiff submits that in the present case the common issues predominate the other issues and the method for later payments is a matter or arithmetic. She submits that money that has been "wrongly" deducted, plus interest, is readily calculable. She estimates that individual claims would run between $5,000 and $16,000 each and would otherwise be small claims matters that might have to be brought in as many as 43 different court registries.

[60] The plaintiff also submits that the expert evidence required to compare the fees that are charged by the BCMA with the "market" rate for those services would be provided much more cost-effectively through one action than many.

[61] Lastly, the plaintiff submits that she is an appropriate class representative as required by s. 4(1)(e) of the *Class Proceedings Act*, which mandates that:

> there is a representative plaintiff who
>
> i. would fairly and adequately represent the interests of the class,
>
> ii. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> iii. does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[62] The plaintiff submits that she is appropriate because she is a member of the class familiar with the issues and is prepared to prosecute the action. She submits

that she is not in conflict with other members of the class of non-members of the BCMA and that she has provided a “workable” plan. She submits that the case meets all of the relevant criteria for certification as a class proceeding.

X

[63] The BCMA submits that there are a number of deficiencies in the plaintiff’s application, principally the plaintiff’s failure to disclose a cause of action. The foundation of this submission is *Lavigne v. Ontario Public Services Employees Union*, [1991] 2 S.C.R. 211 [*Lavigne*].

[64] The BCMA accepts that the principles in *Hunt* apply. It also submits that *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2011 BCCA 187 at para. 96, is instructive:

> [96] The question with respect to certification is whether the pleadings allege a cause of action insofar as they relate to the claim the representative plaintiff makes on behalf of the IPs against the defendants. I recognize that the considerations are the same as those that govern striking pleadings: *Elms v. Laurentian Bank of Canada*, 2001 BCCA 429, 90 B.C.L.R. (3d) 195 at paras. 20-21. They are as quoted in *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 at para. 15:
>
> > 15 An excellent statement of the test for striking out a claim under such provisions is that set out by Wilson J. in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980:
> >
> > > ... 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 ... should the relevant portions of a plaintiff's statement of claim be struck out. ...
> >
> > The test is a stringent one. The facts are to be taken as pleaded. When so taken, the question that must then be determined is whether there it is "plain and obvious" that the action must fail. It is only if the statement of claim is certain to fail because it contains a "radical defect" that the plaintiff should be driven from the judgment. See also *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

[65] The BCMA submits that if, on a proper analysis of the law, it is plain and obvious that the claim cannot succeed, the plaintiff will have failed to meet the onus set out in s. 4(1)(a). In *Pearson v. Boliden Ltd.*, 2002 BCCA 624 at para. 39 the court, per Newbury J.A., noted:

> [39] This court has ruled, however, that *Hunt v. Carey* does not mean that difficult questions of law should not be decided in an application to strike pleadings under R. 19(24): see the judgment of Taylor J.A. for the Court in *Kripps. v. Touche Ross & Co.* (1992) 94 D.L.R. (4th) 284. By analogy, the same would be true of an application to certify a class action, where by implication the action may not proceed unless the pleadings disclose a cause of action. Taylor J.A. observed further in *Kripps*:
>
> > It seems to me that a court is not bound to refuse relief under Rule 19(24) simply because the relevant area of law is uncertain, that is to say, because it seems possible another court might come to a different conclusion on the law. Every aspect of the common law is necessarily the product of evolution, and this process must continue if the common law is to serve its purpose. It would be wrong that those against whom action is brought in an area of law which happens to be in an active state of development should for that reason alone be required to bear the cost of inquiry into the facts before the court will decide whether the claim is one which calls for an answer. ... To say that it is not obvious "at once" beyond reasonable doubt that a claim, as pleaded or as it might be amended, is in law "bound to fail", is something very different from saying, as did the House of Lords in *Donoghue v. Stevenson*, [1932] A.C. 562, that the plaintiff, if she proved the facts which she averred, would be entitled to succeed.
>
> [Underline emphasis in *Pearson.*]

[66] In other terms, in addressing a submission based on novelty, Garson J. (as she then was) made the following point in *Greater Vancouver Regional District v. British Columbia (Attorney General)*, 2009 BCSC 577 at para. 31:

> [31] The plaintiff argues that this case is novel and complex and should not be decided under R. 19(24)(a). In my view difficult questions of law, even if they are complex or novel, may well be decided under this rule if on a proper analysis of the law it is plain and obvious that the claim cannot succeed. In my view, for the reasons given above, this claim cannot succeed and it is quite proper to so decide the question under R. 19(24)(a): *Kripps v. Touche Ross & Co.* (1992), 94 D.L.R. (4th) 284, 69 B.C.L.R. 2d) 62 (C.A.); *Pearson v. Boliden Ltd.*, 2002 BCCA 624, 7 B.C.L.R. (4th) 245; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2008 BCSC 419, 82 B.C.L.R. (4th) 362; and *McMurray v. Marshall*, 2005 BCSC 961, 47 B.C.L.R. (4th) 127.

[67] The purpose of imposing such a requirement as a precondition to certification is set out in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras. 19-20:

> [19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
>
> [20] This promotes two goods – efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be – on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.

[68] The BCMA submits that each of the plaintiff's claims, for breach of trust, breach of fiduciary duty, conversion, violation of the *Canadian Charter of Rights and Freedoms* and unjust enrichment are based on the fact that the BCMA charges "non-member fees." There is no factual dispute between the parties that these fees are distinct from the fees paid to the BCMA to administer the plan. The BCMA acknowledges that non-members fees help fund its general operations.

[69] There is also no question that the BCMA is authorized by the government to charge these fees. The plaintiff nevertheless alleges that the agreement is unlawful to the extent that the dealings between the government and the BCMA purport to affect non-members.

[70] The BCMA submits that there is no reasonable cause of action based on such a notion of illegality. The specific pleadings of illegality are at paras. 5 and 7 of the plaintiff's Notice of Civil Claim.

> The charging by the BCMA of arbitrary and excessive administration fees to non-member physicians deprives the public of the intended benefit of the Benefit Plans in a government funded medicine scheme, by the BCMA's taking of the funds intended by the public for the continuing education and social welfare of all BC physicians which would attract and retain excellent physicians in British Columbia for the greater public good.

> ...
>
> The charging by the BCMA of arbitrary and excessive administration fees to non-member physicians is unlawful, contrary to public policy, and in particular is contrary to the freedom of association protected by section 2 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982.

[71] The BCMA submits that *Lavigne* is a complete answer to this claim of illegality. In *Lavigne* a teacher at a Community College in Ontario, was obliged, under the *Ontario Collective Bargaining Act*, to pay dues to the union regardless of whether he was a member. He took issue with some of the union's spending, beyond its function as the exclusive bargaining representative of teachers. He brought an application seeking a declaration that the statutory authorization requiring him to pay dues whether or not he was a union member infringed, among other things, s. 2(d) of the *Charter.*

[72] Mr. Lavigne was unsuccessful in arguing that the compulsory payment of dues interfered with his *Charter* right to freedom of association. At paras. 230-231 of the Supreme Court decision, La Forest J. observed:

> 230 ... I do not think the freedom of association is necessarily a right to isolation. As a matter of metaphysical and sociological reality, "no man is an island", and the *Charter* must be taken to recognize this. At the very fundamental level, it could certainly not have been intended that s. 2(d) protect us against the association with others that is a necessary and inevitable part of membership in a democratic community, the existence of which the *Charter* clearly assumes. Thus, it could not be said that s. 2(d) entitles us to object to the association with the government of Canada and its policies which the payment of taxes would seem to entail given the comprehensive nature of its authority and functions. In Justice Holmes' phrase, the state is "the one club to which we all belong" and its activities will inevitably associate us with policies and groups with which we may not wish to be associated: see Robert Horn in *Groups and the Constitution* (1971), at p. 3.
>
> 231 Realistically, too, as I will more fully explain later, the organization of our society compels us to be associated with others in many activities and interests that justify state regulation of these associations. Thus I doubt that s. 2(d) can entitle us to be free of all legal obligations that flow from membership in a family. And the same can be said of the workplace. In short, there are certain associations which are accepted because they are integral to the very structure of society. Given the complexity and expansive mandate of modern government, it seems clear that some degree of involuntary association beyond the very basic foundation of the nation state will be

> constitutionally acceptable, where such association is generated by the workings of society in pursuit of the common interest. However, as will be seen, state compulsion in these areas may require assessment against the nature of the underlying associational activity the state has chosen to regulate.

[73] Whether, in a given case, it is appropriate to compel persons with similar interests to become part of a group to promote those interests is a threshold issue. La Forest J. described the question as follows, at para. 240:

> 240 In essence, whether, and under what circumstances, such government intervention is permissible is the broad issue presented by this appeal. More particularly, the threshold issue in this case is whether Parliament or the legislatures may create democratically run bodies comprised of persons naturally associated with one another in certain activities or interests, and grant them authority to direct those activities without breaching the freedom of association -- in the present case, unions.

[74] In order to meet the threshold issue, he observed:

> 249 ... [one must] ... first be satisfied that the "compelled combining of efforts towards a common end" is required to "further the collective social welfare" (p. 43). Where such a combining of efforts is required, and where the government is acting with respect to individuals whose association is already "compelled by the facts of life", such as in the workplace, the individual's freedom of association will not be violated unless there is a danger to a specific liberty interest such as the four identified by Professor Etherington above. This approach only applies, however, so long as the association is acting in furtherance of the cause which justified its creation. Where the association acts outside this sphere, different considerations arise.
>
> 250 This brings us to the specific nature of the alleged violation in the present case. While the appellant's proposition in its broadest compass comes close to claiming a right to isolation despite his natural association with his fellow workers, what he really objects to is the compelled payment of dues which are then used to support matters that are not, in his view, related to collective bargaining concerns. This, of course, poses a more difficult problem.
>
> 251 It must be recognized that there is a vast difference between saying that the *Charter* does not entitle a person to artificial isolation from his or her co-workers, and saying that that person never has a right to object to the extent or nature of his or her association with them. To bring the discussion down to earth somewhat, I would suggest that a worker like Lavigne would have no chance of succeeding if his objection to his association with the Union was the extent that it addresses itself to the matters, the terms and conditions of employment for members of his bargaining unit, with respect to which he is "naturally" associated with his fellow employees. Few would think he should

> not be required to pay for the services the Union renders him in this context.
> ...

[75] Mr. Lavigne did not quarrel with the aspects of the union's activities related to collective bargaining. His concern was with other aspects of its activities:

> 251 ... Significantly, he does not object to these matters. With respect to these, the Union is simply viewed as a reasonable vehicle by which the necessary interconnectedness of Lavigne and his fellow workers is expressed.
>
> 252 When, however, the Union purports to express itself in respect to matters reflecting aspects of Lavigne's identity and membership in the community that go beyond his bargaining unit and its immediate concerns, his claim to the protection of the *Charter* cannot as easily be dismissed. In regard to these broader matters, his claim is not to absolute isolation but to be free to make his own choices, unfettered by the opinion of those he works with, as to what associations, if any, he will be associated with outside the workplace.

[76] La Forest J. saw this aspect of the claim (as distinct from the collective bargaining aspect of the union's activities from which Mr. Lavigne clearly benefitted), as a violation of the *Charter:*

> 259 In my view, it is more consistent with the generous approach to be applied to the interpretation of rights under the *Charter* to hold that the freedom of association of an individual member of a bargaining unit will be violated when he or she is compelled to contribute to causes, ideological or otherwise, that are beyond the immediate concerns of the bargaining unit. As I stated previously, this distinction derives logically from the fact that the reason the forced association is permissible is because the combining of efforts of a particular group of individuals with similar interests in a particular area is required to further the collective good. When that association extends into areas outside the realm of common interest that justified its creation, it interferes with the individual's right to refrain from association.

[77] This led to a consideration of whether the infringement could be justified under s. 1 of the *Charter.* La Forest J. prefaced his consideration of s. 1 with the following observations at para. 263:

> 263 In dealing with s. 1, I propose to focus on the alleged interference with the appellant's freedom of association in connection with the use of his money for assisting causes to which he objects. He concedes that the collection of dues to support collective bargaining in the workplace is a reasonable limitation to his freedom of association under s. 1. And it will be obvious from what I have said previously that I agree that, in so far as the

> Rand formula provides for a mechanism for the payment of dues to the Union for collective bargaining, it does not infringe on the freedom of association. I confine myself, then, to a discussion of the issues regarding the compelling of "dissenters" like Lavigne to contribute to a fund used for causes not directly related to the workplace.

After considering that the objectives of the imposition of dues was to ensure that unions have the necessary funds to operate, and that democracy in the workplace would be respected by not limiting the use of the dues the union received, La Forest J. moved on to proportionality, and the question of minimal impairment at paras. 268-269:

> 268 I turn to the question of minimal impairment. It could be argued that the state objectives of fostering a politically active union movement guided by democratic decision-making could be achieved while more fully respecting the rights of those in the position of the appellant. They could simply be given a right of "opting out" of paying dues to the extent that such dues are spent promoting opinions or organizations with which they disagree. Alternatively, the government could impose some guidelines on what causes will be deemed to be within the legitimate area of interest of unions. Surely the state could preclude unions from spending money on things like opposition to the SkyDome or Arthur Scargill without undermining the unions' ability to influence affairs relevant to collective bargaining or rendering democracy in the workplace meaningless.
>
> 269 The problem with the opting-out formula is that it could seriously undermine unionism's financial base. It could perhaps even undermine its membership base, since its availability would be an incentive to refrain from becoming a member of a union. If one could opt out, there would be less incentive to become a member, since, presumably, one of the present advantages of membership is that one gets a vote on how one's money will be spent. This would obviously be less attractive if one could unilaterally prevent one's money from being spent on matters of which one disapproves. I would add that the ability to opt out would undermine the spirit of solidarity which is so important to the emotional and symbolic underpinnings of unionism.

And further at para. 272:

> 272 ... Under an opting-out regime, the criterion under which expenditure decisions will be made may well become the acceptability of proposed expenditure to those likely to exercise the right to opt out, rather than a genuine attempt to identify and pursue what is in the best interests of those represented by the union.

[78] He further observed at para. 273:

> 273 As to the alternative under which the government would draw up guidelines as to what would be deemed valid union expenditure and what would not, I would first of all reiterate the point made earlier that this could give rise to the implication that union members are incapable of controlling their own institutions. This kind of paternalism would not do much for the status of unions as self-governing and democratic institutions. Just as importantly, I would draw attention to what I have already said about the difficulty of determining whether a particular cause is or is not related to the collective bargaining process. The appellant complains of what he deems to be glaring examples, but as I have tried to illustrate, many activities, be they concerned with the environment, tax policy, day-care or feminism, can be construed as related to the larger environment in which unions must represent their members. Where one chooses to draw the line will depend on one's political and philosophical predilections, as well as one's understanding of how society works. A legislature may at some point, as apparently was the case in Ontario in the past and continues to be the case in other jurisdictions, decide that it will draw lines between proper and improper use of union dues. In the meantime, I think it would be highly unfortunate if the courts involved themselves in drawing such lines on a case-by-case basis. Such a result would ensue if the Court were to conclude that the limits on the appellant's s. 2(d) rights in this case are not "demonstrably justified in a free and democratic society".

[79] La Forest J. upheld the impingement as justified under s. 1 of the *Charter.*

[80] McLachlin J. took the view that the compelled payment of union dues was not an infringement of the *Charter* at all because there was no link between the mandatory payment required and any personal association with the aspects of the union's activities to which Mr. Lavigne objected. She observed at para. 296:

> 296 ... The whole purpose of the [Rand] formula is to permit a person who does not wish to associate himself or herself with the union to desist from doing so. The individual does this by declining to become a member of the union. The individual thereby dissociates himself or herself from the activities of the union. Fairness dictates that those who benefit from the union's endeavours must provide funds for the maintenance of the union. But the payment is by the very nature of the formula bereft of any connotation that the payor supports the particular purposes to which the money is put. By the analogy with government, the payor is paying by reason of an assuming or imposed obligation arising from this employment, just as a taxpayer pays taxes by reason of an assumed or imposed obligation arising from living in this country. By the analogy of commerce, the payor is simply paying for services and benefits received.

[81] McLachlin J. also took the view, at para. 300, that the majority analysis extending s. 2(d) to cover compelled financial contributions,

> ... would recognize the *prima facie* validity of a plethora of claims and put the courts into the business of assessing the justifiability of a great many government actions (whether by the means of distinguishing between "immediate concerns" and more attenuated goals under s. 2(d), as on La Forest J.'s analysis, or under s. 1 of the *Charter*) -- in circumstances where there may be "no threat to any constitutional interest", as the Court of Appeal put it. Examples of potential claims abound. Customers of telephone companies are compelled to pay government-set rates for provision of a service that could be regarded as a necessity; does that mean that gives individuals the constitutional right to object to company expenditures of which they do not approve? If tax revenues are used to support a particular regime in a foreign country (as, for example, happened when Canada subsidized the building of a Canadian nuclear reactor in Romania), is the taxpayer who objects to the regime forced to "associate" with it, or with other taxpayers who may support our government's policy? If a government expends funds for the performance of abortions, is a person who morally objects to abortions entitled to withhold taxes?
>
> 301 To distinguish the payment of fax, my colleague La Forest J. refers to the ground asserted by Powell J. in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), at p. 259, n. 13, that governments are "representative of the people", while a union is "representative only of one segment of the population". With respect, I find this a debatable distinction. In the case of both a country and a union, money is taken only from those who are legally represented by the payor. The same problem of dissenters from policy and the same considerations of benefits received arise in each case. Nor can the two situations be distinguished on the ground that the union's expenditures may be less justifiable than government's. Public financing of particular causes goes well beyond an even-handed subsidizing of mainstream political parties.

[82] In *Merry v. The Manitoba Medical Association*, [1989] 2 W.W.R. 526 (Q.B.), aff'd [1989] M.J. No. 469 (C.A.), a similar question arose in the context of a case involving medical fees. One of the submissions was that the position of doctors was inherently different from that of unions. The court, per Ferg J., observed:

> ... whether the doctors as a whole like it or not, the National Health Plan experience in Canada has in the past two decades likened them to industrial workers who have to associate and bargain collectively for their daily bread, for rewards for the fruits of their labour, if you will. The lifeblood of the doctors' remuneration is found in their fee schedules which are negotiated and bargained for with provincial governments Canada-wide. And the experience and realities of these negotiations, repugnant as they may be to many, in the medical profession, have on occasion required the doctors to withdraw services and go on strike and walk the picket line so they might obtain what they consider their just deserts. I say this, not to proselytize, but because in the arguments before me I was asked to distinguish between the position of union workers who bargain under the aegis of the provincial or federal Labour Relations Acts, and doctors (in this province at least) who are governed by

> the terms of The Manitoba Medical Association Fees Act and The Manitoba Health Services Insurance Act. While it is clear the M.M.A. is not and never has been a union, and doctors are not union members, I find that that is a distinction which I cannot draw either inferentially or legally. To do so would be to look through the glass blindly to the realities that exist. The result then is that whatever Charter jurisprudence has evolved over the past few years in the labour law field must be applied equally to doctors as well as teachers, nurses, social workers, Crown attorneys (professionals all), policemen, firemen, as well as all other kinds of workers from the struggling unskilled, to the highly skilled tradesmen in this country, blue collar and white collar workers, who all find they are required to associate for their common purposes and ends, and bargain collectively with employers, whether those employers be governments or private enterprise.

[83] The BCMA submits that the present case is, like *Lavigne*, one involving "individuals whose association is already compelled by the facts of life." The government scheme requires an agency that can bargain with it concerning the conditions under which medical services are rendered. The BCMA submits that *Merry* establishes that the combination required in the medical services context is analogous to collective bargaining in the union context. The BCMA submits that the importance of this structure is evident in the *Canada Health Act*, which sets conditions on the transfer of funding that presuppose such an arrangement.

[84] The BCMA submits that the plaintiff's pleadings do not allege the infringement of a specific liberty interest such as that advanced in *Lavigne*, where Mr. Lavigne had a conscientious objection to some of the causes the union supported. The plaintiff's position relative to the purposes of the BCMA (set out in para. 7, herein) is set out in para.12 of an affidavit, sworn in support of her application:

> 12. I note the purposes of the BCMA as alleged by the Defendant herein at paragraph 2 of the Response to Civil Claim, and I say that:
>
> (a) I do not require the BCMA for the advancement of my "scientific welfare", my "educational welfare", or my "professional welfare". Insofar as those terms have any meaning, I take personal responsibility to advance my own such descriptions of welfare;
>
> (b) I do not require the BCMA for my economic welfare and I would be content to negotiate my own economic arrangement with the BC government if I were permitted to do so;
>
> (c) I do not require the BCMA to promote the highest quality healthcare delivery, as I see that as a personal responsibility

> of mine, and a responsibility of the Ministry of Health and the government;
>
> (d) I feel and take personal responsibility for my own integrity and honour and that of my chosen profession and I do not require the BCMA to take over this responsibility for me;
>
> (e) I do not require the BCMA to further the interests of the Canadian Medical Association ("CMA");
>
> (f) I do not require the BCMA to be my agent in bargaining and I would prefer to negotiate my own fair arrangement if permitted to do so;
>
> (g) I find it objectionable that the BCMA seeks to rely on an alleged role as my "agent" in bargaining an Agreements (at Response to Civil Claim paragraph 2(e)), and at the same time says I am not a party to the resulting Agreements (at Response to Civil Claim paragraph 43 and 46), and thus somehow lack standing to complain.

[85] The BCMA submits that the plaintiff simply objects to paying for aspects of the BCMA's activities that she does not think she needs.

[86] The BCMA submits that, applying *Lavigne*, the Notice of Civil Claim does not frame a claim that involves an infringement of s. 2(d) of the *Charter*. It submits that medical practitioners have a right, pursuant to s. 2(d) of the *Charter*, to associate. The scheme of public health care requires an agency to act for doctors collectively. The BCMA submits that *Lavigne* is authority for the proposition that the compelled payment of dues serves important social objectives, by ensuring that the BCMA has sufficient resources to fulfil its mandate, and by ensuring its independence from government. The BCMA submits that there is no merit in the plaintiff's allegations of illegality, which underpins the whole of the plaintiff's claim.

XI

[87] The BCMA submits that if the plea of illegality cannot be sustained there is no reasonable cause of action based on unjust enrichment.

[88] The test for unjust enrichment has three parts: an enrichment of the defendant; a corresponding deprivation of the plaintiff, and an absence of a juristic reason for the benefit. The BCMA submits that if the contractual right of the BCMA to

charge non-member fees is enforceable, there is a juristic reason for the fees. The BCMA submits that the claim for unjust enrichment would depend on a finding that its authorization is illegal. If there is no such finding, the BCMA submits there cannot be a claim of unjust enrichment. The BCMA submits that this is so, even in the face of an argument that, as a non-party to the contract between the government and the BCMA, the plaintiff is not bound by it, in the face of the benefits she derives from it.

XII

[89] The BCMA submits that there is no "trust" relationship in this case, and that even if one exists the pleadings do not disclose a reasonable cause of action for breach of trust. The plaintiff's allegation of breach of trust is in the following terms:

> The BCMA has breached [a] trust when it misappropriated and converted the trust funds by charging administration fees to the non-members, or in the alternative when it charged arbitrary and excessive administration fees.

[90] The BCMA accepts that once a trust is established the beneficiaries are entitled to due performance:

> A trust is an equitable obligation, binding a person who is called a trustee to deal with property over which he has control (which is called the trust property) for the benefit of persons (who are called beneficiaries or, in old cases, *cestuis que trust*), of whom he may himself be one, and any one of whom may enforce the obligation. Any act or neglect on the part of the trustee which is not authorized or excused by the terms of the trust instrument, or by law, is called a breach of trust: Underhill and Hayton, Law Relating to Trusts and Trustees, 15th ed. (London: Butterworths and Co. Ltd., 1995).

[91] The BCMA submits that it is "beyond clear" on the pleadings, and with reference to the agreements on which the pleadings are based, that one of the purposes for which money was paid by the government to the BCMA was to fund the administration fee chargeable against benefits due to non-members. If the BCMA were a trustee, its conduct in charging non-member fees, it submits, is conduct that falls squarely within the purposes of the trust as pleaded.

XIII

[92] The BCMA submits that the claim for breach of fiduciary duty falls for the same reason as the claim for breach of trust. The pleading reads:

> The charging by the BCMA of administration fees, or alternatively arbitrary and excessive administration fees to non-member physicians is in breach of its fiduciary duty, and amounts to the taking of an unlawful profit by the BCMA.

[93] The BCMA submits that the "no-profit" rule admits of exceptions as set out by Lord Herschell in *Bray v. Ford*, [1896] A.C. 44 (H.L.) at p. 51 (cited in *Canadian Metals Exploration Ltd. v. Wiese*, 2007 BCCA 318):

> It is an inflexible rule of a Court of Equity that a person in a fiduciary position ... is not, unless otherwise expressly provided, entitled to make a profit.

[94] The BCMA submits that in the present case the authority to charge non-member fees is expressly provided, as noted in the Notice of Civil Claim at para. 24(g). The BCMA submits that this means that there is no chance of success for this aspect of the claim.

XIV

[95] There is also a claim in the plaintiff's Notice of Civil Claim at para. 7 of the "relief claimed" seeking a mandatory injunction "requiring the BCMA to comply with its reporting obligation set out in the BSA and set out in paras. 24(h) and (i) of Part 1 of the Notice:

> h. the BCMA was required to report annually to the government on its expenditures related to the administration of the Benefit Plans to allow the BC government to meet its statutory obligations to account for the use of public money; and
>
> i. the BCMA benefits department was required to report the value of administration fees charged to non-members for each Benefit plan on an annual basis.

[96] The plaintiff did not allude to this in submission. The BCMA's position is that this is not a provision for the benefit of the plaintiff or any member of the intended class, and that the circumstances in which a third party beneficiary of a contract –

assuming the plaintiff could be so described – might rely on the principled exception to the doctrine of privity of contract would be in *defence* of an action not as part of a positive claim (see: *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd*., [1999] 3 S.C.R. 108; *District of Kitimat v. Alcan Inc.*, 2006 BCCA 75).

[97] The BCMA summarizes its position as follows:

> In summary, the plaintiff's claim is entirely misconceived. Each substantive cause of action reflects an attack on the same conduct of the BCMA, the legality of which has been judicially and conclusively determined by the Supreme Court of Canada. In the face of valid authorization, no claim for breach of trust, breach of fiduciary duty or unjust enrichment can be maintained. The plaintiff's claim to enforce provisions of a contract to which she is not a party is similarly misconceived. Section 41(1)(a) operates in circumstances such as these to bar certification and to prevent the parties from being put to the time and expense of trying issues which are lacking in merit and bound to fail.
>
> [from the BCMA's submission]

[98] The BCMA submits that having failed to meet the threshold issue the plaintiff's claim ought to be dismissed, and that it is unnecessary to go on to the remainder of its submission, respecting the plaintiffs proposal that the matter be advanced as a class proceeding.

XV

[99] The BCMA takes the position, however, that even if the court finds that the threshold for a cause of action has been met the matter is unsuitable for certification as a class proceeding.

[100] The BCMA submits that the entire point of the *Class Proceeding Act* is the certification of "common issues" (s. 8(i)(e)) which should be determined in a single proceeding before individual issues are tried. The *Act* does not define "common issues" but the term has been explained in the case law. In *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 [*Western Canadian Shopping Centres Inc.*]; and *Gariepy v. Shell Oil Co.* (2002) 23 C.P.C. (5th) 360 at 382, the courts have suggested that to be considered "common" an issue or issues:

> (a) must be necessary to the resolution of each member's claim;
>
> (b) need not predominate over non-common issues nor does the resolution of the common issues need to be determinative of each member's claim; and
>
> (c) must be a "substantial" common ingredient of each member's claim.

[101] In *Western Canadian Shopping Centres Inc.*, in the Supreme Court of Canada, the Chief Justice observed at paras. 39-40:

> 39 ... Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. ... However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. ...
>
> 40 ... [W]ith regard to common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[102] In *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, the Chief Justice commented:

> As I wrote in *Western Canadian Shopping Centres,* the underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" (para. 39). Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial ... ingredient" of each of the class members' claims.

[103] The BCMA submits that the commonality of a proposed common issue can be determined by the answer to the question: "Does the determination of the common issue in relation to the representative plaintiff tell the court anything about the resolution of that issue in relation to the other individual class members?"

[104] In *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54 at p. 65, a distinction is noted between common issues and common causes of action:

> The causes of action are asserted by all class members. But the fact of a common cause of action does not in itself give rise to a common issue. A common issue cannot be dependent upon findings of fact which have to be made with respect to each individual claimant. While the theories of liability can be phrased commonly the actual determination of liability for each class member can only be made upon an examination of the unique circumstances with respect to each class members' purchase of a policy.

[105] The BCMA submits that the premise of the plaintiff's application for certification is flawed because the only common question is whether the BCMA is authorized to charge non-members an administration fee in an amount up to the equivalent of BCMA dues.

[106] The BCMA is generally critical of the plaintiff's submissions on certification as lacking in analysis and generally conclusory. The BCMA points out that several of the 30 or so issues identified by the plaintiff are not really issues at all but raise matters of essentially uncontested fact. Others, it submits, are clearly in the nature of individual assessments. It submits that yet others go beyond the allegations set out in the pleadings.

[107] Having identified these concerns, the BCMA did not embark on a detailed assessment, but submitted that many of the proposed issues are merely aspects that the authorization question. It submits that if the answer to the authorization question is "yes" there is nothing to the breach of trust, fiduciary duty and unjust enrichment claims, except individual claims to overcharges, if there are any.

[108] The BCMA submits that if the answer to the authorization question is "no" then the issue is basically one of unjust enrichment, which, in the circumstances, would turn on the question of juristic reason. It submits that this would involve a consideration of whether the BCMA could rebut the *prima facie* case of unjust enrichment in the circumstances, on a consideration of public policy and the reasonable expectation of the parties. The BCMA submits that while public policy may be a common component of such an analysis, reasonable expectation is individual and individual issues (such as estoppel) might arise in individual cases.

The BCMA submits that the process becomes even more individualized at the remedy stage.

[109] The BCMA submits that the plaintiff challenges the "reasonableness" of the fee charged to non-members, without addressing any evidence as to how the fees are, in any respect, unreasonable. It submits that the allegation is again an individual matter, which is implicitly recognized by the plaintiff where she noted in her own submission that some non-members pay nothing while others pay thousands of dollars.

[110] The BCMA submits that despite the plaintiff's allegation that a prudent and reasonable benefits administrator would perform the same service more economically, there is no evidence that this is so, or that the issue could be assessed in a common way.

[111] The BCMA submits that the plaintiff's plan for the calculation of damages following in the event of a finding of liability in the common issue is unworkable. It submits that the concept of the BCMA preparing a "report" for each member "indicating the damages suffered by each class member" within eight weeks of the outcome of a summary trial application is remarkable in several particulars. Apart from reversing the onus, the BCMA submits that the plan does not suggest any methodology for calculating such damages.

[112] The BCMA submits that even if it could be said that there are common issues, a class proceeding is not preferable in the circumstances, because the individual nature of each non-members claim would render one proceeding too unwieldy.

[113] The BCMA submits that the goal of the *Act* is fairness for both parties and that cost effectiveness does not trump the proper objective of all legal proceedings, that is, a just determination between the parties. Thus an action should not be certified unless the test set out in *Hollick* at para. 18 (see herein at para. 102) and *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348, 42 B.L.R. (3d) 276 at para. 62 is met:

(a) such a proceeding would be inherently fair, efficient and manageable (preferability in an absolute sense), and

(b) a class proceeding is superior to other reasonably available procedures for obtaining redress for class members (preferability in a relative sense).

[114] In *Hollick* at para. 29, the Supreme Court observed:

> ... it is ... important in B.C. and Ontario to assess the litigation as a whole, including the individual hearing stage, in order to determine whether the class action is the preferable means of resolving the common issues. In the abstract, common issues are always best resolved in a common proceeding. However, it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court.

[115] In *Hoy v. Medtronic Inc.* (2003), 14 B.C.L.R. (4th) 32, 2003 BCCA 316 at para. 54, the Court of Appeal explained cost/benefit as follows:

> [54] A number of the authorities speak of a "cost/benefit" analysis in the context of the preferability question: see, for example, *Tiemstra*, *supra*, and *Flexwatt*, *supra*. However, in my respectful view the cost/benefit analysis is not of the nature described by the defendants, i.e. it is not an accounting exercise to determine economic viability. The analysis, rather, involves an assessment of whether a class proceeding would advance the claims in any meaningful way. If resolution of the common issues goes a considerable measure towards obtaining relief for the plaintiffs, then the benefit of proceeding by way of class action, as opposed to individual actions, is a factor in favour of certification. Certification, in such circumstances, would advance the objects of judicial economy and improved access to the courts. If, as was the case in *Tiemstra*, *supra*, resolution of the common issues, would not put the plaintiffs in any better position than if they simply pursued individual claims, it is clear that there is little, if any, benefit to proceeding by way of a class action.

[116] In *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910, at paras. 128-129, the Superior Court of Ontario observed:

> 128 The question of judicial economy - and that of preferability in general - must, however, be looked at in the context of the claims as a whole and what will be required for their resolution: *Hollick*, at paras. 27-30. As McLachlin C.J. noted, at para. 29, undue weight is not to be given to "the fact that [section 5(1)(d)] uses the phrase "resolution of the common issues" rather than "resolution of the class members' claims". For this reason, the plaintiffs are required to demonstrate that the resolution of the common issues will substantially advance the proceeding. If, on the basis of the necessary cost-

> benefit approach, its significance as a step in the litigation will be overwhelmed by the number and complexity of individual issues that remain, certification should be refused. This has happened in previous decisions in which it has been said that the end of the common issues trial would, in reality, mark the commencement of the litigation rather than its end.
>
> 129 Allied to this approach to determining the preferable procedure is the court's insistence in previous cases that the evidence must establish that a class proceeding will be a fair, efficient and manageable method of achieving the goals of the *CPA:* see, for example, *Caputo v. Imperial Tobacco Ltd.* (2004), 42 B.L.R. (3d) 276 (Ont. S.C.J.), at para. 68.

[117] The BCMA submits that the concerns addressed in this line of cases are evident in this case. It submits that the whole premise of the plaintiff's action is faulty in that there are no class wide liability issues that can be determined, leaving only the quantification of damages. It submits that each claim of each non-member must be individually assessed and that individualized issues of limitations, laches or acquiescence will all need to be considered, as well as whether any amount apparently due should be subject to an equitable set off. The BCMA submits that the plaintiff has not led any evidence or made any submission that supports the proposition that it is preferable that the individual claims be heard as a class proceeding.

[118] The BCMA submits that the question of authorization can be determined by a declaratory judgment that will effectively bind the BCMA in any individual litigation with non-members.

[119] The BCMA submits that the plaintiff is not an appropriate representative. It submits that the plaintiff had difficulty delivering the required materials in time, that her material does not set out all the facts material to certification, that her material suggests, on its face, conflicts amongst members of the class, and that she has not produced a workable plan.

XVI

[120] Essentially, the plaintiff's claim is that the benefits to which she is entitled could be administered more cheaply either by government directly or by a different benefits administrator. The other possibility would be for the BCMA to charge a more

modest rate. The premise underlying the claim is that the benefits to which the plaintiff claims entitlement can be segregated from the services and activities of the BCMA in which the plaintiff takes no interest, and administered for her benefit, and for others who take the same position.

[121] The material before the Court shows, however, that the BCMA is engaged in the central activity of bargaining for all doctors, which benefits all doctors. The benefits the plaintiff claims are negotiated as are the fees she charges for her services. The plaintiff makes it clear that she accepts those negotiated benefits on the basis that she has no choice, having been excluded from bargaining with the government directly. She does not concede that she derives any benefit from the activities of the BCMA that would justify a direct contribution on her part to the BCMA. The plaintiff's position is considerably more restrictive than the position taken by Mr. Lavigne: he at least conceded that he derived a benefit from the negotiating activities of the union.

[122] It stands to reason that non-members may take different positions with respect to the benefit they derive from the activities of the BCMA. Some may concede a value to the bargaining aspects of the BCMA's mandate, while still wishing to dissociate themselves from membership. There is certainly a range of potential interests among non-members depending on the extent of their self-described dissociation from membership. It is difficult to see how an individual enquiry would be avoided by choosing one non-member with one particular view of the limits of the BCMA's usefulness to her.

[123] Whether such an enquiry makes any sense at all, however, depends on whether it is lawful for the government to authorize the BCMA to act as the sole agent with which it will bargain in relation to doctors' salaries and benefits.

[124] If that authority is lawful, a subsidiary question might arise, over whether the limitation imposed on the BCMA's ability to change administrative fees to non-members, set out in s. 15.3 of the Master Agreement (see para. 18, herein), is authority for the BCMA to charge on the basis that it does (50% plus GST on each

identified entitlement until the equivalent of member's fees is collected), or whether some other principle, implying a less aggressive form of collection somehow applies.

[125] I have set out the BCMA's submission on authorization, which it characterizes as a threshold issue. This is not, as is sometimes the case, a question of a relationship that is difficult to describe in legal terms. The plaintiff is able to describe her relationship with the BCMA as breaches of legal duties or unjust enrichment. The question of whether the pleadings disclose a cause of action is, in the circumstances, a question not of description but of whether the law respecting the particular kind of relationship the plaintiff challenges is so clearly against her that it has no chance of success.

[126] I have reproduced portions of *Lavigne* at some length in these reasons (see paras. 72-81, herein). *Lavigne* is clear authority for the proposition that "legislatures may create democratically run bodies comprised of persons naturally associative with one another in certain activities or interests, and grant them authority to direct those activities without breaching ... freedom of association" (*Lavigne* para. 240).

[127] In the present case, the government of British Columbia did not create the BCMA to administer the various statutory and contractual instruments that govern the provision of health care through doctors; it *accepted* the BCMA as a pre-existing and logical body to represent those collective interests. It remains the obvious body to do so, representing, depending on which numbers are true, a substantial, or a vast majority of British Columbia's doctors. In accepting the BCMA as the logical agent for the doctors of British Columbia, the government chose a voluntary organization governed by majority vote. At para. 241 of *Lavigne*, La Forest J. quotes, with approval, a passage from P. Weiler, Reconcilable Differences: New Directions in Canadian Labour Law (1980), at pp. 124-25 and 143-45:

> The common premises of Canadian labour relations legislation are certification of a union when a majority of employees choose to be represented by that union, exclusive bargaining authority, binding agreements and the union's duty of fair representation in respect of all members of the bargaining unit. Clearly, such schemes contemplate majoritarian decision-making and, thereby, envisage the existence of dissent even in respect of the threshold question of collective representation by a

> union as compared to individual employment relations. Regardless of disparate views between groups of workers within a bargaining unit, the essence of labour law in Canada recognizes the need to empower workers collectively as participants in their relationship with their employer. The Rand formula and the agency shop are common vehicles for maintaining union security and obtaining payment for services rendered.

[128] The BCMA pursues a number of objectives on behalf of doctors (see paras. 7-9, herein). Its mandate, except as constrained by the terms of the contractual obligations it has undertaken, may be changed by vote of its membership. Its fee structure reflects the sums deemed necessary to carry out the objects it has voluntarily undertaken, with the approval of its membership. It is exactly the sort of body referred to in para. 270 of *Lavigne.*

[129] *Lavigne* is clear authority for the proposition that government may choose to deal with such a representative body in order to further valid social objectives. It is also authority for the proposition that freedom to associate does not necessarily include the freedom *not* to associate, as set out in para. 249 of *Lavigne* (see para. 74, herein).

[130] In *Lavigne*, as I have noted (see paras. 71-81, herein) Mr. Lavigne's objection was to the use of the dues he was obliged to pay for purposes to which he objected. The case concerned a version of the so-called "Rand formula". A Rand formula, also known as "automatic check-off" authorizes the collection of dues by unions from non-members, to ensure that workers with similar interests, who obtain the benefit of collective action, cannot avoid contributing to the collective. The formula was devised in the context of an arbitration of a strike involving the Ford Motor Company in Windsor. It has statutory status in the *Canada Labour Code* and in some provinces. In others, it is authorized as part of a collective agreement.

[131] The scheme in place in relation to the BCMA is actually less onerous to non-members than a pure Rand formula, because non-members are not required to pay membership fees on the same basis as members. They are not, in fact, obliged to pay at all, until they access the benefits that have been identified. At that point, the

BCMA recovers fees per benefit paid to a *maximum* of the equivalent of fees a member pays.

[132] The observation in *Lavigne*, at para. 231 (see para. 72, herein) that "the organization of our society compels us to be associates in many activities and interests that justify state regulation" certainly applies to a government funded health care scheme. There are compelling social interests in organized collective bargaining on the part of government and medical doctors. It is recognized in *Lavigne*, and it is true of the BCMA, that collective entities like unions and associations may come together for a variety of other purposes deemed worthwhile by their membership. *Lavigne* recognizes the right of a person who wishes to dissociate himself from those activities to do so. The majority recognized that the Rand formula infringes s. 2(d) of the *Charter* but found that the limitation was justified under s. 1 of the *Charter* (see paras. 77-79, herein). McLachlin J. took a broader view that there was no infringement (see paras. 80-81, herein).

[133] The arrangements between the government of British Columbia and the BCMA are "compelled by circumstances". The right of doctors who do not wish to become members of the BCMA is respected. The payment of fees by non-members for those services administered by the BCMA is duly authorized, and well within the principles outlined in *Lavigne*. So is the concept of paying fees up to the equivalent of member's fees, inasmuch as *Lavigne* is authority for the somewhat cruder imposition of full member's fees (in the form of union dues) regardless.

[134] The plaintiff's position is a variant of the position taken by Mr. Lavigne before the trial judge in that case, whose analysis treated the activities of the union as divisible, and the limit of the union's right to levy fees to be for those purposes (collective bargaining), with which Mr. Lavigne was prepared to be associated. In rejecting that approach, the Ontario Court of Appeal addressed Mr. Lavigne's conscientious objection in a passage quoted with approval by McLachlin J. at para. 298 of her judgment in *Lavigne*:

> 298 For these reasons, I agree entirely with the Court of Appeal's characterization of Lavigne's position ((1989), 67 O.R. (2d) 536, at p. 565):

> He is not forced to join the union; he is not forced to participate in its activities, and he is not forced to join with others to achieve its aims.
>
> * * *
>
> ... neither the payment, nor the use to which any part of it might be put by the union or any labour body with which it is affiliated, operates so as to compel the non-member to join or associate with any political party or to join or associate with causes other than those of his choice or to be identified with any of the aims and objectives of the union. In the absence of dangers of this nature, we see no threat to any constitutional interest protected by s. 2(d).

[135] While the majority of the court differed with McLachlin J. on s. 2(d), she identified the mischief inherent in the sort of analysis the plaintiff suggests at para. 300 of *Lavigne* (see para. 81, herein). While I do not doubt that the plaintiff's objection to membership is a personally conscientious choice, the concerns she raises are purely pecuniary, and turn on a belief (yet to be proved) that an analysis of the value of the services she obtains from the BCMA will show that they could be administered more cheaply by someone else.

[136] This immediately points up a problem with identifying other non-members as members of a "class" because the degree to which non-members are aligned with other aspects of the BCMA's activities would have to be assessed. They all benefit, at a minimum, from the results of collective bargaining. Some would, no doubt concede that they benefit from other aspects of the BCMA's activities. In its administration of the benefits scheme for its members the BCMA is obliged to maintain the apparatus by which is reimburses them. These activities are integrated into the pursuit of other objectives democratically approved by a majority of members, and fees are assessed accordingly. The plaintiff's position suggests the establishment of an administrative paradigm that takes no account of the integrated nature of the various objectives and negotiated achievements of the BCMA, and posits a sort of duty on the part of the BCMA (or the government) to establish a separate mechanism for the administration of non-members accounts, as if their subjective experience of the "good" they get out of these activities should be determinative of what they pay.

XVII
SUMMARY

[137] The short answer to all of this is that it is lawful for the government to choose the BCMA as the agent through which it deals with all doctors, members and non-members alike. The plaintiff is "legally represented" by the BCMA, to borrow a phrase from McLachlin J. The activities of the BCMA and the cost of administering those activities are matters in which the members have a vote. As *Merry* (see para. 84, herein) makes clear, in relation to the national health care regime, doctors are in a position indistinguishable in principle from union members like Mr. Lavigne. As I also noted, in contrast to the usual Rand formula, the plaintiff in this matter actually has the advantage of paying "up to" the equivalent of member fees depending on her use of the services of the BCMA. She may, in any given year, pay less. While she may not wish to benefit from some aspects of the BCMA's activities she clearly benefits from those pertinent to collective bargaining. The BCMA's value to her whether she likes it or not, is not merely the cheapest imaginable administration fee for the benefits she accesses, but the unquantifiable value of the BCMA's negotiations on behalf of all doctors. She is entitled to a voice in whether or not the BCMA should be pursuing certain objectives, and to how much doctors should contribute, if she chooses to join. If she does not, *Lavigne* establishes that she may be obliged to pay because the government's choice to deal with doctors through the BCMA is lawful, and, in turn, the BCMA's collection of dues from non-members is authorized as a reasonable limitation on freedom of association under s. 1 of the *Charter*.

[138] As such, the plaintiff's allegations that the government and the BCMA cannot bargain on her behalf is untenable. The claims the plaintiff advances for breach of trust, breach of fiduciary duty, conversion, violations of the *Charter* and unjust enrichment are all doomed to fail. The *Charter* position of the plaintiff has been exhaustively and definitively established in *Lavigne.* All of the other aspects of the claim revolve around the BCMA's alleged abuse of its position to take more fees

than is reasonable from the benefit payments it administers for non-members, assuming a more efficient benefits administrator.

[139] There is no principle of law in this context founding a cause of action that, as a matter of law, would require that the benefits be administered in accordance with any such standard. It would imply an artificial segregation of those things the plaintiff self-selects as of benefit to her, which each individual in the putative "class" would, in any event, have to make on his or her own.

[140] Given the principles set out in *Lavigne*, all of the abuses the plaintiff alleges are merely different ways of looking at the means by which the BCMA collects fees "up to" those charged to members. Inasmuch as the classic Rand formula and s. 15.3 of the Physician Master Agreement authorize non-member fees equivalent to member fees, the plaintiff's claims are all allegations of "over-charging" *within* that legal authorization. If an entity in the position of the BCMA is authorized to collect the equivalent of member fees from non-members, the manner in which it collects those fees – in part, and over a period of time – does not give rise to a cause of action.

XVIII

[141] Bearing in mind all of the principles respecting the general requirement that pleadings disclose a cause of action (see paras. 35-38, herein) and particularly those set out in *Abdool* (see para. 39, herein), I am of the view that, accepting the salient facts as proved – as such, all the relevant facts appear to be admitted – it is plain and obvious that the plaintiff's claims cannot succeed. It is not a question of difficulties with the articulation of the claims, even if, as the BCMA submitted, the articulation could be improved. It is simply that the collection of fees from non-members by a lawfully authorized representative of a collective to which the plaintiff is "compelled by circumstances to associate" up to the level of fees charged to members, is lawful.

[142] I will not address the other issues, specifically the question of common issues, “preferablity”, appropriate representative, or “workable plan”, although I have outlined those arguments and considered them in attempting to give the widest possible contextual consideration of the issues the plaintiff has articulated. I think it is probably evident that were I to go on to this stage, there appear to be serious issues with respect to whether the non-members constitute a “class”.

[143] On the basis that I find that there is no reasonable cause of action disclosed at all, including any based on illegality, unjust enrichment, breach of trust, or breach of fiduciary duty, and that there is no standing to enforce the unaddressed contractual rights pled in the Notice of Civil Claim, the plaintiff’s certification application is dismissed and the entire claim is struck out.

“McEwan J.”

The Honourable Mr. Justice McEwan