

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY

OCT 1 2009



Amended pursuant to the Order of Justice Pitfield
pronounced May 14, 2009
Original filed December 4, 2008

No. S-088484
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF THE *JUDICIAL REVIEW PROCEDURE ACT*,
R.S.B.C. 1996, c. 241

BETWEEN:

MARIËL SCHOOFF, DAPHNE LANG, JOYCE HAMER,
MYRNA ALLISON and CAROL WELCH

PETITIONERS

AND:

MEDICAL SERVICES COMMISSION,
CAMBIE SURGERIES CORPORATION and
FALSE CREEK SURGICAL CENTRE INC.

RESPONDENTS

THIS IS THE AMENDED PETITION OF:

Mariël Schooff
c/o Victory Square Law Office LLP
500-100 West Pender Street
Vancouver, BC V6B 1R8

Daphne Lang
c/o Victory Square Law Office LLP
500-100 West Pender Street
Vancouver, BC V6B 1R8

Joyce Hamer
c/o Victory Square Law Office LLP
500-100 West Pender Street
Vancouver, BC V6B 1R8

Myrna Allison
c/o Victory Square Law Office LLP
500-100 West Pender Street
Vancouver, BC V6B 1R8

Carol Welch
c/o Victory Square Law Office LLP
500-100 West Pender Street
Vancouver BC V6B 1R8

ON NOTICE TO:

Attorney General of British Columbia
Legal Services Branch
6th Floor, 1001 Douglas Street
Victoria, BC V8W 1X4
Attn: Jean Walters and Craig Jones

Medical Services Commission Secretariat
3-1, 1515 Blanshard Street
Victoria, BC V8W 3C8
Attn: Lee Peacock, Administrator

Ministry of Health Services
5th Floor, 1515 Blanshard Street
Victoria, BC V8W 3C8
Attn: Hon. George Abbott, Minister of Health Services

Cambie Surgery Centre
2836 Ash Street
Vancouver, BC V5Z 3C6
Attn: Dr. Brian Day

False Creek Surgical Centre
6th floor-555 West 8th Avenue
Vancouver, BC V5Z 1C6
Attn: Dr. Mark Godley, Dr. Richard Chan and Dr. Amin Javer

Pezim Clinic
Suite 30 - 3195 Granville Street, Hycroft Centre
Vancouver, BC V6H 3K2
Attn: Dr. Michael Pezim

Dr. Marc Boyle
101-2296 McCallum Road
Abbotsford, BC V2S 3P4

Dr. Grant Burnell
c/o Blaylock Surgical Centre
2-2545 McCallum Road
Abbotsford, BC V2S 3R1

Dr. Russell Naito
1890 Cooper Road, Suite 200
Kelowna, BC V1Y 8B7

Dr. Richard Brownlee
212 - 300 Columbia Street
Kamloops, BC V2C 6L1

Cambie Surgeries Corporation
c/o Irwin G. Nathanson, Q.C.
Nathanson, Schachter & Thompson LLP
Suite 750 - 900 Howe Street
Vancouver, BC V6Z 2M4

False Creek Surgical Centre Inc.
c/o Irwin G. Nathanson, Q.C.
Nathanson, Schachter & Thompson LLP
Suite 750 - 900 Howe Street
Vancouver, BC V6Z 2M4

Let all persons whose interests may be affected by the Order sought TAKE NOTICE that the petitioner applies to court for the relief set out in this petition.

APPEARANCE REQUIRED

IF YOU WISH TO BE HEARD at the hearing of the petition or wish to be notified of any further proceedings, YOU MUST GIVE NOTICE of your intention by filing a form entitled "Appearance" in the above registry of this court within the Time for Appearance and YOU MUST ALSO DELIVER a copy of the "Appearance" to the petitioner's address for delivery, which is set out in this petition.

YOU OR YOUR SOLICITOR may file the "Appearance". You may obtain a form of "Appearance" at the registry.

IF YOU FAIL to file the "Appearance" within the proper Time for Appearance, the petitioner may continue this application without further notice.

TIME FOR APPEARANCE

Where this Petition is served on a person in British Columbia, the Time for Appearance by that person is 7 days from the service (not including the day of service).

Where this Petition is served on a person outside British Columbia, the Time for Appearance by that person after service, is 21 days in the case of a person residing anywhere within Canada, 28 days in the case of a person residing in the United States of America, and 42 days in the case of a person residing elsewhere.

TIME FOR RESPONSE

IF YOU WISH TO RESPOND to the application, you must, on or before the 8th day after you have entered an appearance,

(a) deliver to the Petitioners

(i) 2 copies of a response in Form 124, and

(ii) 2 copies of each affidavit on which you intend to rely at the hearing, and

(b) deliver to every other party of record

(i) one copy of a response in Form 124, and

(ii) one copy of each affidavit on which you intend to rely at the hearing,

(1) The Address of the Registry is:
800 Smithe Street
Vancouver, BC

(2) The ADDRESS FOR DELIVERY is:
Victory Square Law Office
500-100 West Pender Street
Vancouver, BC V6B 1R8
Fax number for delivery: (604) 684-8427

(3) The name and office address of the
Petitioners' solicitor is:
Marjorie Brown
Victory Square Law Office
500-100 West Pender Street
Vancouver, BC V6B 1R8

The Petitioners apply for:

1. A declaration that, when paying claims for benefits rendered contrary to section 17(1) and/or s. 13(6) of the *Medicare Protection Act* ("MPA"), the Medical Services Commission ("Commission") is:

- i. not acting in accordance with its obligations under section 27(4) of the MPA to only pay for claims for benefits that comply with the MPA; and
- ii. not acting in accordance with its obligations under section 27(2) of the MPA to assess claims for payment in accordance with the requirements of the MPA.

2. A declaration that,

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

in such a fashion that payment is made to practitioners for claims for benefits rendered in violation of section 17(1) and/or 13(6) of the MPA, the Commission and/or the Ministry of Health Services (the "Ministry"), acting on behalf of the Commission, have failed to act in a manner that satisfies the criteria described in section 7 of the *Canada Health Act*, as required by section 5(2), and 5.1(a) of the MPA.

3. Orders in the nature of mandamus that the Commission and/or the Ministry, when acting on behalf of the Commission, take such steps as are necessary under section 27(2) of the MPA to ensure that any claims paid to practitioners, with respect to the benefits received by,

- i. Mariël Schooff, at the False Creek Surgical Centre, on January 28, 2003;
- ii. Daphne Lang, at the Pezim Clinic, on May 5, 2003; and

iii. Carol Welch at the False Creek Surgical Centre on or about December 22, 2006

are assessed and, if appropriate, reassessed under section 27(2) of the MPA to ensure compliance with section 17(1) of the MPA.

4. An order in the nature of mandamus that the Commission take such steps as are necessary to satisfy its obligations under section 5(2) and 5.1(a) of the MPA when discharging its duties under sections 5(1)(e), 5(1)(j) and 5(1)(q) of the MPA;

5. Costs; and

6. Such other relief as counsel may advise and which the Court considers appropriate.

The grounds upon which the application by the Petitioners for the orders sought is brought are:

1. The Commission has failed to fulfil its statutory obligation under section 27(2) of the MPA to assess and, if appropriate reassess, claims for payments in accordance with the requirements of the MPA.

2. The Commission has failed to fulfil its statutory obligation under section 27(4) of the MPA to refuse to pay for claims for benefits that do not comply with the MPA.

3. The Commission has failed to determine the information required to be provided by beneficiaries for the purpose of assessing or reassessing claims for payment of benefits rendered to beneficiaries under section 5(1)(e) of the MPA in accordance with its obligations under section 7 of the *Canada Health Act*, as required by section 5(2) and 5.1(a) of the MPA.

4. The Commission has failed to determine whether matters are related to the rendering of a benefit under section 5(1)(j) of the MPA, in accordance with its obligations under section 7 of the *Canada Health Act*, as required by section 5(2) and 5.1(a) of the MPA.

5. The Commission has entered into arrangements and made payments for the costs of rendering benefits under section 5(1)(q) of the MPA in violation of its obligations under section 7 of the *Canada Health Act*, as required by section 5(2) and 5.1(a) of the MPA.

The petitioner will rely on:

1. *The Medicare Protection Act*;
2. *The Medicare Protection Amendment Act, 2003*;
3. *The Canada Health Act*;
4. *The Judicial Review Procedure Act*
5. *The Medical and Health Services Regulation and*
6. Such other statutes as counsel may advise.

At the hearing of this Petition will be read the affidavit(s) of:

1. Kelly Robinson, sworn December 4, 2008
2. Annamaria Pears, sworn December 4, 2008
3. Carol Welch, sworn December 4, 2008
4. Mariël Schooff, sworn December 4, 2008
5. Kelly Robinson #2, sworn December 19, 2008

copies of which are served herewith, and such further Affidavits as may arise.

The facts upon which this Petition is based are as follows:

Facts with respect to the Respondent's knowledge of extra-billing and/or user charges

7. On January 27, 2003, counsel for the Petitioners, at that time acting on behalf of the British Columbia Nurses' Union ("BCNU"), wrote to the Minister of Health Services (the "Minister") regarding *inter alia* possible breaches of the MPA by the False Creek Surgical Centre ("FCSC") and the Cambie Surgery Centre ("CSC").
8. The BCNU alleged *inter alia* that physicians affiliated with the FCSC and CSC who are enrolled with the Medical Service Plan, pursuant to the MPA, and have not made an election under the MPA, provided benefits to beneficiaries and received payment directly from said beneficiaries. The BCNU provided the Minister with evidence, in the form of media reports, in support of these allegations. The BCNU alleged that such billing would constitute direct billing or a user charge, contrary to section 17(1) of the MPA.
9. The BCNU asked *inter alia* that the Minister investigate the allegations of direct billing and user charges at the FCSC and CSC.
10. Also on January 27, 2003, counsel for the Petitioners, at that time acting on behalf of the BCNU, wrote to physicians, including Dr. Brian Day at the CSC, advising that he had been identified by the BCNU as a physician advocating the privatization of medical services. In this letter, the BCNU described to Dr. Day, and other physicians, the limits on user charges and extra billing under the MPA.
11. On April 1, 2003, counsel for the Petitioners, on behalf of the BCNU, again wrote to the Minister requesting a response to the letter of January 27, 2003.
12. Additionally, in its letter of April 1, 2003, the BCNU alerted the Minister to a specific allegation of a breach of section 17(1) the MPA. The BCNU cited media reports that patient Mariël Schooff had paid the FCSC \$6,000 to obtain medical care that apparently constituted a benefit under the MPA, from an enrolled physician, Dr. Amin Javer, who had apparently not made an election under the MPA .

13. On April 1, 2003, the Minister responded to the BCNU's letters acknowledging the Ministry's responsibility, on behalf of the Commission, for investigating extra-billing and unauthorized facility fees.

14. Despite the examples of violations of section 17(1) of the MPA provided in the BCNU's letters of January 27 and April 1, 2003, the Minister requested that specific details of charges to patients be brought to the attention of staff of the Medical Services Plan ("MSP") at the Ministry.

15. On May 20, 2003, counsel for the Petitioners, on behalf of the BCNU, wrote to the Minister requesting a response to its specific allegation of a contravention of section 17(1) of the MPA by the FCSC in relation to Ms. Schooff. The BCNU also provided the Minister with additional evidence, in the form of more media reports and information about private health care clinics, of more possible breaches of section 17 of the MPA by Dr. Day at the CSC. This evidence included public statements made by Dr. Day describing his efforts to operate a private, for-profit health care clinic.

16. On August 13, 2003, counsel for the Petitioners, on behalf of the BCNU, wrote to the Minister requesting a response to its letter of May 20, 2003. In the letter the BCNU cited the Minister's recent comments in the Legislature, which the BCNU described as confirming the BCNU's analysis with respect to the extra-billing and user charges to patients described in the BCNU's letters to the Minister of January 2, April 1 and May 20, 2003.

Facts regarding Commission and Ministry policies and procedures with respect to extra billing and user charges

17. Documents obtained pursuant to the *Freedom of Information and Protection of Privacy Act* and the *Access to Information Act* concerning extra-billing and user charges in British Columbia indicate that from 2000 forward this contravention of the MPA increased significantly. Instances of extra-billing and user charges were brought to the Ministry's attention. Prior to 2001, the Ministry appeared to understand and stated its commitment to act on the obligations imposed by the MPA. However, as extra-billing and user charges became increasingly notorious, the Ministry appeared to take little action, on behalf of the Commission, to enforce the MPA. Ultimately, the Ministry adopted a policy tantamount to non-enforcement of the MPA.

18. The Ministry and/or Commission's earlier understanding of the limits on extra-billing and/ user charges under the MPA is demonstrated in Minute #1148 of the Commission, dated October 26, 1995, which states that an enrolled physician who directly or indirectly derives an economic benefit as a consequence of a beneficiary being charged more than the MSP rate for an insured service will be deemed to be extra-billing, contrary to the MPA. The Minute states that the Commission will take the appropriate remedial action.

19. According to a Commission document dated January 15, 1998 and entitled "Amendments to the Medicare Protection Act: Information for Medical Practitioners from the Medical Services Commission", then-recent amendments to the MPA clarified that the prohibition on extra-billing in the MPA applies not only to medical practitioners, but also to anyone acting on behalf of a medical practitioner.

20. Health Canada documents indicate that Health Canada has been engaged in bilateral discussions and correspondence with the Ministry with respect to instances of extra-billing and user charges in British Columbia since at least June 2000.

21. Correspondence about extra-billing at the FCSC specifically continued between Health Canada and the Ministry throughout 2001 with the Ministry indicating in a letter dated October 15, 2001, that the then-new government of the province had an interest in exploring the merits of expanded public-private partnerships for the delivery of health services. The Ministry said the initiative may have a significant impact on the issues raised in Health Canada's correspondence, including an incidence of confirmed extra-billing at the FCSC from 2000.

22. Correspondence between Health Canada and the Ministry continued in 2002 and 2003 and reflected *inter alia* that an allegation of extra billing at the FCSC raised by Health Canada in a letter of June 9, 2000 remained unresolved.

23. Each year Health Canada asks the Ministry to provide estimates of the amount of extra-billing and/or user-charges that will occur in a fiscal year. Pursuant to the *Canada Health Act*, the federal government reduces the Canada Health and Social Transfer ("CHST") to each province by the amount of extra-billing and/or user-charges in that province, if any.

24. On January 13, 2002, the Ministry estimated user charges of \$4,610 in connection with the FCSC for the period of April 1, 2000 to March 31, 2001.

25. On March 11, 2003, Health Canada confirmed a deduction of \$4,610 to the CHST payment from the federal government to the government of British Columbia.

26. In an internal email between Ministry officials, dated October 31, 2003, in regards to an instance of suspected extra billing at the FCSC, a Ministry official stated that, based on previous correspondence with the physicians and clinics involved, and their lawyer, it was extremely unlikely that the charges would be voluntarily refunded.

27. A January 5, 2004, Ministry briefing document states that, in 9 of 16 cases of extra-billing or user charges for services provided between April 1, 2001 and March 31, 2002, legal counsel for the physicians and clinics involved refused to provide the information and/or the refunds requested by the Ministry.

28. The January 5, 2004 briefing document also notes that the Ministry had received reports that private clinics were attempting to discourage patients from making complaints to MSP about extra-billing and user charges, and that the Ministry was aware of some cases in which patients were asked to sign "waivers of MSP coverage". The briefing document appends a waiver form from the FCSC. The appended waiver states, in part, "I understand that by undergoing surgery at the False Creek Surgical Centre, I am paying privately for facility fees and that I waive any rights to obtain government reimbursement for these costs. I accept fully that these fees are not an insured service under the Medical Services Plan of British Columbia (MSP)"

29. Correspondence continued between the Ministry and Health Canada in 2003 and 2004 as Health Canada made efforts to obtain the Ministry's estimates for extra-billing and user charges for 2001-2002, which the Ministry did not provide, in breach of the *Canada Health Act*. On March 11, 2004, the Minister of Health for the federal government wrote to the Minister advising that if the requested information was not received, Health Canada would impose an estimate of the charges.

30. Ultimately, Health Canada imposed charges of \$126,775 for the 2001-2002 fiscal year. Documents from Health Canada indicate that it arrived at the amount based on a public statement by then-Minister Colin Hansen in December, 2003, in which the Minister referred to 55 cases of user charges or extra-billing then under review by Ministry officials. A Health Canada fact sheet dated November 4, 2004 states that Health Canada attempted to schedule bilateral discussions on the issue with the Ministry, but had received no response at that time.

31. For the 2002-2003 fiscal year, Health Canada confirmed a deduction of \$72,464 to the CHST payment to the government of British Columbia. For 2003-2004, British Columbia was subject to a CHST deduction of \$29,019 and for 2004-2005, a deduction of \$114,850 was imposed. For 2005-2006, British Columbia was subject to a CHST deduction of \$42, 112.50.

32. In or about March or April, 2004, the Ministry adopted revised procedures for handling reports of extra-billing. Under the new procedure, staff were to follow up on complaints, but stop short of taking any remedial or enforcement action, if the physician did not voluntarily remedy the situation.

33. This policy differed from the Ministry's previous procedures. According to an MSP Procedures document, between 1996 and 2003, the Ministry's procedure for handling complaints, which was approved by the Commission, was to request repayment of inappropriate charges, and, if necessary, take remedial action, which could result in penalties including possible de-enrollment from MSP.

34. According to this MSP Procedures document, between 2001 and 2003, MSP received an increasing number of reports from patients about apparent instances of extra-billing. The MSP Procedures document goes on to state that, while a few of these cases were resolved with repayment, most were not, as physicians or clinics refused to make refunds and those physicians or clinics claimed that Commission and MSP did not have the power to compel them to issue refunds.

35. According to a draft document dated June 8, 2005, and entitled "British Columbia's Extra-Billing Calculations Methodology", cases of extra-billing and user charges mentioned only in the media, cases for which documentary evidence is not provided, and cases that come to the Ministry's attention other than through direct complaints, even if disclosed by physicians during investigations, are not included in the Ministry's reports of extra-billing and user charges to Health Canada.

36. The "Extra-Billing Calculation Methodology" document states that the Ministry does not investigate the following: public statements by private clinic owners or medical directors acknowledging extra-billing; cases suggested by reporting anomalies; the reasonableness of patient charges ostensibly for uninsured services and provided in conjunction with insured services; patient charges for medically necessary services provided by diagnostic facilities that are not approved by

the Commission for MSP payment and not under contract to a Health Authority; and, questionable hospital charges.

37. Despite the notoriety of extra-billing and user charges, the Ministry, on behalf of the Commission, and the Commission do not appear to have any other policy or procedure that would or could lead to enforcement of the MPA and the discharge of the Commission's duties under the MPA.

Facts specific to Mariël Schooff

38. In an internal Ministry email, dated March 26, 2003, apparently in response to a discussion about media reports about Ms. Mariël Schooff's circumstances, a Ministry official stated that the Ministry was seeking direction on how to proceed with such cases, since the physician's representative had advised that it was his or her view that the MPA did not afford the Ministry sufficient jurisdiction to compel the production of the information the Ministry had requested.

39. On May 6, 2003, the Ministry wrote directly to Ms. Schooff requesting confirmation of the media reports that she had been billed directly for a benefit under the MPA.

40. On May 26, 2003, Health Canada wrote to the Ministry expressing concern that Dr. Amin Javer had inappropriately charged a patient for an insured service at the FCSC. Health Canada also expressed concern that physicians were ignoring the Ministry's communications regarding compliance with the *Canada Health Act* and that more proactive monitoring was required.

41. On June 26, 2003, counsel for the Petitioners, on behalf of Ms. Schooff and the BCNU, wrote to the Ministry confirming that the FCSC had apparently violated section 17(1) of the MPA with respect to Ms. Schooff for a service provided by Dr. Javer. The Petitioner enclosed a copy of the "Private Billing" invoice prepared by the FCSC and provided to Ms. Schooff.

42. On August 1, 2003, Health Canada wrote to the Ministry stating that unless it was confirmed Ms. Schooff was reimbursed for user charges, a deduction would be made to the province's CHST payment.

43. On August 28, 2003, the Ministry wrote to counsel for the Petitioners confirming that Dr. Javer billed the Medical Service Plan and was paid for the benefit performed on Ms. Schooff. The Ministry confirmed that neither Dr. Javer or the FCSC were entitled to bill Ms. Schooff directly in relation to this benefit. The Ministry then directed the Petitioners' counsel to approach the FCSC and Dr. Javer directly to seek a reimbursement of the monies unlawfully obtained from Ms. Schooff.

44. On September 5, 2003, the Petitioners' counsel wrote to the FCSC, to the attention of Dr. Javer, requesting reimbursement for Ms. Schooff of the illegal charges associated with her surgery.

45. On September 13, 2004, the Petitioners' counsel wrote to the Ministry advising that the FCSC and Dr. Javer had failed to respond to its request to reimburse Ms. Schooff. The BCNU requested

that the Ministry investigate the matter and take the steps necessary to require repayment from the FCSC and Dr. Javer, and to generally conclude the matter.

46. On April 12, 2005, the Petitioners' counsel once again wrote to the Ministry on behalf of the BCNU advising that the matter with respect to Ms. Schooff remained unresolved.

47. On March 27, 2008, counsel for the Petitioners wrote to the Chair of the Commission on behalf of Ms. Schooff, copying the Minister, to describe Ms. Schooff's experience, state that it disclosed breaches of the MPA and to request that the Commission investigate the circumstances of Dr. Javer's practice and the FCSC and ensure that the Commission was not improperly rendering payments to doctors at the FCSC. Counsel for the Petitioners also requested that the Commission ensure that Ms. Schooff be reimbursed for the illegal charges.

48. On May 13, 2008, counsel for the Commission wrote to counsel for the Petitioners and stated that it was involved in correspondence with the FCSC regarding Ms. Schooff's circumstances.

49. On June 19, 2008, counsel for the Petitioners wrote to counsel for the Commission and advised, *inter alia*, of the Petitioners' position that Ms. Schooff's circumstances are evidence of a systemic failure by the Commission to enforce the MPA since the Commission has known about Ms. Schooff's circumstances since approximately May 2003.

50. Neither counsel for the Petitioners, nor Ms. Schooff herself, have received further communication from the Commission or the Commission's counsel regarding Ms. Schooff.

Facts specific to Joyce Hamer

51. On May 23, 2003, counsel for the Petitioners, on behalf of patient Ms. Joyce Hamer and the BCNU, wrote to the Ministry advising that the McCallum Surgical Centre ("MSC") had billed Ms. Hamer directly for a benefit rendered under the MPA.

52. The Ministry responded by way of a letter dated July 18, 2003, confirming that Dr. Marc Boyle, a physician enrolled with MSP, had received payment for the benefit provided to Ms. Hamer. Another enrolled physician, Dr. Grant Burnell, was also compensated by MSP. The Ministry confirmed that neither the physicians nor the MSC were entitled to bill Ms. Hamer for her medical care. The Ministry suggested approaching the MSC directly to recover the illegal charge.

53. On August 6, 2003, counsel for the Petitioners wrote to the MSC, enclosing the Ministry's letter and requesting repayment of the unlawful charges.

54. As a result of a telephone call from the MSC, on August 7, 2003, counsel for the Petitioners again wrote to the MSC, explaining the alleged violation of the MPA in greater detail.

55. On August 18, 2003, counsel for the Petitioners wrote to the MSC, acknowledging repayment of \$3,000 that the MSC had charged to Ms. Hamer, in contravention of the MPA.

56. Also on August 18, 2003, counsel for the Petitioners wrote to Ms. Hamer, enclosing the cheque from the MSC.

57. On April 8, 2008, counsel for the Petitioners wrote to the Chair of the Commission, copying the Minister, to describe Ms. Hamer's experience, state that it disclosed breaches of the MPA and to request that the Commission investigate the circumstances of the physicians' practices at the MSC and ensure that the Commission was not improperly rendering payments to doctors at the MSC.

58. On May 13, 2008, counsel for the Commission wrote to counsel for the Petitioners and stated that there would be no further investigations into the doctors at the MSC as Ms. Hamer had been reimbursed and the MSC was now closed.

59. On June 19, 2008, counsel for the Petitioners wrote to counsel for the Commission and advised of the Petitioners' position that Ms. Hamer's circumstances are evidence of a systemic failure by the Commission to enforce the MPA.

60. Neither counsel for the Petitioners nor Ms. Hamer have received further communication from the Commission or the Commission's counsel regarding Ms. Hamer.

Facts specific to Daphne Lang

61. On April 19, 2004, counsel for the Petitioners, on behalf of the patient Ms. Daphne Lang and the BCNU, wrote to the Pezim Clinic regarding a charge to Ms. Lang for a medically necessary procedure performed by Dr. Pezim. The Minister was copied on this letter.

62. Counsel for the Petitioners demanded that the Pezim Clinic refund the unlawful charge to Ms. Lang. The Pezim Clinic did not respond.

63. On April 12, 2005, counsel for the Petitioners wrote to the Ministry, advising that the Pezim Clinic had failed to refund Ms. Lang the unlawful charge.

64. On August 5, 2005, the Ministry wrote to counsel for the Petitioners stating that, based on the information provided, it appeared the medical services received by Ms. Lang were benefits under the MPA and she should therefore not have been charged for them.

65. On June 16, 2008, counsel for the Petitioners wrote to the Chair of the Commission, copying the Minister, to explain Ms. Lang's circumstances, state that Ms. Lang's experience disclosed breaches of the MPA and to request that the Commission investigate the circumstances of Dr. Pezim's practice and the Pezim clinic and ensure that the Commission was not improperly rendering payments to doctors at the Pezim clinic. Counsel for the Petitioners also requested that the Commission ensure that Ms. Lang be reimbursed for the illegal charges.

66. On August 11, 2008, counsel for the Commission wrote back to state that the Ministry had requested Ms. Lang's MSP number and documentation of the service in its letter of August 5, 2005, and had not received it.

67. On October 2, 2008, counsel for the Petitioners wrote to counsel for the Commission enclosing Ms. Lang's MSP number and advising that Ms. Lang was searching for the rest of the documentation that the Ministry had requested.

68. On November 18, 2008, counsel for the Petitioners wrote to counsel for the Commission and advised that Ms. Lang had been unable to locate documentation pertaining to the service she had received at the Pezim Clinic, but that, based on the information already provided, counsel for the Petitioners trusted that the Commission would still continue to investigate the matter.

Facts Specific to Myrna Allison

69. On or about December 18, 2006, Ms. Myrna Allison was advised by her prosthodontist, Dr. Shupe, that she required a biopsy of a spot on her mouth.

70. Dr. Shupe told Ms. Allison he would send her to see Dr. Russell Naito for the biopsy and that she should speak with Dr. Shupe's secretary regarding an appointment with Dr. Naito, an oral and maxillofacial surgeon. Dr. Shupe's secretary informed Ms. Allison that an appointment with Dr. Naito would not be covered by the Medical Services Plan and that she would have to pay him for both a consultation and the biopsy.

71. Ms. Allison declined the appointment, and obtained a referral from her family physician to Dr. Stevens, whose colleague, Dr. Prabhu, performed the biopsy on January 29, 2007, on an urgent basis, after a consultation appointment with Dr. Stevens on January 22, 2007.

72. Ms. Allison received the results of her biopsy on February 6, 2007, and did not pay Dr. Stevens or Dr. Prabhu, who are both physicians, anything for the consultation or the procedure.

73. On April 2, 2008, counsel for the Petitioners wrote to the Chair of the Commission on behalf of Ms. Allison and the BCNU, copying the Minister of Health, to explain Ms. Allison's circumstances, state that Ms. Allison's experience disclosed breaches of the MPA, and to request that the Commission investigate the circumstances of Dr. Naito's practice and ensure that the Commission was not rendering payments improperly to Dr. Naito.

74. By letter dated May 27, 2008 and transmitted by facsimile on June 6, 2008, counsel for the Commission advised that the Commission had concluded that the fees Dr. Naito proposed to charge Ms. Allison would have been permitted under the MPA and the *Medical and Health Care Services Regulation*, and therefore the Commission did not intend to take further steps.

75. On June 19, 2008, counsel for the Petitioners wrote to counsel for the Commission and advised that she disagreed with the Commission's interpretation of the application of the MPA and the *Medical and Health Services Regulation* to Dr. Naito's practice.

76. Counsel for the Petitioners has received no further communication from the Commission or the Commission's counsel regarding Ms. Allison.

Facts Specific to Carol Welch

77. In or about late October 2006, Ms. Carol Welch was referred by her family physician to a neurosurgeon, Dr. Richard Chan, as a result of bursitis.

78. Initially, Ms. Welch was told that the first available consultation appointment with Dr. Chan was on July 4, 2007.

79. Having heard from a colleague who had also been referred to Dr. Chan that Dr. Chan might be able to perform the surgery sooner at the FCSC, Ms. Welch telephoned the FCSC in or about mid-December 2006. She explained her circumstances and was told she could see Dr. Chan sooner for a consultation for a fee of \$450. She agreed to pay the fee and did so at her appointment with Dr. Chan one week later on or about December 22, 2006.

80. At her appointment, Dr. Chan advised that Ms. Welch required surgery. He advised that the surgery could be done at the FCSC within two weeks for a fee of \$5,000, but that she would have a 4 to 6 month wait to obtain surgery at the hospital. Dr. Chan advised that Ms. Welch would not have to pay Dr. Chan's fee over and above the \$5,000, which would be covered by the Medical Services Plan.

81. Ms. Welch could not afford the cost of the surgery, so she declined the appointment and waited for surgery in the public system despite ongoing pain.

82. On March 27, 2008, counsel for the Petitioners wrote to the Chair of the Commission on behalf of Ms. Welch and the BCNU, copying the Minister, to explain Ms. Welch's circumstances, state that Ms. Welch's experience disclosed breaches of the MPA, and to request that the Commission investigate the circumstances of Dr. Chan's practice and ensure that the Commission was not rendering payments improperly to doctors at the FCSC. Counsel for the Petitioners also requested that the Commission ensure that Ms. Welch be reimbursed for the illegal charges.

83. On May 13, 2008, counsel for the Commission replied and stated that the Commission would be contacting Dr. Chan and the FCSC in regards to Ms. Welch's circumstances.

84. On June 19, 2008, counsel for the Petitioners wrote to counsel for the Commission and requested an update on the status of the investigation.

85. Neither counsel for the Petitioners nor Ms. Welch have received further communication from the Commission or the Commission's counsel regarding the investigation.

Facts specific to Barry Penner

86. On or about May 2004, MLA Barry Penner acknowledged publicly that he paid a facility fee to receive a medically necessary procedure.

87. The Minister took the position that such a facility fee is not contrary to the MPA.

Facts regarding media reports and the Urgent Care Centre

88. Extensive reports are routinely published in the media in BC and nationally detailing widespread and pervasive breaches of *inter alia* section 17 of the MPA.

89. For example, extensive reports were published in November and December 2006 about the opening of the Urgent Care Centre in Vancouver by Dr. Mark Godley. Dr. Godley is also the director of the FCSC. Descriptions of the operations of the Urgent Care Centre indicated its operations, at that time, would be in contravention of the MPA.

90. Reacting to the opening of the Urgent Care Centre, the Minister stated that no facility in BC would be permitted to operate outside the bounds of provincial legislation.

Facts specific to Barbara Gosling

91. On or about May 2006 Dr. Neufeld referred Barbara Gosling to Dr. Brownlee for a consultation. Approximately 2 months passed and Ms. Gosling did not receive a response from Dr. Brownlee.

92. On or about July 2006, Ms. Gosling telephoned Dr. Brownlee and asked how soon she would be able to see him for a private consultation. Ms. Gosling's call was connected to another line and she discussed making a private appointment with Dr. Brownlee. Ms. Gosling was told an appointment would be available in a few months, for a fee. Ms. Gosling did not schedule a private appointment.

93. On or about late October 2006 Ms. Gosling received a notice from Dr. Brownlee's office advising that an appointment was scheduled for her for February 26, 2008.

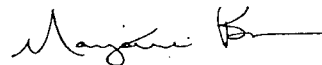
94. On or about November 16, 2006, Terry Gosling, Ms. Gosling's husband, telephoned Dr. Brownlee's office and asked if Dr. Brownlee could see Ms. Gosling more quickly if she was prepared to pay. Dr. Brownlee's office provided Mr. Gosling with another telephone number to call.

95. On or about November 16, 2006, Mr. Gosling telephoned the other number provided and was advised that Ms. Gosling could see Dr. Brownlee within 2 to 3 weeks if she would pay a fee of \$350. Mr. Gosling was further advised that the appointment would be during Dr. Brownlee's regular office hours at his regular office.

The Petitioners estimate that the application will take 5 days.

September 4, 2009

Dated



Petitioners' solicitor