KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 160**

Date: **2025 09 26**
File No. QBG-SA-00493-2022
Judicial Centre: Saskatoon

BETWEEN:

KEITH ANSTEAD

PLAINTIFF

- and -

SASKATCHEWAN MEDICAL ASSOCIATION

DEFENDANT

Counsel:

E.F. (Anthony) Merchant, K.C.	for the plaintiff
C. Ryan Lepage and Julianne H. Labach	for the defendant

FIAT — CURRIE J.
September 26, 2025

Introduction

[1] This action has been certified as a class action, but it has not yet reached the common issues trial.

[2] The defendant, Saskatchewan Medical Association ("the SMA"), now applies for dismissal of the action by way of a summary judgment. The SMA applies under Rule 7-2 of *The King's Bench Rules*:

> **7-2** A party may apply, with supporting affidavit material or other evidence, for summary judgment on all or some of the

> issues raised in the pleadings at any time after the defendant has filed a statement of defence but before the time and place for trial have been set.

[3] There are two broad parts to a summary judgment application. The first is the determination of whether the matter can be determined on a summary basis, rather than needing to proceed to trial. The second, which arises if the matter can be determined on a summary basis, is the determination of the merits of the summary judgment application.

[4] Often a judge hears argument in one hearing on both parts of a summary judgment application, making a determination on the second part only if he or she has concluded that the matter can be determined on a summary basis. In the circumstances of this case, though, I heard argument on only the first part of the application – whether the matter can be determined on a summary basis rather than needing to go to a trial.

Circumstances

[5] Justice Zarzeczny certified this action as a class action on December 12, 2014 (*Anstead v Saskatchewan Medical Association*, 2014 SKQB 406, [2015] 7 WWR 535). The matter subsequently was addressed by the Court of Appeal (*Saskatchewan Medical Association v Anstead*, 2016 SKCA 143). Justice Ottenbreit of that court described the circumstances of the action at paras. 2-6:

> [2] Dr. Anstead is a physician and is the representative plaintiff in a class action issued pursuant to *The Class Actions Act*, SS 2001, c C-12.01 [*CAA*]. The class definition certified by the certification hearing judge may be summarized as physicians who are surgical assistants and who earn more than 50% of their income by providing surgical services. The members of the class are distinguishable from physicians who have an office where they engage in a family practice (office-based assistants), but provide the same or similar surgical services part-time.
>
> [3] The majority of medical compensation in the Province of Saskatchewan is paid pursuant to the Physician Payment

Schedule (Payment Schedule) created by regulations pursuant to *The Saskatchewan Medical Care Insurance Act*, RSS 1978, c S-29 [*SMCIA*]. The Payment Schedule has the force of law. When a physician performs an insured medical service under the Payment Schedule he or she is entitled to receive payment for that service in accordance with the Payment Schedule.

[4] SMA is the exclusive bargaining representative of all physicians in Saskatchewan in respect of most fees paid to doctors under the *SMCIA*. The pay scales for all surgical assistants are negotiated pursuant to an organizational and consultative framework set forth in the *SMCIA* and *The Insured Services (Physicians) Payment Schedule Review Regulations, 1989*, RRS c S-29 Reg 15 [*Regulations*], promulgated pursuant to the *SMCIA*. The *Regulations* establish a conjoint committee called the Minister's Medical Payment Schedule Review Committee (PSRC) comprised of up to five members appointed by the Minister of Health and up to five members appointed by the SMA. The purpose of the PSRC is to consult with the board of the SMA on behalf of the Minister regarding the Payment Schedule. No alteration of the Payment Schedule can be passed into regulation without this consultation.

[5] In addition to the PSRC, the *SMCIA* also establishes a similarly conjoint Medical Compensation Review Committee (MCRC) the purpose of which is to prepare an agreement between the SMA and the Minister of Health regarding revisions to the Payment Schedule. The end product of this consultative process is usually an agreement that, amongst other things, modifies the Payment Schedule. This modification is achieved through a negotiated macro adjustment to the Payment Schedule which is then extrapolated into the individual services set forth in the Payment Schedule.

[6] SMA negotiated the Payment Schedule with the Government of Saskatchewan for all surgical assistants, both members of the class and office-based assistants. The Payment Schedule paid the class members lower fees than were paid to office-based assistants for providing the same or similar services. The different fees for the two categories of surgical assistants were agreed on and accepted by both SMA and the Government for what they considered to be appropriate policy considerations. The cause of action claimed by Dr. Anstead on behalf of the class is based on an alleged breach by SMA of its common law fiduciary duties and obligations of fairness and fair representation in negotiating the fees for the members of the

class.

The Court's approach to a summary judgment application

[6] Rule 7-5 describes the circumstances in which a summary judgment may be granted:

> **7-5**(1) The Court may grant summary judgment if:
>
> > (a) the Court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
> >
> > (b) the parties agree to have all or part of the claim determined by summary judgment and the Court is satisfied that it is appropriate to grant summary judgment.
>
> (2) In determining pursuant to clause (1)(a) whether there is a genuine issue requiring a trial, the Court:
>
> > (a) shall consider the evidence submitted by the parties; and
> >
> > (b) may exercise any of the following powers for the purpose, unless it is in the interest of justice for those powers to be exercised only at a trial:
> >
> > > (i) weighing the evidence;
> > >
> > > (ii) evaluating the credibility of a deponent;
> > >
> > > (iii) drawing any reasonable inference from the evidence.
>
> (3) For the purposes of exercising any of the powers set out in subrule (2), a judge may order that oral evidence be presented by one or more parties, with or without time limits on its presentation.
>
> (4) If the Court is satisfied that the only genuine issue is a question of law, the Court may determine the question and grant judgment accordingly.
>
> (5) If the Court is satisfied that the only genuine issue is the amount to which the applicant is entitled, the Court may order a trial of that issue or grant judgment with a reference or an accounting to determine the amount.

> (6) If the Court is satisfied there are one or more genuine issues requiring a trial, the Court may nevertheless grant summary judgment with respect to any matters or issues the Court decides can and should be decided without further evidence.
>
> (7) If an application for summary judgment is dismissed, either in whole or in part, a judge may order the action, or the issues in the action not disposed of by summary judgment, to proceed to trial in the ordinary way.
>
> (8) If an application for summary judgment is dismissed, the applicant may not make a further application pursuant to rule 7-2 without leave of the Court.

[7] Two court decisions lead the way in explaining the court's application of Rule 7-5. In *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87, at para 66, Justice Karakatsanis observed that summary judgment may be granted:

> (a) where the judge determines, based only on the evidence that is before the court, that there is no genuine issue requiring a trial; or
>
> (b) if there is a genuine issue requiring a trial:
>
> (i) where the issue can be resolved through the court's Rule 7-5(2) fact-finding powers; and
>
> (ii) where it is in the interests of justice to exercise the Rule 7-5(2) fact-finding powers and to grant judgment.

[8] Justice Barrington-Foote elaborated on that observation in *Tchozewski v Lamontagne*, 2014 SKQB 71, [2014] 7 WWR 397 [*Tchozewski*]. He said at para. 30:

> [30] The central question posed on a Rule 7-2 application, accordingly, is whether summary judgment will achieve what Karakatsanis J. calls (at para. 28) the "principal goal", and Popescul C.J.Q.B calls "the overarching consideration" (at para. 49, *Pervez* [2013 SKQB 377, [2013] 12 WWR 794]): that is, a fair process that results in a just adjudication of the dispute

before the court. The answer to this question calls for an analysis of the affidavit and other evidence presented and the issues raised by the application, in the context of the litigation as a whole. In *Hyrniak*, Karakatsanis J. breaks that analysis down into discrete steps and key principles - a "roadmap" - based on the various elements of the summary judgment rules. In brief, the key elements of that roadmap, in the context of a Rule 7-2 application, are as follows:

1. The court must first decide if there appears to be a genuine issue requiring a trial within the meaning of Rule 7-5(1)(a)), based solely on the evidence before the court, and without using the powers provided by Rule 7-5(2)(b) to weigh the evidence, evaluate credibility and draw inferences. (*Hryniak*, para. 66)

2. There will be no genuine issue requiring a trial if the judge is able to reach a fair and just determination on the merits based on the affidavit and other evidence. That will be so if the summary judgment process:

    (a) allows the judge to make the necessary findings of fact;

    (b) allows the judge to apply the law to the facts; and

    (c) is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial. (*Hryniak*, para. 49)

3. The issue is not whether the summary judgment process is as thorough or the evidence is as complete as at trial. It is whether the judge is confident he or she can find the facts and apply the relevant legal principles so as to fairly resolve the dispute. If the judge has that confidence, proceeding to trial is generally not proportionate, timely or cost effective. A process that does not give the judge confidence in his or her conclusions, on the other hand, is never proportionate. (*Hryniak*, paras. 50 and 57)

4. If there appears to be a genuine issue requiring a trial, the court should next determine if a trial can be avoided by using Rule 7-5(2)(b) powers to weigh evidence, evaluate credibility and draw inferences,

and whether it is in the interests of justice that those powers be exercised only at trial. (*Hryniak*, para. 56)

5. In deciding whether there is a genuine issue requiring trial, and whether it is in the interests of justice to use the powers provided by Rule 7-5(2)(b) to avoid a trial, the court must consider the nature of the evidence and issues. It must also consider proportionality in the context of the litigation as a whole. The relevant factors may include, but are not limited to:

    (a) the complexity of the claim;

    (b) the amount at issue;

    (c) the importance of the issues;

    (d) the relative cost and speed of a summary judgment application, as compared to trial;

    (e) whether better evidence will be available at trial than on the application, and the nature and extent of the conflict in the evidence, including:

        (i) whether there is competing evidence from multiple witnesses, the evaluation of which would benefit from cross-examination;

        (ii) whether credibility determinations are at the heart of the issues to be determined; and

        (iii) whether credibility determinations are made more difficult by the shortage of reliable documentary yardsticks.

    (f) whether the court is able to fairly evaluate the evidence, including the extent to which it would assist the court to have evidence presented by way of a trial narrative, to hear and observe witnesses and to have the assistance of counsel in reviewing the facts and the law within the conventional trial process;

    (g) whether summary judgment would resolve all

> claims against all parties, or whether a trial will be necessary in any event, raising, among other things, the possibility of duplicative proceedings or inconsistent findings of fact; and
>
> (h) whether the application could dispose of an important claim against a key party, thereby reducing cost and delay. (Rule 1-3, *Hryniak, supra*, paras. 58, 60 and 66, and *Pervez*, para. 48)
>
> 6. The court also has the discretion to permit a party to present oral evidence pursuant to Rule 7-5(3) if it would allow the court to reach a fair and just adjudication on the merits and is the proportionate course of action. (*Hryniak*, para. 63)

Readiness for a summary judgment application

[9] Dr. Anstead argues that it is not fair or appropriate to consider a summary judgment application in this action, because there has not been full disclosure. He suggests that the parties have not engaged in questioning under Part 5 of *The King's Bench Rules*, but in fact the SMA's counsel questioned Dr. Anstead on August 9, 2022, and Dr. Anstead's counsel questioned the proper officer of the SMA, Ed Hobday, on May 24, 2023.

[10] Dr. Anstead also says that he has not received full disclosure of documents from the SMA. He cites *Churko v Merchant*, 2019 SKQB 307 and *Chernick v Chernick*, 2020 SKQB 168, in emphasizing the court's insistence that the parties be ready for the summary judgment application, by having taken all necessary steps and by having filed all appropriate materials.

[11] In fact, the SMA delivered its affidavit of documents to Dr. Anstead in 2021. Dr. Anstead says, though, that there may be more documents that should be disclosed. In the years since he has had the SMA's affidavit of documents in hand, however, he has not taken any steps to seek such further disclosure. I am not persuaded

that Dr. Anstead's hypothesis, that there exist more relevant documents, is a reason to defer or decline to hear the summary judgment application, given that he has not pursued that hypothesis to date.

[12] Dr. Anstead also suggests that consideration of a summary judgment application is not appropriate unless the record is complete in the sense of including every possibly relevant piece of information. In this regard, he raises the possibility of seeking an order under Rule 5-20 to question non-parties to the action, such as the SMA representatives who actually were "in the room" when the Payment Schedule was being negotiated.

[13] For two reasons, I am not persuaded that this prospect is a reason to defer or decline to hear the summary judgment application. First, Justice Barrington-Foote has made it clear that the inclusion of every possibly relevant piece of information is not required. He said in *Tchozewski* at para 30:

> [30] … In brief, the key elements of that roadmap, in the context of a Rule 7-2 application, are as follows:
>
> …
>
> 3. The issue is not whether the summary judgment process is as thorough or the evidence is as complete as at trial. It is whether the judge is confident he or she can find the facts and apply the relevant legal principles so as to fairly resolve the dispute. If the judge has that confidence, proceeding to trial is generally not proportionate, timely or cost effective. A process that does not give the judge confidence in his or her conclusions, on the other hand, is never proportionate. (*Hryniak*, paras. 50 and 57)
>
> ...

[14] With that guidance in mind, I note that there is before the court detailed evidence with respect to what happened "in the room". That evidence is in the affidavit

of Allan Florizone, who participated in those discussions and so is in a position to relate what was discussed.

[15] Second, Dr. Anstead has not pursued the prospect of questioning non-parties to date, and so I conclude that the prospect is not a reason for deferring or declining to hear the summary judgment application.

Anticipated effect of a dismissal as requested

[16] Dr. Anstead points out that the members of the class have not yet been served with notice pursuant to s. 21 and s. 22 of *The Class Actions Act*, SS 2001, c C-12.01:

> **21**(1) Notice that an action has been certified as a class action must be given by the representative plaintiff to the class members in accordance with this section.
>
> …
>
> **22**(1) Unless the court orders otherwise, notice pursuant to this Part must:
>
> (a) describe the action, including the name and address of the representative plaintiff and the relief claimed;
>
> (b) state the manner in which and the time within which a class member may opt out of the action;
>
> (c) **Repealed.** 2007, c.21, s.11.
>
> (d) describe any counterclaim or third party claim being asserted in the action, including the relief sought;
>
> (e) summarize any agreements respecting fees and disbursements:
>
> (i) between the representative plaintiff and the representative plaintiff's lawyer; and
>
> (ii) if the recipient of the notice is a member of a subclass, between the representative plaintiff for

> that subclass and that representative plaintiff's lawyer;
>
> (f) describe the possible financial consequences of the action to class members and subclass members;
>
> (g) state that the judgment on the common issues for the class, whether favourable or not, will bind all class members who do not opt out of the action;
>
> (h) state that the judgment on the common issues for a subclass, whether favourable or not, will bind all subclass members who do not opt out of the action;
>
> (i) describe the rights, if any, of class members to participate in the action;
>
> (j) give an address to which class members may direct inquiries about the action; and
>
> (k) give any other information the court considers appropriate.
>
> …

[17] Consequently, argues Dr. Anstead, the other members of the class have not had an opportunity to opt out of the action. The importance of that opportunity, he says, was explained by Justice Sharpe in *Currie v McDonald's Restaurants of Canada Ltd.* (2005), 74 OR (3d) 321 (CanLII) (CA) at para 28:

> [28] The right to opt out is an important procedural protection afforded to unnamed class action plaintiffs. Taking appropriate steps to opt out and remove themselves from the action allows unnamed class action plaintiffs to preserve legal rights that would otherwise be determined or compromised in the class proceeding. Although she was not referring to inter-jurisdictional issues, in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63, at para. 49, McLachlin C.J.C. identified the importance of notice as it relates to the right to opt out: "A judgment is binding on a class member only if the class member is notified of the suit and given an opportunity to exclude himself or herself from the proceeding." The right afforded to plaintiff class members to opt out has been found to provide some protection to out-of-

> province claimants who would prefer to litigate their claims elsewhere: *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389, [1999] O.J. No. 2268 (S.C.J.), at p. 404 O.R. It is obvious, however, that if the right to opt out is to be meaningful, the unnamed plaintiff must know about it and that, in turn, implicates the adequacy of the notice afforded to the unnamed plaintiff. …

[18] Referring to Chief Justice McLachlin's observation that "A judgment is binding on a class member only if the class member is notified of the suit …", Dr. Anstead says that there is little point to the SMA's application for summary judgment. Since a summary judgment dismissal of the action would be binding only on Dr. Anstead (because no other class members have had notice of the action), he asserts, little would be accomplished by the dismissal. The other class members would be unaffected by that ruling.

[19] In response, the SMA points out that, if the court grants a summary judgment dismissal of the action, that dismissal would be based on the court's analysis and ruling on the facts and law pertaining to the issues in the action. Therefore, says the SMA, that summary judgment would constitute a precedent that would be followed by this court in the event that any class member chose to seek a continuation of the claim. In reality, asserts the SMA, the summary judgment effectively would determine the action.

[20] The SMA adds that it was Dr. Anstead's obligation, under s. 21 of the *Act*, to give notice to the class members once the action had been certified – something that he has not done even though the action was certified by Justice Zarzeczny in 2014. It would be perverse, says the SMA, to permit Dr. Anstead to rely on his own failure to meet his obligations as a reason for deferring or declining to hear the summary judgment application.

[21] If it were only a matter of addressing the interests of Dr. Anstead and the

SMA, I would find this second response of the SMA to be persuasive. In fact, it is a matter of addressing also the interests of the class members, who are not at fault for the notice not yet having been served. Consequently, I do not adopt the second response.

[22] I am satisfied, however, that the lack of notice to the class members is not a reason for deferring or declining to hear the summary judgment application. If this action otherwise is appropriate and ready for a summary judgment application, I am not persuaded that the court should defer or decline to hear the application on the basis of what may happen after the application is determined. In any event, Dr. Anstead has not persuaded me that there is little point to the application. There is logic and reason to the SMA's response to that suggestion, and that response leaves me unprepared to defer or decline to hear the summary judgment application.

Whether certification precludes a summary determination

[23] Dr. Anstead argues that a putative class action (an action that is intended by the plaintiff to be certified as a class action) must be given special consideration in the context of a summary judgment application. He says that this special status makes a putative class action less appropriate for summary determination. Further, Dr. Anstead says that an action that actually has been certified as a class action, as here, is even less appropriate to be dealt with by way of a summary judgment application.

[24] This is so, he argues, because by virtue of certification the court already has ruled that the action has merit. This is especially so in this action, he adds, because when Justice Zarzeczny found that the statement of claim discloses a cause of action (as required for certification in s. 6(1)(a) of *The Class Actions Act*), he used the then-current test of "authentic cause of action" rather than the current "plain and obvious" test.

[25] Putative class actions have been recognized as special. For example,

Justice Popescul (as he then was) said in *Thorpe v Honda Canada, Inc.*, 2009 SKQB 488, 357 Sask R 1, at paras 19-20:

> [19] A class proceeding such as this is a special type of action from the outset that may be certified into a class proceeding or converted, at the Court's discretion, into a regular individual proceeding. See *Caputo v. Imperial Tobacco Ltd.* (2005), 74 O.R. (3d) 728 at para. 28 (S.C.J.); and *Holmes v. Jastek Master Builder 2004 Inc.*, 2007 SKQB 242, 308 Sask. R. 156, at paras. 5-7.
>
> [20] Section 44 of the *Act* specifically provides that *The Queen's Bench Rules* apply to class actions to the extent not in conflict with the Act. Ottenbreit J. (as he then was) made the following comment in *Alves v. MyTravel Canada Holidays Inc.*, *supra*, at para. 23:
>
> > [23] Class actions prior to certification are like any other action under the *Queen's Bench Rules of Court* and therefore susceptible to those rules. They are nevertheless in my view a specialized action which because of their size and breadth and complexity require a specialized approach to their management.
>
> ...

[26] Accordingly, I accept that a putative class action is special. It is special, though, only in the sense that it is a regular action that could become a class action. Other rules and laws that apply to a regular action apply to the putative class action.

[27] An action that has been certified as a class action also is special, but likewise only in the sense that it involves procedural steps that are unique to a class action (notice to members of the class, a common issues trial, etc.). Other rules and laws that apply to a regular action continue to apply to the certified class action.

[28] Consequently, I conclude that the regular rules and laws relating to an application for summary judgment apply to a summary judgment application that is made in a certified class action, subject to there being a specific factor in the class action that justifies making an exception to application of the regular rules and laws.

Specifically addressing Dr. Anstead's suggestion, an action that has been certified as a class action is not automatically exempt from being subject to a summary judgment application, nor is it *prima facie* less appropriate for being determined summarily.

[29] As to the fact that certification of an action includes the finding that the pleadings disclose a cause of action, that circumstance does not support opposition to a summary judgment application being considered. In a certification decision, the court's determination regarding disclosure of a cause of action is made without attempting to determine the strength of the cause of action, beyond the low threshold of simply disclosing a cause of action (or of disclosing an authentic cause of action). The court does not determine whether the claim has merit.

[30] Dr. Anstead refers also to court decisions in which the court is reluctant to hear a summary judgment decision before the action reaches the certification hearing. Those decisions have no application here. They are focused on moving the action along to that certification hearing, whereas this action is beyond that stage.

[31] Dr. Anstead refers to the Court of Appeal's analysis of the proceedings that led to Justice Ottenbreit's decision, and to his conclusion that the SMA had engaged in an abuse of process. All of that discussion, however, has no bearing on the appropriateness of a summary judgment application, since all of that discussion relates to dealing with Justice Zarzeczny's rulings.

[32] Finally, Dr. Anstead says that both Justice Zarzeczny and Justice Ottenbreit have ruled that this action must go *to trial*. It is true that both Justice Zarzeczny and Justice Ottenbreit referred to the action proceeding to trial. Such remarks, though, merely communicated the point that certain issues would not be dealt with then, but rather would be dealt with later. The references to "trial" were not intended by either Justice Zarzeczny or Justice Ottenbreit to preclude an application for summary judgment. They were intended only to convey the message that a particular

issue was not being determined at that time.

[33] Certification does not preclude a summary determination, and nothing in the earlier decisions in this action precludes a summary determination.

Issues on the summary judgment application

[34] As Justice Ottenbreit reviewed on the appeal that followed Justice Zarzeczny's certification of this action, the factual background to this action is the establishment of the fee code differential that provides for a higher rate of payment to physicians who are serving as part-time surgical assistants than to physicians who are serving as full-time surgical assistants. The cause of action asserted in the action is, as described by Justice Ottenbreit, "breach by SMA of its common law fiduciary duties and obligations of fairness and fair representation in negotiating the fees for the members of the class". The damages claimed in the action would amount to millions of dollars.

[35] Pursuant to Rule 7-2, the SMA has identified the following issues – all of which are raised in its statement of defence – for summary judgment:

(a) whether the organizational and consultative framework that is established in *The Saskatchewan Medical Care Insurance Act*, RSS 1978, c S-29 ("the *SMCIA*"), is a comprehensive code that displaces common law duties such as those claimed in this action;

(b) even if the *SMCIA* is not a comprehensive code that displaces the common law duties, whether the pleaded common law duties conflict with – and are superseded by – the provisions of the *SMCIA*;

(c) whether the action is barred by the applicable limitation period; and

(d) whether the common law duties, as alleged in the pleadings, in fact

were complied with.

[36] On this application I must determine whether some or all of these issues are appropriate for determination on a summary basis.

The issue of whether the *SMCIA* displaces common law duties

[37] The SMA pleads that, as a matter of law, the organizational and consultative framework that is established in the *SMCIA* is a comprehensive code that displaces common law duties such as those claimed in this action. The SMA refers, as an example of such a legal determination, to *Gladstone v Canada (Attorney General)*, 2005 SCC 21, [2005] 1 SCR 325.

[38] This issue is one of interpretation of the *SMCIA*. Its determination does not depend on evidence. It is a legal issue. Therefore, it is not a genuine issue requiring a trial. It is appropriate for summary determination.

The issue of whether the pleaded duties are superseded by the *SMCIA*

[39] The SMA pleads that, even if the *SMCIA* is not a comprehensive code that displaces the common law duties, the pleaded common law duties conflict with – and are superseded by – the provisions of the *SMCIA*. The SMA pleads that the *SMCIA* provisions prevail over the common law duties by virtue of being statutory provisions.

[40] This too is a legal issue. Addressing the issue is a matter of comparing the pleaded duties with the provisions of the *SMCIA*, and of applying the law relating to the interaction between statute law and common law. Doing so does not require reference to evidence of the circumstances of this action, other than to general and uncontroverted background of the framework that is established in the *SMCIA*. This is not a genuine issue requiring a trial. It is appropriate for summary determination.

The issue of whether the action is barred by the limitation period

[41] The SMA pleads that the claim was discoverable and was discovered no later than April 1, 2007 (which is the implementation date for the fee code differential that is the subject of this action), so that the claim (which was issued January 23, 2013) is barred by the limitation period that is set out in *The Limitations Act*, SS 2004, c L-16.1.

[42] In his decision on certification, Justice Zarzeczny said at paras. 76-77:

> [76] The defendant argues that the claims of some of the class members may be barred by virtue of the application of *The Limitations Act*, SS 2004, c L-16.1. The plaintiff responds that the causes of action claimed constitute continuous breaches. The plaintiff also observed that the defendant has not yet legally raised the limitations defence because a statement of defence has not as yet been filed. Additionally, the plaintiff submits that the application of the limitations defence to individual class members may also engage the legal issue of discoverability. Implicitly the plaintiff argues that the "limitations clock" may well be found by a trial court to run from the date that the SMA and Government agree on any new agreement respecting physician remuneration if that agreement contains the fee payment differential complained of in this action and it continues until the differential codes are eliminated.
>
> [77] The issue of any limitations defence and these and perhaps other arguments advanced in respect of its defence, if pleaded by the defendant as it suggests it will, may involve an examination and application of the facts as produced in the evidence at some or other stage of a trial whether of the common or individual class member issues.

[43] Justice Zarzeczny referred to the arguments that there were continuous breaches, and that the applicable limitation period began running on each occasion of a new agreement between the provincial government and the SMA (an argument that subsequently appeared in Dr. Anstead's amended reply to defence). These arguments can be addressed without additional evidence, as the evidence that is before the court

includes a full explanation of the framework of establishment of the fee code differential.

[44] Justice Zarzeczny also alluded to the possibility that the limitation question can be determined only on an individual basis. This possibility could arise if determining the limitation period for each class member involves identifying when each class member knew about the fee code differential and its effect on that member.

[45] Addressing that possibility, the SMA argues that the modification of surgical assistant fees was well-known within the SMA membership. In that regard, the SMA relies on the Supreme Court decision in *Canada (Attorney General) v Lameman*, 2008 SCC 14, [2008] 1 SCR 372, in which the court confirmed determination of the limitation question was determined at a summary judgment application. The court said at para. 12:

> [12] We are of the view that, assuming that the claims disclosed triable issues and that standing could be established, the claims are barred by operation of the *Limitation of Actions Act* [RSA 1980, c L-15]. There is "no genuine issue" for trial. Were the action allowed to proceed to trial, it would surely fail on this ground. Accordingly, we agree with the chambers judge that it must be struck out, except for the claim for an accounting of the proceeds of sale, which is a continuing claim and not caught by the *Limitation of Actions Act*.

[46] This ruling was in the context of uncontroverted evidence that the causes of action raised would have been clear to the plaintiffs in the 1970s. In the face of that uncontroverted evidence the court agreed with the lower court that the claim was barred by the limitation period. The court described this context at paras. 17-18:

> [17] It is argued that the causes of action here advanced were discoverable as early as the 1880s and 1890s. We do not find it necessary, however, to go back so far. The evidence filed by the government establishes that in the 1970s the causes of action now raised would have been clear to the plaintiffs, exercising due diligence. … It is thus clear that members of the Enoch Band

> were aware of the facts on which this action was based in 1979. The chambers judge, on all the evidence, concluded that any interested party exercising due diligence could have uncovered the same facts Mr. Tyler did.
>
> [18] The plaintiffs filed no material in response to this evidence. They did not say whether or not, in the 1970s, they knew of the causes of action they now raise. There is no explanation for how, as members of the Papaschase Descendants Council, they could have been unaware of these matters, with due diligence, when some Papaschase descendants were aware of the Enoch Band's claim. On this state of the evidence, the only available inference is that these causes of action became discoverable within the meaning of the *Limitation of Actions Act* in the 1970s, and that the claims are now statute-barred.

[47] Here the SMA's position is that not only Dr. Anstead but also every other class member knew of the fee code differential when it was implemented in 2007. The SMA asserts that any physician who billed for surgical assistant services after April 1, 2007 *had* to have known of the differential. Furthermore, the SMA points to the uncontroverted evidence that the differential has been a matter of public record since 2007. The SMA points as well to the uncontroverted fact that the Payment Schedule – which dictates the compensation of physicians – at all times has been readily available to class members. All of this is in addition to the record of communications by and on behalf of full-time surgical assistants, on this topic, beginning even before April 1, 2007.

[48] This evidence, says the SMA, supports the conclusion that each class member had at least constructive knowledge of the differential. The matter of constructive knowledge, in the context of a limitation period, was discussed by Justice Moldaver in *Grant Thornton LLP v New Brunswick*, 2021 SCC 31, [2021] 2 SCR 704 . He said at para. 44:

> [44] In assessing the plaintiff's state of knowledge, both direct and circumstantial evidence can be used. Moreover, a plaintiff will have constructive knowledge when the evidence shows that

> the plaintiff ought to have discovered the material facts by exercising reasonable diligence…

[49] As to a class member's actual knowledge of the fee code differential and its effect on the class member, despite the SMA's insistence that each class member *had* to have known that circumstance, I must recognize the possibility that a class member in fact did not know. It could be, for example, that a class member did not pay particular attention to the details of the billing process, perhaps leaving the matter of billing to someone else without discussing the differential. It could be that a class member did not engage in the discussions about the differential that so many other class members were having. The question of whether each class member had actual knowledge can be resolved only with trial evidence.

[50] As to the question of constructive knowledge, the SMA points to the remarks of Justice Grammond in *Varley v Canada (Attorney General)*, 2025 FC 753 at paras 50-51:

> [50] The Defendant is arguing that the claim was objectively discoverable before May 2015 because some members of the class brought other class actions dealing with the same issues before 2015 or because the media attention that these class actions received would have alerted a reasonably diligent class member to the main facts constituting the cause of action.
>
> [51] I am unable to agree with the Defendant. The main premise of its argument is that objective discoverability must be assessed in the abstract, without reference to each individual class member's circumstances or abilities. For the reasons set forth below, whether an individual member ought to have discovered their cause of action is an inquiry that cannot be divorced from a person's actual circumstances. In the rare cases in which discoverability was decided as a common issue, there was evidence that the circumstances of each class member were substantially similar. Such evidence is lacking in the present case. It follows that the introduction of class actions by other class members or the media attention that they attracted cannot be the basis for a finding that all members of the present class

> ought to have discovered their cause of action before May 2015.

[51] The SMA insists that there is overwhelming similarity among the class members in this action, given that they all are or were full-time surgical assistants, and so they all billed according to the Payment Schedule. Possibly that assertion is correct, but I am not persuaded that I can conclude that it is so. Determining even constructive knowledge in this case may require evidence as to the individual class members, as contemplated by Justice Grammond.

[52] I conclude that, as to a class member's actual knowledge of the fee code differential and its effect on the class member, evidence from each member will be required. This is not a question that can be resolved even with the Rule 7-5(2) fact-finding power. It requires trial evidence. As to a class member's constructive knowledge, it may be that evidence from each member will be required. If the circumstances of an individual class member are relevant to the determination, this too is not a question that can be resolved even with the Rule 7-5(2) fact-finding power.

[53] In any event, I am not inclined to break determination of the limitation issue into two parts, one of which would be dealt with now and the other of which would be dealt with at trial. Keeping the limitation issue intact, to be determined in one piece, is more efficient.

[54] The issue of the limitation period is not appropriate for determination by way of summary judgment.

The issue of whether the pleaded duties were met

[55] The following excerpts from the second amended statement of claim set out the alleged common law duties of the SMA:

> 14. As the exclusive bargaining agent for class members, the Defendant owed and continues to owe class members a duty of

> fair representation, including a duty to treat all of its members in an evenhanded and non-arbitrary manner.
>
> …
>
> 18. Because of the categorical fiduciary relationships, the Defendant owed and owes class members fiduciary duties, including:
>
> (a) the duty to act in their best interests,
>
> (b) the duties
>
> (i) to act impartially when acting pursuant to a dual agency and
>
> (ii) to act evenhandedly when acting or participating as trustee, and
>
> (c) to deal honestly and in good faith with class members.

[56] The SMA says that, in fact, it complied with these duties. In support of that assertion it points to the evidence that appears in the affidavits of Mr. Hobday and of Mr. Florizone. Mr. Hobday describes the broad outline of the process that was engaged in by the SMA. Mr. Florizone participated in the discussions of the fee code differential that is the subject of this action. In his affidavit he describes what was done, including the deliberations and analysis that were engaged in by the SMA Working Group in that regard. The minutes of the Working Group are in evidence.

[57] While Dr. Anstead disputes the characterization of the facts that are established by this factual evidence, the evidence will establish the factual foundation necessary to a determination of whether the pleaded duties in fact were complied with.

[58] Additional evidence is not required in order to put the court in a position to determine that factual foundation.

[59] Furthermore, in light of the nature of this evidence, including the minutes of the Working Group (which provide an independent report of what was discussed), I

am confident that if Dr. Anstead files evidence aimed at countering some part of the evidence, the court will be able to resolve any such factual conflict by using the Rule 7-5(2) fact-finding power.

[60] In the end, this is not a genuine issue requiring a trial. This issue is appropriate for summary determination.

Conclusion

[61] The SMA, pursuant to Rule 7-2 of *The King's Bench Rules*, has identified four issues for determination on this summary judgment application. I have concluded that three of them are appropriate to be determined on the summary judgment application:

(a) whether the organizational and consultative framework that is established in *The Saskatchewan Medical Care Insurance Act* ("the *SMCIA*") is a comprehensive code that displaces common law duties such as those claimed in this action;

(b) even if the *SMCIA* is not a comprehensive code that displaces the common law duties, whether the pleaded common law duties conflict with – and are superseded by – the provisions of the *SMCIA*; and

(c) whether the common law duties, as alleged in the pleadings, in fact were complied with.

[62] The limitation issue is not appropriate for determination by way of summary judgment. If this action continues after the determination of the summary judgment application, that issue may be addressed at trial.

_____J.
G.M. CURRIE