Federal Court

Cour fédérale

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Date:	September 30, 2004 — 10:49 am
Subject:	The Canadian Union of Public Employees *et al. v.* The Minister of Health Court File number: T-709-03

Total number of pages including this one 29

Comments:

Counsel,

Please find transmitted here the Reasons for Order and Order of the Honourable Mr. Justice Mosley issued yesterday in the above noted proceeding. A certified copy will follow shortly by registered mail.

Regards,

Federal Court

CANADA

Cour fédérale

Date: 20040929

Docket: T-709-03

Citation: 2004 FC 1334

Ottawa, Ontario, this 29th day of September, 2004

Present: The Honourable Mr. Justice Mosley

BETWEEN:

THE CANADIAN UNION OF PUBLIC EMPLOYEES, THE COUNCIL OF CANADIANS, THE CANADIAN HEALTH COALITION, THE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, AND THE CANADIAN FEDERATION OF NURSES UNIONS

Applicants

and

THE MINISTER OF HEALTH

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicants, a group of unions and public interest organizations, claim that the Minister of Health has failed to exercise duties imposed on his office by the *Canada Health Act*, R.S.C. 1985, c. C-6. They allege that the Minister does not adequately monitor compliance with the requirements of the legislation and does not properly report to Parliament on the administration and operation of the Act, as he is required to do by the statute. In particular, they claim that he has failed to investigate the extent to which provincial health care insurance

programs satisfy the criteria for national standards set out in the Act and the extent to which the provinces have met mandatory conditions for the payment of federal financial contributions.

[2] The applicants seek declarations from the Court that the Minister has failed to perform these statutory duties, declarations that the *Canada Health Act Annual Report,* mandated by the legislation, does not include all relevant information and orders in the nature of *mandamus* requiring the Minister to properly investigate and report on provincial non-compliance[1].

[3] The applicants' claims and the remedies they seek relate to a number of important public policy issues of great interest to Canadians. The Minister, in response, concedes their importance but argues that the Court is not the correct forum in which to address them. Thus there is a threshold question that must first be considered: are the applicants' claims justiciable issues? The respondent also opposes the grant of public interest standing to the applicants to argue their claims.

[4] As the parties had agreed to an expedited hearing on all of the issues raised in the pleadings, I heard argument on the merits of the claims as well as the respondent's objections and reviewed all of the evidence filed. Having reached the conclusion that the claims are not justiciable I will, accordingly, confine these reasons to that issue.

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[1]The claimed relief is reproduced in full as Annex "A" to these reasons.

BACKGROUND

The Applicants

[5] The Canadian Union of Public Employees (CUPE) has approximately 180,000 members employed in the health care sector, including nurses, radiologists, paramedics and laundry and kitchen workers in hospitals. In the affidavit of Morna Ballantyne, Managing Director-National Services for CUPE, she attests that CUPE has confronted an "unprecedented onslaught of initiatives to contract out or privatize the work that members perform. This can not only effect their collective bargaining rights, but also the terms and conditions of their employment, the value of their pensions, and their job security."

[6] The Council of Canadians currently has more than 100,000 members and 50 chapters across the country. The primary objective of the Council, as set out in the affidavit of its national chairperson, Maude Barlow, is the promotion of economic justice, the renewal of democracy, the assertion of Canadian sovereignty, the preservation of the environment and the advancement of alternatives to corporate free trade. The Council conducts research and public information campaigns, and publishes reports in order to stimulate debate among Canadians about issues such as the preservation and extension of publicly funded health care.

[7] The Canadian Health Coalition includes organizations representing unions, seniors, women, churches, students, consumers and health care professionals from across Canada. One of the primary goals of this organization is the preservation and enhancement of Canada's public health system for the benefit of all Canadians.

[8] The Communications, Energy and Paperworkers Union of Canada (CEP) represents 150,000 workers at pulp and paper mills, telephone companies and in the oil, gas, chemical and mining industries. Members also come from many other fields of work. CEP's President, Brian Payne states in his affidavit that Canada's publicly funded health care system is of vital interest to his union's members.

[9] Finally, the Canadian Federation of Nurses Unions is the largest organization of nurses in Canada, with approximately 122,000 members belonging to nine nurses unions across the country. The Federation works to ensure that nurses' and patients' priorities are reflected in health policy.

The Canada Health Act

[10] The preamble of the *Canada Health Act* ("CHA") states that it is not the federal government's intention to abrogate or derogate from the provinces any powers vested in them under the provisions of the *Constitution Act, 1867*. The legislation, enacted in 1984, establishes

five fundamental criteria and sets out the conditions that provincial[2] health insurance plans must meet in order for the provinces to receive the full federal cash contribution under the Canada Health and Social Transfer ("CHST").

[11] The CHST is authorized pursuant to the *Federal-Provincial Fiscal Arrangements Act*, R.S.C. 1985, c. F-8. In 1999, the Social Union Framework Agreement was negotiated between the federal and provincial governments, establishing a non-binding "Dispute Avoidance and Resolution" process for the purpose of resolving inter-governmental disputes. In April 2002, the federal and provincial governments (with the exception of Quebec) jointly agreed to a dispute avoidance and resolution process with regards to the CHA.

[12] The Minister of Health has an obligation under section 23 of the CHA to report annually to Parliament on the operation and administration of the legislative scheme. The 2001-2002 report tabled in the House of Commons on February 14, 2003 was the focus of these proceedings. Section 23 provides:

23. The Minister shall, as soon as possible after the termination of each fiscal year and in any event not later than December 31 of the next fiscal year, make a report respecting the administration and operation of this Act for that fiscal year, including all relevant information on the extent to which provincial health care insurance plans have satisfied the criteria, and the extent to which the provinces have satisfied the conditions, for payment under this Act and shall cause the report to be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the report is completed.	23. Au plus tard pour le 31 décembre de chaque année, le ministre établit dans les meilleurs délais un rapport sur l'application de la présente loi au cours du précédent exercice, en y incluant notamment tous les renseignements pertinents sur la mesure dans laquelle les régimes provinciaux d'assurance-santé et les provinces ont satisfait aux conditions d'octroi et de versement prévues à la présente loi; le ministre fait déposer le rapport devant chaque chambre du Parlement dans les quinze premiers jours de séance de celle-ci suivant son achèvement.

[2] References to the provinces or provincial health insurance plans includes the territories and their plans.

[13] The annual report consists of data and descriptions of provincial health care insurance plans compiled by provinces using a "Users' Guide" prepared by Health Canada. This Guide sets out the information about the provincial health care insurance plans which the Minister considers relevant to reporting on compliance with the CHA. According to the applicants, provinces often fail to provide complete or consistent responses to the issues set out in the Users' Guide and the annual reports provide little to no assessment or analysis of how each province is meeting the CHA criteria. Important matters such as wait times and the extent to which individuals are bypassing the public system and using private health care resources are not reported. The applicants term these "informational deficiencies".

[14] Sections 3 and 4 of the CHA set out the objective of Canadian health care policy and the purpose of the legislation as follows:

3. It is hereby declared that the primary objective of Canadian health care policy is to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers.	3. La politique canadienne de la santé a pour premier objectif de protéger, de favoriser et d'améliorer le bien-être physique et mental des habitants du Canada et de faciliter un accès satisfaisant aux services de santé, sans obstacles d'ordre financier ou autre.
4. The purpose of this Act is to establish criteria and conditions in respect of insured health services and extended health care services provided under provincial law that must be met before a full cash contribution may be made.	4. La présente loi a pour raison d'être d'établir les conditions d'octroi et de versement d'une pleine contribution pécuniaire pour les services de santé assurés et les services complémentaires de santé fournis en vertu de la loi d'une province.

[15] The five fundamental criteria which provincial health insurance plans must satisfy to qualify for federal funding are set out in section 7 of the CHA. Sections 8 to 12 of the Act then further delineate how provinces are to meet each of the five criteria:

7. In order that a province may qualify for a full cash contribution referred to in section 5 for a fiscal year, the health care insurance plan of the province must, throughout the fiscal year, satisfy the criteria described in sections 8 to 12 respecting the following matters:

(a) public administration;
(b) comprehensiveness;
(c) universality;
(d) portability; and
(e) accessibility.

8. (1) In order to satisfy the criterion respecting public administration,

(a) the health care insurance plan of a province must be administered and operated on a non-profit basis by a public authority appointed or designated by the government of the province;

(b) the public authority must be responsible to the provincial government for that administration and operation; and

(c) the public authority must be subject to audit of its accounts and financial transactions by such authority as is charged by law with the audit of the accounts of the province.

(2) The criterion respecting public administration is not contravened by reason only that the public authority referred to in subsection (1) has the power to designate any agency

(a) to receive on its behalf any amounts payable under the provincial health care insurance plan; or

(b) to carry out on its behalf any responsibility in connection with the receipt or payment of accounts rendered for insured health services, if it is a condition of the designation that all those accounts are subject to assessment and approval by the public authority and that the public authority shall determine the amounts to be paid in respect thereof.

7. Le versement à une province, pour un exercice, de la pleine contribution pécuniaire visée à l'article 5 est assujetti à l'obligation pour le régime d'assurance-santé de satisfaire, pendant tout cet exercice, aux conditions d'octroi énumérées aux articles 8 à 12 quant à :

a) la gestion publique;
b) l'intégralité;
c) l'universalité;
d) la transférabilité;
e) l'accessibilité.

8. (1) La condition de gestion publique suppose que :

a) le régime provincial d'assurance-santé soit géré sans but lucratif par une autorité publique nommée ou désignée par le gouvernement de la province;

b) l'autorité publique soit responsable devant le gouvernement provincial de cette gestion;

c) l'autorité publique soit assujettie à la vérification de ses comptes et de ses opérations financières par l'autorité chargée par la loi de la vérification des comptes de la province.

(2) La condition de gestion publique n'est pas enfreinte du seul fait que l'autorité publique visée au paragraphe (1) a le pouvoir de désigner un mandataire chargé :

a) soit de recevoir en son nom les montants payables au titre du régime provincial d'assurance-santé;

b) soit d'exercer en son nom les attributions liées à la réception ou au règlement des comptes remis pour prestation de services de santé assurés si la désignation est assujettie à la vérification et à l'approbation par l'autorité publique des comptes ainsi remis et à la détermination par celle-ci des montants à payer à cet égard.

Comprehensiveness

9. In order to satisfy the criterion respecting comprehensiveness, the health care insurance plan of a province must insure all insured health services provided by hospitals, medical practitioners or dentists, and where the law of the province so permits, similar or additional services rendered by other health care practitioners.

Intégralité

9. La condition d'intégralité suppose qu'au titre du régime provincial d'assurance-santé, tous les services de santé assurés fournis par les hôpitaux, les médecins ou les dentistes soient assurés, et lorsque la loi de la province le permet, les services semblables ou additionnels fournis par les autres professionnels de la santé.

Universality

10. In order to satisfy the criterion respecting universality, the health care insurance plan of a province must entitle one hundred per cent of the insured persons of the province to the insured health services provided for by the plan on uniform terms and conditions.

Universalité

10. La condition d'universalité suppose qu'au titre du régime provincial d'assurance-santé, cent pour cent des assurés de la province ait droit aux services de santé assurés prévus par celui-ci, selon des modalités uniformes.

Portability

11. (1) In order to satisfy the criterion respecting portability, the health care insurance plan of a province

(a) must not impose any minimum period of residence in the province, or waiting period, in excess of three months before residents of the province are eligible for or entitled to insured health services;

(b) must provide for and be administered and operated so as to provide for the payment of amounts for the cost of insured health services provided to insured persons while temporarily absent from the province on the basis that

(i) where the insured health services are provided in Canada, payment for health services is at the rate that is approved by the health care insurance plan of the province in which the services are provided, unless the provinces concerned agree to apportion the cost between them in a different manner, or

(ii) where the insured health services are provided out of Canada, payment is made on the basis of the amount that would have been paid by the province for similar services rendered in the province, with due regard, in the case of hospital services, to the size of the hospital, standards of service and other relevant factors; and

(c) must provide for and be administered and operated so as to provide for the payment, during any minimum period of residence, or any waiting period, imposed by the health care insurance plan of another province, of the cost of

Transférabilité

11. (1) La condition de transférabilité suppose que le régime provincial d'assurance-santé :

a) n'impose pas de délai minimal de résidence ou de carence supérieur à trois mois aux habitants de la province pour qu'ils soient admissibles ou aient droit aux services de santé assurés;

b) prévoie et que ses modalités d'application assurent le paiement des montants pour le coût des services de santé assurés fournis à des assurés temporairement absents de la province :

(i) si ces services sont fournis au Canada, selon le taux approuvé par le régime d'assurance-santé de la province où ils sont fournis, sauf accord de répartition différente du coût entre les provinces concernées,

(ii) s'il sont fournis à l'étranger, selon le montant qu'aurait versé la province pour des services semblables fournis dans la province, compte tenu, s'il s'agit de services hospitaliers, de l'importance de l'hôpital, de la qualité des services et des autres facteurs utiles;

c) prévoie et que ses modalités d'application assurent la prise en charge, pendant le délai minimal de résidence ou de carence imposé par le régime d'assurance-santé d'une autre province, du coût des services de santé assurés

insured health services provided to persons who have ceased to be insured persons by reason of having become residents of that other province, on the same basis as though they had not ceased to be residents of the province.

(2) The criterion respecting portability is not contravened by a requirement of a provincial health care insurance plan that the prior consent of the public authority that administers and operates the plan must be obtained for elective insured health services provided to a resident of the province while temporarily absent from the province if the services in question were available on a substantially similar basis in the province.

(3) For the purpose of subsection (2), "elective insured health services" means insured health services other than services that are provided in an emergency or in any other circumstance in which medical care is required without delay.

Accessibility

12. (1) In order to satisfy the criterion respecting accessibility, the health care insurance plan of a province

(a) must provide for insured health services on uniform terms and conditions and on a basis that does not impede or preclude, either directly or indirectly whether by charges made to insured persons or otherwise, reasonable access to those services by insured persons;

(b) must provide for payment for insured health services in accordance with a tariff or system of payment authorized by the law of the province;

(c) must provide for reasonable compensation for all insured health services rendered by medical practitioners or dentists; and

(d) must provide for the payment of amounts to hospitals, including hospitals owned or operated by Canada, in respect of the cost of insured health services.

(2) In respect of any province in which extra-billing is not permitted, paragraph (1)(c) shall be deemed to be complied with if the province has chosen to enter into, and has entered into, an agreement with the medical practitioners and dentists of the province that provides

(a) for negotiations relating to compensation for insured health services between the province and provincial

fournis aux personnes qui ne sont plus assurées du fait qu'elles habitent cette province, dans les mêmes conditions que si elles habitaient encore leur province d'origine.

(2) La condition de transférabilité n'est pas enfreinte du fait qu'il faut, aux termes du régime d'assurance-santé d'une province, le consentement préalable de l'autorité publique qui le gère pour la prestation de services de santé assurés facultatifs à un habitant temporairement absent de la province, si ces services y sont offerts selon des modalités sensiblement comparables.

(3) Pour l'application du paragraphe (2), «services de santé assurés facultatifs» s'entend des services de santé assurés, à l'exception de ceux qui sont fournis d'urgence ou dans d'autres circonstances où des soins médicaux sont requis sans délai.

Accessibilité

12. (1) La condition d'accessibilité suppose que le régime provincial d'assurance-santé :

a) offre les services de santé assurés selon des modalités uniformes et ne fasse pas obstacle, directement ou indirectement, et notamment par facturation aux assurés, à un accès satisfaisant par eux à ces services;

b) prévoie la prise en charge des services de santé assurés selon un tarif ou autre mode de paiement autorisé par la loi de la province;

c) prévoie une rémunération raisonnable de tous les services de santé assurés fournis par les médecins ou les dentistes;

d) prévoie le versement de montants aux hôpitaux, y compris les hôpitaux que possède ou gère le Canada, à l'égard du coût des services de santé assurés.

(2) Pour toute province où la surfacturation n'est pas permise, il est réputé être satisfait à l'alinéa (1)c) si la province a choisi de conclure un accord et a effectivement conclu un accord avec ses médecins et dentistes prévoyant:

a) la tenue de négociations sur la rémunération des services de santé assurés entre la province et les

organizations that represent practising medical practitioners or dentists in the province;

(b) for the settlement of disputes relating to compensation through, at the option of the appropriate provincial organizations referred to in paragraph (a), conciliation or binding arbitration by a panel that is equally representative of the provincial organizations and the province and that has an independent chairman; and

(c) that a decision of a panel referred to in paragraph (b) may not be altered except by an Act of the legislature of the province.

organisations provinciales représentant les médecins ou dentistes qui exercent dans la province;

b) le règlement des différends concernant la rémunération par, au choix des organisations provinciales compétentes visées à l'alinéa a), soit la conciliation soit l'arbitrage obligatoire par un groupe représentant également les organisations provinciales et la province et ayant un président indépendant;

c) l'impossibilité de modifier la décision du groupe visé à l'alinéa b), sauf par une loi de la province.

[16] Section 13 of the Act sets out the reporting requirements for the provinces to qualify for the full cash contribution and provides for regulations to prescribe the manner and type of information that is to be provided by the provinces. However, no such regulations have been made:

13. In order that a province may qualify for a full cash contribution referred to in section 5, the government of the province

(a) shall, at the times and in the manner prescribed by the regulations, provide the Minister with such information, of a type prescribed by the regulations, as the Minister may reasonably require for the purposes of this Act; and

(b) shall give recognition to the Canada Health and Social Transfer in any public documents, or in any advertising or promotional material, relating to insured health services and extended health care services in the province.

13. Le versement à une province de la pleine contribution pécuniaire visée à l'article 5 est assujetti à l'obligation pour le gouvernement de la province :

a) de communiquer au ministre, selon les modalités de temps et autres prévues par les règlements, les renseignements du genre prévu aux règlements, dont celui-ci peut normalement avoir besoin pour l'application de la présente loi;

b) de faire état du Transfert dans tout document public ou toute publicité sur les services de santé assurés et les services complémentaires de santé dans la province.

[17] Pursuant to sections 14 and 15, the Governor in Council has the power, after a matter of non-compliance has been referred by the Minister, to reduce or withhold any amount of the federal cash contribution to a province that has been determined to be in default of the Act:

14. (1) Subject to subsection (3), where the Minister, after consultation in accordance with subsection (2) with the minister responsible for health care in a province, is of the opinion that

(a) the health care insurance plan of the province does not or has ceased to satisfy any one of the criteria described in sections 8 to 12, or

(b) the province has failed to comply with any condition set out in section 13,

and the province has not given an undertaking satisfactory to the Minister to remedy the default within a period that the Minister considers reasonable, the Minister shall refer the matter to the Governor in Council.

(2) Before referring a matter to the Governor in Council under subsection (1) in respect of a province, the Minister shall

(a) send by registered mail to the minister responsible for health care in the province a notice of concern with respect to any problem foreseen;

(b) seek any additional information available from the province with respect to the problem through bilateral discussions, and make a report to the province within ninety days after sending the notice of concern; and

(c) if requested by the province, meet within a reasonable period of time to discuss the report.

(3) The Minister may act without consultation under subsection (1) if the Minister is of the opinion that a sufficient time has expired after reasonable efforts to achieve consultation and that consultation will not be achieved.

15. (1) Where, on the referral of a matter under section 14, the Governor in Council is of the opinion that the health care insurance plan of a province does not or has ceased to satisfy any one of the criteria described in sections 8 to 12 or that a province has failed to comply with any condition set out in section 13, the Governor in Council may, by order,

(a) direct that any cash contribution to that province for a fiscal year be reduced, in respect of each default, by an amount that the Governor in Council considers to be appropriate, having regard to the gravity of the default; or

14. (1) Sous réserve du paragraphe (3), dans le cas où il estime, après avoir consulté conformément au paragraphe (2) son homologue chargé de la santé dans une province :

a) soit que le régime d'assurance-santé de la province ne satisfait pas ou plus aux conditions visées aux articles 8 à 12;

b) soit que la province ne s'est pas conformée aux conditions visées à l'article 13,

et que celle-ci ne s'est pas engagée de façon satisfaisante à remédier à la situation dans un délai suffisant, le ministre renvoie l'affaire au gouverneur en conseil.

(2) Avant de renvoyer une affaire au gouverneur en conseil conformément au paragraphe (1) relativement à une province, le ministre :

a) envoie par courrier recommandé à son homologue chargé de la santé dans la province un avis sur tout problème éventuel;

b) tente d'obtenir de la province, par discussions bilatérales, tout renseignement additionnel disponible sur le problème et fait rapport à la province dans les quatre-vingt-dix jours suivant l'envoi de l'avis;

c) si la province le lui demande, tient une réunion dans un délai acceptable afin de discuter du rapport.

(3) Le ministre peut procéder au renvoi prévu au paragraphe (1) sans consultation préalable s'il conclut à l'impossibilité d'obtenir cette consultation malgré des efforts sérieux déployés à cette fin au cours d'un délai convenable.

15. (1) Si l'affaire lui est renvoyée en vertu de l'article 14 et qu'il estime que le régime d'assurance-santé de la province ne satisfait pas ou plus aux conditions visées aux articles 8 à 12 ou que la province ne s'est pas conformée aux conditions visées à l'article 13, le gouverneur en conseil peut, par décret :

a) soit ordonner, pour chaque manquement, que la contribution pécuniaire d'un exercice à la province soit réduite du montant qu'il estime indiqué, compte tenu de la gravité du manquement;

(b) where the Governor in Council considers it appropriate, direct that the whole of any cash contribution to that province for a fiscal year be withheld.	b) soit, s'il l'estime indiqué, ordonner la retenue de la totalité de la contribution pécuniaire d'un exercice à la province.
...	...

Evidence filed

[18] The applicants have filed several affidavits. The first is from law professor Joan Gilmour who specializes in health law and policy and who has researched and published several articles on health regulation and policy, including on the privatization of health care. Professor Gilmour sets out the background and present-day situation of health care service delivery in Canada, and comments on the effects of the proliferation of privately owned and for-profit health care clinics on the criteria set out in the Act. She states that in her view it is essential that any judgment regarding the extent to which provincial insured health care services are in line with the requirements of the Act must be informed by an assessment of the nature and effect of privatization attempts and initiatives in each province.

[19] Professor Gilmour attests that it is her opinion that the Minister's annual reports to Parliament poorly document the key developments and transformations that have been taking place in health care service delivery, notably the proliferation of private clinics and for-profit delivery of health care services and that this encourages queue jumping, private payment for insured services and erodes the publicly delivered and insured system of health care delivery. Professor Gilmour also attests that the information in the annual report is presented without

criticism by the Minister but is merely a narrative description of provincial health insurance plans based on information and statistics provided by the provinces.

[20] Secondly, the applicants have filed the affidavit of professor and current Canada Health Services Research Foundation/Canadian Institutes for Health Research Chair in Health Services and Nursing Research, Pat Armstrong. Professor Armstrong describes problems and deficiencies she has observed in the Minister's annual reports such as the failure to include complaints by individuals about potential cases of non-compliance. She notes that Auditors General of Canada have repeatedly documented the failure of successive Ministers of Health to live up to their monitoring, reporting and enforcement obligations under the CHA, and states that the annual report does not permit members of Parliament to determine if the billions of dollars transferred to the provinces results in health care delivery that complies with the legislation. She comments that the information provided by the provinces for the reports offer only a "patchwork quilt of information that is incomplete, often not comparable, and that varies quite considerably from one jurisdiction to the next." Professor Armstrong also attests that in her opinion no assessment is made in the annual report with regards to the extent of provincial compliance with the Act.

[21] An affidavit from Dr. Philip Devereaux, a Fellow of the Royal College of Physicians and Surgeons of Canada and a clinical scholar and cardiologist in the Department of Medicine at McMaster University, was also filed by the applicants. In this affidavit Dr. Devereaux comments on the lack of comparative information in the reporting information prepared annually under the CHA, and compares this information with the studies that he has conducted comparing

the health outcomes in investor-owned private for-profit versus private not-for-profit health care delivery systems. His studies, based on data collected in the United States, found that the investor-owned for-profit delivery of health care services "significantly increases the risk of death to patients, when compared to the not-for-profit delivery of the same health care services."

[22] Other affidavits were submitted from representatives of each of the named applicants, stating their organizations' interests in and connection to the issues raised in this proceeding.

[23] The respondent has filed three affidavits. The first is from Roger Guillemette, the Assistant Director of the Information, Analysis and Reporting Unit of the Canada Health Act Division. This Unit is responsible for the production of the Canada Health Act Annual Report, including the collection, analysis and processing of information related to the administration of the Act. Mr. Guillemette's affidavit describes the administration and evolution of the section 23 reporting requirement under the Act, setting out the history of cost-sharing programs for health care between the federal and provincial governments. He describes the approach taken by Health Canada in gathering information on provincial health insurance plans as collaborative and interactive. Mr. Guillemette also sets out that the annual report consists of three parts: a narrative description of the provincial health care systems relating to the five criteria, documentation to confirm compliance with the criteria and conditions and statistics identifying trends in the provincial health care systems.

[24] Mr. Guillemette attests that each spring the Users' Guide is updated and expanded to reflect areas of clarification identified in Health Canada's review of the previous year's material, in discussion and assessment of content with provincial health officials, and in order to expand on information requirements in response to either federal or provincial concerns. Meetings and teleconferences between Health Canada and the provinces are held and consultations are continued throughout the year in preparation for the following year's report. Mr Guillemette also describes that in 2000, staff and funding levels were increased for the production of the annual report, to improve administration of the CHA and enable Health Canada to better assess and monitor compliance. He also notes that the length of the annual report has tripled since its first publication in 1984-1985. Mr. Guillemette concludes that the annual report is "...not designed to act as a deficiency checklist or a forum for critics who allege failures by provincial health insurance plans. Nor is it to serve as [a]n inventory of compliance and monitoring issues that are the subject of current or future discussions. Its role, in my opinion, is to provide objective information on **the extent** provincial plans have met the criteria and conditions of the CHA."

[25] The second affidavit is from Gigi Mandy, Director of the Canada Health Act Division of Health Canada. Ms. Mandy describes this Division as the one responsible for the day-to-day administration of the CHA, as the Division has delegated authority from the Minister to deal with the operation and administration of the Act. The Information, Analysis and Reporting Unit (the "IAR Unit") of the Division has the primary responsibility for the production of the annual report. Ms. Mandy comments on the implementation, operation and administration of the CHA

by Health Canada. According to her, the Division must and does keep informed about emerging health insurance issues across Canada, monitors the provincial administration of health care delivery, receives complaints about health care and the application of the Act and then follows up on such complaints by verifying facts with the provinces and if issues are not resolved, requesting the province to investigate on the matter and report back. Only if the issue is not resolved to the satisfaction of the Division after taking these steps, is the complaint brought to the attention of the federal Minister of Health.

[26] Ms. Mandy states that issues of concern in relation to provincial compliance with the Act's criteria and conditions are identified by the Compliance and Interpretation Unit of the Division and then attempts to resolve such issues through cooperation and collaboration with the province are made by this Unit on behalf of the Minister. Ms. Mandy attests that in forming an opinion under section 14 the Minister may take into account the factors of "health system issues, pressures and priorities, the state of intergovernmental relations in the health care field, financial and budgetary issues, and the impact that the opinion may have on other activities relating to the CHA." Ms. Mandy also states that the Minister does not look to the annual report for the purpose of determining whether there is a violation of the Act, as such monitoring and consultation about complaints and possible issues of non-compliance takes place throughout the year.

[27] Ms. Mandy notes that the 2002 federal and provincial agreement has had the effect of making the process followed by the Minister prior to forming an opinion regarding whether a

provincial insurance plan had ceased to satisfy any of the Act's criteria or conditions, more transparent. In the end, however, the Minister is not bound by the dispute avoidance report and retains full discretion in forming an opinion as to provincial non-compliance.

[28] The respondent's third affidavit is from David Kelly, former Deputy Minister of Health in British Colombia and Assistant Deputy Minister of Health in British Columbia, Alberta and Saskatchewan at various times in the 1980s and 1990s. He has also written and spoken publicly on health care policy issues. He provides an overview of the issues that have emerged in recent years, emphasizing the complexity of the management of health care delivery. According to Mr. Kelly, the annual report does not pretend to deal with current or future trends in the Canadian health care system, as such information is already available to the Minister from a wide variety of other sources, such as the Canadian Institute for Health Information established, in part by Health Canada in 1994. In his view, the objective of the annual report is to set out how provincial health insurance plans are organized and delivered to meet the criteria and conditions set out in the federal Act and the annual report achieves this by setting out relevant information indicating how the provinces meet the criteria, conditions and provisions of the Act.

The parties' positions

[29] The applicants, through their expert affidavits, have highlighted deficiencies in the nature and extent of the information provided by the provinces and incorporated by Health Canada in the annual report. They have alleged the failure of the report to comprehensively and plainly

document the changes being made in provincial health care insurance plans that appear to allow and even to facilitate the privatization of insured health services, including private, for-profit, delivery of health care and private payment for health care. Important and timely issues such as the shortage of doctors, nurses and other providers in many areas, waiting lists for diagnostic and surgical services and programs to de-institutionalize medical care away from the hospital setting are not set out in the annual report despite their prominence in the public debate. The applicants refer to several reports of the Auditors General of Canada from 1987 onwards, where the annual report's lack of assessment and analysis of provincial compliance with the Act have been criticized.

[30] The applicants did not directly address the issue of justiciability in their written argument. At the hearing, they argued that all of the substantive issues raised required judicial intervention. They begin with the premise that since section 23 of the CHA imposes an obligation on the Minister, and not merely a discretionary authority, to provide Parliament with a report containing "all relevant information" on the provincial satisfaction of the criteria and conditions of the Act, the alleged "informational deficiencies" in the report disable Parliament and the public from making an informed assessment of the extent of provincial compliance. Further, they contend that the Minister has improperly delegated his reporting authority to the provinces by assigning the responsibility for drafting most parts of the annual report to provincial officials and has accepted that the provinces will have, effectively, a veto over which information they will provide.

[31] The applicants submit that the court may infer that the Minister of Health has chosen to disregard the section 14 authority and that this is an exercise of discretion which is inconsistent with and frustrates the purpose of the Act. The factors described in the Mandy affidavit as "health systems issues, pressures and priorities, the state of intergovernmental relations in the health care field, financial and budgetary issues" are not mandated by subsection 14(1) as requirements for beginning the section 14 non-compliance procedure by referring a notice of concern to the provinces. Thus the applicants argue that the Minister has altered the statutory procedure set out by Parliament in section 14 and fettered his discretion in its application.

[32] It is common ground between the parties that the Minister has never issued a notice of concern to a province under section 14 nor referred any matters to the Governor-in-Council since the CHA's enactment in 1984, despite, according to the applicants, widely reported concerns about provincial compliance. The applicants argue that the Minister's failure to issue notices of concern is an "abdication of duty". Numerous complaints about provincial health insurance plans failing to comply with the criteria of the Act have been made, including complaints concerning queue jumping by persons who pay privately for publicly insured services. The applicants point to a statement in the Auditor General's 2002 Report that since 1999 there have been no investigations in respect of potential non-compliance with the Act's criteria.

[33] The applicants recognize that the Minister's enforcement responsibilities under section 14 are discretionary but argue, nonetheless, that the courts have a supervisory role to play in requiring that Ministers do not fetter their discretion by refusing to exercise it. Furthermore,

discretionary decisions made by Ministers must take into account only relevant considerations and disregard irrelevant ones. While this court may accept a deferential standard of review for the exercise of ministerial discretion, the applicants submit that the evidence demonstrates that successive Ministers have unlawfully fettered their duty to determine whether or not to invoke the provisions of section 14 of the Act.

[34] The respondent argues that this Court should decline to adjudicate on the issues raised with respect to sections 14 and 23 of the CHA, as they contemplate a political process involving inter-governmental consultation and discretionary decision-making by the Minister. Moreover, the obligation to report to Parliament on provincial compliance is strictly political. The respondent relies on *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441 and *Lexogest Inc. v. Manitoba (Attorney General)* (1993), 101 D.L.R. (4th) 523, 85 Man. R. (2d) 8 (C.A.).

[35] The respondent contends that the section 23 obligation imposed on the Minister is owed solely to Parliament and not to the public at large or to the applicants on behalf of the public interest. It follows that any process to seek a remedy with respect to non-compliance with section 23 must also lie with Parliament. The respondent relies on *Rothmans of Pall Mall Canada Ltd. v. Canada (Minister of National Revenue)*, [1976] 1 F.C. 314, (1975), 60 D.L.R. (3d) 650 (T.D.), aff'd [1976] 2 F.C. 500 (C.A.).

[36] The respondent submits that the Minister in satisfying his reporting obligation to Parliament must have regard to a myriad of policy issues in addition to the terms of the statute. It is open to the Minister to chose alternative means to encourage compliance and it would be inappropriate for the Court to examine the Minister's discretionary power to begin a consultative process with a province in the event of a potential breach of the criteria or conditions of the Act. Another branch of government, namely the executive in the form of the Minister and thereafter the Governor in Council, have been provided jurisdiction to deal with compliance matters under section 14 of the Act, and the Court should not intervene. The respondent describes the issues raised with respect to section 14 of the Act as political in nature, involving the relations between federal and provincial levels of government and their respective views of their responsibilities. The respondent relies on *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 and *Thorne's Hardware Ltd. v. Canada*, [1983] 1 S.C.R. 106.

[37] Sections 14 and 15 of the Act, submits the respondent, deal with a political process that involves inter-governmental consultation, a discretionary decision of the Minister based on such consultation and the possibility of referral of the matter to the Governor in Council. Chief Justice Scott of the Manitoba Court of Appeal, considering similar processes at the provincial level in *Lexogest Inc., supra,* concluded in his dissenting reasons that these are not justiciable matters. The majority did not address the issue. Chief Justice Scott's reasoning was followed by Hunter J., of the British Columbia Supreme Court in *Brown v. British Columbia (Attorney*

General) (1997), 41 B.C.L.R. (3d) 265, [1998] 5 W.W.R. 312, a case dealing with a cap on health insurance benefits for treatment outside Canada.

[38] Finally, the respondent cautions the court to consider that a finding that the reporting obligation of the Minister is justiciable will have significant implications beyond the current case, since the obligation of the Minister to report to Parliament is not unique and this obligation is imposed on many Ministers by several pieces of legislation.

ANALYSIS

[39] As stated by Chief Justice Dickson in *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, *supra* at pages 90-91, a determination of whether a matter is justiciable is:

> "...first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue, or instead, deferring to other decision-making institutions of the polity...There is an array of issues which calls for the exercise of judicial judgment on whether the questions are properly cognizable by the courts. Ultimately, such judgment depends on the appreciation by the judiciary of its own position in the constitutional scheme.

[40] In the view of this member of the judiciary, while this application raises important questions, they are of an inherently political nature and should be addressed in a political forum rather than in the courts.

[41] The Act requires that the annual report tabled by the Minister be laid before each House of Parliament, thus indicating that Parliament's intention in creating this obligation was to provide for review and debate on the content of the reports by Parliament itself. Allegations of informational deficiencies with such reports are, therefore, to be addressed and dealt with by that branch of government, and not, in my view, by the judiciary. It is not for the courts to usurp the role of Parliament in determining the nature and quality of the information it has deemed necessary to conduct its functions. As stated by Justice McLachlin, as she then was, in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at page 389:

> ...Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.

[42] The Minister's duty to report to Parliament on an annual basis as to provincial compliance with the Act's criteria and conditions is clear. The determination of what constitutes "all relevant information" for the purpose of the reporting requirement is appropriately determined by the Minister, in consultation with the provinces, and is subject to policy and political concerns, the parameters of which it is not for this Court to determine. The Minister is accountable to Parliament for the scope and accuracy of the information the report contains. I agree with the respondent that the section 23 obligation is one owed to Parliament and not to the applicants or the public at large although requiring production of an annual report will

necessarily inform public debate on the subject. Any remedy, therefore, with regards to fulfilling the section 23 obligation lies within Parliament and not with the courts.

[43] The applicants' argument in relation to the provinces controlling the nature and extent of the information provided to the federal Minister is predicated, in my view, on an underlying challenge to the Governor in Council's failure to make regulations to require the provinces to provide prescribed information to the federal Minister concerning their health insurance plans. This cannot sustain a justiciable issue. The lack of such regulations is not a matter for the courts, as the Act does not oblige the Minister to propose them nor the Governor in Council to make them. The enabling authority, set out in paragraph 22 (1)(c) of the Act, is strictly permissive and not mandatory.

[44] Moving to the applicants' challenge to the lack of enforcement action from the Minister, and preceding federal Ministers of Health, under sections 14 and 15 of the Act, I am also of the view that this issue is not justiciable, as the process of initiating an investigation and issuing a notice of concern to a province with regard to possible non-compliance with the CHA is a political and policy-oriented one, related to the discretionary decision whether to withhold or cease federal funding for health care. As stated by Chief Justice Scott in *Lexogest Inc., supra* at page 542, the consequences of non-compliance with the requirements of the CHA are set out in the statute itself and are of a political nature.

[45] In *Cameron v. Nova Scotia (Attorney General)* (1999), 204 N.S.R. (2d) 1, 177 D.L.R. (4th) 611 (C.A.), leave to appeal to S.C.C. dismissed June 29, 2000, [1999] S.C.C.A. No. 531 (QL), the Nova Scotia Court of Appeal found that a failure of a province to comply with the CHA, thereby raising the possibility of financial penalty to the province, is a political and not a justiciable issue. At paragraphs 96-97 the Court stated:

> The appellants refer to the fact that the Canada Health Act authorizes federal payments to provinces which establish provincial medical care programs that comply with the principles set out in the Canada Health Act. They argue that the policy under the [provincial] Act... is in violation of the Canada Health Act.
>
> If, without deciding that the Act fails to meet the standards or objectives of the Canada Health Act, it does not follow that the appellants would be entitled to relief in this Court. Jurisdiction over health care is exclusively a provincial matter. Failure of a province to comply with the Canada Health Act may result in the Government of Canada imposing a financial penalty on the province. It raises a political, not a justiciable issue. It does not render the provincial legislation unconstitutional. I refer to Brown v. British Columbia (Attorney General) (1997), 41 B.C.L.R. (3d) 265; (1998), 5 W.W.R. 312 (B.C.S.C.) and Lexogest Inc. v. Manitoba (Attorney-General) (1993), 101 D.L.R. (4th) 523 (Man.C.A.).

[46] Nor do I find that the specific problems with the administration of the CHA highlighted by the applicants raise questions of law that are clearly justiciable. The applicants rely upon the statement of LeDain J. in *Finlay, supra,* at page 632, "There will no doubt be cases in which the question of provincial compliance with the conditions of federal cost-sharing will raise issues that are not appropriate for judicial determination, but the particular issues of provincial non-compliance raised by the respondent's statement of claim are questions of law and as such clearly justiciable."

[47] The situation in *Finlay,* is in my view, distinguishable from the present context as it involved an individual's challenge to a provincial social assistance law that allegedly infringed a

condition for federal contribution under the *Canada Assistance Plan*, R.S.C. 1970, c. C-1. The withholding of federal funding in that scheme was also set out in mandatory language. That is not the situation before me, given that no specific provincial law is challenged. The Minister's failure to act under sections 14 and 15 is instead challenged and the language of sections 14 and 15 grants a discretionary power, whereby consultations are to be initiated. The ultimate decision to reduce or withhold a federal contribution is, from the language of section 15(1), entirely within the discretion of the Governor in Council, upon referral of the matter by the Minister of Health, following consultations.

[48] For these reasons, the application is dismissed. As the questions raised by the applicants relate to matters of important public policy and do not appear to have been previously addressed by the courts, no order of costs shall be made in favour of the respondent.

ORDER

THIS COURT HEREBY ORDERS that this application is dismissed. There is no order as to costs.

"Richard G. Mosley"
F.C.J.

Annex A

Relief Claimed:

1. A declaration that the *Canada Health Act Annual Report 2001-2002* (the "Annual Report") does not properly report upon the administration and operation of the *Canada Health Act*, and does not include all relevant information on the extent to which provincial health plans have satisfied the criteria (namely public administration, comprehensiveness, universality, portability and accessibility), and the extent to which the Provinces have satisfied conditions (namely, the prohibition on extra-billing and user charges), for payment under the *Canada Health Act*;

2. A declaration that the Minister of Health (the "Minister") is obligated to include in the Annual Report a determination of the extent to which provincial health plans have satisfied the criteria, and the extent to which the Provinces have satisfied the conditions, for payment under the *Canada Health Act*;

3. A declaration that the Minister has failed to include in the Annual Report a determination of the extent to which provincial health plans have satisfied the criteria, and the extent to which the Provinces have satisfied the conditions, for payment under the *Canada Health Act*;

4. A declaration that the Minister has declined to exercise her discretion, and has failed to properly exercise her discretion under s. 14 of the *Canada Health Act*, by systematically failing to investigate alleged instances of non-compliance with the requirements of the *Canada Health Act*;

5. An order in the nature of mandamus requiring the Minister to include in the next Annual Report to Parliament:

i) an account of the administration and operation of the *Canada Health Act*, including a description of the policies, practices and resources utilized by Health Canada to monitor, assess and enforce the Act in order that members of Parliament may assess their effectiveness;

ii) all relevant information on the extent to which provincial health care insurance plans have satisfied the criteria, and the extent to which the provinces have satisfied the conditions, for payment under the *Canada Health Act*;

iii) a determination of the extent to which provincial health plans have satisfied the criteria, and the extent to which the Provinces have satisfied the conditions, for payment under the *Canada Health Act*;

6. An order in the nature of mandamus requiring the Minister to properly exercise her discretion with respect to the authority under s. 14 of the *Canada Health Act* to issue a "notice of concern", and to seek information from and consult with a province, when a problem is foreseen concerning whether the heath care insurance plan of the province satisfies the criteria of the Act;

7. The costs of this Application;

8. Such further and other relief as counsel may advise and this Honourable Court may permit.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-709-03
STYLE OF CAUSE:	THE CANADIAN UNION OF PUBLIC EMPLOYEES, THE COUNCIL OF CANADIANS, THE CANADIAN HEALTH COALITION, THE COMMUNICATIONS ENERGY AND PAPERWORKERS UNION OF CANADA, AND THE CANADIAN FEDERATION OF NURSES UNIONS and THE MINISTER OF HEALTH
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 28, 2004
REASONS FOR ORDER AND ORDER BY :	The Honourable Mr. Justice Mosley
DATED:	September 29, 2004

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