



No. S090663
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CANADIAN INDEPENDENT MEDICAL CLINICS
ASSOCIATION, CAMBIE SURGERIES CORPORATION,
DELBROOK SURGICAL CENTRE INC., FALSE CREEK
SURGICAL CENTRE INC., OKANAGAN HEALTH
SURGICAL CENTRE INC. and ULTIMA MEDICAL SERVICES
INC.

PLAINTIFFS

AND:

MEDICAL SERVICES COMMISSION OF BRITISH
COLUMBIA, MINISTER OF HEALTH SERVICES OF BRITISH
COLUMBIA and ATTORNEY GENERAL OF BRITISH
COLUMBIA

DEFENDANTS

REPLY AND DEFENCE TO COUNTERCLAIMS

REPLY

1. In reply to paragraph 4(b) of the Statement of Defence, the function of the Medical Services Commission ("MSC") as described therein is qualified, pursuant to section 3(3) of the *Medicare Protection Act*, R.S.B.C. 1996, c. 286 (the "Act"), by the words "under the Medical Services Plan", thereby indicating that the function of the MSC is limited to the operation of the Medical Services Plan ("MSP"), and that the function of the MSC does not extend to medical and health care services that are outside the MSP.

2. In reply to paragraph 4(g) of the Statement of Defence, the defendants, as a matter of administrative policy and practice, treat the schemes listed in section 27 of the *Medical and Health Care Services Regulation*, BC Regulation 426/97 as being exempt from the prohibitions and restrictions on medical practitioners in sections 14, 17, 18 and 45 of the Act.

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3. In reply to paragraph 10 of the Statement of Defence, that paragraph does not join issue with the right pleaded in paragraph 25 of the Statement of Claim as constitutionally guaranteed under section 7 of the *Charter*, namely, access to medical care, including the right of access to medical care of one's choice and the right of access to adequate and timely medical care. Paragraph 10 of the Statement of Defence appears to deny that there is a constitutional right to be provided with health care. Whether or not there is any such constitutional right to the provision of health care is irrelevant to the plaintiffs' claim.

4. In reply to paragraph 15 of the Statement of Defence, the provisions of the Act that violate sections 7 and 15 of the *Charter* are not saved by section 1 of the *Charter* as a reasonable limit prescribed by law that is demonstrably justifiable in a free and democratic society. The burden of proof under section 1 rests on the defendants and the defendants have not pleaded material facts that support their reliance upon section 1. The defendants cannot satisfy the burden of meeting the test under section 1.

Sufficiently important objective

- (a) The purpose of the Act as stated in section 2, is to preserve a publicly-managed and fiscally-sustainable health care system for British Columbia in which access to necessary medical care is based on need and not an individual's ability to pay.

Rational connection

- (b) Given the above objective of the Act, the prohibitions on a patient's right of access to medical care of his or her choice and on a patient's right of access to adequate and timely medical care are not rationally connected to the aims of the legislation. There is no rational connection between preventing access to private medical care and maintaining a public system that provides need-based access to necessary medical care. The Act's restrictions on private medical care are at best not related to the Act's objective, and at worst are directly contrary to its objective. Such restrictions are not required in other free and democratic societies with publicly-managed and fiscally sustainable health care systems.

Minimal impairment

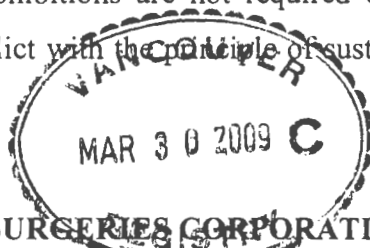
- (c) The prohibitions on a patient's right of access to medical care of his or her choice and on a patient's right of access to adequate and timely medical care are not minimally impairing. The Act's restrictions on private medical care do not impair as little as reasonably possible the rights at issue. By prohibiting private medical care under the MSP and effectively prohibiting private medical care outside of the MSP, except under certain government schemes, the Act's restrictions result in a total exclusion and completely prevent patients from realizing these rights.

Proportionate effect

- (d) The denial of choice and access to timely and effective medical care to those who need it is not proportionate to the beneficial effects, if any, of the prohibition on private medical care. The putative benefits do not outweigh the deleterious effects. Prohibiting citizens from obtaining private medical care leaves patients no choice but to accept excessive delays in receiving health care. The physical and psychological suffering and risk of death that may result will outweigh any benefit that may be demonstrated to the system as a whole.

5. In reply to paragraph 20 of the Statement of Defence, the pleaded aim of the MSP deals with matters that are beyond the statutory scope of the MSP. The matters pleaded as the aim of the MSP are, instead, the matters stated in the Preamble to the Act to be a commitment on the part of the people and government towards developing an efficient, effective and integrated health care system, and not a description of the MSP as enacted or its specific purpose.

6. In reply to paragraph 33 of the Statement of Defence, the plaintiffs deny that the prohibitions in section 17, 18 and 45 of the Act are essential to the function of the MSC or the purpose of the Act. The prohibitions are not required or rationally connected to the stated purposes of the Act, and conflict with the principle of sustainability and the value of individual choice set out in the Act.



**DEFENCE OF CAMBIE SURGERIES CORPORATION TO THE COUNTERCLAIM
OF THE DEFENDANT, THE MEDICAL SERVICES COMMISSION**

7. Except where expressly admitted, the plaintiff and defendant by Counterclaim, Cambie Surgeries Corporation ("Cambie"), denies each and every allegation in this Counterclaim.

8. Cambie admits paragraphs 38, 39, 40, and 57 of this Counterclaim.

9. In answer to the whole of this Counterclaim, Cambie relies on the matters pleaded in its Statement of Claim at paragraphs 1 to 40.

10. In answers to paragraphs 49, 50 and 53 and the whole of this Counterclaim, the defendant and plaintiff by Counterclaim, the MSC, has not pleaded material facts that support its claim to a reasonable belief upon which the defendant bases its actions.

11. In further answer to paragraphs 49, 50, 52 and 53 and the whole of this Counterclaim, Cambie has not acted unlawfully, as the provisions in the Act that directly or indirectly prohibit or impede access to private health care and patient choice in health care are in violation of sections 7 and 15 of the *Charter*, are not demonstrably justified under section 1 of the *Charter*, and thus are of no force and effect.

12. In answer to the whole of this Counterclaim, the scope of the audit as set out by the MSC is in excess of its statutory powers, in that it seeks to audit the billing and business practices of Cambie without restriction, even though the MSC is aware that the majority of the medical procedures performed in the clinic are either for persons whom the MSC accepts are not beneficiaries of the MSP or are procedures that the MSC accepts are not “benefits” for the purpose of the MSP.

13. In answer to paragraphs 54 to 55 and the whole of this Counterclaim, Cambie has a legal duty to protect the privacy of information provided to it by its clients. This duty arises under the *Personal Information Protection Act*, S.B.C. 2003, c. 63 (“*PIPA*”) and Cambie pleads and relies on *PIPA*.

14. In answer to paragraphs 54 to 55 and the whole of this Counterclaim, the information requested is confidential information that Cambie is under no obligation to provide to the MSC.

15. In response to paragraph 47 of this Counterclaim, the Supreme Court is not given statutory authority under section 36 of the Act to issue a warrant.

WHEREFORE the plaintiff and defendant by Counterclaim Cambie, claims as against the defendant and plaintiff by Counterclaim the Medical Services Commission:

- (a) Dismissal of the Counterclaim;
- (b) Costs; and
- (c) Such further and other relief as this Court may deem just.

**DEFENCE TO COUNTERCLAIM OF THE DEFENDANT, THE MINISTER OF
HEALTH SERVICES OF BRITISH COLUMBIA**

16. Except where expressly admitted, the plaintiffs and defendants by Counterclaim, other than the Canadian Independent Medical Clinics Association (“these plaintiffs”), deny each and every allegation in this Counterclaim.

17. In answer to the whole of this Counterclaim, these plaintiffs rely on the matters pleaded in their Statement of Claim at paragraphs 1 to 40.

18. The Minister of Health Services of British Columbia (the “Minister”) lacks standing to bring this Counterclaim, in that the Minister has no standing to seek damages in respect of damages allegedly suffered by Her Majesty the Queen in Right of the Province, and has no standing to seek declarations with respect to the alleged “Acknowledgement Forms”, as defined in this Counterclaim, since any such forms represent agreements between private parties.

19. In answer to paragraph 62 of this Counterclaim, these plaintiffs deny that any of their fee arrangements are unlawful.

20. In answer to paragraph 63 of this Counterclaim, these plaintiffs do not use the same forms and contractual arrangements as each other, and therefore there is no standard form of arrangement as alleged in paragraph 63 and therefore no basis for the declaration sought.

21. In response to paragraph 65 of this Counterclaim, any public interest in the allocation of medical resources is limited to the allocation of medical resources within the public health care system, and there is no statutory or other proper basis for any allocation by the government of medical resources that are outside the public system.

22. In answer to the whole of this Counterclaim, and in particular answer to paragraphs 62, 63, 65, 68 and 69 of this Counterclaim, these plaintiffs have not acted unlawfully, as the provisions in the Act that directly or indirectly prohibit or impede access to private health care and patient choice in health care are in violation of sections 7 and 15 of the *Charter*, are not demonstrably justified under section 1 of the *Charter*, and are thus of no force and effect.

23. In answer to paragraphs 68 and 70 of this Counterclaim, no fees charged by these plaintiffs constitute extra-billing as that term is defined in the *Canada Health Act*, R.S.C 1985,

c. C 6 since that definition only encompasses additional billings to patients by medical practitioners and dentists.

24. In answer to paragraphs 67, 68 and 69 of this Counterclaim, the *Canada Health Act* does not refer to “unlawful billing” as a basis for deductions from transfers to the provinces. Instead, the *Canada Health Act* provides for deductions on account of user charges or on account of extra-billing by medical practitioners or dentists that are permitted by the province in question. The fees paid to these plaintiffs are irrelevant for the purpose of the calculation of transfer payments pursuant to the *Canada Health Act*.

25. The Minister has failed to plead that any deductions from transfers to the province pursuant to the *Canada Health Act* have been made on account of any fees charged by these plaintiffs. In any event, if there have been any deductions from transfers to the province on account of fees charged by these plaintiffs, then these plaintiffs say that any such deductions were not in accordance with the applicable legislative regime.

26. In the alternative, if any amounts were deducted from transfers to the province under the *Canada Health Act* on account of fees charged by these plaintiffs, then the Minister suffered no loss thereby, as the amount of any deductions was far less than the costs would have been to the public health care system had the medical procedures taken place within the public health care system. The damages claimed are in any event not foreseeable and are too remote.

27. These plaintiffs owe no duties at law to the Minister related to the transfers to the province under the *Canada Health Act*, and this Counterclaim discloses no reasonable cause of action.

WHEREFORE the plaintiffs claim as against the defendant, the Minister of Health Services of British Columbia:

- (a) Dismissal of the Counterclaim;
- (b) Costs; and
- (c) Such further and other relief as this Court may deem just.

FASKEN MARTINEAU DuMOULIN LLP

Per:

A handwritten signature in black ink, appearing to be 'L. DuMoulin', written over a horizontal line.

Dated: March 30, 2009

Solicitors for the Plaintiffs

The Solicitors for the Plaintiffs are Fasken Martineau DuMoulin LLP, whose office address and address for delivery is 2900 - 550 Burrard Street, Vancouver, B.C. V6C 0A3
Telephone: 604 631 3131 Facsimile: 604 631 3232. (Reference: D.G. Cowper, Q.C. /
W. Stanley Martin/278141.00001)