No. S090663
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CAMBIE SURGERIES CORPORATION, CHRIS CHIAVATTI by his litigation guardian RITA CHIAVATTI, MANDY MARTENS, KRYSTIANA CORRADO by her litigation guardian ANTONIO CORRADO and ERMA KRAHN

PLAINTIFFS

AND:

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

DEFENDANTS

AND:

SPECIALIST REFERRAL CLINIC (VANCOUVER) INC.

DEFENDANT BY COUNTERCLAIM

DR. DUNCAN ETCHES, DR. ROBERT WOOLARD, DR. GLYN TOWNSON, THOMAS MCGREGOR, THE BRITISH COLUMBIA FRIENDS OF MEDICARE SOCIETY, CANADIAN DOCTORS FOR MEDICARE, MARIËL SCHOOFF, DAPHNE LANG, JOYCE HAMER, MYRNA ALLISON, and CAROL WELCH

INTERVENERS

APPLICATION RESPONSE

Application Response of: the Plaintiffs.

THIS IS A RESPONSE TO the Notice of Application of The Medical Services Commission of British Columbia ("the Commission"), filed September 6, 2012.

Part 1: ORDERS CONSENTED TO

1. None.

Part 2: ORDERS OPPOSED

1. The Plaintiffs oppose the granting of all of the orders in Part 1 of the Notice of Application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

1. None.

Part 4: FACTUAL BASIS

The Plaintiffs

1. The Plaintiff Cambie Surgeries Corporation ("CSC") owns and operates the Cambie Surgery Centre ("Surgery Centre") in the City of Vancouver, British Columbia. The Surgery Centre is a multi-specialty surgical and diagnostic facility, containing six operating rooms, recovery beds and overnight stay rooms.

2. CSC treated its first patient in 1996. In August, 2003, a $5 million expansion of the Surgery Centre was completed, resulting in a 17,000 square foot facility that is more than double its original size. The facility has six (6) operating rooms ("ORs"), two of which are digital, and represent some of the most advanced OR's in Canada.

3. The Surgery Centre is equipped and accredited to standards that equal or exceed the standards of a major public hospital in British Columbia. Operations and diagnosis and treatments are performed by highly qualified physicians, who are independent professionals and not employees of the Surgery Centre. In 2010-2011, the Surgery Centre treated approximately 3800 patients.

4. The plaintiffs Chiavatti, Martens, Corrado, and Krahn ("the Individual Plaintiffs") are residents of British Columbia who have had medical procedures performed at the Surgery Centre.

The Government's acquiescence in the operation of CSC

5. The Commission has the authority pursuant to s. 5(1)(c) of the *Medicare Protection Act ("MPA")* to exempt various groups of BC patients from the prohibitions in the *MPA* on private payment for medical services, and has exempted groups such as WCB claimants, RCMP officers, and inmates of federal penitentiaries, among others.

6. Since at or about the time CSC commenced operations, the Government and the Commission have known that CSC has been providing private health care to the residents of British Columbia in contravention of ss. 17(1)(b) and 18(3) of the *MPA*, by charging a facility fee for surgical treatments which are a benefit under the *MPA*.

7. Dr. Brian Day, the President of CSC, deposes that since the Surgery Centre opened in July 1996, he has always been entirely upfront with patients, the media, government officials, members of the Commission, the medical profession, and the general public about the fact that CSC charges patients a facility fee for surgical services.

8. In October of 2000, the then Premier of the British Columbia, Ujjal Dosangh, was quoted as saying that "(it) would do no good to shut down (Dr. Brian) Day's (Cambie Surgical Centre) Clinic if we can't provide those services elsewhere", and therefore that he wanted to improve public care first before enforcing the *MPA* with respect to private clinics like the Surgery Centre. Since that time, the wait lists for surgeries and diagnostics in the public health care system in British Columbia have worsened, not improved.

Affidavit #3 of Dr. Brian Day, sworn October 2, 2012.

9. In their Affidavits, Gordon Denford, who was a member of the Commission from 2000-2008, and Dr. Derryck Smith, who was a member of the Commission from 1998-2006 to X, depose that the Commission frequently discussed that CSC was charging a fee to residents of British Columbia for medical services in contravention of the *MPA*, and that the members of the Commission did not attempt to prevent CSC from operating in breach of the *MPA* during this period.

Affidavit #1 of Gordon Denford, sworn October 2, 2012
Affidavit #1 of Dr. Derryck Smith, sworn October 11, 2012

Background to the injunction application

10. On December 4, 2008, Mariel Schooff, Daphne Lang, Joyce Hamer, Myrna Allison, and Carol Welch filed a Petition (the "Petition") seeking to compel the Medical Services Commission and the B.C. Ministry of Health Services to enforce the provisions of the MPA restricting private billing for medical services. The Petition was filed on notice to CSC, as well as other private health care clinics in Vancouver, B.C.

11. In January 28, 2009, CSC, together with other plaintiffs who have since discontinued their claims by consent commenced an action (the "Action") claiming that restrictions in sections 14, 17, 18 and 45 of the *MPA* (the "Impugned Provisions") have the effect of preventing the availability of private health care to British Columbia residents in violation of ss. 7 and 15 of the *Charter of Rights and Freedoms* (the "*Charter*").

12. On February 20, 2009, the Defendants filed their statement of defence and made a counterclaim against CSC and the Defendant by Counterclaim, Specialist Referral Clinic ("SRC"). In its counterclaim, the Commission sought a warrant authorizing an inspector to enter CSC's and SRC's premises to inspect and copy their records and the records of practitioners; injunctive relief relating to the work of inspectors; declarations that there is reason to believe CSC and SRC have contravened ss. 17 and 18 of the MPA; and interim and permanent injunctions restraining CSC and SRC from contravening ss. 17 and 18 of the *MPA*. The counterclaim of the Government also sought damages against CSC and SRC flowing from the economic losses the Government says it has suffered as a result of the extra billing practices carried on by CSC and SRC and the resulting actions of the Government of Canada (referring to the *Federal-Provincial Fiscal Arrangements Act*, R.S.C. 1985, c. F-8.). It also sought a declaration that certain acknowledgement forms utilized by CSC and SRC are void and unenforceable, and interlocutory and permanent

orders restraining those parties from requiring beneficiaries to execute the acknowledgement forms.

13. On April 29, 2009, CSC brought an application to be added to the Petition as a respondent. The application was opposed by the Petitioners, the Commission and the Attorney General. Mr. Justice Pitfield granted the application and CSC was added as a respondent in the Petition proceeding.

Oral Reasons for Judgment of Mr. Justice Pitfield, dated May 14, 2009

14. On August 14, 2009, CSC filed the same Notice of Constitutional Question in both the Action and the Petition, raising the constitutional validity of the *MPA*. On November 20, 2009, Madam Justice Smith held that the issues raised in the Notice of Constitutional Question should be determined in the Action, not the Petition, so as not to compel the government to enforce legislation which may or may not be constitutional, until the constitutional issues have been resolved in the Action.

Schoof v. Medical Services Commission, 2009 BCSC 1596, at para. 40

15. Two of the Petitioners/Interveners, Mariel Schooff and Carol Welch, also commenced a class action on January 28, 2009, seeking damages for what they say are unlawful charges levied against them by various private clinics operating in British Columbia. The Class Action has been stayed by consent, pending a final determination of the *Charter* issues raised in the Action.

16. Further to the counterclaims of the Commission and the Ministry, the Commission applied for a warrant requiring CSC and SRC to submit to an audit. On November 20, 2009, Justice Smith declined to issue a warrant for an audit. Instead, pursuant to the equitable jurisdiction of the Court, Justice Smith ordered CSC and SRC to permit inspectors appointed by the Commission to enter their premises to inspect their records and enjoined them from hindering, molesting or interfering with the inspectors. Justice Smith's decision was overturned by the Court of Appeal in September 2010.

Schoof v. Medical Services Commission, supra ;
Cambie Surgeries Corporation v. B.C. (Medical Services Commission), 2010 BCCA 396

17. The issues relating to the audit were resolved in the fall of 2010. The Commission carried out audits of CSC between January and November 2011. On June 27, 2012, the Commission considered the Audit Report and concluded that CSC has contravened ss. 17 and 18 of the MPA, and appears to continue to do so.

18. On July 18, 2012, the Chair of the Commission wrote to CSC, enclosing a copy of the Audit Report, and advising that the Commission intended to pursue the legal remedies identified in its counterclaim, against CSC. The Commission advised that it would not seek these remedies if CSC confirmed that all of the practices, identified in the Audit Report as unlawful, ceased within 30 days of July 18, 2012.

Affidavit #1 of Lee Peacock, sworn August 20, 2012.

19. CSC advised the Commission that it was not willing to stop providing private health care services to residents of British Columbia pending a determination of the constitutional issues.

Wait times in the British Columbia public healthcare system are unacceptable

20. As set out in the Affidavits tendered by the Plaintiffs in this application: (i) The wait times that presently exist for medical diagnosis and treatment within the public healthcare system in British Columbia are excessive and unacceptable; (ii) Patients suffer and their conditions deteriorate if their medical treatment is delayed. Within the British Columbia healthcare sector, doctors see many patients who are functionally disabled, in pain, losing sleep, unable to be active, have become dependent on painkillers, and are suffering from permanent, irreversible damage as a result of the prolonged wait for healthcare; and (iii) If the injunction sought by the Commission is granted the residents of British Columbia will not have the ability to pay for timely medical services at CSC, and they will return to the lengthy and unacceptable wait times in the public system. This will be harmful to the health care needs and interests of all residents of British Columbia, because it will lead to greater wait times for everyone without any corresponding benefit to the public healthcare system.

Part 5: LEGAL BASIS

1. This Court has already ruled that the constitutionality of the Impugned Provisions should be adjudicated prior to the Commission taking steps to enforce these provisions in relation to private pay medical clinics. This injunction application is therefore an improper collateral attack on Justice Smith's decision.

Schoof v. Medical Services Commission, supra

2. Even if this Court had not already ruled that the constitutionality of the Impugned Provisions should be determined first, when the constitutionality of provisions of a statute has been put into issue, a public authority must establish that it would suffer irreparable harm if an injunction were not granted pending the determination of the constitutional validity of the statutory provisions in question.

Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers, Local 832, [1987] 1 SCR 110
RJR-MacDonald v. Canada, [1994] 1 SCR 311

3. The Commission has tendered no evidence that the public interest would be irreparably harmed if an injunction were not granted pending the determination of the constitutionality of the Impugned Provisions.

4. CSC has been providing private medical services to residents of British Columbia for about 16 years. This has been known and accepted by the Commission and the Provincial Government since at or about the time CSC commenced providing private healthcare service to the residents of British Columbia some 16 years ago.

5. The affidavit evidence tendered by the Plaintiffs in this application shows that CSC's operations have contributed positively to health care in the province, and that if their operations were enjoined prior to a determination of the constitutional validity of the Impugned Provisions the public interest in timely access to health care would be significantly harmed.

6. The Commission argues that this Court does not have the discretion to refuse to grant the statutory injunction sought in this case. It relies on the British Columbia Court of Appeal decision in *Maple Ridge (District) v. Thornhill Aggregates Ltd.* (1998), 162 DLR (4th) 203 (BCCA) as authority for that proposition. With respect, this is too narrow a reading of the holding in that case.

7. The *Maple Ridge* case did not involve a challenge to the constitutionality of the provisions in the statute that Maple Ridge sought to enforce by way of injunction. Rather, the respondents were claiming that Maple Ridge had acted in bad faith in dealing with an ancillary rezoning application.

8. Also, it is significant that in the *Maple Ridge* case, while an injunction was granted, it was stayed by the court pending the determination of the bad faith claim relating to the rezoning application, and that Chief Justice McEachern in dissent held that an injunction should not even have been granted pending the determination of the bad faith claim.

9. In this case, the constitutionality of the provisions the Commission seeks to enforce by way of an interim injunction has been directly challenged in the Plaintiffs' underlying action. Pursuant to its counterclaim to the Plaintiffs' constitutional challenge, the Commission seeks an injunction pending the determination of these constitutional issues.

10. This Court has accepted that, while the test from the *Maple Ridge* case will apply in ordinary cases where the breach of a statute gives rise to a statutory injunction, when there is a direct challenge to the constitutionality of the statute that is said to have been breached, the court should apply the traditional test for injunctions in constitutional cases set out by the Supreme Court of Canada.

Vancouver Parks Board v. Mickelson et al., 2003 BCSC 1271.
Vancouver (City) v. O'Flynn-Magee, 2011 BCSC 1647.
City of Victoria v. Thompson, 2011 BCSC 1810.

11. Thus, in this case, the three part test for injunctive relief established by the Supreme Court of Canada for cases involving constitutional challenges to legislation applies: (1) has the applicant demonstrated the existence of a serious question to be tried? (2) will the applicant suffer irreparable harm if the injunction is not granted? (3) does the balance of convenience favour granting the injunction?

Serious question to be tried

12. In considering whether there is a serious issue to be tried, this question is assessed from the perspective of the applicant for the injunction, even in constitutional cases. In this

case the applicant for the injunction is the Commission, and therefore the question is whether there is a serious issue to be tried as to whether CSC's operations breach s. 17 and s. 18 of the *MPA*. CSC concedes that the Commission can establish a serious question to be tried.

Vancouver Parks Board v. Mickelson et al., 2003 BCSC 1271 at para. 23.
Vancouver (City) v. O'Flynn-Magee, 2011 BCSC 1647 at para. 54.

Irreparable harm

13. To satisfy the second branch of the injunction test, the Commission must establish that there will be irreparable harm if the injunction is not granted.

14. The Commission has not led any evidence that if an injunction is not granted, the public interest would be harmed.

15. Most important, CSC submits that the evidence is clear that irreparable harm will be caused to the British Columbia healthcare system, to ordinary British Columbians, and to CSC itself, if the injunction *is* granted.

16. While injunctions can protect constitutional rights, they may also violate constitutional rights. Granting the Commission's application for an injunction would lead to irreparable harm for all those British Columbians who have sought to mitigate the lengthy and unacceptable wait times in the public healthcare system, and the consequential breaches of their constitutional rights, by seeking diagnosis or treatment at the Surgery Centre. If CSC is forced to cease its operations that violate the *MPA*, all those patients in British Columbia who have elected to use the services offered by the doctors at the Surgery Centre to alleviate unreasonable wait times would find themselves back facing the delays and waitlists found in the British Columbia public healthcare system, leading to the significant consequences associated with delayed treatment. This increased risk of disease and harm is disproportionate to and not outweighed by any benefit that might arise from altering the status quo and prohibiting CSC from operating as it always has.

Canada (Attorney General) v. PHS Community Services Society, [2011] 3 SCR 134, at para. 136 ["*Insite*"].

17. Granting the injunction sought by the Commission would also lead to irreparable harm to the public healthcare system in British Columbia as a whole, because the doctors who utilize the surgical and diagnostic facilities at the Surgery Centre to supplement the patients they can see and treat in the public healthcare system would no longer be able to do so, and would therefore no longer be able to alleviate part of the strain on the British Columbia public healthcare system caused by unreasonably long waitlists. They may also be unwilling to continue to practice in British Columbia.

18. Dr. Brian Day, President of CSC, acknowledged that certain aspects of CSC's billing practices are contrary to the terms of the *MPA* long before the Commission began the 2011 audit giving rise to this injunction application. He has said this both publicly – in media reports and in court documents that are a matter of public record – and in exchanges and meetings with various government officials since CSC commenced

operating in 1996. His position has always been that CSC is not acting illegally because the provisions in question in the *MPA* are unconstitutional.

Affidavit #3 of Dr. Brian Day, sworn October 2, 2012.

19. CSC has been permitted to continue to operate in contravention of the *MPA* and to continue to alleviate strain on the public healthcare system and its lengthy wait lists. Only now, in its counterclaim to the Plaintiffs' constitutional challenge has the Commission attempted to enjoin the operations of CSC.

20. For years, the Commission, and the government of British Columbia, have not only acquiesced to, but have benefitted from the provision of private medical services to the residents of British Columbia and it is manifestly unfair to now argue that Cambie's continued operation will give rise to irreparable harm. CSC's role within the British Columbia healthcare system reflects the status quo, and that status quo ought to be maintained pending the determination of these important constitutional questions.

21. Thus, there is no evidence of any urgency and no justification for altering the status quo while waiting for a determination of the constitutionality of the Impugned Provisions. Given the Commission and the government's historical acceptance of the operations of CSC, continuing the status quo until the constitutional issues are resolved will not cause any harm to the public. If CSC's facilities, staff, and equipment, as well as the services of the physicians who provide surgical treatment, go underutilized, despite that the public healthcare system in British Columbia currently lacks the capacity and the ability to properly satisfy demand, British Columbia residents will be harmed as a result. For all these reasons, the status quo is in the public interest.

Balance of convenience

(a) *Strength of the Plaintiffs' constitutional challenge*

22. In cases where the constitutionality of the legislation giving rise to the right to seek an injunction is challenged, the strength of the constitutional questions to be tried is assessed at the balance of convenience stage of the analysis.

23. In light of the Supreme Court of Canada decisions in *Chaoulli v. Quebec (Attorney General)*, [2005] 1 SCR 791 and *Insite*, the Plaintiffs respectfully submit that they raise a serious issue to be tried, which has considerable merit.

24. Under s. 7 of the *Charter*, the residents of British Columbia, along with all other Canadians, have "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

25. The Individual Plaintiffs submit that the restrictions in the *MPA* on their ability to acquire private insurance in order to pay for timely medical services violate s. 7 of the *Charter*. Cambie submits that the restrictions in the *MPA* prohibiting private clinics from charging

surgery or facility fees prevents British Columbians from obtaining timely medical services, and also violate s. 7 of the *Charter*.

26. In both *Chaoulli* and *Insite*, the Supreme Court of Canada held that Canadian citizens cannot be deprived of the right under s. 7 of the *Charter* to obtain timely and effective medical services. The Plaintiffs submit that because timely medical services are not generally available in British Columbia, residents of this province cannot be statutorily denied the ability to pay for timely medical services from private clinics.

27. The situation of the Individual Plaintiffs set out in the Notice of Civil Claim and in their affidavits, as well as the situation generally in British Columbia regarding the length of time it takes to have surgical procedures carried out and the detrimental effect this has on patients as described in the other affidavits tendered by the Plaintiffs, conclusively establishes that there is a serious constitutional issue to be tried under s. 7 of the *Charter*.

28. Further, given the exemptions that have been accorded to certain residents under the *MPA*, such as workers who are injured or who become ill during the course of their employment, federal prisoners, and members of the RCMP, the Plaintiffs submit that there is also a serious question to be tried as to whether residents of the province who do not quality for an exemption from the *MPA* are denied their right to equality under s. 15 of the *Charter*.

(b) *The public interest*

29. In *Metropolitan Stores*, Justice Beetz confirmed that there is no presumption of constitutionality in constitutional cases where interim injunctive relief is sought. Rather, in each case, a court must consider the consequence to the public of not enforcing a law pending a determination of its constitutionality.

30. Further, in *RJR-MacDonald,* the Supreme Court of Canada noted that, in constitutional cases, the government does not hold the monopoly over the public interest. It is possible that not enforcing the law can in fact further the public interest or at least not harm it.

31. This is exactly the case with respect to CSC. Rather than harming the public interest, the services provided by doctors at the Surgery Centre promote and enhance the public interest, by easing the strain placed on the public healthcare system by lengthy and unacceptable wait times.

32. While the restrictions in the *MPA* on the provision of private healthcare in British may have been intended to advance the public interest they are not doing so. As Premier Dosangh stated in 2000, "unless and until the public health care system in BC can provide timely medical service to BC residents, there is a need for private clinics, such as Cambie, in the province to alleviate the strain on the public system."

33. The Commission has led no evidence that waiting times have improved since Premier Dosangh's comments in 2000 about why the *MPA* was not being enforced against CSC and other private clinics such that the Commission can now justify enforcement of the

restrictions on private healthcare in the *MPA* against CSC and SRC in order to protect the public interest. Indeed, the evidence tendered by the Plaintiffs demonstrates that wait times are worse today than they were in 2000.

34. Thus, the Plaintiffs submit that allowing the Surgery Centre to continue its operations in the manner that it has for 16 years would in fact further the public interest, rather than harm it. The balance of convenience favours maintaining the status quo.

Conclusion

35. For the reasons suggested above, CSC submits that the Commission's application for injunctive relief ought to be dismissed.

Part 6: MATERIALS TO BE RELIED ON

1. Affidavit #1 of Dr. Alastair Younger, sworn October 1, 2012;
2. Affidavit #1 of Anokh Aadmi, sworn October 5, 2012;
3. Affidavit #1 of Dr. Antoni Otto, sworn October 4, 2012;
4. Affidavit #1 of Barbara Collin, sworn October 4, 2012;
5. Affidavit #1 of Dr. Bassam Masri, sworn October 2, 2012;
6. Affidavit #3 of Dr. Brian Day, sworn October 2, 2012;
7. Affidavit #4 of Dr. Brian Day, sworn October 2, 2012;
8. Affidavit #1 of Dr. Derryck Smith, sworn October 11, 2012;
9. Affidavit #1 of Erma Krahn, sworn September 24, 2012;
10. Affidavit #1 of Gordon Denford, sworn October 2, 2012;
11. Affidavit #1 of Janet Walker, sworn October 4, 2012;
12. Affidavit #1 of Krystiana Corrado, sworn September 25, 2012;
13. Affidavit #1 of Leslie Vertesi, sworn October 11, 2012;
14. Affidavit #1 of Mandy Martens, sworn September 26, 2012;
15. Affidavit #1 of Dr. Marcel Dvorak, sworn October 5, 2012;
16. Affidavit #1 of Dr. Mark Adrian, sworn October 5, 2012;
17. Affidavit #1 of Dr. Ramesh Sahjpaul, sworn October 5, 2012;
18. Affidavit #1 of Dr. Richard Kramer, sworn October 2, 2012;
19. Affidavit #1 of Rita Chiavatti, sworn September 25, 2012;
20. Affidavit #1 of Dr. Ross Davidson, sworn October 2, 2012;
21. Affidavit #1 of Dr. William Regan, sworn October 9, 2012;
22. Affidavit #1 of Zoltan Nagy, sworn September 27, 2012;
23. Affidavit #1 of Debbie Waitkus, sworn November 1, 2012;
24. The Pleadings filed in this action; and
25. Such further and other material as this Honourable Court may allow.

The Plaintiffs estimate that the application will take 2 days.
CSC has filed a document in this proceeding that contains CSC's address for service.

Dated November 6, 2012

Lawyer for the Application Respondents, Plaintiffs
Peter A. Gall, Q.C.