



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 Defendant by Counterclaim Specialist Referral Clinic (Vancouver) Inc. ("SRC").

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 Defendant by Counterclaim opposes 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**

1. The Defendant by Counterclaim adopts and relies upon the facts set out in the Application Response of the Plaintiffs and, in addition, relies upon the following additional facts.

***The Specialist Referral Clinic (Vancouver) Inc. ("SRC")***

1. SRC is a group of specialist physicians who provide private individual medical assessments to patients, who include residents of British Columbia, for a fee.
2. SRC has been providing this medical service since 2002. The Commission and the Government have been aware of SRC's operations and their provision of medical assessments to residents of British Columbia, since SRC commenced operations.

Affidavit #4 of Dr. Brian Day, sworn October 2, 2012

3. A medical assessment by a specialist physician is a necessary prerequisite to further surgical or other interventional medical treatment in British Columbia. In the public healthcare system, there are often long wait times for specialist consultation, largely due to a lack of resources for surgical and other subsequent treatment which may be required.
4. Clients who obtain medical assessments at SRC often choose to have surgical treatment at the Surgery Centre operated by Cambie Surgeries Corporation ("CSC").
5. The SRC also performs an administrative function for CSC, including the invoicing of private pay patients who undergo surgical treatment at the Surgery Centre.

**Part 5: LEGAL BASIS**

1. SRC says that its actions in charging BC residents a fee for an individualized medical assessment do not violate the *MPA*.

2. However, SRC admits that insofar as it has collected and remitted funds from individual patients who ultimately had medically necessary procedures performed at the Surgery Centre, it is in a similar position with respect to a breach under the legislation as is CSC.
3. To the extent that any actions by SRC are in contravention of the *MPA*, SRC says that these provisions of the *MPA* (the “Impugned Provisions”) are unconstitutional for the reasons set out in the Action filed by the Plaintiffs.
4. SRC submits that 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*, 2009 BCSC 1596

5. Even if this Court has 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

6. 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.
7. The SRC has been providing private medical services to residents of British Columbia for about 10 years. This has been known and accepted by the Commission and the Provincial Government since at or about the time SRC commenced providing private healthcare service to the residents of British Columbia 10 years ago.
8. The affidavit evidence tendered by the Plaintiffs and the Defendant by Counterclaim SRC in this application shows that SRC’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.
9. 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 (4<sup>th</sup>) 203 (BCCA) as authority for that proposition. With respect, this is too narrow a reading of the holding in that case.
10. 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.

11. 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.
12. In the application before this Court, 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 against SRC pending the determination of these constitutional issues.
13. 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.

14. 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***

15. 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 SRC's operations breach s. 17 and s. 18 of the *MPA*. SRC 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***

16. 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.
17. The Commission has not led any evidence that if an injunction is not granted, the public interest would be harmed.

18. Most importantly, SRC submits that the evidence is clear that irreparable harm will be caused to the British Columbia healthcare system, to ordinary British Columbians, and to SRC itself, if the injunction *is* granted.
19. 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 assessment or diagnosis at SRC. If SRC is forced to cease offering individual assessments to BC residents on a private pay basis or to arrange for such patients to have surgical treatment at the Surgery Centre, all those patients in British Columbia who have elected to use the services offered by the doctors at SRC (often followed by treatment at 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 SRC from operating as it always has.

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

20. 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 offer assessments and treatment through SRC and 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.
21. SRC does not concede that its billing practices in relation to individual medical assessments are contrary to the terms of the *MPA*. However, and in any event, it has been clear to the public, the provincial government and to the Commission since long before the Commission began the 2011 audit giving rise to this injunction application that SRC offers medical assessments to BC residents on a private pay basis, which often lead to surgical or other medical treatment at the Surgery Centre. Even if certain of SRC's billing practices were found to be in contravention of the *MPA*, SRC's position is that it is not acting illegally because the provisions in question in the *MPA* are unconstitutional.

Affidavit #4 of Dr. Brian Day, sworn October 2, 2012.

22. SRC has been permitted to continue to offer individual assessments on a private pay basis to BC residents and to continue to alleviate strain on the public healthcare system and its lengthy wait lists for many years. Only now, in its counterclaim to the Plaintiffs' constitutional challenge, has the Commission attempted to enjoin the operations of SRC.

23. 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 only now argue that SRC's continued operation will give rise to irreparable harm. SRC'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.
24. 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 *MPA*. Given the Commission and the government's historical acceptance of the operations of SRC, continuing the status quo until the constitutional issues are resolved will not cause any harm to the public. If SRC's facilities, staff, and equipment, as well as the services of the physicians associated with SRC, 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' and SRC's constitutional challenge***

25. 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.
26. In light of the Supreme Court of Canada decisions in *Chaoulli v. Quebec (Attorney General)*, [2005] 1 SCR 791 and *Insite*, SRC respectfully submits that SRC and the Plaintiffs raise a serious issue to be tried, which has considerable merit.
27. 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".
28. SRC submits that the restrictions in the *MPA* prohibiting private clinics from charging fees for medical assessments or facility fees prevents British Columbians from obtaining timely medical services, and also violate s. 7 of the *Charter*. SRC further submits that the restrictions in the *MPA* on BC residents' ability to acquire private insurance in order to pay for timely medical services violate s. 7 of the *Charter*.
29. 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 medical service in certain circumstances. SRC submits 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 assessment and treatment through private clinics in British Columbia.

30. 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 medical assessments and interventional procedures carried out and the detrimental effect this has on patients as described in the other affidavits tendered by SRC and the Plaintiffs, conclusively establishes that there is a serious constitutional issue to be tried under s. 7 of the *Charter*.
31. 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, SRC submits that there is also a serious question to be tried as to whether residents of the province who do not qualify for an exemption from the *MPA* are denied their right to equality under s. 15 of the *Charter*.

**(b) *The public interest***

32. 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.
33. 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.
34. This is exactly the case with respect to SRC. Rather than harming the public interest, the services provided by doctors at SRC promote and enhance the public interest, by easing the strain placed on the public healthcare system by lengthy and unacceptable wait times.
35. 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.”
36. 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 private clinics such that the Commission can now justify enforcement of the restrictions on private healthcare in the *MPA* against SRC in order to protect the public interest. Indeed, the evidence tendered by the Plaintiffs and SRC demonstrates that wait times are worse today than they were in 2000.
37. Thus, SRC submits that being able to continue its operations in the manner that it has for 10 years would in fact further the public interest, rather than harm it. The balance of convenience favours maintaining the status quo.

**Conclusion**

38. For all of these reasons, SRC submits 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 Plaintiff estimates that the application will take two (2) days.

SRC has filed a document in this proceeding that contains SRC's address for service.

Dated November 6, 2012

  
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Lawyer for the Application Respondent,  
Specialist Referral Clinic (Vancouver) Inc.  
Peter A. Gall, Q.C.