Affidavit #1 H. Nguyen
Sworn August 30, 2012
No. S090663
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CAMBIE SURGERIES CORPORATION

PLAINTIFF

AND:

MEDICAL SERVICES COMISSION 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

AFFIDAVIT #1 OF HEIDI NGUYEN

I, HEIDI NGUYEN, legal assistant, of 2200-1055 West Hastings Street, in the City of Vancouver, in the Province of British Columbia, MAKE OATH AND SAY AS FOLLOWS THAT:

1. I am a legal assistant with the law firm Heenan Blaikie LLP, solicitors for the Plaintiff, and as such have personal knowledge of the facts deposed to herein except where those facts are stated to be based upon information and belief, which facts I believe to be true.

2. Attached as **Exhibit "A"** is a copy of the outline of argument of the applicants Mariel Schooff, Daphne Lang, Joyce Hamer, Myrna Allison, and Carole Welch (together, the "Applicants"), to be added as party-defendants in Vancouver Registry S-090663, dated April 12, 2010.

3. Attached as **Exhibit "B"** is a copy of the outline of argument of the defendant by counterclaim, Specialist Referral Clinic (Vancouver Inc.), regarding the Applicants' application to be added as party-defendants in Vancouver Registry S-090663, dated May 20, 2010.

4. Attached as **Exhibit "C"** is a copy of the Applicants' written argument in support of the application to be added as party-defendants in Vancouver Registry S-090663, dated May 18, 2010.

5. Attached as **Exhibit "D"** is a copy of the Applicants' further Amended Petition, filed October 1, 2009 in Vancouver Registry No. S-088484.

SWORN BEFORE ME in the City of Vancouver, in the Province of British Columbia, on this 30th day of August, 2012)

A Commissioner for taking affidavits in the Province of British Columbia)

Heidi Nguyen

JOANA G. THACKERAY
HEENAN BLAIKIE LLP
Barristers & Solicitors
Suite 2200-1055 West Hastings Street
Vancouver, B.C. V6E 2E9
Direct: 778-330-1061 Fax: 604-669-5101

No. S-090663
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

AND:

Specialist Referral Clinic (Vancouver) Inc.

DEFENDANT BY COUNTERCLAIM

AND:

Duncan Etches, Glyn Townson, Thomas MacGregor, the British Columbia Friends of Medicare Society and Canadian Doctors for Medicare

INTERVENORS

OUTLINE

Victory Square Law Office LLP
#500 - 100 West Pender Street
Vancouver, BC V6B 1R2
P: (604) 684-8421 F: (604) 684-8427

Marjorie Brown
Counsel for Mariël Schooff, Daphne Lang, Joyce Hamer

This is Exhibit "A" referred to in the affidavit of HEIDI NGUYEN
sworn before me at VANCOUVER
this 30TH day of AUGUST 20 12
Joana Thackeray
A Commissioner for taking Affidavits for British Columbia

No. S-090663
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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AND:

Duncan Etches, Glyn Townson, Thomas MacGregor, the British Columbia Friends of Medicare Society and Canadian Doctors for Medicare

INTERVENORS

OUTLINE

PART I

The following relief will be sought at the hearing:

1. An order that the applicants Mariël Schooff, Daphne Lang, Joyce Hamer, Myrna Allison, and Carol Welch (the "Patient Petitioners") be added as party-defendants or, in the alternative, as intervenors in these proceedings.

2. An order that the applicant British Columbia Nurses' Union ("BCNU") be added as an intervenor in these proceedings;

3. A direction that parties and intervenors added pursuant to the above-noted orders:

(a) will receive copies of all pleadings and documents exchanged or produced by the parties;

(b) may participate in any cross-examinations on affidavits;

(c) may submit evidence at the hearing of this action; and

(d) may provide written submissions and make oral submissions at the hearing of this action.

4. A direction that any ruling on costs for or against parties or intervenors added pursuant to this Order be deferred until the conclusion of the trial of this action.

PART II

Basis for seeking relief:

Patient Petitioners' application for party standing

1. The Patient Petitioners' respectfully submit that they have a direct interest in this action that is a mirror image of the Cambie Surgeries Corporation's and False Creek Surgical Centre's direct interest in the petition filed by the Patient Petitioners on December 4, 2008 and subsequently amended on December 19, 2008 (the "Patient Petition") and, as such, they ought to be added as parties to this action (the "CIMCA Action").

2. The Patient Petitioners further submit that their direct interest could suffer irreparable harm if they were denied party status in the CIMCA Action and the Court subsequently produced a decision in the CIMCA Action in favour of the Plaintiffs. In such a circumstance, the legal rights claimed by the Patient Petitioners in the Patient Petition would being at serious risk, without their having been afforded an opportunity to have evidence or submissions heard and leaving the Patient Petitioners without any right of appeal. This would constitute a deprivation of fair hearing to the Patient Petitioners.

3. The Patient Petitioners submit that their addition as a party is just and convenient as it will not compromise the efficiency or expediency of this litigation. The Patient Petitioners have committed to working collaboratively with the other parties to ensure there is no duplication of

evidence or submissions or otherwise any unnecessary time and expense resulting from their addition as a party.

4. The Patient Petitioners submit that their inclusion as parties will add a factual underpinning critical to adjudicating the application of the *Charter of Rights and Freedoms*, without adding unnecessary time and expense to the litigation. The Patient Petitioners have a direct experience accessing services, offered in contravention of the *Medicare Protection Act*.

5. The Patient Petitioners submit that their direct interest meets the Rule 15(5)(a)(ii)-(iii) criteria for adding parties in that they:

(a) ought to have been joined as a party at the onset of this action;

(b) their participation in this action is necessary to ensure that all matters in the proceeding may be effectively adjudicated upon; and

(c) there exists between the Patient Petitioners and the Plaintiffs a question or issue related to or connected with any relief in or subject-matter of this action that would be just and convenient to determine within the adjudication of the action.

6. The Patient Petitioners rely upon Rule 15, the inherent jurisdiction of the Court and any applicable other supporting evidence or law.

Patient Petitioners' application for intervenor status

7. In the alternative, the Patient Petitioners submit that their direct interest in the CIMCA Action, specifically the important contribution they will make to the evidentiary record and submissions on this important issue of public law, is more than sufficient to warrant addition to the proceedings as an intervenor with broad participatory rights, including the right to participate in any cross-examinations on affidavits, submit evidence at the hearing of this action, and provide written submissions and make oral submissions at the hearing of this action.

8. We say that in the alternative to the Patient Petitioners' direct interest and party status, they may be granted intervenor status with broad participatory rights on the basis that they are able to make a useful contribution to the public law issue that is different from that of the present parties and intervenors. Through their evidence and submissions, the Patient Petitioners will be able to provide a different perspective to the issues than the other parties, show a special interest in the outcome and make a useful contribution to the resolution of the issues.

9. The Patient Petitioners have committed to working collaboratively with the other defendants to ensure there is no duplication or other undue time or expense in the CIMCA Action should they be added as intervenors pursuant to the directions sought above. As such, their

inclusion as an intervenor with broad participatory rights will impose no additional burden on the litigation.

10. Without the granting of party status or intervenor status with broad participatory rights, the Patient Petitioners interests will be greatly and irrevocably harmed. The Patient Petitioners' direct interest could suffer irreparable harm if they were denied party status in this action and the Court subsequently produced a decision in this action in favour of the Plaintiffs. They will be faced with no other recourse and no other avenue to have their case heard.

11. The Patient Petitioners rely upon and the inherent jurisdiction of the Court and any applicable other supporting evidence or law.

The BCNU application for intervenor status

12. The BCNU submits that they have a strong public interest in the CIMCA Action set out above and the contribution it could make to the evidentiary record on this important issue of public law is sufficient to warrant addition to the proceedings as an intervenor with broad participatory rights, including the right to participate in any cross-examinations on affidavits, submit evidence at the hearing of this action, and provide written submissions and make oral submissions at the hearing of this action.

13. The BCNU and its members have an interest in the continuing applicability of the provisions of the *Medicare Protection Act* that the Plaintiffs seek to have declared unconstitutional. These statutory provisions affect the BCNU and its members: *British Columbia Nurses' Union v. British Columbia (Attorney General)* (2006), 57 B.C.L.R. (4th) 63, 2006 BCCA 434 at para. 37.

14. The BCNU and its members should be granted intervenor status with broad participatory rights on the basis that they are able to make a useful contribution to the public law issue that is different from that of the parties. Through its evidence and submissions, the BCNU will be able to provide a different perspective to the issues than the other parties, show a special interest in the outcome and make a useful contribution to the resolution of the issues.

15. The BCNU has committed to working collaboratively with the other defendants to ensure there is no duplication or other undue time or expense in the CIMCA Action should they be added as intervenors pursuant to the directions sought above. As such, its inclusion as an intervenor with broad participatory rights will impose no additional burden on the litigation.

16. The BCNU relies upon and the inherent jurisdiction of the Court and any applicable other supporting evidence or law.

PART III

Basis for opposing relief:

n/a

Dated: April 12, 2010

For:

Marjorie Brown,
Counsel for the Applicants

This Outline was prepared by Marjorie Brown of the law firm of VICTORY SQUARE LAW OFFICE LLP whose place of business is 500 - 100 West Pender Street, Vancouver, BC, V6B 1R8, Telephone: (604) 684-8421, Fax: (604) 684-8427.

No. S-090663
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

AND:

SPECIALIST REFERRAL CLINIC (VANCOUVER) INC.

DEFENDANT BY COUNTERCLAIM

OUTLINE

FORM 125

PART I

The following relief will be sought at the hearing:

1. N/A

PART II

Basis for seeking relief:

This is Exhibit "B" referred to in the affidavit of HEIDI NGUYEN sworn before me at VANCOUVER this 30TH day of AUGUST 20 12

A Commissioner for taking Affidavits for British Columbia

1. N/A

PART III

Basis for opposing relief:

1. The respondent opposes the granting of the relief set out in the following paragraphs of the petition (or notice of motion): 1, 2, 3, and 4 (save and except an order for intervenor status on the same terms as the other intervenors granted status herein).

Background

2. This Court issued its reasons for judgment with respect to the audit, other intervenor/party applications and procedural motions on November 20, 2009.

3. The audit did not proceed in March 2010, although the parties engaged in discussion regarding the potential terms of the audit. There is an appeal underway with respect to the order for an audit, and accordingly, the audit has not proceeded.

4. At this point in time, the claim and counterclaim both remain active and have not been severed. Whether an audit will proceed has not yet been fully resolved, which in turn means that the question of the product of any such audit being used in these proceedings remains uncertain. That is the standpoint from which the court must evaluate the applications before it.

Schooff Petitioners - Party Status

5. This court has already considered the test for adding parties at para. 199 of the previous Reasons (2009 BCSC 1596):

> [199] The addition of parties under R. 15(5)(a)(iii) of the *Rules of Court* is a matter of discretion: [citations omitted]. I have considered the principles to be found in the cases and the provisions of R. 15(5) and I am not satisfied that this is a case that falls within the meaning of that Rule. None of the applicants has shown the direct interest in the litigation that would warrant

> including them as parties. Further, they do not meet the criteria under R. 15(5)(a)(ii) of the *Rules of Court*: their participation in the proceedings is not necessary to the effective adjudication of the issues and it cannot be said that they ought to have been joined as parties at the outset. I do not find that it would be just and convenient to add them as parties in order to determine a question or issue between them and any of the existing parties.

6. SRC relies upon and adopts the submissions of the plaintiffs in the action herein with respect to opposing this application. SRC adds the following points.

7. This action is not a 'mirror image' of the *Schooff* petition. Although some of the factual context is the same, the parties are very different. Until the CIMCA parties were added to the *Schooff* matter, that case was between private individuals and the government, seeking to force the government to take action against non-parties. Those "non-parties" then sought to be added.

8. Here, the matter is between those parties alleged to be in violation of the *Medicare Protection Act* challenging the Act, the government defending the challenge to the Act and in combination seeking to enforce the Act against the plaintiffs and the defendant by counterclaim, and the defendant by counterclaim forced into the action to defend itself against the government. The government is charged with both defending the Act (when presumably it would be free to bring in the evidence of the Schooff petitioners to the extent it wishes) and enforcing the Act, the relief sought by the Schooff petitioners in their own matter. The government already occupies the field in which the Schooff petitioners seek to insert themselves.

9. From the perspective of SRC, it is already answerable to and must defend itself against the government in this litigation. That is not a small task for a private party to undertake. Introducing an additional opponent pursuing the same interests unnecessarily complicates an already complex case.

10. In addition, parties have all of the rights of discovery and examination available under the Rules. It would be unprecedented and unfair for the Schooff petitioners, themselves patients in receipt of medical care, to have potential access to the medical records of other

patients and the business records of other facilities beyond the facts of their own case. This is a substantial prejudice to the patients, physicians and clinic, particularly when taking into account the importance of privacy interests and the legal obligation of SRC to protect the confidentiality of patient records (discussed below as well as in the previous proceeding).

11. If the Schooff petitioners are to have a role in the proceeding to minimize any alleged impact on their own personal legal rights, that role is met by intervenor status, and, at best, confinement to the facts of their own individual cases. The matter of their role in leading evidence can be determined when the proceedings are further advanced and when it is known what evidence the parties themselves intend to bring forward.

12. The inclusion of the Schooff petitioners as parties only opens more questions:

(a) If, on their analysis, they are permitted as parties, would each of the physicians who treated them automatically be permitted as parties as well if such relief was sought?

(b) Would other patients automatically be granted party status if the Schooff petitioners are granted party status?

(c) Would other patients be granted party status by virtue of filing a companion proceeding against the government?

13. The existence of the *Schooff* petition is not enough to differentiate these patients from others or from their physicians, and allowing the application could invite many more in this already complex proceeding.

BCNU/Schooff Petitioners - Intervenor Status

14. The question before the court in considering an application for intervenor status is stated in para. 203 of this Court's previous reasons, 2009 BCSC 1596:

> ...the question is whether the applicants will contribute something significant that otherwise would be absent from the litigation such that they will be of assistance to the Court as intervenors.

15. The BCNU seeks intervenor status that is nearly equivalent to full party status, inclusive of an order that it receive copies of "all pleadings and documents exchanged or produced by the parties". There is nothing to support the conclusion that such terms are required in order for the BCNU or the Schooff petitioners to assist the court.

16. This Court has previously ruled as follows with respect to the other intervenors:

> [207] I will allow the applicants to intervene on the basis that their legal analysis must ultimately be different, or at least offer a different perspective, from the parties' submissions. Otherwise, if the intervenors' legal arguments do simply prove to be a repetition or modest expansion of the submissions made by the parties, I reserve the right, as Cole J. did in *B.C.T.F. v. British Columbia (Attorney General)*, 2009 BCSC 436, 94 B.C.L.R. (4th) 267, to decline to entertain them.
>
> [208] As for the possibility of leading evidence, I will not determine that matter until the proceedings are further advanced and until it is known what evidence the parties themselves intend to bring forward.
>
> [209] I am not aware of any case in which an intervenor has been given rights of discovery and I decline to make that order.

17. In SRC's submission, if the application for intervenor status is to be allowed, it should not be on any different terms than were permitted with respect to the other intervenors.

18. SRC has taken the position throughout that its patients' privacy and confidentiality should be preserved in this litigation, particularly as it has been drawn in as a defendant by counterclaim. SRC has a legal obligation to maintain the confidentiality of the medical records in its custody, particularly where the scope of the MSC's statutory authority to inspect the records is in question.

19. As noted in Picard, *Legal Liability of Doctors and Hospitals in Canada*, 4th ed., much of the information provided by patients to doctors is "highly personal and private. It is therefore natural that patients should have a legitimate expectation that their confidences

will not be revealed to third parties without their permission. This expectation is reflected in the duty which is imposed on doctors to respect the confidentiality of all information which they obtain about their patients" (p. 16). SRC has also referred to the fiduciary nature of doctor-patient confidentiality, and the important of privacy as a Charter value (see for example *R. v Dersch*, [1993] 3 S.C.R. 768; *R v. Dyment*, [1988] 2 S.C.R. 417). Those submissions remain compelling on this application.

20. Dr. Day has given evidence of the scope of SRC's work, some of which is agreed by the parties to be beyond the purview of the *Medicare Protection Act*, and some of which is in dispute as to whether it is outside the scope. Legal professional privilege is foremost among the concerns, as SRC sees many individuals for independent medical examinations at the request of lawyers for the purposes of litigation.

21. Given that the counterclaim and the constitutional action are not severed at this stage, and the petitioners have requested an unlimited scope of discovery not limited to the constitutional portion only, there is a risk that if discovery rights are granted to any intervenor, those rights will provide private information to parties who are strangers to the matters discussed in those documents.

22. The relief in the form sought should be denied.

Dated: 20 May 2010

Harper Grey LLP

HARPER GREY LLP
(Per W.S. Clark and M.K. Kinch)
Solicitor for the Specialist Referral Clinic

Name and address of solicitor:
HARPER GREY LLP
Barristers & Solicitors
3200 - 650 West Georgia Street
Vancouver, BC V6B 4P7
Telephone: (604) 687-0411
(Fax No: (604) 669-9385)
Attn: WSC/MKK

This is Exhibit "C" referred to in the
affidavit of HEIDI NGUYEN
sworn before me at VANCOUVER
this 30TH day of AUGUST 20 12

A Commissioner for taking Affidavits
for British Columbia

No. S-090663
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

AND:

Specialist Referral Clinic (Vancouver) Inc.

DEFENDANT BY COUNTERCLAIM

AND:

Duncan Etches, Glyn Townson, Thomas MacGregor, the British Columbia Friends of Medicare Society and Canadian Doctors for Medicare

INTERVENORS

APPLICANTS' WRITTEN ARGUMENT

I. NATURE OF THE APPLICATION

1. The continuing availability of quality, affordable health care cuts to the very core of the Canadian identity. The rights and responsibilities set out in the *Charter of Rights and Freedoms* are imbued in the fabric of Canadian society. This case engages both of those touchstones of the Canadian experience, making it absolutely critical that this Honourable Court hears the broadest possible range of facts, evidence and law.

2. The Applicants, Mariël Schooff, Daphne Lang, Joyce Hamer, Myrna Allison, and Carol Welch (the "Patient Petitioners") and the British Columbia Nurses' Union (the "BCNU") are uniquely positioned to provide this Honourable Court with that important breadth of perspective. They are not strangers to this litigation. Far from it, they are equipped with the very evidence this Honourable Court must hear to render its decision. The addition of the Patient Petitioners as a party defendant and the BCNU as an intervenor with broad participatory rights will allow the Court to obtain a full picture of the applicable facts and law without unduly spending the Court's resources.

3. The Applicants seek relief in the form of the following orders and directions:

(a) An order that Mariël Schooff, Daphne Lang, Joyce Hamer, Myrna Allison, and Carol Welch be added as party-defendants or, in the alternative, as intervenors in these proceedings.

(b) An order that the British Columbia Nurses' Union be added as an intervenor in these proceedings;

(c) A direction that parties and intervenors added pursuant to the above-noted orders:

(i) will receive copies of all pleadings and documents exchanged or produced by the parties;

(ii) may participate in any cross-examinations on affidavits;

(iii) may submit evidence at the hearing of this action; and

(iv) may provide written submissions and make oral submissions at the hearing of this action; and

(d) A direction that any ruling on costs for or against intervenors added pursuant to this Order be deferred until the conclusion of the trial of this action.

II. Background Facts

4. On December 4, 2008, the Patient Petitioners filed a petition regarding, *inter alia*, the systemic failure of the Respondents, the Medical Services Commission (the "Commission") and/or the Ministry of Health Services (the "Ministry"), to properly enforce the *Medicare Protection Act* (the "MPA") in compliance with the *Canada Health Act*, as required by section 5(2), and 5.1(a) of the MPA. In particular, the affidavit materials in support of the petition establish several contraventions of the MPA left unenforced and uninvestigated by the Commission and/or the Ministry. These contraventions are summarized in paragraphs 5-9 and 11 below and are set out in great detail in the affidavit evidence included with the instant application.

Mariël Schooff

5. The following facts concern the Patient Petitioner Mariël Schooff:

(a) In or around 2002, Ms. Schooff was suffering significant pain as a result of a serious sinus condition. She experienced constant migraine headaches and frequent colds, such that she was often forced to take time off work.

(b) In October 2002, the specialist she had been referred to, Dr. Amin Javer, advised her that he was the only physician performing a particular procedure within the time she required to address her condition. Dr. Javer advised Ms. Schooff that he had limited operating time at the public hospital and that it might be up to five years before he could see her in the public system. Dr. Javer then advised Ms. Schooff that he could see her more quickly at the False Creek Surgical Centre (the "FCSC"), which had the same equipment as the public hospital, but that there would be a fee for the procedure.

(c) The symptoms associated with Ms. Schooff's condition were of such seriousness and had such a profound impact on her life that she did not believe that she could wait up to five years for surgery. Ms. Schooff felt that she had no choice but to pay for the surgery, even though this caused her significant financial hardship.

(d) On or around January 28, 2003, the FCSC billed Ms. Schooff $6,000 for medical care constituting a benefit under the MPA from an MPA enrolled physician, Dr. Javer.

(e) The BCNU assisted Ms. Schooff in drawing this contravention to the attention of the MPA to the attention of the Commission/Ministry of Health. Despite the BCNU's many requests (through counsel) the FCSC and Dr. Javer failed to reimburse Ms. Schooff.

Affidavit of Mariël Schooff, sworn December 4, 2008 in Vancouver Registry No. S-088484 at paras. 1-8.

Joyce Hamer

6. The following facts concern the Patient Petitioner Joyce Hamer:

(a) On or around June 2003, Ms. Hamer suffered great pain and an inability to work as a result of a debilitating knee condition.

(b) On or around June 2003, Ms. Hamer paid the McCallum Surgical Centre $1,750 to receive an MRI on both of her knees and subsequently another $3,000 for surgery.

This medical care constituted a benefit under the MPA from MPA enrolled physicians, Dr. Marc Boyle and Dr. Grant Burnell. With the assistane of the BCNU, Ms. Hamer eventually did obtain a refund of her private billing payment.

Affidavit of Annamaria Pears, sworn December 4, 2008 in Vancouver Registry No. S-088484, Exhibit 1 at 125-127.

Daphne Lang

7. The following facts concern the Patient Petitioner Daphne Lang.

(a) On May 5, 2003, Ms. Lang paid the Pezim Clinic (the "PC") $160 for medical care constituting a benefit under the MPA from MPA enrolled physician, Dr. M.E. Pezim.

(b) The BCNU assisted Ms. Lang in drawing this contravention of the MPA to the attention of the Commission/Ministry. Despite the BCNU's requests (through counsel, the PC and Dr. Pezim failed to reimburse Ms. Lang.

Affidavit of Annamaria Pears, sworn December 4, 2008 in Vancouver Registry No. S-088484, Exhibit 2 at 167.

Myrna Allison

8. The following facts concern the Patient Petitioner Myrna Allison.

(a) On or around December 2006, Ms. Allison attempted to book an appointment with Dr. Russell Naito to obtain a biopsy, as a result of a specialist referral from her prosthodontist, Dr. Shupe.

(b) Dr. Naito advised Ms. Welch that she would be required to pay $80 for a consultation, between $175 and $600 for the biopsy and an additional $375 for sedation during the biopsy. Dr. Naito advised that the surgery could be performed by January 2007.

(c) On or about January 29, 2007, Ms. Allison obtained the biopsy from another physician without paying private billing fees.

Affidavit of Annamaria Pears, sworn December 4, 2008 in Vancouver Registry No. S-088484, Exhibit 5.

Carol Welch

9. The following facts concern the Patient Petitioner Carol Welch.

(a) On or around December 2006, Ms. Welch was suffering from a very painful ruptured disc.

(b) On or around December 22, 2006, the FCSC billed Ms. Welch $450 for a consultation constituting a benefit under the MPA from an MPA enrolled physician, Dr. Russell Chan;

(c) Dr. Chan advised Ms. Welch that she would be required to pay $5,000 for surgery to be performed at the FCSC within two weeks or, alternatively, she must wait 4-6 months for surgery in the public system;

(d) Ms. Welch could not afford to pay for the earlier surgery, although she required the procedure. She declined an appointment at the FCSC and waited for surgery in the public system, while suffering great pain and unable to work more than half days at her job. Her condition required her to visit Dr. Magnuson approximately every 10 days to assess her condition and continue pain medication.

(e) The BCNU assisted Ms. Welch in drawing this contravention of the MPA to the attention of the Commission/Ministry. Despite the BCNU's many requests (through counsel), the FCSC and Dr. Chan failed to reimburse Ms. Welch for the private billing paid.

Affidavit of Carol Welch, sworn December 4, 2008 in Vancouver Registry No. S-088484 at paras. 1-8.

10. The Patient Petitioners sought declaratory relief confirming the various breaches of the MPA alleged; and orders in the nature of *mandamus* to require the Commission and/or Ministry to comply with the MPA when assessing physician claims for payment under the MPA; and to otherwise comply with the MPA when discharging duties under the MPA.

11. The Patient Petitioners filed an amended petition on December 19, 2008 (the "Patient Petition"), adding facts and evidence in support of their application, concerning the circumstances of Barbara Gosling, specifically the fact that Ms. Gosling had been offered an earlier appointment by the MPA enrolled Dr. Brownlee in exchange for payment of a user fee directly to the physician.

Affidavit of Kelly Robinson #2, sworn December 19, 2008 in Vancouver Registry No. S-088484, Exhibits A-B

12. On January 28, 2009, the Patient Petitioners Schooff and Welch (the "Class Action Plaintiffs") commenced a class action proceeding (the "Class Action") on their own behalf and in a representative capacity on behalf of all beneficiaries within the meaning of the MPA. A copy of the Class Action is attached at **Appendix "A"**.

13. The Class Action seeks damages for what the Patient Petitioners and Class Action Plaintiffs assert are unlawful charges levied against them by various private clinics under the MPA. The writ of summons in the Class Action was filed in this Court but has not, at this time, been served on the respondent parties, nor has the Class Action been certified by the Court.

14. The Class Action Plaintiffs did not serve and proceed with the Class Action as they were awaiting the results of the Petition, which would have determined the relevant application and operation of the MPA.

15. On May 5, 2009, the Patient Petition proceeding, which was set for hearing on May 11, 2009, was adjourned by agreement between the then-parties.

16. On May 14, 2009, Mr. Justice Pitfield granted party status to Cambie Surgeries Corporation ("Cambie") and FCSC in the Patient Petition proceeding.

17. On August 13, 2009, Cambie and FCSC filed a Notice of Constitutional Question in the Petition. The *Charter* issues raised are identical to the issues set out in Cambie and FCSC's constitutional challenge in this action (the "CIMCA Action").

18. During a case management hearing of October 14-16 and November 17, 2009, before this Court, the Patient Petitioners argued for a concurrent hearing of the Constitutional issues raised in the Petition and in this action.

19. On November 20, 2009, the Court held that the Constitutional issues raised in both the Petition and CIMCA Action would be determined in the CIMCA Action.

20. This Court also concluded that the Petition ought to be stayed until the constitutionality of the statute on which the Patient Petitioners rely is determined. In staying the Patient Petition, this Court invited a submission on behalf of the Patient Petitioners regarding their status in the CIMCA Action.

21. In light of the fact that the Petition is stayed pending the outcome of the CIMCA Action and, as a result, the determination of the application and operation of the MPA in the Patient Petition is on hold, the Class Action Plaintiffs have not yet served or otherwise proceeded with the Class Action.

22. The Class Action Plaintiffs have applied for and received an extension for filing the statement of claim in the Class Action until June 30, 2010.

III. Positions of the Other Parties

23. The Patient Petitioners understand the other parties' positions to be as follows:

(a) the Attorney General does not take a position;

(b) Cambie and FCSC, as well as the Specialist Referral Clinic ("SRC") oppose the participation of the Patient Petitioners as parties;

(c) Cambie and FCSC, as well as SRC, oppose the participation of the Patient Petitioners as intervenors, on the terms sought;

(d) Cambie and FCSC, as well as SRC, do not oppose the participation of the Patient Petitioners as intervenors on the terms previously granted to the intervenors, Duncan Etches et al;

(e) Cambie and FCSC oppose the participation of the BCNU as an intervenor;

(f) SRC does not oppose the participation of BCNU as an intervenor on the terms previously granted by this Court to the intervenors Duncan Etches et al.

IV. Submissions

Patient Petitioners' application for party status based on direct interest

24. The Patient Petitioners respectfully submit that they have a direct interest in the action which is a mirror image of the Cambie and FCSC's direct interest in the Patient Petition proceeding and, as such, they ought to have been added as parties to the CIMCA Action at its commencement.

25. More specifically, the Patient Petitioners submit that they have a direct interest in the Notice of Constitutional Question in the CIMCA Action, wherein the Plaintiffs assert the rights of patients, not physicians, to access adequate and timely medical care and medical care of their choice, under section 7 of the *Charter*.

26. The Patient Petitioners further submit that their direct interest could potentially suffer irreparable harm if they are denied party status in this action and the Court subsequently produces a decision in this action in favour of the Plaintiffs. In such a circumstance, the legal rights claimed by the Patient Petitioners in the Petition would be denied without evidence or submissions being heard and absent any right to appeal, resulting in a deprivation of fair hearing to the Patient Petitioners. This direct interest would not be as suitably satisfied by the granting of intervenor status.

27. The Patient Petitioners further submit that their addition as a party is just and convenient as it will not compromise the efficiency or expediency of this litigation.

28. The Patient Petitioners submit that their inclusion as parties will add the factual underpinning critical to adjudicating the application of the *Charter* without adding unnecessary time or expense to the litigation. The Patient Petitioners' affidavit evidence outlines the unique perspective of persons who have actually experienced private health care, including the resulting financial loss, and physical and mental impact. As set out above, the Plaintiffs have decided to take a position on *patient* rights in their Notice of Constitutional Question. It is appropriate that the actual patients are able to adduce evidence in response to the Plaintiffs' assertions.

29. The Patient Petitioners submit that their direct interest meets the Rule 15(5)(a)(ii)-(iii) criteria for adding parties in that they:

(a) ought to have been joined as a party at the onset of this action;

(b) their participation in this action is necessary to ensure that all matters in the proceeding may be effectively adjudicated upon; and

(c) there exists between the Patient Petitioners and the Plaintiffs a question or issue related to or connected with any relief in or subject matter of this action that would be just and convenient to determine within the adjudication of the action.

Rule 15(5)(a), generally

30. In *Canadian Labour Congress v. Bhindi*, the Court of Appeal addressed the scope of Rule 15(5)(a):

> [Rule 15 of the *Supreme Court Rules*] is only applicable to cases where the party sought to be added has a direct interest in the outcome of the particular action between the particular parties. It is not intended to cover cases where a person can be granted standing on the basis of being affected by the answer to the legal question in dispute, rather than being affected by the precise outcome between the parties.

Canadian Labour Congress v. Bhindi (1985), 61 B.C.L.R. 85, 17 D.L.R. (4th) 193 (C.A.) [*Bhindi*] at para. 31.

31. The Court should exercise its discretion to add parties generously to allow effective determination of the issues, without delay, inconvenience or separate trials. Unless the allegations are frivolous, the parties should be added.

Ipsos S.A. v. Reid, 2005 BCSC 1114 [*Ipsos*] at para. 107.

32. "Rule 15(5)(a)(ii) applies in two circumstances, where a person 'ought to have been joined as a party', or where a person's 'participation in the proceeding is necessary to ensure that all matters in the proceedings may be effectually adjudicated upon'. In the event that either of these tests is met, the person should be joined."

Kitimat (District) v. British Columbia (2006), 61 B.C.L.R. (4th) 295, 2006 BCCA 562 [*Kitimat*] at para. 28.

33. The test of whether a party ought to have been joined includes "situations in which joining the person may be more than mere convenience but less than a necessity."

Kitimat, supra at para. 29.

34. Rule 15(5)(a)(iii) encompasses both an interest in the object of the litigation (i.e. the relief sought) and an interest in the subject of the litigation.

Kitimat, supra at para. 35.

35. In the case at hand, the Patient Petitioners have a direct interest in the precise outcome of the CIMCA action. The Patient Petitioners allegations are not frivolous and their addition as parties will allow for an effective determination of the *Charter* issues. Indeed, absent their addition in this proceeding, it is difficult to see how these *Charter* issues could be addressed for the Patient Petitioners and therefore, they ought to have been joined as a party or, their participation is certainly necessary to ensure effective adjudication of all matters in the CIMCA action (and the Patient Petition). The Patient Petitioners therefore respectfully submit that they meet the criteria for addition as a party set out in Rule 15(5)(a)(ii) and (iii).

The Patient Petitioners' direct interest

36. The necessity of the Patient Petitioners' participation in the proceeding to ensure that all matters in the proceedings may be effectually adjudicated upon in the CIMCA Action, as well as their interest in the subject matter of the action, are set out in detail by Mr. Justice Kelleher in his earlier decision addressing the BCNU's application for public interest standing to bring forward the predecessor to the Patient Petition. In that earlier decision, Mr. Justice Kelleher confirmed the direct interest of patient litigants in adjudication of the Commission's failure to perform its duties under the MPA. This reasoning applies with equal force to the adjudication of the constitutionality of those same statutorily-prescribed duties.

> However, the courts have generally stressed the importance of allowing those with a legitimate and well-funded private interest to bring an action, even where this means denying public interest standing to a large organization. In *Canadian Council of Churches*, the Supreme Court of Canada denied the petitioner public interest standing, rejecting the argument that individual refugees would have difficulty challenging the impugned legislation in court. The court emphasized that a great many refugee claimants appeal administrative decisions every year, and noted that in each of these cases the individual litigants provided a clear factual background upon which the court could ground its decision.
>
> [...]
>
> ***Those directly affected by the Commission's failure to perform this duty include those patients who have accepted illegal treatment, as well as patients who have not accepted illegal treatment but who have suffered as a result of those who have infringed the Act, in the form of longer waiting times, delayed appointments, or reduced quality of care.*** [emphasis added]
>
> *British Columbia Nurses' Union v. British Columbia (Attorney General)* (2008), 82 B.C.L.R. (4th) 343, 2008 BCSC 321 [*BCNU v. BC AG*] at paras. 42, 44.

37. In *BCTF v. British Columbia (Attorney General)*, the applicants Laurence and Weis sought party status in a constitutional challenge to the *Elections Act* originated by their respective trade unions. While the trade unions argued that the *Elections Act* violated the *Charter of Rights and Freedoms*, the applicants asserted that the impugned legislation was constitutional and ought to be upheld. Mr. Justice Cole concluded that Laurence and Weis held a direct interest:

> As individuals whose interests are specifically invoked in the statement of claim, it is difficult to see how the applicants can be said not to have a direct interest in the outcome of the action between the parties.
>
> [...]
>
> That the applicants will be "affected by the precise outcome between the parties", there can be no question. Because they object to being identified with and compelled to financially

> support the promotion of the political views of their unions, the advertising restrictions imposed by the impugned provisions minimize the extent to which their *Charter* rights are infringed. Should the plaintiffs succeed in having those provisions declared unconstitutional, they will regain the ability to spend compulsory union dues on election advertising without legislative restrictions and thereby to pursue political agendas that are not universally supported by their members. The applicants will therefore lose the benefit of what they consider to be an important limitation on the extent to which their union dues can be spent in election advertising with which they disagree. Their constitutional interests in dissenting expression, association and voting within the context of compulsory union membership may also be further impaired.
>
> *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, [2008] B.C.J. No. 2246, 2008 BCSC 1599 [*BCTF*] at paras. 19, 21.

38. The position of the Patient Petitioners is analogous to the direct interest of Laurence and Weis in the sense that they oppose the Plaintiffs and take the position that the relevant provisions of the MPA are constitutional and ought to be upheld. Indeed, the August 13, 2009, Notice of Constitutional Question in this action specifically asserts rights that are exclusively those of patients, not the physicians and corporate entities represented by the Plaintiffs. In particular, at paragraph 4 of the Notice of Constitutional Question the Plaintiffs assert that section 7 of the *Charter* provides, *inter alia*, "a right of access to adequate and timely medical care; and a right of access to medical care of one's choice." These are not physician rights within the health care system, but rather the rights of patients such as the Patient Petitioners.

39. The Patient Petitioners' evidence directly concerns access to adequate and timely health care and health care of one's choice. All of the Patient Petitioners have experienced such a lack of access, through an additional financial burden or pain and suffering, from the Plaintiffs' and others' breaching of the MPA. The Patient Petitioners are the *only* persons connected to these proceedings who are able to speak to the "right of access to adequate and timely medical care and the right of access to medical care of one's choice", with an evidentiary record directly relevant to the constitutional questions.

40. The Patient Petitioners claim of direct interest party standing can be distinguished from the unsuccessful application for direct interest party standing brought by Duncan Etches and others. In that earlier application Her Ladyship distinguished those applicants' circumstances from the successful applicants in *BCTF, supra*:

> In *BCTF*, it was evident that there would likely be an impact on the *Charter* rights and, in a minor way, on the financial interests of the applicants if the plaintiffs in the action succeeded. It was not necessary in *BCTF* for Cole J. to draw inferences about contested hypothetical future events and their consequences.
>
> *Schooff v. Medical Services Commission*, [2009] B.C.J. No. 2309, 2009 BCSC 1596 [*Schooff #2*] at para. 198.

In the instant application, no such distinction applies. The infringement of the Patient Petitioners' *Charter* rights and financial interests, far from being hypothetical, are clearly set out in the affidavit materials before this Court, the same affidavit evidence brought in support of the Patient Petition.

Rule 15(5)(a)(ii): the Cambie and FCSC inclusion in the Patient Petition as a mirror image

41. The Patient Petitioners' direct interest in the action is a mirror image of the Cambie and FCSC's direct interest in the Patient Petition proceeding and, as such, they ought to have been added as parties to the CIMCA Action at its commencement. In response to the Cambie and FCSC's application Mr. Justice Pitfield held:

> Throughout the petition the complaint that is directed at the Medical Services Commission directly raises the nature of its relationship and its obligations to the clinics or physicians to whom amounts were paid under whatever arrangement it is that governs the relationship between the Commission and those physicians, whether in conjunction with or separately from their clinics. The effect of the Petition is to raise squarely the question of the character of the arrangement between the applicants and physicians who practice in them and the Medical Services Commission. I am satisfied beyond any doubt whatsoever that these applicants ought to have been joined as parties at the commencement of this Petition.
>
> *Schooff v. Medical Services Commission* (May 14, 2009), Vancouver S088484, B.C.S.C. [*Schooff #1*] at para. 11.

On the basis of that finding, Mr. Justice Pitfield concluded that Cambie and FCSC had a direct interest in the outcome of the Patient Petition.

42. In the same respect, the Notice of Constitutional Question brought by the Plaintiffs in the CIMCA Action raises squarely the impact of the relevant provisions of the MPA on patients. This is precisely the evidence that the Patient Petitioners seek to put before this Honourable Court in this action. It would be contrary to the interests of justice to deny the Patient Petitioners party standing in this action commenced by FCSC and Cambie when they hold that status in the Patient Petition. As a result, this Honourable Court should also find that the Patient Petitioners ought to be joined as parties.

Rule 15(5)(a)(ii) and (iii): the potential irreversible harm to the Patient Petitioners' direct interests

43. If the Plaintiffs are successful and the relevant provisions of the MPA are found contrary to the *Charter*, the Patient Petitioners' real and tangible interests will be potentially harmed. The Patient Petition is a claim of statutory legal rights dependant upon the constitutionality of the MPA. Were the Court to find in the CIMCA Action that the relevant provisions of the MPA are contrary to the *Charter*, those legal rights claimed by the Patient Petitioners in the Patient Petition would be denied without evidence or submissions being heard and absent any right to appeal.

44. This direct interest goes to the heart of both Rule 15(5)(a)(ii) and (iii):

(a) The potential, irreversible harm to the Patient Petitioners' claim of legal rights demonstrates they ought to have been joined as a party at the onset of this action.

(b) The fact that the Patient Petitioners are claiming the very same statutory rights the Plaintiffs seek to find unconstitutional shows that there exists between the Patient Petitioners and the Plaintiffs a question or issue related to or connected with any relief in or subject matter of the action, namely the compliance of the relevant provisions of the MPA with the *Charter of Rights and Freedoms*.

45. On a number of occasions, the Court has added a party on analogous grounds. The *Kitimat* case involved a petition brought by the City of Kitimat seeking a finding that several orders-in-council brought by the provincial Ministry of Energy and Mines were, in some cases, *ultra vires* and of no force and effect, and in others limited in scope. The only respondent named was the Ministry. The orders and declarations sought by the petitioner would have rendered invalid the provincial instruments in Alcan's favour and that may have restricted the range of uses to which Alcan could put the power it generates. The Court of Appeal granted Alcan party status on the basis that its direct interests would be affected by the Court's decision:

> In this case, the District of Kitimat and Mr. Wozney seek remedies that will render invalid provincial instruments in its favour and that may restrict the range of uses to which Alcan may put the power it generates. This is a direct interest in the litigation, with Alcan and Kitimat having an issue between them related both to the relief claimed in the proceeding and to the subject matter of the proceeding.
>
> In *Save Richmond Farm Society v. Township of Richmond* (13 February 1989), Vancouver A890333 (B.C.S.C.), Madam Justice Prowse cited Lord Denning in *Gurtner v. Circuit and Another*, [1968] 2 Q.B. 587 at 595 (C.A.) as follows:
>
> > It seems to me that when two parties are in dispute in an action at law, and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party on such terms as it thinks fit.
>
> And at page 596:
>
> > It would be most unjust if they were bound to stand idly by watching the plaintiff get judgment against the defendant without saying a word when they are the people who have to foot the bill.
>
> In the same way, it would be most unjust if Alcan were bound to stand idly by watching the District of Kitimat and Mayor Wozney obtain judgment against the Province without its participation in the litigation, when it is Alcan who will directly suffer the consequences. *Kitimat, supra* at paras. 36-38.

46. For the same reasons, the Patient Petitioners should not be required to "stand idly by watching" the Plaintiffs in the CIMCA Action obtain judgment when it is they who will directly suffer the consequences as a result of the decision.

47. The fact that Alcan's direct interest was a commercial/financial interest, while the Patient Petitioners' interest is litigation of a legal right, is a distinction without a difference. There is no greater import to a legal right based upon the monetary amount at stake. This is apparent in the Court's decisions in *B.C. Fisheries Survival Coalition v. Canada* and *Team Transport Services v. Ready*.

48. In *B.C. Fisheries Survival Coalition v. Canada*, the petitioner sought a number of declarations that would have rendered unconstitutional an agreement between the Nisga'a Tribal Council and the federal and provincial Crowns.

> *B.C. Fisheries Survival Coalition v. Canada*, [1999] B.C.J. No. 660 (S.C.) [*BC Fisheries*] at para. 10.

49. In *Team Transport Services v. Ready*, the respondents had been appointed by government to facilitate transportation disputes. In the context of a hearing regarding the termination of an employee, Mr. Klair, the respondents denied an application seeking to have them recuse themselves on the grounds of a reasonable apprehension of bias. The petitioner then sought judicial review of that decision, specifically a declaration that the two present respondents committed an arbitral error by reason of bias in refusing to recuse themselves, an order that the award be set aside and that they be removed as arbitrators in relation to the complaint regarding Klair. The arbitrators sought an order removing them as parties in the petition on the basis that their decision spoke for itself and their participation in the process was not necessary. Mr. Klair sought an order adding him as a party on the grounds that if the petition was successful in removing them, there would result a further delay in having his own arbitration heard as new arbitrators would have to be appointed. Relying upon *Kitimat* and *BC Fisheries*, the Master added Klair as a party based upon his claim of legal rights in another proceeding being compromised by the outcome of the petition – the same circumstances faced by the Patient Petitioners.

> *Team Transport Services v. Ready*, [2007] B.C.J. No. 613, 2007 B.C.S.C. 406 [*Team Transport*] at paras. 29-33.

50. It is not sufficient to satisfy this direct interest by granting the Patient Petitioners intervenor status. Intervenor status leaves the fate of the Patient Petitioners' legal rights to other parties without providing them any recourse through appeal should the Plaintiffs prevail in the CIMCA Action. While it is possible that in such a case, the Commission or Ministry may appeal, this is far from a certainty, particularly in light of the fact that they continue to remain a respondent in the Patient Petition and, presumably, continue to oppose the relief sought by the Patient Petitioners in that proceeding. Without any right to appeal through the granting of party status, the interests of justice generally would not be met.

51. The absence of the right to appeal the potential deprivation of one's legal rights was a principal reason that the Court of Appeal granted party status to Alcan in *Kitimat* and Mr. Klair in *Team Transport*.

> *Kitimat, supra* at paras. 43-48.
> *Team Transport, supra* at para. 33.

52. In reaching its decision, the Court of Appeal in *Kitimat* delved in great detail into the difference between a party and an intervenor, the latter requiring the absence of any legal rights at stake in the proceeding:

> But most significantly it is just that Alcan should be joined as a party. As I have earlier indicated, its entitlements may well be limited by the order obtained by the petitioners. It is plainly just that Alcan should be in a position to appeal such an order.
>
> ***The chambers judge considered that Alcan's ability to participate as an intervenor would satisfy the interests of justice. With respect, this misconceives the role of an intervenor and the effect of a person participating as an intervenor. As to the role, I would observe that no person is required to be an intervenor, and non-participation as an intervenor would erode entirely, as against that party, the force of any order made. As to the effect of a person participating as an intervenor, as I earlier indicated, participation would not be accompanied by an ability to appeal under the Court of Appeal Act.***
>
> The chambers judge relied heavily upon *Wastech* in reaching his conclusion that participation as an intervenor was the appropriate role for Alcan. In my view, the use of intervenors is properly described by Mr. Justice Seaton in *Canada (Attorney General) v. Aluminum Company of Canada Ltd.* (1987), 10 B.C.L.R. (2d) 371 (C.A.). There, Mr. Justice Seaton noted at pages 382 to 385 that:
>
> > ***I will use the term "intervener" to describe persons or associations that are permitted to participate in proceedings to promote their own views, though the proceedings will not determine their legal rights.***
> > The term "intervener" was used in English law but not in the sense that it is now used in Canada. It described a person introduced in the proceedings to protect his own interest in circumstances in which we would add a party. The ecclesiastical courts used the term "intervener" in somewhat the same sense. The modern intervener has evolved from amicus curiae, not from interveners...
> >
> > Unlike many jurisdictions, we have no enactment respecting intervention, British Columbia courts are free to develop the practice best suited to our circumstances.
> >
> > The British Columbia courts have moved more firmly than have other Canadian courts toward the American model of permitting interest groups to appear as interveners. That development can be seen most clearly in

> *MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 380, 50 C.P.C. 298, [1985] 2 C.N.L.R. 54, 13 C.R.R. 283 (B.C.C.A.) and *Can. Lab. Congress v. Bhindi [supra]*. The *[B.C. Wildlife Federation]* is the sort of broadly based group that has been granted intervener status in this province.
>
> It is clear, in my view, that the role of an intervenor in the courts in British Columbia is different from the role of a party, and *Wastech* does not say differently.
>
> [...]
>
> ***In my view, the suggestion that Alcan could be an intervenor does not answer the substance of Alcan's position, which is that the orders made may directly affect instruments it holds from the Province. In these circumstances, it is inadequate to suggest it be a mere intervenor.*** [emphasis added]
>
> *Kitimat, supra* at paras. 43-46, 48.

53. Applying the reasoning in *Kitimat*, the notion that the Patient Petitioners should be granted intervenor status, rather than party status, is based upon a misconception of the role of an intervenor. The CIMCA Action will potentially determine the Patient Petitioners' legal rights and, for that reason, they should be properly added to the action as parties with a full right to appeal.

Rule 15(5)(a)(iii): "just and convenient"

54. The addition of the Patient Petitioners not only serves the interests of justice and convenience for the reasons set out above, it would also add little additional time or expense to the proceedings while providing much of the necessary factual underpinning critical to *Charter* litigation. For these reasons, the addition of the Patient Petitioners meets the test set out in Rule 15(5)(a)(iii) as "just and convenient." Indeed, in light of the addition of Cambie and FCSC to the Patient Petition, the exclusion of the Patient Petitioners would be contrary to the interests of justice and convenience.

55. In *Ipsos*, the Court added Vision Critical as a party, partly on the basis that little additional or extra trial preparation would be required as a result of its addition to the action.

> *Ipsos, supra* at paras. 110-112.

56. In *Dion v. Dion*, the Court identified several factors relevant to the determination of whether the addition of a party was "just and convenient":

(a) the stage of the proceedings at which the applicant seeks to be added;

(b) "the objects of securing a just, speedy and inexpensive determination of every action upon its merits and of avoiding a multiplicity of proceedings";

(c) whether it is suitable to try the issues together, in light of the nature of the issues in the existing proceeding and any complication, delay and cost that will result from the addition of parties.

Dion v. Dion (2005), 50 B.C.L.R. (4th) 388, 2005 BCSC 1802 [*Dion*] at para. 26.

57. In the instant case, all of the factors set out above are met:

(a) the action is at a very early stage and has not yet proceeded to the discovery stage;

(b) the Patient Petitioners have committed to working collaboratively with the other defendants to ensure there is no duplication or other undue time or expense in the CIMCA Action should they be added as parties;

(c) unlike the applicants for party status in the earlier proceeding before Her Ladyship, the Patient Petitioners are not strangers to the litigation and seek to adduce evidence that has been available for several years and is familiar to all the parties; and

(d) the two proceedings are interconnected in such a way that the addition of the Patient Petitioners is all but certain to avoid an unnecessary waste of the Court's resources (this interconnectedness is summarized by Mr. Justice Pitfield in granting Cambie and FCSC party status in the Patient Petition).

Schooff #1, supra.
Schooff #2, supra.

58. As well, the addition of the Patient Petitioners as a party will further promote the interests of justice and convenience by providing the factual underpinning critical to *Charter* litigation.

59. As noted by the Supreme Court of Canada in *MacKay v. Manitoba*, *Charter* litigation does not exist in a factual vacuum, rather it requires a thorough and concrete factual underpinning:

> *Charter* cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. For example, issues pertaining to freedom of religion, freedom of expression and the right to life, liberty and the security of the individual will have to be considered by the courts. Decisions on these issues must be carefully considered as they will profoundly affect the lives of Canadians and all residents of Canada. In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most *Charter* cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinion as to the future impact of the impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts.

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.
>
> *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, 61 D.L.R. (4th) 385 at paras. 8-9.

60. In light of the likelihood of a section 1 *Charter* analysis in the CIMCA Action, this requirement to secure a thorough and concrete factual underpinning is rendered even more acute, particularly with respect to the salutary benefits and deleterious effects of the relevant provisions in the MPA:

> One of the prongs of the s. 1 justification analysis requires a consideration of the proportionality of the offending legislation's salutary benefits and deleterious effects. In this regard, the salutary benefits of election advertising limits for the *Charter* rights of dissenting union members is not a new issue, rather it is simply one aspect of the s. 1 analysis that is inherent in the issues framed by the pleadings.
>
> In my view, it is important to have a full and fair s. 1 analysis, and the applicants' evidence and submissions be considered. Further, given that they are not bringing an affirmative challenge to the legislation, their opportunity to meaningfully argue that their rights must be taken into account in the constitutional analysis is essentially limited to participating in this case.
>
> *BCTF, supra* at paras. 30-31.

61. As a result, the present Defendants in this action will quite likely find themselves faced with the prospect of securing evidence on the prospective impact of the relief sought by the Plaintiffs, as well as the salutary effects of the relevant provisions in the MPA. This is precisely the evidence that the Patient Petitioners have already secured and adduced. For that reason, the addition of the Patient Petitioners further promotes the interests of justice and convenience by potentially reducing the other parties' time and expense in securing the proper factual underpinning to their case.

The applications for intervenor status

62. The Patient Petitioners submit in the alternative that their direct and public interest in the CIMCA Action is sufficient such that the Court should exercise its inherent jurisdiction to add the Patient Petitioners to the proceedings as an intervenor. Neither FCSC and Cambie, or SRC, oppose the addition of the Patient Petitioners as intervenors. However, a dispute remains regarding the terms of their participation. Broadly put, the Patient Petitioners request to be added on terms that would permit cross-examination on any affidavit material and the ability to submit evidence at the hearing of the action are opposed.

63. The BCNU submits that its direct and public interest in the CIMCA Action is sufficient such that the Court should exercise its inherent jurisdiction to add the BCNU to the proceedings as an intervenor. FCSC and Cambie oppose the addition of the BCNU as an intervenor; SRC opposes the terms sought for the addition of the BCNU. As with the addition of the Patient Petitioners, the SRC opposes the right of the BCNU to participate in any cross-examination on affidavits and to submit any evidence at the hearing of the action.

Direct and public interest in intervenor status

64. The Courts have generally taken a liberal position in permitting applicants to intervene. This liberal approach should be extended to the BCNU's application for intervenor status. Often intervenors are able, in the public interest, to bring relevant issues and perspectives to the proceedings. The BNCU, as a healthcare union, is well situated to bring forward the public interest on relevant issues and perspectives in the CIMCA action.

> *Comox-Strathcona (Regional District) v. Hansen*, [2003] B.C.J. No. 1498, 2003 BCSC 974 [*Comox-Strathcona*] at para. 34 citing *District of Squamish v. Great Pacific Pumice Inc.*, [2001] B.C.J. No. 518, 2001 BCSC 406.

65. The granting of intervenor status may be based upon the direct interest of the applicant or public interest grounds as summarized by the Court of Appeal in *Gehring v. Chevron*:

> In *EGALE Canada Inc. v. Canada (Attorney General)*, 2002 BCCA 396, 170 B.C.A.C. 204, I gave a brief summary of the principles that are generally considered on an application for leave to intervene:
>
> > [6] The principles to be applied on applications for intervenor status have been considered by this Court in a number of cases [...]
> >
> > [7] Generally speaking, before an applicant will be allowed to intervene, the court should consider whether the applicant has a direct interest in the litigation or whether the applicant can make a valuable contribution or bring a different perspective to a consideration of the issues that differs from those of the parties. When an application for intervention is made on a public law issue, the application may be allowed even though the applicant does not have a direct interest in the appeal.
>
> In *R. v. Watson*, 2006 BCCA 234, 70 W.C.B. (2d) 995, Newbury J.A. (in Chambers), after making reference to some of the case authorities, made the following helpful observations about what must be considered when the applicant does not have a direct interest in the litigation:
>
> > [3] [...] it is clear that where the applicant does not have a 'direct' interest in the litigation, the court must consider the nature of the issue before the court (particularly whether it is a 'public' law issue); whether the case has

> a dimension that legitimately engages the interests of the would-be intervenor; the representativeness of the applicant of a particular point of view or 'perspective' that may be of assistance to the court; and whether that viewpoint will assist the court in the resolution of the issues or whether, as noted in *Ward v. Clark*, the proposed intervenor is likely to 'take the litigation away from those directly affected by it.' (Para. 6) ...

[emphasis added]

Gehring v. Chevron Canada Ltd. (2007), 75 B.C.L.R. (4th) 36, 2007 BCCA 557 [*Gehring*] at paras. 6-7.

66. A legal interest in the proceedings is sufficient to establish a direct interest.

Comox-Strathcona, supra at paras. 30-32 citing *Mullins v. Levy*, [2002] B.C.J. No. 2177, 2002 BCSC 1336 [*Mullins*].

67. The BCNU may also be granted intervenor status on the basis that it is able to make a useful contribution to this public law issue that is different from that of the parties.

PHS Community Services Society v. Canada (Attorney General), [2008] B.C.J. No. 2991, 2008 BCCA 441 [*PHS*] at para. 13, citing *Gehring, supra.*

68. As noted above, Madam Justice Newbury in *Gehring* cited several factors the Court must consider when evaluating the contribution to the public law issue that the applicant may make:

(a) whether the case has a dimension that legitimately engages the interests of the would-be intervenor;

(b) the representativeness of the applicant of a particular point of view or 'perspective' that may be of assistance to the court; and

(c) whether that viewpoint will assist the court in the resolution of the issues or the proposed intervenor is likely to 'take the litigation away from those directly affected by it'.

69. The application of all of these factors makes it clear that the BCNU should be granted intervenor status. The BCNU's perspective on this issue is unique and its involvement long-standing. We submit that Mr. Justice Kelleher's finding below is a complete answer confirming that the BCNU's involvement as an intervenor legitimately engages its interests and reflects its representativeness of a particular point of view or perspective that may be of assistance to the court. This "multitude of direct and indirect ways" in which the impugned legislation affects the BCNU and its members will enhance and enrich the factual underpinning necessary to this case.

> In the present case the continued viability of the *Medicare Protection Act* affects the [BCNU] and its members in a multitude of direct and indirect ways. The [BCNU] has had extensive involvement in the dispute. I am satisfied that the [BCNU] has a genuine interest in ensuring that the Commission remains accountable for its actions.
>
> *BCNU v. BC AG, supra* at para 37.

70. The BCNU submits that it has at least as strong an interest in the outcome of this litigation as the entities added as the other intervenors in the CIMCA Action. The CIMCA Action will determine whether the MPA continues to prohibit private billing, user charges and private insurance, and by extension of Mr. Justice Kelleher's reasoning cited above, the BCNU and its members will be affected in "a multitude of direct and indirect ways" by the outcome of the CIMCA Action. The BCNU and its members' interest in this action is further demonstrated by its continuing involvement in the public healthcare debate on issues regarding access to quality healthcare as set out in the affidavit evidence of BCNU President Debra McPherson.

> Affidavit of Annamaria Pears, sworn December 4, 2008 in Vancouver Registry No. S-088484 at Exhibit 4.

The direction sought for intervenor status with broad participatory rights

71. We submit that the Patient Petitioners and the BCNU should both be afforded intervenor status with broad participatory rights in the CIMCA Action to avoid a breach of natural justice and procedural fairness.

72. The potential, irreversible harm to the Patient Petitioners' claim of legal rights makes their claim for intervenor status much different than the application brought by Duncan Etches and others in *Schooff #2*. Therefore, as a matter of natural justice and procedural fairness, including the right to a fair hearing, the Patient Petitioners respectfully submit that they ought to be afforded full participatory rights in the CIMCA Action. It is respectfully submitted that it would be an abuse of this Court's process to allow a proceeding that is determinative of the Patient Petitioners' legal rights to proceed without their full participation.

73. The Patient Petitioners and the BCNU have worked together in order to bring forward the Patient Petitioners' evidence, even prior to the petition leading to Mr. Justice Kelleher's decision in *BCNU v. BCAG*. Following Mr. Justice Kelleher's decision that the BCNU was not the appropriate party to advance the claims made on the basis of public interest standing, the Patient Petitioners have continued to work with the BCNU in advancing evidence concerning both the BCNU and the Patient Petitioners, in the Patient Petition.

74. The Patient Petitioners and the BCNU have committed to working collaboratively with the other defendants to ensure there is no duplication or other undue time or expense in the CIMCA Action should they be added as intervenors pursuant to the directions sought above. Neither the

Patient Petitioners nor the BCNU are strangers to the litigation and much of the evidence the Patient Petitioners intend to adduce is already before the Court and quite familiar to the parties.

75. There is ample precedent in support of the direction sought by the Patient Petitioners and the BCNU:

(a) In *Mullins v. Levy*, the Court granted intervenor status to the applicant with permission to adduce evidence, cross-examine witnesses and make submissions.

(b) In *Canwest v. Canada*, the Ontario Superior Court granted intervenor status to the applicant with permission to adduce affidavit evidence, cross-examine witnesses and make submissions.

(c) In *Comox-Strathcona*, the Court granted intervenor status to the applicant with permission to adduce affidavit evidence and written make submissions (the applicant did not seek the right to cross-examination).

Mullins, supra at paras. 17-20.
Canwest Media Works v. Canada (Attorney General), [2006] O.J. No. 4403 (S.C.J.) at para.. 14.
Comox-Strathcona, supra at paras 36-37.

76. By contrast, the more limited participation rights advocated by FCSC and Cambie, as well as SRC, would not allow the Patient Petitioners and the BCNU to bring forward the evidence and the perspective garnered through their long involvement in this issue. The Patient Petitioners' direct interest and the BCNU's genuine interest would not be well represented in Court with this limitation.

V. CONCLUSION

77. The facts and law set out above establish that both the Patient Petitioners and the BCNU have a unmistakable direct and public interest in this litigation.

78. For all of the reasons set out above, the Patient Petitioners submit that:

(a) The Patient Petitioners have a direct interest in this action such that this Honourable Court should add Mariël Schooff, Daphne Lang, Joyce Hamer, Myrna Allison, and Carol Welch as party-defendants to this action.

(b) In the alternative, the Patient Petitioners' direct interest in the CIMCA Action, specifically the important contribution they would make to the evidentiary record and submissions on this important issue of public law, is more than sufficient to warrant

addition to the proceedings as an intervenor with broad participatory rights, including the direction set out above.

79. In addition, the BCNU submits that:

(a) The BCNU has a strong public interest in the CIMCA Action set out above and the contribution it could make to the evidentiary record on this important issue of public law is sufficient to warrant addition to the proceedings as an intervenor with broad participatory rights, including the direction set out above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: May 18, 2010

Marjorie Brown,
Counsel for the Applicants

This Written Submission was prepared by Marjorie Brown of the law firm of VICTORY SQUARE LAW OFFICE LLP whose place of business is 500 - 100 West Pender Street, Vancouver, BC, V6B 1R8, Telephone: (604) 684-8421, Fax: (604) 684-8427.

APPENDIX A

S-090678

FORM 1 (RULE 8(3))
[en. B.C. Reg. 161/98, s. 21, effective July 1, 1998]

No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

MARIËL SCHOOFF and CAROL WELCH suing on their own behalf and in a representative capacity on behalf of all beneficiaries within the meaning of the *Medicare Protection Act* who were unlawfully charged for benefits or for materials, consultations, procedures, use of an office, clinic or other place or for any other matter that related to the rendering of a benefit under the *Medicare Protection Act*

PLAINTIFF(S)

AND:

FALSE CREEK SURGICAL CENTRE on its own behalf and in a representative capacity on behalf of all persons who charged beneficiaries within the meaning of the *Medicare Protection Act* for benefits or for materials, consultations, procedures, use of an office, clinic or other place or for any other matter that related to the rendering of a benefit under the *Medicare Protection Act*

DEFENDANT(S)

WRIT OF SUMMONS

BROUGHT UNDER THE *CLASS PROCEEDINGS ACT*

(Name and address of each Plaintiff)

Mariël Schooff
2248 Rampart Place
Port Coquitlam, BC V3C 5C5

Carol Welch
15 - 6280 - 48A Avenue
Delta, BC V4K 4W2

(Name and address of each Defendant)

False Creek Surgical Centres Inc.
1700 - 1075 West Georgia Street
Vancouver, BC V6E 3C9

Ambulatory Surgical Centres Canada Company
800 - 1959 Upper Water Street
Halifax, NS B3J 3N2

Comox Valley Surgical Associates Inc.
201 - 467 Cumberland Road
Courtenay, BC V9N 2C5

Kamloops Surgery Centre Ltd.
301 - 186 Victoria Street
Kamloops, BC V2C 5R3

Delbrook Surgical Centre Inc.
2900 - 555 Burrard Street
Vancouver, BC V6C 0A3

Okanagan Health Surgical Centre Inc.
c/o Pushor Mitchell LLP
3rd Floor, 1665 Ellis Street
Kelowna, BC V1Y 2B3

Prince George Surgery Centre Inc.
700 - 550 Victoria Street
Prince George, BC V2L 2K1

Surgical Spaces Inc.
1450 - 1075 West George Street
Vancouver, BC V6E 3C9

South Fraser Surgical Centre Inc.
33695 South Fraser Way
Abbotsford, BC V2S 2C1
Victoria Surgery Ltd.
7th Floor, 1175 Douglas Street
Victoria, BC V8W 2E1

Blaylock Surgical Centre Inc.
301 - 2031 McCallum Road
Abbotsford, BC V2S 3N5

Cambie Surgeries Corporation
2836 Ash Street
Vancouver, BC V5X 3X7

Specialist Referral Clinic (Vancouver) Inc.
2800 Park Place, 666 Burrard Street
Vancouver, BC V6C 2Z7

Timely Medical Alternatives Inc.
700 - 401 West Georgia Street
Vancouver, BC V6B 5A1

ELIZABETH THE SECOND, by the Grace of God, of the United Kingdom, Canada and Her other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith.

To the defendant:

TAKE NOTICE that this action has been commenced against you by the plaintiff(s) for the claim(s) set out in this writ.

IF YOU INTEND TO DEFEND this action, or if you have a set off or counterclaim that you wish to have taken into account at the trial, **YOU MUST**

(a) **GIVE NOTICE** of your intention by filing a form entitled "Appearance" in the above registry of this court, at the address shown below, within the Time for Appearance provided for below and **YOU MUST ALSO DELIVER** a copy of the Appearance to the plaintiff's address for delivery, which is set out in this writ, and

(b) if a statement of claim is provided with this writ of summons or is later served on or delivered to you, **FILE** a Statement of Defence in the above registry of this court within the Time for Defence provided for below and **DELIVER** a copy of the Statement of Defence to the plaintiff's address for delivery.

YOU OR YOUR SOLICITOR may file the Appearance and the Statement of Defence. You may obtain a form of Appearance at the Registry.

JUDGMENT MAY BE TAKEN AGAINST YOU IF

(a) **YOU FAIL** to file the Appearance within the Time for Appearance provided for below, or

(b) **YOU FAIL** to file the Statement of Defence within the Time for Defence provided for below.

TIME FOR APPEARANCE

If this writ is served on a person in British Columbia, the time for appearance by that person is 7 days from the service (not including the day of service).

If this Writ is served on a person outside British Columbia, the time for appearance by that person, after service, is 21 days in the case of a person residing anywhere within Canada, 28 days in the case of a person residing in the United States of America, and 42 days in the case of a person residing elsewhere.

[or, if the time for appearance has been set by order of the court, within that time.]

TIME FOR DEFENCE

A Statement of Defence must be filed and delivered to the plaintiff within 14 days after the later of

(a) the time that the statement of claim is served on you (whether with this writ of summons or otherwise) or is delivered to you in accordance with the Rules of Court, and

(b) the end of the Time for Appearance provided for above.

[or, if the time for defence has been set by order of the court, within that time.]

(1) The Address of the Registry is:

800 Smithe Street
Vancouver, B.C.

(2)	The plaintiff's **ADDRESS FOR DELIVERY** is: Victory Square Law Office LLP 400 - 198 West Hastings Street Vancouver, B.C. V6B 1H2 Fax number for delivery: (604) 684-8427
(3)	The name and office address of the plaintiff's solicitor is: Marjorie Brown Victory Square Law Office LLP 400 - 198 West Hastings Street Vancouver, British Columbia V6B 1H2

The Plaintiffs' claim is for repayment of unlawful charges by the Defendants for benefits, or for materials, consultations, procedures, use of an office, clinic or other place or for any other matter that related to the rendering of a benefit, in contravention of sections 17(1)(a) and 17(1)(b) of the *Medicare Protection Act*.

Jan. 28/09
Dated

Marjorie Brown, Plaintiff's Solicitor

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SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY

OCT 1 2009

Amended pursuant to the Order of Justice Pitfield
pronounced May 14, 2009
Original filed December 4, 2008

No. S-088484
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *JUDICIAL REVIEW PROCEDURE ACT*, R.S.B.C. 1996, c. 241

BETWEEN:

MARIËL SCHOOFF, DAPHNE LANG, JOYCE HAMER, MYRNA ALLISON and CAROL WELCH

PETITIONERS

AND:

MEDICAL SERVICES COMMISSION, CAMBIE SURGERIES CORPORATION and FALSE CREEK SURGICAL CENTRE INC.

RESPONDENTS

THIS IS THE AMENDED PETITION OF:

Mariël Schooff
c/o Victory Square Law Office LLP
500-100 West Pender Street
Vancouver, BC V6B 1R8

Daphne Lang
c/o Victory Square Law Office LLP
500-100 West Pender Street
Vancouver, BC V6B 1R8

Joyce Hamer
c/o Victory Square Law Office LLP
500-100 West Pender Street
Vancouver, BC V6B 1R8

This is Exhibit "D" referred to in the affidavit of HEIDI NGUYEN sworn before me at VANCOUVER this 30TH day of AUGUST 2012

Joana Thackeray
A Commissioner for taking Affidavits for British Columbia

Myrna Allison
c/o Victory Square Law Office LLP
500-100 West Pender Street
Vancouver, BC V6B 1R8

Carol Welch
c/o Victory Square Law Office LLP
500-100 West Pender Street
Vancouver BC V6B 1R8

ON NOTICE TO:

Attorney General of British Columbia
Legal Services Branch
6th Floor, 1001 Douglas Street
Victoria, BC V8W 1X4
Attn: Jean Walters and Craig Jones

Medical Services Commission Secretariat
3-1, 1515 Blanshard Street
Victoria, BC V8W 3C8
Attn: Lee Peacock, Administrator

Ministry of Health Services
5th Floor, 1515 Blanshard Street
Victoria, BC V8W 3C8
Attn: Hon. George Abbott, Minister of Health Services

Cambie Surgery Centre
2836 Ash Street
Vancouver, BC V5Z 3C6
Attn: Dr. Brian Day

False Creek Surgical Centre
6th floor-555 West 8th Avenue
Vancouver, BC V5Z 1C6
Attn: Dr. Mark Godley, Dr. Richard Chan and Dr. Amin Javer

Pezim Clinic
Suite 30 - 3195 Granville Street, Hycroft Centre
Vancouver, BC V6H 3K2
Attn: Dr. Michael Pezim

Dr. Marc Boyle
101-2296 McCallum Road
Abbotsford, BC V2S 3P4

Dr. Grant Burnell
c/o Blaylock Surgical Centre
2-2545 McCallum Road
Abbotsford, BC V2S 3R1

Dr. Russell Naito
1890 Cooper Road, Suite 200
Kelowna, BC V1Y 8B7

Dr. Richard Brownlee
212 - 300 Columbia Street
Kamloops, BC V2C 6L1

Cambie Surgeries Corporation
c/o Irwin G. Nathanson, Q.C.
Nathanson, Schachter & Thompson LLP
Suite 750 - 900 Howe Street
Vancouver, BC V6Z 2M4

False Creek Surgical Centre Inc.
c/o Irwin G. Nathanson, Q.C.
Nathanson, Schachter & Thompson LLP
Suite 750 - 900 Howe Street
Vancouver, BC V6Z 2M4

Let all persons whose interests may be affected by the Order sought TAKE NOTICE that the petitioner applies to court for the relief set out in this petition.

APPEARANCE REQUIRED

IF YOU WISH TO BE HEARD at the hearing of the petition or wish to be notified of any further proceedings, YOU MUST GIVE NOTICE of your intention by filing a form entitled "Appearance" in the above registry of this court within the Time for Appearance and YOU MUST ALSO DELIVER a copy of the "Appearance" to the petitioner's address for delivery, which is set out in this petition.

YOU OR YOUR SOLICITOR may file the "Appearance". You may obtain a form of "Appearance" at the registry.

IF YOU FAIL to file the "Appearance" within the proper Time for Appearance, the petitioner may continue this application without further notice.

TIME FOR APPEARANCE

Where this Petition is served on a person in British Columbia, the Time for Appearance by that person is 7 days from the service (not including the day of service).

Where this Petition is served on a person outside British Columbia, the Time for Appearance by that person after service, is 21 days in the case of a person residing anywhere within Canada, 28 days in the case of a person residing in the United States of America, and 42 days in the case of a person residing elsewhere.

TIME FOR RESPONSE

IF YOU WISH TO RESPOND to the application, you must, on or before the 8th day after you have entered an appearance,

(a) deliver to the Petitioners

(i) 2 copies of a response in Form 124, and

(ii) 2 copies of each affidavit on which you intend to rely at the hearing, and

(b) deliver to every other party of record

(i) one copy of a response in Form 124, and

(ii) one copy of each affidavit on which you intend to rely at the hearing,

(1) The Address of the Registry is: 800 Smithe Street Vancouver, BC
(2) The ADDRESS FOR DELIVERY is: Victory Square Law Office 500-100 West Pender Street Vancouver, BC V6B 1R8 Fax number for delivery: (604) 684-8427

(3) The name and office address of the Petitioners' solicitor is:
Marjorie Brown
Victory Square Law Office
500-100 West Pender Street
Vancouver, BC V6B 1R8

The Petitioners apply for:

1. A declaration that, when paying claims for benefits rendered contrary to section 17(1) and/or s. 13(6) of the *Medicare Protection Act* ("MPA"), the Medical Services Commission ("Commission") is:

   i. not acting in accordance with its obligations under section 27(4) of the MPA to only pay for claims for benefits that comply with the MPA; and

   ii. not acting in accordance with its obligations under section 27(2) of the MPA to assess claims for payment in accordance with the requirements of the MPA.

2. A declaration that,

   i. in acting under section 5(1)(e) to determine the information required to be provided by practitioners for the purpose of assessing or reassessing claims; and

   ii. in acting under section 5(1)(j) to determine whether any matter is related to the rendering of a benefit; and

   iii. in acting under section 5(1)(q) to enter into arrangements and make payment for the costs of rendering benefits provided on a fee for service or other basis,

in such a fashion that payment is made to practitioners for claims for benefits rendered in violation of section 17(1) and/or 13(6) of the MPA, the Commission and/or the Ministry of Health Services (the "Ministry"), acting on behalf of the Commission, have failed to act in a manner that satisfies the criteria described in section 7 of the *Canada Health Act*, as required by section 5(2), and 5.1(a) of the MPA.

3. Orders in the nature of mandamus that the Commission and/or the Ministry, when acting on behalf of the Commission, take such steps as are necessary under section 27(2) of the MPA to ensure that any claims paid to practitioners, with respect to the benefits received by,

   i. Mariël Schooff, at the False Creek Surgical Centre, on January 28, 2003;

   ii. Daphne Lang, at the Pezim Clinic, on May 5, 2003; and

iii. Carol Welch at the False Creek Surgical Centre on or about December 22, 2006

are assessed and, if appropriate, reassessed under section 27(2) of the MPA to ensure compliance with section 17(1) of the MPA.

4. An order in the nature of mandamus that the Commission take such steps as are necessary to satisfy its obligations under section 5(2) and 5.1(a) of the MPA when discharging its duties under sections 5(1)(e), 5(1)(j) and 5(1)(q) of the MPA;

5. Costs; and

6. Such other relief as counsel may advise and which the Court considers appropriate.

The grounds upon which the application by the Petitioners for the orders sought is brought are:

1. The Commission has failed to fulfil its statutory obligation under section 27(2) of the MPA to assess and, if appropriate reassess, claims for payments in accordance with the requirements of the MPA.

2. The Commission has failed to fulfil its statutory obligation under section 27(4) of the MPA to refuse to pay for claims for benefits that do not comply with the MPA.

3. The Commission has failed to determine the information required to be provided by beneficiaries for the purpose of assessing or reassessing claims for payment of benefits rendered to beneficiaries under section 5(1)(e) of the MPA in accordance with its obligations under section 7 of the *Canada Health Act*, as required by section 5(2) and 5.1(a) of the MPA.

4. The Commission has failed to determine whether matters are related to the rendering of a benefit under section 5(1)(j) of the MPA, in accordance with its obligations under section 7 of the *Canada Health Act*, as required by section 5(2) and 5.1(a) of the MPA.

5. The Commission has entered into arrangements and made payments for the costs of rendering benefits under section 5(1)(q) of the MPA in violation of its obligations under section 7 of the *Canada Health Act*, as required by section 5(2) and 5.1(a) of the MPA.

The petitioner will rely on:

1. The *Medicare Protection Act*;
2. The *Medicare Protection Amendment Act, 2003*;
3. The *Canada Health Act*;
4. The *Judicial Review Procedure Act*
5. The *Medical and Health Services Regulation* and
6. Such other statutes as counsel may advise.

At the hearing of this Petition will be read the affidavit(s) of:

1. Kelly Robinson, sworn December 4, 2008
2. Annamaria Pears, sworn December 4, 2008
3. Carol Welch, sworn December 4, 2008
4. Mariël Schooff, sworn December 4, 2008
5. Kelly Robinson #2, sworn December 19, 2008

copies of which are served herewith, and such further Affidavits as may arise.

The facts upon which this Petition is based are as follows:

Facts with respect to the Respondent's knowledge of extra-billing and/or user charges

7. On January 27, 2003, counsel for the Petitioners, at that time acting on behalf of the British Columbia Nurses' Union ("BCNU"), wrote to the Minister of Health Services (the "Minister") regarding *inter alia* possible breaches of the MPA by the False Creek Surgical Centre ("FCSC") and the Cambie Surgery Centre ("CSC").

8. The BCNU alleged *inter alia* that physicians affiliated with the FCSC and CSC who are enrolled with the Medical Service Plan, pursuant to the MPA, and have not made an election under the MPA, provided benefits to beneficiaries and received payment directly from said beneficiaries. The BCNU provided the Minister with evidence, in the form of media reports, in support of these allegations. The BCNU alleged that such billing would constitute direct billing or a user charge, contrary to section 17(1) of the MPA.

9. The BCNU asked *inter alia* that the Minister investigate the allegations of direct billing and user charges at the FCSC and CSC.

10. Also on January 27, 2003, counsel for the Petitioners, at that time acting on behalf of the BCNU, wrote to physicians, including Dr. Brian Day at the CSC, advising that he had been identified by the BCNU as a physician advocating the privatization of medical services. In this letter, the BCNU described to Dr. Day, and other physicians, the limits on user charges and extra billing under the MPA.

11. On April 1, 2003, counsel for the Petitioners, on behalf of the BCNU, again wrote to the Minister requesting a response to the letter of January 27, 2003.

12. Additionally, in its letter of April 1, 2003, the BCNU alerted the Minister to a specific allegation of a breach of section 17(1) the MPA. The BCNU cited media reports that patient Mariël Schooff had paid the FCSC $6,000 to obtain medical care that apparently constituted a benefit under the MPA, from an enrolled physician, Dr. Amin Javer, who had apparently not made an election under the MPA .

13. On April 1, 2003, the Minister responded to the BCNU's letters acknowledging the Ministry's responsibility, on behalf of the Commission, for investigating extra-billing and unauthorized facility fees.

14. Despite the examples of violations of section 17(1) of the MPA provided in the BCNU's letters of January 27 and April 1, 2003, the Minister requested that specific details of charges to patients be brought to the attention of staff of the Medical Services Plan ("MSP") at the Ministry.

15. On May 20, 2003, counsel for the Petitioners, on behalf of the BCNU, wrote to the Minister requesting a response to its specific allegation of a contravention of section 17(1) of the MPA by the FCSC in relation to Ms. Schooff. The BCNU also provided the Minister with additional evidence, in the form of more media reports and information about private health care clinics, of more possible breaches of section 17 of the MPA by Dr. Day at the CSC. This evidence included public statements made by Dr. Day describing his efforts to operate a private, for-profit health care clinic.

16. On August 13, 2003, counsel for the Petitioners, on behalf of the BCNU, wrote to the Minister requesting a response to its letter of May 20, 2003. In the letter the BCNU cited the Minister's recent comments in the Legislature, which the BCNU described as confirming the BCNU's analysis with respect to the extra-billing and user charges to patients described in the BCNU's letters to the Minister of January 2, April 1 and May 20, 2003.

Facts regarding Commission and Ministry polices and procedures with respect to extra billing and user charges

17. Documents obtained pursuant to the *Freedom of Information and Protection of Privacy Act* and the *Access to Information Act* concerning extra-billing and user charges in British Columbia indicate that from 2000 forward this contravention of the MPA increased significantly. Instances of extra-billing and user charges were brought to the Ministry's attention. Prior to 2001, the Ministry appeared to understand and stated its commitment to act on the obligations imposed by the MPA. However, as extra-billing and user charges became increasingly notorious, the Ministry appeared to take little action, on behalf of the Commission, to enforce the MPA. Ultimately, the Ministry adopted a policy tantamount to non-enforcement of the MPA.

18. The Ministry and/or Commission's earlier understanding of the limits on extra-billing and/ user charges under the MPA is demonstrated in Minute #1148 of the Commission, dated October 26, 1995, which states that an enrolled physician who directly or indirectly derives an economic benefit as a consequence of a beneficiary being charged more than the MSP rate for an insured service will be deemed to be extra-billing, contrary to the MPA. The Minute states that the Commission will take the appropriate remedial action.

19. According to a Commission document dated January 15, 1998 and entitled "Amendments to the Medicare Protection Act: Information for Medical Practitioners from the Medical Services Commission", then-recent amendments to the MPA clarified that the prohibition on extra-billing in the MPA applies not only to medical practitioners, but also to anyone acting on behalf of a medical practitioner.

20. Health Canada documents indicate that Health Canada has been engaged in bilateral discussions and correspondence with the Ministry with respect to instances of extra-billing and user charges in British Columbia since at least June 2000.

21. Correspondence about extra-billing at the FCSC specifically continued between Health Canada and the Ministry throughout 2001 with the Ministry indicating in a letter dated October 15, 2001, that the then-new government of the province had an interest in exploring the merits of expanded public-private partnerships for the delivery of health services. The Ministry said the initiative may have a significant impact on the issues raised in Health Canada's correspondence, including an incidence of confirmed extra-billing at the FCSC from 2000.

22. Correspondence between Health Canada and the Ministry continued in 2002 and 2003 and reflected *inter alia* that an allegation of extra billing at the FCSC raised by Health Canada in a letter of June 9, 2000 remained unresolved.

23. Each year Health Canada asks the Ministry to provide estimates of the amount of extra-billing and/or user-charges that will occur in a fiscal year. Pursuant to the *Canada Health Act*, the federal government reduces the Canada Health and Social Transfer ("CHST") to each province by the amount of extra-billing and/or user-charges in that province, if any.

24. On January 13, 2002, the Ministry estimated uses charges of $4,610 in connection with the FCSC for the period of April 1, 2000 to March 31, 2001.

25. On March 11, 2003, Health Canada confirmed a deduction of $4,610 to the CHST payment from the federal government to the government of British Columbia.

26. In an internal email between Ministry officials, dated October 31, 2003, in regards to an instance of suspected extra billing at the FCSC, a Ministry official stated that, based on previous correspondence with the physicians and clinics involved, and their lawyer, it was extremely unlikely that the charges would be voluntarily refunded.

27. A January 5, 2004, Ministry briefing document states that, in 9 of 16 cases of extra-billing or user charges for services provided between April 1, 2001 and March 31, 2002, legal counsel for the physicians and clinics involved refused to provide the information and/or the refunds requested by the Ministry.

28. The January 5, 2004 briefing document also notes that the Ministry had received reports that private clinics were attempting to discourage patients from making complaints to MSP about extra-billing and user charges, and that the Ministry was aware of some cases in which patients were asked to sign "waivers of MSP coverage". The briefing document appends a waiver form from the FCSC. The appended waiver states, in part, "I understand that by undergoing surgery at the False Creek Surgical Centre, I am paying privately for facility fees and that I waive any rights to obtain government reimbursement for these costs. I accept fully that these fees are not an insured service under the Medical Services Plan of British Columbia (MSP)"

29. Correspondence continued between the Ministry and Health Canada in 2003 and 2004 as Health Canada made efforts to obtain the Ministry's estimates for extra-billing and user charges for 2001-2002, which the Ministry did not provide, in breach of the *Canada Health Act*. On March 11, 2004, the Minister of Health for the federal government wrote to the Minister advising that if the requested information was not received, Health Canada would impose an estimate of the charges.

30. Ultimately, Health Canada imposed charges of $126,775 for the 2001-2002 fiscal year. Documents from Health Canada indicate that it arrived at the amount based on a public statement by then-Minister Colin Hansen in December, 2003, in which the Minister referred to 55 cases of user charges or extra-billing then under review by Ministry officials. A Health Canada fact sheet dated November 4, 2004 states that Health Canada attempted to schedule bilateral discussions on the issue with the Ministry, but had received no response at that time.

31. For the 2002-2003 fiscal year, Health Canada confirmed a deduction of $72,464 to the CHST payment to the government of British Columbia. For 2003-2004, British Columbia was subject to a CHST deduction of $29,019 and for 2004-2005, a deduction of $114,850 was imposed. For 2005-2006, British Columbia was subject to a CHST deduction of $42, 112.50.

32. In or about March or April, 2004, the Ministry adopted revised procedures for handling reports of extra-billing. Under the new procedure, staff were to follow up on complaints, but stop short of taking any remedial or enforcement action, if the physician did not voluntarily remedy the situation.

33. This policy differed from the Ministry's previous procedures. According to an MSP Procedures document, between 1996 and 2003, the Ministry's procedure for handling complaints, which was approved by the Commission, was to request repayment of inappropriate charges, and, if necessary, take remedial action, which could result in penalties including possible de-enrollment from MSP.

34. According to this MSP Procedures document, between 2001 and 2003, MSP received an increasing number of reports from patients about apparent instances of extra-billing. The MSP Procedures document goes on to state that, while a few of these cases were resolved with repayment, most were not, as physicians or clinics refused to make refunds and those physicians or clinics claimed that Commission and MSP did not have the power to compel them to issue refunds.

35. According to a draft document dated June 8, 2005, and entitled "British Columbia's Extra-Billing Calculations Methodology", cases of extra-billing and user charges mentioned only in the media, cases for which documentary evidence is not provided, and cases that come to the Ministry's attention other than through direct complaints, even if disclosed by physicians during investigations, are not included in the Ministry's reports of extra-billing and user charges to Health Canada.

36. The "Extra-Billing Calculation Methodology" document states that the Ministry does not investigate the following: public statements by private clinic owners or medical directors acknowledging extra-billing; cases suggested by reporting anomalies; the reasonableness of patient charges ostensibly for uninsured services and provided in conjunction with insured services; patient charges for medically necessary services provided by diagnostic facilities that are not approved by

the Commission for MSP payment and not under contract to a Health Authority; and, questionable hospital charges.

37. Despite the notoriety of extra-billing and user charges, the Ministry, on behalf of the Commission, and the Commission do not appear to have any other policy or procedure that would or could lead to enforcement of the MPA and the discharge of the Commission's duties under the MPA.

Facts specific to Mariël Schooff

38. In an internal Ministry email, dated March 26, 2003, apparently in response to a discussion about media reports about Ms. Mariël Schooff's circumstances, a Ministry official stated that the Ministry was seeking direction on how to proceed with such cases, since the physician's representative had advised that it was his or her view that the MPA did not afford the Ministry sufficient jurisdiction to compel the production of the information the Ministry had requested.

39. On May 6, 2003, the Ministry wrote directly to Ms. Schooff requesting confirmation of the media reports that she had been billed directly for a benefit under the MPA.

40. On May 26, 2003, Health Canada wrote to the Ministry expressing concern that Dr. Amin Javer had inappropriately charged a patient for an insured service at the FCSC. Health Canada also expressed concern that physicians were ignoring the Ministry's communications regarding compliance with the *Canada Health Act* and that more proactive monitoring was required.

41. On June 26, 2003, counsel for the Petitioners, on behalf of Ms. Schooff and the BCNU, wrote to the Ministry confirming that the FCSC had apparently violated section 17(1) of the MPA with respect to Ms. Schooff for a service provided by Dr. Javer. The Petitioner enclosed a copy of the "Private Billing" invoice prepared by the FCSC and provided to Ms. Schooff.

42. On August 1, 2003, Health Canada wrote to the Ministry stating that unless it was confirmed Ms. Schooff was reimbursed for user charges, a deduction would be made to the province's CHST payment.

43. On August 28, 2003, the Ministry wrote to counsel for the Petitioners confirming that Dr. Javer billed the Medical Service Plan and was paid for the benefit performed on Ms. Schooff. The Ministry confirmed that neither Dr. Javer or the FCSC were entitled to bill Ms. Schooff directly in relation to this benefit. The Ministry then directed the Petitioners' counsel to approach the FCSC and Dr. Javer directly to seek a reimbursement of the monies unlawfully obtained from Ms. Schooff.

44. On September 5, 2003, the Petitioners' counsel wrote to the FCSC, to the attention of Dr. Javer, requesting reimbursement for Ms. Schooff of the illegal charges associated with her surgery.

45. On September 13, 2004, the Petitioners' counsel wrote to the Ministry advising that the FCSC and Dr. Javer had failed to respond to its request to reimburse Ms. Schooff. The BCNU requested

that the Ministry investigate the matter and take the steps necessary to require repayment from the FCSC and Dr. Javer, and to generally conclude the matter.

46. On April 12, 2005, the Petitioners' counsel once again wrote to the Ministry on behalf of the BCNU advising that the matter with respect to Ms. Schooff remained unresolved.

47. On March 27, 2008, counsel for the Petitioners wrote to the Chair of the Commission on behalf of Ms. Schooff, copying the Minister, to describe Ms. Schooff's experience, state that it disclosed breaches of the MPA and to request that the Commission investigate the circumstances of Dr. Javer's practice and the FCSC and ensure that the Commission was not improperly rendering payments to doctors at the FCSC. Counsel for the Petitioners also requested that the Commission ensure that Ms. Schooff be reimbursed for the illegal charges.

48. On May 13, 2008, counsel for the Commission wrote to counsel for the Petitioners and stated that it was involved in correspondence with the FCSC regarding Ms. Schooff's circumstances.

49. On June 19, 2008, counsel for the Petitioners wrote to counsel for the Commission and advised, *inter alia*, of the Petitioners' position that Ms. Schooff's circumstances are evidence of a systemic failure by the Commission to enforce the MPA since the Commission has known about Ms. Schooff's circumstances since approximately May 2003.

50. Neither counsel for the Petitioners, nor Ms. Schooff herself, have received further communication from the Commission or the Commission's counsel regarding Ms. Schooff.

Facts specific to Joyce Hamer

51. On May 23, 2003, counsel for the Petitioners, on behalf of patient Ms. Joyce Hamer and the BCNU, wrote to the Ministry advising that the McCallum Surgical Centre ("MSC") had billed Ms. Hamer directly for a benefit rendered under the MPA.

52. The Ministry responded by way of a letter dated July 18, 2003, confirming that Dr. Marc Boyle, a physician enrolled with MSP, had received payment for the benefit provided to Ms. Hamer. Another enrolled physician, Dr. Grant Burnell, was also compensated by MSP. The Ministry confirmed that neither the physicians nor the MSC were entitled to bill Ms. Hamer for her medical care. The Ministry suggested approaching the MSC directly to recover the illegal charge.

53. On August 6, 2003, counsel for the Petitioners wrote to the MSC, enclosing the Ministry's letter and requesting repayment of the unlawful charges.

54. As a result of a telephone call from the MSC, on August 7, 2003, counsel for the Petitioners again wrote to the MSC, explaining the alleged violation of the MPA in greater detail.

55. On August 18, 2003, counsel for the Petitioners wrote to the MSC, acknowledging repayment of $3,000 that the MSC had charged to Ms. Hamer, in contravention of the MPA.

56. Also on August 18, 2003, counsel for the Petitioners wrote to Ms. Hamer, enclosing the cheque from the MSC.

57. On April 8, 2008, counsel for the Petitioners wrote to the Chair of the Commission, copying the Minister, to describe Ms. Hamer's experience, state that it disclosed breaches of the MPA and to request that the Commission investigate the circumstances of the physicians' practices at the MSC and ensure that the Commission was not improperly rendering payments to doctors at the MSC.

58. On May 13, 2008, counsel for the Commission wrote to counsel for the Petitioners and stated that there would be no further investigations into the doctors at the MSC as Ms. Hamer had been reimbursed and the MSC was now closed.

59. On June 19, 2008, counsel for the Petitioners wrote to counsel for the Commission and advised of the Petitioners' position that Ms. Hamer's circumstances are evidence of a systemic failure by the Commission to enforce the MPA.

60. Neither counsel for the Petitioners nor Ms. Hamer have received further communication from the Commission or the Commission's counsel regarding Ms. Hamer.

Facts specific to Daphne Lang

61. On April 19, 2004, counsel for the Petitioners, on behalf of the patient Ms. Daphne Lang and the BCNU, wrote to the Pezim Clinic regarding a charge to Ms. Lang for a medically necessary procedure performed by Dr. Pezim. The Minister was copied on this letter.

62. Counsel for the Petitioners demanded that the Pezim Clinic refund the unlawful charge to Ms. Lang. The Pezim Clinic did not respond.

63. On April 12, 2005, counsel for the Petitioners wrote to the Ministry, advising that the Pezim Clinic had failed to refund Ms. Lang the unlawful charge.

64. On August 5, 2005, the Ministry wrote to counsel for the Petitioners stating that, based on the information provided, it appeared the medical services received by Ms. Lang were benefits under the MPA and she should therefore not have been charged for them.

65. On June 16, 2008, counsel for the Petitioners wrote to the Chair of the Commission, copying the Minister, to explain Ms. Lang's circumstances, state that Ms. Lang's experience disclosed breaches of the MPA and to request that the Commission investigate the circumstances of Dr. Pezim's practice and the Pezim clinic and ensure that the Commission was not improperly rendering payments to doctors at the Pezim clinic. Counsel for the Petitioners also requested that the Commission ensure that Ms. Lang be reimbursed for the illegal charges.

66. On August 11, 2008, counsel for the Commission wrote back to state that the Ministry had requested Ms. Lang's MSP number and documentation of the service in its letter of August 5, 2005, and had not received it.

67. On October 2, 2008, counsel for the Petitioners wrote to counsel for the Commission enclosing Ms. Lang's MSP number and advising that Ms. Lang was searching for the rest of the documentation that the Ministry had requested.

68. On November 18, 2008, counsel for the Petitioners wrote to counsel for the Commission and advised that Ms. Lang had been unable to locate documentation pertaining to the service she had received at the Pezim Clinic, but that, based on the information already provided, counsel for the Petitioners trusted that the Commission would still continue to investigate the matter.

Facts Specific to Myrna Allison

69. On or about December 18, 2006, Ms. Myrna Allison was advised by her prosthodontist, Dr. Shupe, that she required a biopsy of a spot on her mouth.

70. Dr. Shupe told Ms. Allison he would send her to see Dr. Russell Naito for the biopsy and that she should speak with Dr. Shupe's secretary regarding an appointment with Dr. Naito, an oral and maxillofacial surgeon. Dr. Shupe's secretary informed Ms. Allison that an appointment with Dr. Naito would not be covered by the Medical Services Plan and that she would have to pay him for both a consultation and the biopsy.

71. Ms. Allison declined the appointment, and obtained a referral from her family physician to Dr. Stevens, whose colleague, Dr. Prabhu, performed the biopsy on January 29, 2007, on an urgent basis, after a consultation appointment with Dr. Stevens on January 22, 2007.

72. Ms. Allison received the results of her biopsy on February 6, 2007, and did not pay Dr. Stevens or Dr. Prabhu, who are both physicians, anything for the consultation or the procedure.

73. On April 2, 2008, counsel for the Petitioners wrote to the Chair of the Commission on behalf of Ms. Allison and the BCNU, copying the Minister of Health, to explain Ms. Allison's circumstances, state that Ms. Allison's experience disclosed breaches of the MPA, and to request that the Commission investigate the circumstances of Dr. Naito's practice and ensure that the Commission was not rendering payments improperly to Dr. Naito.

74. By letter dated May 27, 2008 and transmitted by facsimile on June 6, 2008, counsel for the Commission advised that the Commission had concluded that the fees Dr. Naito proposed to charge Ms. Allison would have been permitted under the MPA and the *Medical and Health Care Services Regulation*, and therefore the Commission did not intend to take further steps.

75. On June 19, 2008, counsel for the Petitioners wrote to counsel for the Commission and advised that she disagreed with the Commission's interpretation of the application of the MPA and the *Medical and Health Services Regulation* to Dr. Naito's practice.

76. Counsel for the Petitioners has received no further communication from the Commission or the Commission's counsel regarding Ms. Allison.

Facts Specific to Carol Welch

77. In or about late October 2006, Ms. Carol Welch was referred by her family physician to a neurosurgeon, Dr. Richard Chan, as a result of bursitis.

78. Initially, Ms. Welch was told that the first available consultation appointment with Dr. Chan was on July 4, 2007.

79. Having heard from a colleague who had also been referred to Dr. Chan that Dr. Chan might be able to perform the surgery sooner at the FCSC, Ms. Welch telephoned the FCSC in or about mid-December 2006. She explained her circumstances and was told she could see Dr. Chan sooner for a consultation for a fee of $450. She agreed to pay the fee and did so at her appointment with Dr. Chan one week later on or about December 22, 2006.

80. At her appointment, Dr. Chan advised that Ms. Welch required surgery. He advised that the surgery could be done at the FCSC within two weeks for a fee of $5,000, but that she would have a 4 to 6 month wait to obtain surgery at the hospital. Dr. Chan advised that Ms. Welch would not have to pay Dr. Chan's fee over and above the $5,000, which would be covered by the Medical Services Plan.

81. Ms. Welch could not afford the cost of the surgery, so she declined the appointment and waited for surgery in the public system despite ongoing pain.

82. On March 27, 2008, counsel for the Petitioners wrote to the Chair of the Commission on behalf of Ms. Welch and the BCNU, copying the Minister, to explain Ms. Welch's circumstances, state that Ms. Welch's experience disclosed breaches of the MPA, and to request that the Commission investigate the circumstances of Dr. Chan's practice and ensure that the Commission was not rendering payments improperly to doctors at the FCSC. Counsel for the Petitioners also requested that the Commission ensure that Ms. Welch be reimbursed for the illegal charges.

83. On May 13, 2008, counsel for the Commission replied and stated that the Commission would be contacting Dr. Chan and the FCSC in regards to Ms. Welch's circumstances.

84. On June 19, 2008, counsel for the Petitioners wrote to counsel for the Commission and requested an update on the status of the investigation.

85. Neither counsel for the Petitioners nor Ms. Welch have received further communication from the Commission or the Commission's counsel regarding the investigation.

Facts specific to Barry Penner

86. On or about May 2004, MLA Barry Penner acknowledged publicly that he paid a facility fee to receive a medically necessary procedure.

87. The Minister took the position that such a facility fee is not contrary to the MPA.

Facts regarding media reports and the Urgent Care Centre

88. Extensive reports are routinely published in the media in BC and nationally detailing wide-spread and pervasive breaches of *inter alia* section 17 of the MPA.

89. For example, extensive reports were published in November and December 2006 about the opening of the Urgent Care Centre in Vancouver by Dr. Mark Godley. Dr. Godley is also the director of the FCSC. Descriptions of the operations of the Urgent Care Centre indicated its operations, at that time, would be in contravention of the MPA.

90. Reacting to the opening of the Urgent Care Centre, the Minister stated that no facility in BC would be permitted to operate outside the bounds of provincial legislation.

Facts specific to Barbara Gosling

91. On or about May 2006 Dr. Neufeld referred Barbara Gosling to Dr. Brownlee for a consultation. Approximately 2 months passed and Ms. Gosling did not receive a response from Dr. Brownlee.

92. On or about July 2006, Ms. Gosling telephoned Dr. Brownlee and asked how soon she would be able to see him for a private consultation. Ms. Gosling's call was connected to another line and she discussed making a private appointment with Dr. Brownlee. Ms. Gosling was told an appointment would be available in a few months, for a fee. Ms. Gosling did not schedule a private appointment.

93. On or about late October 2006 Ms. Gosling received a notice from Dr. Brownlee's office advising that an appointment was scheduled for her for February 26, 2008.

94. On or about November 16, 2006, Terry Gosling, Ms. Gosling's husband, telephoned Dr. Brownlee's office and asked if Dr. Brownlee could see Ms. Gosling more quickly if she was prepared to pay. Dr. Brownlee's office provided Mr. Gosling with another telephone number to call.

95. On or about November 16, 2006, Mr. Gosling telephoned the other number provided and was advised that Ms. Gosling could see Dr. Brownlee within 2 to 3 weeks if she would pay a fee of $350. Mr. Gosling was further advised that the appointment would be during Dr. Brownlee's regular office hours at his regular office.

The Petitioners estimate that the application will take 5 days.

September 4, 2009
Dated

Petitioners' solicitor

No. S090663
Vancouver Registry

IN THE SUPREME COURT OF
BRITISH COLUMBIA

BETWEEN:

CAMBIE SURGERIES COPORATION

PLAINTIFF

AND:

MEDICAL SERVICES COMMISSION
et al

DEFENDANTS

AND:

SPECIALIST REFERRAL CLINIC
(VANCOUVER) INC.

DEFENDANTS BY WAY OF COUNTERCLAIM

AFFIDAVIT

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