IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Canadian Independent Medical Clinics Association v. British Columbia (Medical Services Commission),* 2010 BCSC 927

Date: 20100702
Docket: S090663
Registry: Vancouver

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

Before: The Honourable Madam Justice Lynn Smith

Reasons for Judgment

Counsel for Plaintiffs: I.G. Nathanson, Q.C. and M.R.V. Storrow, Q.C.

Counsel for Defendants: J.G. Penner

Counsel for Defendant by Counterclaim:	M.K. Kinch
Counsel for Intervenors:	A.M. Latimer
Counsel for the Applicants:	M. Brown and J. Mistry
Place and Date of Hearing:	Vancouver, B.C. May 25, 2010
Place and Date of Judgment:	Vancouver, B.C. July 2, 2010

[1] Mariël Schooff, Daphne Lang, Joyce Hamer, Myrna Allison and Carol Welch (the "individual applicants") apply to be added as defendants to these proceedings or, in the alternative, as intervenors. The British Columbia Nurses' Union ("BCNU") applies to be added as an intervenor.

History of the proceedings

[2] The history of these proceedings is, briefly, as follows.

[3] The individual applicants filed a petition on December 4, 2008 seeking to require the Medical Services Commission and the British Columbia government to enforce the *Medicare Protection Act*, R.S.B.C. 1996, c. 286 [*MPA*], with respect to its restrictions on the private billing of fees for medical services in the Province. They argue that their *Charter* rights, statutory legal rights, and financial interests have been infringed.

[4] The affidavits the individual applicants filed in support of their petition allege contraventions of the *MPA* in connection with their own experience as patients seeking or obtaining medical services from practitioners in British Columbia. Some, but not all, of those alleged contraventions involve services delivered at the plaintiff private clinics.

[5] In particular, Ms. Schooff deposes that she was billed $6,000 (for which she was not reimbursed) to have a procedure done by a physician who told her that he was the only one performing a particular procedure; otherwise, she would have to wait for up to five years before he could see her in the public system. Ms. Hamer says that she paid $4,750 in total for an MRI and surgery on her knees, to remedy a debilitating knee condition; she did receive a refund of her private billing payment. Ms. Lang in her affidavit swears that she paid $160 for medical care constituting a benefit under the *MPA* and was not reimbursed. Ms. Allison's evidence is that she was told she would be required to pay $80 for a consultation, between $175 and $600 for a biopsy, and $375 for sedation through the private clinic route, but she

obtained the biopsy through another physician without paying private billing fees. Ms. Welch deposes that she paid $450 for a consultation with a physician and was told she would be required to pay $5,000 for surgery at the False Creek Surgical Centre ("FCSC"), which she could not afford; she has not been reimbursed for the private billing she paid.

[6] The individual applicants claim that, despite their efforts, the Medical Services Commission and the British Columbia government left these contraventions of the *MPA* unenforced and uninvestigated, leading to their attempt to obtain a court order for enforcement through their petition.

[7] Previously, an attempt by the BCNU to bring the same claim forward had been struck. BCNU was found not qualified for public interest standing because the case could better be brought forward by individual patients: *British Columbia Nurses' Union v. British Columbia (Attorney General)*, 2008 BCSC 321, 82 B.C.L.R. (4th) 343. In that case, Kelleher J. stated at para. 44:

> In this case, the petitioner argues that the Commission has failed to perform a statutory duty imposed by the *Medicare Protection Act*, namely to ensure that physicians who impose a user charge are not also paid for procedures performed under the *Act*. 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. Medical practitioners may also be directly affected by the Commission's failure to perform its statutory duty. As set out in *Canadian Council of Churches* and *Canadian Bar Association*, those private litigants who are directly affected by the Commission's actions are in a better position to initiate a lawsuit. In making decisions, the court benefits from a clear and concrete factual underpinning. A private litigant who is directly affected by proposed litigation can raise arguments and provide a more precise factual scenario than a public interest litigant. In evaluating whether to grant public interest standing, it is important to ensure that the views of public litigants do not displace the views of private litigants.

[8] On January 28, 2009, the applicants Mariël Schooff and Carol Welch commenced a class action, proceeding on their own behalf and in a representative capacity, seeking damages for what they say are unlawful charges levied against

them by various private clinics operating in British Columbia. The writ in that action has been filed but not yet served, and the class action has not been certified by the Court.

[9] Also on January 28, 2009, the plaintiffs (an association of private medical clinics and a number of private medical clinics operating in British Columbia) filed their writ and statement of claim in this action (the "CIMCA action"). In it they seek declarations that ss. 14, 17, 18 and 45 of the *MPA* are unconstitutional. Those sections restrict the ability of physicians and facilities to charge fees directly to patients for medical services in British Columbia. The allegation of unconstitutionality is based upon unjustifiable infringements of the rights to life, liberty and security of the person guaranteed under s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

[10] On May 14, 2009, Pitfield J. granted party status to two of the plaintiffs (Cambie Surgeries Corporation ("Cambie") and FCSC) as respondents in the petition.

[11] On August 14, 2009, the plaintiffs filed a Notice of Constitutional Question raising the constitutional validity of the *MPA* in this action, and filed the same Notice of Constitutional Question in the petition.

[12] After hearing submissions from the parties, as case management Judge for the action and the petition, I decided (*Schooff v. Medical Services Commission*, 2009 BCSC 1596) that the constitutional issues raised in both the petition and the CIMCA action should be determined in the CIMCA action. I ordered that the petition be stayed until the constitutionality of the *MPA* had been determined. In staying the petition, I invited submissions from the petitioners if they wished to be added as parties or intervenors in the CIMCA action.

[13] The plaintiffs oppose the addition of the individual applicants as parties, but do not oppose their involvement as intervenors. The plaintiffs oppose the BCNU's

application to be added as an intervenor. The Specialist Referral Clinic (defendant by counterclaim) takes the same position as do the plaintiffs. The defendants (Medical Services Commission of British Columbia, Minister of Health Services of British Columbia and Attorney General of British Columbia) take no position on the applications. The existing intervenors take no position on the applications.

The individual applicants

[14] The individual applicants submit that they have a direct interest in this action. They say that their interest is a "mirror image" of Cambie's and FCSC's direct interest in the petition (recognized by the addition of Cambie and FCSC as parties to that petition). They say that they assert the rights of patients to access adequate and timely medical care, and that their direct interest could suffer irreparable harm if they are denied party status and the Court decides the constitutional issue in favour of the plaintiffs. Their petition, in which the private clinics raised the exact same constitutional issue, has been stayed. Their position is that in these circumstance, their legal rights would be denied without their having had the opportunity to lead evidence or make submissions, and they would have no right of appeal. Thus, the applicants say, justice requires that they be parties rather than intervenors.

[15] Ms. Brown for the individual applicants submits that it is just and convenient to add them as parties because to do so will not compromise the efficiency or expediency of the litigation. She further submits that their inclusion as parties will significantly add to the factual underpinning needed by the Court to adjudicate the *Charter* issues. She points to evidence that the individual applicants have been involved for years in attempts to persuade the government to enforce the *MPA* and that they have gathered an important, precise record that would be of great value in the litigation.

[16] Counsel for the individual applicants notes that the plaintiffs, all incorporated entities offering, in one way or another, medical services on a private basis, are not asserting rights as service providers or as physicians; instead, they are purporting to assert the rights of patients. The individual applicants say that they, as "actual

patients", should be able to assert the rights of patients, adduce evidence and make submissions in this matter.

[17] In the alternative, the individual applicants seek to be added as intervenors with the right to cross-examine on affidavits, submit evidence, receive copies of all pleadings and documents exchanged or produced by the parties, and make written and oral submissions at the hearing. They say that their claim for intervenor status is on a much different level than the application previously brought by the existing intervenors (see *Schooff v. Medical Services Commission*), and that it would be an abuse of the Court's process to allow a proceeding that is determinative of their legal rights without enabling them to fully participate. They point to their collaborative work with the other defendants to ensure there is no duplication or undue time or expense incurred, and argue that they are not strangers to the litigation, having launched the first proceeding in which these issues were raised.

[18] The position of the plaintiffs is that the individual applicants are no more affected by the constitutional issues at stake in the action than are any other citizens, or any other persons who have at some time obtained private medical care in British Columbia. Mr. Nathanson for the plaintiffs submits that the application is not a mirror image of his clients' application to be joined as parties to the petition. He notes that if the petition is successful, the government will be compelled to take action against the private clinics, which were specifically named, giving them a direct interest in the outcome of the proceeding.

[19] The plaintiffs question the individual applicants' claim that they will suffer irreparable harm if they are not added as parties. Mr. Nathanson points to the history of the individual applicants' position regarding the constitutional issue. The individual applicants, for a significant period of time, opposed the *Charter* issue being raised in their petition because they did not wish unnecessarily to become embroiled in the constitutional battle. Further, until fairly recently, their position was that they wished to be added as intervenors rather than as parties to this action.

[20] Ms. Brown, in response to this submission, acknowledged that the individual applicants have changed their position in light of the progress of the litigation and upon further reflection, and noted that the current application is the only one that they have brought regarding their status in this action.

[21] The plaintiffs' position is that there is no basis for an expanded scope of involvement for the applicants as intervenors and (as I understand it) that they should be permitted to intervene on the same basis as the existing group of intervenors (who will have no rights of discovery but will be permitted to make submissions and, possibly, to lead evidence depending upon the completeness of the evidentiary record put forward by the parties).

[22] Counsel for the Specialist Referral Clinic, the defendant by counterclaim, submitted that the privacy interests of patients of the private clinics should not be overlooked, and argued that if the applicants are joined as intervenors, it should not be on the terms they seek, in particular with respect to obtaining access to all pleadings and documents. Ms. Kinch referred to cases affirming the *Charter* value of privacy in the context of medical interventions: *R. v. Dersch*, [1993] 3 S.C.R. 768, 85 C.C.C. (3d) 1; *R. v. Dyment*, [1988] 2 S.C.R. 417, 55 D.L.R. (4th) 503. She submitted that there would be great difficulty with document disclosure if the order were made in the terms sought by the individual applicants.

[23] The governing rule with respect to joinder of parties is Rule 15(5)(a) of the *Supreme Court Rules*, which states:

> 15(5)(a) At any stage of a proceeding, the court on application by any person may
>
> (i) order that a party, who is not or has ceased to be a proper or necessary party, cease to be a party,
>
> (ii) order that a person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon, be added or substituted as a party, and

> (iii) order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected
>
> (A) with any relief claimed in the proceeding, or
>
> (B) with the subject matter of the proceeding,
>
> which in the opinion of the court it would be just and convenient to determine as between the person and that party.

[24] The discretion provided by Rule 15(5)(a) is to be exercised pursuant to the principles established in the jurisprudence, notably, that the addition of a party requires that the aspiring party have a direct interest in the outcome of the particular action between the particular parties: *Canadian Labour Congress v. Bhindi* (1985), 61 B.C.L.R. 85 at 94, 17 D.L.R. (4th) 193 (C.A.) [*Bhindi*].

[25] In *Bhindi*, the Canadian Labour Congress sought to be added as a party to litigation involving the constitutionality of s. 9 of the *Labour Code*, R.S.B.C. 1979, c. 212, which permitted "closed shop" agreements between employers and trade unions. The Court of Appeal denied the application but held that the Supreme Court of British Columbia has inherent jurisdiction to permit interventions, and that the applicant should be granted intervenor status so that the constitutional issues raised in the proceedings would be decided with the benefit of a full record.

[26] Anderson J.A. wrote at p. 94:

> ... In my opinion, Rule 15 of the Supreme Court Rules is not applicable to the case on appeal. It 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. It is conceded that the appellant has no direct interest in the outcome of the particular action between the particular parties in this case. Rule 15 reads in part as follows:
>
> Removing, adding or substituting party
>
> (5)(a) At any stage of a proceeding the court on application by any person may
>
> . . .

> order that a person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon, be added or substituted as a party ...
>
> It seems to me that under that rule a "party" can only be added where it "is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon ...". See *Enterprise Realty Ltd. v. Barnes Lake Cattle Co. Ltd. (supra)*. The appellant is unable to show that if it is not added as a "party" that "all matters in the proceeding cannot be effectually adjudicated upon".
>
> [Emphasis added]

[27] More recently, in *Kitimat (District) v. Alcan Inc.*, 2006 BCCA 562, 61 B.C.L.R. (4th) 295, the Court of Appeal again addressed the scope of Rule 15(5)(a). In that case, the District of Kitimat and the District's mayor had brought a petition seeking orders that instruments regulating Alcan Inc. and its hydroelectric generation at Kemano, British Columbia were *ultra vires*. The Chambers Judge had held that Alcan should be added as an intervenor but not as a party, and that Alcan's participation as an intervenor would satisfy the interests of justice.

[28] The Court of Appeal overturned that decision, holding that Alcan had a direct interest in the litigation. It said that Alcan ought to have been joined as a party respondent and that Alcan and Kitimat had an issue between them relating to both the relief claimed in the proceeding and the subject matter of the proceeding.

[29] Saunders J.A. discussed some of the history of the Rule at para. 24:

> ... Rule 15 derives from the common law on the proper party to an action. The identity of parties required to be joined in litigation differed in the courts of law (which required joinder of those having conflicting interests), and the courts of equity (which required joinder of all persons materially interested in the subject of the suit): see Frederic Calvert, *A Treatise Upon the Law Respecting Parties to Suits in Equity*, 2nd ed., London: W. Benning, 1847; Joseph Story, *Commentaries on Equity Pleadings*, 8th ed., Boston: Little, Brown and Company, 1870; and John Sidney Smith, *The Practice of the Court of Chancery*, 6th ed., London: William Maxwell, 1857. The discussion in Calvert centred on two different formulations of the test for joining a person as a party, that the person had a material interest in the subject matter of the dispute, and that the person had a material interest in the object of the dispute. I consider that Story captures the elusive character of a firm rule in a passage at s. 76c that is equally apt to interpretation of our *Rules of Court*:

> The truth is, that the general rule in relation to parties, does not seem to be founded on any positive and uniform principle; and therefore it does not admit of being expounded by the application of any universal theorem, as a test. It is a rule founded partly in artificial reasoning, partly in considerations of convenience, partly in the solicitude of courts of equity to suppress multifarious litigation, and partly in the dictate of natural justice, that the rights of persons ought not to be affected in any suit, without giving them an opportunity to defend them. Whether, therefore, the common formulary be adopted, that all persons materially interested in the suit, or in the subject of the suit, ought to be made parties, or that all persons materially interested in the object of the suit, ought to be made parties, we express but a general truth in the application of the doctrine, which is useful and valuable, indeed as a practical guide, but is still open to exceptions, and qualifications, and limitations, the nature and extent and application of which are not, and cannot, independently of judicial decision, be always clearly defined.

[Footnotes omitted; emphasis added.]

[30] Addressing the issues in the case before it, the Court said at paras. 32-38:

> [With reference to Rule 15(5)(a)(ii)] In this case it is difficult to see how a binding order can be made in the terms sought in the petition, limiting the instruments held by Alcan, without its participation. That its direct interests might be affected by the granting of the relief sought is apparent from the terms of the petition. In my view, on the authority of *Morishita,* Alcan was a necessary party for a full determination of the issues, including at the appellate level, and thus Alcan is one who "ought to have been joined as a party".
>
> Likewise Alcan, in my view, was entitled to be joined under Rule 15(5)(a)(iii) ...
>
> ...
>
> Rule 15(5)(a)(iii) applies where there may be between the party seeking to be added and any party to the litigation, a question or issue related to "relief claimed in the proceeding" or "the subject matter of the proceeding". That is, Rule 15(5)(a)(iii) encompasses both tests referred to by Calvert, an interest in the object and an interest in the subject of the litigation, such that either is sufficient to require joinder, provided it is just and convenient to determine the question or issue between that party and one already joined in the proceeding.
>
> 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.
>
> [Emphasis added.]

[31] At para. 45, the Court distinguished between the positions of parties and intervenors:

> ... 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. ...

[32] With respect to the contention that Alcan could not be added as a party because there was no cause of action between itself and one of the parties, the Court of Appeal stated at paras. 33-34:

> ...The chambers judge, relying upon *Paramount Drilling and Blasting Ltd. v. North Pacific Roadbuilders Ltd.* (2005), 43 B.C.L.R. (4th) 101 (C.A.), said that Rule 15(5)a)(iii) required Alcan to have a cause of action between itself and one of the parties. Citing the earlier decision in which Alcan had the District's action dismissed, and referring to the common position of Alcan and the Province, the chambers judge held that the necessary cause of action was not present.
>
> With respect, the chambers judge's view of *Paramount* over-reads that decision, which, in turn relied upon *Robson Bulldozing Ltd. v. Royal Bank of*

> *Canada* (1985), 62 B.C.L.R. 267 (S.C.). Both cases involved an action. In contrast, this proceeding is a petition for judicial review which takes as its foundation the prerogative writs where, by definition, there is no cause of action between any of the parties. That analysis is not relevant to a judicial review proceeding.

[33] With respect to the distinction drawn in *Kitimat* between the addition of parties to petitions, and the addition of parties to actions, I observe that the application before me is for the addition of a party to an action (where the Court of Appeal decision in *Kitimat* suggests that the existence of a cause of action between the applicants and the existing parties may be a relevant consideration). However, there is no suggestion that the individual applicants assert a cause of action against the plaintiffs in this action, or that the plaintiffs assert any cause of action against the individual applicants.

[34] In *Ipsos S.A. v. Angus Reid*, 2005 BCSC 1114, 16 C.P.C. (6th) 262, Wedge J. allowed an application brought by the plaintiff to join a defendant, finding that there were issues between the plaintiff and the proposed defendant relating to the subject matter of the proceedings and the remedies sought, and that it would be just and convenient to add the party. She commented (at para. 107) that the court's discretion to add or substitute parties should be exercised generously to allow the effective determination of the issues without delay, inconvenience or separate trials. I note that the application was by the plaintiff to join the new defendant because the plaintiff wished to seek relief against that defendant. It was not an application by a volunteer defendant against which no relief was sought by the plaintiff.

[35] In a case under the Ontario Rules, *CanWest Media Works Inc. v. Canada (Attorney General)*, [2006] O.J. No. 4403 (Sup. Ct. J.), Lax J. permitted an *ad hoc* coalition of groups and one individual to have party status in a *Charter* challenge to the statutory prohibition on direct-to-consumer advertising of prescription drugs. However, the Ontario *Rules of Civil Procedure*, in Rule 13.01, contemplate the addition of party intervenors, while the British Columbia Rules do not.

[36] The individual applicants also drew to my attention *B.C. Fisheries Survival Coalition v. Canada*, [1999] B.C.J. No. 660, 1999 CarswellBC 572 (S.C.) [*B.C. Fisheries*]. The direct interest of the Nisga'a Tribal Council in the litigation was described by Williamson J. at paras. 5 and 10 of *B.C. Fisheries*:

> The applicants submit that the issuing of any of the declarations sought would have a "catastrophic" effect upon the Nisga'a Nation, effectively wiping out an effort the affidavit evidence discloses commenced 109 years ago, including the last 20 years of negotiation. They submit they ought to have been added as defendants in the first place, and that serious questions or issues exist between them and the defendants, questions relating to or connected with both the relief claimed and the subject matter of the proceeding.
>
> ...
>
> Applying that reasoning to the facts in the case at bar, I conclude that the Nisga'a Tribal Council has a direct interest itself in the relief claimed. Unlike the B.C. Federation of Labour, a federation of a number of trade unions some of whom might have had a direct interest in the proceedings, should the plaintiffs in this case succeed the Nisga'a will be affected themselves by the "precise outcome between the parties". This is a "direct interest". The Nisga'a Final Agreement will either be rendered void immediately, or will be subject to the vicissitudes of the amending formula set out in Part V of the Constitution Act, 1982. If not catastrophic, the impact would be significant and would extend to most if not all aspects of the daily life of members of the Nisga'a Nation. I conclude it would be just and convenient to determine this issue in this proceeding.

[37] In *B.C. Citizens First Society v. British Columbia (Attorney General)*, 1999 CarswellBC 583 (S.C.), the Nisga'a Tribal Council and Joseph Gosnell Sr. had sought to be added as defendants in the action, where the plaintiffs sought a declaration that the proposed agreement between the Crown in Right of Canada, the Crown in Right of B.C., and the Nisga'a Nation violated *The Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, and the *Charter*. Williamson J. held that the Nisga'a Tribal Council could be added as a defendant, but Joseph Gosnell Sr. could not. He stated that the Nisga'a Tribal Council's "direct interest...in the precise outcome of this case is arguably greater [than] it is in *B.C. Fisheries Survival Coalition*, because in this proceeding the plaintiffs seek, among other things, an injunction enjoining the Crown from transferring assets to the

Nisga'a" (para. 5). Thus, financial as well as fundamentally important legal interests of the Nisga'a Tribal Council were engaged.

[38] In *Criminal Code of Canada (Re)*, 2010 BCSC 517, Bauman C.J.B.C. denied the application for party status of an individual who was potentially affected by the outcome of the reference proceeding, but did not have a direct interest in it.

[39] The case upon which the individual applicants placed the most reliance is *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, 2008 BCSC 1599 [*BCTF*], where in some respects the facts were quite similar to those before me. The individual applicants argue that their interest in the issues at stake in this litigation is analogous, indeed identical, to the interest of the applicants in the *BCTF* case.

[40] The applicants for party status in *BCTF* were members of trade unions. Those unions had brought a constitutional challenge to the restriction of third party election advertising under the *Election Act*, R.S.B.C. 1996, c. 106. In addition, one individual plaintiff was a member of the same trade union as one of the applicants. The applicants' position, contrary to that of the plaintiffs, was that the impugned legislation was constitutional. Cole J. held that the applicants had a direct interest in the matter and granted their application to be joined as parties, stating at paras. 19-21:

> 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. ...

[41] The decision to add a party is a matter of discretion under Rule 15(5)(a). The Court in *BCTF* exercised its discretion to add the applicants as parties, taking into account the governing principles and all of the circumstances there. One of those circumstances was that the applicants stood to lose the benefit of a restriction on the use of their union dues. Another circumstance was that one of the plaintiffs was an individual who was a fellow member of the same trade union as that of an applicant. That individual plaintiff would be asserting the position of members of the union, and Cole J. commented at para. 20:

> I consider the interests of the applicants in the outcome of the litigation to be no less than those of the individual plaintiff, Ms. Toms. They have the same entitlement to participate in the litigation in order to ensure that their individual rights as union members, albeit dissenting ones, are as fully considered as those of Ms. Toms.

[42] Both of those circumstances distinguish that case from this one.

[43] I find that in the circumstances of this case, the individual applicants do not have a direct interest in the outcome of the particular action between the particular parties, as is required. I find that they do not meet the conditions described in Rule 15(5)(a)(ii) or (iii), as they are not persons who ought to have been joined as parties or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon.

[44] In exercising my discretion to refuse the addition of the individual applicants as parties, I also take into account the following, without suggesting that any of these factors is in itself a “test”:

(1) This is an application opposed by the plaintiffs, who have a legitimate interest in limiting the bounds of the litigation. The addition of the individual applicants as parties, with full rights of discovery, could add to the complexity and expense of the litigation.

(2) There is no cause of action asserted against the individual applicants by the plaintiffs, or a cause of action asserted by them against the plaintiffs in this proceeding.

(3) The individual applicants are in no different position than any other persons who have received medical services from private facilities in British Columbia. If they are proper parties, then anyone in that position might also be a proper party.

[45] The individual applicants' application for party status is dismissed.

[46] However, the individual applicants have a strong case to be included as intervenors.

[47] The question is, as stated in *Gehring v. Chevron Canada Limited*, 2007 BCCA 557, 75 B.C.L.R. (4th) 36 at paras. 6-7, whether the individual applicants have a direct interest in the litigation, can make a valuable contribution or bring a different perspective to a consideration of the issues.

[48] Their perspective on the issues, as patients who have had involvement with privately delivered health care and who support the constitutionality of the *MPA*, will not otherwise be brought before the Court. I think they can make a valuable contribution and I will grant their application for intervenor status.

[49] As for the terms upon which the individual applicants are permitted to intervene, I have concluded that they should be permitted to submit evidence as well as legal argument in this proceeding. This is for two reasons. First, it appears that they will be able to bring forward evidence that would enhance the evidentiary record. Second, if their petition had not been stayed, they would have been able to lead such evidence in that proceeding. Their submissions of evidence and legal argument will be in a form and with such limits as are determined at a later stage.

[50] The individual applicants may apply to participate in cross-examination on affidavits, if such cross-examination is ordered. They will receive copies of all pleadings, lists of documents and submissions.

[51] I decline to permit the individual applicants rights of discovery. I also decline to order that they receive all documents produced by the parties. They will have liberty to apply, at a later stage, for access to specific documents listed by the parties.

The BCNU

[52] The BCNU's position is that it has a strong "public interest" in the action, that it could make a contribution to the evidentiary record, and that it should be permitted to intervene on the same basis as the individual applicants.

[53] The plaintiffs and the defendant by counterclaim oppose the BCNU application. Counsel for the plaintiffs points out that the BCNU is a member of the BC Friends of Medicare Society (known as the BC Health Coalition, or "BCHC"), one of the existing intervenors. In addition, it appears that one or more of the individual applicants are members of the BCNU. The individual applicants and the BCNU are represented by the same counsel.

[54] In these circumstances, I am not persuaded that the addition of the BCNU as an intervenor would bring a different perspective before the Court. The BCNU may be able to make a valuable contribution, but it must do so either through its membership in the BCHC, or through its support for those individual applicants who are BCNU members. The application by BCNU for intervenor status is dismissed.

"Lynn Smith J."