



No. S090663
Vancouver Registry

BETWEEN:

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

PLAINTIFFS

AND:

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

DEFENDANTS

AND:

SPECIALIST REFERRAL CLINIC (VANCOUVER) INC.

DEFENDANT BY COUNTERCLAIM

AND:

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

INTERVENORS

NOTICE OF APPLICATION

Name of Applicant: British Columbia Anesthesiologists' Society

To: The Plaintiff, CAMBIE SURGERIES CORPORATION and the Plaintiff's Solicitors

81
910

And To: The Plaintiffs, CHRIS CHIAVATTI by his litigation guardian RITA CHIAVATTI, MANDY MARTENS, KRYSTIANA CORRADO by her litigation guardian ANTONIO CORRADO and ERMA KRAHN and their Solicitors

And To: The Defendants, MEDICAL SERVICES COMMISSION OF BRITISH COLUMBIA, MINISTER OF HEALTH SERVICES OF BRITISH COLUMBIA, and ATTORNEY GENERAL OF BRITISH COLUMBIA and their Solicitors

And To: The Defendant by CounterClaim, SPECIALIST REFERRAL CLINIC (VANCOUVER) INC., and their Solicitors

And To: The Intervenors, DUNCAN ETCHES, GLYN TOWNSON, THOMAS MACGREGOR, THE BRITISH COLUMBIA FRIENDS OF MEDICARE SOCIETY, CANADIAN DOCTORS FOR MEDICARE, MARIËL SCHOOFF, DAPHNE LANG, JOYCE HAMER, MYRNA ALLISON, and CAROL WELCH and their Solicitors

TAKE NOTICE that an application will be made by the applicant(s) to the presiding judge or master at the courthouse at 800 Smithe Street, Vancouver, British Columbia, on **Friday, September 28, 2012 at 9:45 a.m.** for the order(s) set out in Part 1 below.

Part 1: ORDER(S) SOUGHT

An Order the Applicant, British Columbia Anesthesiologists' Society, be granted intervenor status in this proceeding;

Direction the intervenor added pursuant to this order:

- a. shall receive copies of all pleadings, lists of documents and submissions, with liberty to apply for access to specific documents listed;
- b. may participate in any cross-examinations on affidavits;
- c. may submit evidence at the trial or summary trial of this action which will include the right to examine and cross-examine witnesses; and
- d. may submit oral and written submissions to the Court at the trial or summary trial of this action; and

An Order the Applicant British Columbia Anesthesiologists' Society will not be subject to any order of costs and shall not be entitled to any costs.

Part 2: FACTUAL BASIS

Application for Intervenor Status by BCAS

1. The Applicant, British Columbia Anesthesiologists' Society (the "BCAS"), is a voluntary organization representing the interests of anesthesiologists in British Columbia. [Affidavit of Dr. Roland Orfaly #1 (the "Affidavit"), paras 1, 11-12]

Representative of BCAS – Executive Director, Dr. Roland Orfaly

2. Dr. Roland Orfaly, the Affiant, is the Executive Director and representative of the Applicant BCAS. [Affidavit, paras 1, 11-14]

Proceedings concern important public law issues – Constitutional validity of Public Health Care in British Columbia

3. This proceeding concerns the Constitutional validity of the *Medicare Protection Act*, RSBC 1996, c. 286 which restrict the ability of physicians and facilities to charge fees to patients for medical services in British Columbia. At issue is the Constitutional validity of public health care in British Columbia.
4. The proceeding concerns public law issues which have important implications for the functioning of the public health care system in British Columbia – and indeed for all of Canada.

Background and qualifications of Applicant Intervenor

Dr. Orfaly – Anesthesiologist with background expertise and special perspective

5. Dr. Roland Orfaly is a licensed physician and specialist in anesthesiology who has practiced in British Columbia as a physician for over 14 years and as a specialist anesthesiologist for 11 years. [Affidavit, paras 2-4]
6. Anesthesiologists are closely involved in virtually every patient undergoing surgery, in every surgical subspecialty, throughout the province. The Anesthesiologist's medical involvement begins with pre-operative assessment and medical preparation of patients waiting for surgery, through surgery, and extends after surgery into the recovery period and beyond. Anesthesiologists are also involved in other facets of medical care including obstetric analgesia (child birth), non-surgical programs (including intensive care units, emergency, interventional radiology, cardiology procedures, MRIs to psychiatry anesthesia) [Affidavit, paras 5-8].
7. As an anesthesiologist involved in practically every surgery in British Columbia, the Applicant has special perspective and information concerning central issues in this

proceeding. Anesthesiologists would assist the Court by contributing to the evidentiary record. Anesthesiologists have a special and unique perspective to offer the Court. [Affidavit, paras 9-10]

8. As medical practitioners, anesthesiologists have an inherent interest and are directly impacted by the issues in these proceedings. [Affidavit, paras 10, 25]

BCAS – Anesthesiologists’ organization having further special expertise and perspective within public health structure

9. As noted above, the BCAS is the voluntary organization for anesthesiologists in British Columbia. [Affidavit, paras 1, 11-12]
10. As the voluntary organization for anesthesiologists, BCAS representatives are involved in roles related to the wider functioning of the public health system. As participant in the clinical and administrative parts of the public health system in British Columbia, the BCAS and the Affiant have experience and perspective on wider issues related to the delivery of health care in the province. [Affidavit, paras 13-17]
11. The Intervenor Applicant has knowledge relevant to these proceedings including manipulation of administrative data; evidence concerning surgical wait times, administrative inefficiency; evidence of the rationing of surgery; failure to address collaborative recommendations, etc. [Affidavit, paras 18-26]
12. As the BCAS Executive Director, the Affiant brings a further expertise and perspective on issues central to the proceeding which would be of great assistance to the Court addressing the complex issues raised in this important constitutional case.

Other Intervenors provide perspective supporting status quo

13. This Court has granted intervenor status to the following parties, who will provide perspective evidence as patients and general physicians generally in support of the status quo:

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

Intervenor Applicant will provide important information and expertise to Court for important public issue

14. The Intervenor Applicant, BCAS, is non-aligned and does not have an official position concerning the remedy sought by the Plaintiffs in this proceeding. [Affidavit, para 26-27]
15. The BCAS seeks intervenor status to provide important factual information and perspective to the Court. [Affidavit, paras 27-28]
16. The Intervenor Applicant has important and specialized knowledge that would assist the Court in addressing the important public issues raised in this proceeding.
17. The Intervenor Applicant will provide expertise and information not otherwise represented through the existing parties concerning central issues in the proceeding.

Part 3: LEGAL BASIS

Law concerning intervenor status

18. The Court has inherent jurisdiction to grant intervenor status to the applicant and to fix the terms of his intervention. *International Forest Products Ltd. V Kern*, 2000 BCSC 1087, per Pitfield J. at para. 20; *Canadian Labour Congress v Bhindi et al* (1985), 61 B.C.L.R. 85 (C.A.).
19. In *Squamish (District) v. Great Pacific Pumice Inc.*, 2001 BCSC 406, Oppal J. (as he then was) stated at para. 13:
 13. *It is safe to say that courts have generally taken a liberal position in permitting applicants to intervene. The reason is that often intervenors are able, in the public interest, to bring relevant issues and perspectives to the proceedings.*
20. Intervention is more likely to be permitted in proceedings concerned with issues of public law rather than private law. *International Forest Products Ltd. v Kern*, supra, per Pitfield J. at para. 20, citing *MacMillan Bloedel Ltd. v Mullin et al* (1985), 66 B.C.L.R. 207 (C.A.) at page 210 and *Guadagni v B.C. (W.C.B. of B.C.)* (1988), 30 B.C.L.R. (2d) 259 (C.A.) at 263.
21. Intervenor status may be granted where the issues before the court are public law issues which have a dimension that legitimately engages the interests of the applicant

and those represented and the applicant possesses a particular point of view or perspective which may assist the Court in the resolution of the issues.

Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Minister of Agriculture and Lands), 2011 BCCA 294, per Hinkson J.A. at para 19; *International Forest Products Ltd. v. Kern*, supra at paras 19 and 20; *MacMillan Bloedel v Mullien et al*, supra per Esson J.A. (as he then was) at paras 7 and 8; *Friedman v MacGarvie*, 2012 BCCA 109, per Bennett J.A. at para. 27.

22. Paul R. Muldoon, *Law of Intervention, Status and Practice*, Canada Law Books, states at pp. 7-8;

Rather than seeking the determination of private rights, a public law action concerns issues of public policy (such as constitutional challenges or grievances with respect to the operation of statutory or administrative policies). ...

... When the notion of public interest litigation is recognized, the concept of intervention takes on a slightly more expanded and, indeed, vital role. Because public law actions do affect those beyond the immediate parties to the action, intervention plays a crucial role in providing a means for individuals, groups, associations, corporate entities and the like, to have their positions heard and for the courts to have as complete and full a record on the matter as possible.

“Public interest intervention” can be described as intervention by strangers seeking to have some point of view heard, to bring to light how the decision will impact on the public, or some segment of the public, or to reveal the consequences and implications of the decision.

And at pp. 64-65:

These constituencies can be diverse – professional associations, private and public interest groups, ratepayer groups, and even individuals sincerely concerned with the operation of public policy or the development of legal doctrine. Not only is the nature of intervenors varied and diverse, but so is the range of proceedings where applications for intervention may occur. They may occur in an obvious case of public importance such as a constitutional challenge to a particular law or a judicial review of an administrative practice.

23. Intervenor status may be granted where the applicant can provide the Court with a helpful sense of the broader implications that its decision on this issue may have.

Western Industrial Clay Products Ltd. v Keeping, [1997] B.C.J. No. 42, 86 B.C.A.C. 50 (C.A.), per Newbury J.A. at para 6.

6.... *The Court in this case will be concerned not with a private contract between parties but with the construction of Crown grants at a certain period of time. As Mr. Zivot notes, the determination may affect grantees of other materials and may affect other parties who have grants of land in the Railway Belt. It may very well be helpful to this Court to have an idea of the broader implications of any decision it may make. By the same token, I am not persuaded that the granting of intervenor status to the Mining Association will unduly expand or complicate the appeal. As I understand it, The Association does not propose to raise new issues or to "hijack" the appeal as it has been framed by the parties.*

24. The applicant does not have a disqualifying private interest in the outcome of the Petition. *International Forest Products Ltd. v Kern*, supra at paras 19 and 20.
25. Intervenors are not precluded from initiating issues that are clearly relevant and not new in the sense that they relate to the primary issues in the proceeding. *Squamish (District) v. Great Pacific Pumice Inc.*, supra at paras. 15-17.
26. See *In Reference Re Sections 32 and 34 of the Workers Compensation Act*, [1989] 2 S.C.R. 335, [1989] S.C.J. No. 113, where a private litigant with particular expertise and background relevant to the issues was granted intervenor status in the Supreme Court of Canada. Per Sopinka J. at para 12:

Useful and Different Submissions

12. *This criteria is easily satisfied by an applicant who has a history of involvement in the issue giving the applicant an expertise which can shed fresh light or provide new information on the matter. As stated by Brian Crane in Practice and Advocacy in the Supreme Court of British Columbia Continuing Legal Education Seminar, (1983), at p. 1.1.05: "an intervention is welcomed if the intervenor will provide the Court with fresh information or a fresh perspective on an important constitutional or public issue."*

27. Intervenor status will be granted where an applicant has particular expertise and knowledge that will help the Court address important public issues such as the Constitutional issues raised in this case: *Bhindi, Mullins and Canadian Mortgage and*

Housing Corp v Bracken Heights Cooperative Housing Co-operative Association
(1945) 39 CPC (3d) 347.

Law concerning intervenor status applied in this proceeding

28. This Court has acknowledged the important public issues raised by this same proceeding and applied the principles above in granting intervenor status for other persons and groups having important information and expertise.

29. In *Schooff v Medical Services Commission* 2009 BCSC 1596, the Court granted intervenor status to applicants including certain individual patients, physicians and two organizations supportive of the status quo (Canadian Doctors for Medicare and BC Friends of Medicare, also known as the BC Health Coalition). Allowing the applications for intervenor status, Justice Smith stated as follows:

[200] Turning to the question of intervention, there is no doubt that the applicants have a strong interest in the matters at stake in the litigation. They will be affected by the decision on the Constitutional issues, both as members of the public and as users or providers in the health care system...

[201] I do not find it necessary to know at this point what the proposed intervenor's legal arguments will be. The authorities do not support a specific requirement that they will advance a unique and different legal analysis, particularly at the trial level...

*[202] In British Columbia, applicants have been permitted to intervene at the trial level in instances where they could assist the Court by contributing to the evidentiary record, including cases involving important constitutional issues: *Bhindi, Mullins, and Canada Mortgage and Housing Corp v Bracken Heights Housing Cooperative Assn.* (1945) 39 CPC (3d) 347, 55 ACWS (3d) 727. However, limitations can be imposed on intervenors in the form of terms or conditions, as appropriate in each case, to ensure that the litigation is not taken away from the parties or delayed: *Bhindi, Comox-Stratcona, and College Institute Educators' Assn. v British Columbia*, 2002 BCSC 1480 (Canlii), 2002 BCSC 1480, 117 ACWS (3d) 399.*

[203] Thus, ultimately, 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.

[204] *The evidence shows that the positions of the applicants may well be different from those of the British Columbia Government and the Commission in some respects. I also note that Dr. Etches and Dr. Wollard bring the perspective of physicians who consider that the public health system is threatened by an increase in the proportion of privately delivered health care (a perspective not otherwise represented through the existing parties).*

[205] *There are important issues of constitutional law at stake, and they are not easy ones. There is a variety of perspectives about the delivery of health care, and about the constitutionality of measures such as those in the MPA. I am satisfied that the range of perspectives brought before the Court will be significantly more complete with the applicants than it would be without them.*

[206] *Finally, I conclude that potential adverse effects flowing from the participation of the intervenors can be mitigated through conditions imposed on their level or participation.*

[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 *BCTF v British Columbia (Attorney General)*, 2009 BCSC 436 (Canlii) 2009 BCSC 436, 94 BCLR (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.*

[210] *Accordingly, the application for intervenor status is granted on the conditions I have mentioned. I defer any ruling on costs until the conclusion of the trial.*

30. In *Canadian Independent Medical Clinics Association v British Columbia (Medical Services Commission)* 2010 BCSC 927, the Court considered intervenor status for

certain individual patients and the BC Nurses Union. Justice Smith granted intervenor status for the individual patients. Justice Smith stated as follows:

[46] ...[T]he 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 (Canlii), 2007 BCCA 557, 75 BCLR (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 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 late stage, for access to specific documents listed by the parties.

31. Justice Smith did not need to grant intervenor status for the BC Nurses Union, as individual patient intervenors were also BCNU members who were represented by the same counsel and it was also aligned with the intervenor BC Friends of Medicare Society.

32. The Applicant BCAS has valuable perspective and expertise on central issues of this proceeding that would be of assistance to the Court as intervenors.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit of Dr. Roland Orfaly dated September 19, 2012.
2. The pleadings and proceedings herein.
3. Such other materials as counsel may advise.

The applicant(s) estimate(s) that the application will take 30 to 60 minutes.

[Check the correct box.]

[] This matter is within the jurisdiction of a master.

[X] This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33,

(b) file the original of every affidavit, and of every other document, that

i. you intend to refer to at the hearing of this application, and

ii. has not already been filed in the proceeding, and

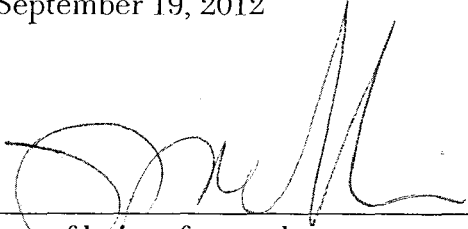
(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

i. a copy of the filed application response;

ii. a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

iii. if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date: September 19, 2012



Signature of lawyer for Applicant

Murray Tevlin

Tevlin Gleadle Employment Law
(Solicitor for British Columbia Anesthesiologists' Society)

To be completed by the court only:

Order made

- in the terms requested in paragraphs of Part 1 of this notice of application
- with the following variations and additional terms:

.....

.....

.....

Date:[dd/mmm/yyyy].....

Signature of Judge Master

Appendix

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

[Check the box(es) below for the application type(s) included in this application.]

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery

- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts

