No. S-090663
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CAMBIE SURGERIES CORPORATION, CHRIS CHIAVATTI by his litigation guardian RITA CHIAVATTI, MANDY MARTENS, KRYSTIANA CORRADO by her litigation guardian ANTONIO CORRADO and ERMA KRAHN, WALID KHALFALLAH by his litigation guardian DEBBIE WAITKUS, and SPECIALIST REFERRAL CLINIC (VANCOUVER INC.)

PLAINTIFFS

AND:

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

DEFENDANTS

AND:

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

INTERVENORS

APPLICATION RESPONSE

Application Response of: the Plaintiffs, Cambie Surgeries Corporation ("**Cambie**") and Specialist Referral Clinic (Vancouver) Inc. ("**SRC**"), (collectively, the "**Respondents**").

THIS IS A RESPONSE TO the Notice of Application of the Defendants, the Medical Services Commission of British Columbia (the "**MSC**"), the Minister of Health of British Columbia (the "**Minister**"), and the Attorney General of British Columbia (the "**AG**"), (collectively, the "**Applicants**" or the "**Defendants**"), filed September 20, 2013 (the "**Application**").

Part 1: ORDERS CONSENTED TO

The Application Respondents consent to the granting of NONE of the orders set out in the Part 1 of the Notice of the Application.

Part 2: ORDERS OPPOSED

The Application Respondents oppose the granting of ALL of the orders set out in Part 1 of the Notice of Application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Application Respondents take no position on the granting of NONE of the orders set out in Part 1 of the Notice of Application

Part 4: FACTUAL BASIS

Overview

1. The Application seeks an order for the disclosure and production of various financial and administrative documents in the possession of the Respondents (the "**Documents**").

2. The Respondents submit that none of the Documents are relevant to any issue properly raised in the pleadings.

3. This action involves a challenge by patients and private healthcare providers to legislation prohibiting private healthcare. The Plaintiffs say that the legislative prohibition against private healthcare violates an individual's right to life, liberty, and security of the person, by interfering with an individual's personal and fundamental decisions about his or her own health. It further violates the rights of all British Columbians by limiting them to a public health care system that jeopardizes their health, and infringes on their well-being through unnecessary and detrimental wait times. Finally, it violates the equality rights in section 15 of Charter by imposing an arbitrary and capricious scheme of exclusions from speedy high-quality private healthcare. This constitutes a system of differential treatment in respect of the fundamental interests of individuals contrary to the equality guarantees of section 15.

4. These claims raise large and complex legal issues, requiring extensive factual evidence about the structure and operation of our current health care system and expert evidence on whether this system unnecessarily jeopardizes individuals' lives, health and well-being.

5. The Documents sought by the Applicants, however, will be of no assistance to this Court in deciding the issues raised in the action. The production of the Documents, to the extent they exist, simply prejudices the Respondents by disclosing confidential and sensitive business information, which may be used by the government for other purposes, or in other proceedings and forums.

6. Even if the Documents have some relevance, they are of such minimal relevance to the issues raised in this litigation that the Respondents' rights to privacy and confidentiality in respect of the Documents far outweigh any probative value obtained by their disclosure in this litigation.

Background

7. The Plaintiffs, including the Respondents, filed their Further Amended Notice of Civil Claim (the "**Claim**") in this matter on January 10, 2013. The Plaintiffs in this matter include the Application Respondents, which are corporate entities, and five individuals.

8. Among other things, the Plaintiffs seek a declaration that provisions of the *Medicare Protection Act*, R.S.B.C. 1996, c. 286 (the "***Act***") that restrict the billing practices of physicians and medical facilities in British Columbia for benefits provided under the *Act* are unjustifiable infringements of sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the "***Charter***").

9. To be clear, the Plaintiffs do not "seek to fundamentally alter the model of health care delivery" in British Columbia, and certainly not in Canada, as stated in the Application (Application, Part 2, para. 2). Moreover, the Plaintiffs do not claim that "private clinics are the superior delivery model" for health care in British Columbia (Application, Part 3, para. 41), nor do they seek to abolish, decrease or impede the delivery of public health care in the province in any way.

10. Rather, the Plaintiffs, including the Respondents, seek to ensure individuals in British Columbia are free to obtain private medical care and private medical insurance for their health care needs, should they choose to do so, without unlawful government interference. Given that many British Columbians face unreasonably long wait times for their health care needs in the public system, the Plaintiffs submit the positions taken in the Claim are clearly meritorious and the remedies sought entirely consistent with and complementary to a high quality public healthcare system,.

11. The Defendants filed their Response to the Plaintiffs' Further Amended Notice of Civil Claim (the "**Response**") on January 11, 2013.

12. In addition to filing their Response, on January 11, 2013, each of the Defendants individually filed counterclaims against the Respondents, which seek the following relief:

    a. The counterclaim filed by the MSC seeks, *inter alia*, a declaration that the Respondents have contravened sections 17 and 18 of the *Act*, and seeks interim

and permanent injunctions restraining the Respondents from continuing to do so (the "**MSC Counterclaim**");

b. The counterclaim filed by the AG seeks, *inter alia*, a declaration that the Respondents have required their patients to sign certain unlawful agreements purporting to waive their statutory entitlements under the *Act* prior to receiving care from the Respondents, and seeks a permanent injunction restraining the Respondents from continuing to employ such agreements (the "**AG Counterclaim**"); and

c. The counterclaim filed by the Minister seeks, *inter alia*, damages from the Respondents for their billing practices contrary to the *Act* (the "**Minister Counterclaim**)

(collectively, the "**Counterclaims**").

13. Pursuant to its obligations in this litigation as outlined in the February 2013 Case Plan Proposal, and under Rule 7-1 of the *Supreme Court Civil Rules* (the "***SCCR***"), the Plaintiffs have disclosed and produced over 1100 documents to the Defendants, by way of the following list of the documents:

a. The Plaintiffs' List of Documents, dated April 30, 2013;

b. The Plaintiffs' Supplemental List of Documents, dated May 31, 2013;

c. The Plaintiffs' Second Supplemental List of Documents, June 24, 2013;

d. The Plaintiffs' Third Supplemental List of Documents, dated July 29, 2013; and

e. The Plaintiffs' Fourth Supplemental List of Documents, September 11, 2013.

(collectively, the "**Plaintiffs' Lists of Documents**").

14. The Defendants conducted examinations for discovery of the Respondents, as follows:

a. Dr. Brian Day, in his capacity as representative of Cambie, on June 17, 2013; and

b. Mr. Zoltan Nagy, in his capacity as representative of SRC, on June 18, 2013.

15. Dr. Day is the President of Cambie and SRC. Mr. Nagy is the Manager of SRC.

16. By way of letters dated June 19, 2013, and July 4, 2013, both directed to counsel for the Plaintiffs, counsel for the Defendants requested a response to the numerous requests for documents and information made of Mr. Day and Mr. Nagy at the examinations for discovery of Cambie and SRC, respectively (the "**Requests**").

17. Counsel for the Plaintiffs received the official transcripts for the examinations of discovery of Mr. Day and Mr. Nagy on June 26, 2013.

18. By way of letter dated July 16, 2013, counsel for the Plaintiffs provided to counsel for the Defendants its initial answers to the Requests (the "**Answers**").

19. In respect of the numerous categories of documents sought in the Requests, the Answers advised either that the Plaintiffs would, subject to privilege, produce the requested documents if they exist, or that the Plaintiffs were refusing to produce the documents sought on the basis that the documents were irrelevant to this litigation, to the extent they exist.

20. The Documents, as sought in the Application, reflect the categories of documents sought in the Requests that the Plaintiffs refused to provide. The Documents pertain, exclusively, to the private financial and business affairs and conduct of the Respondents.

21. At no time have the Plaintiffs agreed or consented to the disclosure or production of any of the Documents, either explicitly or by implication.

22. The Defendants January 11, 2013, letter to counsel for the Plaintiffs, referred to in the Application, merely requested the preservation of numerous categories of documents, including the Documents, ostensibly in the possession of the Defendants. In respect of the March 8, 2013, teleconference between counsel for the parties, referred to in the Application, counsel for the Plaintiffs did in fact question the relevance of the Respondents' financial documentation to this litigation.

23. The Defendants also conducted examinations for discovery of the individual Plaintiffs on the following dates:

    a. Ms. Krystiana Corrado, on July 22, 2013;

    b. Mr. Antonio Corrado, in his capacity as litigation guardian of Ms. Corrado, on August 12, 2013;

    c. Mr. Chris Chiavatti, on August 12, 2013;

    d. Ms. Erma Krahn, on August 12, 2013;

    e. Ms. Mandy Martens, on August 14, 2013; and

    f. Ms. Rita Chiavatti, in her capacity as litigation guardian of Mr. Chivatti, on August 26, 2013.

    (collectively, the "**Individual Discoveries**").

24. Pursuant to the Individual Discoveries, the Defendants made numerous requests for documents and information. Those requests have largely been, or already were, fulfilled. In any event, those requests are not the subject of this Application.

Part 5: LEGAL BASIS

1. The Respondents rely on the *SCCR* and the inherent jurisdiction of this Court.

2. The Documents sought in the Application pertain exclusively to the administrative and financial operations and conduct of the Respondents, Cambie and SRC. It is submitted that the Documents are not to be disclosed as they are immaterial or irrelevant to this litigation. Further, even if some of the documents have some minimal relevance, the Respondents' right to preserve the confidentiality and privacy of this sensitive business information far outweighs any probative value the Documents may provide on the issues raised in this litigation.

3. Under *SCCR* Rule 7-1(1), each party of record is required to prepare a list of documents that lists all documents that could, if available, be used by any party of record to prove or disprove a material fact. If unsatisfied with the disclosure, and subsequent to serving a written demand for further disclosure under Rule 7-1(11), a party of record may apply to this court under Rule 7-1(14).

Global Pacific Concepts Inc. v. Owners of Strata Plan, 2011 BCSC 1752 [*Global*], para. 7
Kaladjian v. Jose, 2012 BCSC 357 [*Kaladjian*], paras. 41-42

4. This two-tier process for disclosure must be understood in relation to the *SCCR*'s objective of proportionality, as outlined at Rule 1-3. First, under Rule 7-1, the *SCCR's* focus on proportionality has lessened the disclosure obligations on a party, restricting such disclosure to only those documents that may prove or disprove a material fact.

Burgess v. Buell Distribution Corporation, 2011 BCSC 1740 [*Burgess*], para. 5
Biehl v. Strang, 2010 BCSC 1391 [*Biehl*], para. 14

5. Evidence is material if it is offered to prove or disprove a fact in issue. In particular, the concept of materiality in respect of disclosure requires a probative connection between the facts or evidence to be disclosed and the substantive law on the material issues in dispute between the parties. Material disclosure is thus restricted to only those documents which advance a party's case.

Biehl, para. 16

6. Accordingly, under the first-tier of the disclosure process per Rule 7-1(1), a party's disclosure obligations no longer require it to make an exhaustive list of relevant documents, where relevance is broadly defined, as under the former *Supreme Court Rules*. Rather, a party is only required to disclose documents probative of the material issues in dispute.

Kaldjian, paras. 43-45

7. Although the second-tier of the disclosure process per Rule 7-1(14) permits this Court to impose a broader scope of disclosure obligations than the materiality mandated under Rule 7-1(1), that second-tier of disclosure nonetheless remains restrained by proportionality and the requirement that disclosure sought goes to material issues in dispute.

Edwards v. Ganzer, 2012 BCSC 138 [*Edwards*], para. 41
Kaladjian, para. 44
Global, para. 9

8. In particular, for a document to be disclosed on the basis of relevance – which may be understood as slightly broader than materiality – it must have some *real* probative value to the litigation. Further, determining the scope of appropriate disclosure can only be made by reference to the pleadings and the manner in which the issues in dispute have therein been defined.

Biehl, para. 17
Park v. Mullin, 2005 BCSC 1813 [*Park*], para. 10
Kaladjian, para. 61

9. Above all else, it remains at all times for this Court to exercise its discretion under Rule 7-1(14) and *not* order a party to produce documents sought or requested by another party. The Court's exercise of its discretion is properly framed within the proportionality requirements of Rule 1-3.

Park, para. 15
Kaldjian, paras. 43-45
Edwards, para. 41

10. Whether the Applicants seek the Documents on the narrow basis of materiality, or the slightly broader basis of relevance, they have failed to establish any basis on which this Court should order their disclosure. Specifically, the Application is premised either on logical inconsistencies, particularly with regard to the pleadings, or on basic misrepresentations of the facts. But, the Documents have no real probative value to the issues in dispute and there is no basis for their disclosure or production.

11. The Applicants ground their claim to the Documents on the basis they would prove or disprove what has been pleaded in the Claim and the Counterclaims and, specifically, paragraphs 61-67 of the Response. Paragraphs 61-67 of the Response plead the following:

a. Private-for-profit medical clinics like Cambie and SRC exist for the purpose of maximizing the income of their owners and of the physicians who practice there (para. 61);

b. Physicians are able to earn more money for the same or less effort in private clinics such as Cambie and SRC as compared with the public system (para. 62);

c. As a result there is a tendency for physicians to prefer private over public practice, with a corresponding reduction in the quantity and quality of care available in the public system (para. 63);

d. There is no inventive for physicians who practice in both private and public systems to encourage patients to seek treatment from them privately (para. 65);

e. There is an incentive for physicians with an ownership interest in a private clinic to refer patients to the private clinic for treatment that is not appropriate (para. 66).

12. Accordingly, in their Response, the Applicants assume that private medical clinics exist for the purpose of maximizing profits, and that private practice is more lucrative and less demanding for physicians than public practice. Based on this unfounded assumption, they draw a number of dubious conclusions, including that there is an incentive and a tendency for physicians to maintain lengthy wait lists and to withhold relevant information on wait lists from patients in the public system and that physicians in private practice will refer their patients for inappropriate care.

13. Of course, if this were a real concern, it could be addressed through regulation of the private system. It would not begin to justify prohibiting the private system entirely.

14. But, even if the argument that physicians working in both the public and private system would have a tendency to undermine the public system to increase their incomes were a response to the Claim, this argument simply cannot be proven or disproven based on the Documents. The Documents, which are the specific business plans, overall corporate structure and governance, and financial operations and records of the Respondents provide no evidence of the finances or tendencies of doctors in the private system, as it exists now, or as it would exist if the Claim were successful. The Respondents are merely one private clinic among many in the province. Clearly, if the Documents proved that the Respondents typically lose money, the Province is not going to abandon its argument as refuted. Equally, if the Respondents typically make money, the argument is not going to be proven. Evidence for the argument could only come from experts who have examined the behaviour of doctors in the many health systems in Europe and elsewhere in the world, that permit both a public and private system, to see whether there is any known tendency of doctors to undermine the public system.

15. As a result, the Documents do not, and cannot, provide any evidence that would either prove or disprove the Applicants' fundamental assumption that private practice by physicians in British Columbia generally is more lucrative and less demanding than practice by physicians in the British Columbia public health care system.

16. Further, the Documents cannot provide any evidence that would prove or disprove that a parallel private health care system in the province would inevitably result in longer wait times in the public system as a result of a tendency by doctors to undermine the public

system to increase their incomes. As a result, the Documents are not material to the Response.

17. Rather, the assertions in the Response forming the basis of the Application can only be addressed through expert evidence and the Documents do not have any real probative value requiring their disclosure.

Desgagne v. Yuen, 2006 BCSC 955
Ireland v. Low, 2006 BCSC 393, paras. 9-11

18. Similarly, the Counterclaims do not provide any basis on which the Documents would be disclosed or suggest any manner in which they would provide any real probative value to the material issues in dispute.

19. Based on their respective Counterclaims, and as outlined in the Application, the MSC and the Minister are already satisfied by virtue of the audit reports they have already obtained and disclosed, that the Respondents are operating in violation of the Act. In any event, this is not in dispute; it has been admitted by the Respondents, as noted in the Application itself (Application, Part 3, para. 44). Accordingly, it is not a material issue whether the Respondents have violated the *Act*, and this cannot form the basis requiring disclosure of the Documents.

20. The Minister Counterclaim seeks damages against the Application Respondents for their violation of the *Act*. But neither the Response nor the Minister Counterclaim plead any basis on which the Documents may be of assistance in establishing liability or quantifying the scope of those damages.

21. The Application also suggests the Documents are to be disclosed because this litigation is "fundamentally driven by the corporate plaintiffs [the Application Respondents] and Dr. Day" (Application, Part 2, para 4). In particular, the Application suggests the Documents will provide information on the relationships of the Plaintiffs, particularly with regard to the funding of this litigation.

22. The various agreements between the parties for funding this litigation are irrelevant to the issues in dispute and certainly to the Application. In any event, the Applicants provide no basis on which the Documents would be material even on this issue.

23. Moreover, allegations about the relationship between the Plaintiffs, in addition to being baseless and offensive, have no bearing on the material issues in dispute. This Court has refused to order disclosure where it would confuse the issues or expend the time and effort of the parties without any significant probative value.

Goldman Sachs v. Sessions, 2000 BCSC 67, para. 32

24. In the alternative, if the Documents are material or relevant, which is denied, it is submitted that they are of such minimal probative value to the issues in this litigation that the competing interests of the Respondents' rights to privacy and confidentiality, as well as the *SCCR*'s emphasis on proportionality, far outweigh any value in their disclosure.

25. Here, the Documents include the business strategies and financial statements of corporate entities. These are documents which, by their very nature, are kept confidential and private. This Court has denied applications for further production where issues of confidentiality outweigh probative value.

Park, para. 15
Bishop v. Minichello, 2009 BCSC 358, para. 13

26. Further, the implied undertaking or a sealing order is no answer to the prejudice that the Respondents would suffer should the Applicants obtain the Documents. The Respondents are in direct economic competition with, and have been the subject of audits and scrutiny by, the Applicants. To require disclosure of the Documents would be to severely disadvantage the financial and economic health of the Respondents without any significant evidentiary or probative value to this litigation.

Part 6: MATERIALS TO BE RELIED ON

1. The Pleadings filed in this action;

2. Affidavit #5 of Dr. Brian Day, to be sworn;

3. Affidavit #1 of Tracy Tso, to be sworn;

4. Such further and other material as this Honourable Court may allow.

The Respondents estimate that the Application will take one day to be heard.

The Respondents have filed in this proceeding a document that contains their address for service.

Date: October 8, 2013

for Robert W. Grant, Q.C.
Counsel for the Respondents