IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cambie Surgeries Corporation v. Medical Services Commission of British Columbia,* 2013 BCSC 2066

Date: 20131021
Docket: S090663
Registry: Vancouver

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

Interveners

Before: Associate Chief Justice Cullen

Oral Reasons for Judgment

Counsel for the Plaintiffs:	M. Elliot & R.W. Grant, Q.C.
Counsel for the Defendants:	K.A. Horsman
Place and Date of Hearing:	Vancouver, B.C. October 11, 2013
Place and Date of Judgment:	Vancouver, B.C. October 21, 2013

[1] **THE COURT:** In this application the defendants seek an order requiring the corporate plaintiffs to list 18 categories of documents set out in Appendix A to their Notice of Application, to make the originals available for inspection and copying by the defendants, and for costs in any event of the cause.

[2] The application is brought pursuant to Rule 7-1, the relevant portions of which read as follows:

> (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
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> (a) prepare a list of documents in Form 22 that lists
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> (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact, and
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> (ii) all other documents to which the party intends to refer at trial, and
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> (b) serve the list on all parties of record.
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> ...
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> (10) If a party who has received a list of documents believes that the list omits documents or a class of documents that should have been disclosed under subrule (1) (a) or (9), the party may, by written demand, require the party who prepared the list to
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> (a) amend the list of documents,
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> (b) serve on the demanding party the amended list of documents, and
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> (c) make the originals of the newly listed documents available for inspection and copying in accordance with subrules (15) and (16).
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> (11) If a party who has received a list of documents believes that the list should include documents or classes of documents that
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> (a) are within the listing party's possession, power or control,
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> (b) relate to any or all matters in question in the action, and
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> (c) are additional to the documents or classes of documents required under subrule (1) (a) or (9),
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> the party, by written demand that identifies the additional documents or classes of documents with reasonable specificity and that indicates the reason why such additional documents or classes of documents should be disclosed, may require the listing party to
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> (d) amend the list of documents,
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> (e) serve on the demanding party the amended list of documents, and
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> (f) make the originals of the newly listed documents available for inspection and copying in accordance with subrules (15) and (16).

> ...
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> (13) If a party who receives a demand under subrule (10) or (11) does not, within 35 days after receipt, comply with the demand in relation to the demanded documents, the demanding party may apply for an order requiring the listing party to comply with the demand.
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> (14) On an application under subrule (13) or otherwise, the court may
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> (a) order that a party be excused from compliance with subrule (1), (3), (6), (15) or (16) or with a demand under subrule (10) or (11), either generally or in respect of one or more documents or classes of documents, or
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> (b) order a party to
>
> (i) amend the list of documents to list additional documents that are or have been in the party's possession, power or control relating to any or all matters in question in the action,
>
> (ii) serve the amended list of documents on all parties of record, and
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> (iii) make the originals of the newly listed documents available for inspection and copying in accordance with subrules (15) and (16).

[3] The nature and scope of applications such as this were described by Madam Justice Dillon in *Global Pacific Concepts Inc. v. Strata Plan NW 141*, 2011 BCSC 1752 at paras. 7 to 9 as follows:

> [7] Rule 7-1(1) provides that, unless the court otherwise orders, each party of record must prepare a list of documents that lists all documents that could, if available, be used by any party of record at trial to prove or disprove a material fact. Rule 7-1(11) provides that if a party who has received a list of documents believes that the list should include documents or classes of documents that relate to any or all matters in question in the action, then that party may, by written demand, request a further amended list of documents and an application may then be brought for further disclosure as provided in Rule 7-1(14). That rule says that on an application under subrule (13) or otherwise, the court may order a party to amend a list of documents to list additional documents that are or have been in the party's possession, power, or control relating to any or all matters in question in the action.
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> [8] These provisions of Rule 7-1 have been interpreted recently in *Biehl v. Strang*, 2010 BCSC 1391. In that case, the court considered the scope of Rule 7-1(1) and, in particular, the meaning of "use by a party of record to prove or disprove a material fact". In consideration of what is a material fact within the meaning of Rule 7-1(1), the court, at paragraph 16, noted that:
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> > [16] In Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis Canada, 2009) at para. 2.50, relevance is distinguished from materiality:

> §2.50 A distinction has also been drawn between relevance and materiality. ... The concept of materiality, however, requires the court to focus on the material issues in dispute in order to determine if the proffered evidence advances the party's case. [Emphasis in *Biehl.*]
>
> In other words, the requirement that the disclosure relate to a material fact limits the breadth of what is relevant.
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> The court acknowledged at paragraph 15 that Rule 7-1(14) provides for wider disclosure when an application is made to the court. In that case, documents "relating to any or all matters in question in the action" may be ordered to be produced.
>
> [9] That wording is much closer to the test traditionally known, prior to the new Rule 7-1(1), as the *Peruvian Guano* test of relevancy, which is cited in *Biehl* at paragraph 12 to be documents which may, not must, either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. The question is whether a document can properly be said to contain information which may enable the party requiring the document either to advance his own case or damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, or if it may have either of those two consequences. Therefore, it is acknowledged that the initial disclosure under Rule 7-1(1) relates to a materiality requirement, but that a party can apply to the court, as the defendant did here, for broader disclosure pursuant to Rule 7-1(14).

THE POSITION OF THE APPLICANT

[4] It is the position of the applicants that the documents sought are disclosable under the narrower test set forth in Rule 7-1(1), but, if not, fall within the broader rule of disclosure envisaged by 7-1(14). The applicants contend that in a number of ways the plaintiffs have squarely made the disclosure sought material by their pleadings in this action.

[5] This lawsuit challenges the constitutional validity of ss. 14, 17, 18 and 45 of the *Medicare Protection Act*, R.S.B.C. 1996, c. 248, as infringing ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*. The plaintiffs seek an order under s. 52(1) of the *Constitution Act, 1982*, that the impugned sections are of no force and effect.

[6] Although there are seven plaintiffs in this application, only the corporate plaintiffs, Cambie Surgeries Corporation and Specialist Referral Clinic, are directly implicated by this application.

[7] Cambie and SRC are private medical clinics which provide some medical services for which they bill patients in contravention of the *Medicare Protection Act*. It is their contention that the provisions which they are in violation of limit the ability of British Columbia residents to obtain medical insurance and access to medical care in a timely manner, and thus constitute an infringement of their "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" in s. 7 and of their right of equality before and under the law and to "equal protection and benefit of the law without discrimination, in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" in s. 15.

[8] The plaintiffs assert these infringements are not the result of "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" as provided for in s. 1 of the *Charter*.

[9] The rights at issue are not those of the medical service providers who are hindered by the impugned provisions from privately charging for medical services covered by the *Act* or in a greater amount provided for in the *Act*. They are the rights of British Columbians said to be hindered in their access "to reasonable health care within a reasonable time" (para. 98, Amended Notice of Civil Claim) by the impugned provisions.

[10] The documents sought by the applicants fall into four categories: the financial records of the corporate plaintiffs, the relationship (financial and administrative) between the two clinics, the relationship between clinics and the physicians providing medical services through them, and documents related to billing practices and medical fee charges.

[11] What is brought into issue is the Medical Services Plan, which is a plan administered by the Medical Services Commission under the *Medicare Protection Act* to provide a publicly funded plan to provide care to beneficiaries consistent with the *Canada Health Act*, R.S.B.C 1985, c. 6.

[12] The scheme does not preclude Cambie from operating an exclusively private business and it does not apply to physicians who are not enrolled under the scheme who provide services and bill privately. It is possible and lawful to operate entirely outside of the operation of the statute.

[13] In connection with Cambie, however, there is a mix of public and private health care within the same clinic conducted in a way that violates the *Medicare Protection Act*. The physicians who provide the services are enrolled. They bill MSP for their services, while the clinic charges, in addition, a private facility fee to the patient. There is some evidence that the clinic also bills extra for a service provided by the physician. It is not clear on the evidence whether this happens, and if so, whether it is the clinic or the physician who is the recipient of the extra service charge.

[14] It is the applicant's contention that while ostensibly this is an action seeking a remedy for an alleged violation of the rights of British Columbians subject to the *MPA* and the MSP, it was conceived and is being primarily pursued by the corporate plaintiffs in order to legitimize their current method of operating privately for profit while being subsidized by the public health care system.

[15] The applicants contend that the materiality of the documents being sought is evident on the amended statement of civil claim pleadings. They refer to para. 13, which reads as follows:

> 13. Cambie owns and operates the Cambie Surgery Centre (hereinafter the "Surgery Centre") in the City of Vancouver, British Columbia. The Surgery Centre is a multi-specialty surgical and diagnostic facility, containing six operating rooms, recovery beds and overnight stay rooms. The Surgery Centre is equipped and accredited to standards that equal or exceed the standards of a major public hospital in British Columbia. Operations and diagnosis and treatments are performed by highly qualified physicians, who are independent professionals and not employees of the Surgery Centre.

[16] The applicants argue that in light of the corporate plaintiffs' dominant involvement in this lawsuit and claim of standing in the public interest on the grounds

that they "have a genuine interest in the resolution of the questions posed and there is no other reasonable and effective manner in which the full scope of these legal questions may be brought before this Honourable Court" in paragraph 12, the assertion in paragraph 13 describing the operations of Cambie that "Operations and diagnosis and treatments are performed by highly qualified physicians, who are independent professionals and not employees of the Surgery Centre" directly raises the issue of the relationship between the physicians and the clinic.

[17] The applicants argue that in articulating the legal basis for finding of breach of s. 7, the plaintiffs expressly cite as an element of the deprivation of the right to life and the security of the person the lack of commercial viability of independent clinics, which assume the cost of the use of their medical facilities.

[18] The applicants point to paras. 111 to 115 as asserting a factual matrix in support of the plaintiffs' claim which clearly and directly establishes the materiality of the financial, administrative and structural character of the corporate plaintiffs. Those paragraphs read as follows:

> 111. For consultations and surgeries within the public health care system, the fees for the surgeon or specialist physician are covered by MSP while the cost of the hospital facilities is covered by the Government through the *Hospital Insurance Act*. The costs associated with operating a medical facility and purchasing surgical and diagnostic equipment are tremendous.
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> 112. Sections 14, 17, and 18 of the *Act* have the effect of very significantly limiting the options for medical practitioners in terms of offering private medical services to ordinary British Columbians, other than Preferred Beneficiaries, because in their case, independent medical practitioners cannot off-set the operational costs of running a private clinic.
>
> 113. Most medical practitioners in independent medical facilities, such as those at the Surgery Centre and SRC, are enrolled medical practitioners – which means that they may provide services in public facilities, and also in independent facilities but in the latter case only for Preferred Beneficiaries and other patients not subject to the restrictions of the *Act*.
>
> 114. Because of the restrictions of the *Act* on direct and extra-billing, combined with the prohibition of private insurance, private medical practitioners in British Columbia are prohibited or seriously limited in offering needed medical care to a large segment of the population.

> The most important consequences of those measures are felt by ordinary British Columbians themselves, as they are prevented from having access to needed medical care.
>
> 115. British Columbia patients facing unacceptable wait times for surgery or diagnostic procedures in the public system cannot have access to private care under the current legislative and regulatory scheme unless, either the independent facilities assume the costs of the use of their medical facilities – which would not be commercially viable, or private medical practitioners and clinics provide patients with medically required services in contravention to the *Act*.

[19] The applicants also rely on paragraph 120 of the Amended Notice of Civil Claim as engaging the materiality of the disclosure sought. Paragraph 120 reads as follows:

> 120. Based on comparison with other health systems in Canada and internationally, permitting and facilitating access to a private healthcare system does not jeopardize the existence of a strong public healthcare system. The experiences in other jurisdictions demonstrate that a hybrid private-public health care system allows the public system to thrive and provide better care to patients. There are options available which allow maintaining a vigorous public health system supported by private health services which, together, would allow the provision of reasonable health care within a reasonable time, and thus ensure the protection of *Charter* rights of all British Columbians.

[20] The applicants say this paragraph, which is asserted in support of a contention that the impugned legislative provisions are arbitrary, invokes the prospect of "options available", which "would allow the provision of reasonable health care within a reasonable time, and thus ensure the protection of *Charter* rights of all British Columbians".

[21] The applicants argue that by this paragraph the plaintiffs are implicitly advancing the clinic's provision of medical services as an option passing constitutional muster. The applicants say the documents and disclosure sought test the validity of that implicit assertion and it cannot be meaningfully explained or determined without the disclosure sought.

[22] The applicants rely on their response to the further amended civil claim as joining issue with the plaintiffs on those material questions. Specifically, the

applicants cite paragraphs 61 to 66 of their response as emphasizing the significance of the factual issue under the model Cambie is proposing as constitutionally mandated, whether it would be beneficial or detrimental to the overall health care system. The applicants say that these pleadings and the issues joined by them are sufficient to establish the materiality of the disclosure sought and are determinative of the outcome of this application.

[23] The applicants, however, go on to cite two of three counterclaims filed by the defendants as further buttressing the materiality of the disclosure sought. In the counterclaim brought by the Minister of Health, it is alleged as against Cambie and SRC that they facilitated unlawful billing practices, including the charging of fees for the rendering of a benefit or other matters related to the rendering of a benefit and that they facilitated the billing practices of medical practitioners contrary to the *Act* by charging beneficiaries unauthorized fees for benefits, materials, consultations, procedures, use of an office, clinic, or for other matters related to the rendering of a benefit. They say it amounts to in excess of what is authorized in law and for services of which a claim has also been submitted to the Commission.

[24] The Minister of Health seeks "damages for the unlawful actions of unlawfully billing clinics. The Ministry asserts as a legal basis for its claim that under provisions of the *Canada Health Act*, Canada may deduct from the monies payable under the *Canada Health Act* or transfer any amounts that have been unlawfully billed by medical practitioners or others in relation to benefits available under the *Act*.

[25] The Ministry asserts the clinics have intended to cause economic loss to the Province or have been willfully blind. It acknowledges that if a medical practitioner bills in contravention of the *Act*, payments by MSP to the practitioner are recoverable from the practitioner.

[26] The defendant Medical Services Commission has also counterclaimed against Cambie and SRC based on an audit carried out by inspectors appointed by the Commission. It asserts that the audit determined that Cambie and SRC "have been and will likely continue to be in breach of ss. 17 and 18 of the *Act*". The

Commission seeks a declaration that Cambie and SRC have contravened ss. 17 and 18 and interim and permanent injunctions restraining them from further contraventions.

[27] The applicants contend that what the counterclaim put in issue is both the fact and the nature of Cambie's and SRC's contravention of an *Act*. They acknowledge that the audit has revealed the contraventions and that the plaintiffs admit it, but submit that neither the audit nor the admissions reveal the full nature and extent of the contraventions. They note that the plaintiffs acknowledge charging beneficiary's fees, referred to as "a facility fee" or a "surgery fee", but deny they charge for the time of the physician in providing the service. The applicants also point out the auditors could not resolve that issue because they were denied access to the relevant records.

[28] The applicants submit that the evidence of the plaintiffs on this point is unsatisfactory and unrevealing and the two documents they have from patients of the clinics imply or indicate that the physician's time is charged for in addition to the MSP payment made.

[29] The applicants say the nature and extent of the overbilling is important in considering whether the enterprise undertaken by private clinics will benefit or disadvantage the public health care system. They say it feeds into the damages counterclaim as well.

[30] The applicants contend that the private clinics are "in the driver's seat" in this litigation and are essentially seeking to substitute their model of private and public health care for the current model while resisting any inquiry into what is being proposed as a substitute.

[31] The applicants submit the action brought by the plaintiffs raises fundamentally important issues and the plaintiffs' submissions as to the harm it would cause them if their records were made public and the concern they raise about collateral use of the

documents and the principle of proportionality should be viewed in light of the great importance of this case.

[32] The applicants further say the risk of collateral use of the documents is met by the implied undertaking rule, which addresses such issues not by excusing the parties from disclosure, but by excluding use of the disclosure except in the particular litigation.

[33] The applicants say the premise of the plaintiffs is that private for profit clinics can provide medically necessary surgeries for a fee in a way that does not undermine but benefits the public health care system. They contend what is being advanced is the Cambie and SRC model and it is critical to have more information about that model and how it actually works, rather than to rely only on what the plaintiffs choose to say about it.

THE POSITION OF THE DEFENDANTS

[34] So far as the respondents are concerned, they contend that what divides the parties on this application is a fundamentally different view of what the action is all about. The plaintiffs say the action is about individual rights, specifically the *Charter* rights of British Columbia residents and how legislation limiting the provision of health care services violates their rights. A British Columbia resident cannot choose a private health care system unless they leave the country and they cannot get private health care in the Province. The plaintiffs say that that violates the liberty, security of the person and life of individual British Columbians. The plaintiffs point to one of the individual plaintiffs, who may have died without access to private health care alongside the benefit of public health care.

[35] The plaintiffs say this claim is about individuals asserting their rights. They say that if the corporate plaintiffs were removed from the action, then the claims would be the same. The clinics are involved as public interest litigants and it is not an action about Cambie or SRC. They are not put forward as a model, and they acknowledge government could regulate private clinics however it sees fit.

[36] The plaintiffs acknowledge under the present system a physician can choose not to be enrolled in the plan and acknowledge that a doctor or group of doctors could operate out of a private facility and charge whatever they wanted to. The plaintiffs say, however, that setting up a private system through the existing mechanisms are effectively prohibited for two reasons. They say firstly it is almost impossible to find a doctor who is willing to opt out just to make money. Most doctors want to be part of the public system. Secondly, they say there is a prohibition against health insurance, and that means that only wealthy people could avail themselves of a fully private system. The plaintiffs say arguably there is not a sufficient market for this standalone, isolated private system.

[37] The plaintiffs say there are 70 private clinics in British Columbia in addition to Cambie and SRC. A measure of how they could work can be found in most European countries, which have a combined system. The plaintiffs say that the defendants want to make this action about Cambie, but it is not. They say Cambie is concerned that the defendants are seeking this information to make out some broader case of misconduct against it and SRC. The plaintiffs contend that extra billing has nothing to do with the *Charte*r challenge which is extant in this case.

[38] As to what the defendants have identified in the Notice of Claim as implicating the corporate structure, financial circumstances and relationships of Cambie and SRC, the plaintiffs say that those aspects of the pleadings identified are not necessary to the action. They are merely descriptions of the plaintiffs to demonstrate why they are seeking public standing, but they do not assert matters that are material to the claim itself. They point out that paragraph 13 is merely descriptive, paragraph 14 makes a general statement about relationships between the corporate defendants which is background only, and neither has anything to do with the claim itself.

[39] The plaintiffs say the allegations that follow are not about Cambie and SRC; they are about private medical clinics generally. The issue is whether a lack of

private medical facilities impairs the health care of private individuals, and that is going to be dependent on expert evidence.

[40] The plaintiffs say that the evidence will address how such clinics could function if they were permitted. Plaintiffs' counsel says these are questions which experts have thought about and written about. The issue is not Cambie's alone. The plaintiffs say the court will be invited to look at other countries and other jurisdictions not unlike Canada with private health care facilities to determine how and if they work. In that context, the plaintiff says whether Cambie makes or loses money is not a relevant consideration. It is operating in a regime in which its operation is unlawful. The question is, if it is not unlawful, how can it work to benefit the system as a whole?

[41] The plaintiffs agree s. 1 is implicated by this action, but say the issue is not whether the public system is good, but whether the existence of a private system would enhance it.

[42] As to the costs of operating of a medical facility, Cambie's costs, they say, are not germane, and they submit that the court can look at a hospital's costs of operating a medical facility to gauge that issue.

[43] The plaintiffs further say that the reason for the backlog in the public system is that doctors have restricted access to hospitals in the public system and doctors who work at Cambie do so in addition to, not instead of their allotted time in a hospital. Cambie's financial documents will not provide evidence of the dynamic influencing the backlog, one way or the other.

[44] The plaintiffs argue that the defendants' response at paragraphs 61 to 65 is really an argument rather than a statement of material facts. The argument is that doctors will undermine the public system if they are allowed to work in the private system as well. The plaintiffs submit that there is nothing about this claim which mandates a particular kind of private system that mirrors Cambie's experience, and if so, the Government could regulate the system to avoid the problems envisioned by

the defendants' argument. Counsel for the plaintiffs cited examples of other functioning public/private systems. He submits that in a lawful system the private model could and would be different than it presently is in B.C. He submits how the case will be won or lost will have nothing to do with what happens at Cambie or SRC.

[45] In dealing with the counterclaims, the plaintiffs contend that the Minister of Health's claim for damages is, at most, speculative, as under the *Canada Health Act* the deductions from health transfer payments are discretionary. There is no suggestion that it has happened and there is a need to show causation, none of which can be demonstrated by looking at the clinic's internal documents. The plaintiffs submit it is almost as though the defendants want to bring about deductions by exposing the clinic's billing practices.

[46] As to the MSC counterclaim, the plaintiffs point out that the clinics have admitted being in violation of the *Act* and have always done so. The plaintiffs' position is that what they are doing is permissible because the restrictions on public health care are unconstitutional. The plaintiffs say there is no need for disclosure to prove or disprove the violation as it is admitted. The sole question is whether the provisions which the clinics are in violation of are constitutionally valid.

[47] The plaintiffs say that whether Dr. Day, the principal of the clinics, is "in the driver's seat of this litigation", as the defendants allege, or not, is irrelevant. The plaintiffs draw a distinction between the clinic's financial or administrative records and the individual plaintiffs' medical records, as the latter records help to show the strengths of the private system and support the contention that the public system works better when it is augmented by a private system.

[48] The plaintiffs argue that the court has the discretion to decline to order disclosure under either test arising in Rule 7-1. They submit that even if the court concludes there is a basis to order disclosure, the probative value of the documents is exceeded by the countervailing interests of the corporate plaintiffs. They contend in the context of this action, which is focused on whether the impugned provisions

considered broadly infringe the specified rights of British Columbians, the actual financial and administrative circumstances of Cambie and SRC carry very little significance and the inconvenience and burden placed on them by being forced to dig through all their records overbalances the value.

[49] In addition, the plaintiffs point to the sensitive and confidential nature of the records and the risks of harm to the corporate plaintiffs' economic interest that a public hearing could bring. They point to contracts with various entities such as WCB and ICBC that Cambie has and the disadvantage that would accrue if other clients became aware of those contracts. They also point to the possibility of the defendants being influenced in other proceedings by what they learn in the event of disclosure. They say the "concern" that arises here is much greater than the probative value.

THE APPLICANTS' REPLY

[50] In reply, the defendants contend that what is in issue here is the prohibition on extra billing under the public plan and whether B.C. is constitutionally mandated to permit a dual public/private medical system. It is not the *Canada Health Act* being challenged; it is the system that functions in British Columbia and whether it would function better with a private component.

[51] The defendants say the issue cannot be decided in a factual vacuum and the court would derive significant assistance in its task in looking at how clinics like Cambie operate to see whether they are constitutionally required. The defendants ask rhetorically why such an issue would be better addressed by only expert evidence, why what occurs in Sweden is more germane than what actually happens "on the ground in British Columbia". The defendants repeat that Cambie is held out as an example of a model that works better and submits its operation is entirely material to the issues at large.

[52] The defendants point out that the counterclaims are standing pleadings and can be amended once the documents sought are received. They rely on the implied

undertaking as the remedy for the plaintiffs' concerns about the sensitivity and confidentiality of the information sought and the prospect of its use in collateral proceedings.

DISCUSSION AND CONCLUSION

[53] The essential legislative context of the action underlying this application can be found in the *Canada Health Act*, ss. 3, 5, 7, 18, 19 and 20 and the correlative provisions of the *Medicare Protection Act*, ss. 13(1) and (3), s. 14(1) and (7), s. 17, s. 18 and s. 45. They read as follows:

Canada Health Act

> 3. It is hereby declared that the primary objective of Canadian health care policy is to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers.
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> …
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> 5. Subject to this Act, as part of the Canada Health Transfer, a full cash contribution is payable by Canada to each province for each fiscal year.
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> …
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> 7. In order that a province may qualify for a full cash contribution referred to in section 5 for a fiscal year, the health care insurance plan of the province must, throughout the fiscal year, satisfy the criteria described in sections 8 to 12 respecting the following matters:
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> (a) public administration;
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> (b) comprehensiveness;
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> (c) universality;
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> (d) portability; and
>
> (e) accessibility.
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> …
>
> 18. In order that a province may qualify for a full cash contribution referred to in section 5 for a fiscal year, no payments may be permitted by the province for that fiscal year under the health care insurance plan of the province in respect of insured health services that have been subject to extra-billing by medical practitioners or dentists.
>
> 19. (1) In order that a province may qualify for a full cash contribution referred to in section 5 for a fiscal year, user charges must not be permitted by the province for that fiscal year under the health care insurance plan of the province.

(2) Subsection (1) does not apply in respect of user charges for accommodation or meals provided to an in-patient who, in the opinion of the attending physician, requires chronic care and is more or less permanently resident in a hospital or other institution.

20. (1) Where a province fails to comply with the condition set out in section 18, there shall be deducted from the cash contribution to the province for a fiscal year an amount that the Minister, on the basis of information provided in accordance with the regulations, determines to have been charged through extra-billing by medical practitioners or dentists in the province in that fiscal year or, where information is not provided in accordance with the regulations, an amount that the Minister estimates to have been so charged.

Medicare Protection Act

13 (1) A medical practitioner or health care practitioner who wishes to be enrolled as a practitioner must apply to the commission in the manner required by the commission.

…

(3) A practitioner who renders benefits to a beneficiary is, if this Act and the regulations made under it are complied with, eligible to be paid for his or her services in accordance with the appropriate payment schedule, less any applicable patient visit charge or reduction made under section 24 (2).

…

14 (1) A practitioner may elect to be paid for benefits directly from a beneficiary.

…

(7) If an election is in effect and the practitioner has complied with subsection (9),

(a) the beneficiary must make a request for reimbursement directly to the commission, and

(b) the beneficiary is only entitled to be reimbursed for the lesser of

(i) the amount that is provided in the appropriate payment schedule for the benefit, less any applicable patient visit charge, and

(ii) the amount that was charged by the practitioner.

…

17 (1) Except as specified in this Act or the regulations or by the commission under this Act, a person must not charge a beneficiary

(a) for a benefit, or

(b) for materials, consultations, procedures, use of an office, clinic or other place or for any other matters that relate to the rendering of a benefit.

(2) Subsection (1) does not apply:

(a) if, at the time a service was rendered, the person receiving the service was not enrolled as a beneficiary;

(b) if, at the time the service was rendered, the service was not considered by the commission to be a benefit;

(c) if the service was rendered by a practitioner who

(i) has made an election under section 14 (1), or

(ii) is subject to an order under section 15 (2) (b);

(d) if the service was rendered by a medical practitioner who is not enrolled.

18 (1) If a medical practitioner who is not enrolled renders a service to a beneficiary and the service would be a benefit if rendered by an enrolled medical practitioner, a person must not charge the beneficiary for, or in relation to, the service an amount that, in total, is greater than

(a) the amount that would be payable under this Act, by the commission, for the service if rendered by an enrolled medical practitioner, or

(b) if a payment schedule or regulation permits or requires an additional charge by an enrolled medical practitioner, the total of the amount referred to in paragraph (a) and the additional charge.

(2) Subsection (1) applies only to a service rendered in

(a) a hospital as defined in section 1 of the Hospital Act, or

(b) a community care facility as defined in section 1 of the Community Care and Assisted Living Act.

(3) If a medical practitioner described in section 17 (2) (c) renders a benefit to a beneficiary, a person must not charge the beneficiary for, or in relation to, the service an amount that, in total, is greater than

(a) the amount that would be payable under this Act, by the commission, for the service, or

(b) if a payment schedule or regulation permits or requires an additional charge, the total of the amount referred to in paragraph (a) and the additional charge.

45 (1) A person must not provide, offer or enter into a contract of insurance with a resident for the payment, reimbursement or indemnification of all or part of the cost of services that would be benefits if performed by a practitioner.

(2) Subsection (1) does not apply to

(a) all or part of the cost of a service

(i) for which a beneficiary cannot be reimbursed under the plan, and

(ii) that is rendered by a health care practitioner who has made an election under section 14 (1),

(b) insurance obtained to cover health care costs outside of Canada, or

> (c) insurance obtained by a person who is not eligible to be a beneficiary.
>
> (3) A contract that is prohibited under subsection (1) is void.

[54] It is, as noted, ss. 14, 17, 18 and 45 of the *Medicare Protection Act* which are being challenged in this action. No section of the *Canada Health Act* is being impugned.

[55] The plaintiffs' resistance to this application reduced to its essence is that the impugned provisions of the *MPA* infringe the specified *Charter* protected rights by limiting B.C. residents access to timely and affordable medical care by denying a hybrid public/private method of providing medical services.

[56] The plaintiffs say this lawsuit is therefore about the relationship between the legislated system of providing medical care in British Columbia and those individuals who are subject to it. The plaintiffs say there is nothing in the relationship between the two corporate plaintiffs and the relationship between the corporate plaintiffs and the physicians providing services in their facilities, the billing practices and medical fee charges, or in the financial records of the corporate plaintiffs that implicate the central issues in this lawsuit which concerns the effect of the impugned legislation on members of the public, not physicians or private clinics.

[57] As I understand it, the concept underlying this lawsuit is that the current model of public health care in British Columbia breaches an individual's s. 7 rights by having long (and therefore perilous) wait times for necessary treatments and breaches s. 15 rights by having different health care vehicles for medical issues arising in different circumstances such as, for example, under the Workers' Compensation regime.

[58] To that extent, I agree that neither the financial circumstances or practices of the private clinics are germane considerations in assessing the question of whether there is an infringement of s. 7 or 15 of the *Charter*.

[59] This action, however, goes further than that. It does not focus only on the means by which the current regime delivers public medical services or its alleged shortcomings; it identifies the infringing conduct requiring a constitutional remedy as the restriction on private health care.

[60] While I would expect, as the plaintiffs submit, that much of the evidence material to the issues raised by this lawsuit will relate to asserted deficiencies in the current system, their impact on individuals and how they might be addressed in health care regimes in other jurisdictions, it seems to me that there is some materiality in what is being sought by the defendants in this application.

[61] In particular, where the plaintiffs have specifically cited the lack of commercial viability of independent clinics, which assume the cost of their own medical facilities, and a threshold of wealth necessary to access them under the current regime, as being probative of its constitutional deficiency, an exploration of those issues in connection with existing functioning private clinics in the province of British Columbia could yield evidence capable of offering proof or disproof of what is alleged as material to the action.

[62] Although the plaintiff clinics are not operating lawfully within the current regime, what their costs are, what their billing practices are and what is potentially available to them as profit can provide evidence enabling an assessment of the commercial viability of private clinics under the current regime as well as under a modified regime. It also could provide evidence enabling an assessment of what impact private health clinics operating in a larger public system has on individual British Columbians seeking health care.

[63] I do not similarly see how the plaintiff clinic's relationship with individual physicians gives rise to the threshold for disclosure. The issue for resolution here is whether the impugned proscriptions and limitations operate in breach of s. 7 and s. 15 of the *Charter*, and if so, whether they are saved by s. 1 or of no force and effect under s. 52(1).

[64] Although disclosure of some aspect of Cambie's and SRC's operations may yield evidence which could prove or disprove a material fact, I am not satisfied that the clinic's relationship with individual physicians meets either that test or the lower threshold contemplated in Rule 7-1(11). To grant the relief sought in this connection would, in my view, be a diversion from the issues in this case and would not assist in its orderly presentation or resolution.

[65] I have considered the plaintiffs' submissions concerning the confidentiality and sensitivity of the documents being sought. I accept and emphasize the critical importance of the implied undertaking rule in a case such as this. I also conclude that the words of Smith J., as he then was, in *Goldman Sachs & Co. v. Sessions*, 2000 BCSC 67 at para. 37, are apposite:

> It must be remembered that the plaintiff chose to litigate this matter. Therefore, it must accept the defendant's right to take legitimate steps to defend the action. As observed by La Forest J. in *Hunt v. T & N plc*, [1993] 4 S.C.R. 289, at p. 329, paragraph 64, albeit in a different context, the fundamental importance of the right to discovery in British Columbia is emphasized by the *Rules of Court* and the case law "even at the cost of considerable loss of confidentiality."

[66] I accept that what the defendants are seeking by disclosure places an onerous burden on the plaintiffs. I do not find in that a reason to deny the relief sought, except as I have already indicated. However, I do conclude disclosure should be limited beyond what the defendants are seeking.

[67] In the result, I will make no orders in relation to any documents sought in Appendix A which are highlighted in yellow and identified as relating to records not in existence. I will make no order in relation to paras. roman numeral xxii and xxxiv. I will make the orders sought in relation to the remaining paragraphs, but in relation to roman numerals xx, xxi, xxiii, xxvii, xxxii and xxxiii, I will limit them to the past five years of records. Costs will be in the cause.

[68] MR. GRANT: My Lord, only one question. My friends had asked for 14 days, and that may be difficult. If we could have up to 30 days?

[69] THE COURT: It seems reasonable to me. Yes, certainly, Mr. Grant.

[70] Thank you, counsel.

"A.F. Cullen ACJ."

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Associate Chief Justice Cullen