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.

THIS IS A RESPONSE TO the Notice of Application of the Intervenors, Dr. Duncan Etches, Dr. Robert Woollard, Glyn Townson, Thomas McGregor, the British Columbia Friends of Medicare Society, Canadian Doctors for Medicare (collectively, the "**Applicants**") filed April 24, 2014.

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 Applicants seek an order permitting them to adduce six expert opinions (the "**Proposed Expert Evidence**") as evidence in this proceeding.

2. The Plaintiffs oppose the application on the basis that the Proposed Expert Evidence is duplicative of the expert evidence that will be relied on by the defendants, will not be of assistance to the Court, will encumber the record, will take the litigation away from the pleadings and the parties, will prejudice the Plaintiffs, and will add substantially to the cost to the parties.

Procedural History

3. The Applicants are intervenors in this proceeding.

4. The Applicants do not have party status. Their application to be added as defendants was dismissed by Madam Justice Smith.

Schooff v. Medical Services Commission, 2009 BCSC 1596 ("*Schooff*")

5. In dismissing the application to be added as parties, this Court held as follows:

> None of the applicants has shown the direct interest in the litigation that would warrant including them as parties. Further, they do not meet the criteria under R. 15(5)(a)(ii) of the Rules of Court: their participation in the proceedings is not necessary to the effective adjudication of the issues and it cannot be said that they ought to have been joined as parties at the outset.

Schooff, at para. 199

6. The Court determined that the Applicants' role in this proceeding was appropriately limited to that of intervenors.

7. At that time, the Court acknowledged that limitations on the Applicants' participation in the proceeding would be required to avoid duplication and prejudice to the parties. As Justice Smith explained:

> ...I conclude that potential adverse effects flowing from the participation of the intervenors can be mitigated through conditions imposed on their level or participation.
>
> 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 rights...to decline to entertain them.
>
> 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.
>
> *Schooff*, at paras. 206-208

8. On January 10, 2013, Chief Justice Bauman (as he then was), consolidated the orders made in this proceeding granting intervenor status to various individuals and organizations. The January 10, 2013 order confirms that the Court will determine whether and to what extent intervenors may be permitted to lead evidence in this proceeding.

The Parties' Evidence

9. This proceeding has progressed considerably since the orders of Chief Justice Bauman and Justice Smith referred to above.

10. The parties have exchanged lists of documents. Most recently, on May 1, 2014, the Defendants served their Fourteenth Supplementary List of Documents. The Defendants alone have now listed over 26,000 documents The Plaintiffs have now disclosed approximately 1200 documents.

11. The parties have also exchanged lists of potential experts and expert reports in chief.

12. Lists of potential experts were exchanged between the parties in or about May and June 2013.

13. On March 17, 2014, the parties exchanged expert reports in chief. The Plaintiffs served 5 reports from 4 experts. The Defendants served 30 reports from 28 experts.

14. The parties must provide notice of their intention to call reply expert evidence by May 15, 2014. The parties then have until July 15, 2014, to serve their reply expert reports.

The Applicants' Proposed Expert Evidence

15. The Applicants propose to adduce expert opinions on regarding the following topics:

a. International trade and foreign investment as it relates to the healthcare sector;

b. The impact of the reforms implemented by the Province of Quebec following the decision of the Supreme Court of Canada in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35;

c. The United States' healthcare system and the influence of United States-based healthcare insurance companies and service providers in an increasingly integrated North American economy in the event of a greater opportunity for private investment in the Canadian healthcare sector;

d. The importance of Canada's single-payer healthcare system to its industrial and manufacturing economy and the role of health insurance plans in collective bargaining;

e. The effect of increased privatization on the medical education system; and,

f. The impact that privatization may have on physicians who remain committed to the medicare model.

16. The Proposed Expert Evidence is duplicative and merely corroborative of the expert evidence of the defendants.

17. Further, the Proposed Expert Evidence will not assist the Court in resolving the issues that are raised by this action.

Part 5: LEGAL BASIS

1. The Respondents rely on the *Supreme Court Civil Rules* and the inherent jurisdiction of this Court.

2. By its nature, the role of intervenors is limited. That role is to provide a different perspective on the legal issues raised, not to increase the scope of litigation.

3. As Seaton J.A. held in *Canada (Attorney General) v. Aluminum Company of Canada*:

> Intervenors should not be permitted to take the litigation away from those directly affected by it. Parties to litigation should be allowed to define the issues and seek

resolution of matters they determine appropriate to place in issue. They should not be compelled to deal with issues raised by others.

Canada (Attorney General) v. Aluminum Company of Canada, 35 DLR (4th) 495, 1987 CanLII 162, p. 203

4. The principle that intervenors not be permitted to take the litigation away from the parties extends to the introduction of evidence.

B.C.T.F. v. B.C. Public School Employers' Assn. and British Columbia (Attorney General), 2005 BCSC 143, para. 28

5. The application should be dismissed. Permitting the applicants to adduce the Proposed Expert Evidence will take the litigation away from the parties, and improperly expand the role of intervenors in this litigation at the expense of the parties and extend proceedings.

6. First, much of the Proposed Expert Evidence is irrelevant to the issues in dispute in the litigation and if admitted, would widen the *lis inter partes*, which intervenors are not entitled to do.

7. Second, much of the Proposed Expert Evidence is duplicative of the expert evidence that will be relied on by the defendants.

8. Third, the Proposed Expert Evidence will encumber the record before the Court. Even leaving aside reply expert reports, the Court will be faced in over 35 expert reports to review. The record before the Court will also be comprised of thousands of documents. Adding to the record as the Applicants propose is not in the interests of the parties or this Court.

9. Fourth, the Plaintiffs will suffer substantial prejudice and unfairness if the Applicants are permitted to adduce the Proposed Expert Evidence. In particular:

   a. The Plaintiffs will be put to the additional cost and expense associated with reviewing the Proposed Expert Evidence and retaining additional experts to prepare reply expert reports;

   b. The Applicants would be placed in a *better* position than the parties. If their application is granted, they will have had the benefit of reviewing all of the expert evidence that the parties have filed prior to determining the nature of their expert evidence. That is fundamentally unfair to the Plaintiffs; and

   c. The Plaintiffs will be prejudiced by delay. Depending on when this Court renders its decision, and if the application is granted, the Plaintiffs would receive the reports potentially only one month or less before trial, and approximately three and a half

months after the parties exchanged their expert reports. During that time period, the Plaintiffs will likely be finalizing their reply reports to the experts and in the later stages of preparing for trial. The Plaintiffs will not be given a sufficient or reasonable time to reply to the Proposed Expert Reports.

10. Finally, allowing the Applicants to adduce expert evidence would improperly expand the role of the Applicants beyond what was intended by this Court. Importantly, this Court declined to grant the Applicants full party status as defendants, on the basis that their participation was not necessary to the effective adjudication of the issues in dispute. The Applicants were added as intervenors only, because they could offer a unique legal perspective from the parties. However, they now seek to significantly expand their role in this litigation by entering expert reports, many of which proffer opinions that are not in any way related to the different legal perspective for which they were added in the first place.

11. For all of these reasons, the application should be dismissed.

Part 6: MATERIALS TO BE RELIED ON

1. The Pleadings filed in this action;

2. Affidavit #1 of Taylor Clarke, sworn May 7, 2014.

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

The Plaintiffs/Respondents estimate that the Application will take two hours to be heard.

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

Date: May 7, 2014

for: Peter A. Gall, Q.C.
Counsel for the Plaintiffs/Respondents