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, ERMA KRAHN, WALID KHALFALLAH by his litigation guardian DEBBIE WAITKUS, and SPECIALIST REFERRAL CLINIC (VANCOUVER INC.)

PLAINTIFFS/APPLICANTS

AND:

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

DEFENDANTS/RESPONDENTS

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

WRITTEN ARGUMENT OF THE APPLICANTS

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I. OVERVIEW

A. The Basis for the Orders Sought

1. In this proceeding, the Applicants challenge a range of provisions of the *Medicare Protection Act* (‘***MPA***’)[1] that restrict access to medically necessary services (the ‘**impugned provisions**’). These provisions are an unconstitutional restriction on the life, liberty and security of person interests, and infringed the equality rights, of British Columbians.

2. The Applicants apply to have this Court exercise its jurisdiction to prevent the Respondent Medical Services Commission (the ‘**Commission**’) from enforcing the impugned provisions of the *MPA* against Cambie and SRC (together, the “**Clinics**”) and the physicians associated with the Clinics (the “**Clinics’ Physicians**), pending a determination on the constitutionality of these provisions.

3. The Court has inherent jurisdiction to control these proceedings and the parties before it, and to make such orders as will ensure the orderly and efficient utilization resources, and “to secure the just, speedy and inexpensive determination of every proceeding on its merits”.[2]

4. The Applicants must be able to focus on the trial preparation, including extensive document review, occasioned by the Defendants’ failure to produce relevant documents. The Applicants are being prevented from doing so by the conduct of the Respondents in seeking to enforce the impugned provisions prior to a trial on their constitutional validity.

5. The Applicants are not questioning the validity of the warrant obtained by the Commission, as such, or asking this Court to make any order respecting the Provincial Court. The Applicants are therefore not seeking to attack the warrant in this proceeding, or make any order with respect to non-parties, as the Respondents’ suggest.

6. Rather, this Application[3] addresses the conduct of a party to this proceeding, namely the Commission, for the benefit of parties to this proceeding, namely Cambie and SRC.

7. The Commission’s recent and zealous efforts to enforce the impugned provisions are unnecessarily disrupting these proceedings, and such activities should be restrained pending the resolution of the constitutionality of the provisions in question.

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[1] *Medicare Protection Act, RSBC 1996, c 286* (“***MPA***”), ***BoA TAB 25***.
[2] *Supreme Court Civil Rules*, BC Reg 168/2009 (the “***Rules***”), R 1-3(1).
[3] Notice of Application, dated September 28, 2015 (“**Application**”).

8. Notwithstanding the Commission's agreement to not take enforcement actions under the impugned provisions against the Clinics, the Commission has obtained a warrant to search Cambie and SRC for the ostensible purpose of auditing the Clinics' Physicians. Doing so is the equivalent of going after the Clinics themselves, which the Respondents previously agreed not do.

9. Although the Commission argues that enforcing the *MPA* against the Clinics' Physicians is necessary in the public interest, the Commission has failed to explain how the public interest would be advanced or why it is in the public interest to pursue only the physicians working for the Clinics who are currently challenging the constitutionality of these provisions.[4]

10. As occurred with the audit of the Clinics, the audits of the Clinics' Physicians will likely lead to further enforcement actions provided for under the *MPA*, including seeking injunctions against them, and could conceivably result in disciplinary proceedings before the College of Physicians and Surgeons that would harm the professional and financial interests of both the Clinics and the Clinics' Physicians.

11. Although the Respondents characterize such eventualities as 'speculative', enforcing the impugned provisions of the *MPA* against the Clinics' Physicians is the only conceivable purpose of conducting these audits. Indeed, the Respondents claim that they must take these steps in order to enforce the impugned provisions in the public interest.

12. If the Commission is not contemplating steps in enforcement, there is no explanation for proceeding with the audits on an urgent basis, or at all.

13. It is of course open to the Respondents to undertake that they will *not* take any of these steps, no matter what the audits reveal, but they have not done so.

14. But if the Respondents *are* willing to assure this court that the audit will result in no negative consequences to the professional and personal interests of the Clinics' Physicians, why are the Respondents taking *any* steps, prior to the determination of the constitutionality of these provisions being completed?

15. While the Respondents seek to describe the warrant to search the Clinics as some trivial and discrete measure, it must be viewed as the initial step towards further enforcement of the impugned provisions. This conduct will seriously impact not only the Clinics' Physicians but the Clinics to which they provide services, and to the patients who rely on private services to meet their medical needs that are not being adequately addressed in the public system.

[4] Affidavit #8 of Dr. Brian Day, sworn September 30, 2015, ("**Day Affidavit #8**") Application Record ("**AR**") Tab 42, at paras 40-42.

16. The Commission's current course of conduct will further disrupt and hamper the resolution of the constitutional challenge to the very provisions the Commission is now seeking to enforce.

17. The Applicants bring this application as a protective measure, to prevent the Commission from taking steps to execute the warrant and avoid the significant time, energy and resources that would be consumed, and also to prevent the inevitable further enforcement steps that will result.

18. The Respondents, in their Response, seek to divert the focus of this Application away from their conduct. In particular, they seek to wrongly characterize Dr. Day's position relating to the payment of Clinics' Physicians as misleading and inaccurate.[5]

19. Dr. Day's evidence has been clear and accurate. It has, however, consistently been misinterpreted by the Respondents. The Respondents have included in the application record approximately twenty affidavits, apparently for the sole purpose of trying to establish some inconsistency in Dr. Day's testimony on this issue.[6]

20. There is no inconsistency. However, this issue is *entirely irrelevant* to whether the Commission should continue to seek to enforce these impugned provisions, notwithstanding the harm and delay it causes to this constitutional litigation, and notwithstanding that the Commission cannot articulate a single reason why this must be done prior to determining the constitutional validity of the very provisions they are seeking to enforce.

21. The Respondents tacitly concede that the issues of what constitutes 'extra-billing' or overlapping billing, and what Dr. Day has previously said and what admissions were made and not made and the volumes of affidavits included in the Application Record are entirely irrelevant to this application, by failing to rely on any of this evidence in the Legal Basis section of the Response. The twenty affidavits form no part of their argument in response.

22. The Applicants submit that the Clinics' billing practices should be determined at trial and not in the context of this Application, to which they have no relevance.

23. The Commission's unnecessary and disruptive conduct is a continuation of a long course of conduct throughout this litigation. The Applicants submit that this conduct should be stopped now, so that the parties can proceed to determine the constitutionality of the impugned provisions.

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[5] Application Response, filed September 29, 2015 ("**Application Response**"), Facts, at paras 42-44.
[6] See Application Response, Facts, Footnote 13.

B. The Commission's Overlapping Activities

24. There is a further serious issue raised in by this application: the overlapping role played by the Commission.

25. The Commission is both a party to these proceedings, and acts as the enforcement arm of the Province, administering the very provisions challenged as unconstitutional.

26. The Respondents have admitted in their Application Response that the Commission is using information obtained through the discovery process and the orders of this Court in this litigation for a different and ulterior purpose: namely, for the purposes of enforcing the impugned provisions as against the Clinics' Physicians, some of whom gave testimony in these proceedings.[7]

27. Specifically, the Respondents have admitted that its current action against the Clinics' Physicians is being taken as a result of information that the Commission obtained through these proceedings, namely the Admissions and documents and evidence provided to the Respondents through the discovery process.

28. If the Commission were permitted to use this information for a purpose outside of this litigation, it would be violating the Respondents' implied undertaking, confirmed more than 20 years ago in the *Hunt* decision, that no party may use material discovered or produced in a proceeding for an ulterior purpose, including obtaining warrants or initiating other proceedings.

29. It should be emphasized that throughout the history of this litigation, the audit procedures under the *MPA* have fueled the conduct of the Respondents in this litigation, and the discovery process in this proceeding has fuelled further audits by the Commission.

30. Notably, individuals responsible for the Commission's audits, such as Mr. Stephen Abercrombie, whose affidavit forms the basis of the warrant application, have been intimately involved in this constitutional litigation. Mr. Abercrombie has attended discoveries in this proceeding, and been provided with volumes of evidence obtained through the discovery process.

31. This intermingling of distinct roles and proceedings has led to a disturbing information cycle, in which evidence given or admissions made in this proceeding leads to further enforcement action by the Commission, and where the Commission, exercising its audit powers under the *MPA*, in turn leads to further applications in this proceeding.

32. Providing the orders sought by the Applicants would not only ensure the most efficient and orderly use of this Court's and the parties' resources; it would also

[7] Application Response, Facts, at paras 40-45.

end the potential abuse of the Commission's dual role as enforcement arm and party to the litigation.

C. The Agreement to not Enforce the Impugned Provisions

33. The Applicants understood that the issue of whether the Commission would take enforcement steps against the Clinics or the Clinics' Physicians was determined in 2013, after the Commission first sought to enforce the impugned provisions against the Clinics.

34. In 2012, following an audit of Cambie and SRC, the Commission sought a number of orders against the Clinics, including an injunction to enforce the impugned provisions (the "**2012 Injunction**").

35. In early 2013, at a case management conference, Chief Justice Bauman strongly urged the Commission to not seek to enforce the impugned provisions against the Clinics pending resolution of the constitutional matter. The Respondents agreed.

36. The Respondents now seek to characterize their agreement in 2013 as merely a discrete concession on their part, limited to that specific injunction application.

37. However, until a few months ago, the Applicants reasonably understood that the audits of Clinics' Physicians – like other enforcement steps against the Clinics – were being held in abeyance, pending the adjudication of the constitutional challenge to the provisions.

38. Such an understanding was reasonable, given that the *reason* the Respondents did not pursue the 2012 Injunction against the Clinics was because it was entirely unnecessary to obtain an injunction urgently or otherwise, as there was no evidence of harm to the public, and also because it would have required a determination of the very constitutional issues set for trial without the benefit of the evidence at trial.

39. The Applicants were informed over three years ago that these physician audits were taking place. About two years ago, the Applicants learned that the audits of the Clinics' Physicians were supposedly ongoing.

40. However, the Commission did not take any steps that would have affected the Clinics' ability to provide medically necessary services to British Columbians.

41. To the Applicant's knowledge, the Commission did not take any further steps relating to the audits of the Clinics' Physicians.

42. Seeking to execute a warrant to search the Clinics, and to pursue the audits of the Clinics' Physicians, does affect the Clinics' continuing operations, as well as the Applicants' trial preparation.

43. Moreover, seeking to enforce the impugned provisions against the Clinics' Physicians will lead to the enforcement steps outlined above, and either prevent or

reasonably deter the Clinics' Physicians from continuing to treat patients at the Clinics.

44. In this way, auditing the Clinics' Physicians indirectly provides the Respondents with the same outcome as an injunction against the Clinics, which the Respondents expressly agreed not to pursue until the constitutional matter was adjudicated.

45. The Respondents appear to argue that they do not need a reason to take such steps, regardless of whether they are necessary or urgent, and regardless of the fact that they have taken no such steps in the past, or at all against any entities other than the Clinics, and did not take such steps against Cambie when it started operating over 20 years ago. Since these steps are affecting and will continue to affect the litigation, the Applicants submit that they *do* need a reason to take these steps now.

46. Given this background, the serious delay in this proceeding that the Respondents have already caused and the resulting prejudice the Applicants have suffered, the Applicants are seeking an order that the Commission's conduct stop pending resolution of this proceeding, so that the constitutionality of the provisions can be tested as soon as possible.

D. Delays Caused by the Respondents

47. The Respondents have also submitted that the delay the Commission's conduct would cause should be disregarded because of the Applicants' own conduct in this litigation. They claim that the Clinics are 'estopped' from arguing that there is any harm resulting from the delay caused by the Respondents, because the Applicants have "failed to take reasonable steps to prepare for trial".[8]

48. This allegation is outrageous, false and unbecoming of the Respondents. The Plaintiffs do not have the infinite resources of the Province of British Columbia. Nevertheless, the Plaintiffs were ready to proceed to trial in March 2015, until they learned that thousands of documents had recently been uncovered by the Defendants which may be relevant to the issues and had not been disclosed. This number quickly grew to over 100,000 new documents. Since that time the Plaintiffs have dedicated time to reviewing the documents and pursuing all other steps necessary to ensure that their case will be ready for trial.

49. The Applicants have also had to deal with numerous and pointless applications brought on by the Respondents. This includes an application for orders for more disclosure by the Plaintiffs, which was settled with some brief admissions, and an application to strike the Applicants' pleadings, inexplicably brought six years after the pleadings in the Action were initially filed, and brought well *after* the trial ought to have commenced.

50. The Applicants have brought a further application to dismiss the Respondents' application to strike, for the same reason as the present application: so that the

[8] Application Response, Legal Basis, at para 22(d).

parties can stop expending scarce resources on matters that are unrelated to preparing for the upcoming trial.

51. The Applicants have also had to expend resources to deal with the audits and the warrant, which would have been better dedicated to trial preparation. This entire application would have been unnecessary if the Commission had shown a modicum of restraint before bringing an application for a warrant to search the Clinics in support of its efforts to enforce the impugned provisions against the Clinics' Physicians.

52. Indeed, the Respondents would not even agree to stay the warrant for half a day to permit these matters to be raised at the scheduled case-management conference. As a result, this application had to be brought on an urgent basis, which again unnecessarily consumed significant time and resources.

53. The Respondents further argue that, if the Applicants do not want to submit to the warrant to search their premises, the Applicants should mount a time- and resource-consuming application to judicially review the issuance of the warrant itself.[9]

54. This suggestion poses same problem as the Respondents' application to strike parts of the Plaintiffs' claim, the continuing audit of the Clinics and the Clinics' Physicians, and the injunction application against the Clinics: it requires the constitutional issues to be decided on a summary basis.

55. Moreover, such a judicial review would not provide the Applicants with the remedy they seek in this Application, as the remedy sought in the current Application does not pertain solely to the execution of the warrant.

56. Remarkably, the Respondents have failed to acknowledge that all of these costs and use of further resources, is due entirely to their failure to properly disclose all relevant material in the early years of the litigation.

57. The trial was scheduled for March 2, 2015. As a result of the Respondents' defaults in disclosure, it has been adjourned for 14 months, to June 6th, 2016.

58. In recent months, the Plaintiffs have received approximately 20,000 new documents from the Respondents, amounting to hundreds of thousands of pages of new discovery material.

59. Needless to say, this late disclosure has consumed and will continue to consume an inordinate amount of time, and has significantly delayed this proceeding.

60. By undertaking and initiating enforcement proceedings, and seeking to conduct intrusive searches of the Applicants' premises, the Respondents are seeking to take advantage of their own failure to comply with the rules of disclosure. Further, these

[9] Application Response, Legal Basis, at para 4.

actions only delay and disrupt the Applicants' ability to prepare for trial, and in particular, to conduct a full review of the Respondents' new documents.

61. The Respondents have cited no urgency in undertaking these audits, over three years after they were purportedly initiated, and over two years after the Respondents were informed that the Clinics might have the documents they are seeking.

62. The only thing that has changed with respect to these dormant audits is that the Clinics have made certain admissions in this proceeding in order to expedite the litigation process. These admissions were made solely for the purposes of this litigation and can be used solely for this litigation. It is improper to use them for any other purpose.

63. The Respondents, however, forcefully demanded that the Clinics agree to have those Admissions provided to the Commission's investigations and enforcement arm, so that they could be used to the detriment of the Clinics' Physicians for the purposes of audit of those Physicians.

64. When the Clinics did not submit to this demand, but advised that the would require the consent of the Clinics' Physicians, the Commission sought a warrant to search the Clinics to obtain this information, which was only known to the Commission due to its participation as a party in this proceeding.

65. The Applicants are asking this Court to restrain the Commission from exploiting the very delay the defendants have caused to further disrupt these proceedings, and prevent the further misuse of the Commission's dual position to the prejudice of the Clinics and the Clinics' Physicians in separate enforcement actions. The full basis for this submission is set out below.

II. THE ORDERS SOUGHT

66. As set out in the Notice of Application, the Applicants are therefore seeking the following orders:

1. An interlocutory stay of the operation and enforcement of sections 14, 17, 18 and 45 of the *Medicare Protection Act*, as those provisions apply to the Applicants or any associated or affiliated persons, pending determination of the constitutional issues raised in the action;
2. An interlocutory order suspending the application of section 36 of the *MPA* as those provisions apply to the Applicants or any associated or affiliated persons, and an order relieving the Applicants from any legal obligation to comply with any warrant or other order issued under those provisions, pending the determination of the constitutional issues raised in the action;
3. An interlocutory injunction, in the nature of a prohibition order, against the Medical Services Commissions from taking any steps to enforce or investigate alleged breaches of sections 14, 17, 18 and 45 of the *Medicare*

Protection Act, by way of audits or otherwise, as those provisions apply to the Applicants or affiliated persons;

4. Costs; and
5. Such further and other relief as this Honourable Court may deem just.[10]

67. The objective of the Applicants in bringing this application is to be given the opportunity prepare for the trial on the newly scheduled trial date, with the limited resources available to the Plaintiffs. This objective can only be achieved if the Commission ceases its unnecessary enforcement actions, designed to hamper the Clinics' operations, after approximately 25 years of operation.

68. As described below, this constitutional challenge was initially filed in 2009, after the Commission had taken steps to enforce the impugned provisions as against the Clinics and the Clinics' Physicians. It is now nearing the end of 2015, and the trial is not scheduled to begin until mid-2016, seven years after the claim was initially filed.

69. The parties cannot prepare for trial in an expeditious manner so long as the Commission is taking steps to enforce the very provisions that the Applicants say are unconstitutional. It was on this basis that Chief Justice Bauman urged the Commission to stop doing so in 2013, so that the matter could proceed to trial as soon as possible.

70. The Applicants are seeking orders that would achieve this objective. The Commission must discontinue all actions against the Clinics and the Clinics' Physicians, so that the Applicants can devote their time and resources to trial preparation.

[10] Application, at paras 1-5.

III. THE FACTS

A. The Parties

1. The Applicant Cambie Surgeries Corporation owns and operates Cambie in the City of Vancouver, BC. Cambie is a multi-specialty surgical and diagnostic facility, containing six operating rooms, recovery beds and overnight stay rooms.

2. By its own admission, Cambie has been in contravention of sections 17(1)(b) and 18(3) of the *Medicare Protection Act* ("***MPA***") since 1996, when it first commenced operation, as a result of charging a "facility fee" for surgical treatments which are a benefit under the *MPA*.

3. SRC is a group of specialist physicians who provide private individual medical assessments to patients, including residents of British Columbia, for a fee. SRC has been providing this medical service since 2002, and clients who obtain medical assessments at SRC often choose to have surgical treatment at Cambie.

4. Cambie is used by a number of physicians in the Province to provide surgical services. Some of Clinics' Physicians have been selected by the Commission for audit. According to the Respondents' evidence, these audits were initiated in 2012, following the audit of Cambie and SRC.[11]

5. The Commission is a nine member statutory body continued pursuant to the *MPA*, whose purpose is to facilitate reasonable access to quality medical care, health care and diagnostic facility services for residents of British Columbia under the Medical Services Plan (the "**MSP**") continued under the *MPA*.

6. The Respondent Commission, as well as the Respondent Minister of Health Services (the "**Minister**") and the Attorney General of British Columbia, have known and accepted, since the time Cambie and SRC commenced operations in 1996 and 2002 respectively, that Cambie and SRC were providing medical services to residents of BC in a manner that the Defendants knew (or understood) violated the *MPA*, such as the statutory prohibitions against direct and extra billing for medically required services.[12]

B. Background Proceedings

7. On December 4, 2008, a Petition (the "**Petition**") was filed by a number of Petitioners, seeking to compel the Commission and the Ministry to enforce the impugned provisions of the *MPA* restricting private billing for medical services.

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[11] Application Response, Facts, at paras 38, 39.

[12] Affidavit #7 of Dr. Brian Day, sworn September 28, 2015 ("**Day Affidavit #7**"), **AR Tab 37**, para 40; Affidavit #1 of Gordon Denford, sworn October 2, 2012, **AR Tab 8**, at paras 14-16; Affidavit #1 of Derryck Smith, sworn October 11, 2012, **AR Tab 16**, at paras 28-32.

The Petition was filed on notice to Cambie, as well as other private health care clinics in Vancouver, B.C.

8. On January 28, 2009, the Applicants, as the Plaintiffs in this proceeding, filed a Statement of Claim (the "**Action**") against the Defendants, alleging that sections 14, 17, 18 and 45 of the *MPA* directly or indirectly prohibit or impede access to private health care and patient choice in primary health care and therefore violate sections 7 and 15 of the *Canadian Charter of Rights and Freedoms (*the "***Charter***"), and that such violation is not demonstrably justified under section 1 of the *Charter*.

9. On February 20, 2009, the Respondents filed their Statement of Defence and made a counterclaim against Cambie and SRC. In its counterclaim, the Commission sought a warrant authorizing an inspector to enter the Clinics to inspect and copy their records and the records of practitioners, as well as interim and permanent injunctions restraining the Clinics from contravening ss. 17 and 18 of the *MPA*.

10. The counterclaim also sought damages against Cambie and SRC flowing from alleged economic losses the Government says it has suffered as a result of the extra billing practices carried on by Cambie and SRC and the resulting actions of the Government of Canada.

11. On November 20, 2009, Madam Justice Smith held that the constitutional issues should be determined in the Action, not the Petition, so as not to compel the government to enforce legislation which may or may not be constitutional.[13]

12. In particular, Smith J. made the following observations respecting how it would be unnecessarily wasteful and time consuming to address the specific relief sought in the Petition – that is, the enforcement of the impugned provisions:

> Having decided that the Constitutional Issues should be determined in the Action, I turn to the question of the Petition. The Petitioners seek to compel the government to enforce legislation which may or may not be constitutional. Until the question of constitutionality is decided, it would be wasteful of court time and the parties' resources to address the specific relief sought in the Petition. I conclude that the Petition should be stayed until the Constitutional Issues have been decided in the Action.[14]

13. Smith J. also declined to issue a warrant for an audit as sought in the Defendants' counterclaim. Instead, pursuant to the equitable jurisdiction of the Court, Justice Smith ordered an injunction against Cambie and SRC requiring them to permit inspectors appointed by the Commission to enter their premises to inspect their records; and enjoining them from hindering, molesting or interfering with the inspectors.

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[13] *Schooff v. Medical Services Commission*, 2009 BCSC 1596, **BoA Tab 28**.
[14] *Schooff*, **BoA Tab 28**, at para 40 (emphasis added)

14. Justice Smith's decision was overturned by the Court of Appeal in September 2010. The Court of Appeal found that Smith J. should not have issued an injunction in this proceeding, and that if the Commission needed to undertake these audits, it should seek a warrant to do so.[15]

15. A few points should be highlighted from the Court of Appeal's ruling.

16. First, the Court of Appeal was concerned with the confusion and potential for impropriety resulting from the Commission's multiple roles, and warned that seeking to supplement the discovery process through the use of the audit procedures would be inappropriate. The Court of Appeal held:

> The application for a warrant became entangled in the litigation, leading to a great deal of confusion. The parties and the chambers judge seemed, at times, to suggest that an audit could be used for the purpose of discovery in the litigation. In my view, that would not be an appropriate basis for conducting an audit. The statutory provisions allowing for an audit are designed to allow for the orderly administration and regulation of the Medical Services Plan, not as an adjunct to rights of discovery in litigation.[16]

17. Second, the Court anticipated the very injunction proceeding the Applicants have now been forced to bring. The Court stated that the applicants in this case could apply to:

> suspend the operation of the audit provisions of the statute, as those provisions relate to them, pending the conclusion of their constitutional challenge. Such an application would have clearly fallen within the scope of *RJR-MacDonald*, and much of the confusion over the applicable test would have been avoided.[17]

18. The Court continued:

> If the appellants consider that an audit should not take place pending determination of their constitutional challenge, they are entitled to apply to a judge of the Supreme Court for an order exempting them from the relevant provisions of the *Medicare Protection Act* pending the determination of their challenge. Such an application could properly be brought as an interlocutory application in the extant proceedings. Such an application would clearly be an application for an interlocutory stay, and the *RJR-MacDonald* test would apply.[18]

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[15] *Cambie Surgeries Corporation v. B.C. (Medical Services Commission)*, 2010 BCCA 396 ("**Cambie BCCA**"), **BoA Tab 3**.
[16] *Cambie BCCA*, **BoA Tab 3**, at para 43 (emphasis added).
[17] *Cambie BCCA*, **BoA Tab 3**, at para 44.
[18] *Cambie BCCA*, **BoA Tab 3**, at para 46 (emphasis added).

19. The Court also emphasized that, in exceptional circumstances, a party may apply for a warrant in the context of the civil proceedings.[19]

20. As this proceeding is case-managed, the Respondents should have either brought this matter up in case management before filing for a warrant, or should have permitted the Applicants to raise the issue at the regularly scheduled case conference.[20]

21. That would have permitted the matter to proceed in an orderly fashion, without the need for this urgent Application. However, the Respondents refused this option, and instead chose to obtain a warrant to search the premises of the Clinics in Provincial Court, as discussed below.[21]

22. The Applicants emphasize again that these audits, based on the Respondents own evidence, have apparently ongoing for three years, albeit with little action over the last two years. [22] There is clearly no urgency here, as will be discussed in more below, and no reason to bypass the case-management process and seek to have these warrants granted and executed on an urgent basis.

23. After the Court of Appeal's decision, the Respondent Commission continued the audit of the Clinics, but no search warrant was sought or obtained. Instead, the parties negotiated the conditions and procedures relating to the collection of materials from the Clinics.

24. On July 18, 2012, the Chair of the Commission wrote to Cambie, enclosing a copy of the Audit Report, and advising that the Commission intended to pursue the legal remedies identified in its counterclaim against Cambie ("**July 2012 Letter**").

25. The July 2012 Letter also stated that the Commission would be auditing the Clinics' Physicians (the "**Targeted Audits**"), stating:

> …the Commission has decided to request that the Audit and Inspection Committee undertake <u>focused audits of the physicians who appear to have been involved in double or overlapping billing</u>, where both patients and the Medical Services Plan were billed for or in connection with the same medical service[23]

26. In response to the July 2012 Letter, the Applicants advised the Commission that they were not willing to stop providing private health care services to residents of British Columbia pending a determination of the constitutional issues.

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[19] *Cambie BCCA*, **BoA Tab 3**, at para 42.
[20] Affidavit #1 of Cindy Chu, sworn September 28, 2015 ("**Chu Affidavit #1**"), **AR Tab 36**, Exhibit 'C', at 66.
[21] Chu Affidavit #1, **AR Tab 36**, Exhibit 'C', at 67.
[22] Application Response, Facts, at paras 38-40.
[23] Chu Affidavit #1, **AR Tab 36**, Exhibit 'C', at 45-46 (emphasis added).

27. On September 6, 2012, the Respondents sought to enforce the impugned provisions by bringing an application to enjoin the Clinics from providing services while the constitutional challenge was being adjudicated.

28. In response, the Applicants brought a cross-application seeking a stay of the Respondents' application, pending resolution of the constitutional questions.

29. In January 2013, following Chief Justice Bauman's suggestion at a case management conference, the Respondents abandoned their application for an injunction pending the outcome of the Action, and agreed to take no further steps to enforce the impugned provisions against Cambie or SRC (the "**Agreement**").

30. The Respondents dispute whether or not they agreed to take no further steps to enforce the impugned provisions of the *Act* against the Clinics or the Clinics' Physicians.[24]

31. The Respondents seek to characterize their agreement as merely adjourning the specific injunction against the Clinics, without any reference to *why* they were urged by the Court, and sensibly agreed, to adjourn those particular injunction proceedings.

32. There was not something especially deficient about the injunction application as a standalone exercise of the Commission's statutory powers. That power is specifically set out in section 45.1 of the *MPA*.

33. Thus, the problem with the application for an injunction was *not* that the Commission did not have the authority as set out in the statute.

34. The problem was that seeking to enforce the impugned provisions against the Clinics would involve the Commission enforcing "legislation which may or may not be constitutional"; would further delay the trial into the constitutionality of those very provisions; and was entirely unnecessary, pending the determination of whether the provisions they were seeking to enforce were constitutionally sound.

35. Moreover, it was, in effect, contrary to Madam Justice Smith's decision that the Petition to enforce the impugned provisions should be stayed pending the Court's decision on the constitutional validity of the provisions.

36. The Commission agreed not to proceed with its enforcement actions against the Clinics for these reasons. The Applicants' understood that the Defendants had effectively agreed they could not enjoin the Clinics or otherwise hamper their operations pending the resolution of the constitutional issues.

37. Now, the Respondents seek to effectively ignore these reasons for restraint, by proceeding with the audits of the Clinics' Physicians, presumably for the purpose of seeking to enjoin the Clinics' Physicians from providing services with the Clinics, or to otherwise take steps to enforce the impugned provisions as against the Clinics' Physicians.

[24] Application Response, Facts, at para 53.

C. Facts Leading to the Present Application

38. In September or October 2008, the Commission communicated to certain physicians that the Audit and Inspection Committee had authorized an on-site audit of Cambie and SRC, and that as part of the audit of the Clinics, certain medical records relating to services performed by the physicians at the Clinics may be reviewed and copied as "audit evidence." Following this audit, the Commission published the Audit Report of Cambie and SRC in July 2012.[25]

39. The Respondents informed the Applicants by way of its July 2012 Letter that it would be auditing the Clinics' Physicians.

40. Following the publication of the Audit Report in July 2012, the Commission informed the Clinics' Physicians in November or December 2012 that it had authorized an audit of the services they provided at the Clinics, and would be auditing them.

41. In January 2013, the Commission delivered extensive information requests to the Clinics' Physicians.[26]

42. Between March and December 2013, certain of the Clinics' Physicians responded to the Commission's requests.

43. Notably, on or around June 13, 2013, many of the Clinics' Physicians responded to requests from the Commission respecting the Targeted Audits by providing some documentation or answers to the Commission. Some of the Clinics' Physicians indicated to the Commission that if further documentation was needed, it would have to be obtained from Cambie or SRC.[27]

44. A few days later, on June 17, 2013, the Defendants conducted an examination for discovery of Dr. Day, in his capacity as the President of Cambie and SRC, within the underlying Action. Mr. Stephen Abercrombie, the Audit Manager for the Medical Services Commission attended the discovery.

45. In November of 2013, after the Respondents had agreed to take no further steps to enjoin the Clinics directly, the Applicants' and Respondents' counsel exchanged correspondence, in which the Applicants' disputed the appropriateness of the continuation of the Targeted Audits.[28]

46. The Applicants requested that the Commission suspend further investigations relating to Cambie, SRC, and the Clinics' Physicians who provide services to them, pending the conclusion of the constitutional challenge.[29]

47. In December 2013, the Respondents were again informed by certain of the Clinics' Physicians (or their counsel) that if they required documents not already provided

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[25] Affidavit #1 of Linda Mai, sworn January 31, 2014 ("**Mai Affidavit #1**"), **AR Tab 22**, at para 3.
[26] Affidavit #7 of Stephen Abercrombie, sworn September 28, 2015 ("**Abercrombie Affidavit #7**"), **AR Tab 38**, at paras 8-17.
[27] Abercrombie Affidavit #7, **AR Tab 38**, at paras 13-17, Exhibit 'A'.
[28] Mai Affidavit #1, **AR Tab 22**, Exhibit 'C.
[29] Mai Affidavit #1, **AR Tab 22**, Exhibit 'D'.

by the Clinics' Physicians in the course of the audits, they would have to seek those from the Clinics.[30]

48. To the Applicants' knowledge, the Commission did not take *any* steps to obtain those documents – through requests from Cambie and SRC under the Commission's auditing powers, or through obtaining a warrant to search Cambie or SRC – over the next 18 months.

49. In summary, the Commission was informed over two years ago by a majority of the Clinics' Physicians that if it required more documentation, it would have to obtain it from the Clinics. Nevertheless, no steps were taken to request those documents until August 2015, and no steps were taken to obtain a warrant until September 2015.

50. So while the Commission claims these Targeted Audits were "ongoing", and that they had determined that they required the Clinics assistance in completing the audits, they determined this over two years ago, and did nothing.

51. Instead, the Commission undertook a number of actions – to a similar effect – in *this proceeding*. That is, the Respondents sought financial and billing information with respect to the Clinics' Physicians through the discovery process in this proceeding, and not through the BIP or the audit procedures as set out in the *MPA*.

52. In particular, on July 11, 2014, the Respondents applied in this proceeding to have a forensic audit team (TCS Forensics) enter Cambie and SRC to make a mirror image of all computer systems and digital storage devices on the premises. That order was granted by consent on July 22, 2014, and included the direction that TCS Forensics shall keep all such information in confidence and not disclose it except by further order of the Court.

53. Due to the magnitude of the task of reviewing all of the Clinics' documents for relevance, and the limited resources of the Applicants, the Respondents proposed to review the files and provide redacted copies of records they believed to be relevant to the Applicants.

54. As part of this proposal, the Respondents stated that "we will undertake not to permit any of the documents to be disclosed to anyone outside the Ministry of Justice and our agents: specifically, none of the documents will be disclosed to personnel at the Ministry of Health or the Medical Services Commission until such time as you have agreed, or the Court has found, that they are relevant to the litigation".[31]

55. On April 2, 2015, the Respondents provided the Applicants with an unfiled copy of a 52 page Notice of Application in this proceeding for the production of documents (the "**April 2015 Application**"). The application states that the "defendants have recently come into possession of documents", and the "defendants have, over the

[30] Mai Affidavit #1, **AR Tab 22**, at para 17.
[31] Affidavit #10 of Carol Mae Brossard, sworn April 1, 2015, **AR Tab 32**, Exhibit 'M'.

years, obtained a significant amount of evidence" which, it claimed, showed that the Applicants had not complied with their disclosure obligations.[32]

56. In support of the April 2015 Application, the Respondents relied upon information obtained in its 2012 audit of the Clinics. For instance, it repeatedly cites Affidavits #3 and #6 of Steven Abercrombie, both of which were based on information that "was obtained in the course of conducting the audit of Cambie Surgeries Corporation ("Cambie") and Specialist Referral Clinic ("SRC")".[33]

57. Indeed, the April 2015 Application expressly relies on the audit of Cambie and SRC conducted by the Commission in 2011, and the specific findings of that audit, as a basis for its application in this ostensibly separate proceeding.[34]

58. In other words, just as the Respondents have been using the discovery process in this proceeding as a basis of proceeding with its audits, it has been relying on the use of its audit powers in support of obtaining documents for the purposes of this proceeding.

59. On or around June 10, 2015, Cambie and SRC made certain admissions relating to the billing practices at Cambie and SRC (the "**Admissions**"), which Admissions were made in an effort to avoid unnecessary distractions, expedite the trial process in the underlying Action, and to promote the efficient use of judicial resources.[35]

60. These Admissions were made solely and exclusively for use in the Action, that is, "for the purpose of this proceeding only". Even absent that clear language in the Notice to Admit itself, these Admissions and related documents were covered by the implied undertaking rule.[36]

61. Immediately after providing the Admission, on June 22, 2015, counsel for the Respondents wrote to the Applicants' counsel, seeking permission to use the Admissions and various other documents tendered in the Action *for the purpose of the Targeted Audits of the Physicians*. This email was not from counsel to the Commission (Mr. Musto), but rather from counsel to the Government in this constitutional litigation, Mr. Penner.[37]

62. The Applicants' counsel responded that it would seek instructions with respect to that request, and that it may take some time, as the Applicants' do not represent the Clinics' Physicians.[38]

63. On July 31, 2015, Respondents' counsel stated that if a response is not forthcoming, he "will be forced to seek instructions to bring an application for leave of the court

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[32] April 2015 Application, at paras 4, 27.
[33] Affidavit #6 of Stephen Abercrombie, sworn July 4, 2014 ("**Abercrombie Affidavit #6**"), **AR Tab 29**, at para 3; Affidavit #3 of Stephen Abercrombie, sworn September 20, 2013 ("**Abercrombie Affidavit #3**"), **AR Tab 18**, at para 3; April 2015 Application, at paras 31, 32, 33, 88, 90, 92, 94, 96, 105.
[34] Application, at para 33.
[35] Chu Affidavit #1, **AR Tab 36**, Exhibit 'A'.
[36] Day Affidavit #7, **AR Tab 37**, at paras 4-6; Chu Affidavit #1, **AR Tab 36**, Exhibit 'A'.
[37] Chu Affidavit #1, **AR Tab 36**, Exhibit 'B'.
[38] Chu Affidavit #1, **AR Tab 36**, Exhibit 'B'.

to use the admissions for the purposes" of the Targeted Audits. The Respondents did not bring this application.

64. On August 10, 2015, Applicants' counsel responded, noting that it was inappropriate to seek to use the Admissions and documents produced in the Action for the purposes of the Targeted Audits, and that the Clinics' position was that they could not consent to the use of the Admissions and associated confidential documents in the Targeted Audits, without the Commission first seeking to obtain the Clinics' Physicians' consent.[39] Applicants' counsel proposed a process by which that consent might be sought.

65. To the Applicants' knowledge, the Respondents have not provided notice to the Clinics' Physicians or their legal counsel that their audits had been resurrected (after at least 18 months of apparent inactivity), nor have the Respondents sought the Clinics' Physicians' consent to use the Admissions and documents for the purposes of the Targeted Audits.

66. Counsel for the Applicants has been authorized to inform the Court of the following statement, attributable specifically to William Clark, a senior partner at Harper Grey LLP, representing a number of the Clinics' Physicians:

> "Harper Grey acts for some of the physicians subject to the audits authorized under s.36(2) of the *MPA*, relating to Cambie. Harper Grey has heard nothing from the Commission in follow up to those audits (after Harper Grey sent out its responses in December 2013). To William's knowledge, none of their clients have heard anything directly from MSC regarding these audits."

67. So, instead of informing the Clinics' Physicians (or their counsel) or seeking the Physician's consent, on August 12, 2015, the Director of the Billing Integrity Program ('**BIP'**) of the Ministry wrote to Dr. Day, purporting to provide notice that they intended to enter the Applicants' premises to obtain a range of confidential and private documents relating to physician billing practices.[40]

68. On September 8th, 2015, the Commission restated its demand for access to the Applicants' premises and confidential documents, and threatened to obtain a warrant under the *MPA* if the request was not granted.[41]

69. The September 8th letter referred to, and enclosed, the July 2012 Letter, which indicated that the Targeted Audits were undertaken for the purpose of enforcing the impugned provisions.[42]

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[39] Chu Affidavit #1, **AR Tab 36**, Exhibit 'B', at 19-20.
[40] Day Affidavit #7, **AR Tab 37**, at para 12, Exhibit 'A'.
[41] Chu Affidavit #1, **AR Tab 36**, Exhibit 'C', at 52.
[42] Chu Affidavit #1, **AR Tab 36**, Exhibit 'C', at 53.

70. On September 10, 2015, the Applicants responded through legal counsel, informing the Respondents that if they intend to proceed with the Targeted Audits, that the Applicants would be applying to the Case Management Judge in the constitutional litigation for an order restraining the Commission from proceeding with any further enforcement action pending resolution of the constitutional issues in the Action.[43]

71. On September 16 and 17, 2015, counsel to the Respondents contacted counsel to the Applicants, indicating that the Commission was preparing an application for a warrant to search the premises of the Clinics, and would not be bringing the matter before the Case Management Judge.[44]

72. The Applicants, through legal counsel, responded on September 18, 2015, requesting notice of any proceeding to obtain a warrant to search the premises of the Applicants, and stating that the application for a warrant should be delayed until the matter could be brought before the Case Management Judge.[45]

73. The Respondents did not respond until the following Monday, informing the Applicants that they had applied on September 18th to obtain a warrant.[46]

74. The Respondents filed their application for a warrant after receiving the Applicants' request for notice of the application and the hearing, but provided no such notice.[47]

75. The Respondents did not raise the matter before the Case Management Judge before applying for a warrant to search the premises of Cambie and SRC, and did not permit the Applicants to file this Application before applying for the warrant.

76. The warrant was issued on September 21, 2015, and was scheduled to take effect on October 5, 2015.[48]

77. On September 22, 2015, the Applicants reasonably requested that the Respondents delay the execution of the warrant to permit this Application to proceed during the regularly scheduled case planning conference on that same day, October 5, 2015.[49]

78. The Respondents denied the request to hold off on the execution of the warrant for a single day to permit this matter to be put before the Court in a convenient and orderly fashion.[50]

79. Despite the fact that these audits had been 'ongoing' for over three years, and that the Commission had taken no steps under the *MPA* to obtain the documents from the Clinics' Physicians or Cambie for over two years, the Respondent Commission

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[43] Chu Affidavit #1, **AR Tab 36**, Exhibit 'B', at 55-56.
[44] Chu Affidavit #1, **AR Tab 36**, Exhibit 'C', at 65, 67.
[45] Chu Affidavit #1, **AR Tab 36**, Exhibit 'C', at 68.
[46] Chu Affidavit #1, **AR Tab 36**, Exhibit 'E', at 72.
[47] Chu Affidavit #1, **AR Tab 36**, Exhibit 'C', at 68.
[48] Chu Affidavit #1, **AR Tab 36**, Exhibit 'C', at 68.
[49] Chu Affidavit #1, **AR Tab 36**, Exhibit 'D', at 70.
[50] Chu Affidavit #1, **AR Tab 36**, Exhibit 'E', at 78.

obtained this warrant on an urgent basis, and would not agree to stay its execution of the warrant for a single day, or half a day, to permit the matter to be brought before the Case Management Judge.

80. Instead, the Applicants have had to respond to the actions of the Commission to search the Clinics' premises and to enforce the impugned provisions of the *MPA*, for no apparent or urgent reason. That is why the Applicants have had to bring this application on an urgent basis.

D. Timing Concerns of the Audits in Relation to the Adjudication of the Action

81. The Respondents have not provided any plausible reason for why they have now, after years of inactivity, sought to urgently resurrect the Targeted Audits.

82. Notably, the Respondents have not seriously contended that the Clinics are likely to abscond with or destroy relevant records, or that there is any urgency with respect to the carrying out of the Targeted Audits or obtaining the confidential records.

83. While the Respondents imply that Cambie had impermissibly destroyed documents in the past, it is not clear on what basis they make this damaging allegation, and the allegation has not been particularized.[51]

84. Of course, the Clinics, like other health care facilities, do not keep records forever, so depending on what material they are referring to, documents may have been destroyed in the course of regular housekeeping, and in compliance with regulations requiring the maintenance of documents and records for a certain period of time.

85. But that cannot plausibly be used as evidence of anything relating to Cambie's complete cooperation with the past audit, or any sort of urgency with respect to this audit.

86. To the extent that the Commission was seeking to imply that the Clinics had improperly or illegal destroyed records, that is entirely untrue, as confirmed in Dr. Day's 7th Affidavit.[52]

87. Thus, the Respondents have provided no reason why it was necessary to execute a warrant urgently, or prior to the matter being raised before the Case Management Judge.

88. If there was a true concern that the Clinics would illegally destroy records, the Commission could have sought to protect those records or obtain a warrant in 2012, or 2013, following the audit of Cambie and SRC. It took no such steps.

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[51] Application Response, Facts, at para 36; Chu Affidavit #1, **AR Tab 36**, Exhibit 'C' at 33.
[52] Day Affidavit #7, **AR Tab 37**, at para 42, Exhibit 'A'.

89. In light of all of the circumstances, the only matter that *is* urgent is being able to proceed to trial as quickly as possible, and this course of action is precisely what is impeded by the Commission's actions.

90. The Respondents submit that the Applicants are "doing nothing to prepare for trial", and that counsel to the Clinics "have made virtually no effort over the past six months to prepare for trial, either".[53] The Respondents claim that the Clinics are therefore 'estopped' from relying on the Respondents' delay as a basis for the orders sought.[54] The legal argument addressing this claim is below, however it should be noted that the facts demonstrate this submission is without foundation.

91. For example, the Applicants have been working on agreed statements of facts regarding the Patient Plaintiffs. This is a time-consuming task, as it requires reviewing the Plaintiffs' examinations for discovery, their affidavits, their medical records, and communicating with the Plaintiffs. While the Applicants have not prioritized these tasks as urgent, given the delay in the trial date and the massive document disclosure underway, they have been worked on.

92. In April of this year, the Respondents advised that they intended to bring an application regarding their belief that the Applicants had not produced all of its documents. Addressing and resolving this matter took a considerable amount of time and effort.

93. In early 2015, the Respondents agreed to provide the Applicants with a comprehensive draft agreed statement of facts regarding the health care system. The Applicants received a skeletal draft in February, and recently received a more comprehensive draft (on September 22). The Applicants did not repeatedly make demands of the Respondents in this respect, understanding that they are working on this, and that it takes time.

94. The Applicants have been also working on their own comprehensive notice to admit, which will address major aspects of the issues in this litigation.

95. In August, the Respondents sent the Applicants a Notice to Admit, mainly containing statements that were (a) not properly the subject of a notice to admit, (b) too vague to properly respond to, (c) legal conclusions, and/or (d) matters for expert evidence. The Applicants were still required to respond to this.

96. Over the course of the summer, the Applicants worked closely with the Respondents to identify how to narrow the scope of the Respondents' production, primarily to expedite the Respondents' review and disclosure process. Narrowing the scope alone took significant amounts of time, as it required:

[53] Application Response, Facts, at para 54.
[54] Application Response, Legal Basis, at para 22(d).

(a) A number of meetings, including in-person meetings in both Vancouver and Victoria to understand the nature and scope of the documents being produced and their potential relevance; and

(b) Reviewing the previous documents disclosed, and initial batches of the new documents to understand what relevant documents the Plaintiffs already had, and what the new documents were likely to add.

97. The Applicants understand these narrowing efforts reduced the amount of documents that the Respondents needed to review and produce by at least half.

98. With respect to actually reviewing the new documents, the Applicants have spent considerable amounts of time to establishing new systems to review and identify the relevant documents (because prior to the adjournment, the Applicants had reviewed approximately 30,000 documents, had determined detailed tagging systems based on the types of documents disclosed, and identified all the documents they intended to rely on a trial). Re-determining the relevant subset of documents is a time –consuming, comparative and iterative process.

99. The Applicants have determined that the total amount of new documents (19,241) and pages of documents (116,059), which have been listed since March 2015. Moreover, at the Applicants have determined that, at the rate of the Defendants' disclosure of 750 documents per week, reviewing each document for only 3 minutes would require 37.5 hours of dedicated review each week.

100. The Applicants must not only review all of this material, but must determine what material is relevant, must determine whether further examinations of Government representatives are required, must consult with their clients, and must conduct further legal research and review their own documents again.

101. Without fully understanding the nature and content of the documents, which continue to come in, thousands at a time each month, the Applicants cannot even begin to start addressing the Respondents' requests (such as whether certain witnesses and experts can be cut).

102. Further, the Applicants' counsel must be in constant communication with all of the Plaintiffs' witnesses to update them on the progress, and ensure they remain available for the anticipated start date of the trial.

103. In August of this year, the Respondents also advised that they intended to bring an application to strike certain parts of the Plaintiffs' claim, six years after the commencement of this litigation. Preparing the Plaintiffs' response to this has taken up significant amounts of time, despite the fact that it does not achieve the purpose of applications to strike – i.e. the promotion of trial efficiency, through bringing an application at the *early* stages of a proceeding.

104. Therefore, even if the Respondents' legal argument on this point had any merit (which it does not), it is entirely inaccurate to say that nothing has been done on this file on behalf of the Applicants.

105. It *is* accurate to say, however, that the Applicants have not been able to adequately prepare for trial, because they have been dealing with unnecessary applications, search warrants, and proceedings initiated by the Respondents. That is the reason for bringing this Application.

E. Effect of the Warrant and Seeking to Enforce the Impugned Provisions

106. As the Respondents have been made aware, Cambie's long-time accountant has recently passed away. Currently, Cambie does not have an appropriate officer to assist in and ensure that the audit and proposed search is conducted efficiently and in a manner which protects the privacy of patients to the greatest extent possible.[55]

107. The proposed search for which the Respondents have sought a warrant will therefore require considerable expenditure of time and resources, and will cause significant disruption at Cambie and SRC, directly impacting the ability of Cambie and SRC to provide to its patients and delaying medically necessary surgeries and obstructing trial preparation.[56]

108. The outcome of the audits respecting the Clinics' Physicians may be wide-ranging and punitive, and could include:

(a) an action seeking repayment of any money recovered by the federal government due to extra billing,

(b) conviction of an 'offence' resulting in fines or imprisonment[57],

(c) cancellation of the physician's enrolment;[58]

(d) an injunction against the Clinics' Physicians,[59] and

(e) professional discipline through the College of Physicians, up to and including cancellation of a license to practice.[60]

109. As evidenced by the steps taken following the audit of Cambie and SRC – including seeking various orders, injunctions and damages for alleged losses – the continuation of the audits and enforcing the impugned provisions against the

[55] Day Affidavit #7, **AR Tab 37**, at paras 23-26.
[56] Day Affidavit #7, **AR Tab 37**, at paras 19-28.
[57] *MPA*, *supra*, **BoA Tab 35**, s. 46; *Offence Act*, RSBC 1996, c 338, s. 4, **BoA Tab 36**, s. 4.
[58] *MPA*, *supra*, **BoA Tab 35**, s. 15.
[59] *MPA*, *supra*, **BoA Tab 35**, s. 45.1.
[60] *Health Professions Act*, RSBC 1996, c 183, BoA Tab 33, s. 39(2).

Clinic's Physicians will likely deter the Clinics' Physicians from providing services at Cambie and SRC.

110. The Respondents suggest that any harm based on the possibility that the Clinics' Physicians will choose to no longer provide services at Cambie and SRC is "speculative".[61] This assertion is discussed in more detail in the legal basis section, below.

111. In brief, however, it is entirely reasonable to expect that if the Commission seeks to enforce the impugned provisions of the *MPA* against the Clinics' Physicians, many of the Clinics' Physicians will stop working with the Clinics, and/or will stop doing surgeries that the public system cannot accommodate out of a fear of retaliation by the Commission.

112. In light of the potential consequences which may flow from the audit – the risk of being charged with an offence, or accused of unprofessional conduct, or sued for damages – it is difficult to imagine how this would not deter the Clinics' Physicians from providing these services at the Clinics or at all. Indeed, that is presumably the Respondents' very purpose in conducting the audits.

113. Proceeding with the audits and proposed search will not only disrupt the Clinics' ability to provide necessary health care services to the BC Residents – as it has been doing, for over 25 years, with the Governments acquiescence if not support – but will also further undermine the Clinics' ability to prepare for trial, which has already been significantly delayed by the Respondents failure to comply with its disclosure obligations.

[61] Application Response, Legal Basis, paras 21, 22(b), 37.

IV. LEGAL BASIS

114. As set out in the Application, the Applicants are seeking a number of orders against the Respondent Commission, including an interlocutory injunction, prohibition orders, and suspension of the operation of statutory provisions, based on the Court's inherent jurisdiction.

115. Fundamentally, the Applicants are requesting this court to exercise its jurisdiction over the parties and these proceedings to restrain the Commission from enforcing the *MPA* as against the Clinics' or the Clinics' Physicians, pending a determination on whether the impugned provisions the Commission seeks to enforce are constitutionally valid.

A. The Relevant Rules: Supreme Court Civil Rules and the Law and Equity Act

116. This Application is brought under Rule 10-4 of the *Rules*,[62] and s. 39 of the *Law and Equity Act*,[63] and under this court's inherent jurisdiction.

117. The Applicants submit that, for present purposes, these rules simply codify or supplement the Court's inherent jurisdiction to make orders respecting the parties and proceedings before it. Indeed, the Court may exercise its inherent jurisdiction notwithstanding the presence of rules of court:

> The inherent jurisdiction of the court may be exercised in any given case, notwithstanding that there are Rules of Court governing the circumstances of such case. The powers conferred by the Rules of Court are, generally speaking, additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the court. The two heads of powers are generally cumulative, and not mutually exclusive, so that in any given case, the court is able to proceed under either or both heads of jurisdiction.[64]

118. However, to the extent that specific rules or provisions need to be relied upon, the following are relevant.

119. The *Rules* provide that a party may apply to the Court for a pre-trial injunction, and that an injunction may be issued by order of the Court. The *Rules* also provide special powers to a case-management Judge as follows:

> (1) At a case planning conference, the case planning conference judge or master may make one or more of the following orders in respect of the action, whether or not on the application of a party
>
> (…)

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[62] *Supreme Court Civil Rules*, BC Reg 168/2009 (the "***Rules***"), **BoA Tab 37.**
[63] R.S.B.C. 1996, c. 253 ("***Law and Equity Act***"), **BoA Tab 34**.
[64] *R & J Siever Holdings Ltd. v. Moldenhauer*, 2008 BCCA 59, **BoA Tab 27**, at para 14.

> (v) any orders the judge or master considers will further the object of these Supreme Court Civil Rules.[65]

120. The *Law and Equity Act* provides as follows:

> (2) Nothing in this Act disables the court from directing a stay of proceedings in a cause or matter pending before it, if it thinks fit.
>
> (3) Any person, whether or not a party to a cause or matter pending before the court, who would have been entitled, but for this Act, to apply to the court to restrain the prosecution of it, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule or order, contrary to which all or any part of the proceedings in the cause or matter may have been taken, may apply to the court, by motion in a summary way, for a stay of proceedings in the cause or matter, either generally or so far as may be necessary for the purposes of justice and the court must make any order that is just.[66]

121. And section 39 of the *Law and Equity Act* provides:

> **Injunction or mandamus may be granted or receiver appointed by interlocutory order**
>
> **39** (1) An injunction or an order in the nature of mandamus may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.

122. Finally, the foundational purpose of the *Rules* is set out in Rule 1-3(1):

> The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.

123. That is precisely the basis upon which the Applicants seek the orders in this Application: because the conduct of the Defendants in seeking to search the Clinics' premises, as a necessary step to taking further enforcement action against the Clinics' Physicians, will further delay and disrupt the just and efficient resolution of the Constitutional Action.

124. The orders sought in this proceeding, and the purpose for which the orders are sought, are therefore expressly provided for in the *Rules* and the *Law and Equity Act*, and are otherwise within this court's inherent jurisdiction, independent of any specific rules of court.

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[65] *Rules*, *supra*, **BoA Tab 37**, Rules 10-4(1), 10-4(4), and 5-4(1).
[66] *Law and Equity Act*, *supra*, **BoA Tab 34**, s. 8.

B. The Court's Broad Inherent Jurisdiction

i. Inherent Jurisdiction: an Overview

125. It is difficult to overstate the comprehensive nature of the Court's inherent jurisdiction to control its proceedings and the conduct of the parties before it. McLachlin & Taylor describe the Court's inherent jurisdiction in the following broad terms:

> Inherent jurisdiction is a jurisdiction to do all that is "necessary to do justice between the parties": (…) This is, however, a common-law power that must be considered in light of statutory authority (…). A more extensive definition of inherent jurisdiction than that found in *Glover v. Glover*, *supra*, is that it is "the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them" or, put another way "[i]t connotes that the process of the court must be used properly, honestly, and in good faith, and must not be abused. It means that the court will not allow its function as a court of law to be misused, and it will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation" (…)
>
> Inherent jurisdiction has also been described as "an overriding, supervisory jurisdiction, enabling the court to do what it must to maintain itself, its dignity, and its powers free from abuse by those who would enlist its auspices for purposes inconsistent with its own institutional interests and goals. In doing so it protects not only itself but the public for whom it was created; the just, speedy and inexpensive resolution of disputes is in the public interest"[67]

126. As the Supreme Court of Canada observed in *MacMillan Bloedel*, this inherent jurisdiction is difficult to define. The ubiquitous nature of this inherent jurisdiction "precludes any exhaustive enumeration of the powers which are thus exercised by the courts".[68]

127. Nevertheless, the Supreme Court confirmed that this power fundamentally includes "the power to control its process and enforce its orders". In particular, the Court relies on an author's classification of the functions of the court under its inherent jurisdiction, which are "clearly knowable" and included under the following headings:

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[67] Frederick M. Irvine, *McLachlin & Taylor British Columbia Practice* (online) ("**McLachlin & Taylor**") **BoA Tab 38**, at 1, 2; See also *Halifax Regional Municipality v. Ofume*, 2003 NSCA 110 ("***Ofume***"), **BoA Tab 11**, at para 21.

[68] *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 SCR 725 ("***MacMillan Bloedel***"), **BoA Tab 15**, at para 33.

> (i) ensuring convenience and fairness in legal proceedings; (ii) preventing steps being taken that would render judicial proceedings inefficacious; (iii) preventing abuse of process; and (iv) acting in aid of superior courts and in aid or control of inferior courts and tribunals.[69]

128. The emphasized categories above are the primary bases upon which the Applicants are seeking the Court to exercise its inherent jurisdiction: to ensure convenience and fairness in legal proceedings and to prevent the Commission from taking steps that would render judicial proceedings inefficacious.

129. The conduct of the Respondents in this case additionally rises to the level of an 'abuse of process', as will be described in more detail below.

130. However, it is not necessary to find a specific abuse of process in order for the Court to exercise its inherent jurisdiction to control its own processes and the parties before it. This point was explained in a case of the Nova Scotia Court of Appeal called *Halifax Regional Municipality v. Ofume*.[70]

131. That case cites, with approval, a discussion of the broad nature of the Court's inherent jurisdiction in *Montreal Trust*, where the Court dealt with an argument that the Court's inherent jurisdiction was limited to "the power to prevent abuse of its process by staying or dismissing vexatious actions".[71]

132. The Court in *Manitoba Trust* rejected that the Court's inherent jurisdiction was so limited, stating that:

> (…) this narrows the scope of a concept whose nature has been described as "so pervasive in its operation that it seems to defy the challenge to determine its quality and to establish its limits"(…)
>
> It is true that inherent jurisdiction is frequently invoked to prevent abuse of the process of a Court by staying or dismissing a vexatious action. The *Orpen* case [*Orpen v. A.-G. Ont.*, [1925] 2 D.L.R. 366, 56 O.L.R. 327], was of that type, and naturally enough the authorities there cited deal with frivolous or vexatious actions that were so stayed or dismissed. But it would be wrong to think that that type of case is exhaustive of the scope of inherent jurisdiction. In our view its nature is broader. (…)
>
> Certain other features of inherent jurisdiction pointed out by Master Jacob are relevant for us to note. Inherent jurisdiction is derived not from any statute or rule but from the very nature of the Court as a superior Court of

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[69] *MacMillan Bloedel*, *supra*, **BoA Tab 15**, at para 33; see also *R. v. Nixon*, 2011 SCC 34 at para 33.
[70] *Ofume*, *supra*, **BoA Tab 11**.
[71] *Ofume*, *supra*, **BoA Tab 11**, at para 21, quoting *Montreal Trust Co. v. Churchill Forest Industries (Manitoba) Ltd. (1972)*, [1971] M.J. No. 38 (Q.L.), 21 D.L.R. (3d) 75 (C.A.), **BoA Tab 19** ("***Montreal Trust***").

> law: "The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law." (p. 27).(…)[72]

133. The Nova Scotia Court of Appeal in *Ofume* also referred to a prior decision of its own court, where the Court's inherent jurisdiction was described as follows:

> The inherent jurisdiction of the court has been described as a vague concept and one difficult to pin down. It is a doctrine which has received little by way of analysis, but there is no question it is a power which a superior trial court enjoys to be used where it is just and equitable to do so. It is a procedural concept and courts must be cautious in exercising the power which should not to be used to effect changes in substantive law.[73]

134. Thus, it is not necessary for this Court to expressly find an abuse of process to restrain the conduct of a party that will detrimentally impact on a proceeding before it, or to provide an order that would enable the parties to get back to work on the Action, and move forward to trial as rapidly as possible.

ii. No Issues Respecting the Scope of the Proposed Orders

135. In their Application Response, the Respondents do not take issue with the breadth of the Court's inherent jurisdiction as such, or the Court's power to make orders with respect to those parties before it, in order to ensure the efficient, fair, and orderly use of judicial resources and proceedings.

136. Rather, the Respondents argue that this Application amounts to a collateral attack on the warrant, and that the inherent jurisdiction of the court does not extend to abuses of the process of *other courts*, such as the Provincial Court.[74]

137. This submission misapprehends the orders sought by the Applicants, and the basis for those orders.

138. To clarify: the Applicants do not challenge the legal validity of the warrant in this Application, nor does the Application seek to restrain the conduct of the Provincial Court. As the orders set out in the Application make clear (reproduced at para 36 above), the Applicants seek no orders against the Provincial Court.

139. Rather, the Applicants seek orders to restrain the conduct of the Commission, which is a party to this proceeding, and specifically with respect to the impact of its conduct on the proceeding currently before this Court.

140. The basis for the Application is therefore not that the warrant is illegal, as such, but rather that executing the warrant will unnecessarily delay and disrupt the

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[72] *Ofume*, *supra*, **BoA Tab 11**, at para 21.
[73] *Ofume*, **BoA Tab 11**, at para 22, quoting *Goodwin v. Rodgerson* (2002), 2002 NSCA 137, 210 N.S.R. (2d) 42 at 48.
[74] Application Response, Legal Basis, at paras 3-7.

constitutional challenge, and will subject parties to this proceeding to the application of laws challenged as unconstitutional. In short, the fact that the Provincial Court has issued a warrant does not mean that the Commission must execute it, if doing so unnecessarily disrupts and delays these proceedings or constitutes an abuse of process.

141. In a similar vein, the Respondents assert that "the Audited Physicians are not parties to either this application or the underlying constitutional challenge", and therefore "it is doubtful that this Court has inherent jurisdiction in these proceedings to grant the relief sought with respect to the Audited Physicians, but only with respect to the Clinics".[75]

142. The warrant obtained is to search the premises of Cambie and SRC, not the premises of the Clinics' Physicians. The impact of executing the warrant and enforcing the impugned provisions would not only, or even primarily, be felt by the Clinics' Physicians, but would necessarily affect those entities through which, and for which, the Clinics' Physicians provide those services, namely Cambie and SRC. And most fundamentally, it will disrupt and delay the proceedings to which the Clinics, not the Clinics' Physicians, are a party.

143. If the Applicants were seeking relief *against* the Clinics' Physicians, that would normally (although not always) require their participation in the proceeding. The Applicants seek no such order.

144. The fact that issuing the order sought in these proceedings would have some impact on whether the audits can be carried out against the Clinics' Physicians is of no moment, because the basis of the order sought is the conduct of the parties to this proceeding, and the impact that enforcing the provisions impugned in this proceeding would have on the constitutional litigation between the parties to this proceeding.

145. In summary, the Applicants are seeking orders *against* a party to this proceeding – namely the Commission – to prevent it from acting in such a way as to further and unnecessarily disrupt and delay these proceedings, and to prevent it from interfering with the trial preparation of other parties to these proceedings – Cambie and SRC.

146. Making such an order is entirely within the power and jurisdiction of the court in this proceeding, under its inherent jurisdiction control the parties and the proceedings before it, which the Court "may draw *upon as necessary whenever it is just or equitable to do so*… in order to do justice between the parties and to secure a fair trial between them".[76]

147. Even if there was some concern with the scope of the order sought, which the Applicants submit there is not, it is important to recognize that the Court's inherent

[75] Application Response, Legal Basis, at paras 11-12.
[76] McLachlin & Taylor, *supra*, **BoA Tab 38**, at 1, 2.

jurisdiction to do all that is necessary to control its proceedings in the interests of justice can be put to broad purposes.

148. The Courts have comprehensive powers to enable it to fulfil "the judicial function of administering justice according to law in a regular, orderly and effective manner".[77]

149. For instance, the Court's inherent jurisdiction was relied upon in the case of *Re BC Government Employees' Union*, where Chief Justice McEachern issued an injunction, on the court's own motion, to prohibit the picketing of courthouses as contempt of court. That decision was then upheld by the Court of Appeal.[78]

150. The persons enjoined in that case were not parties to any particular proceeding, and the persons who would benefit were not parties to a specific proceeding before the Chief Justice. Nevertheless the Court exercised its inherent jurisdiction to restrain the conduct of the picketers.

151. In the *BC Teachers Federation* case, the Court exercised its inherent jurisdiction to enjoin the BC Teachers Federation from using its funds to pay striking teachers and thus facilitate the continuing breach of a court order, and even appointed a monitor with a number of specified powers and duties to ensure the order was obeyed.[79]

152. The Union in that case otherwise had the power to dispose of its money as it chose, however the Court required them as parties to a proceeding to not do something they were otherwise entitled to do.

153. McLachlin and Taylor give other examples of the expansive scope of the court's inherent jurisdiction, including the making of an order directing that the Registrar of Land Titles (which was not a party to the proceeding) amend the title to the petitioner's to clarify the true scope of that title, even though the applicable act did not apply; and authorizing an institution to release the plaintiff's employment records and to discuss the plaintiff's employment history with counsel for the defendant in order to facilitate a step in the investigatory process, and offering the institution protection against any assertion that it had no right to release employment records or discuss the plaintiff's employment history.[80]

154. In the latter case, *Mand v. Stuzewski*, the Court emphasized in addition that "(i)t is difficult to find direct authority under the Rules for this application but it is in accord with the purpose expressed in Rule 1(5): "The object of these rules is to

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[77] *Thomson v. Eadie*, 2007 BCCA 524 ("***Thomson v. Eadie***"), **BoA Tab 30,** at para 22.
[78] *Re B.C. Govt. Employees' Union*, [1985] B.C.J. No. 1939, 64 B.C.L.R. 113 (C.A.), **BoA Tab 25**.
[79] *British Columbia Public School Employers Assn. v. British Columbia Teachers Federation*, [2005] B.C.J. No. 2151, 2005 BCSC 1443, **BoA Tab 2**.
[80] McLachlin & Taylor, **BoA Tab 38**, at 1, 2, citing *Thomson v. Eadie. supra*, and *Mand v. Stuzewski*, 2000 BCSC 1303, [2000] B.C.J. No. 1847 ("***Mand v. Stuzewski***").

secure the just, speedy and inexpensive determination of every proceeding on its merits".[81]

155. As these cases show, the Court's inherent jurisdiction is very broad, and the fact that such orders may indirectly or tangentially impact third parties or the lawful rights of parties to this proceeding does not deprive the court of its power "to control its own process, to order proceedings that will ensure the expeditious and least expensive disposition of claims consistent with ensuring justice to the parties".[82]

156. Finally, to the extent that the Respondents are suggesting the Court must only consider this matter under the *RJR-MacDonald* framework, it is clear that the Court of Appeal was describing an avenue the Applicants could take with respect to certain portions of the relief sought, not the *exclusive* avenue.[83]

157. The Court did not comment on the inherent jurisdiction of this Court to restrain the parties from delaying and disrupting its own proceedings, or conducting themselves in such a manner that amounts to an abuse of process.

158. In summary, the Court can use its broad inherent jurisdiction to restrain conduct on the part of the parties before it, where that conduct would be unfair or would otherwise disrupt the speedy and inexpensive resolution of the proceedings before it. The basis for the Court doing so is set out in the section below.

C. The Commission Enforcing the Act Against the Clinics and the Clinics' Physicians is an Abuse of Process

159. In addition, the Applicants submit that the conduct of the Respondents can be characterized as an abuse of process, and restrained on that basis.

160. The Court's power to restrain an abuse of process is effectively an adjunct of its broader inherent jurisdiction to control the parties and proceedings before it. As explained by the BC Court of Appeal in *R. v. Light*:

> (…) the special power to stay proceedings which constitute an abuse of process is an adjunct of the inherent jurisdiction which the courts have to control their own process. That jurisdiction, which can only be exercised in the clearest of cases, existed independently of the remedies provided for the breach of individual rights which are now constitutionally entrenched in the Charter; (…) Its purpose is to preserve the integrity of the process through which justice is administered in the community, not to provide a remedy for the breach of individual rights. When the jurisdiction is exercised, it is exercised in order to prevent the court's process from being enlisted in a proceeding which would damage its integrity; (…) The fact that when it is exercised it simultaneously provides, as it frequently will, a

[81] *Mand v. Stuzewski*, *supra*, **BoA Tab 16**, at para 21 (emphasis added).
[82] *Montana Band v. Canada*, [1999] F.C.J. No. 1631, **BoA Tab 18**, at para 29.
[83] Application Response, Legal Basis, at para 13.

remedy for a breach of individual rights, is a circumstance which is incidental to and does not detract from the unique nature of this important jurisdiction.[84]

161. The Court's power to restrain an abuse of process is, like the inherent jurisdiction from which it is derived, very broad in nature. Abuse of process is a "flexible" doctrine that applies in a wide variety of circumstances, where conduct is "unfair to the point that they are contrary to the interest of justice".[85]

162. An abuse of process can be restrained through "the inherent power of the court to prevent the misuse of its procedure, in a way that would… bring the administration of justice into disrepute".[86]

163. A range of examples of abuses of process restrained by the courts are included in the McLachlin and Taylor excerpt provided, as follows:

- Thus, it has been held that the Supreme Court of British Columbia has an inherent jurisdiction and a corresponding duty to exercise that jurisdiction to protect a petitioner or plaintiff who seeks relief in that court from proceedings by a respondent or defendant who is vexatiously abusing the process of the court: *Household Trust Co. v. Golden Horse Farms Inc.*, [1992] B.C.J. No. 652, 65 B.C.L.R. (2d) 355 (C.A.).

- The inherent jurisdiction of the court has also been invoked to prevent the abuse of process that would result from the filing of an appearance (since 2010, replaced by a response to civil claim) by a party who has not been served where the filing was unauthorized and was done without the party's knowledge or instructions; see *Lawson v. Bajpai*, [1989] B.C.J. No. 178, 36 B.C.L.R. (2d) 106 (S.C.); and *R & J Siever Holdings Ltd. v. Moldenhauer*, [2008] B.C.J. No. 214, 52 C.P.C. (6th) 33, 2008 BCCA 59, revg [2007] B.C.J. No. 940, 41 C.P.C. (6th) 158, 2007 BCSC 632.

- In the exercise of that power the court may prevent a respondent or defendant from launching interlocutory proceedings or being heard on his or her own application: *Household Trust Co. v. Golden Horse Farms Inc.*, supra.

- This is a general discretionary power not restricted by the specific abuse of process power found in Rule 9-5(1)(d): *Willis v. Beauchamp* (1886), 34 W.R. 357 (Eng. C.A.) and *Gola v.*

[84] *R. v. Light* (1993), 21 B.C.A.C. 241 (C.A.) at 244-245, approved in *R. v. Guilbride*, 2006 BCCA 392, **BoA Tab 23**, at para 125.
[85] *Toronto (City) v. C.U.P.E.*, Local 79, 2003 SCC 63 ("***C.U.P.E.***"), **BoA Tab 31**, at para 37.
[86] *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), **BoA Tab 6**, at para 55, per Goudge J.A., dissenting, aff'd [2002] 3 S.C.R. 307, 2002 SCC 6.

Zaporanik, [1924] S.J. No. 85, [1924] 3 W.W.R. 811, [1925] 1 D.L.R. 34 (C.A.) (…)[87]

164. The Applicants submit that seeking to enforce the impugned provisions at this stage of the proceedings against the Clinics or the Clinics' Physicians, and taking other ancillary steps such as searching the Clinics' premises, constitutes an abuse of process in the context of the ongoing constitutional challenge to the validity of the very provisions the Respondents' seek to enforce.

165. The Respondents' actions, or planned actions, constitute an abuse of process for four primary reasons:

i. first, the Commission's conduct over the course of these proceedings is inconsistent, or at least in significant tension, with its implied undertaking to keep the information obtained through discovery separate from its enforcement functions;

ii. second, the Commission's actions and intended actions are taken in the knowledge that it will delay and disrupt these proceedings, and without any urgency or basis for them;

iii. third, the Respondents are seeking to take advantage of their own defaults and delays in these proceedings to prejudice the Applicants, and those associated with the Applicants; and

iv. fourth, the Respondents efforts to enforce the impugned provisions are effectively inconsistent with their agreement to hold enforcement steps against Cambie and SRC in abeyance pending the resolution of the constitutional challenge.

166. Each of these bases, in the Applicants' submission, are independently sufficient for this court to find an abuse of process, or otherwise exercise its inherent jurisdiction to restrain the activities of the Commission pending resolution of this constitutional challenge. Taken together, this conclusion is even more clearly justified.

iii. Potential Inconsistency with Implied Undertaking

167. In the Applicants' respectful submission, it would be manifestly unfair and otherwise offend the community's sense of fair play and decency to permit the Respondents to use information provided by the Applicants in this proceeding – information provided to expedite the trial process – as a basis to resurrect dormant audit investigations, and in an effort to prejudice the Clinics' Physicians in a purportedly separate administrative enforcement proceeding.

[87] McLachlin & Taylor, *supra*, **BoA Tab 38**, at 3-4.

168. As noted in the Application and above, the Admissions were specifically made for the use in this proceeding only.

169. Even in the absence of such explicit language, there is an implied undertaking to not use information obtained in the course of discovery for an ulterior purpose, and such conduct constitutes contempt of court. As explained in *Halsbury's*, the common law in Canada provides that

> there is an implied undertaking by any party conducting an examination for discovery that the information obtained will not be used for collateral or ulterior purposes. A similar implied undertaking arises in the case of discovery of documents. Any such misuse constitutes a contempt of court. Further, the proceedings may be stayed or dismissed, or the defence may be struck. The implied undertaking has been described as "a rule of judge-made procedural law arising from the inherent jurisdiction of the court to control its own process". It is a response to the invasion of privacy and confidentiality of a litigant's affairs consequent on discovery and precludes the use of material disclosed on discovery for a collateral or ulterior purpose.[88]

170. The BC Court of Appeal in *Hunt v. T & N PLC* observed that this implied undertaking rule applied in BC,[89] which was confirmed by the Supreme Court of Canada in *Juman v. Doucette*. As summarized from the headnote of the latter decision:

> A party is not in general free to disclose discovery evidence of what they view as criminal conduct to the police or other strangers to the litigation without a court order. The root of the implied undertaking is the statutory compulsion on a party such as the appellant to participate fully in pre-trial oral and documentary discovery. If the opposing party seeks information that is relevant and is not protected by privilege, it must be disclosed even if it tends to self-incrimination. While the public interest in getting at the truth in a civil action outweighs the examinee's privacy interest, the latter is entitled to a measure of protection, and the law thus requires that the invasion of privacy should generally be limited to the level of disclosure necessary to do justice in the civil litigation in which the disclosure is made. The rules of discovery were not intended to constitute litigants as private attorneys general. [90]

171. This implied undertaking has broad application. For instance, the Ontario Court of Appeal has stayed an action for defamation on the basis that the material upon which that claim was based was obtained through discovery processes. The Court

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[88] Halsbury's Laws of Canada, *Halsbury's Laws of Canada - Civil Procedure (2012 Reissue)*, VIII. Discovery, HCV 185, **BoA Tab 39**.
[89] *Hunt v. T & N PLC* (1995), 4 B.C.L.R. (3d) 110 (C.A.), **BoA Tab 13**.
[90] *Juman v. Doucette*, [2008] 1 SCR 157, 2008 SCC 8, **BoA Tab 14**.

in that case quoted from another decision, where the rationale for the rule was explained:

> The primary rationale for the imposition of the implied undertaking is the protection of privacy. Discovery is an invasion of the right of the individual to keep his own documents to himself. It is a matter of public interest to safeguard that right. The purpose of the undertaking is to protect, so far as is consistent with the proper conduct of the action, the confidentiality of a party s documents. It is in general wrong that one who is compelled by law to produce documents for the purpose of particular proceedings should be in peril of having those documents used by the other party for some purpose other than the purpose of the particular legal proceedings and, in particular, that they should be made available to third parties who might use them to the detriment of the party who has produced them on discovery. A further rationale is the promotion of full discovery, as without such an undertaking the fear of collateral use may in some cases operate as a disincentive to proper discovery. The interests of proper administration of justice require that there should be no disincentive to full and frank discovery.[91]

172. And in *Discovery Enterprise*, the BC Supreme Court observed that the principle would apply to prevent a party to a proceeding to use information obtained in the course of a proceeding, even where that has otherwise been made available to the public:

> A third-party spectator in the courtroom may record details of the materials read out in open court and use them for collateral purposes, short of purposes prescribed by law. This fact, however, does not lead to the conclusion that the recipient may do so. The English decision of *Sybron Corporation v. Barclays Bank*, [1985] 1 Ch. 299 at 321 explains why a third party may do what the recipient litigant may not:
>
> > It is necessary, in my judgment, to distinguish between the party on whom the undertaking is imposed on the one hand and third parties on the other hand. The undertaking binds the former, it does not bind the latter, who have given no undertaking.
>
> The party giving the undertaking should continue to be bound by its undertaking not to use disclosed documents for collateral purposes. Access to the information which binds the party, its counsel and its employees. Only the court, can lift this undertaking.[92]

173. Finally, in *Chonn v. DCFS Canada Corp dba Mercedez-Benz Credit Canada*, 2009 BCSC 1474, the Court described the bright line nature of this implied undertaking:

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[91] *Goodman v. Rossi*, [1995] O.J. No. 1906, 24 O.R. (3d) 359 (Ont. C.A.), **BoA Tab 10**.

[92] *Discovery Enterprises Inc. v. Ebco Industries Ltd. (1997)*, 42 B.C.L.R. (3d) 192 (S.C.) **BoA Tab 9**, at paras 21-22 (emphasis added).

> A party who has documents from earlier litigation that are impressed with the implied undertaking simply cannot make use of those documents without the concurrence of the party from whom they were obtained or leave of the court. The implied undertaking protects documents or oral discovery obtained in earlier litigation from being used for any purpose "collateral" to that litigation. Thus, the documents cannot be used for internal strategic review in subsequent litigation. They cannot be used for the purposes of drafting pleadings. They cannot be sent to counsel for the purposes of obtaining an opinion in new litigation.[93]

174. In brief, the Courts have drawn a bright line around information that is obtained in the context of civil litigation: that it can *only* be used for the purposes of that litigation.

175. The implied undertaking is not limited to the actual use of the physical documents. It is equally impermissible for a party to a proceeding can use discovery or other evidentiary processes in the litigation to obtain information or knowledge that it would not otherwise have had, and then use that information to trigger other powers – such as a search or audit power – to then obtain that material again.

176. The essence of the rule, as noted above, is that a party to a proceeding should not be able to use *information* obtained in the proceeding to then prejudice or harm the interests of the other party to the litigation. The fact that a party that has obtained certain knowledge that it would not have had but for the litigation process, and also has power to obtain the information *again* (i.e. through statutory search powers) without the consent of the parties to the litigation, does not absolve that party of their implied undertaking to not make use of that information for purposes collateral or ulterior to the proceeding in which they were obtained.

177. The problematic aspect of the Commission's conduct is not necessarily in handing over documents or admissions to the audit investigators, but doing what amounts to the same thing: using the knowledge obtained in these proceedings to the detriment of the parties being discovered in the context of separate audits and enforcement steps.

178. As noted above, the Respondents have frankly admitted, in their April 2015 Application and in their Application Response, that they have both used material obtained in the audit processes for use in this separate proceeding, and that they are seeking the material for the audit process on the basis of information obtained through this proceeding.

179. In their Application Response, the Respondents explain their newfound interests in obtaining a warrant and collecting more information by stating that the

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[93] *Chonn v. DCFS Canada Corp dba Mercedez-Benz Credit Canada*, 2009 BCSC 1474, **BoA Tab 8**, at para 25.

"Commission has obtained a significant amount of information *through the litigation process* that happens to be relevant to the Overlapping Billing Audits".[94]

180. Although the Respondents submit – correctly – that they "may not rely on any of that information for purposes of the audits, or disclose that information to the inspectors" undertaking the audits,[95] it has clearly done so, as detailed above.

181. In any event, the obligation to not disclose material or information obtained in this proceeding to the inspectors is of little use when, for instance, the head of the Commission's audit team is present in examinations for discovery in this proceeding, is presumably privy to other evidence tendered in this proceeding and through the discovery process, and is charged with given significant volumes of evidence in this proceeding.

182. In the Applicants' submission, the Respondents have used this dual role for impermissible purposes, and have in fact been brazen in doing so. In their Application Response, the Respondents go so far as to implicitly demand that the Applicants permit their evidence in this proceeding to be used against them and others in the audits, almost as an ultimatum.

183. Specifically, the Respondents seek to deny that irreparable harm will flow if an injunction is not granted (discussed further below), because "the Clinics are able to avoid the execution of the Warrant (and consequently any delay or harm) by making the same admissions made in this Action to the inspectors for the purposes of the audit".[96]

184. The Applicants should not be coerced into forgoing their legal entitlement to rely on this implied undertaking through the threat that, if they will not do so, their premises will be subjected to an intrusive search and the seizure of confidential and sensitive documents, many of which pertain to third parties and that the Applicants are not at liberty to disclose without their consent.

185. In the Applicants' respectful submission, seeking to use the materials obtained through this proceeding for the purposes of resurrecting these audits, or for launching or bolstering audits, is in significant tension with the implied undertaking to not use the information for collateral or ulterior purposes.

186. As noted by Mr. Justice Groberman in the 2010 case, the Respondents cannot use the audit investigations as an adjunct to the discovery process. In the Applicants submission, in light of the implied undertaking, the principle applies in the other direction as well.[97]

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[94] Application Response, Facts, at para 41.
[95] Application Response, Facts, at para 41.
[96] Application Response, Legal Basis, at para 22(d).
[97] *Cambie BCCA*, **BoA Tab 3**, at para 43.

187. Whether or not the Commission's conduct strictly speaking constitutes a violation of its implied undertaking, the Applicants submit that the Respondents should not be permitted to use Admissions and documents obtained in this proceeding in order to bolster the basis for audits of Clinics' Physicians. To do so is a further and independent abuse of the court's processes.

iv. No urgency in enforcing the MPA or conducting the audits

188. For many years, the Commission, and the government of British Columbia, have not only permitted, but have benefitted from, the provision of private medical services to the residents of British Columbia.

189. The Defendants have known and accepted, since the time Cambie and SRC commenced operations that the Clinics were providing medical services to residents of British Columbia in a manner that the Respondents understood violated the *MPA*. The Defendants benefitted from the Cambie's and SRC's operations because they treated patients who could not receive treatment in the public health care system in a reasonable time.

190. The Applicants submit it is manifestly unfair to now seek to enforce those provisions against the Clinics or the Clinics' Physicians who provide services at the Clinics, particularly where there is no demonstrated urgency in completing the audits prior to the constitutionality of the very provisions in question being decided.

191. The Respondents have provided no reason or evidence respecting urgency in seeking to enforce the impugned provisions or complete these audits. Nor have the Respondents provided evidence that they are undertaking audits of other private clinics or their physicians, either on an urgent basis or at all.

192. As set out above, this rush to obtain and execute warrants respecting Cambie's and SRC's premises come:

- five years after the Respondents became aware of the power to obtain a warrant to undertake audit procedures in the BC Court of Appeal Cambie decision;

- at least three years after the audit process respecting the Clinics' Physicians were purportedly initiated, according to the Respondents' own evidence; and

- more than two years after the Respondents were made aware by counsel to the Clinics' Physicians that certain documents, if they exist, and information would have to be obtained from the Clinics.

193. Although the Respondents claim that the audits were "ongoing", they were obviously ongoing without any sense of urgency whatsoever.

194. Indeed, the audits of the Clinics' Physicians have been held in abeyance – formally or not – for almost two years, and were only resurrected upon the Respondents obtaining Admissions in the underlying Action.

195. As described above, the Respondents have expressly agreed to put into abeyance their efforts to enforce the impugned provisions as against Cambie and SRC directly.

196. The Respondents now seek to do indirectly – through auditing and enforcing the provisions against the Clinics' Physicians – what it has acknowledged it cannot do directly: namely, shut down or hamper the Clinics' operations, through the enforcement of the impugned provisions, prior to the constitutionality of the impugned provisions being decided.

197. Seeking to take further and unnecessary enforcement steps under the *MPA*, as against the Clinics' or the Clinics' Physicians, will further delay and disrupt the Applicants ability to adequately prepare for trial, and will likely continue to lead to more proceedings and applications brought by both parties.

198. Seeking to do so without any plausible reason or urgency, prior to the determination of the constitutional validity of the very provision sought to be enforced, constitutes an abuse of the court's process and should be restrained.

v. Respondents Seeking to Take Advantage of their Own Defaults and Delay

199. As noted above, the trial in this Action has been derailed by the Respondents' conduct in the discovery process. In the Applicants submission, the Respondents should not be able to rely on their own default and delay in having the constitutionality of these matters heard and decided, in order to enforce the very provisions of the *MPA* that are currently under constitutional challenge.

200. The Applicants have set out in some detail above the delays caused by the Respondents' conduct, and in particular their failure to fulfil their disclosure obligations from the outset.

201. Strangely, the Respondents seek to now rely on the fact that, at the time of filing their Application Response, there was not a trial date set as a result of their failures in the context of document production. The Respondents asserted that any harm caused by the Commission's conduct is speculative, because "(i)t is impossible to determine that a trial will be delayed if it is unknown when it will be scheduled".[98]

202. This is, with respect, senseless.

203. The court does not need to know the *specific* date that the trial will be delayed until in order to determine that having to review hundreds of thousands of pages of new documents will delay the trial; or that bringing an unnecessary application to strike

[98] Application Response, Legal Basis, at para 22(d).

will delay the trial; or that seeking to take enforcement steps against Clinics' Physicians, and undertaking an intrusive search of the offices of Cambie and SRC, will delay the trial.

204. And in any event, the trial has now been set for June 6, 2015. It is now known that as a result of the delay in disclosing documents, and the amount of documents the Applicants must now review, the trial has been delayed for over a year.

205. If the Respondents had acted appropriately from the outset and properly fulfilled their disclosure obligations, the trial in this proceeding would already have concluded, and the constitutional determination may have already been made, rendering any attempts to enforce the impugned provisions unconstitutional.

206. The Respondents' renewed interest in conducting the Targeted Audits, and searching the Applicants' premises, is coincident with the Respondents filing a comprehensive application to strike the Applicants' pleadings, more than six years after the initial Action was filed and again prior to raising the issue with the Case Management Judge (as requested by the Applicants).

207. Now, after having delayed the trial into the constitutionality of these very provisions, the Respondents seek to take advantage of delay they have caused, in order to use the Admissions made by the Applicants *against* the Applicants and its affiliated physicians.

208. In the Applicants' submission, the Commission should not be permitted to take advantage of its own delays to enforce provisions against the Clinics or the Clinics' Physicians, when it is only because of this delay that the constitutionality of the provisions have not yet been tested.

vi. Cessation of further enforcement

209. For the reasons set out above, the Applicants had reasonably understood that no further enforcement actions would be taken against Cambie, SRC, or the physicians providing important services through the Clinics.

210. The Applicants understood that this Agreement would apply to all activities of the Clinics, including the conduct of the affiliated physicians.

211. Until now, the Respondents' conduct appeared to confirm this understanding, in taking no recent steps with respect to the audits, and not seeking further documents following the correspondence in late 2013, when the Commission was informed by the Clinics' Physicians that any further documentation must be obtained from Cambie or SRC.

212. This seems to be the Clinics' Physicians' understanding as well, as indicated by the statement of their counsel.

213. It was only on this basis of this understanding that the Applicants did not pursue a stay of the Commission's enforcement powers pending resolution of the Action at an earlier date.

214. It is only now, over two years after being made aware that any further documents for the purposes of the Targeted Audits would have to be obtained by the Clinics, and only after obtaining the Admissions in this proceeding, that the Commission has obtained and is seeking to execute a warrant against Cambie and SRC.

215. In light of the Applicants' reasonable understanding that the Commission would not attempt to do indirectly what it acknowledged, after Chief Justice Bauman's urging, that it could not do directly, it would be an abuse of process for the Commission to now continue to enforce the impugned provisions against Cambie, SRC, or their service providers.

216. Moreover, by seeking to enforce the impugned provisions at this stage, the Respondents are not only effectively resiling from their position not to enforce the impugned provisions pending determination of the constitutional issues, but are essentially seeking to relitigate the issue resolved by Madam Justice Smith in 2009.

217. As noted, Madam Justice Smith determined that the enforcement of the impugned provisions (as sought by the Petitioners) should be stayed pending the resolution of the constitutional issues raised in the Action.[99]

218. The Respondents are effectively seeking to effectively avoid this finding – and the court's finding that "it would be wasteful of court time and the parties' resources to address the specific relief sought in the Petition", that is, the enforcement of the impugned provisions, is a further abuse of the court's processes.

219. Attempts to now resurrect the audits and apply the impugned provisions against Clinics' Physicians, and seeking warrants to search and disrupt the Clinic's operations, is entirely unnecessary, an abuse of process, and can only serve to further disrupt and delay the adjudication of the important constitutional issues raised.

220. In these circumstances, the Court should exercise its broad, inherent jurisdiction to restrain the Commissions conduct, as sought in the orders or in an order the Court deems just, as an abuse of process or more generally under its inherent jurisdiction to control its own processes.

[99] *Schooff*, **BoA Tab 28**, at para 40.

D. The Applicants are entitled to an injunction

221. For the reasons described above, the Applicants submit that they are entitled to have this Court issue the orders sought in this Application, as the orders sought pertain to the conduct of the Commission as a party to this litigation, and the steps it has taken to delay and disrupt these proceedings.

222. As such, and should this Court agree that it should exercise its inherent jurisdiction to restrain the Commission from taking further steps to unnecessarily delay and disrupt these proceedings, it may not be necessary to address the broader injunction argument.

223. However, the Applicants submit they are nevertheless entitled to a broader order, which would formally enjoin the Commission from enforcing the impugned provisions of the *MPA*, and suspend the operation of those provisions, as against Cambie, SRC or its associated agents, employees or service-providers, including physicians providing services at the Clinics, pending the resolution of this proceeding.

224. As Mr. Justice Groberman observed in *Cambie BCCA*, such an application would be determined according to the general injunction test, as set out in *RJR-MacDonald*.

225. To be entitled to an interlocutory injunction or a stay of the enforcement of statutes alleged to be unconstitutional, the Applicants must satisfy the Court that (i) there is a serious question to be tried, (ii) there will be irreparable harm if an injunction or stay is not granted, and (iii) the balance of convenience favours granting an injunction or stay.[100]

i. Serious Question to be Tried

226. The burden on the applicant under the first part of the test is a low one. Unless the case can be said to be frivolous or vexatious, it will be satisfied.[101] No party has seriously contended that there is not a serious issue to be tried, and the Respondents concede the point here.[102]

ii. Irreparable Harm

227. On the second branch, irreparable harm must be assessed in the context of a *Charter* challenge,[103] and will be established where, in the absence of the injunction, the interests sought to be protected by the *Charter* may be irreparably infringed or

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[100] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 ("***RJR-MacDonald***"), **BoA Tab 26**, at 334.
[101] *RJR-MacDonald*, *supra*, **BoA Tab 26**, at 335-338.
[102] Application Response, Legal Basis, at para 15.
[103] See the discussion in *RJR-MacDonald*, **BoA Tab 26**, at 340-342.

harmed.[104] As in the broader constitutional challenge, relevant harms are not limited to those directly impacting the Applicants.[105]

228. Additionally, an abuse of the Court's process can cause irreparable harm to the public interest in the administration of justice.[106] Harms to the orderly and efficient disposition of proceedings can constitute irreparable harm, which may include a consideration of wasted time and resources.[107]

229. Therefore, contrary to the Respondents' assertion in their Application Response, it need not be shown that 'irreparable harm' pertains specifically that "the interests of sections 7 and/or 15 of the *Charter*", although the Applicants have shown that. Rather, it is enough to demonstrate that there has been an abuse of process or that a litigant is conducting itself in such a way as to harm the orderly and efficient disposition of the proceedings, would further delay and disrupt these proceedings.

Application Response, Legal Basis, at para 19-20.

230. Nevertheless, in the present case, the irreparable harm if the injunction is not granted goes further, as set out in the Application:

(a) Enforcing the impugned provisions may result in the Applicants or associated persons being prosecuted, prejudiced or otherwise impacted by the application of unconstitutional laws. As "(n)o one should be subjected to an unconstitutional law", permitting the audits to continue would amount to irreparable harm if the Plaintiffs are successful in their challenge.[108]

(b) Permitting the continuation of the audits and the enforcement of the impugned provisions may reasonably cause many of the Clinics' Physicians to cease providing the public with medically necessary services through Cambie, which could cause irreparable harm to the security of person of patients who depend upon those services, and who will be forced to endure further delay in obtaining medically necessary treatment.

(c) A search according to an unreasonable law constitutes a breach of section 8 of the *Charter*;[109] a search pursuant to an unconstitutionally law must be unreasonable, and inconsistent with section 8. If the Applicants are successful in their underlying constitutional challenge, the effect of

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[104] *Canada (HRC) v. Canadian Liberty Net*, [1998] 1 SCR 626, **BoA Tab 5**, at paras 46-47 (noting that the general irreparable harm standard must be relaxed in the context of constitutional rights and freedoms); see generally Kent Roach, *Constitutional Remedies in Canada* (loose-leaf ed.) ("**Roach**"), **BoA Tab 40**, at ss. §7.250-7.360.

[105] See Roach, *supra*, **BoA Tab 40**, at ss. 7.360.

[106] *Cape Breton (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2013 NSSC 41, **BoA Tab 7**, at paras 51-58; *Tessma v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 427, **BoA Tab 29**.

[107] *North American Tungsten Corp. Ltd. v. Mackenzie Valley Land and Water Board*, 2003 NWTCA 3, **BoA Tab 20**, at 3 ("it is recognized that "resources wasted on litigation" are not generally considered to qualify *but they are factors to consider nevertheless*"; emphasis added).

[108] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, **BoA Tab 21**, at 314; *R. v. Nur*, 2015 SCC 15, **BoA Tab 24**, at para 51.

[109] *R. v. Collins*, [1987] 1 S.C.R. 265, **BoA Tab 22**, at 278.

executing a warrant to search Cambie's premises and seize sensitive medical and financial information, would be to effect an unreasonable search and seizure, in further violation of the *Charter*. The invasion upon the constitutionally protected privacy interests of the Clinics, the Clinics' Physicians and the patients will be irreparably harmed if the audits are permitted to continue, and this harm cannot be undone.[110]

(d) The actions of the Respondents in seeking to enforce the impugned provisions, which actions were only made possible by the delay in the trial of the constitutional question caused by the Respondents themselves, will further delay and disrupt the adjudication of the important constitutional issues raised in the Action, and will bring the administration of justice into disrepute.

231. Each of these considerations would result in irreparable harm if the injunction sought is not granted.

a) Harms are not speculative

232. The Respondents make a number of submissions in their Application Response, in the course of submitting that the Applicants cannot establish irreparable harm.

233. First, they claim that the Applicants have not established irreparable harm, because the harms to Cambie and SRC are "speculative", and because the "Clinics have failed to demonstrate that the impugned laws *are* unconstitutional".[111]

234. First, of course the Applicants have not yet definitively established the unconstitutionality of the impugned provisions. That is the case in all applications for an *interim* injunction pending such a challenge.

235. And in this case, that exact determination has been delayed by the Respondents conduct in these proceedings. That is *very reason* this application is being sought, so that the Applicants will have their opportunity to prove that the impugned provisions are unconstitutional as soon as possible.

236. To a certain extent, this application was brought to prevent the future harm that will be caused by the Commission's conduct. All injunctions are sought to prevent future harm. That does not mean that the apprehension of harm sought to be avoided by the injunction are speculative.

237. Second, there is nothing speculative about the harm that the Commission acting upon its warrant will have on the operation of Cambie and SRC directly. Dr. Day's affidavit sets out the harms that will come to Cambie and SRC directly, and their ability to prepare for trial, if the Commission is permitted to execute its warrant.

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[110] *143471 Canada Inc. v. Quebec (Attorney General)*, [1994] 2 SCR 339, **BoA Tab 32**, at 380-383.
[111] Application Response, Legal Basis, at paras 21-22.

238. In particular, at paras 17-28, Dr. Day describes the harm to Cambie and SRC, and their ability to both care for their patients and to prepare for the constitutional challenge. At paragraph 20, the Affidavit states

> 20. The Inspection will require considerable expenditure of time and resources by the Clinics. The Inspection will cause considerable disruption at the Clinics, directly impacting the ability of the Clinics to provide medical care to its patients, delaying medically necessary surgeries, and obstructing trial preparation.[112]

239. This application is therefore brought upon apprehension of harm to the litigation process, both with respect to the further delay and disruption this will cause to the present application, and based on the fact that the Respondents seek to continue to use information from the Action as a basis to conduct audits and harry both the Clinics and the Clinics' Physicians.

240. It is additionally brought upon the apprehension of harm to the individuals affected by the Commission's conduct and anticipated conduct. The apprehension of future harm of this sort is not speculative, but entirely reasonable.[113]

241. Despite arguing that the harm caused by future steps at enforcement are "speculative", the Commission repeatedly premises its balance of convenience argument on its assertion that it must enforce the impugned provisions of the *Act*, and intends to do so against the Clinics' Physicians, and that its actions in that respect are purportedly in the public interest.[114]

242. The Commission cannot then say that taking further steps to enforce the impugned provisions are speculative, when doing so is the sole basis for conducting the audits, and when enforcing the impugned provisions provides the basis for the Respondents' balance of convenience argument.

243. As their balance of convenience argument shows, the Respondents intend to enforce the impugned provisions against the Clinics' Physicians. The problem with taking these steps is that the Applicants say that these laws are unconstitutional, and therefore the audits and enforcement of these provisions are constitutionally suspect as a result.

244. Taking further steps at enforcing the *MPA* through the continuation of these audits – even if purportedly only against the Clinics' Physicians – will nevertheless put the Clinics' Physicians in considerable legal jeopardy.

245. If the Clinics' Physicians, or any number of them, are thereby deterred from continuing to provide services at the Clinics – as it is reasonable to believe they would be – this would prevent those physicians from providing medical services

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[112] Day Affidavit #7, **AR Tab 37**, at para 20.
[113] See *supra* at paras 108-113.
[114] Application Response, Legal Basis, at paras 30, 34-36, 42-43.

and surgeries to those who need them, additionally impacting the section 7 and 15 rights of the patients.

246. If the Clinics or the Clinics' Physicians are forced to cease offering services to BC residents on a private basis, all those patients in British Columbia who have elected to use these services to alleviate unreasonable wait times would find themselves back facing the delays and waitlists found in the British Columbia public healthcare system, leading to the significant consequences associated with delayed treatment. This increased risk of disease and harm is disproportionate to, and not outweighed by, any benefit that might arise from altering the status quo and prohibiting the Clinics from operating as they always have.[115]

247. In any event, as the Court has held since *Big M Drug Mart*, no person can be prosecuted or otherwise prejudiced by an unconstitutional law, which the Clinics' Physicians and the Clinics would be if further enforcement activities are undertaken under the impugned provisions.

248. It was on just this basis – that the Court should not determine whether the Government should be enforcing these provisions against the Clinics, before determining whether the provisions themselves are unconstitutional – that Madam Justice Smith stayed the Petition against the government in the first place.

249. As taking further steps (beyond the execution of the warrant) is the only purpose for undertaking these audits against the Clinics' Physicians, the constitutional harms and (additional) the harms to the litigation process that would result from this conduct are not speculative.

b) Search to enforce unconstitutional laws leads to irreparable harm

250. Additionally, undertaking the search of the Clinics' premises themselves would, in the Applicants submission, raise serious constitutional issues under section 8 of the *Charter*, which protects persons against unreasonable searches and seizures.

251. The Respondents note in response, correctly, that the Applicants do not directly challenge the provisions of the *Act* which give the Commission the power to seek a search warrant or conduct audits.[116]

252. The Applicants submit that a search *undertaken in order to enforce an unconstitutional law* renders that search itself unconstitutional. It is no answer to say that the searches and seizures – if undertaken for a *constitutionally sound* purpose, which the Respondents appear to assume – *would* be valid.

253. It should be emphasized that the search warrant itself is an intrusive procedure, and the execution of the search warrant will permit the Commission access to the entire

[115] *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 SCR 134, 2011 SCC 44, **BoA Tab 4**, at para 136.
[116] Application Response, Legal Basis, at para 22(c).

stock of Cambie's files, most of which contain confidential and sensitive financial and patient information and data.

254. These constitutional harms to the interests of the Applicants, as well as various other parties – such as the Clinics' Physicians, and potentially the patients of the Clinics, whose files will also be subject to a search – cannot be undone. That is one of the bases for the irreparable harm in this case if the injunction is not granted.

255. In any event, as the Respondents note, Groberman JA expressly contemplated a challenge to the use and enforcement of the impugned provisions through the Commission's audit and enforcement powers.[117] As the BC Court of Appeal understood, although there was no standalone constitutional challenge to the audit and search provisions, their use as against the Clinics and the Clinics' Physicians could nevertheless be enjoined, in so far as those provisions facilitated the Commission's enforcement of potentially unconstitutional laws.

256. It is no answer to this application to assert that the searching and auditing powers, if undertaken for a constitutionally sound purpose and to enforce constitutionally sound provisions, would be legal. That submission begs the very question to be decided.

257. It is the fact that the Respondents, by their own admission, are seeking to use these intrusive search powers to enforce the *impugned* provisions that renders the searches and seizures constitutionally suspect, in light of the serious challenge to the constitutionality of these provisions.

c) Unnecessary harms to the litigation process can constitute irreparable harm

258. Finally, the Respondents contend that the Applicants are 'estopped' from arguing that further delay and disruption caused by this constant stream of audits constitutes harm of which this Court can take notice.

259. The Applicants say that the Clinics are doing nothing to prepare for trial, and that the Clinics' counsel have "made virtually no effort over the past six months to prepare for trial either".[118]

260. As described above, this is wholly inaccurate.

261. To be clear, the Applicants have discussed the Defendants' requests with Respondents multiple times. The Respondents know that the Applicants generally do not object to these requests, but are focusing their efforts on review of the new documents being disclosed by the Defendants.

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[117] *Cambie BCCA*, **BoA Tab 3**, at para 43-45; Application Response, Legal Basis, at paras 13-14.
[118] Application Response, Facts, para 54.

262. While the Applicants have attempted to be responsive to the many requests of Respondents' counsel, *none* of these are urgent at this point in time. The Applicants are simply working on a different timeline than the Respondents wish, as the Applicants have prioritized the document review over everything else.

263. As set out in the facts above, the Applicants have been working on many of the tasks resulting from the Respondents failure to disclose all relevant documents at an early stage of the litigation. This has been the single greatest barrier to moving ahead in a timely manner.

264. The Applicants' main priority, as the Respondents have been repeatedly informed, is getting through the new documents that the Respondents failed to produce until *after* the trial was scheduled to begin.

265. Therefore, even if it made sense to speak of the Applicants being 'estopped' from noting that the Commissions' actions are causing further and entirely unnecessary delay in these proceedings due to the Applicants own inaction, there has been no inaction.

266. At this stage, the fact is that the Respondents obtained an urgent warrant to search the Clinics' premises (without notice to the Applicants), and seek to undertake steps to enforce the impugned provisions against the Clinics' Physicians, and so on. These steps are neither urgent nor important, and simply distract significantly from trial preparation and moving forward with the proceedings before the Court.

267. These delays and distractions need to stop, and the continuation of this type of conduct will do irreparable harm to the integrity of the justice system, and the interests of justice.

iii. Balance of Convenience

268. As the Supreme Court has recognized, applications for interlocutory injunctions against enforcement of legislation under constitutional challenge raises "special considerations when it comes to determining the balance of convenience". The Court must seek to assess the benefit flowing from the law's enforcement, if any, against the rights that are alleged to be infringed by the law.[119]

269. There is no presumption of constitutionality in constitutional cases where interim injunctive relief of this nature is sought; in each case, a court must consider the consequence to the public of not enforcing a law pending a determination of its constitutionality.

270. Thus, the Court has "clearly rejected reliance on a presumption that legislation is constitutional in deciding interlocutory applications", finding that such a

[119] *Harper v. Canada (Attorney General)*, 2000 SCC 57, **BoA Tab 12**, at para 5.

presumption "is not compatible with the innovative and evolutive character of [the *Charter*]".[120]

271. This is particularly important in this case, where the only reason the Commission is able to undertake these enforcement measures is because of the Respondents own delays in these proceedings. This very issue was discussed by Cory and Sopinka JJ. on behalf of the Court in *RJR-MacDonald*, where they referred to the balance of convenience as follows:

> On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.
>
> On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the *Charter* **and might encourage a government to prolong unduly final resolution of the dispute**.[121]

272. In light of these legal principles, the Plaintiffs submit that the balance of convenience strongly favours granting the injunction on the grounds that:

(a) There is no conceivable public benefit in seeking to now enforce the impugned provisions through audit procedures prior to the Court having determined the constitutionality of these very provisions. The Respondents have permitted, and benefited from, the operation of Cambie (and the conduct of its doctors) since 1996.

(b) The Government had previously taken no steps to obtain a warrant to search Cambie and SRC following clarification of the law in 2010, and being informed by the Clinics' Physicians, in 2013, that any further documents would have to be obtained from Cambie directly.

(c) The Respondents have indicated no basis for the urgent continuation of the audits, nor any basis for urgent search of the Applicants' premises, that would justify the risk of imposing the very unconstitutional effects currently under review, and further delaying this important constitutional litigation.

(d) The harm caused by enforcing the impugned provisions of the *MPA* is potentially significant, and may severely impact a range of important *Charter* interests, as described in the irreparable harm analysis above;

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[120] *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 SCR 110, **BoA Tab 17**, at 124; Roach, **BoA Tab 40**, at 7-7.
[121] *RJR–MacDonald*, *supra*, **BoA Tab 26**, at 333-34.

(e) The Respondents have already effectively agreed to suspend the enforcement of the *MPA* against Cambie and SRC until completion of the constitutional case, and should not now be able to pursue these audits as it would further undermine the Applicants' ability to prepare for the trial.

(f) The Defendants have not clarified why no steps were taken with respect to the Targeted Audits until immediately after the Plaintiffs provided the Admissions in the purportedly separate Action, and have not provided any evidence that the Targeted Audits must now be completed urgently, prior to determining whether the impugned provisions are constitutional, much less prior to the matter being raised before the Case Management Judge.

273. The Respondents spend an inordinate amount of space in their Application Response arguing that the relief the Applicants are seeking would be the end of Medicare as this province knows it.[122]

274. The Applicants submit that the Respondents concerns are not valid or pressing, in light of the fact that the Government has been acquiescing in the operation of private clinics, as a necessary adjunct to the public system, for decades, and acquiescing to the operation of Cambie specifically.

275. The Commission only began to enforce the impugned provisions twenty years after Cambie began operating, and only after a Petition was brought seeking to force them to do so, and even then, the Respondents have taken only minor and halting steps in this respect.

276. Indeed, despite seeking to characterize refusing to grant the Application in this case as "maintaining the status quo", the opposite is true. The status quo would be to continue to permit the Clinics to operate unobstructed – whether that obstruction comes in the form of seeking to enjoin the Clinics, or seeking to enforce the impugned provisions against the Clinics' service providers.[123]

277. Given the Commission and the government's historical acceptance of the operations of the Applicants, continuing the status quo until the constitutional issues are resolved will not cause any harm to the public. If Applicants' facilities, staff, and equipment go underutilized, despite that the public healthcare system in British Columbia currently lacks the capacity and the ability to properly satisfy demand, British Columbia residents will be harmed as a result. For all these reasons, the status quo is in the public interest.

278. In the Applicants' respectful submission, there is therefore an air of unreality to the Respondents submissions with respect to the balance of convenience. They seek to describe steps to enforce the *MPA*, at this stage, as necessary to "protect the public",

[122] Application Response, Legal Basis, at paras 29-36.
[123] Application Response, Legal Basis, at para 40.

and claim that the harm to the public in failing to enforce the impugned provisions as "devastating".

279. They have not been taking these steps. The Respondents have filed no evidence, and given no indication, that they are actively seeking to enforce these provisions against any *other* clinics or physicians across the province who are engaged in the provision of private care.

280. Apparently, enforcing these provisions is only of great importance and necessity to the maintenance of public health care as we know it when it comes to the only private clinics that are currently challenging their constitutionality.

281. If the sky-falling scenario were even remotely plausible, the sky would have fallen by now, given that the Commission has taken no meaningful steps to enforce the impugned provisions over the past decades, and have done nothing to further the Targeted Audits for nearly two years.

282. Despite the Respondents' submissions, simply assuming that the provisions are constitutionally valid or that enforcing the impugned provisions is in the public interest is not required where a constitutional exemption is sought.

283. As noted above, the Supreme Court of Canada has instead stated the opposite: that there is no "presumption" that the impugned provisions are constitutionally valid, and that the government does not hold the monopoly over the public interest.[124] It is possible that not enforcing the law can in fact further the public interest, or at least not harm it.

284. This is exactly the case with respect to the Clinics and the Clinics' Physicians. Rather than harming the public interest, the services provided by doctors at the Clinics promote and enhance the public interest, by easing the strain placed on the public healthcare system by lengthy and unacceptable wait times.

285. While the restrictions in the *MPA* on the provision of private healthcare in British were intended to advance the public interest they are not doing so. As Premier Dosangh stated in 2000, "unless and until the public health care system in BC can provide timely medical service to BC residents, there is a need for private clinics, such as Cambie, in the province to alleviate the strain on the public system."[125]

286. In light of the Government's consistent acceptance of the operation of Cambie and the performance of necessary surgeries by the Physicians, exempting the Clinics and the Clinics' Physicians from enforcement of the impugned provisions and any related audits constitutes a narrow exemption applying to only a few persons, and preserving the status quo would in no way harm the public interest.[126]

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[124] See *supra* at paras 268-270.
[125] Affidavit #3 of Dr. Brian Day, sworn October 2, 2012, **AR Tab 9**, Exhibit 'D', at 12.
[126] See *Baier v*. *Alberta*, 2006 SCC 38, **BoA Tab 1**, at paras 17-18.

287. Similarly, there is no basis for a concern over the scope of this order, as the Respondents suggest.

288. As noted in the Application, there is a lower threshold for obtaining interlocutory relief where the Applicants seek an exemption, i.e., "when the impugned provisions are in the nature of regulations applicable to a relatively limited number of individuals and where no significant harm would be suffered by the public".[127] That is what the Applicants seek here: an exemption from the enforcement of the impugned provisions as against the Clinics and the Clinics' Physicians.

289. Nevertheless, the Respondents submit – in the face of the specific orders sought – that the Applicants are effectively seeking what amounts to a general 'suspension' of the provisions, instead of a limited exemption for the Clinics and their service providers, and that this should weigh against the granting of the injunction sought.[128]

290. Moreover, they suggest that granting the exemption would result in other clinics or practitioners being able to rely on the exemption, with the result that the Commission would be effectively prohibited from enforcing the impugned provisions against anyone.[129]

291. As noted above, this submission is difficult to maintain, as there is no evidence that the Commission is actually seeking to enforce the impugned provisions against anyone *except* the Clinics and the Clinics' Physicians.

292. In any event, this is not a place for a full hearing on the merits of the constitutional challenge. To the extent that the specific relief sought is considered too expansive, as presently worded, this Court can modify the order in such a manner that it deems fit.

293. The relief that the Applicants are seeking is with respect to the Clinics specifically, and with respect to the Clinics' Physicians. Such an order could be narrowly tailored so as to not provide the broad exemption that the Respondents fear, however misplaced those fears may be.[130]

294. In summary on the balance of convenience point, seeking to enforce the impugned provisions at this stage would:

    (a) disrupt, hamper, and otherwise deter the operations of Cambie and SRC and the medically necessary services provided by the Clinics' Physicians, causing significant and entirely unnecessary harm to the constitutional

[127] *Metropolitan Stores*, *supra*, **BoA Tab 17**, at 147; see also Roach, *supra*, **BoA Tab 40**, at §7.560-7.590.
[128] Application Response, Legal Basis, at para 32-33.
[129] Application Response, Legal Basis, at paras 32-34.
[130] Application Response, Legal Basis, at paras 32-34.

interests of the Applicants, the Clinics' Physicians, and patients of Cambie and SRC;

(b) delay and disrupt the Applicants' ability to prepare for the trial challenging the very provisions sought to be enforced through the audit procedure;

(c) would essentially be inconsistent with the Respondents' Agreement to not enforce the impugned provisions pending the resolution of the Action; and

(d) is entirely unnecessary in light of the demonstrated lack of urgency in enforcing these provisions.

295. Ultimately, the Clinics' role within the British Columbia healthcare system reflects the status quo, and that status quo ought to be maintained pending the determination of these important constitutional questions.

296. As such, even if constitutionality of the provisions is ultimately upheld, an exemption pending resolution of the Action will not harm the public interest; indeed, the opposite is true, the medical care of residents will be enhanced, for the reasons described above.

297. For these reasons, the balance of convenience favours the orders sought by the Plaintiffs, and the Plaintiffs are entitled to the orders set out herein.