



No. S-090663
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

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

PLAINTIFFS

AND:

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

DEFENDANTS

AND:

SPECIALIST REFERRAL CLINIC (VANCOUVER) INC.

DEFENDANT BY COUNTERCLAIM

AND:

DUNCAN ETCHES, ROBERT WOOLLARD, GLYN TOWNSON, THOMAS MACGREGOR, 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

NOTICE OF APPLICATION

Page 1 of 10

Name(s) of applicant(s): Mariël Schooff, Daphne Lang, Joyce Hamer, Myrna Allison, Carol Welch (the “Patient Interveners”)

To: The Plaintiffs, Defendants and Interveners Duncan Etches, Robert Wollard, Glyn Townson, Thomas MacGregor, British Columbia Friends of Medicare Society, Canadian Doctors for Medicare, and the British Columbia Anesthesiologists’ Society

TAKE NOTICE that an application will be made by the applicants to Associate Chief Justice Cullen at the courthouse at 800 Smithe Street, Vancouver, British Columbia, on the 12 day of May, 2014 at 9:45 a.m. for the order set out in Part 1 below.

Part 1: ORDER SOUGHT

1. An order granting the Patient Interveners the right to adduce affidavit evidence at trial regarding
 - (a) patients’ experiences of health care delivery in British Columbia (the “Patient Affidavit Evidence”); and
 - (b) regarding the role and function of the Medical Services Commission (together, the “Affidavit Evidence”).

2. An order that the Patient Affidavit Evidence be admitted notwithstanding that it was made in one of the following BC Supreme Court files:
 - (a) British Columbia Nurses’ Union v. Attorney General of British Columbia, Vancouver Registry File No. L051005;
 - (b) British Columbia Nurses’ Union v. Medical Services Commission, Vancouver Registry File No. S-068256; and
 - (c) Schooff and Others v. Medical Services Commission, Vancouver Registry File No. S - 088484 (the “Patient Petition”).

3. A direction that the Affidavit Evidence be served and filed on or before June 30, 2014.
4. An order that the Patient Interveners may submit written argument seven days after the Defendants submit their written arguments, subject to the limit that except as necessary to develop its argument, the Patient Interveners' argument will not duplicate submissions made by any party.
5. An order that Patient Interveners may make oral submissions at trial, subject to the limit that except as necessary to develop its argument, the Patient Interveners' submissions will not duplicate submissions made by any party.
6. An order that there be no costs to the Patient Interveners in any event of the cause.

Part 2: FACTUAL BASIS

1. On December 4, 2008, the Patient Interveners filed the Patient Petition regarding, *inter alia*, the systemic failure of the Medical Services Commission (the "Commission") and or the Ministry of Health Services (the "Ministry"), to enforce the *Medicare Protection Act*, RSBC 1996, c. 286 ("*MPA*") in compliance with the *Canada Health Act*, RSC 1985, c. C-6. The Patient Interveners sought various remedies including declaratory relief and orders in the nature of *mandamus* that would require the Commission and the Ministry to comply with the *MPA*.
2. On January 28, 2009, Cambie Surgeries Centre ("CSC") and others commenced the within action (the "CSC Action").
3. On May 14, 2009, Pitfield J. granted party status to CSC and the False Creek Surgical Centre ("FCSC") in the Patient Petition.

4. On August 13, 2009, the CSC and FCSC filed a Notice of Constitutional Question in the Patient Petition, raising issues identical to those set out in the constitutional challenge in the CSC Action.

5. On November 20, 2009, this Court held that the CSC Action would be the most appropriate vehicle for the constitutional issues raised in both the Patient Petition and CSC Action. This Court also stayed the Patient Petition until the constitutionality of the *MPA* was determined in the CSC Action. The Court invited the Patient Interveners to apply for status in the CSC Action.

6. On July 2, 2010, this Court added the Patient Interveners as interveners in the CSC Action. In her decision, indexed as *Canadian Independent Medical Clinics Association v. British Columbia (Medical Services Commission)*, Smith J. wrote,

[The Patient Interveners'] perspective on the issues, as patients who have had involvement with privately delivered health care and who support the constitutionality of the *MPA*, will not otherwise be brought before the Court. I think they can make a valuable contribution and I will grant their application for intervenor status.

As for the terms upon which the [Patient Interveners] are permitted to intervene, *I have concluded that they should be permitted to submit evidence as well as legal argument* in this proceeding. This is for two reasons. First, it appears that they will be able to bring forward evidence that would enhance the evidentiary record. Second, if their petition had not been stayed, they would have been able to lead such evidence in that proceeding. Their submissions of evidence and legal argument will be in a form and with such limits as are determined at a later stage. [*emphasis added*]

7. On September 7, 2012, Bauman C.J. ordered the addition as Plaintiffs in the CSC Action several patients who received private medical care. Another patient Plaintiff was added later (the "Patient Plaintiffs").

8. As is evident from the Third Amended Notice of Civil Claim, the Patient Plaintiffs will give evidence about the medical care they received in the public system, what led them to seek care privately, and their medical outcomes. Based on that evidence, the Plaintiffs will ask the Court to draw inferences about the effects the *MPA* has on British Columbia patients.

9. The Patient Interveners each have direct evidence regarding the medical treatment they received in British Columbia, including whether they received treatment in the public or private system and what they were told about waitlists and potential outcomes. For those who received private health care, their evidence shows the resulting financial loss, physical and mental impact of that care. In addition, the Patient Interveners have access to further evidence from other patients who received medical care publically, privately, or both. This evidence contrasts with that which will be adduced by the Patient Plaintiffs.

10. For example, the Affidavit Evidence includes an affidavit from Ms. Welch, one of the Patient Interveners. Her affidavit describes her experience seeking medical care for a painful herniated disc. She was referred to a surgeon, Dr. Russell Chan, who offered her an earlier consultation at False Creek Surgical Centre for a \$450 fee, in contravention of the *MPA*. Dr. Chan offered to perform surgery privately if Ms. Welch paid \$5000. He told Ms. Welch that his fee would be paid by MSP.

11. Ms. Welch, is deceased. Before her death she made an affidavit in the Patient Petition. The Court would not have the benefit of her evidence if this application is denied. In addition, some of the Patient Interveners are elderly and/or ill and reside throughout British Columbia. It would be a burden, personal and financial, for them to travel to Vancouver to testify orally.

12. To the knowledge of the Patient Interveners, no party intends to adduce evidence from patients who support the constitutionality of the *MPA*.

13. To the knowledge of the Patient Interveners, no party intends to adduce evidence regarding the role and function of the Medical Services Commission, which among other things determines which medical services are “benefits” under the *MPA*.

14. According to the Case Plan, there will be a hybrid method of trial with both *viva voce* and affidavit evidence.

15. On December 2, 2013 the Patient Interveners wrote to counsel for the parties informing them of their intention to adduce affidavit evidence.

16. The Affidavit Evidence is not expert evidence.

Part 3: LEGAL BASIS

1. This Court has already decided that the Patient Interveners may adduce evidence and submit argument that would assist the Court. It is only the scope of those rights which remains to be determined.

2. The Court may order, pursuant to Rule 12-5(59), that evidence may be admitted on affidavit at trial.

3. The Patient Interveners seek rights that are minimally intrusive into this litigation. Submitting evidence by affidavit limits the amount of court time necessary to address the evidence while allowing the Court to consider the evidence that this Court has already determined is relevant to the constitutional issues raised.

4. The evidence sought to be adduced is directly relevant to the proceedings in that it responds to the evidence of the Patient Plaintiffs and provides a different perspective regarding patient interactions and experiences with the current British Columbia healthcare system: *PHS Community Services Society v. Canada (Attorney General)*, 2008 BCCA 441, at ¶13.

5. The Affidavit Evidence will provide the Court with another perspective about the effects the *MPA* has on British Columbia patients that will not otherwise be provided in this proceeding.

6. The evidence sought to be adduced is of the same or similar quality to that the Patient Interveners would have been permitted to present in the Patient Petition either to advance the Patient Petition or in response to CSC and FCSC's Notice of Constitutional Question.

7. If the affidavit evidence is adduced by June 30, 2014, the parties will have sufficient time before the start of trial to cross-examine the affiants (with the exception of the deceased Ms. Welch) if they deem it necessary.

8. With respect to Ms. Welch, though she is not available for cross-examination as she is deceased, her evidence is straightforward and unique. It will assist the Court's understanding of the way medical services are delivered by practitioners who work in the private system in British Columbia. There is minimal prejudice to the Plaintiffs in admitting the evidence, as the Plaintiffs would be able to cross-examine all other Patient Intervenor affiants should they wish. Moreover, Ms. Welch would have been available for cross-examination had the Plaintiffs pursued the CSC Action in a timely manner. Further, the parties have been aware of the contents of Ms. Welch's affidavit for years but have never indicated concern about its contents. Any outstanding concerns about the reliability of the evidence can be addressed in terms of the weight assigned to it. The balance of prejudice weighs in favour of admitting Ms. Welch's affidavit.

9. Each of the affidavits sought to be introduced was sworn for the purpose of this action or for a closely related action or petition.

10. The Patient Interveners seek to play a minor role and assist the Court in the public interest. They do not seek the costs of this application and ask that no costs be assessed against them. The usual practice that costs are not assessed against interveners should apply: *Faculty Assn. of the University of British Columbia v. University of British Columbia*, 2009 BCCA 56.

Part 4: MATERIAL TO BE RELIED ON

1. Third Revised Notice of Civil Claim
2. Affidavit #1 of Kelly Robinson, made April 29, 2014.

The applicants estimate that the application will take 20 minutes.

This matter is within the jurisdiction of the master.

This matter is not within the jurisdiction of a master.

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

(a) file an application response in Form 33,

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

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

(ii) has not already been filed in the proceeding, and

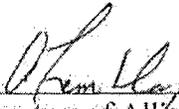
(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

(i) a copy of the filed application response;

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

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

Date: 29 April 2014
[dd/mmm/yyyy]


Signature of Allison Tremblay
 Applicant Lawyer for applicant(s)

To be completed by the court only:

Order made

in the terms requested in paragraphs of Part 1 of this notice of application

with the following variations and additional terms:

Date: _____
[dd/mmm/yyyy] Signature of Judge Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

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

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