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

AND:

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

DEFENDANTS

AND:

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

INTERVENORS

APPLICATION RESPONSE

Re: Notice of Application of Plaintiffs dated 21 October 2015

Application response of: the Defendants Medical Services Commission of British Columbia, Minister of Health of British Columbia, and Attorney General of British Columbia.

This is a Response to: the Notice of Application of the Plaintiffs dated 21 October 2015.

Part 1: Orders Consented To

The defendants consent to the granting of the orders set out in the following paragraphs of Part 1 of the application: none

Part 2: Orders Opposed

The defendants oppose the granting of the orders set out in paragraphs 1, 2, and 3 of Part 1 of the application.

Part 3: Orders on Which No Position is Taken

The defendants take no position on the granting of NONE of the orders set out in Part 1 of the application.

Part 4: Factual Basis

1. The defendants say that most of the facts relevant to this application are set out in their application to strike portions of the Third Amended Notice of Civil Claim, filed on 11 September 2015 (the "Application to Strike"), and the defendants adopt those statements of fact.

2. In addition, the defendants note the following facts.

3. On 14 August 2015 they sought dates from the plaintiffs' counsel for the hearing of a one-day application to strike the plaintiffs' section 15 claim.[1]

4. The plaintiffs' counsel responded on 17 August that they would be available during the week of 14 December 2015.[2]

5. Eventually, after some communications back and forth, counsel agreed on 21 August that the hearing would proceed during the week of 14 December for two days, and that no appeal would be taken from the outcome of the application.[3]

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[1] Affidavit #14 of Carol Mae Brossard, sworn 27 October 2015, Ex. "A".
[2] Brossard Affidavit #14, Ex. "B"

6. The plaintiffs have not yet filed a Response to the Application to Strike.

7. Finally, certain assertions of fact made by the plaintiffs require specific responses.

The "Series of Applications"

8. The plaintiffs assert[4] that since March of 2015 "the Defendants have threatened to bring, or have brought, a series of applications against the Plaintiffs on matters of limited to no relevance to the real issues in the constitutional challenge".

9. The only application that the defendants have actually brought since March of 2015 is the Application to Strike. The plaintiffs cannot credibly assert that *that* application has "limited to no relevance to the real issues," since it is directed at dismissing large portions of the plaintiffs' claim.

10. The only application that the defendants have "threatened" to bring is an application for further disclosure that was sent to the plaintiffs in April, but never actually proceeded.[5]

The Forensics Audit Team

11. The plaintiffs assert[6] that they consented to "a forensics audit team conducting an invasive search of Cambie and SRC; providing the Defendants with direct access to and copies of all Cambie and SRC's records".

12. The placement of this paragraph in the Notice of Application implies that this was done at some point since March of 2015: in fact it occurred during the summer of 2014. It is thus of no relevance to how the plaintiffs have been preparing for trial in recent months.

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[3] Brossard Affidavit #14, Ex. "C".
[4] Part 2, para. 22 of the Notice of Application.
[5] The defendants suggested in July that they might be forced to bring an application in connection with certain admissions made by the plaintiffs, but it never went any further than that suggestion.
[6] Part 2, para. 23 of the Notice of Application.

13. In addition, however, it is factually inaccurate to say that the defendants have been given "direct access to and copies of" any of the records of Cambie or SRC. The Order to which the plaintiffs consented permitted a third party, TCS Forensics Inc., to make copies of the electronic records of Cambie and SRC. The defendants are only able to access any of those records by asking TCS Forensics to conduct a search (a time-consuming and expensive process) after which TCS Forensics provides the search results to the plaintiffs' counsel for review. Only documents that the plaintiffs' counsel agrees are relevant are ultimately available to the defendants.

Part 5: Legal Basis

1. The plaintiffs ask this Court to exercise its inherent jurisdiction to sanction an abuse of process to stay the Application to Strike, apparently on four bases:[7]

a) Delay in bringing the application;
b) The application serves no meaningful purpose;
c) The application will delay the adjudication of the merits of the plaintiffs' claim; and
d) The application will impede the plaintiffs' capacity to prepare for trial.

2. The defendants will respond to each of these bases in turn.

Delay Is Not a Basis for Staying the Application

3. The plaintiffs rely on several Ontario authorities for the proposition that delay disentitles the defendants from bringing the Application to Strike. The Ontario Rules, however, require that an application to strike pleadings be brought "promptly."[8] Such a requirement is absent from the British Columbia Supreme Court Civil Rules.

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[7] Part 2, para. 3; Part 3, para. 5 of the Notice of Application.
[8] *Rules of Civil Procedure*, O.R. 194/90, Rule 21.02.

4. Furthermore, the law in Ontario is that, notwithstanding the express requirements of the Rules, delay does not operate as an absolute bar to the bringing of a motion to strike a claim as disclosing no cause of action.[9]

5. The plaintiffs also rely on an authority from the Federal Court. The rule in the Federal Court, however, is that an application to strike may be brought *at any time* if the basis for the application is an allegation that the pleadings do not disclose a cause of action:

> The authority to strike out pleadings pursuant to paragraph 221(1) of the Rules is a discretionary power in the exercise of which it is relevant to consider how much time has passed between the closing of pleadings and when the motion to strike the pleadings was brought, and whether any defects in the pleadings can be corrected through amendments: ... The case law has moreover stated that when the motion to strike is sought pursuant to paragraph 221(1)(a) of the Rules on the basis that no reasonable cause of action is shown, that motion can be brought at any stage of the proceedings.... [10]

6. The mere fact of delay in bringing the Application to Strike is no basis for staying the application. Certainly permitting it to proceed would not constitute "misuse of [the Court's] procedure" that would "bring the administration of justice into disrepute," the test for abuse of process relied on by the plaintiffs.[11]

The Application Serves a Meaningful Purpose

7. The plaintiffs refer to *Imperial Tobacco*, but fail to note its actual relevance to this application:[12]

> The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

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[9] *Morguard Real Estate Investment Trust v. ERM Canada Corp.*, 2012 ONSC 4195 at para. 48; *Sudbury Downs v. Ontario Harness Horse Assn.*, 2003 CarswellOnt 3676 at para. 11 (S.C.J.).
[10] *Verdicchio v. R.*, 2010 FC 117 at para. 19.
[11] Part 3, para. 2 of the Notice of Application.
[12] *R. v. Imperial Tobacco*, 2011 SCC 42

> This promotes two goods – efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be – on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.[13]

8. The Application to Strike seeks to accomplish both of the goals identified by the Supreme Court of Canada: focusing the attention of the Court and the parties on claims that are not hopeless, thereby making it more likely that the trial process will successfully come to grips with the merits of the case.

9. The plaintiffs assert[14] that the "evidence that goes to arbitrariness also goes to overbreadth". There is no question that this is true, to the extent that the evidence does actually go to those issues. However, evidence that goes to the Disputed Section 7 Claim does not truly go to either arbitrariness or overbreadth, as set out in the Application to Strike.[15]

10. The plaintiffs also assert[16] that "the evidence that the Plaintiffs will rely on to establish the section 15 breach generally overlaps with the evidence the Plaintiffs intend to adduce for their section 7 claim". This assertion is made without reference to any actual evidence.

11. It is plain on the face of the pleadings, and the Application to Strike, that there is overlap between the plaintiffs' section 15 claim and the Disputed Section 7 Claim. There is no apparent overlap, however, between the rest of the section 7 claim and the section 15 claim: they are based on entirely different facts. If the Application to Strike is successful, the evidence that relates solely to the section 15 claim and the Disputed Section 7 Claim will be rendered entirely irrelevant.

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[13] *Imperial Tobacco* at paras. 19-20

[14] Part 3, para. 16 of the Notice of Application.

[15] Those paragraphs of the Third Amended Notice of Civil Claim that claim a breach of section 7 of the *Charter* in connection with the "Defendants' Preferential Policy".

[16] Part 3, para 16 of the Notice of Application.

12. The plaintiffs refer to creating "discrete silos of evidence in a separate proceeding". It is unclear what is meant by this.

13. In the following paragraphs,[17] the plaintiffs assert that it is necessary for them to adduce evidence relevant to the Disputed Section 7 Claim in order to provide the Court with "a comprehensive understanding of the issues raised". If the Application to Strike is successful, the plaintiffs will still be entitled to call all evidence that is relevant to the issues that have been properly pleaded. If evidence they wish to call is *only* relevant to a pleading that does not disclose a cause of action, there is no reason why the Court or the parties should be obliged to spend any time dealing with it.

14. The plaintiffs then assert that their section 15 claim "can only adequately be adjudicated in light of the entire scheme of the *MPA*, in the overall the effects of the legislative regime in the context of the health care system in British Columbia, and the evidence relating to the impact on the claimant groups".

15. If the Third Amended Notice of Civil Claim discloses a cause of action with respect to section 15, the plaintiffs will be entitled to call any evidence they wish that is relevant to that cause of action. If, however – as the Application to Strike asserts – no cause of action is disclosed, then there is no reason to waste Court time, or parties' resources, dealing with evidence that is not relevant to any cause of action. The appropriate place to make arguments about whether a cause of action exists is at the hearing of the Application to Strike.

16. The plaintiffs then assert that "Striking one aspect of the discrimination claim ... will only serve to deprive the court of a full understanding of the claim at issue". The defendants are seeking to strike the *entire* section 15 claim. If they are successful, there will be no remaining "aspect" of the claim.

17. In sum, the Application to Strike most certainly serves a meaningful purpose, in that it will enable the parties and the Court to focus their attention and efforts on claims that are not

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[17] Part 3, para. 22 of the Notice of Application.

entirely hopeless. The place for the plaintiffs to dispute whether or not the Application to Strike ought to be successful is at the hearing of the application, not on a preliminary application to stay it.

The Application Will Not Delay the Trial

18. The plaintiffs assert in a conclusory way that the Application to Strike will delay the trial in this matter.[18] They do not, however, refer to any evidence or, indeed, any actual facts in support of this conclusory assertion.

19. The Application to Strike will in fact help to ensure that the trial of this matter does proceed in a timely way. By narrowing the issues and focusing the parties' efforts on claims that are not entirely hopeless, it will reduce the amount of time required both to prepare for trial and to conduct the trial.

The Application Will Not Impede the Plaintiffs' Preparation for Trial

20. The bulk of the plaintiffs' argument under this heading is predicated on their arguments regarding delay and a lack of meaningful purpose, and thus is no more persuasive than those arguments.

21. The plaintiffs assert that the Application to Strike will "consume judicial and party resources unnecessarily"[19] and that it is "delaying the Plaintiffs' trial preparation".[20]

22. The plaintiffs offer no evidence in support of these assertions.

23. The Application to Strike has been set down for a two day hearing, although the defendants say it should be possible to complete it in one day. No evidence is permitted on the application, because it is being brought pursuant to Rule 9-5(1)(a).

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[18] Part 2, para. 3; Part 3, para. 29 of the Notice of Application.
[19] Part 3, para. 29 of the Notice of Application.
[20] Part 3, para. 30 of the Notice of Application.

24. The effort that the plaintiffs' counsel have put into preparing this application could have been spent preparing a substantive response to the Application to Strike. If additional effort is required it is not because of the Application to Strike, but because the plaintiffs chose to bring this application.

25. The plaintiffs cannot credibly assert that the time involved in a two day hearing could outweigh the gains in trial efficiency if the Application to Strike is successful.

Conclusion

27. The defendants say that the plaintiffs have failed to establish any basis on which this Court could find that permitting the Application to Strike would be to countenance an abuse of the Court's process.

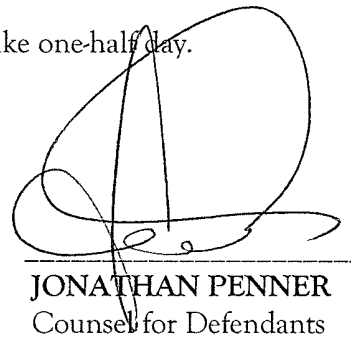
28. This application should therefore be dismissed, with costs.

Part 6: MATERIAL TO BE RELIED ON

1. The defendants will rely on the pleadings filed herein and such other materials as this Court will allow.

The defendants estimate that the application will take one-half day.

DATED 27 October 2015



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