No. S-090663
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CAMBIE SURGERIES CORPORATION, CHRIS CHIAVATTI by his litigation guardian RITA CHIAVATTI, MANDY MARTENS, KRYSTIANA CORRADO by her litigation guardian ANTONIO CORRADO and ERMA KRAHN, WALID KHALFALLAH by his litigation guardian DEBBIE WAITKUS, and SPECIALIST REFERRAL CLINIC (VANCOUVER INC.)

PLAINTIFFS

AND:

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

DEFENDANTS

AND:

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

INTERVENORS

NOTICE OF APPLICATION

Name of applicants: the Plaintiffs Cambie Surgeries Corporation and Specialist Referral Clinic (the "**Applicants**")

To: the Defendants Medical Services Commission of British Columbia, Minister of Health Services of British Columbia and Attorney General of British Columbia (collectively, the "**Respondents**")

TAKE NOTICE that an application will be made by the applicants to the Associate Chief Justice Cullen at the courthouse at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia on November 2, 2015, at 9:45 a.m. for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order that the Defendants' Application to Strike, set down for December 14-15, 2015, (the "**Application to Strike**") be stayed;

2. Costs; and

3. Such further and other relief as this Honourable Court may deem just.

Part 2: FACTUAL BASIS

A. Overview

1. In their Application to Strike, the Defendants seek to strike portions of the Plaintiffs' section 7 claim relating to the arbitrariness of the regime established by the *Medicare Protection Act* (the "**Arbitrariness Claim**") and the entirety of the Plaintiffs' section 15 claim (the "**Equality Claim**") (together, the "**Disputed Claims**").

2. The Defendants advance two grounds for this relief: that the Disputed Claims are (a) not connected to the relief sought and (b) fail to plead the required elements of the Disputed Claims.

3. The Plaintiffs seek to have the Application to Strike be stayed on the basis of the considerable and unreasonable delay in bringing this application, and on the basis that permitting it to proceed at this stage in the litigation would serves no meaningful purpose, and indeed will only serve to further delay the adjudication of these important matters.

B. Background Proceedings

4. On December 4, 2008, a Petition was filed by a number of Petitioners, seeking to compel the Commission and the Ministry to enforce the provisions of the *Medicare Protection Act* (the "***MPA***") restricting private billing for medical services (the "**Petition**"). The Petition was filed on notice to Cambie, as well as other private health care clinics in Vancouver, B.C.

5. On January 28, 2009, the Plaintiffs initiated an action against the Defendants, alleging, *inter alia*, 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 health care (the "**impugned provisions**") 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* (the "**Action**").

6. In the January 2009 Writ of Summons, the Plaintiffs claimed that the impugned provisions were arbitrary, "in that they do not apply on a uniform basis", and in particular, do not apply to "beneficiaries of numerous other health care programs; they have an effect that varies according to the personal financial circumstances of patients; and they are arbitrary in their geographic limitations" (at para 26(d)).

7. The Writ of Summons also pleaded that the impugned provisions violated section 15 of the *Charter*, and in particular, that "the provision of the Act that directly or indirectly prohibit

or impede access to private health care.... and the exceptions to those prohibitions and restrictions incorporated into the Regulation", result in a violation of section 15 (at para 33).

8. The exemptions resulting in the impugned provisions imposing a discriminatory effect are listed in paras 33 and 34, and the Writ of Summons states that the exempted persons "receive preferential access to medical care", and that the "effect" of the impugned provisions is that persons who are not given preferential access "are subject to discriminatory prohibitions and restrictions on reasonable access to, and choice of, medical care" (paragraph 35).

9. The Defendants filed a substantive response to the January 2009 Writ of Summons, generally denying that any of the facts alleged constituted either an infringement or denial of the Plaintiffs' constitutionally guaranteed rights or freedoms.

10. Notably, the Defendants did not directly address the Plaintiffs' claims regarding the arbitrariness of the impugned provisions in paragraph 26(d).

11. The Defendants also did not provide a direct substantive response to the discrimination claims. Rather, the Defendants stated that the facts disclosed no reasonable claim that section 15(1) of the *Charter* has been breached and that section 27 of the Regulation has no relevance to the Plaintiffs' claim, as it related to services rendered by health care practitioners, not medical practitioners.

12. However, the Defendants did not bring an application to strike the pleadings in relation to the Disputed Claims, or at all, at that time.

13. Subsequently, the Plaintiffs and Defendants filed the following pleadings and amended pleadings:

    (a) Notice of Civil Claim, filed September 13, 2012;

    (b) Amended Notice of Civil Claim, filed January 10, 2013;

    (c) Response to Further Amended Civil Claim, filed January 11, 2013;

    (d) Further Amended Notice of Civil Claim, filed March 25, 2014; and

    (e) Response to Third Amended Civil Claim, filed March 26, 2014.

14. Throughout the course of these filings over the past six years, the Defendants took no steps to bring an application to strike any part of the Plaintiffs' pleadings, including the Disputed Claims.

C. Preparations for Trial

15. Following the Writ of Summons, the parties have amended their pleadings by consent, retained experts, exchanged expert reports, and conducted examinations for discovery - all on the basis of the claims as pleaded.

16. With respect to the pleadings, the Plaintiffs filed their Third Amended Notice of Claim on March 25, 2014 (the "**Notice**"), with the Defendants' consent. The Defendants subsequently filed their Third Amended Response to Civil Claim, on March 26, 2014.

17. The Defendants took no steps to have the Notice struck on the basis that it did not disclose a reasonable claim. Rather, the Defendants pleaded a substantive response to the Disputed Claims.

18. The Plaintiffs have therefore prepared for trial on the basis of the pleadings and have taken countless steps to prepare for trial on the basis that the pleadings disclosed a claim.

19. For instance, during the course of the litigation, and since the time of the filing of the Notice, the Plaintiffs have made certain specific document requests in connection to the Disputed Claims.

20. Just prior to the start of the trial, the Defendants informed the Plaintiffs that the Defendants had realized that they had not properly carried out their disclosure obligations over the previous six years. The Defendants advised that there were thousands of new documents, which were relevant to the issues in this litigation and therefore producible.

21. Unsurprisingly, this led to the adjournment of the trial. The parties are now in the midst of yet another round of intensive document discovery, brought on by the Defendants. The Plaintiffs are currently reviewing tens of thousands of additional, recently disclosed documents in relation to requests made in connection to the Disputed Claims.

22. Since the March 2015 adjournment, 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.

23. In order to avoid unnecessary detractions from their preparation for trial, the Plaintiffs attempted to address the concerns underlying the Defendants' applications by, among other things, consenting to a forensics audit team conducting an invasive search of Cambie and SRC; providing the Defendants with direct access to and copies of all of Cambie and SRC's records; and providing the Defendants with admissions on certain matters the Defendants believe to be relevant (the "**Admissions**").

24. Despite these efforts, the Defendants continue to raise procedural hurdles and make ongoing demands of the Plaintiffs, including demanding that the Plaintiffs provide the Admissions (made solely for the purposes of the Action) to the Commission for use against third parties, outside of the Action.

25. On October 5, 2015, the Case Management Judge, Associate Chief Justice Cullen, directed the Defendants to complete their document disclosure by January 15, 2016. His Lordship also directed that the trial commence on June 6, 2016.

26. This trial has already been significantly delayed as a result of the Defendants' conduct. In this respect, the Plaintiffs plead and rely upon the recitation of facts in their Notice of Application for various orders filed September 28, 2015, and in particular, paragraphs 8-32.

Part 3: LEGAL BASIS

The Application to Strike the Plaintiffs Pleadings Should Not Proceed

1. It is the Plaintiffs' submission that it is not necessary or appropriate to adjudicate the Defendants' Application to Strike at this stage of the proceedings. Rather, the Applicants urge this Court to exercise its inherent jurisdiction to order that the Application to Strike be stayed.

2. The Courts can stay such applications on the basis of "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".

Canam Enterprises Inc. v. Coles (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 6);

Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63 at para 37;

3. The Court has broad latitude in issuing a stay of a matter before it, and may direct a stay of proceedings in a cause or matter pending before it, "if it thinks fit".

Law and Equity Act, RSBC 1996, c 253, s. 8.

4. This power is simply a codification of the broader inherent jurisdiction of the Court to direct its own proceedings. As stated by the BC Court of Appeal in *R. & J. Siever Holdings Ltd.*:

> In addition to the powers conferred by the *Rules of Court*, the Supreme Court of British Columbia, as a superior court of record, has inherent jurisdiction to regulate its practice and procedures so as to prevent abuses of process and miscarriages of justice: see I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Leg. Prob. 23 at 23-25. As the author said, at 25,
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> > 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.

R. & J. Siever Holdings Ltd. v. Moldenhauer, 2008 BCCA 59 at para 14.

5. The Plaintiffs seek to have the Application to Strike stayed on the basis that permitting it to proceed at this stage in the litigation would:

   (a) Not serve the purpose of striking pleadings; and

   (b) Further prejudice the Plaintiffs by impeding their capacity to prepare for trial by requiring them to utilize their already-limited resources and time on matters that are more appropriately and efficiently addressed at trial, and would in any event not be appropriate due to the Defendants' lengthy delay in bringing their Application; and because the Application to Strike would allow the Defendants to benefit from the delay, which their own default in failing to disclose relevant documents, has caused.

(a) No Purpose Would be Served in Adjudicating the Application

6. The entire purpose of striking pleadings is to promote trial efficiency and eliminate irrelevant side issues. This can only be accomplished if applications to strike pleadings are brought at an early stage of proceedings.

7. As such, the general rule is that a "pleading should not be struck when the other party has 'pleaded over' or when there is a lengthy delay between delivery of the pleading and the motion to strike".

Harris v. Canada, [2001] 4 FCR 32 at para 25;

Morguard Real Estate Investment Trust v. ERM Canada Corp. et al., 2012 ONSC 4195 at para 46-48;

Tribar Industries Inc. v. KPMG LLP, 2009 CanLII 9747 (ON SC) at para 22.

8. In *Ross River Delta*, for instance, the Court was prepared to dismiss an application to strike given the considerable delay in bringing the application, and notwithstanding that the pleading was expressly challenged in a statement of defence. This was supported on the following basis:

> In the '05 action, Canada pled in its statement of defence, filed September 29, 2005, that it reserved the right to make an application to strike portions of the statement of claim pursuant to Rule 19(24). However, the within application to strike was not actually filed until June 15, 2007, and the hearing was not held until October 11 and 12, 2007. In the interim, a significant number of procedural steps have been taken by the parties, as detailed in the chronology filed by RRDC. These include demands and supplemental demands for further and better particulars and the responses thereto, a notice to admit, and supplemental notice to admit and the replies thereto. Further, over two years have passed since the pleadings closed and this application was heard. In my view, that is a significant delay and, notwithstanding the reservation by Canada of its right to bring this application, it was incumbent upon Canada to do so in a more timely and diligent fashion. Finally, Canada has clearly "pleaded over" in its defence to the '05 action and the numerous

subsequent procedural steps have significantly advanced that action and put both parties to time and expense.

Ross River Dena Council v. Canada (Attorney General), 2007 YKSC 65 at para 62.

9. Moreover, as stated in *Bell*, "the filing of a statement of defence signifies that the claim contains recognizable causes of action to which the defendant can respond and should prevent a defendant from complaining subsequently about an irregularity in the statement of claim", and that a party should not be permitted to make such a claim by way of a response or defence.

Bell v. Booth Centennial Healthcare Linen Services, [2006] O.J. No. 4646 (S.C.J.), at para 6.

10. In this case, there is no purpose to adjudicating an application to strike at this stage of the proceedings, as the Defendants' application will not achieve the purposes of striking pleadings – promoting trial efficiency and achieving better results.

R. v. Imperial Tobacco Canada Ltd., [2011] 3 SCR 45, 2011 SCC 42 at paras 20-21.

11. The Plaintiffs initiated the underlying Action six years ago. Although the claim has been amended, it has stayed substantively the same over that six years. With the exception of a small number of paragraphs relating to the Disputed Claims, the material in the Disputed Claims has been substantially similar since the Writ of Summons was filed in 2009.

12. In particular, the Plaintiffs have always relied upon the Defendants' Preferential Policy as relevant to both the Arbitrariness Claim and the Equality Claim.

13. Moreover, the evidence the Plaintiffs intend to lead, obtained over the course of the past six years and on the understanding that the trial would be adjudicated on the claims as pleaded, is not compartmentalized such that specific aspects of its various claims are supported by discrete "silos" of evidence.

14. Rather, the Plaintiffs' evidence for establishing the Disputed Claims is similar or closely related to the evidence the Plaintiffs intend to adduce for the balance of their claims. Given the nature of the complex constitutional claims at issue, these matters cannot be separated into discrete claims with discrete evidence.

15. For example, the Plaintiffs claim that the impugned provisions are, *inter alia*, arbitrary and overbroad. These two concepts are closely linked; both principles are directed at preventing the "evil" of the absence of a connection between the infringement of rights and what the law seeks to achieve.

Canada (Attorney General) v. Bedford, 2013 SCC 72 ("***Bedford***") at paras 108-112.

16. The Plaintiffs' evidence that goes to arbitrariness also goes to overbreadth, and therefore, this evidence will be adduced even if the Defendants would have been successful in their Application to Strike. Similarly, 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.

17. Therefore, there are no efficiency gains to be had by striking the Disputed Claims, particularly *after* the date this Action had already been scheduled for trial.

18. Nor will seeking to create discrete silos of evidence in a separate proceeding be more likely lead to 'correct' outcomes; in fact, it would achieve the opposite.

19. For instance, the Plaintiffs plead that the Defendants' Preferential Policy contributes to or helps to illustrate the arbitrariness of the impugned provisions.

20. However, the Arbitrariness Claim is not *limited* to the Defendants' Preferential Policy; that is only one aspect of that claim. The issue should be determined and the relevance of the arguments in favour of the Arbitrariness Claim should be decided in the entire context of the arbitrariness argument at trial.

21. Moreover, as stated in *Bedford*, even if there is some question as to the extent to which the Defendants' Preferential Policy contributes to the arbitrariness of the Impugned Provisions (which is denied), the arbitrariness analysis is quintessentially a "matter to be determined on a case-by-case basis, in light of the evidence" (*Bedford*, at para 119).

22. Therefore, if anything, artificially depriving the Plaintiffs of one aspect of their Arbitrariness Claim would undermine a comprehensive understanding of the issues raised.

23. Similarly, section 15 claims require a "flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group". The section 15 analysis is "accordingly concerned with the *social and economic context in which a claim of inequality arises*, and with *the effects of the challenged law or action on the claimant group*."

Kahkewistahaw First Nation v. Taypotat, 2015 SCC 30 at paras 16-18 (emphasis added).

24. Such a claim can only be adequately 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.

25. The discrimination imposed by the impugned provisions is most clearly visible within an comprehensive view of all the evidence and arguments. Striking one aspect of the discrimination claim, in isolation from all the related evidence and arguments, will only serve to deprive the court of a full understanding of the claim at issue.

26. Therefore, there would be no efficiency gains, nor any likelihood that hearing this application will lead to correct results, in permitting the Defendants to proceed with their Application to Strike. To the contrary, it will only serve to unnecessarily further delay this proceeding and compartmentalize the overlapping and related issues that require adjudication at trial.

27. Moreover, relief on an application to strike is discretionary.

28. As a hearing of the Application to Strike would serve neither purposes of bringing an application to strike, the Defendants' Application to Strike should be stayed.

(b) The imposition of additional costs and procedural barriers

29. This conclusion is strengthened by the fact that hearing the Defendants' Application to Strike will further delay the trial and consume judicial and party resources unnecessarily, to the further prejudice of the Plaintiffs.

30. That is, far from promoting trial efficiency, by bringing the Application to Strike the Defendants are further (and unnecessarily) delaying the Plaintiffs' trial preparation.

31. The Plaintiffs and their counsel have already had to devote time and effort to respond to the Defendants' untimely application, and will have to devote further time and effort if it is permitted to proceed.

32. Given that no purpose could possibly be served by bringing this application at this stage of the proceedings, the Defendants are simply imposing additional costs and procedural barriers to the prejudice of the Plaintiffs, which continue to prevent the litigation from proceeding in an efficient manner.

33. The Defendants' actions since the March 2014 adjournment have already significantly delayed the adjudication of the constitutional challenge in this proceeding, and have caused the Plaintiffs significant prejudice. Permitting the Defendants to bring an Application to Strike at this stage in the proceedings would only exacerbate this prejudice, and should not be permitted.

34. Notably, the Defendants could have applied to strike the Disputed Claims at the outset of this proceeding, or even after the amendments in March 2014. Instead, the Defendants filed and served their substantive responses to the claims, and the parties have proceeded on the basis that the Disputed Claims were properly pleaded over the entire course of the litigation.

35. There is simply no reason why the Defendants could not have brought this application three, or four, or five years ago, and it should not be heard now, after the parties have prepared for trial on the basis of the claims as pleaded.

36. Importantly, were it not for the disruption and delay caused by the Defendants' failures in the context of document disclosure, the claims that the Defendants now seek to have struck, initially pleaded in 2009, would have already been heard and adjudicated in the course of the trial itself.

37. That is, but for the Defendants' own default in the course of trial preparation, they would have had no opportunity to bring this application at all.

38. In short, it would be contrary to the interests of justice to permit the Defendants to take advantage of their own defaults in order to bring another unnecessary and time-consuming application.

(c) Conclusion

39. In summary, it makes no sense, would serve no purpose, and is contrary to the interests of justice, for the Defendants to now seek – six years after the claims were initially pleaded, after the evidence has been amassed, and after the parties have spent years preparing for trial on the basis of the claims as pleaded – to have certain portions of the claim struck.

40. The Defendants have not provided any plausible explanation as to why they have brought an application to strike key components of the Plaintiffs' claim long after the parties had reached the eve of trial, and after providing substantive responses to the claims pleaded, and there is no benefit in terms of trial efficiency or promoting correct results.

41. To the contrary, seeking to strike aspects of the Plaintiffs' overlapping claims at this stage would prevent this Court from considering all material and arguments relevant to the complex constitutional claims at issue in a comprehensive, holistic manner, as is appropriate for constitutional challenges of this kind.

42. Therefore, this application should be stayed based on the inherent jurisdiction of this Court to ensure a timely and efficient procedure for the course of trial.

Part 4: MATERIAL TO BE RELIED ON

1. The Pleadings filed in this action; and
2. Such further and other material as this Honourable Court may allow.

The Plaintiffs/Respondents estimate that the Application will take 2 hours to be heard.

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

Date: October 20, 2015

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