No. S090663
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

CAMBIE SURGERIES CORPORATION, CHRIS CHIAVATTI, MANDY MARTENS, KRYSTIANA CORRADO, 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, and the BRITISH COLUMBIA ANESTHESIOLOGISTS' SOCIETY

Intervenors

And:

THE ATTORNEY GENERAL OF CANADA

Pursuant to the *Constitutional Question Act*

APPLICATION RESPONSE

Re: April 21, 2016 Application of Intervenors

Application response of: the Defendants Medical Services Commission of British Columbia, Minister of Health of British Columbia and Attorney General of British Columbia, (the "application respondents").

THIS IS A RESPONSE TO the application of the Intervenors Dr. Duncan Etches, Dr. Robert Woollard, Glyn Townson, Thomas McGregor, The British Columbia Friends of Medicare Society and Canadian Doctors for Medicare, by letter dated April 21, 2016, seeking to have Cambie Surgeries Corporation and the Specialist Referral Clinic removed as parties to the Action.

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 the following paragraphs of Part 1 of the application: none.

Part 3: Orders on Which No Position is Taken

The Defendants take no position on the granting of the orders set out in ALL of the paragraphs of Part 1 of the application.

Part 4: Factual Basis

1. The Defendants do not take any position with respect to the relief sought by the Intervenors. The Defendants do, however, wish to correct or clarify some of the facts asserted by the Plaintiffs in their Response dated 3 May 2016.

2. At para. 4 of Part 4 of their Response, the Plaintiffs quote from the Reasons of Associate Chief Justice Cullen in 2015 BCSC 2169. In those Reasons, Cullen ACJ refers to "the clinics" having filed a statement of claim to commence this action. It is important for the sake of clarity to note that this reference to "the clinics" is *not* a reference to the plaintiffs Cambie Surgeries Corporation ("Cambie") and the Specialist Referral Clinic (Vancouver) Inc. ("SRC") (collectively, the "Clinics"). Rather, the statement of claim that was filed in 2009 was filed by Cambie and four *other* private medical clinics, along with the Canadian Independent Medical Clinics Association ("CIMCA").

3. All of the other clinics, along with CIMCA, discontinued their participation in the litigation in late June of 2010, leaving Cambie as the sole plaintiff.

4. SRC was initially only a defendant by counterclaim. It became a plaintiff when the Further Amended Notice of Civil Claim was filed on 10 January 2013.

5. At para. 4 of Part 4 of their Response, the Plaintiffs assert that "the Government" sought various relief, including declarations that the Clinics had contravened the *Medicare Protection Act* (the "Act"), and permanent injunctive relief, in 2010. This is not accurate. In fact the Medical Services Commission applied on 20 August 2009 for a warrant, and in the alternative an injunction, permitting it to enter the Clinics and inspect their records. There was no application for any declaratory or permanent relief at that time. Madam Justice Lynn Smith granted the injunction on 20 November 2009, instead of the warrant.

6. The provision of the Act under which the Commission sought a warrant (section 36) is not in issue in these proceedings. The injunction granted by Smith J was granted pursuant to the Court's inherent jurisdiction.

7. Although the injunction was subsequently set aside by the Court of Appeal, the Reasons of the Court of Appeal made it clear that it was open to the Commission to seek a warrant pursuant to the Act, and the Clinics accordingly consented to an audit rather than requiring the Commission to make such an application.

8. The audit was completed in 2012, and it was as a result of the audit report that the Commission wrote to the Clinics in July of 2012 seeking confirmation that they would cease their violations of the Act. When that confirmation was not forthcoming, the Commission did, on 6 September 2012, bring an application seeking interim injunctive relief against the Clinics.

9. At para. 9, the Plaintiffs assert that the Commission adjourned its interim injunction application because of the existence of the Plaintiffs' constitutional challenge. In fact, the Commission only agreed to adjourn the application in order to permit the parties to focus their efforts on getting the constitutional challenge to trial in an expeditious manner, rather than being

distracted by the numerous procedural hurdles that were being thrown up by the plaintiffs. This was understood at the time by the plaintiffs.

> Affidavit #13 of Carol Mae Brossard, sworn 26 October 2015, Exs. "B," "C," and "D".

10. At para. 11, the Plaintiffs assert that they obtained an interim injunction against the Commission in the fall of 2015. In fact, Associate Chief Justice Cullen granted a temporary *stay*, not an injunction, and in the course of doing so he expressly stated:

> It is important to note, however, that this conclusion is situational. It does not reflect a determination that bringing enforcement action against the clinics would bring the administration of justice into disrepute or justify a stay of proceedings absent the adjournment, the reasons for it, and the additional burden it has placed on the plaintiffs to prepare for trial.
>
> The stay is intended to address the unique circumstances of this case at this juncture, not to establish that the potential for using information gained through the discovery process necessarily equates to an abuse of process or otherwise justifies a stay of proceedings. Moreover this decision should not be taken as authority that it operates as a future bar to enforcement action. [emphasis added]
>
> *Cambie Surgeries Corporation v. British Columbia (Medical Services Commission)*, 2015 BCSC 2169 at paras. 140-141.

11. The Plaintiffs assert at para. 28 of Part 5 of their Response that the parties "have engaged in extensive discoveries, fulfilled disclosure obligations, addressed document production demands and applications, undertaken a forensic accounting of the Clinics, and negotiated admissions" "*as a result of the counterclaims*". This is not accurate: all of the discovery and disclosure activities engaged in by the Clinics have been primarily the result of the claim brought by the Plaintiffs, and not the counterclaims.

12. At para. 37, the Plaintiffs assert that "the Clinics are the *only* persons – corporate or natural – which are directly subject to a number of the Impugned Provisions". As the Plaintiffs are well aware, this is not an accurate statement. Additional extra billing audits are planned by the

Commission and will be carried out once the current audits of 30 physicians providing services at Cambie are complete.

Affidavit #8 of Christine Jackson, sworn 26 October 2015.

13. The Plaintiffs assert at para. 38 that the Clinics "have also been subject to searches and seizures ... [which] are themselves unconstitutional". It must again be pointed out that the Plaintiffs have not challenged the constitutionality either of section 36 or of the audits.

14. At para. 54, the Plaintiffs assert that "the Government has attempted numerous times" to enforce the Impugned Provisions against the Clinics. As noted above, this is inaccurate.

15. In the same paragraph, the Plaintiffs assert that enforcement of the Impugned Provisions against them "imperil[s] the Clinics' ability to provide ... timely health care services to those suffering by the unconscionable delays in the public health care system". This is a mischaracterization of what it is that the Clinics are actually doing. The Clinics have admitted in the litigation that they do not make any attempt to ascertain whether the beneficiaries to whom they provide services in violation of the Act are in fact being required to wait an unreasonable length of time – or at all – for care in the public health care system. Rather, they will provide services in violation of the Act to anyone who is prepared to pay them for it.

16. At para. 55, the Plaintiffs refer to "the various injunctions sought by the Government to prevent the Clinics from doing acts they assert to be constitutionally protected". As noted above, there have been no such injunctions sought (other than in the Commission's Counterclaim, which will be dealt with at trial).

17. At para. 61, the Plaintiffs again assert that they are providing services "to persons whose *Charter* rights are being violated by unconscionable delays in the public system". As noted above, this is not what the Clinics are actually doing.

18. At para. 64, the Plaintiffs assert that the Defendants are seeking to prevent the Clinics "from providing necessary health care services". The Commission is merely seeking to prevent the Clinics from providing health care services in violation of the Act: the Plaintiffs have stated elsewhere that the majority of the services that are provided at the Clinics are entirely lawful under the Act, and no one is seeking to prevent them from continuing to provide those services.

19. At para. 71, the Plaintiffs assert that they were required to "marshal further expert evidence" at a "prohibitive" cost in order to respond to the two expert reports submitted by the Intervenors. In fact, the two experts whose reports the Plaintiffs tendered in response to the Intervenors' expert reports were also responding to several of the reports that had been tendered by the Defendants, so that any cost associated with responding to the Intervenors' expert reports would merely have been incremental.

20. At para. 72, the Plaintiffs refer to the lack of resources of the individual Plaintiffs for mounting a constitutional challenge such as this. As noted above, this litigation was initially brought by Cambie, CIMCA, and other private clinics, not by individual plaintiffs, and the Clinics have stated publicly that they are paying all of the costs associated with the individual Plaintiffs' participation in this litigation.

21. At para. 98, the Plaintiffs refer to their current preparations for trial, "including an extensive document review". The Defendants have certainly produced a large number of documents in this proceeding, but the vast majority of them were produced at a steady rate every two weeks beginning in April of 2015 and ending in January of 2016: there is no reason why the Plaintiffs should still need to be doing "extensive document review," particularly when they completed their examinations for discovery of the Defendants' representatives on 5 May.

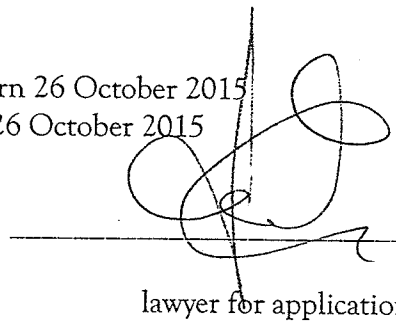
Part 5: Legal Basis

1. The Defendants make no submissions with respect to the legal basis for the Intervenors' application.

Part 6: Materials to be Relied On

1. Affidavit #13 of Carol Mae Brossard, sworn 26 October 2015
2. Affidavit #8 of Christine Jackson, sworn 26 October 2015

Date: 17 May 2016



Signature of
lawyer for application respondents
Jonathan Penner

This APPLICATION RESPONSE is prepared by Jonathan Penner, Barrister & Solicitor, of the Ministry of Justice, whose place of business and address for service is P.O. Box 9280, Stn Prov Govt, 1001 Douglas Street, Victoria, British Columbia, V8W 9J7; Telephone: (250) 952-0122; Facsimile: (250) 356-5707; Email Address: Jonathan.Penner@gov.bc.ca.

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