IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cambie Surgeries Corporation v. British Columbia (Medical Services Commission),* 2014 BCSC 361

Date: 20140305
Docket: S090663
Registry: Vancouver

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, Mariel Schooff, Daphne Lang, Joyce Hamer, Myrna Allison, Carol Welch, and the British Columbia Anesthesiologists' Society

Intervenors

Before: Associate Chief Justice Cullen

Reasons for Judgment

Counsel for Cambie Surgeries Corporation:	M.A.G. Elliot & L.J. Wihak
Counsel for the Defendants:	J.G. Penner & J. Walters
Counsel for Drs. Leith, Lauzon, Gilbart, Stone & Moola:	K. Kinch & L. Johnston
Place and Date of Hearing:	Vancouver, B.C. February 6, 2014
Place and Date of Judgment:	Vancouver, B.C. March 5, 2014

INTRODUCTION

[1] The defendants apply under Rule 7-5 of the *Supreme Court Civil Rules* for an order that Dr. Lauzon, Dr. Gilbart, Dr. Leith, Dr. Stone and Dr. Moola attend to be examined under oath on the matters in question in this action within 14 days of the hearing of this application. The respondent doctors and the respondent plaintiffs oppose the application.

[2] In these reasons I refer to the applicant defendants as "the applicants", the respondent doctors as "the Physicians", and the respondent plaintiffs as "the plaintiffs". In some places, I divide the plaintiffs into "the personal plaintiffs", which are those individuals named as plaintiffs in this action, and "the corporate plaintiffs", which are Specialist Referral Clinic (Vancouver) Inc. ("SRC") and Cambie Surgeries Corporation ("CSC").

[3] The Physicians all provide services at the clinics operated by the corporate plaintiffs and are all shareholders of SRC. Dr. Leith, through Dr. J.M. Leith Inc. is also a shareholder of CSC. The Physicians are all also enrolled with the Medical Services Commission ("MSC") and thus provide services in the B.C. public health care system as well as privately.

[4] The applicants seek to examine the Physicians on questions set out in a letter sent to each physician and appended to Carol Mae Brossard's affidavit #4, dated January 24, 2014. The letter to each physician is the same. I append one such letter as Appendix A to these Reasons.

THE DISCLOSURE DECISION

[5] The applicants sought document disclosure from the corporate plaintiffs in an earlier application pursuant to Rule 7-1. Disclosure was granted in part in *Cambie Surgeries Corporation v. Medical Services Commission of British Columbia*, 2013 BCSC 2066 (the "Disclosure Decision"). That decisions sets out the context of this action at paras. 5-14:

[5] This lawsuit challenges the constitutional validity of ss. 14, 17, 18 and 45 of the *Medicare Protection Act*, R.S.B.C. 1996, c. 248, as infringing ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*. The plaintiffs seek an order under s. 52(1) of the *Constitution Act, 1982*, that the impugned sections are of no force and effect.

…

[7] Cambie and SRC are private medical clinics which provide some medical services for which they bill patients in contravention of the *Medicare Protection Act*. It is their contention that the provisions which they are in violation of limit the ability of British Columbia residents to obtain medical insurance and access to medical care in a timely manner, and thus constitute an infringement of their "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" in s. 7 and of their right of equality before and under the law and to "equal protection and benefit of the law without discrimination, in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" in s. 15.

[8] The plaintiffs assert these infringements are not the result of "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" as provided for in s. 1 of the Charter.

[9] The rights at issue are not those of the medical service providers who are hindered by the impugned provisions from privately charging for medical services covered by the Act or in a greater amount provided for in the Act. They are the rights of British Columbians said to be hindered in their access "to reasonable health care within a reasonable time" (para. 98, Amended Notice of Civil Claim) by the impugned provisions.

…

[11] What is brought into issue is the Medical Services Plan, which is a plan administered by the Medical Services Commission under the *Medicare Protection Act* to provide a publicly funded plan to provide care to beneficiaries consistent with the *Canada Health Act*, R.S.B.C 1985, c. 6.

[12] The scheme does not preclude Cambie from operating an exclusively private business and it does not apply to physicians who are not enrolled under the scheme who provide services and bill privately. It is possible and lawful to operate entirely outside of the operation of the statute.

[13] In connection with Cambie, however, there is a mix of public and private health care within the same clinic conducted in a way that violates the *Medicare Protection Act*. The physicians who provide the services are enrolled. They bill MSP for their services, while the clinic charges, in addition, a private facility fee to the patient. There is some evidence that the clinic also bills extra for a service provided by the physician. It is not clear on the evidence whether this happens, and if so, whether it is the clinic or the physician who is the recipient of the extra service charge.

[14] It is the applicant's contention that while ostensibly this is an action seeking a remedy for an alleged violation of the rights of British Columbians subject to the MPA and the MSP, it was conceived and is being primarily

pursued by the corporate plaintiffs in order to legitimize their current method of operating privately for profit while being subsidized by the public health care system.

[6] Paragraph 10 describes the documents sought in that application:

> [10] The documents sought by the applicants fall into four categories: the financial records of the corporate plaintiffs, the relationship (financial and administrative) between the two clinics, the relationship between clinics and the physicians providing medical services through them, and documents related to billing practices and medical fee charges.

[7] The basis for granting the disclosure application in part is set out at paras. 55-62:

> [55] The plaintiffs' resistance to this application reduced to its essence is that the impugned provisions of the MPA infringe the specified *Charter* protected rights by limiting B.C. residents access to timely and affordable medical care by denying a hybrid public/private method of providing medical services.
>
> [56] The plaintiffs say this lawsuit is therefore about the relationship between the legislated system of providing medical care in British Columbia and those individuals who are subject to it. The plaintiffs say there is nothing in the relationship between the two corporate plaintiffs and the relationship between the corporate plaintiffs and the physicians providing services in their facilities, the billing practices and medical fee charges, or in the financial records of the corporate plaintiffs that implicate the central issues in this lawsuit which concerns the effect of the impugned legislation on members of the public, not physicians or private clinics.
>
> [57] As I understand it, the concept underlying this lawsuit is that the current model of public health care in British Columbia breaches an individual's s. 7 rights by having long (and therefore perilous) wait times for necessary treatments and breaches s. 15 rights by having different health care vehicles for medical issues arising in different circumstances such as, for example, under the Workers' Compensation regime.
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> [58] To that extent, I agree that neither the financial circumstances or practices of the private clinics are germane considerations in assessing the question of whether there is an infringement of s. 7 or 15 of the *Charter*.
>
> [59] This action, however, goes further than that. It does not focus only on the means by which the current regime delivers public medical services or its alleged shortcomings; it identifies the infringing conduct requiring a constitutional remedy as the restriction on private health care.
>
> [60] While I would expect, as the plaintiffs submit, that much of the evidence material to the issues raised by this lawsuit will relate to asserted deficiencies in the current system, their impact on individuals and how they might be addressed in health care regimes in other jurisdictions, it seems to me that there is some materiality in what is being sought by the defendants in this application.

> [61] In particular, where the plaintiffs have specifically cited the lack of commercial viability of independent clinics, which assume the cost of their own medical facilities, and a threshold of wealth necessary to access them under the current regime, as being probative of its constitutional deficiency, an exploration of those issues in connection with existing functioning private clinics in the province of British Columbia could yield evidence capable of offering proof or disproof of what is alleged as material to the action.
>
> [62] Although the plaintiff clinics are not operating lawfully within the current regime, what their costs are, what their billing practices are and what is potentially available to them as profit can provide evidence enabling an assessment of the commercial viability of private clinics under the current regime as well as under a modified regime. It also could provide evidence enabling an assessment of what impact private health clinics operating in a larger public system has on individual British Columbians seeking health care.

[8] Insofar as "the relationship between the clinics and the physicians providing medical services through them" category is concerned, the only documents at issue were described in paragraphs xxii. and xxxiv. of Appendix A to the Notice of Application:

> xxii. Annual non-dividend or non-profit distribution or transfer of moneys or benefits to physicians, whether or not shareholders, by physician, and released since 2001, including but not limited to salaries, contractor billings and loans;
>
> xxxiv. Annual non-dividend or non-profit distribution or transfer of moneys or benefits to physicians of Specialist Referral Clinic (Vancouver) Inc., whether or not shareholders, by physician, annually since 2001, including but not limited to salaries, contractor billing and loans.

[9] Although other documents touching upon the relationship of the clinics to the physicians were sought as described in the appendix, it was common ground that such documents did not exist. It is apparent that the primary focus of that aspect of the disclosure application was the financial relationship between the clinics and physicians practising through them.

[10] The Court declined to grant that category of disclosure for the reasons found at paras. 63-64 of the Disclosure Decision:

> [63] I do not similarly see how the plaintiff clinic's relationship with individual physicians gives rise to the threshold for disclosure. The issue for resolution

> here is whether the impugned proscriptions and limitations operate in breach of s. 7 and s. 15 of the *Charter*, and if so, whether they are saved by s. 1 or of no force and effect under s. 52(1).
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> [64] Although disclosure of some aspect of Cambie's and SRC's operations may yield evidence which could prove or disprove a material fact, I am not satisfied that the clinic's relationship with individual physicians meets either that test or the lower threshold contemplated in Rule 7-1(11). To grant the relief sought in this connection would, in my view, be a diversion from the issues in this case and would not assist in its orderly presentation or resolution.

ISSUES

[11] To some extent this application seeks to revisit the determination in the Disclosure Decision that the relationship between the corporate plaintiffs and the physicians practising through them is not material to determining the constitutionality of the impugned *Medicare Protection Act* provisions.

[12] This application is made under Rule 7-5, the relevant part of which reads:

> (1) If a person who is not a party of record to an action may have material evidence relating to a matter in question in the action, the court may
>
> (a) order that the person be examined on oath on the matters in question in the action, …

[13] The parties agree that an application under Rule 7-5 must show that the respondent(s) have refused or neglected a request by the applicant(s) to give a responsive statement relating to the witness' knowledge of the matters in question and that:

> … The information sought may relate to matters in issue; that the application is not a fishing expedition; that there are no compelling reasons why the order should not be made; and, that the application is based on the probative value of the evidence as opposed to any embarrassment or adverse effect that may be caused (*Preus v. Miller* (1986), 69 B.C.L.R. 104 at 108 (S.C.) Drost L.J.): See Lyle Harris, *Discovery Practice in British Columbia*, 2013 update (Vancouver B.C.: CLE, 1999 at 5-5).

[14] There is evidence that the Physicians refused or neglected to give a responsive statement and it is not alleged by either the Physicians or the plaintiffs that this is a "fishing expedition".

[15] Thus, as I see it, the issues on this application are (i) whether the questions on which the applicants seek to examine the Physicians are material, in the sense that they may relate to matters in issue; (ii) whether there are no compelling reasons why the order should not be made; and, (iii) whether the application is based upon the probative value of the evidence as opposed to its adverse effect or any embarrassment it may cause.

THE PARTIES' POSITION

The Applicants' Position

[16] The applicants contend that the Physicians' evidence is material to the issue of whether the impugned legislation violates the personal plaintiffs' s. 7 rights. The applicants submit that the plaintiffs must demonstrate not only that their right to security of the person is infringed, but also that the deprivation of that right is not in accordance with the principles of fundamental justice. In that regard, the plaintiffs plead that the impugned provisions are arbitrary, overbroad, grossly disproportionate, and vague.

[17] In response, the applicants plead that the impugned provisions withstand *Charter* scrutiny in part because of the deleterious impact on public health care if they are struck down and the private health care system is permitted to operate in tandem with the public system and without restrictions.

[18] The applicants resist the plaintiffs' allegation that "permitting access to a private health care system does not jeopardize the existence of a strong health care system" in a number of ways in their pleadings.

[19] In particular, the applicants plead that physicians' behaviour is influenced by the presence of economic advantages associated with practising in private, for-profit medical clinics like CSC and SRC. They assert that physicians practising in both public and private systems have (a) an incentive to direct patients to private clinics, whether appropriate or not, (b) to delay treatment in the public system to make the

private system more attractive, and (c) to leave the more complex and expensive cases to the public system.

[20] They further plead that physicians enrolled with MSC but operating in private clinics are less available to the public system for various functions, including elective surgery, diagnosis and triage, and emergency treatment, thus impeding the public system from providing timely care.

[21] The applicants also plead that the impugned provisions avoid a health care system featuring inequitable treatment where those most able to pay are preferred.

[22] The applicants say that because of these various effects the legislation at issue is not arbitrary, grossly disproportionate, or overbroad.

[23] The applicants cite academic literature which focuses on other public/private health systems and how the economic incentives of the private system changes the behaviour of health care providers in a way that compromises the timeliness, effectiveness, and cost of the public system. They rely on literature and studies which support the contention that the overall quality of care that patients receive will deteriorate if a public/private system is permitted to operate in the absence of the impugned provisions.

[24] The applicants contend that the Disclosure Decision's finding regarding documents that touch upon the private clinic's relationship to the physicians working through them is not binding on the court in this context as the nature of the application is different. The applicants further assert that in the context of case management, the presiding judge can exercise flexibility in determining applications as he or she becomes more conversant with the nature of the case and the issues it presents.

[25] The applicants say that, even if the Court finds the earlier application has precedential value, what they seek in this application "goes well beyond what was at issue in the [Disclosure Decision]". They submit that the information they seek includes information they were unable to obtain from the corporate plaintiffs on

discovery and information about the Physicians' own practices which the corporate plaintiffs cannot provide and will not seek answers for. The applicants contend the questions they seek to have answered do not, in substance, relate to the physicians' relationship with the clinics and assert that the plaintiffs implicitly concede that some questions are not covered by the Documents Decision.

[26] The applicants point out that the purpose of Rule 7-5 is to enable a party to discover all relevant evidence in advance of trial and they submit there is a clear linkage between the information sought and the pleadings. The applicants say that it is open to the plaintiffs to call the Physicians at trial to attest to the beneficial effects on their patients and practices of having recourse to a private health care facility. The applicants argue that since that category of evidence is open to the plaintiffs, it should be open to them to discover what it is before trial and, if it is not favourable to the plaintiffs, to use it in their defence.

[27] The applicants contend that the plaintiffs have already tendered precisely that sort of evidence in affidavit form in response to the MSC's injunction application.

The Physicians' Position

[28] The Physicians acknowledge that they are enrolled practitioners with MSC who are "involved" at CSC and SRC. They also admit they have refused a request to give a responsive statement to the questions posed. They say, however, that there are legal grounds for their refusal.

[29] The Physicians submit that they also received correspondence from the MSC relating to the audit of CSC, SRC, and physicians who work there, pursuant to s. 36 of the *Medicare Protection Act*. They assert that they have "responded in good faith to those requests through counsel", and have made some "legal objections based on the scope of the MSC's jurisdiction under s. 36 of the *Medicare Protection Act*". They submit that many of the questions posed by the applicants under the aegis of this action "will have the effect of circumventing the legal objections available to [them] in the audit process, with the result that their answers could end up in the

hands of individuals advising the MSC with respect to both the litigation and the audit".

[30] The Physicians contend that the questions posed do not meet the test for the exercise of discretion under Rule 7-5, firstly, because there are compelling reasons why the order should not be made and, secondly, because the application is based not on the probative value of the evidence but on "the embarrassment or adverse effect that may be caused to persons not parties to the action".

[31] The Physicians submit the Documents Decision precludes the order sought from being made and that "[t]here is an objectionable overlap between the litigation and the audit activity that is ongoing, which borders on abuse of process. The order sought will prejudice [their] legal rights in respect of their audit responses (an "adverse effect"…)".

[32] The Physicians say the Disclosure Decision squarely addresses the materiality and relevance of the information sought and argue that paras. 63-64 are not on their face limited to documents evidencing the corporate relationship between the clinics and the Physicians. They say the "bulk of the questions" at issue in this application "relate to their relationships with the clinics and the clinics' operations in a broad sense".

[33] The Physicians rely on *Do v. Esmaili*, 2002 BCSC 245 to illustrate the precedential effect of a document disclosure ruling. They argue that in that case the Court found that such a ruling had precedential value in a related application for the pre-trial examination of witnesses.

[34] The Physicians further argue that although they were not served with the disclosure application, they would likely have had standing as "person[s] affected" to apply to change or set aside the decision if the outcome had been different. As such, they assert that they should have the benefit of the reasons in the Disclosure Decision which are "on their face determinative of this application".

[35] The Physicians argue there is an objectionable overlap with the audit procedure running parallel to this litigation. They say this creates a situation which imperils the effectiveness of their legal right to challenge aspects of the audit and places them in a position where information learned through the litigation could potentially guide the audit.

[36] The Physicians rely on the B.C. Court of Appeal decision in *Cambie Surgeries Corporation v. British Columbia (Medical Services Commission)*, 2010 BCCA 396. This was an appeal from an injunction granted to the MSC which required the corporate plaintiffs to allow MSC inspectors access to their premises and records to perform audits. MSC sought these remedies in its counterclaim against the corporate plaintiffs.

[37] The Court noted that, with or without this action, the MSC has the statutory authority to conduct an audit under s. 36 of the *Medicare Protection Act* and to seek a warrant where necessary to enforce this authority. The Court then set aside the injunction on the basis that the MSC's statutory authority to conduct an audit and seek a warrant where necessary is entirely adequate to enable it to perform its statutory duties. As such, the "extraordinary powers of the Supreme Court to grant an injunction need not have been engaged" (para. 3).

[38] In considering whether the trial judge should have issued a warrant under s. 36(7) of the *Medicare Protection Act*, "given that [she] should not have issued an injunction" (para. 41), the Court held at paras. 42-43:

> [42] In my view, the inclusion of the claim for a warrant in the Commission's counterclaim was not appropriate. The statute contemplates a procedure for applying for a warrant before a justice of the peace. It does not contemplate such an application being by way of a statement of claim (or counterclaim) in a civil suit. I would not rule out the possibility that exceptional circumstances might justify an application for a warrant to be brought within a civil claim. There are, however, no such circumstances in this case. As I have already noted, there is no demonstrated connection between the litigation and the Commission's right to conduct an audit.
>
> [43] 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.

[39] The Physicians argue from this reasoning that "just as the statutory powers of audit are not to be used as an adjunct to rights of discovery in litigation, the rights of discovery in litigation should not be used as an adjunct for the audit."

[40] The Physicians contend that they should be protected from orders that enable "collateral *disclosure* and *knowledge* of their information in two discrete processes involving the same party". They submit the implied undertaking of confidentiality is inadequate protection in these circumstances as it would not prevent MSC from using its audit powers to obtain information it comes to know exists through the litigation process. They argue that the potential for knowledge gained through the litigation to influence the course of the audit is a live danger given MSC is auditing four of the five Physicians.

[41] The Physicians further argue that the questions at issue "go mainly to the physicians' relationships with the clinics just as the audit did". They argue, as a result, "it is unjust to place non-parties to an action at risk of administrative actions and/or administrative penalties in the circumstances of this case, or to permit the litigation and the audit each to function as adjuncts of the other." The Physicians submit, given the availability of substantial academic literature addressing the issues which the applicants raised in response to the plaintiffs' s. 7 claim, the "personal information of the physicians is of limited probative value relative to the potential prejudices to them that could occur in relation to the audit."

[42] Alternatively, they submit that if the Court grants this application, it should be on the following terms:

> (a) [The Physicians] are at liberty to respond in writing to the questions posed…, with the exception of question 8(b) with respect to [SRC], within reasonable timelines;
>
> (b) Restrictions on how the responses may be used/disclosed outside the litigation in other matters involving the [applicants] and the [Physicians] (including potential future matters);

(c) Specific terms regarding payment, timing of responses.

[43] In relation to question 8(b) set forth in the letter from the applicants, the Physicians make the following submission:

> 21. Question 8(b) with respect to SRC reads: "Do you agree with SRC that the services you provide to beneficiaries at SRC, and particularly Independent Medical Assessments ("IMAs") are not medically necessary? If so, please explain." This question is not an appropriate question of the physicians, for the following reasons:
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> (a) It seeks an opinion on a point of law. Whether the physicians personally agree with a legal position of one of the parties to the litigation is irrelevant;
>
> (b) The context in which SRC made such a statement and the precise words used were not provided to the physicians;
>
> (c) The term "medically necessary" has different meanings, some of which are legal. The meaning of the phrase and the context in which it is intended to be considered have not been articulated.

The Plaintiffs' Position

[44] The plaintiffs rely on the Disclosure Decision on the same basis as the Physicians. They also argue that the information sought by the applicants is not material. The plaintiffs say that information about how individual physicians behave in the present B.C. public health care system, which does not permit a parallel private system, has no probative value with respect to how physicians might act in a health care regime which permits parallel public and private systems.

[45] The plaintiffs say that there are 70 to 75 private clinics in B.C., yet the applicants only seek information about those physicians with a relationship to the corporate plaintiffs. They argue it is only because of this relationship that the applicants seek to examine them. The plaintiffs say such a foundation was deemed irrelevant in the Disclosure Decision. In other words, the plaintiffs say that there is no material difference in this application to the basis upon which the defendants previously sought document disclosure.

[46] The plaintiffs submit this application is "the latest attempt in a series of efforts by the applicants to improperly obtain information relating to the inner workings of the corporate plaintiffs".

[47] They rely on the Disclosure Decision for the proposition that "a diversion from the issues in this case would not assist in its orderly presentation or resolution" and submit that those words apply equally to this application.

[48] The plaintiffs submit that this action raises large and complex legal issues concerning how a regime accommodating both public and private health care systems would affect the constitutional rights of British Columbians. They say evidence of the individual behaviour of five physicians will be of no assistance in such a context. They submit the application should be dismissed.

ANALYSIS

1. Does the Disclosure Decision preclude the order sought here?

[49] The earlier application for document discovery respecting the relationship between the corporate plaintiffs and the physicians working through them had a limited focus. The documents at issue were confined to those showing a financial relationship between the physicians and the corporate plaintiffs. The only pleadings cited in that application as supporting that requested disclosure read:

> In connection with [CSC], however, there is a mix of public and private health care within the same clinic conducted in a way that violates the *Medicare Protection Act*. The physicians who provide the services are enrolled. They bill MSP for their services, while the clinic charges, in addition, a private facility fee to the patient. There is some evidence that the clinic also bills extra for a service provided by the physician. It is not clear on the evidence whether this happens, and if so, whether it is the clinic or the physician who is the recipient of the extra service charge.

[50] In resolving the disclosure application, the Court's focus was on the plaintiffs' assertion, through their pleadings, that it is the legislative restriction on private health care, not the deficiency of the public system, which infringes the *Charter* and requires a remedy. Specifically, the plaintiffs assert that evidence of their financial and administrative operations is probative of the constitutional deficiency of the

impugned legislation as it shows that private clinics lack commercial viability under the present regime and serve only those meeting a threshold of wealth.

[51] No other aspect of the pleadings in this action formed the basis for the disclosure ordered. It was in that context that the application for the disclosure of documents evidencing the relationship between the clinics and the physicians operating through them was dismissed.

[52] This application is different in kind and context from the earlier disclosure application. Its primary focus is on the relationship between the Physicians who operate in both the public and private systems and their patients.

[53] The asserted materiality of the evidence sought is based on the applicants' assertions, in their pleadings, that physicians who practice in parallel public and private health care systems will do so in ways that favour the more remunerative private system at the expense of the public system. As a result, the applicants say, the problems in the public system will be exacerbated rather than enhanced if the impugned provisions are struck down. The applicants contend that evidence of this sort is material to the issue of whether the impugned provisions are arbitrary, overbroad, grossly disproportionate or vague, as they plaintiffs allege, or whether they accord with the principles of fundamental justice "in part because of the deleterious effects that could reasonably be expected to ensue if the impugned provisions were struck down".

[54] While some of the areas of proposed examination do touch on the relationship between the physicians and the clinics, it is in a different context and for a different purpose than was manifest in the disclosure application. For this reason, I do not regard the Disclosure Decision as a precedent governing the outcome of this application.

2. Is the information sought material to issues in the action?

[55] The overarching issues which this action engages are (1) what long term, broad-based, systemic impact the limitations placed on private health care by the

impugned provisions have on the timely and equitable delivery of medical services, (2) what long-term, broad-based, systemic impact legislative regimes without such limitations have on timely and equitable health care delivery in other jurisdictions, and (3) whether and, if so how, any disparity in impact between such systems implicates the constitutional rights as pleaded in this action.

[56] Those issues cannot be decided in the abstract but must be addressed by cogent evidence.

[57] The question in this application is whether the particular experience and practice of the Physicians, in the context of their association with the corporate plaintiffs, can cast any meaningful light on the issues that require illumination in the action.

[58] In the earlier disclosure application, the applicants offered a characterization of the corporate plaintiffs' interest in launching and pursuing this action, which is summarised in the Disclosure Decision at para. 14:

> [14] It is the applicant's contention that while ostensibly this is an action seeking a remedy for an alleged violation of the rights of British Columbians subject to the *[Medicare Protection Act]* and the MSP, it was conceived and is being primarily pursued by the corporate plaintiffs in order to legitimize their current method of operating privately for profit while being subsidized by the public health care system.

[59] Whether that characterization of the underlying motive for this action is accurate, or not, is not material to the constitutional validity of the impugned legislation.

[60] Any evidence that seeks to address or colour the underlying motives of the plaintiffs' case is a diversion from what this case is about and will not assist in its orderly presentation or resolution. It is worth noting that much, if not most, of the litigation involving *Charter* protected rights arises in a criminal law context and is initiated by accused who have a clear self-interest in challenging legislative provisions or actions by those in authority. Allowing the validity of a constitutional

challenge to be impugned by exposing and discrediting the nature of the interests which may underlie it would lead to a hopeless evidentiary quagmire.

[61] It is necessary to approach the issue of the materiality of the proposed examinations of the Physicians with those observations in mind.

[62] Having considered the matter carefully, I conclude there is an aspect of materiality to the evidence sought. The Physicians operate in both the private and public sectors of the present health care regime in British Columbia. While evidence of their experience and practice in dealing with patients in both systems cannot directly address the ultimate issue of the constitutionality of the impugned provisions, it can nevertheless assist in understanding how private and public health care might interact in a parallel system and can furnish actual, as opposed to theoretical, examples of some of the advantages and disadvantages of having physicians working in both systems. The Physicians' experiences and practices will not provide evidence of the systemic impact of a dual system on the quality and timeliness of health care in B.C. because of their anomalous position in the current regime and the extremely small proportion of the health care system they represent. However, that evidence could further an understanding of the potential problems that a dual health care system could create, as the applicants contend, or of the problems it could resolve, as the plaintiffs contend.

[63] Thus, while the examinations sought will not reveal evidence directly addressing the long term, broad-based, systemic issues which this action raises, it cannot be said there is no materiality to the questions posed.

[64] While there are, among the questions posed, some which touch on the financial relationship between the corporate plaintiffs and the Physicians, most of the questions are inquiries about the Physicians' relationships with patients in both the public and private systems and how the financial differences between those systems may influence how they deal with their patients. I am thus satisfied the questions posed cast light on the Physicians' relationship with their patients and their uses of the public and private systems.

[65] I do not consider it material, however, whether any of the Physicians have "a direct or indirect financial interest" in either of the corporate plaintiffs. That inquiry is not anchored to any explanation of how the physician may deal with a patient or divide his time between the public and private health care systems and I do not permit it.

[66] The Physicians submit that the question posed in paragraph 8(b) "Do you agree with SRC that the services you provide to beneficiaries at SRC, and particularly independent medical assessments ("IMAs") are not medically necessary? If so, please explain" seeks an opinion on a question of law, and is not properly contextualized or explained. I agree and do not allow that inquiry either. It is uncertain what the Physicians are being asked for their opinion on. In any event, their opinion on a very limited and individual circumstance has no discernible materiality to the constitutionality of, or justifications for, the impugned provisions.

3. Do the inquiries either (a) infringe the Physicians' right not to have the litigation process used as an adjunct to the MSC audit, or (b) border on an abuse of the court's process?

[67] The prejudice which the Physicians identify as flowing from this application lies in the fact that the MSC is conducting an audit of four of the five Physicians and/or the corporate plaintiffs. They argue that in light of the audits, to permit the inquiries pursuant to Rule 7-5 invites the possibility that MSC will, by virtue of its status in this lawsuit, come into possession of information concerning the Physicians that may guide its audit inquiries. The Physicians also assert that they have been singled out for this application because of their relationship with the corporate plaintiffs. They submit that because they are being audited, any order for them to be examined may render moot their legal objection to questions asked in the audit, as MSC would have access to the information through the litigation process.

[68] The Physicians submit that the order sought will place them in a very prejudicial position and, given the relatively low probative value of the evidence that might be revealed, the Court should exercise its discretion against granting it.

[69] In essence, the Physicians contend that the existence of a parallel process, in which the MSC is auditing their compliance with the impugned legislation, creates an embarrassment or adverse effect which overcomes any probative value of the evidence sought.

[70] Having determined that the evidence sought has some probative value to some of the issues in this litigation, it is necessary to consider whether and to what extent the examination sought is based not on that probative value, but rather on "any embarrassment or adverse effect that may be caused".

[71] Clearly, being examined in one process about matters that would be the focus of concern in another process, as is the case here, could lead to embarrassment or an adverse effect. The fact that the audit process has potential implications for the professional standing of four of the five Physicians bears on the validity of permitting an examination in this proceeding if the information gleaned from it were available for use, directly or indirectly, in the regulatory proceeding.

[72] The question I must determine is whether any potential embarrassment or adverse effect is sufficiently abated by the implied undertaking rule.

[73] In *Juman v. Doucette*, 2008 SCC 8, [2008] 1 S.C.R. 157. the nature and extent of the implied undertaking rule was analyzed where the disclosure of information acquired in civil litigation to police or the Attorney General for investigative or prosecutorial purposes was contested. In that case, the Court discussed the rationale for an implied undertaking at paras. 23-27:

> [23] Quite apart from the cases of exceptional prejudice, as in disputes about trade secrets or intellectual property, which have traditionally given rise to express confidentiality orders, there are good reasons to support the existence of an implied (or, in reality, a court-imposed) undertaking.
>
> [24] In the first place, pre-trial discovery is an invasion of a private right to be left alone with your thoughts and papers, however embarrassing, defamatory or scandalous. At least one side in every lawsuit is a reluctant participant. Yet a proper pre-trial discovery is essential to prevent surprise or "litigation by ambush", to encourage settlement once the facts are known, and to narrow issues even where settlement proves unachievable. Thus, rule 27(22) of the B.C. *Rules of Court* compels a litigant to answer all relevant questions posed on an examination for discovery. Failure to do so can result

> in punishment by way of imprisonment or fine pursuant to rules 56(1), 56(4) and 2(5). In some provinces, the rules of practice provide that individuals who are not even parties can be ordered to submit to examination for discovery on issues relevant to a dispute in which they may have no direct interest. It is not uncommon for plaintiff's counsel aggressively to "sue everyone in sight" not with any realistic hope of recovery but to "get discovery". Thus, for the out-of-pocket cost of issuing a statement of claim or other process, the gate is swung open to investigate the private information and perhaps highly confidential documents of the examinee in pursuit of allegations that might in the end be found to be without any merit at all.
>
> [25] The public interest in getting at the truth in a civil action outweighs the examinee's privacy interest, but the latter is nevertheless entitled to a measure of protection. The answers and documents are compelled by statute solely for the purpose of the civil action and the law thus requires that the invasion of privacy should generally be limited to the level of disclosure necessary to satisfy that purpose and that purpose alone. Although the present case involves the issue of self-incrimination of the appellant, that element is not a necessary requirement for protection. Indeed, the disclosed information need not even satisfy the legal requirements of confidentiality set out in *Slavutych v. Baker*, [1976] 1 S.C.R. 254. The general idea, metaphorically speaking, is that whatever is disclosed in the discovery room stays in the discovery room unless eventually revealed in the courtroom or disclosed by judicial order.
>
> [26] There is a second rationale supporting the existence of an implied undertaking. A litigant who has some assurance that the documents and answers will not be used for a purpose collateral or ulterior to the proceedings in which they are demanded will be encouraged to provide a more complete and candid discovery. This is of particular interest in an era where documentary production is of a magnitude ("litigation by avalanche") as often to preclude careful pre-screening by the individuals or corporations making production.
>
> [27] For good reason, therefore, the law imposes on the parties to civil litigation an undertaking to the court not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled (whether or not such documents or answers were in their origin confidential or incriminatory in nature).
>
> [Citations omitted.]

[74] As to the relationship between the implied undertaking rule and the use of disclosure obtained in the civil litigation discovery process in a police investigation or prosecution, the Court held at para. 48:

> [48] In reaching her conclusion, Kirkpatrick J.A. rejected the view expressed in *755568 Ontario and Perrin v. Beninger*, [2004] O.J. No. 2353 (QL) (S.C.J.), that the public interest in investigating possible crimes is not in all cases sufficient to relieve against the undertaking. It is inherent in any balancing exercise that one interest will not always and in every circumstance

> prevail over other interests. It will depend on the facts. In *Tyler v. M.N.R.*, [1991] 2 F.C. 68 (C.A.), in a somewhat analogous situation of statutory compulsion, the appellant was charged with narcotics offences. Revenue Canada, on reading about the charges in a newspaper, began to investigate the possibility that the appellant had not reported all of his income in earlier years. The Minister invoked his statutory powers to compel information from the appellant, who sought to prevent the Minister from communicating any information thereby obtained to the RCMP. Stone J.A., speaking for a unanimous Federal Court of Appeal, agreed that the Minister should be permitted to continue using his compulsory audit for Income Tax Act purposes but prohibited the Minister from sharing the information compulsorily obtained from the appellant with the RCMP. Stone J.A. was of the view that the prosecution of crime did not necessarily trump a citizen's privacy interest in the disclosure of statutorily compelled information and I agree with him.

[75] Interestingly, the Court went on to observe that if the police or the Attorney General had the requisite grounds, they could apply for a search warrant to obtain the requisite information, as they were not parties to the implied undertaking and hence not bound by its terms. That reasoning would not apply to MSC which is a party to the implied undertaking here and hence, it is bound to not use the information obtained "for any purpose other than securing justice in the civil proceedings in which the answers were compelled." It would thus be a breach of the implied undertaking rule if any information acquired through the discovery I have granted was shared in any way with anyone in the MSC with responsibility to guide or direct the audit.

[76] Any collateral use of information gained from examining the Physicians, whether direct or indirect, to guide or focus any proceedings under the *Medicare Protection Act* would be a violation of the implied undertaking by the MSC.

[77] I thus conclude that the implied undertaking sufficiently abates any potential embarrassment or adverse effect that permitting the examinations could have.

CONCLUSION

[78] I grant the order sought subject to the exceptions discussed at paras. 65-66.

[79] I considered the Physicians assertion that they should be permitted to answer the questions in writing and conclude that the inquiries should be made orally under

oath or solemn affirmation. I foresee that permitting written answers could cause the process to become protracted by disagreements about the nature of the question or the appropriate scope of reply, perhaps even resulting in a further court application. I view oral testimony as more efficacious than written.

[80] The examinations are to be conducted within six weeks. The Physicians will be paid in accordance with the applicants' submissions.

"A.F. Cullen ACJ."

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Associate Chief Justice Cullen