



No. S090663
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 CORPORATION 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, CANADA DOCTORS FOR MEDICARE, MARIEL SCHOOFF, DAPHNE LANG, JOYCE HAMER, MYRNA ALLISON, CAROL WELCH, and the BRITISH COLUMBIA ANESTHESIOLOGISTS' SOCIETY

DEFENDANTS

APPLICATION RESPONSE

FORM 33 (RULE 8-1(10))

Application response of: Dr. Jean Lauzon, Dr. Michael Gilbert, Dr. Jordan Leith, Dr. Trevor Stone, and Dr. Farhad Moola (the "application respondents")

THIS IS A RESPONSE TO the notice of application of The Defendants Medical Services Commission of British Columbia, Minister of Health of British Columbia, and Attorney General of British Columbia filed January 24, 2014:

PART 1: ORDERS CONSENTED TO

The application respondents consent to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms: Not applicable

PART 2: ORDERS OPPOSED

The application respondents oppose the granting of the orders set out in paragraphs 1 of Part 1 of the notice of application.

PART 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondents take no position on the granting of the orders set out in paragraphs nil of Part 1 of the notice of application.

PART 4: FACTUAL BASIS

1. The application respondents do not contest that they are physicians who have been involved at Cambie Surgery Centre and/or the Specialist Referral Clinic. They also do not contest that they are enrolled practitioners with the Medical Services Commission (“MSC”). It is admitted that each of the application respondents has refused on request of the applicants to give a responsive statement to the questions provided. There are legal grounds for that refusal which are set out in the following section of this Application Response.
2. Additionally, each of the application respondents is in receipt of correspondence from the MSC under the ambit of s. 36 of the *Medicare Protection Act* (audit powers), pertaining to the MSC’s audit in relation to Cambie Surgery Centre and Specialist Referral Clinic, and now individual physicians who work there.
3. Of the application respondents who have received recent information requests from the MSC pursuant to s. 36 of the *Medicare Protection Act*, they have responded in good faith to those requests through counsel. In respect of certain inquiries made by the audit

inspector, the responses include legal objections based on the scope of the MSC's jurisdiction under s. 36 of the *Medicare Protection Act*. Many of the questions posed of the application respondents in relation to the Action will have the effect of circumventing the legal objections available to the application respondents 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. No steps have been taken on the audit side to adjudicate the validity of the legal objections regarding the scope of s. 36 of the *Medicare Protection Act*.

PART 5: LEGAL BASIS

1. Rule 7-5(1) is a discretionary provision, which provides that the Court *may* make an order that a person who is not a party be examined where he or she “may have material evidence relating to a matter in question in the action”. It does not differ in substance from the previous Rule 28.
2. The case law on pre-trial examination of witnesses generally requires that the applicant must show:
 - (a) The application is not a “fishing expedition”;
 - (b) There are no compelling reasons why the order should not be made, and
 - (c) The application is based on the probative value of the evidence as opposed to any embarrassment or adverse effect that may be caused to persons not parties to the action.

Lyle Harris, *Discovery Practice in British Columbia*, 2013 Update
(Vancouver, BC: CLE, 1999) at 5-5

Preus v. Miller (1986), 69 B.C.L.R. 104 at 108

3. The application respondent's opposition to the application at hand is based upon paragraph (b) and (c) above. There are two compelling reasons why the order should not be made, unique to this action and the background to the case and a parallel administrative process within the Medical Services Commission. Those reasons are:
 - (a) There is a prior ruling in this action that precludes the order sought from being made;

- (b) There 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 the application respondent's legal rights in respect of their audit responses (an "adverse effect" within the meaning of paragraph (c)).

Prior Ruling in this Action

4. There appears to be prior reasons for judgment made in this litigation that squarely address the materiality and relevance of the information sought from the application respondents on this application. The applicants were already unsuccessful in obtaining the information through discovery of documents. In the defendants' Notice of Application filed September 22, 2013, they argued they should be provided the following (p. 11, paragraph 46):

Issues such as fee structures, surgical costs, and the clinics' relationship with their physicians have been canvassed in the affidavits filed by Dr. Day and Mr. Nagy in these proceedings. In resisting production of documents on these topics, the plaintiffs leave the defendants effectively unable to test the plaintiffs' evidence.

5. In this court's ruling on that application in *Cambie Surgeries Corporation v. Medical Services Commission of British Columbia*, 2013 BCSC 2066, the following was stated at paragraphs 63-64:

[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).

[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.

6. The above reasons appear to hold that the relationship between the clinics and individual physicians do not meet the disclosure test and factually would be a diversion from the issues in the case. The reasons on their face are not restricted to documents relating to the *corporate* relationship between the clinics and the physicians (i.e. if they are shareholders). The bulk of the questions posed by the applicants of the physicians all relate to their relationships with the clinics and the clinics' operations in a broad sense.

See for example, affidavit of Carol Brossard sworn 24 January 2014:
SRC questions 1-4, 8-11, 13-16
Cambie questions: 2-15

7. Where a disclosure application has failed on legal grounds, the court has held that an application for pre-trial examination of a witness for the same information must also fail. See *Do v. Esmaili*, 2002 BCSC 245 (where the initial application had failed on the basis of privilege).
8. To the best of our knowledge, no individual physicians whose information was sought on the disclosure application were served with that application. It is likely that had the outcome been different, individual physicians as "person[s] affected" by the order would have had standing to apply to change it or set it aside pursuant to Rule 8-5(8). Conversely, now that those reasons have been issued and are on their face determinative of this application, the individual physicians as persons affected should have the benefit of those reasons which were favourable to them.

Objectionable Overlap Between Litigation and Audit, and Prejudice to Application Respondent's Legal Rights in Respect of Audit Activity

9. While this litigation has been underway, the MSC has pursued a parallel audit procedure involving the clinics and individual physicians. By way of background, the audit has gone through the following phases:
 - (a) Late 2008: Certain of the application respondents received notice that SRC and Cambie were to be audited and that records relating to services they had provided to patients there may form part of the audit evidence (Affidavit #1 of Linda Mai, para. 3).

- (b) The Audit and Inspections Branch of the Medical Services Commission carried out on-site audits at SRC and Cambie in January-February 2011 (Affidavit #1 of Linda Mai, para. 4).
 - (c) An audit report prepared June 2012 was publicly released, with individual physicians' names redacted in the public document (Affidavit #1 of Linda Mai, para. 4).
 - (d) Late 2012: Individual physicians received notice that they were now the subjects of audits themselves in relation to one or both clinics (Affidavit #1 of Linda Mai, para. 6).
 - (e) January 2013: Extensive information requests were detailed to individual physicians. Questions were posed on a form that sought that the physician respond in writing and have the statement witnessed (not a requirement under the *Medicare Protection Act*). The MSC also took the position that physicians were required to obtain records from other parties where the records were not in the physicians' control, and that consent of patients and the clinics was not required in order for the physicians to comply (Affidavit #1 of Linda Mai, paras. 7-8). The requests were followed by a period of months in which discussions took place between counsel regarding timelines, legal issues and whether the person writing on behalf of the MSC was properly appointed as an inspector.
 - (f) November 13, 2013: The MSC wrote to further seek the physicians' responses, stating: "Should you not respond fully and adequately by December 14, 2013, you will be deemed to not have responded to the Medical Services Commission, contrary to the *Medicare Protection Act*. In which case, we will proceed with alternate courses of action, without necessarily providing you with further notice." (Affidavit #1 of Linda Mai at para. 13).
 - (g) Where information requests had been received by the application respondents, their responses were delivered in mid-December 2013 prior to the MSC's deadline of December 14, 2013. Those responses including substantial answers to questions, along with common legal objections and legal positions on the scope of the Act (Affidavit #1 of Linda Mai at paras. 16-19).
 - (h) On January 7, 2014, counsel for the application respondents wrote to the MSC asserting privacy rights pursuant to s. 49 of the *Medicare Protection Act* (Affidavit #1 of Linda Mai at para. 21).
10. In the earlier phase of the case, there were application and appeal proceedings regarding the granting of relief under the *Medicare Protection Act* (warrants and injunctions) within the bounds of this proceeding. Whether that relief should have been pursued in this action was ruled upon by the Court of Appeal as follows in *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396. The Court of Appeal held as follows at para. 43:

[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.

11. It is submitted that in the above holding of the Court of Appeal should be read as applying in both directions: 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.
12. The individual physicians should be protected from potential orders that could prompt not only collateral use as between the parallel proceedings, but also against collateral *disclosure* and *knowledge* of their information in two discrete processes involving the same party (the MSC).
13. The implied undertaking of confidentiality to the extent it applies to the application respondents' answers is inadequate in these circumstances. While the implied undertaking of confidentiality may provide a safeguard against collateral uses (in the sense of the physician's responses becoming a document in the audit or any other audit), it does not guard against the risk of administrative powers and penalties being threatened in order to obtain the same information through audit procedures (in existing audit matters or in potential future audits), because the information is simply known by the MSC's collective mind to exist. The application respondents are already in receipt of threats of escalation of administrative action against them, without particulars as to what form that action might take.

Affidavit #1 of Linda Mai, para. 13

14. Mr. Penner on behalf of the MSC has confirmed in writing that individual physicians are the target of current audit activity (Affidavit #1 of Linda Mai, exhibit D). He has stated in correspondence to counsel for Cambie the following:

The Commission is not presently auditing either Cambie Surgeries Corporation or the Specialist Referral Clinic (Vancouver) Inc. The Commission's audit of those two clinics disclosed apparent instances of double billing by certain physicians, and the Commission is auditing those physicians.

The concern you express regarding the Commission's access to the clinics' documents is, as the Court has already been advised, entirely groundless. Those documents will not be used for any purpose other than the litigation in which they were disclosed, without either the clinics' consent or further order of the Court.

15. It is not clear from Mr. Penner's correspondence to counsel for Cambie or the applicant's materials on this application how the physicians that are the subject of this application were identified to receive questions in respect of the litigation. The individual physicians do not have an assurance that their information supplied in the audit is not being used to single them out in relation to the litigation, notwithstanding the ruling of the Court of Appeal. Specifically, the audit branch of the MSC has not provided confirmation that it is complying with section 49 of the *Medicare Protection Act*, which states: "A person engaged in the administration of this Act must keep confidential matters respecting an individual beneficiary or practitioner that come to his or her knowledge in the course of his or her employment or duties..." The MSC has been asked for confirmation that each physician's response in the audit "will not be used in any audit of any other practitioner or person, and further, will not be provided to (a) inspectors or MSC staff involved with audit issues concerning others, (b) any individuals with the MSC who are involved in the Cambie litigation, (c) MSC counsel in the Cambie litigation, (d) any parties or intervenors in the Cambie litigation." No response has been provided to date.
16. The questions asked with respect to the litigation do not pertain to particular patients or complaints that might otherwise be part of the MSC's evidentiary response to the claim. The questions go mainly to the physicians' relationships with the clinics, just as the audit did. One of the stated purposes of the audit of the individual physicians was to focus on "the business relationship between [the physician] and SRC, CSC, and any other parties, in regard to payments you may have received for in relation to benefits rendered" (Affidavit #1 of Linda Mai at para. 6), and the questions posed in the January 2013

information requests are on common issues (Affidavit #1 of Linda Mai at Exhibits A and B).

17. The MSC has not suspended or deferred audit activity against individual physicians involved with the party clinics pending the outcome of this litigation, despite being asked to do so. To the contrary, the level of audit activity and the threats of penalty for non-response have increased with the proximity of trial.

Affidavit #1 of Linda Mai, para. 13 and Exhibits C and D

18. In our submission, it is unjust to place non-parties to the action at risk of administrative actions and/or administrative penalties in the circumstances of this case, or to permit the litigation and the audit to each function as adjuncts of the other. It is very time-consuming for individual physicians to respond to audit activity, particularly in the unusual circumstances of this case. It borders on abuse of process to engage litigation processes simultaneously in a fashion that could subvert the physicians' individual legal rights in relation to the audit. Mr. Penner's letter seeking information in the litigation was dated just over a week after the MSC's letter threatening without notice action against individual physicians.
19. The applicants have appended copious academic literature available to them to make the submissions they plan to put forward at trial. 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.

Alternative Position

20. In the event that the court sees fit to make an order compelling the application respondents to respond to the applicants' requests, the following terms are appropriate:
 - (a) They are at liberty to respond in writing to the questions posed in Mr. Penner's correspondence, with the exception of question 8(b) with respect to Specialist Referral Clinic (discussed below), within reasonable timelines;

- (b) Restrictions on how the responses may be used/disclosed outside the litigation in other matters involving the defendants and the application respondents (including potential future matters);
 - (c) Specific terms regarding payment, timing of responses.
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:
- (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.

PART 6: MATERIAL TO BE RELIED ON

- 1. Affidavit #1 of Linda Mai sworn January 29, 2014
- 2. Pleadings filed in the within action


The application respondents estimate that the application will take ½ day.

- The application respondents have NOT filed in this proceeding a document that contains the application respondents' address for service. The application respondents' address for service is:

**HARPER GREY LLP
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Fax: 604 669 9385

Dated: 31 January 2014


HARPER GREY LLP
(Per M. Kathleen Kinch)
Lawyer for Dr. Jean Lauzon, Dr. Michael Gilbert, Dr.
Jordan Leith, Dr. Trevor Stone, and Dr. Farhad
Moola