

Vancouver

05-May-14

REGISTRY

No. S-090663
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

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

PLAINTIFFS

AND:

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

DEFENDANTS

AND:

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

INTERVENORS

APPLICATION RESPONSE

(Re "Audit Documents")

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

This is a Response to: the Notice of Application of the Plaintiffs filed 29 April 2014.

Part 1: ORDERS CONSENTED TO

The Defendants do not consent to the granting of any of the orders set out in Part 1 of the petition.

Part 2: ORDERS OPPOSED

The Defendants oppose the granting of the orders set out in paragraphs 1 and 2 of Part 1 of the petition.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Defendants take no position on the granting of none of the orders set out in Part 1 of the petition.

Part 4: FACTUAL BASIS

1. This action originally included as plaintiffs four private clinics – Delbrook Surgical Centre Inc., False Creek Surgical Centre Inc., Okanagan Health Surgical Centre Inc., and Ultima Medical Services Inc. – who discontinued their participation (along with the Canadian Independent Medical Clinics Association) in June of 2010.

Writ of Summons and Statement of Claim, filed 28 January 2009;
Notice of Discontinuance, filed 30 June 2010.

2. Whatever their motives for discontinuing their participation may have been, those clinics have played no further role in this litigation since that date.

3. The Defendants have already disclosed and produced to the Plaintiffs some 583 documents that relate to paragraph (c) of Part 1 of the Notice of Application.

Affidavit #3 of Christine Jackson, sworn 2 May 2014.

4. No documents relating to that paragraph, other than those already disclosed, are in the Defendants' possession or control.

5. The Defendants have also already disclosed and produced to the Plaintiffs the following documents that relate to the Commission's auditing of private clinics in general:

- minutes ("Records of Decisions") of at least 50 meetings of the Commission at which extra billing and audits of private clinics are discussed; and
- the Commission's "Extra Billing Status Update" recording the status of all extra billing audits of private clinics.

Jackson Affidavit, para. 4.

Part 5: LEGAL BASIS

1. The Defendants do not disagree with the Plaintiffs' description of the applicable law at paras. 1-4 of Part 3 of the Notice of Application.

2. The Defendants do say, however, that the documents sought by the Plaintiffs, to the extent they have not already been disclosed, are not relevant to the matters in issue in this litigation, and disclosure of them ought not to be ordered.

3. The Plaintiffs rely on comments made by this Court in the context of previous applications in this litigation in support of their argument that the documents sought are relevant, but they have misconstrued those comments, or taken them out of context.

4. At para. 6, the Plaintiffs rely on comments made in paras. 61-62 of 2013 BCSC 2066 (the "Documents Application") to assert that "this Court has already determined that the operation of private clinics under the current system has probative value to this litigation". What this Court actually said in those paragraphs, however, was that the *financial records* of the *plaintiff clinics* could potentially provide evidence "enabling an assessment of the commercial viability of private clinics under the current regime as well as under a modified regime" because the plaintiffs had specifically cited the viability of independent clinics in their claim.

Cambie Surgeries Corporation v. Medical Services Commission of British Columbia, 2013 BCSC 2066 at para. 62.

5. This Court did not make a finding “in the air” that the operation of private clinics has probative value.
6. The Plaintiffs do not, on this application, assert that the financial records of other private clinics will assist in the assessment of the commercial viability of private clinics under the current regime. On that basis alone the comments relied on are inapplicable.
7. In addition, however, and critically, this Court’s decision in the Documents Application was expressly grounded in the fact that the plaintiff clinics had waived any claim to confidentiality by initiating this litigation:

I also conclude that the words of Smith J., as he then was, in *Goldman Sachs & Co. v. Sessions*, 2000 BCSC 67 at para. 37, are apposite:

It must be remembered that the plaintiff chose to litigate this matter. Therefore, it must accept the defendant’s right to take legitimate steps to defend the action. As observed by La Forest J. in *Hunt v. T & N plc*, [1993] 4 S.C.R. 289, at p. 329, paragraph 64, albeit in a different context, the fundamental importance of the right to discovery in British Columbia is emphasized by the *Rules of Court* and the case law “even at the cost of considerable loss of confidentiality.”

Cambie Surgeries Corporation, supra, at para. 65.

8. Unlike the plaintiff clinics, the private clinics with respect to whom the Plaintiffs seek disclosure have *not* waived their claim to confidentiality. Indeed, some of them were among those who expressly *discontinued* their participation in this litigation.
9. Dr. Brian Day, in the affidavit on which the Plaintiffs rely in support of their application, makes it clear that disclosure of the kinds of documents that the Plaintiffs seek in this litigation can be highly intrusive and detrimental:

These items involve confidential business information, including CSC and SRC's corporate and business structure, as well as its business operations. If such documents were made public, they could be obtained by other independent clinics in British Columbia and elsewhere, who are our business competitors. ...

If our competitors or potential competitors have access to this highly sensitive and confidential information, it could be used by them to CSC and SRC's detriment.

While some of CSC and SRC's corporate records are available to the Defendants through a search of their corporate records, the disclosure of further corporate records would be detrimental to the business interests of CSC and SRC....

The above documents are highly sensitive and are at the heart of CSC and SRC's operations. If these documents were put in the public domain, nearly all of Cambie's confidential financial records would be available to the public, and to our competitors. For the reasons identified above, this would likely have an adverse effect on CSC and SRC's operations....

Any information regarding arrangements between the two clinics, and how medical professionals that perform services at the clinics are compensated, goes to the heart of the financial structure of the clinics. and could be used by our competitors to our financial detriment. ...

Affidavit #5 of Dr. Brian Day, sworn 9 October 2013, paras. 10-12, 15, 17.

10. There is no reason to believe that these comments are not equally applicable to the private clinics who are not parties to this litigation.

11. Lest there be any doubt as to whether the Plaintiffs are in fact seeking these kinds of documents, they expressly state, at para. 7 of Part 3: “the Audit Documents will provide insight into the billing and other financial practices of other private clinics in British Columbia....”

12. The Plaintiffs also rely at para. 8 of Part 3 on comments made by this Court in the context of an application to compel five physicians to attend to be examined under oath pursuant to Rule 7-5 (the “Rule 7-5 Application”). Again, the context of the decision is important in understanding why the comments relied on by the Plaintiffs do not assist them. As this Court noted in that decision, responding to the Plaintiffs’ argument that the Documents Application was determinative, this application is “in a different context and for a different purpose”.

Cambie Surgeries Corporation v. British Columbia (Medical Services Commission), 2014 BCSC 361 at para. 54.

13. In the Rule 7-5 Application the Defendants sought evidence that would illuminate the behaviour of physicians who had the opportunity to divide their time between the public health care system and a private health care opportunity. This was directly linked to the pleadings.

14. On this application, the Plaintiffs have cited a number of passages from the pleadings, but have failed entirely to link the documents they seek to any of those passages.

15. Further, to the extent that the matters set out in para. 5 of Part 3 are in issue in this litigation, the documents already disclosed by the Defendants are the only ones that are relevant. Financial and other documents relating to the operation of other private clinics could not possibly shed any light on any of the issues identified in that paragraph.

16. The Plaintiffs assert at para. 10 of Part 3 that evidence relating to the plaintiff clinics “needs to be viewed in the larger context of how private clinics throughout British Columbia are operating under the current system”. If they believe that such evidence is indeed relevant to the matters in issue in this litigation, it has been open to them for the past five years to go out and gather it.

17. The Plaintiffs have not demonstrated that the Audit Documents will in fact materially advance this Court’s understanding of “the larger context”. There is no reason to believe they will, any more than the documents that the plaintiff clinics provided to the auditors during the audit of Cambie and SRC would.

18. The Plaintiffs assert at para. 12 of Part 3 that the Audit Documents “will help to show whether the injunctive relief sought by MSC is appropriate in the circumstances and the extent to which the alleged infringements of the Act by Cambie and SRC are causing the Defendants damage”. They offer no authority for this proposition.

19. The Plaintiffs must describe with more particularity how the financial records of other private clinics, or any of the other Audit Documents, can possibly show whether injunctive relief against the plaintiff clinics is appropriate, particularly in light of the long-established principle that a statutory injunction will always be granted upon a showing that the statutory preconditions

have been met, absent extraordinary circumstances. Further, whether the infringements of the Act by the plaintiff clinics are causing damage to the Defendants is legally irrelevant.

The court will rarely conclude that the public interest in having the law obeyed is outweighed by the hardship an injunction would impose upon the defendant. It seems clear that where the Attorney General sues to restrain breach of a statutory provision and is able to establish a substantive case, the courts will be very reluctant to refuse on discretionary grounds. In one case, it was held that “the general rule no longer operates; the dispute is no longer one between individuals, it is one between the public and a small section of the public refusing to abide by the law of the land”. In another case, Devlin J. held that although the court retains a discretion, once the Attorney General has determined that injunctive relief is the most appropriate mode of enforcing the law, “this court, once a clear breach of the right has been shown, should only refuse the application in exceptional circumstances.”

It has also been held that where the Attorney General sues to restrain a breach of the law, actual damage need not be shown, on the theory that Parliament is taken to have declared the harm injurious and the public is injured automatically by any breach of the law. This will be reinforced where the legislation specifically provides for injunctive relief. [footnotes omitted]

Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf (Toronto: Canada Law Book, 1992) at paras. 3.150-3.160.

See also *North Pender Island Local Trust Committee v. Conconi*, 2010 BCCA 494 at paras. 37-38.

Conclusion

20. In the words of P.J. Flynn J. in *R. v. Lavigne*, “This is not just a fishing expedition by the [Plaintiffs]. Rather, it is a fanciful expedition in search of a fishing boat.”

R. v. Lavigne, 2013 ONSC 7194 at para. 58.

21. The Plaintiffs’ application should be dismissed, with costs.

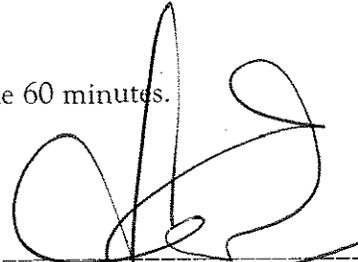
Part 6: MATERIAL TO BE RELIED ON

The Defendants rely upon:

1. Affidavit #3 of Christine Jackson, made 2 May 2014.

The Defendants estimate that the application will take 60 minutes.

DATED 5 May 2014



JONATHAN PENNER
Counsel for Defendants