



S-090663

No.  
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CANADIAN INDEPENDENT MEDICAL CLINICS  
ASSOCIATION, CAMBIE SURGERIES CORPORATION,  
DELBROOK SURGICAL CENTRE INC., FALSE CREEK  
SURGICAL CENTRE INC., OKANAGAN HEALTH  
SURGICAL CENTRE INC. and ULTIMA MEDICAL SERVICES  
INC.

PLAINTIFFS

AND:

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

DEFENDANTS

**WRIT OF SUMMONS**

Name and  
Address of  
each Plaintiff

Canadian Independent Medical Clinics Association  
c/o Fasken Martineau DuMoulin LLP  
2900-550 Burrard Street  
Vancouver, British Columbia V6C 0A3

Cambie Surgeries Corporation  
c/o Fasken Martineau DuMoulin LLP  
2900-550 Burrard Street  
Vancouver, British Columbia V6C 0A3

Delbrook Surgical Centre Inc.  
c/o Fasken Martineau DuMoulin LLP  
2900-550 Burrard Street  
Vancouver, British Columbia V6C 0A3

False Creek Surgical Centre Inc.  
c/o Fasken Martineau DuMoulin LLP  
2900-550 Burrard Street  
Vancouver, British Columbia V6C 0A3

Okanagan Health Surgical Centre Inc.  
c/o Fasken Martineau DuMoulin LLP  
2900-550 Burrard Street  
Vancouver, British Columbia V6C 0A3

Ultima Medical Services Inc.  
c/o Fasken Martineau DuMoulin LLP  
2900-550 Burrard Street  
Vancouver, British Columbia V6C 0A3

Name and Address of each Defendant      Medical Services Commission of British Columbia  
3-1, 1515 Blanshard Street  
Victoria, British Columbia V8W 3C8

Minister of Health Services of British Columbia  
5<sup>th</sup> Floor, 1515 Blanshard Street  
Victoria, British Columbia V8W 3C8

Attorney General of British Columbia  
Legal Services Branch  
6<sup>th</sup> Floor, 1001 Douglas Street  
Victoria, British Columbia V8W 1X4

**ELIZABETH THE SECOND**, by the Grace of God, of the United Kingdom, Canada and Her other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith.

**TO THE DEFENDANTS:**

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

**TAKE NOTICE** that this action has been commenced against you by the Plaintiff for the claims set out in this writ.

**IF YOU INTEND TO DEFEND** this action, or if you have a setoff or counterclaim that you wish to have taken into account at the trial, **YOU MUST**

- (a) **GIVE NOTICE** of your intention by filing a form entitled "Appearance" in the above registry of this court, at the address shown below, within the Time for Appearance provided for below and **YOU MUST ALSO DELIVER** a copy of the Appearance to the plaintiffs' address for delivery, which is set out in this writ, and
- (b) if a statement of claim is provided with this writ of summons or is later served on or delivered to you, **FILE** a Statement of Defence in the above registry of this

court within the Time for Defence provided for below and **DELIVER** a copy of the Statement of Defence to the plaintiffs' address for delivery.

**YOU OR YOUR SOLICITOR** may file the Appearance and the Statement of Defence. You may obtain a form of Appearance at the registry.

**JUDGMENT MAY BE TAKEN AGAINST YOU IF**

- (a) **YOU FAIL** to file the Appearance within the Time for Appearance provided for below, or
- (b) **YOU FAIL** to file the Statement of Defence within the Time for Defence provided for below.

**TIME FOR APPEARANCE**

If this writ is served on a person in British Columbia, the time for appearance by that person is 7 days from the service (not including the day of service).

If this writ is served on a person outside British Columbia, the time for appearance by that person after service, is 21 days in the case of a person residing anywhere within Canada, 28 days in the case of a person residing in the United States of America, and 42 days in the case of a person residing elsewhere.

**TIME FOR DEFENCE**

A Statement of Defence must be filed and delivered to the plaintiffs within 14 days after the later of:

- (a) the time that the Statement of Claim is served on you (whether with this writ of summons or otherwise) or is delivered to you in accordance with the Rules of Court, and
- (b) the end of the Time for Appearance provided for above.

(1)	The address of the registry is:  800 Smithe Street, Vancouver, B.C. V6Z 2E1
(2)	The Plaintiffs' address for delivery is:  Fasken Martineau DuMoulin LLP 2900-550 Burrard Street Vancouver, B.C. V6C 0A3  Fax number for delivery is: n/a

(3)	<p>The name and office address of the Plaintiffs' Solicitor is:</p> <p>Fasken Martineau DuMoulin LLP 2900-550 Burrard Street Vancouver, B.C. V6C 0A3 Attn: D. Geoffrey Cowper, Q.C./W. Stanley Martin</p> <p>Telephone: 604 631 3131</p>
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**ENDORSEMENT**

See attached Statement of Claim.

**STATEMENT OF CLAIM**

1. The plaintiff Canadian Independent Medical Clinics Association (“CIMCA”) is a non-profit corporation duly incorporated pursuant to the laws of Canada, with a registered office at 880 – 1090 West Georgia Street, Vancouver, British Columbia. CIMCA is an association of independent health care providers and other persons with an interest in private medical care. CIMCA’s objective is to promote improved access to high quality and timely health care for all Canadians.

2. The plaintiff Cambie Surgeries Corporation (“Cambie”) is a corporation duly incorporated pursuant to the laws of British Columbia, with a registered address at 2836 Ash Street, Vancouver, British Columbia.

3. The plaintiff Delbrook Surgical Centre Inc. (“Delbrook”) is a corporation duly incorporated pursuant to the laws of British Columbia, with an office at 107 – 3711 Delbrook Avenue, North Vancouver, British Columbia.

4. The plaintiff False Creek Surgical Centre Inc. (“False Creek”) is a corporation duly incorporated pursuant to the laws of British Columbia, with an office at 6<sup>th</sup> Floor, 555 West 8<sup>th</sup> Avenue, Vancouver, British Columbia.

5. The plaintiff Okanagan Health Surgical Centre Inc. (“Okanagan”) is a corporation duly incorporated pursuant to the laws of British Columbia, with a head office at Suite 401, 3320 Richter Street, Kelowna, British Columbia.

6. The plaintiff Ultima Medical Services Inc. (“Ultima”) is a corporation duly incorporated pursuant to the laws of British Columbia, with a head office at 4440 Stark Street, Richmond, British Columbia.

7. The defendant Medical Services Commission (the “MSC”) is a nine member statutory body continued pursuant to the *Medicare Protection Act*, R.S.B.C. 1996, c. 286 (the “Act”). The function of the MSC is to facilitate reasonable access to quality medical care, health care and diagnostic facility services for residents of British Columbia under the Medical Services Plan continued under the Act (“MSP”).

8. The defendant Minister of Health Services of British Columbia is the provincial Minister responsible for the MSP and the MSC, pursuant to the Act and the *Ministry of Health Act*, R.S.B.C. 1996, c. 301 as amended.

9. The defendant Attorney General of British Columbia is the law officer of the Crown.

### **The Surgery Centre**

10. Cambie owns and operates the Cambie Surgery Centre (the “Surgery Centre”) in the City of Vancouver, British Columbia. The Surgery Centre is a multi-specialty surgical facility, containing six operating rooms, recovery beds and overnight stay rooms. The Surgery Centre is equipped to standards that equal or exceed the standards of a major public hospital in British Columbia. Operations are performed by highly qualified physicians, who are independent professionals and not employees of the Surgery Centre.

11. The plaintiffs Delbrook, False Creek and Okanagan also operate independent surgical facilities that function in a similar manner to the Surgery Centre. The plaintiff Ultima operates as an independent medical clinic.

12. There are at least 50 other independent surgical facilities in British Columbia. Collectively, the independent medical facilities in British Columbia provide health care to many patients in the province and are a significant part of overall health care provision in the Province.

13. Patients who have operations at independent surgical facilities in the Province, including the Surgery Centre, rather than in a public hospital may do so for any of a number of reasons:

- (a) The operations may be funded under agreements between provincial health authorities and the independent surgical facilities.
- (b) The operations are arranged for the patient pursuant to the provincial or territorial workers' compensation schemes.
- (c) The patients may be the beneficiaries of other statutory health care schemes, such as those in place for the benefit of the Royal Canadian Mounted Police, members of the Canadian Armed Forces, inmates of federal penitentiaries, and others.
- (d) The patients are from out of province or out of country and seek access to quality Canadian health care.

(e) The patients may be undergoing cosmetic procedures or other procedures not covered under MSP.

(f) The patients may face an unacceptable waiting period for surgery under MSP.

14. Independent private surgical facilities receive facility fees for the use of their facilities for the purpose of operations and other procedures. Depending on the circumstances, the facility fee may be paid by a provincial health authority, the Workers' Compensation Board, other statutory medical schemes, other third parties or by the patients themselves. The operations of these facilities are beneficial for overall health care in the province. They provide needed additional operating facilities; attract specialist doctors to the province and help retain them in the province by providing them with additional access to operating time, which is rationed in the public hospitals; offer flexibility of work hours to nurses and have helped recruit nurses back into the workforce and retain them in the province; encourage improvements and efficiencies in the public health care system; and provide patients with choice and with speedier access to health care, resulting in reduced pain and disability and improved health outcomes.

#### **The Act and the restrictions on health care, access and choice**

15. The Act, in its Preamble and in sections 2 and 5.1, sets out as the guiding principles of the health care system of British Columbia the principles of universality, comprehensiveness, accessibility, portability, public administration and sustainability. None of these guiding principles requires, as a matter of law or fact, that patients be restricted or prohibited from accessing the private health care of their choice.



16. The Act, in its Preamble, sets that the public health care system is founded on the values of individual choice, personal responsibility, innovation, transparency and accountability. These values are enhanced, and not diminished, by the availability to patients of private health care choices.

17. The public health care system in British Columbia is funded in two distinct ways. First, MSP makes payments to medical and other health practitioners for medical services that are defined as “benefits” under the Act. Second, the public hospitals and clinics in the province are operated by various health authorities established pursuant to the *Health Authorities Act*, R.S.B.C. 1996, c. 180, and are funded by block grants made by the provincial government to the health authorities pursuant to the *Hospital Insurance Act*, R.S.B.C. 1996, c. 204.

18. The medical services provided by medical and other health practitioners that are covered by MSP are referred to as “benefits” in the Act. MSP is a statutory insurance scheme, and the residents of the province entitled to coverage are described as “beneficiaries” and the payments that they must make to the government are described as “premiums”.

19. Sections 1 and 5.3(a) of the Act provide, in part, that a “benefit” is a medically required service rendered by a medical practitioner who is enrolled under section 13 of the Act, unless the service is determined under section 5 by the MSC not to be a benefit. There is no statutory definition of what is meant by a “medically required” service. “Medical practitioners” are defined in the *Interpretation Act*, R.S.B.C. 1996, c. 238, as persons who are licensed to practice medicine in the province. The definition of “benefits” under the Act has been determined by the

Supreme Court of Canada in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657, 2004 SCC 78, not to include all medically required treatment.

20. In contravention of the value of individual choice, the Act restricts the opportunity for individual patients to have access to the private medical care of their choice. This is the effect of a number of provisions in the Act:

- (a) Section 17 prohibits any person from charging a beneficiary for a service that is within the definition of “benefit” or for “materials, consultations, procedures, use of an office, clinic or other place or for any other matter that relate to the rendering of the benefit”.
- (b) Section 18 prohibits a medical practitioner who is not enrolled under the Act, and who provides services in a hospital or community clinic that would be “benefits” under MSP, from charging an amount greater than the amount payable under the MSP tariff for that service. Section 18 contains a similar limit on the amount that may be charged a patient by a practitioner who has elected, pursuant to section 14, to be paid directly by patients rather than by MSP.
- (c) Section 14 requires an enrolled practitioner to choose between receiving reimbursements from MSP or from the patient.

- (d) Section 45 prohibits private insurance that would provide coverage to British Columbia residents for the cost of services that would be “benefits” under MSP if performed by an enrolled practitioner.

21. The combined effect of sections 14, 17, 18 and 45 is to preclude a medical practitioner from providing a service considered by the MSC to be a benefit for more than the amount payable by the MSC under the Act.

22. The purpose and effect of sections 14, 17, 18 and 45 is to restrict or eliminate the opportunity for British Columbia residents to receive the medical care of their choice. The purpose and effect of section 45 is to limit the financial ability of patients to seek out their own medical care. The purpose and effect of sections 17 and 18 is to make it impossible or impracticable, on a financial basis, for providers of private medical care to make such care available to patients. In particular, in relation to surgeries within the public health care system, the fees for the surgeon are covered by MSP while the cost of the hospital facilities is covered by the government through the *Hospital Insurance Act*. By prohibiting the charging of any facility fees, the intent and purpose of section 17 is to prevent or restrict the possibility of private facilities being available to patients. The purpose and effect of section 14 is to limit any combined delivery of public and private health care.

23. The effect of sections 14, 17, 18 and 45 of the Act is to prevent medical practitioners from providing, and patients from receiving, reasonable access to and choice in health care.

### **Section 7 of the *Charter***

24. Section 7 of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”) provides:

Everyone has the 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.

25. The rights to liberty, life and security of the person are a constitutional guarantee of access to medical care, and include both a right to access to medical care of one’s choice, whether public or private, and a right of access to adequate and timely medical care.

26. The provisions in the Act that directly or indirectly prohibit or impede access to private health care, and in particular sections 14, 17, 18 and 45, constitute a deprivation of the rights guaranteed by section 7 of the *Charter*, and this deprivation is not in accordance with the principles of fundamental justice. The provisions in question:

- (a) fail to provide for any process or procedure with respect to the prohibitions and restrictions;
- (b) fail to deal fairly with the rights of patients;
- (c) fail to advance a state interest, in circumstances where the stated statutory guiding principles are not served by the prohibitions and restrictions;
- (d) are arbitrary, in that the prohibitions and restrictions do not apply on a uniform basis. The prohibitions and restrictions do not apply, under section 27 of the

*Medical and Health Care Services Regulation*, BC Regulation 426/97, (the “Regulation”) to the beneficiaries of numerous other health care programs; they have an effect that varies according to the personal financial circumstances of patients; and they are arbitrary in their geographic limitations;

- (e) are impermissibly vague, in that the term “medically required”, which is an essential part of the definition of “benefits” and therefore of the scope of the statutory prohibitions, is undefined and inherently uncertain.

27. Further, the provisions in the Act that prohibit or restrict access to private health care are an infringement of the rights of patients under section 7 of the *Charter* in circumstances where MSP is unable to provide or guarantee access to timely and adequate medical care, including surgical and diagnostic services.

28. The waiting periods for medical care in the Province are unreasonable and result in patients receiving inadequate care in the public health care system. The unacceptable delays in patient care result in extended suffering, and in some cases death, for patients, worse health outcomes for patients, and increased burden and costs for the public system.

29. The provisions in the Act that restrict or prohibit access to private medical care infringe the rights guaranteed by section 7 of the *Charter* and are therefore unconstitutional, invalid and of no force or effect.

30. Although the Supreme Court of Canada determined in *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 891, 2005 SCC 35, that an equivalent prohibition on medical access insurance to that contained in section 45 of the Act was an infringement of the rights guaranteed by section 7, the Act has not been amended to bring it into compliance with the *Charter*.

#### **Section 15 of the *Charter***

31. Section 15(1) of the *Charter* provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

32. Patients seeking medical care are, by virtue of section 15(1), entitled to the equal protection and equal benefit of law and government action and government programs relating to health care, without discrimination based on physical disability.

33. The provisions of the Act that directly or indirectly prohibit or impede access to private health care, and in particular sections 14, 17, 18 and 45, and the exceptions to those prohibitions and restrictions incorporated in the Regulation, result in patients being deprived of access to their choice of private medical care on a basis that is discriminatory under section 15(1).

34. The Regulation, in section 27, provides that “benefits”, for the purpose of MSP, do not include services rendered by a health care practitioner to which a patient is entitled under a number of other federal and provincial health insurance or health care provision schemes. The

statutory schemes listed in section 27 of the Regulation include the schemes for health care under:

- (a) The *Aeronautics Act*, RSC 1985, c. A-2;
- (b) The *Civilian War Pensions and Allowances Act*, now the *Civilian War-Related Benefits Act*, RSC 1985 c. C-31;
- (c) The *Government Employees Compensation Act*, RSC 1985 c. G-5;
- (d) The *Merchant Seaman Compensation Act*, RSC 1985 c. M-6;
- (e) The *National Defence Act*, RSC 1985 c. N-5;
- (f) The *Penitentiary Act*, now the *Prisons and Reformatories Act*, RSC 1985 c. P-20;
- (g) The *Pension Act*, RSC 1985 c. P-6;
- (h) The *Royal Canadian Mounted Police Act*, RSC 1985 c. R-10; and the *Royal Canadian Mounted Police Superannuation Act*, RSC 1985 c. R-11;
- (i) The *Workers' Compensation Act*, RSBC 1996 c.492;
- (j) The *Insurance (Vehicle) Act*, RSBC 1996 c.231.

The persons who are entitled to treatment under the statutory schemes listed in section 27 are referred to herein collectively as “Government Beneficiaries”.

35. The reason why Government Beneficiaries receive preferential access to medical care is that governments have accepted financial responsibility for their health care and consequently governments have an ancillary interest in providing timely access to cost-effective health care to such persons.

36. The effect of sections 14, 17, 18 and 45 of the Act is that patients seeking medical care who are not Government Beneficiaries under s. 27 of the Regulation are subject to discriminatory prohibitions and restrictions on reasonable access to, and choice of, medical care. In regards to their physical disability, that is, their health condition, patients who are not Government Beneficiaries are no different from Government Beneficiaries. Sections 14, 17, 18 and 45, exclude patients not covered under section 27 of the Regulation from access to their choice of private medical care. This exclusion is discriminatory under section 15(1).

37. The provisions of the Act that prohibit and restrict reasonable access to, and choice of, medical care are inconsistent with the purpose of the Act, are prejudicial to a majority of British Columbians and fail to take into account the actual needs and circumstances of people with health conditions who are not Government Beneficiaries.

38. The prohibitions and restrictions in the Act and the Regulation on access to private health care, and in particular sections 14, 17, 18 and 45, constitute an infringement of the right



guaranteed by section 15(1) of the *Charter*, and those provisions are consequently unconstitutional, invalid and of no force or effect.

**Proposed audit**

39. In September 2008, MSC gave notice to Cambie and to numerous surgeons who perform operations in the Surgery Centre that it was proposing to conduct an audit pursuant to section 36 of the Act. MSC has subsequently advised that it intends to proceed with the audit in February, 2009.

40. Cambie is not a medical practitioner and receives no payments from MSP. Although MSC has failed to explain the purpose and scope of the proposed audit, in the circumstances the audit must necessarily be connected to some proposed action by MSC to enforce the prohibitions and restrictions in the Act, in particular section 17, on patient access to private medical care. As section 17, and the other prohibitory and restrictive sections, are unconstitutional, invalid and of no force and effect, MSC lacks any statutory power or basis to conduct the proposed audit. Further, the proposed audit is in itself a contravention of the rights guaranteed by section 7 of the *Charter*.

WHEREFORE the Plaintiffs claim as against the Defendants:

- (a) A declaration that the provisions in the Act that directly or indirectly prohibit or impede access to private health care and patient choice in primary health care are in violation of sections 7 and 15 of the *Charter* and such violation is not demonstrably justified under section 1 of the *Charter*;

- (b) Alternatively, a declaration pursuant to section 52(1) of the *Constitution Act 1982* that sections 14, 17, 18 and 45 of the Act are inconsistent with section 7 of the *Charter* and are therefore of no force and effect to the extent of the inconsistency, with a suspension of the declaration on the condition that the Province table regulations that bring the Act in compliance with the *Charter* within six months;
- (c) General damages;
- (d) Interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996 c. 79;
- (e) An interim and interlocutory order to stay or enjoin the MSC's audit of Cambie until the final determination of the claim herein, on such terms and conditions as are appropriate and just;
- (f) Costs; and
- (g) Such further and other relief as this Court may deem just.

FASKEN MARTINEAU DuMOULIN LLP

Per:

Dated: January 28, 2009

FMD + D. G. Cowper  
Solicitors for the Plaintiffs