No. S090663
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

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

PLAINTIFFS

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

DEFENDANTS

AND:

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

INTERVENORS

AND:

THE ATTORNEY GENERAL OF CANADA

PURSUANT TO THE *CONSTITUTIONAL QUESTION ACT*

PLAINTIFFS' RESPONSE TO DEFENDANT'S APPLICATION TO QUASH THE SUBPOENA OF MINISTER LAKE

OVERVIEW OF THE PLAINTIFFS' POSITION

1. The Plaintiffs oppose the Defendant's application to quash the subpoena issued to British Columbia Minister of Health, Terry Lake.

2. Minister Lake has been the Minister of Health since June 10, 2013, and a Minister in the Provincial Government since March 14, 2011.

3. The Minister of Health is an agent of the Crown, and the Province's chief representative in all matters relating to health care.

4. The Minister presides over and directs the Ministry of Health, which is responsible for "all matters relating to public health and government operated health insurance programs." (*Ministry of Health Act*, s. 5).

5. Minister Lake has the power and responsibility to ensure that the health care system serves the needs of BC residents and that he is properly informed of all aspects of the health care system.

6. Minister Lake is also responsible for the efficient and effective administration of health care agencies and bureaucracies, including the Ministry, the Heath Authorities and the Medical Services Commission.

7. Minister Lake is also responsible for the efficient and effective expenditure of public funds on health care, including initiatives to implement new policies and programs to better deliver health care, while attempting to control costs within the Ministry's budget.

8. The Minister is therefore fully informed about matters that go to the heart of these proceedings, the provision of health care through the public system and the inadequacies of that system, including delays in accessing treatment in the public system, the problem of wait lists, the reasons for the lack of timely treatment in the public system, the consequences of delay to patients, funding arrangements and cost pressures, the provision of medical services through private facilities, including their effect on the public system, the quality of private facilities, and the effect of private access to care on the public system.

9. The Minister can be expected to have highly relevant and probative evidence on these matters, and indeed, he may be the best placed person in the government to give the court a full and complete understanding of the realities of health care provision in the province.

10. Given his expertise and experience, and the wealth of factual information he possesses, the Plaintiffs expected the Defendant to commit to calling Minister Lake, or at least to welcoming his testimony.

11. It has not done so. Instead, it is seeking to prevent Minister Lake from giving any evidence in this case.

12. There is good reason to believe that the Defendant does not want the Minister to testify because he does not agree with many of the positions that the Defendant is taking in these proceedings.

13. Minister Lake, in his capacity as the senior representative of the Province, responsible for health care in the province, has made numerous public statements that directly contradict or seriously undermine the statements that the Defendant has pleaded and advanced in its defence to the claim.

14. Minister Lake has publicly explained why his government is unable to provide timely and adequate treatment to all patients within the public health care system, which he attributes to funding deficiencies, the upward trajectory of health costs and mounting pressures from demographic factors, like the aging population, in direct contradiction to the pleadings of the Defendant.

15. Minister Lake has publicly discussed the virtues of private health care provision, including for medically necessary services, when the public system cannot provide that treatment adequately or in a timely manner, in direct contradiction to the pleadings of the Defendant.

16. Minister Lake has stated that private clinics "can provide a shorter access to care without draining resources from the public health system", that access to private clinics can reduce wait lists in the public system, and that "the private system has always been an important part of public health care in Canada", in direct contradiction to the pleadings of the Defendant.

17. Minister Lake has publicly explained that the Province is "struggling with wait times", that wait times in the Province are "unacceptable", that patients are forced to wait longer than "necessary", that the Province's efforts to date in reducing wait times are not "good enough", and that the Province needs to "do better" in providing timely treatment, in direct contradiction to the pleadings of the Defendant.

18. Minister Lake has publicly explained that physicians are not fully utilized in the public system due to a lack of operating room times, in direct contradiction to the pleadings of the Defendant.

19. His evidence on these issues, based on his public statements speaking as the representative of the Defendant in health care matters, would directly contradict a number of the pleadings that the Defendant relies on in these proceedings.

20. The Defendant nevertheless submits in this Application that the Minister has no relevant evidence to provide to the Court. With respect, that is inconceivable given his role and responsibilities in the provision of health care in the Province and is refuted by his public statements which relate directly to the issues in this case.

21. Minister Lake is the highest level representative of the Ministry of Heath, and he has publicly made statements and admissions of fact on behalf of the Defendant of direct relevance to many issues in these proceedings. He is responsible for defining policy and

supervising the Ministry, and is accountable as the Government's representative on health related matters.

22. These circumstances are unique. It is not common that a Government defendant takes positions in litigation that are directly contrary to the public statements of its own primary representative on the matters at issue.

23. Further, Ministers do not typically make statements or have information that are directly relevant to ongoing litigation.

24. Governments do not typically take positions in litigation that are contrary to the facts known to the Government, such as asserting that that patients are not waiting longer than medically appropriate, long wait times do not cause harm to patients, and that preventing patients from accessing timely treatment does not deprive them of their physical and mental wellbeing, or diminish the quality of their lives.

25. But, those positions are taken by the Defendant in these proceedings. And the Plaintiffs must be given an opportunity to tender the best available evidence to show that these positions are not accepted by the Defendant's own chief representative.

26. This is equivalent to stating publicly "yes, what they are saying is true, but we are denying it in court and they cannot prove it".

27. If this were private litigation involving a corporation, it would be self-evident that the CEO could be called to testify, to contradict the positions taken by the company, to obtain admissions on behalf of the company, and to ascertain the basis for his public statements of fact. It is no different in this case.

28. As the Supreme Court of Canada has stated, Ministers of the Crown benefit from no privilege that would exempt them from the Court's overriding entitlement to every person's evidence. Ministers of the Crown "stand in the same position as any other of His Majesty's subjects."

29. Minister Lake clearly has a wealth of knowledge relevant to these proceedings, and has entered the fray by taking positions and making statements of fact that directly contradict many of the Defendant's positions in this litigation.

30. In essence, the Minister of Health knows that the Government is making assertions of fact in this litigation, on behalf of the Ministry that the Minister oversees, that are untrue. His evidence should be heard by the Court in order to set the record straight.

FACTS

31. The Plaintiffs rely on the Fourth Amended Notice of Claim filed March 14, 2016 (the "**Notice**"). To the extent that specific facts are relevant to this motion, they are specifically referred to below.

32. The Plaintiffs have pleaded that sections 14, 17, 18, and 45 (the "**Impugned Provisions**") of the *Medicare Protection Act* (the "***MPA***") violate section 7 and section 15 of the *Charter* and cannot be saved by section 1.

A. The Minister's Powers

33. Terry Lake is the British Columbia Minister of Health (the "**Minister**"). His duties and responsibilities as Minister are set out in the *Ministry of Health Act* as follows:

> **1(1)** There is to be a ministry of the public service of British Columbia called the Ministry of Health.
>
> (2) The minister is to preside over and be responsible to the Lieutenant Governor in Council for the direction of the ministry.
>
> (…)
>
> **4(1)** The duties, powers and functions of the minister extend to and include all matters relating to health that
>
> > (a) are assigned to the minister under any Act or by the Lieutenant Governor in Council, and
> >
> > (b) are not, by law or by order of the Lieutenant Governor in Council, assigned to another minister, ministry, branch or agency of the government.
> > (…)
>
> **5.** The ministry, under the minister's direction, has charge of all matters relating to public health and government operated health insurance programs.

The Ministry of Health Act, R.S.B.C. 1996, c. 301, ss. 1, 4-5 [emphasis added].

34. Minister Lake was appointed Minister of Health on or around June 10, 2013.

35. Since that time, Minister Lake has made a number of public statements relating to the key matters at issue in this proceeding, as recorded in Hansard, in public speeches, or in the media (the "**Minister's Statements**"), which directly contradict or seriously undermine the Defendant's pleadings and positions in this proceeding.

36. All of the Minister's Statements referred to were made in Minister Lake's capacity as Minister of Health, the Government's representative on health care matters.

B. Facts Regarding Public Funding Deficiencies and Cost Pressures

37. The Defendant's position in this proceeding is that there is sufficient funding to meet the health care needs of British Columbians in a timely way, and that any failure of that system causing harm to patients can only be attributed to the negligence or incompetence of

physicians, the Health Authorities, or other parties that are 'primarily' responsible for health care delivery in the province.

See Response to Fourth Amended Civil Claim, dated February 26, 2016 ("***Response***"), at paras 39, 43, 45-46, 49, 52.

38. However, Minister Lake has made a number of public statements conceding that there are significant cost pressures and funding deficiencies, resulting in an overburdened public system preventing it from providing timely health care to everyone who needs it. This is consistent with the position of the Plaintiffs in these proceedings.

39. For instance, Minister Lake is reported to have said the following:

> There is "no question" that annual increases of just three per cent would put B.C. under enormous fiscal pressure, especially with an aging population, Lake said. "It is a bit, ironic, I think, that a government that is really defending the *Canada Health Act* and public health care in Canada seems to be stuck on a very Conservative mindset around funding health care," he said. [Canadian Press, Sept 27, 2016]
>
> B.C. Health Minister Terry Lake has acknowledged there cannot be unbridled spending on health, but said he remains strongly opposed to what the federal Liberals have on offer, considering the persistently upward trajectory of health costs and mounting pressures from demographic factors, like the aging population. [Canadian Press, Oct 17, 2016]
>
> Health Minister Terry Lake on Sunday said they have been working to reduce wait times for surgeries around B.C. Last year, an extra $10 million was pumped into the medical system to reduce wait lists, he noted. "(But) we are still not where we want to be," he said. [Vancouver Sun, April 24, 2016]
>
> Lake expects the health authorities to increase the scans being performed before Christmas. "People should notice this very soon," Lake said. "We should have acted sooner, to be honest, but we have to manage our budgets and as the premier said, when the province is doing well economically/fiscally, then we have the opportunity to look at the challenges we have in each ministry and address them." [Victoria Times Colonist, November 18, 2015]
>
> "You get used to it," he said, adding that the province needs to add more surgical capacity. Health Minister Terry Lake agreed, saying in an interview Tuesday that lengthening waiting times are "a concern for me, for sure." A growing population and rapidly increasing demand for the procedures are part of the problem, he said. [Vancouver Sun, April 14, 2015]
>
> "I know the ministry and the health authorities are very concerned about wait-lists… But what we've done is we've created a burden on the system that we need to correct, and we are working hard with our health authorities to do that. I apologize for any patients that have had to wait longer than necessary. Having said

> that, all of the health authorities are working hard to reduce those wait-lists and make sure that people are seen in a timely fashion for their follow-up procedures…-" I can't say that it has been smooth for every patient, and I accept that we need to do better. We will do better. All health authorities are working to do that." [Hansard, February 25, 2015 (Volume 20, Number 5)]

40. In effect, Minister's Lake's assessment of the causes of the problems of the public health care system fully support the Plaintiffs' positions in this litigation, which the Defendant purports to deny.

C. Facts Regarding Unused Resources

41. An important part of this case is whether facilities and physicians are currently used at full capacity. That is because the Defendant pleads that unless physicians are prohibited from working in both the public and the private system, that will necessarily drain resources to the private system, creating longer wait times in the public system.

42. This argument is not supportable unless all available facilities and physicians are fully utilized within the public system, i.e. there is zero unused capacity as a result of a lack of funding or the under-utilization of facilities.

43. In public statements, however, the Minister has reportedly made specific reference to unused capacity within the current system. For instance, he has stated as follows:

> "[T]here are orthopedic surgeons in this province that don't have access to OR time in the public system. They, essentially, are not using all of their abilities. In a private surgical centre, that would create opportunities, paid for by the public, where these orthopedic surgeons could do more work. Therefore, actually, we would optimize the health care resources available to us rather than draining resources from one system to another. [Hansard, May 26, 2015, (Volume 27, Number 4)]
>
> Lake said the money will open up extra operating room time in hospitals across the province, and in some cases it will be used to contract private clinics to perform extra day surgeries. "Patients want to have their surgeries done," Lake told reporters. "If the quality is there and if it reduces wait lists and it's paid for and administered by the public system, I think British Columbians would agree with that approach." [New West Record, June 10, 2015]
>
> "I have asked our provincial surgical advisory committee to look at this situation because I think we can do better and that's a matter of co-ordinating services between physicians between specialists and the hospitals and health authorities," said Terry Lake. The province recently put out a policy paper that, ironically, said B.C. has an oversupply of orthopedic surgeons. It calls for consultation, which will take more time. [CBC March 2, 2015]

44. Minister Lake therefore has knowledge of facts regarding unused capacity that would undermine the Defendant's assertion in these proceedings that permitting dual practice would necessarily result in removing scarce resources from the public system.

D. Facts Regarding Wait Times

45. The Defendant has pleaded that any "unnecessary or unreasonable pain or suffering" caused to the Plaintiffs were not the result of long wait times in the system, and that British Columbians who experience unreasonable pain or suffering while awaiting treatment by their chosen physician have several options available to them to avoid unreasonable wait times [*Response,* at paras 31-33, 55].

46. In addition, the Defendant also *denies* the following facts pleaded in the Plaintiffs' Fourth Amended Notice of Civil Claim:

> [88] Wait times throughout the British Columbia public health system are unacceptably long, and prevent ordinary British Columbians from having access to a reasonable standard of healthcare within a reasonable time. (…)
>
> [90] Wait lists are not only an issue in terms of access to a surgeon or a specialist to perform a required medical treatment. In the British Columbia public health system, there are unacceptable delays to receive diagnostic procedures or to see a specialist for an initial consultation. (…)
>
> [95] Actual wait times in British Columbia - the time from the initial referral by a general practitioner to the time of treatment by a specialist - are in many instances much longer than the time medical practitioners themselves would consider to be clinically reasonable, and are therefore neither reasonable nor acceptable from a clinical perspective.
>
> [96] Independent facilities, such as the Surgery Centre and SRC, have the capacity to accept patients, if not immediately, then certainly within a shorter time than they would have if they stayed in the public system.
>
> Fourth Amended Notice of Civil Claim, filed March 16, 2016 ("***Claim***") at paras 88, 90, 95-96.

47. Minister Lake's public statements on wait times fully support the statements of fact in the Plaintiffs' pleadings, and contradict the pleadings of the Defendant. The Minister's Statements on this issue include the following:

> "The reality is we're still struggling with wait times, despite a huge increase in the number of surgeries that we are performing each and every year," [Victoria Times Colonist, June 2, 2015]
>
> The gastroenterologists say they have an ethical and legal obligation to tell family doctors to refer patients elsewhere in B.C. or to a private clinic. That's because the

> eight-week recommended wait time for the procedure following a positive stool test has doubled, said Dr. David Pearson, head of the division of gastroenterologists for VIHA. (…) In an interview Monday, Lake said the wait times are not acceptable and he's asking staff for recommendations to speed up the system. If the specialists can't perform the procedures in a timely fashion, Lake said, he understands their reluctance to encourage doctors to continue to send referrals. [Victoria Times Colonist, July 8, 2013]
>
> "About one per cent of the surgeries done in British Columbia are actually done in private clinics but paid for publicly," said Lake, who described an "unprecedented demand" and unacceptable waiting times facing the public system. [Vancouver Sun, June 1, 2016]
>
> Health Minister Terry Lake told reporters last week that the reason some waiting lists are growing is because the health-care system is doing more surgeries. "But I have asked our provincial surgical advisory committee to look at the situation, because I think we can do better … One of my real desires is to reduce those wait times." [Globe and Mail, Mar 1, 2015]
>
> Health Minister Terry Lake responded to Darcy in the legislature Monday, noting that the wait times are not acceptable. "We have to do better," he said. "We have long wait lists for MRIs, even though we are doing three times as many as we did in 2001. "The reality is we need to do better." [Vancouver 24 Hours, Nov 3, 2015]
>
> It is something on the minds of many British Columbians. When you are in pain, when you're waiting for surgery, it is a long time sometimes because there's a challenge in some areas of British Columbia particularly… On average, British Columbians, in terms of wait-lists, are about middle of the pack across Canada. That's not good enough. [Hansard, March 2, 2015, (Volume 23, Number 4)]

E. Facts Regarding Canada's Performance Relative to Other Systems

48. The Plaintiffs plead that international experience shows that "allowing individuals to choose to obtain private insurance and permitting and facilitating access to a private healthcare system does not jeopardize the existence of a strong public healthcare system", and that the "experiences in other jurisdictions demonstrate that a hybrid private-public health care system allows the public system to thrive and provide better care to patients".

Claim, at para 120;

See also *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at paras 77-84 (*per* Charron J.), paras 140-149 (*per* McLachlin, Major & Bastarache JJ.)

49. In essence, the Plaintiffs say that Canada is not performing as well as other western democracies which permit private insurance and access to private care, including countries such as Australia, New Zealand, and European countries. [*Claim*, at para 120]

50. In response, the Defendant has pleaded that the prohibitions on access to private care is essential to maintaining quality and timely care, and that countries which permit a private care option (such as European countries, Australia and New Zealand), are less equal, more expensive, and provide lower quality care. [*Response,* at paras 7, 30, 70]

51. In a public statement, the Minister has stated that the Plaintiffs (and the Supreme Court of Canada) are correct on this factual dispute:

> Lake said medicare isn't performing as well as health systems in place such as Europe, Australia and New Zealand. He predicted there will be heighted interest in reform as the Canadian population ages and baby boomers discovery they can't get the medical services they need. [Vancouver Sun, January 16, 2016]

F. Facts Relating to Integrity of Physicians

52. The Defendant's pleadings also disparage the integrity and professionalism of physicians, including by pleading that "unnecessary or unreasonable pain or suffering" caused to the Plaintiffs were not the result of wait times endemic to the system, but a result of inappropriate or negligent treatment from their physicians [*Response,* at paras 31-33].

53. The Defendant also impugns the integrity of B.C. physicians generally, by stating that if permitted to operate in both the public and private systems, physicians will deliberately maintain long wait list, deliberately delay providing necessary treatment to patients, and deliberately withhold from and fail to provide beneficiaries with accurate information regarding available treatment [*Response,* at at paras 65-66, 77(f)]

54. In public statements, however, Minister Lake has applauded the skill and integrity of BC physicians, including as follows:

> "We have highly trained physicians, who care for their patients, who have the ability to make clinical judgments. When they feel their patient needs urgent treatment, they can move their patient to the front of the line. If the physician is feeling that their patient needs to have that service, it will be done." [Hansard, April 29, 2015 (Volume 8, Number 24)]

55. This statement directly undermines the Defendant's assertions that physicians would cause harm to patients – indeed would *knowingly* do so – in order to maximize profits.

G. Facts Relating to the Benefits of Private Care

56. The Defendant has also pleaded the following facts with respect to private health care treatment:

> The time spent by a specialist operating in a private clinic is time that he or she is not available to treat such patients, and to thereby reduce his or her wait list. [*Response,* at para 54]

> To the extent that enrolled physicians operate in private clinics like Cambie and SRC, they are not only unavailable to provide elective surgery in the public system, but also to provide diagnosis and triage of patients and, further, they are also unavailable to treat urgent and emergent medical conditions. [*Response,* at para 59]
>
> "This unavailability interferes with the ability of the public health care system to provide appropriate and timely medical care to beneficiaries." [*Response,* at para 60; emphasis added]
>
> Permitting physicians to work in the private system in BC corresponds with a reduction over time in both the quantity and the quality of medical care available to British Columbia residents in the public system [*Response,* para 63]
>
> Permitting a "truly parallel private health care system" actually increases the wait times experienced by beneficiaries who cannot afford treatment in that system. [*Response,* para 64]
>
> Wait times in the public health care system are increased, not reduced, by permitting physicians to work in both the private and the public system [*Response,* paras 65-66, 70(d),(e), (f)]
>
> Because the private and public health care systems must compete for a finite supply of physicians, nurses, and technicians, the overall cost of those health human resources increases, and the cost to the public health care system of maintaining the same level of service is increased. [*Response,* para 70(f)]
>
> Where health care is delivered by for-profit entities… the quality of care may be lower than where health care is delivered by public or private non-profit entities. The evidence shows that, in general, permitting health care to be delivered by for-profit entities results in higher mortality rates and lower quality outcomes. *Response,* at para 78; emphasis added]

57. Minister Lake has made a number of public statements which directly contradict or strongly undermine the Defendant's pleadings with respect to the safety and efficiency of private care, the ability of physicians to work in both the public and private system, and the effect of accessing private treatment on wait lists in the public system:

> "We have always used private providers in the health care system," Lake added. "If the quality is there and it reduces wait lists and is paid for and administered by the public system, I think British Columbians would agree with that approach." [CTV Vancouver, June 1, 2016]
>
> "But the reality is there are some things that the private sector can do under the *Canada Health Act* and under the *Medicare Protection Act* which will actually prove efficient. It can provide a shorter access to care without draining resources from the public health system." [Hansard, May 26, 2015 (Volume 27, Number 4)]

> "We recognize that access to MRIs has been a challenge and this strategy will make sure we better meet the health care needs of British Columbians now and into the future," said Health Minister Lake. "By improving how we manage MRI diagnostics, we can provide families with peace of mind that comes with faster diagnosis and treatment."… MRI scan volumes will be increased by extending operating hours for MRI machines, so more patients can be served each day. This means that some patients will be scheduled to receive their scans during evening or night-time hours. Health authorities may also contract private facilities to perform additional procedures. [BC Government News Release, Nov 18, 2015]
>
> "The health care system in Canada is not entirely a public system in terms of the provision of care. In fact, in the health care system in Canada 70 percent of health care is paid for publicly; 30 percent is paid for privately. That's been that way for some period of time." [Hansard, May 26, 2015 (Volume 27, Number 4)]
>
> "The goal is to reduce wait times. The member says that we should surely be looking at the public system. What we do look for is the patient, because the patient, quite honestly, wants to get their service, their medical treatment, as soon as possible…. As long as the quality is there and people are getting their surgical services in appropriate time…. I think that's what patients in British Columbia are concerned about." [Hansard, May 26, 2015]
>
> "Patients want the best available service," Lake said. "They want it to be effective, efficient and have high quality. I'm not an ideologue in terms of where patients get that treatment. The private system has always been an important part of public health care in Canada." [Victoria Times Colonist, June 2, 2015]
>
> Asked about criticism of his decision to speak at a luncheon sponsored by a private healthcare clinic, Lake said private care is already a fact. "People have this image in Canada that health care is entirely public and, in fact, 30 percent of health care is provide and paid for privately," said Lake. "And about 70 per cent of health care is paid for publicly, like surgery, like seeing your doctor, but in many cases provided for privately, so there is a role for private provision of healthcare in Canada." For example, he said, people can have an MRI through the public system or have it done privately. "it's part of this patchwork of services that has evolved in the Canadian health care system." [Kamloops Blog, June 13, 2014]

58. Clearly, Minister Lake does not believe that private treatment is inherently harmful or of lower quality, or that practicing in private clinics necessarily drains the public system of doctors or nurses, or that the existence of private clinics is incompatible with a robust public sector health care system.

59. To the contrary, Minister Lake has suggested that private treatment is an indispensable part of the current system, and that access to private clinics can alleviate pressures on the public system and can provide treatment more rapidly and efficiently than the public system.

H. Other Attempts to Get Relevant Evidence from Minister Lake

60. The Defendant has not been forthcoming with respect to Minister Lake's other statements and correspondence.

61. For instance, a review of the substantive e-mails (excluding forwards, etc.) labelled by the Defendant as authored by the Minister Lake identified only two such e-mails, despite the fact that he was appointed Minister of Health in 2013.

62. In addition, the Plaintiffs have sought admissions of fact with respect to certain statements of the Minister, including the Minister's statement that "[M]edicare isn't performing as well as health systems in places such Europe, Australia and New Zealand".

63. The Defendant refused to confirm that the Minister made these statements.

I. Summary of Facts

64. The Defendant pleads that private care is low quality, inferior and unsafe; that there is sufficient funding within the system to provide everyone with timely treatment; that there are no unacceptably long wait times in the public system, or if there are, no one is deprived of their physical or mental wellbeing as a result; that physicians will harm patients in order to maximize profit; and that the availability of private treatment options will drive up costs and wait times in the public system.

65. Minister Lake, the Government's highest placed representative on health care matters, and the most well-informed Minister of the Crown those matters, can provide valuable evidence that the Government's pleadings on these points are wrong.

66. Minister Lake as the Province's chief representative on health care also has a wealth of knowledge and information about all of the issues in this litigation and all off the facts in dispute. If he were not permitted to testify, the Plaintiffs would be deprived of an invaluable source of evidence in support their case.

67. The Plaintiffs would be denied their right to every man's evidence and to a fair trial.

68. The Plaintiffs have therefore called Minister Lake to confirm (or deny) that he made statements contradicting the Defendant's position in these proceedings, explain the factual basis for those assertions, and to testify about his knowledge regarding the issues raised in these proceedings

Part 5: LEGAL BASIS

A. Overview of Position

69. It is well established that Ministers of the Crown are, like everyone else, competent and compellable witnesses as long as they are likely to have evidence relevant to a proceeding.

70. In *Smallwood v. Sparling*, the Supreme Court of Canada confirmed that Ministers can be compelled to testify as witnesses, just like anyone else. The Court quoted approvingly from *Wigmore on Evidence* for the following proposition:

> **2370.(c). Testimonial privilege of the executive not to be a witness**. The public (in the words of Lord Hardwicke) has a right to every man's evidence. Is there any reason why this right should suffer an exception when the desired knowledge is in the possession of a person occupying at the moment the office of chief executive of a state?
>
> There is no reason at all. His temporary duties as an official cannot override his permanent and fundamental duty as a citizen and as a debtor to justice. The general principle of testimonial duty to disclose knowledge needed in judicial investigations is of universal force. It does not suffer an exemption which would apply irrespective of the nature of the person's knowledge and would rest wholly on the nature of the person's occupation.
>
> (…)
>
> Let it be understood, then, that there is no exemption for officials as such or for the executive as such from the universal testimonial duty to give evidence in judicial investigations. The exemptions that exist are defined by other principles. [Emphasis in original]
>
> *Smallwood v. Sparling*, [1982] 2 SCR 686 at 695-696.

71. The Supreme Court also quoted approvingly from *R. v. Baines* as follows:

> In *R. v. Baines*, [1909] 1 K.B. 258 subpoenas were issued to the Prime Minister and the Home Secretary to require them to testify in criminal proceedings. They applied to have the subpoenas set aside on the basis they had no evidence to give which was relevant to any issue that could arise at the trial. Their applications were allowed on that basis but in the course of his judgment Bigham J. affirmed that (at p. 261):
>
> > It must not be supposed that the position which the applicants occupy affords them any privilege. They stand in the same position as any other of His Majesty's subjects.
>
> *Smallwood v. Sparling*, [1982] 2 SCR 686 at 695-696.

72. Thus, it is well established, including by the Supreme Court of Canada, that "Ministers of the Crown have no special privilege" that would prevent them from testifying, like any other person, where they have information relevant to a proceeding.

R. v. Allerton, [1914] B.C.J. No. 55.

Central Canada Potash Co v Saskatchewan (AG) [1975] S.J. No. 145, rev'd on other grounds [1977] S.J. No. 16;

R. v. VandenElsen-Finck and Finck, 2005 NSSC 73 at para 2.

73. It should be emphasized that the Plaintiffs are not applying to *discover* Minister Lake as the chosen representative of the Defendant, a process which is governed by other principles relating to the fact that there is only an entitlement to examine *one* individual representative of a party.

74. There is no such restriction with respect to testimony at trial, where a party is entitled to call as many agents or representatives of a party as witnesses, as long as they have relevant evidence.

75. As stated in a leading civil procedure textbook, *Canadian Civil Procedure Law*, "the question of the liability of Crown employees and agents to give testimony is entirely separate from the potential liability of such persons to discovery." With respect to the former, the authors state that the rules are clear, as stated above:

> No rule of law provides immunity for any Crown agent, officer, servant or representative from an order in the nature of a *subpoena duces tecum* (a summons to a witness, requiring the witness to bring documents before a court or tribunal) or other form of compulsory examination — other than perhaps for the sovereign herself and members of her immediate household. In *Smallwood v. Sparling*, Wilson J., giving the judgment of a unanimous Court, stated categorically:
>
> > … there is no exemption for officials as such or for the executive as such from the universal testimonial duty to give evidence in judicial investigations.
>
> Abrams & McGuinness, *Canadian Civil Procedure Law*, 2nd Ed (online: LexisNexis) at §14.73.

76. Similarly, as stated by Professor Hogg et al in *Liability of the Crown:*

> Restrictions on the pre-trial discovery of ministers and Crown servants do not apply to testimony at trial. In any proceeding, including a proceeding against the Crown alone, an individual minister or Crown servant with some knowledge of the facts may be compelled by subpoena to attend and testify at the trial and to bring relevant documents. [emphasis added]
>
> PW Hogg et al, *Liability of the Crown*, 4th ed, (Toronto: Carswell, 2011) at 92.

77. The case relied on by the Defendant in the context of choosing a representative for discovery purposes is therefore inapplicable in these circumstances; there is no requirement for a party to prove, in order to have a witness testify at trial (including the Minister), that the person's evidence "could not be obtained from some other witness".

78. It is therefore not open to the Minister to refuse to testify on the basis that others may also have the evidence being sought (although, as discussed below, much of the evidence the Plaintiffs seek from the Minister, particularly as it pertains to the Minister's own statements, could not be obtained from others.)

B. The Relevance of Minister Lakes Testimony

a. Minister Lake's Expected Testimony is Relevant

79. In light of the above, the only question in this Application is the same question as with any other potential witness challenging the subpoena: is the Minister likely to have evidence relevant to these proceedings?

80. The question of relevance pertains to whether or not testimony is likely to advance the knowledge of the court on matters at issue. It is a low bar. As explained by Rothstein J., in a passage cited with approval by Sopinka et al:

> In order for evidence to satisfy the standard of relevance, it must have "some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would be in the absence of that evidence"
>
> *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 4th ed (LexisNexis online) ("**Sopinka et al**"), at §2.42.

81. Relevance also pertains to statements relating to the existence of facts in the future. As Sopinka et al explain, a fact:

> will be relevant not only where it relates directly to the fact in issue, but also where it proves or renders probable the past, present or future existence (or non-existence) of any fact in issue.
>
> Sopinka et al, at §2.45.

82. This latter point is particularly important in this case, given that much of the Defendant's case in response to the harms currently being caused by the impugned provisions is founded on speculation relating to hypothetical harms to the public system that the Defendant's say would result in the absence of the restrictions.

83. Importantly, the Plaintiffs are not seeking Minister Lake's opinion as to the purpose of or intention behind the enactment of the impugned provisions (which would be irrelevant, per *Clearwater)*.

> *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 SCR 3.

84. Indeed, many cases in which a subpoena of a government officer, such as a Minister, have been quashed were because the proposed testimony related to the legislatures' *intent* in enacting or *motive* behind legislation, as in *Clearwater*, or the purpose behind the making of a particular decision being challenged.

85. In short, "(t)he Supreme Court of Canada has carefully separated analysis of legislative purpose (which may be relevant) from the motives of individual members of government (which cannot be)".

86. However, the Plaintiffs are not seeking any evidence from Minister Lake with respect to the Government's or Legislatures purposes, motives, or intentions in enacting the *MPA* or in making a statutory decision.

87. Rather, the Plaintiffs seek facts and admissions from Minister Lake which directly pertain to the issues in this constitutional challenge: namely, the current and ongoing *effects* of the legislation on BC residents, as well as the causes of those effects, in order to better understand the current scope of the harm suffered by BC patients, and whether the harms currently caused to patients prevented from accessing timely treatment will plausibly be minimized in the future.

88. The Minister is the highest ranked health official in the Government. It is clear that, in a constitutional challenge of this nature and particularly in light of the broad nature of the Defendant's pleadings, the Minister of Health has or is likely to have knowledge of relevant and material facts relating to this proceeding.

89. The Minister can be expected to be well-informed on the overall performance of the system, the viability of a private care option, and the cost pressures the system faces.

90. In fact, the Minister should be among the most well-informed, if not *the* most well-informed, person in the government on many of the matters at issue in this litigation, particularly at a systemic level.

91. As detailed above, the Minister has repeatedly discussed his knowledge of these matters in his own public statements, including, amongst other matters central to this constitutional challenge, statements relating to:

- funding challenges and arrangements;
- mounting cost pressures;
- long and "unacceptable" wait times;
- delays in seeking treatment the public system;
- the availability of operating room time;
- physician integrity;
- human resource allocation and physician availability;
- the availability, performance and quality of private care facilities;
- Canada's performance against systems which do not prohibit private care.

92. In light of these and other statements, and his position as the Government's top health official, Minister Lake is likely to have relevant and material evidence on many of the factual matters at issue in these proceedings.

93. Moreover, based on his public statements, Minister Lake likely has evidence that directly contradicts the position his government is attempting to take in these proceedings.

94. He is the only person who can explain why the Government's chief representative in health care matters is publicly stating facts that are contrary to the position of the Government in this litigation, and to explain the evidentiary basis for his contrary view of the facts at issue in this case.

95. There is no question that if a high ranking officer in a corporation had publicly stated facts which directly contradict a corporation's position in litigation, that person could and would be compelled to testify about those factual statements, and the officer's knowledge with respect to the matters at issue.

96. It should be no different for Minister Lake, who is, in effect, the CEO of the Ministry of Health.

97. The Plaintiffs are therefore entitled to subpoena Minister Lake on the basis that he is likely to have evidence relevant to these proceedings.

98. It should be added that permitting Minister Lake to testify may further the purposes of the *Rules* in a speedy and inexpensive proceeding, by potentially eliminating or lessening the need to call further evidence on points in issue. This is so for two reasons.

99. First, the Minister is likely to have the type of compendious, system-level knowledge about the overall functioning of the health care system in the province, and the challenges faced by the Defendant, that could only be gathered by calling many other individual agents of the Defendant who only have knowledge of discrete parts of the system.

100. Second, among the primary reasons to seek admissions from a party or its representative is to eliminate the need to call evidence on the factual points in issue.

101. If Minister Lake admits in his testimony – as he has in public – many of the factual points at issue in these proceedings, speaking as a representative of the Defendant and the top health officer in the province, that will be very strong evidence against the Defendant's positions.

102. Minister Lake's testimony may therefore eliminated the need to call other evidence on some key points at issue between the parties. No other official in the Ministry of Health is in a position to give the same evidence with the same authority.

b. Entitlement to Compel the Testimony of a Party for the Purposes of Admissions

103. In addition to the fact that Minister Lake is likely to have a considerable amount of evidence relevant to these proceedings, the testimony of Minister Lake is necessary for another reason: in order to establish the admissibility and weight of the statements and admissions of Minister Lake listed above.

104. In his capacity as Minister of Health, the Minister has made numerous statements of fact in various public settings that constitute admissions on behalf of the Defendant relating to matters central to this litigation.

105. In some cases these statements undermine, and in other cases directly contradict, statements of fact (or denials of fact) found in the Defendant's pleadings.

106. Where a party or its agents makes an admission out of court, those are admissible against that party as *prima facie* evidence of the facts contained in those statements.

107. The party admissions or party statements rule was explained by Sopinka J. as follows:

> The practical effect of this doctrinal distinction is that in lieu of seeking independent circumstantial guarantees of trustworthiness, it is sufficient that the evidence is tendered against a party. Its admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements. As stated by Morgan, '[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of oath' (Morgan, 'Basic Problems of Evidence' (1963), pp. 265-66, quoted in McCormick on Evidence, supra at p. 140). The rule is the same for both criminal and civil cases subject to the special rules governing confessions which apply in criminal cases.

R. v. Evans, [1993] 3 SCR 653 ("***R. v. Evans***") at 664.

108. In the case of a government or corporate entity, the general party admissions rule necessarily applies to statements made by the agents or employees of the entity in the course of their duties:

> If the statement had been made by the principal himself, it would have met the classic requirements of an admission against interest and would have been treated as an exception to the hearsay rule. Because the defendant corporation can act and speak only through its agents, it should bear the burden of an admission which relates to its agent's duties. [emphasis added]

Morrison-Knudson Co. v. British Columbia Hydro and Power Authority, [1973] B.C.J. No. 472 at para 8.

109. This is sometimes called a 'vicarious' party statement, and stems from Laskin JA's dissenting judgment in *R. v. Strand Electric Ltd*, which has been widely adopted.

R. v. Strand Electric Ltd, [1969] 1 O.R. 190, [1968] O.J. No. 1291 (Ont. C.A.);

Fontaine v. Canada (Attorney General), 2015 BCSC 1597 ("***Fontaine***") at paras 33-40.

110. The scope of this rule is explained by Sopinka et al as follows:

§6.459 Justice MacKay, quoting from *Cross on Evidence*, suggests that the agent must have been authorized to engage in the conversation in which the admission was made for such to be admissible as evidence against his or her principal. This test is too narrow and Laskin J.A.'s opinion is preferred. So long as the statements were made by the agent within the scope of his or her authority, it should be irrelevant whether or not he or she had the express authorization to make the statement on behalf of his or her employer. Justification for extending admissibility to such statements can be found in the words of one noted American commentator:

> Typically, the agent is well informed about acts in the course of the business, the statements are offered against the employer's interest, and while the employment continues, the employee is not likely to make the statements unless they are true. Moreover, if admissions are viewed as arising from the adversary system, responsibility for statements of one's employee is consistent with that theory. Accordingly, even before the adoption of the Federal Rules, the predominant view was to admit a statement by an agent if it concerned a matter within the scope of the declarant's employment and was made before that relationship was terminated.

§6.460 This wider test has been accepted by a British Columbia court in *Morrison-Knudsen Co. v. B.C. Hydro & Power Authority* in the context of a statement made by an agent to his principal. There had been a divergence of authority as to whether an agent's statement, made within the scope of his authority, but made only to the principal himself, was admissible against the principal as an admission. Justice Macdonald reviewed the authorities, including the Canadian decisions, and came to the conclusion that, in this country, a statement made by an agent to his principal is admissible against the principal as an admission so long as it was made within the scope of the agent's authority. In determining what the limits of an agent's authority are, Macdonald J. adopted the reasoning of an American court, holding that the question of admissibility in all cases turns on whether the declaration falls within the ambit of the subject matter of the agent's employment. He quoted from the American decision as follows:

> The test of admissibility should not rest on whether the principal gave the agent authority to make declarations. No sensible employer would authorize his employee to make damaging statements. The right to speak on a given topic must arise out the nature of the employee's duties. The errand boy should not be able to bind the corporation with a statement about the issuance of treasury stock, but a truck driver should be able to bind his employer with an admission regarding his careless driving. Similarly, an usher should be able to commit his employer with an observation about a slippery spot on the lobby floor.

> It is enough to show the existence of the employment and the general nature of the employee's work … [emphasis added]

Sopinka et al at §6.459-60, citing *Morrison-Knudson Co. v. British Columbia Hydro and Power Authority*, [1973] B.C.J. No. 472;

111. Although the Ministry of Health was removed as a named party in these proceedings, the order permitting that withdrawal states that the Defendant "will, for all purposes, stand in place of… the Minister in the proceedings".

112. The Ministry is a division of the Provincial Crown which, as a party to these proceedings, can only act through its agents:

> **[5]** In *Granitile Inc. v. Canada* [1998] O.J. No. 5028 (O.C.J.), Malloy, J. was asked to permit the plaintiff to call a former federal cabinet minister as its witness, and cross-examine him. The court ruled this could be done. Malloy, J. was concerned with whether a cabinet minister could be within the words "officer ... of an adverse party". The decision does not touch upon the issue of past officers. Apparently, it was not argued that the rule concerns only present officers. Where a government is a party, I have little difficulty with the proposition that a cabinet minister of that government is an "officer ... of an adverse party", or, in the language of our rule, "an officer ... of a public or private body corporate ... that is an adverse party". The Crown is a corporation sole. It acts through agents; in the executive branch, **primarily the Crown's ministers** and, secondarily, the deputies and those under the deputies to the extent of their authorities. These are referred to in statute, such as the *Proceedings Against the Crown Act*, R.S.N.S. 1989, c. 360, s. 2(c), as officers of the Crown. Within their authorities, they discharge offices under the Crown. In common usage, they are referred to as public officials, which denotes office, and is indistinguishable from "public officer".

Founders Square Ltd. v. Nova Scotia (Attorney General), [1999] N.S.J. No. 177.

113. Similarly, as explained in *Ault v. Canada*, in the context of admissions by agents of the government:

> [27] Out-of-court statements made by a party to the proceedings have been regarded as admissible at the instance of an opposing party as an exception to the hearsay rule. An admission may consist of a written statement made directly by or on behalf of a party and tendered as evidence at trial by the opposing party. "Statements made by a representative of a party in his or her capacity as such may be binding as admissions against the party." This is of particular relevance in this case where the Crown is a party and the documents in question were authored by agents or employees of the Crown. For the admissibility of an agent's statements against his or her employer, there must be proof of the agency or employment and proof that the admission of the agent to a third party was made within the scope of his or her authority during the subsistence of the agency or employment relationship. Justification for requiring only these two elements for admissibility of

a statement by an agent as an admission against the principal, rather than requiring the additional element of the actual statement having been authorized by the principal, has been explained as follows:

> The agent is well informed about acts in the course of the business, his statements offered against the employer are against the employer's interest, and while the employment continues, the employee is not likely to make the statements unless they are true. Moreover, if the admissibility of admissions is viewed as arising from the adversary system, responsibility for statements of one's employee is a consistent aspect. Accordingly, the predominant view now favours broader admissibility of admissions by agents if the statement concerned a matter within the scope of the declarant's employment and was made before that relationship was terminated.

Ault v. Canada (Attorney General), [2007] O.J. No. 4924, citing

Sopinka, John, Lederman, Sidney N., Bryant, Alan W. *The Law of Evidence in Canada* 2nd ed. (Butterworths: Toronto, 1999) at para. 6.323 and

Strong, John William (ed.) *McCormick on Evidence* 4th ed. (St. Paul: West Publishing, 1992) at 158; *The Law of Evidence in Canada*, at para. 6.326; *Caron v. Allport*, [1995] O.J. No. 4220 (Gen. Div.) at paras. 22-23.

114. Thus, as with an agent of a corporation, the admissions of agents of the government – including, and indeed especially, the Minister – are treated as party admissions as against the Defendant, which can be admitted for the truth of their contents.

115. In addition, the Plaintiffs anticipate that once they receive proper disclosure of Minister Lake's emails and other communications, there will be other important admissions or statements of fact that the Plaintiffs will rely upon in these proceedings.

116. However, in order to be of value to the Court as party statements or statements against interests, the fact that the statements were made, and the circumstances in which they were made, must be confirmed.

117. While the Minister's Statements made in Hansard are admissible on the basis of judicial notice, some of the Minister's Statements were made in the media, in the context of interviews, or are paraphrased from media reports.

118. The Plaintiffs have attempted, in the past, to get the Defendant to admit that Minister Lake made certain of these statements, which would then be admissible evidence against the Defendant.

119. For instance, the Plaintiffs sent a Notice to Admit to the Defendant, which included the following:

> TAKE NOTICE that the Plaintiffs request the Defendants to admit, for the purpose of this proceeding only, the facts set out below. (…)
>
> 2. On Friday, January 15th, 2016, the Honourable Terry Clark, Minister of Health of British Columbia, participated in an interview with the Ottawa Citizen newspaper in his capacity as the Minster of Health.
>
> 3. At the January 15th, 2016 interview, Minister Lake publicly stated that "[M]edicare isn't performing as well as health systems in places such Europe, Australia and New Zealand" or words to this effect.

120. The Defendant has refused to respond seriously to these attempts to obtain these admissions. Instead, the Defendant used evasive language in order to avoid answering the Notice to Admit, as follows:

> "The Defendant admits that Minister Lake was quoted in an article published on or about 15 January 2016 in the Ottawa Citizen as having said words similar to those quoted in this request, but denies that that fact is relevant to the issues raised by the pleadings in this litigation".

121. Obviously, Minister Lake was *quoted* as saying words similar to those quoted. That was obvious on the face of the media report and not the admission sought.

122. As a result of the Defendant's refusal to admit that Minister Lake made these statements in his capacity as an agent for the Defendant, it is necessary to call Minister Lake to testify, if for no other reason than to establish that he made these statements in the scope of his employment, which can be used as *prima facie* evidence against the Defendant with respect to those matters.

123. In addition, the weight to be given to a party admission of this nature is a function of the circumstances in which a statement was made, and the basis upon which an agent of a party made the statements in question.

124. For instance, if a statement was made out of anger, or with little thought, or without any knowledge of the matters at hand, it will be attributed less weight. However, if the statements were well-considered and well-informed, they will be attributed more weight.

Gerling Global General Insurance Co. v. Canadian Occidental Petroleum Ltd., 1998 ABQB 714, citing e.g. *Caviglia v. Tenoria* ((1992), 71 B.C.L.R. (2d) 254 (B.C.S.C.), and *Theriault v. Patrick* [1995] B.C.J. No. 681 (B.C.S.C.)),

125. The Plaintiffs therefore need to call Minister Lake, at the very least, to testify as to whether he said the things in the media reports, as well as the circumstances in which those statements were made, and the factual basis upon which Minister Lake relied in making those statements.

126. It is not possible to establish these points without the testimony of Minister Lake, who would be able to explain the circumstances under which he made statements that appear, on their face, to be in direct contradiction to certain of the Defendant's pleadings of fact.

127. This circumstance evokes the following statement of the Supreme Court, in finding that Crown privilege need not be absolute in order to maintain the "candour" of internal discussions:

> [48] The same approach was adopted in later cases of which I mention only a few. In the Glasgow Corporation case, supra, at p. 20, Lord Radcliffe made the same point more colourfully by saying he would have supposed Crown servants were "made of sterner stuff". From my experience, he would not be disappointed. And I suspect Cabinet Ministers would be incensed at the suggestion that their officials were made of sterner stuff than themselves. In 1973, Lord Salmon in *Rogers v. Home Secretary*, [1973] A.C. 388 (H.L.), at p. 413, described the candour argument as "the old fallacy". More recently in *Burmah Oil Co. v. Bank of England*, supra, at p. 724, Lord Keith of Kinkel characterized the argument as "grotesque". [emphasis added]

Carey v. Ontario, [1986] 2 S.C.R. 637, [1986] S.C.J. No. 74.

C. Parliamentary Privilege

128. Finally, the Defendant says that Minister Lake cannot be compelled to testify because the Legislative Assembly is currently in session.

129. This concern can be easily eliminated by scheduling Minister Lake at another time during the trial.

130. If Minister of Lake is properly compellable, as the Plaintiffs assert that he is, this cannot be avoided merely based on the scheduling of the Legislative Assembly, which is entirely within the Government's control.

131. That would make the adjudicative process, and the entitlement to "every person's evidence", subject to the arbitrary scheduling of the Legislature.

R. v. National Post, 2010 SCC 16 at para 1.

132. The Rules expressly state that in the context of an application to quash a subpoena, "the court may make any order, as to postponement of the trial or otherwise, it considers will further the object of these Supreme Court Civil Rules."

133. Therefore, if it is necessary, the court can simply postpone the execution of the subpoena, or it amend the date of testimony to a date when the Legislative Assembly is not sitting.

Carroll (Re), 2010 NLCA 53 at para 78.

134. None of that constitutes a bar to Minister Lake's testimony. The only real question in this application, then, is whether he is likely to provide relevant evidence. For the reasons already stated, he is.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: February 6, 2017

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