IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cambie Surgeries Corporation v. British Columbia (Attorney General),* 2018 BCSC 2084

Date: 20181123
Docket: S090663
Registry: Vancouver

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

Defendant

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*

Before the Honourable Madam Justice Winteringham

Reasons for Judgment

Counsel for Plaintiffs:	P. A. Gall, Q.C. S. Gyawali J. Sebastiampillai
Counsel for Defendants:	J. Penner J. Hughes
Place and Date of Hearing:	Vancouver, B.C. September 24-26, 2018
Supplemental Submissions:	Dated October 1, 2018
Place and Date of Judgment:	Vancouver, B.C. November 23, 2018

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I. OVERVIEW

[1] Canada's health care system is founded on the belief that there should be universal coverage for medically necessary health care services on the basis of need and not the ability to pay. Those responsible for administering the health care system in B.C. aim to achieve this foundational belief. It is not the role of the Court to determine the complexities and the many issues that arise in administering health care policy. That role belongs to elected officials and delegates. However, when laws are implemented in the name of health care policy, the courts do have a role to play, namely in deciding whether such laws are constitutionally compliant. In this case, the B.C. government implemented laws that operate to prohibit private-pay medically necessary health services. The issue before the trial judge is whether those prohibitions are compliant with *Charter*-protected rights.

[2] This is an application for an interim and/or interlocutory injunction restraining the B.C. government from enforcing legislation that prohibits private-pay medically necessary health services. The Plaintiffs have brought this application in the middle of a trial that has been underway since September 2016 – the lawsuit having been commenced almost ten years ago. In the trial, the Plaintiffs challenge the constitutionality of ss. 14, 17, 18 and 45 (collectively, the "impugned provisions") of the *Medicare Protection Act*, R.S.B.C. 1996, c. 286 ("*MPA*"). The constitutional challenge raises issues of whether wait times for medically necessary health care, said to be connected to the impugned provisions, violate ss. 7 and 15 of the *Charter of Rights and Freedoms* (the "*Charter*"). For the purposes of this application, the parties focus their submissions on s. 7 of the *Charter* as will I.

[3] Put simply, the Plaintiffs submit that the impugned provisions limit access to private health care by prohibiting the extra-billing of certain private-pay health services. This prohibition is said to impact the wait times for health care in the province. The Plaintiffs plead the s. 7 infringement in this way: In circumstances where the public health care system cannot provide reasonable health care within a reasonable time, and patients are precluded from choosing to obtain health care privately, ss. 14, 17, 18 and 45 of the *MPA,* on their own and taken together,

constitute a deprivation of the rights to life and security of the person guaranteed by s. 7 of the *Charter*. This deprivation of life and security of the person is not in accordance with the principles of fundamental justice because, the Plaintiffs contend, the impugned provisions are arbitrary, overly broad and grossly disproportionate. In short, the constitutional issue is whether it is a violation of s. 7 (and/or s. 15) of the *Charter* to prohibit private-pay medically necessary health services when the result is to subject British Columbians to long delays with the risk of physical and psychological harm.

[4] In April 2018, the B.C. government proclaimed into force significant financial penalties for those who violate the impugned provisions. It is this proclamation into force that gives rise to the application for injunctive relief. The Plaintiffs seek to stay or suspend enforcement of the impugned provisions pending the trial judge's ruling on the constitutionality of the prohibitions.

[5] The parties are deeply immersed in a lengthy and complicated constitutional trial. Many of the positions taken during this application reflect this. In these reasons, I have attempted to address the multiplicity of issues relevant solely to the determination of the issue before me. In so doing, I have tried not to wade into the nuances of the evidentiary record built before the trial judge. In the reasons that follow, I have addressed the following: (1) the background relating to the impugned provisions, this litigation and the impact of the legislative amendments; (2) the evidentiary record and objections to it; (3) the principles enunciated in *Chaoulli v. Quebec (Attorney General),* 2005 SCC 35 ("*Chaoulli*"); (4) the legal test for interim and/or interlocutory injunctive relief in constitutional cases; and (5) an analysis of the legal issues on the application before me.

II. NOTICE OF APPLICATION

[6] On April 4, 2018, the province proclaimed into force, effective October 1, 2018, provisions of the *MPA* including new financial penalties for contraventions of the *MPA* ("*MPA* Amendments")[1]. On July 6, 2018, the Plaintiffs filed their Notice of

[1] In these reasons, "MPA Amendments" refers to the new financial penalties as set out in s. 46 of the *MPA*.

Application for interim and/or interlocutory injunctive relief ("Injunction Application") pending a determination of the constitutionality of the impugned provisions of the *MPA*. On the Injunction Application, the Plaintiffs seek the following orders:

a) A stay or suspension of the operation of Order-in-Council No. 468 of 2018 (September 7, 2018), and/or B.C. Reg. 178/2018, to the extent that it brings into force the following provisions of the *Medicare Protection Amendment Act*, 2003, SBC 2003, c. 95: s. 1, s. 2, s. 4 as it relates to section 17(1.2) of the *Medicare Protection Act*, s. 8, and s. 12, pending a final determination of the constitutional issues raised in the action;

b) In the alternative, a stay or suspension of the coming into force of sections 1, 2, 4 (as it relates to section 17(1.2) of the *Medicare Protection Act*), 8 and 12 of the *Medicare Protection Amendment Act*, 2003, SBC 2003, c. 95, pending a final determination of the constitutional issues raised in the action; and,

c) In the further alternative, an order enjoining the enforcement of sections 17, 18 and 45 of the *Medicare Protection Act* pending a final determination of the constitutional issues raised in the action.

[7] In support of the Injunction Application, the Plaintiffs filed numerous affidavits, extensive trial transcript excerpts, and trial exhibits (including affidavits, expert reports, agreed statements of fact, documents from the common book of documents and substantial wait time data). Needless to say, the record is vast. The Attorney General of British Columbia (the "AGBC") objects to almost all of it.

[8] I will deal with the AGBC's objections below.

III. POSITION OF THE PARTIES

[9] The parties agree that the Court is to determine the Injunction Application on the basis of the test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 ("*RJR-MacDonald*"), at 348-49, which requires the applicants to prove: (1) there is a serious question to be tried; (2) the applicants will suffer

irreparable harm should the injunction be denied; and (3) the balance of convenience weighs in their favour, taking into account an appropriate consideration of the public interest.

[10] The Plaintiffs take the position that the only real issue to be determined on the Injunction Application is the third branch of *RJR-MacDonald*. The Plaintiffs submit that the jurisprudence does not require an exhaustive analysis on the first two branches of the test. The Plaintiffs further submit that the first two branches, serious question to be tried and irreparable harm, are easily met in this case.

[11] The AGBC fundamentally disagrees with the Plaintiffs' position that this Injunction Application can be determined solely on the final inquiry into the balance of convenience. Rather, the AGBC submits that the Plaintiffs have failed to satisfy any of the three branches. In addition to the evidentiary challenges, the AGBC raises a multiplicity of substantive issues under the *RJR-MacDonald* test. As best as I am able in the time available to me, I attempt to address the issues raised by the AGBC which I summarize here:

a) With respect to the first branch of *RJR-MacDonald*, the AGBC submits that the Plaintiffs cannot meet the low burden because there is no serious question to be tried on the pleadings to entitle them to relief in respect of the *MPA* Amendments. The AGBC says that the Plaintiffs have not challenged any of the enforcement provisions of the *MPA* and that they failed in their attempt to amend the pleadings to include such a challenge. In the result, the AGBC submits "there is no relief sought on the pleadings in the underlying action that would entitle the plaintiffs to the relief sought on this injunction application" and there is no legal authority permitting injunctive relief to be granted suspending or staying the coming into force of validly enacted legislation in such circumstances. The AGBC has characterized this application as a collateral attack on the trial judge's reasons dismissing the Plaintiffs' application to amend the pleadings.

b) With respect to the second branch of *RJR-MacDonald*, the AGBC submits that the Plaintiffs have not adduced clear evidence to show how "the irreparable harm will occur to them and [establish] a high probability that, without the injunctive relief sought, the alleged harm to one or more of the Plaintiffs will occur imminently or in the near future." The AGBC advances three points with this submission:

i. The AGBC says the "underlying claim is not pleaded as a systemic claim that puts in issue the s. 7 rights of anyone other than the patient plaintiffs."

ii. The AGBC says that the Plaintiffs have not been granted public interest standing and, as such, cannot "rely on allegations of irreparable harm to unidentified non-parties in order to meet the test for injunctive relief."

iii. The AGBC says that the Plaintiffs have failed to prove any harm is imminent (required for a *quia timet* injunction) because (1) the increased penalties will only be imposed after a lengthy process culminating in conviction and imposition of a penalty; (2) the Plaintiffs could cease extra-billing and comply with the *MPA* thereby avoiding any harm to physicians or clinics; and (3) if the Plaintiffs are permitted to rely on generalized assertions of harm, they have failed to prove, by way of expert evidence, that waiting for medical procedures causes harm.

c) With respect to the third branch of *RJR-MacDonald*, the AGBC submits that this is not one of those clear cases where the Court should enjoin the enforcement of duly enacted legislation. The AGBC submits that the *MPA* Amendments are enacted for the public good and the Court should not summarily decide that those provisions violate constitutionally protected rights. Under this branch, the AGBC responds to factors raised by the Plaintiffs and which the Plaintiffs say tilt the balance in their favour. The AGBC disputes the Plaintiffs' position on the following eight factors:

i. the Plaintiffs seek suspension (not an exemption) of validly enacted legislation; however, this is not one of those exceptional or rare cases where suspension should be granted;

ii. in consideration of what remains of the presumption of constitutionality, the Plaintiffs bear the onus of establishing that the *MPA* Amendments are unconstitutional and the Court should be reluctant to decide that issue on an interlocutory application;

iii. this is not a clear case of unconstitutionality because the *Charter* claim, if it applies to the operation of the health care system at all, requires many "hurdles for [the Plaintiffs] to clear" to prove a violation of s. 7 (and/or s. 15);

iv. the status quo argument advanced by the Plaintiffs (that violations of extra-billing prohibitions in the *MPA* is the "status quo" and has been "accepted" by the government) is flawed;

v. the Plaintiffs rely on case authority that does not assist their position;

vi. the Plaintiffs seek an equitable remedy in circumstances where they are asking the Court to countenance ongoing unlawful activity;

vii. although not required to do so, the AGBC has adduced evidence of actual harm (loss of $15.9 million of health care funding) should the injunction be granted; and

viii. related to the status quo factor, the AGBC says that any delay in implementing the *MPA* Amendments by the B.C. government should not weigh in the Plaintiffs' favour.

IV. BACKGROUND CIRCUMSTANCES RELEVANT TO INTERLOCUTORY INJUNCTIVE RELIEF

A. The parties

[12] The Plaintiffs consist of two corporations, Cambie Surgeries Corporation ("Cambie") and Specialist Referral Clinic ("SRC"), and four individuals. The defendant is the AGBC. There are three interveners. Canada is a party to the underlying action pursuant to s. 3 of the *Constitutional Question Act,* R.S.B.C. 1996, c. 68. Neither Canada nor the interveners participated in the Injunction Application.

[13] The Plaintiffs assert public interest standing by virtue of *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission),* 2016 BCSC 1292, where Justice Steeves wrote, at para. 59:

> It is not necessary to decide whether the Corporate Plaintiffs have public interest standing. However, based on the three part test developed by the Supreme Court of Canada *(Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para. 37) I would conclude that the Corporate Plaintiffs have raised a serious justiciable issue by challenging certain provisions of the *MPA*, they have a real stake in this litigation by virtue of the counterclaim by the defendants (among other reasons), and the participation of the Corporate Plaintiffs is a reasonable and effective way to bring the issues before the court. I note that a purposive and flexible approach is required and the three factors should be seen as interrelated considerations rather than a checklist or technical requirements (at para. 36).

[14] See also *Cambie Surgeries Corp. v. British Columbia* (*Attorney General*), 2018 BCSC 1141 *[Ruling re Amendment of Claim]* where Steeves J. again addressed public interest standing and stated, at para. 60:

> However, in my view, there remains a need for some party to have an interest in the subject matter of the litigation, in this case diagnostic services. As above, the current corporate plaintiffs operate surgical clinics and they use other facilities for diagnostic services (even public facilities). It is true that the corporate plaintiffs were previously granted public interest standing after being granted private interest standing (2016 BCSC 1292). However, the focus of the litigation at that time was surgical procedures….

[15] I will address the public interest standing issue below.

B. The proceedings

[16] The history of this litigation is long. I attempt to summarize it here. I start with the history of the action set out by Associate Chief Justice Cullen (as he then was) in *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission),* 2015 BCSC 2169 *[Ruling re Stay of Enforcement Provisions]* at paras. 14–27:

> 14. This action has a lengthy history, some of which is relevant to the present applications. Cambie has been in operation since 1996 and SRC since 2002. By their own admission, they have been in contravention of s. 17(1)(b) and s. 18(e) of the *MPA* since their inception by charging a facility fee for surgical treatments which are a benefit under the *MPA*.
>
> 15. The plaintiffs assert that the defendants have been aware of the clinic's ongoing violations of the provisions of the *MPA* for quite some time
>
> 16. In May 2007, the Commission Chair wrote to the clinics to identify concerns regarding extra billing. In September 2008, the Commission informed the clinics that it intended to conduct an audit of their records. On December 4, 2008, a group of citizens filed a petition to compel the Commission to enforce the provisions of the *MPA*. On January 29, 2009, the clinics filed a statement of claim to commence this action, which challenges the constitutionality of the impugned provisions ("the Constitutional Action"). On February 20, 2009, the Commission filed a response to the statement of claim and a counterclaim seeking, among other things, a warrant authorizing an inspection of Cambie and SRC's records and interim and permanent injunctions restraining the clinics from contravening the *MPA*.
>
> 17. On November 20, 2009, Madam Justice Smith ruled that the constitutional issues raised by the plaintiffs' statement of claim should be determined before the petition filed by the citizens proceeded; see *Schooff v. Medical Services Commission*, 2009 BCSC 1596 [*Schooff*]. She stayed the petition and declined to grant the requested warrant but issued an injunction permitting the Commission to enter the clinics' premises to inspect its documents and conduct an audit. In granting that remedy, Madam Justice Smith relied on the court's inherent jurisdiction.
>
> 18. On October 20, 2010, the British Columbia Court of Appeal set aside the injunction issued by Justice Smith; see *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396 [*Cambie Surgeries* BCCA].
>
> 19. By June of 2012, without the need to apply for a warrant and with the cooperation of the clinics, the Commission concluded its audit of the clinics. Issues with extra billing and overlapping billing were identified. In July of 2012, the Commission notified the clinics of its intention to conduct an audit of selected physicians who provided services through the clinics ("the Selected Physicians") with a focus on overlapping billing. These audits are referred to as "the Targeted Audits."
>
> 20. On September 6, 2012, the defendants brought an injunction application to enjoin the clinics from providing services in breach of the *MPA* while the Constitutional Action was being heard. In January 2013, during a

> case management conference, the defendants agreed to adjourn the injunction application with the encouragement of the case management judge, Chief Justice Bauman.
>
> 21. By June 2013, some of the Selected Physicians had responded to the Commission's requests for information in the Targeted Audits and had advised the Commission that any further information or documents concerning payments to them would have to be obtained from the clinics.
>
> 22. On June 17, 2013, Dr. Brian Day, the President of the clinics, attended an examination for discovery. Stephen Abercrombie, who is an Audit Manager with the Audit and Investigations Branch of the Ministry of Health and one of the authors of the June 2012 "Specialist Referral Clinic (Vancouver) Inc. and Cambie Surgeries Corporation Audit Report" produced as part of the enforcement process against the clinics, was in attendance.
>
> 23. In November 2013, the clinics requested that the Commission suspend the Targeted Audits. In December 2013, the majority of the Selected Physicians indicated to the Commission that it would need to contact the clinics for further documentation to complete its audit of them.
>
> 24. In the context of the litigation, as opposed to the enforcement process, in April 2015 the Commission prepared an application to compel the clinics to produce a variety of documents regarding the clinics alleged double billing. That application was set down for June 29 and 30, 2015, but did not proceed. In June 2015, the clinics made admissions in the Constitutional Action in relation to double billing, admitting that they were in contravention of the *MPA*.
>
> 25. It does not appear that anything further was done with respect to the Targeted Audits between December 2013 and March 2015…
>
> 26. What ensued thereafter was that the Commission provided to Cambie a notice of its intention to search the clinic. On August 21, 2015, the clinics requested that the audit be deferred until after the Constitutional Action. On September 8, 2015, the Commission repeated its demand for access. On September 10, the clinics indicated they would apply to the case management judge for directions. On September 16, the Commission repeated its intention to seek a warrant. On September 18, the Commission filed a warrant application and on September 21, the warrant was granted by the Provincial Court.
>
> 27. A further salient fact which underlies these applications relates to the adjournment of the trial of this matter and the reasons thereof. The trial was set to commence on March 2, 2015. It was adjourned at the defendants' request (with the agreement of the plaintiffs) because shortly before the trial was set to commence, the defendants discovered thousands of relevant documents in the possession of the Ministry of Health which had not been produced to defendants' counsel and not disclosed to the plaintiffs. The review and disclosure of those documents is now ongoing. Approximately 750 documents are being disclosed each week, and all the newly discovered documents will be disclosed to the plaintiffs by mid-January of 2016.

[17] In the application brought before Cullen A.C.J., the Plaintiffs sought a stay of the execution of the warrant and of the enforcement of ss. 14, 17, 18 and 45 as

those provisions applied to the Plaintiffs pending determination of the constitutional issues (para. 68). The Plaintiffs also sought an interlocutory order suspending the application of s. 36 of the *MPA* as those provisions applied to the Plaintiffs.

[18] In response, Cullen A.C.J. granted a narrow and limited order which would remain in place until the commencement of the trial. It is clear from his reasons that he was concerned about the intermingling of information and issues between the enforcement process under s. 36 and the discovery process in the Constitutional Action. At paras. 138, 140-142, he stated:

> 138. In my view, while acquiring and executing the warrant to enable the Commission to complete its audit of the Selected Physicians would not offend that precept, it is necessary to put in place an order that will inhibit the Commission from taking further future enforcement action against the plaintiff clinics on the narrow ground that its role in the litigation should not be permitted to influence, guide, or focus its enforcement role.
>
> …
>
> 140. It is important to note, however, that this conclusion is situational. It does not reflect a determination that bringing enforcement action against the clinics would bring the administration of justice into disrepute or justify a stay of proceedings absent the adjournment, the reasons for it, and the additional burden it has placed on the plaintiffs to prepare for trial.
>
> 141. The stay is intended to address the unique circumstances of this case at this juncture, not to establish that the potential for using information gained through the discovery process necessarily equates to an abuse of process or otherwise justifies a stay of proceedings. Moreover this decision should not be taken as authority that it operates as a future bar to enforcement action.
>
> 142. The Court is concerned with avoiding unnecessary impediments to this litigation, not with regulating the Commission's ability to pursue its mandate to enforce the *MPA*.

[19] The stay granted by Cullen A.C.J. was extended by Steeves J. but lapsed once the trial commenced.

C. The legislative scheme

[20] The Plaintiffs seek injunctive relief within a legislative context that was altered by the bringing into force of the *MPA* Amendments. In its Response to the Notice of Application, the AGBC provided this overview of the legislative scheme:

> 3. The *MPA* governs the provisions of payment by the MSC to physicians who are enrolled in the Medical Services Plan (MSP), in return for their provision of medically necessary services (known as "benefits") to British

> Columbia residents who are enrolled in the MSP (known as "beneficiaries"). In brief, when an enrolled physician provides a medically necessary service to a beneficiary, the physician is entitled to submit a claim to the MSP for an amount set out in a fee schedule that is negotiated among the MSC, the Ministry of Health, and the Doctors of BC (formerly the BC Medical Association).
>
> 4. The provisions of the *MPA* that the plaintiffs challenge in the underlying action are sections 14, 17, 18 and 45.
>
> 5. In summary, section 14 permits a physician who is enrolled with the MSC to "opt out" of the billing process and bill beneficiaries directly. The beneficiaries must then claim reimbursement from the MSC directly for the amount billed.
>
> 6. Section 17 prohibits the charging of beneficiaries for benefits, or for matters relating to the rendering of benefits, unless otherwise provided for in the *MPA*, in the regulations, or by the MSC (the prohibition does not apply to physicians who have not enrolled with the MSC).
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> 7. Section 18 prohibits non-enrolled physicians from charging beneficiaries more than the amount permitted by the MSC fee schedule, for services provided in hospitals or community care facilities. It also places the same limits on physicians who have opted out under s. 14, regardless of the location where they have provided their services.
>
> 8. Section 45 prohibits contracts of insurance that would cover the cost of services that are benefits when provided to beneficiaries.
>
> 9. The prohibitions on charging beneficiaries for benefits can be traced back to the *Medical Services Plan Act*, enacted in 1981. The current prohibitions originated in the *Medical and Health Care Services Act* of 1992, although there have been numerous amendments over the years.
>
> 10. The prohibition on private insurance likewise has its direct origin in the 1992 legislation, although such private insurance has effectively been non-existent since at least 1975.

[21] The relationship between the *Canada Health Act* ("*CHA*") and the *MPA* is important to an understanding of the legislative scheme. In its written submission, the AGBC provided an overview of the *CHA* and its interplay with the *MPA* as follows:

> 11. The *Canada Health Act* ("*CHA*") is federal legislation that establishes conditions which provinces and territories must fulfill in order to be entitled to full federal funding for the operation of their public health care systems (the Canada Health Transfer or "CHT").
>
> 12. In order to be entitled to full federal funding, provinces and territories are required to ensure that "extra-billing" and "user charges" are not levied by physicians or private clinics. The Regulations under the *CHA* stipulate that provinces and territories must report to Health Canada each December any instances of extra billing or user charges of which they are aware for a preceding fiscal period. The *CHA* itself then requires the federal Minister of

> Health to deduct an equivalent amount from that province's CHT in March of the following year.
>
> 13. In the 2015 fiscal year, the amount of the CHT to British Columbia was $4.446 billion, approximately one quarter of the $17.0 billion allocated to the Ministry of Health ("MoH") by the Legislature.
>
> 14. Between 2004 and 2012, the federal Minister of Health deducted amounts varying between $29,019 and $126,775 from British Columbia's CHT.
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> 15. Beginning in 2013, the deductions from British Columbia's CHT were higher because they included deductions of approximately $175,000 on account of extra billing identified through an audit by the Medical Services Commission ("MSC") of the corporate plaintiffs, Cambie and SRC.
>
> 16. By agreement dated 18 March 2017, the Province agreed with Health Canada that it would conduct further audits of private clinics over a three-year period in order to identify more accurately the extent to which extra-billing was occurring in British Columbia.
>
> 17. In March of 2018, based on the results of audits of private clinics that were carried out by the Ministry of Health pursuant to the March 2017 agreement between the Province and Health Canada, the federal Minister of Health deducted $15.9 million from the CHT.

[22] In short, the provincial and federal governments fund health care in B.C. Federal funding comes through the Canada Health Transfer (the "CHT") which calls for the AGBC to comply with certain requirements, including provisions prohibiting the extra billing of beneficiaries for medically necessary health services. To comply with the requirements of the *CHA*, the MSP was established to pay benefits for beneficiaries. Associate Chief Justice Cullen further described the billing prohibitions and enforcement provisions available under the *MPA* (prior to the amendments) in the *Ruling re Stay of Enforcement Provisions*:

> 8. Practitioners who are not enrolled cannot be paid by MSP. They may charge any fee for a service provided to a beneficiary but not if it is provided in a hospital defined under the *Hospital Act*, R.S.B.C. 1996. c. 200, or in a community care centre as defined in s. 1 of the *Community Care and Assisted Living Act*, S.B.C. 2002, c. 75.
>
> 9. To enforce the provisions of the *MPA*, the Commission has been granted a number of powers. Prior to December 2, 2006, its enforcement powers were confined to medical or healthcare practitioners. It could not take enforcement steps against clinics such as Cambie or SRC. The *MPA* was amended in December 2006 to enable the Commission to audit "anyone's billing or business practices if they are involved in the provision of benefits to beneficiaries." Section 45.1 was added to permit the Commission to obtain an injunction restraining any person from violating the extra billing prohibitions under the *MPA*.

> 10. The Commission also has the power under s. 36(2) of the *MPA* to appoint inspectors to audit:
>
> 1. claims for payment by practitioners;
>
> 2. the billing or business practices of persons who are involved in any way in the provision of benefits to beneficiaries; and
>
> 3. the billing or business practices of persons whom the Commission reasonably believes are either involved in any way in the provision of benefits to beneficiaries or have contravened one of sections 17, 18, 18.1 or 19 of the *MPA*.
>
> 11. Inspectors may enter premises and inspect records of any person whom the inspectors have authority to audit so long as they do so at a reasonable time and for reasonable purposes of the audit.
>
> 12. Under s. 36(7), a justice of the peace may issue a warrant authorizing an inspector to enter a place described in s. 36(5) to exercise the powers therein if satisfied there are records for which there are reasonable grounds to believe are relevant to the matters referred to in s. 36(5).
>
> 13. The Commission's Audit and Inspection Committee uses the Billing and Integrity Program ("BIP") for audit services to the MSP and the Commission. The BIP monitors, audits, and investigates billing patterns and practices of medical and healthcare practitioners to detect and deter incorrect billing. It also seeks recovery of inappropriately paid monies.

[23] In December of 2003, the B.C. legislature unanimously enacted the *Medicare Protection Amendment Act, 2003* which amended a number of the provisions in the *MPA*. Some of the amendments were brought into force in December 2006. It was not until April 4, 2018 that the financial penalties were brought into force, effective October 1, 2018, when the Governor in Council deposited Order-in-Council 160 of 2018. Specifically, s. 46 of the *MPA* was amended to include the following new provisions:

> 46 Offences
>
> (5.1) A person who contravenes section 17(1), 18(1) or (3), 18.1(1) or (2) or 19(1) commits an offence;
>
> (5.2) A person who is convicted of an offence under subsection (5.1) is liable to a fine of not more than $10,000, and for a second or subsequent offence to a fine of not more than $20,000.

[24] In summary, the *MPA* maintains the enforcement powers as described by Cullen A.C.J. (audits and injunctions) but now includes the financial penalties for those found to have contravened the enumerated provisions, including ss. 17(1), 18(1) or 18(3).

D. Application to amend pleadings

[25] The Plaintiffs sought to amend the Fourth Amended Notice of Civil Claim to account for the *MPA* Amendments. The AGBC agreed to some of the proposed amendments. However, the AGBC successfully opposed the Plaintiffs' application to amend its pleadings to add a constitutional challenge to s. 18.1. Relevant to the Injunction Application, the AGBC successfully opposed the Plaintiffs' application to plead facts regarding the new enforcement provisions of s. 46. On July 9, 2018, Steeves J. dismissed this aspect of the Plaintiffs' application to amend, stating at para. 45:

> 45. The result is that the proposed amendments to the plaintiffs' claim that purport to challenge the enforcement of the *MPA* under s. 46 must be struck. They are bound to fail for the simple reason that there is no legal challenge by the plaintiffs to s. 46.

[26] The AGBC says the Injunction Application seeks to circumvent the *Ruling re Amendment of Claim*. That is, the Plaintiffs seek to challenge provisions of the *MPA* that are not properly before the Court. I deal with this below.

V. EVIDENCE RELEVANT TO INJUNCTION APPLICATION

A. AGBC's objections to the record

[27] I turn to the evidentiary record and the objections to it.

[28] In response to the Injunction Application, the AGBC filed an Amended Notice of Application objecting to all of the evidence, either in whole or in part, filed by the Plaintiffs. The AGBC relied on forty-one case authorities and raised six legal bases said to support their objections, including grounds of relevance, hearsay, opinion, argument, collateral attack and evidence that is unfairly prejudicial to their defence at the ongoing trial.

[29] I am mindful of the recent comment from the Court of Appeal in *Premium Weatherstripping Inc. v. Ghassemi,* 2016 BCCA 20 holding that the procedural requirements intended to guard the remedy of interlocutory injunctions must be assiduously met:

> 7. An interlocutory injunction is well understood to be a special sort of non-final order in that, by its very nature, it restricts the freedom of the party against whom it is made, without the applicant having had to prove any allegation beyond the standard of an arguable case. An interlocutory injunction often becomes the entire remedy in an action, and can endure for a very long time unless temporal limits are placed upon it. For that reason, assiduous care in preparation of the application is the standard, including strict compliance with the requirements for all hearsay evidence that would not be permitted to be stated at trial to be on information and belief, with the source identified. There is no room in interlocutory injunction practice for relaxation of that requirement, in my view.

[30] I have spent considerable time working through the objections raised by the AGBC.

[31] I pause to note that the trial commenced in September 2016 and the parties are still in the Plaintiffs' case. As I understand it, approximately half of the time spent in court has been dedicated to resolving the same sort of evidentiary objections raised during the Injunction Application. The trial judge has delivered at least forty-five sets of reasons. Many of those decisions relate to the evidentiary issues raised here and some are cited in support of the AGBC's objections.

[32] On an application such as this and in circumstances where I am told there is considerable urgency and the evidentiary record vast, it is simply not possible to address every objection raised. There is no doubt that there are aspects of the record to which objection can properly be made. I have reviewed the material filed and I have assessed it in a way that takes into account any defects.

[33] That being said, I wish to address specifically two objections raised by the AGBC. The first objection relates to what was characterized as medical "opinion" evidence. The second objection was a broader procedural complaint regarding unfair prejudice.

1. Objection to Plaintiffs' medical "opinion" evidence

[34] Many of the AGBC's objections relate to affidavits filed by physicians in support of the Injunction Application. It is evident that the parties have spent considerable time litigating similar issues before the trial judge. In assessing the

medical evidence presented here, I have considered the history of that litigation which I set out briefly.

[35] I agree with the AGBC that expert opinion evidence is admissible on an interlocutory application but the witness providing the evidence must be properly qualified: *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation & Festival Property Ltd.*, 2009 BCSC 322 at paras. 117-128, 138-151; aff'd 2010 BCCA 539 at paras. 40-42. Further, I agree that evidence regarding the medical effects of waiting for health care could constitute expert opinion evidence and should be treated accordingly.

[36] In assessing the admissibility of the medical evidence tendered on the Injunction Application, I have relied on Justice Steeves' précis on the admissibility of medical opinion evidence in *Cambie Surgeries Corp. v. British Columbia (Attorney General)*, 2018 BCSC 514 *[Ruling re Evidence of Dr. Brian Day]* where he states:

> 35. It is well established that a witness is to testify about what he or she directly observed and not about what he or she thinks their observations mean (2016 BCSC 1390, at para. 22). To do otherwise is to give an opinion about what a particular observation might mean. The inference to be drawn from a particular observation is the trier of fact's responsibility, not the witness'. In some cases it can be the subject of expert evidence but not lay evidence.
>
> 36. The common law has recognized, in narrow circumstances, exceptions to this general rule. A witness may say in evidence that he or she thought a car was speeding or that a person appeared to be intoxicated, for example. These are exceptions because they are not considered matters where scientific, technical, or specialized evidence is necessary (sometimes described as "lay opinion evidence"): 2016 BCSC 1390, at para. 22; *Graat v. The Queen*, [1982] 2 S.C.R. 819.
>
> 37. In 2016 BCSC 1896, I found that a doctor is permitted to testify about his or her experiences with waitlists (i.e. how long they have been, how a patient gets on a waitlist, etc.) so long as these observations form a part of the everyday experience of the doctor (at para. 14). Similarly, a doctor is permitted to testify about his or her observations as to a patient's situation while waiting for a medical procedure (i.e. whether the patient is in pain or not), as this observation would be similar regardless of whether a doctor or non-doctor observed it (at para. 15).
>
> 38. However, a doctor who is not qualified by the Court as an expert, is not permitted to give opinion evidence about, for example, whether wait times are medically justified or not justified. That is an opinion and lay witnesses (such as doctors not tendered by a party as an expert) generally cannot provide opinions in their evidence.

> 39. Moreover, personal opinions about the state of the Canadian health care system is inadmissible opinion evidence. Personal opinions that go beyond lay observations or that go beyond a duly qualified expert's area of expertise are inadmissible (2016 BCSC 2161 at para. 46).
>
> 40. Opinion evidence is admissible in court where it is tendered through an expert (not a lay person). Rule 11 of the *Supreme Court Civil Rules*, BC Reg 168/2009 sets out the procedure for presenting expert evidence. Among other things, a person certified under this Rule as an expert must certify that he or she is aware of the "duty to assist the court and is not to be an advocate for any party" (Rule 11-2(1)).

[37] I have also relied on the ruling of Steeves J. regarding evidence of a doctors' observations of their patients as they await medical procedures. Justice Steeves said this in *Cambie Surgeries Corp. v. British Columbia (Attorney General),* 2016 BCSC 1896 *[Ruling re non-expert medical witnesses]*:

> 15. Another related category of evidence is also from a doctor, again not certified as an expert, who testifies about his or her observations as to a patient's situation while waiting for a medical procedure. These observations can be about a patient being in pain, having restricted movements, not being at work, being anxious and/or depressed and other matters. I conclude that these observations are also admissible. In my view the character of these observations are the same as observations that could be made by a non-doctor. The fact that the witness is a doctor is relevant inasmuch as he or she may use medical language to describe his or her observations. But I see no difference for the purposes of admissibility with a non-doctor testifying about an accident where the victim was bleeding from the leg and a doctor saying the same victim was bleeding from the carotid artery.
>
> 16. I acknowledge there is an element of opinion in this type of evidence. However, it has been the case for some time that distinctions between fact and opinion can be tenuous and even false (*Graat v. The Queen,* [1982] 2 S.C.R. 819, at p. 15 (QL)). This development in the law of evidence has been applied in cases involving, for example, non-expert telecommunication workers describing how to determine the location of a cellphone (*R. v. Hamilton*, 2014 ONCA 339, at paras. 272-9) and a police officer testifying about his observations from years of experience about the operation of street level drug trafficking (*R. v. Ballony-Reeder,* 2001 BCCA 293, at para. 12).
>
> 17. In some cases this is called the "compendium statement of fact exception" to the usual requirement for expert opinions (*Ganges Kangro Properties Ltd. v. Shepard,* 2015 BCCA 522) and in other cases it is called "lay opinion evidence", *American Creek Resources Ltd. v. Teuton Resources Corp.*, 2013 BCSC 1042, at para. 142).
>
> 18. In any case I conclude that a doctor's observations about his patient while waiting for a medical procedure or prior to being put on a waitlist, however that list is defined, are analogous to the accepted forms of this type of evidence in other cases. This includes identification of handwriting, identification of persons, identification of things; apparent age; the bodily plight or condition of a person, including illness; the emotional state of a

> person, whether distressed, angry and depressed; and other categories (*Graat*, at para. 46).
>
> 19. I also conclude that this type of evidence may be generalized to reflect the experience of a doctor over a period of time and experience with a number of patients in the same situation. Of course, at a certain point highly generalized evidence without sufficient particulars cannot be given significant weight. I have in mind here statements such as patients simply being "significantly disabled" or "in significant distress." A doctor giving this type of evidence is subject to cross-examination, including questions about specific patients, and this might include details of their treatment.
>
> …
>
> 22. Turning to a fourth and perhaps final category of evidence here, the evidence may include evidence from a doctor, again not certified as an expert, who says a patient is experiencing a specific medical condition caused by waiting for a medical procedure.
>
> 23. In my view that is an issue that is at the heart of this litigation and ultimately for me to decide. There can be evidence on that issue that would certainly assist the court, but in my view it must be evidence in the form of an expert. To be clear, evidence on that issue or similar issues from a doctor testifying without being certified as an expert is not admissible. I take examples of this from the will-say statements that include a statement that wait times have a significant impact on the health outcomes and quality of life of patients or delayed treatment has a negative impact on the overall well-being of patients. Again, these conclusions are for the court to make based on admissible evidence including observations by physicians, expert reports and evidence from patients.

[38] I reiterate that I have been guided by the evidentiary rulings of Steeves J. as I assess the affidavit evidence of several doctors including the weight, if any, to be attributed to that evidence as I work through the legal issues engaged in the Injunction Application.

2. Unfairly prejudicial to the AGBC to tender responding evidence on Injunction Application

[39] The second objection I wish to address is what the AGBC has called "unfair prejudice." The submission was put this way:

> Many of the central issues in the [trial] are put into issue by the plaintiffs for determination on the Injunction Application. Compelling the defendant to respond to the plaintiffs' trial evidence where the effect of doing so is to compel it to adduce its defence of the plaintiffs' case in the underlying trial compounds the abuse of process and procedural unfairness created by the manner in which the plaintiffs have attempted to proceed with these applications.

[40] In support of the "unfair prejudice" submission, the AGBC raises two concerns. First, they raise a concern about inconsistent findings of harm should I embark on a comprehensive review of all of the evidence on this application. Second, the AGBC says it is simply unfair that the Plaintiffs demand a substantive response on the Injunction Application because it forces the AGBC to respond to the merits of the Plaintiffs' case in the trial before the Plaintiffs' case is closed.

[41] I address each of the AGBC's concerns.

[42] First, I am not satisfied that the Plaintiffs' approach will lead to inconsistent findings of harm. It will be very clear to anyone reading these reasons that this is an interlocutory application for injunctive relief pending a determination of the constitutional issues on the merits. Nothing in these reasons for interlocutory relief should be construed as deciding the merits of the claim or the issues to be determined by the trial judge. That I, as a motion judge, have a limited role was made clear by Justice Beetz in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.,* [1987] 1 S.C.R. 110 ("*Metropolitan Stores"*):

> 40. The limited role of a court at the interlocutory stage was well described by Lord Diplock in the *American Cyanamid* case, *supra*, at p. 510:
>
> > It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.
>
> 41. The *American Cyanamid* case was a complicated civil case but Lord Diplock's *dictum*, just quoted, should *a fortiori* be followed for several reasons in a *Charter* case and in other constitutional cases when the validity of a law is challenged.
>
> 42. First, the extent and exact meaning of the rights guaranteed by the *Charter* are often far from clear and the interlocutory procedure rarely enables a motion judge to ascertain these crucial questions…
>
> 43. Still, in *Charter* cases such as those which may arise under s. 23 relating to Minority Language Educational rights, the factual situation as well as the law may be so uncertain at the interlocutory stage as to prevent the court from forming even a tentative opinion on the case of the plaintiff: *Marchand v. Simcoe County Board of Education* (1984), 10 C.R.R. 169 at p. 174…

[43] Justice Beetz went on to express his view about determining the merits of a constitutional case at an interlocutory stage at para. 50:

> Most of the difficulties encountered by a trial judge at the interlocutory stage, which are raised above, apply not only in *Charter* cases but also in other constitutional challenges of a law. I therefore fully agree with what Professor R.J. Sharpe wrote in *Injunctions and Specific Performance*, at p. 177, in particular with respect to constitutional cases that "the courts have sensibly paid heed to the fact that at the interlocutory stage they cannot fully explore the merits of the plaintiff's case." At this stage, even in cases where the plaintiff has a serious question to be tried or even a *prima facie* case, the court is generally much too uncertain as to the facts and the law to be in a position to decide the merits….

[44] There is no doubt that the issues to be determined by me in the Injunction Application are not the same as the issues for the trial judge in the underlying action. These issues remain in dispute between the parties and it is important that I refrain from expressing any preliminary thoughts on the strengths or weaknesses of their respective positions except insofar as is required. This is so even though the Plaintiffs rely on much of the same evidence here as they do at trial.

[45] That said, to account for the AGBC's objections, the fact that the AGBC has yet to commence the calling of evidence and the deficiencies of some of the evidence tendered, I have relied on only a limited aspect of the evidence filed on the Injunction Application. To be clear, any findings of fact I have made are relevant only to the issues before me in determining whether the interlocutory relief should be granted and not on the merits of the constitutional claims to be determined by the trial judge. In other words, I touch on the merits only insofar as is necessary to determine whether the Plaintiffs have met their burden in obtaining injunctive relief and for no other purpose.

[46] I turn to the second point raised by the AGBC. That is, requiring the AGBC to respond fully and substantively to the evidence presented on the Injunction Application allows the Plaintiffs to split their case. As I understand this submission, the AGBC claims that any substantive response on this Injunction Application will enable the Plaintiffs to shore up their evidence. In support of its position, the AGBC relies on *R. v. Krause,* [1986] 2 S.C.R. 466 at 473 where Justice McIntyre stated:

> … The general rule is that the Crown, or in civil matters the plaintiff, will not be allowed to split its case. The Crown or the plaintiff must produce and enter in its own case all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in the pleadings; in a criminal case the indictment and any particulars: see *R. v. Bruno* (1975), 27 C.C.C. (2d) 318 (Ont. C.A.), per Mackinnon J.A., at p. 320, and for a civil case see*: Allcock Laight & Westwood Ltd. v. Patten, Bernard and Dynamic Displays Ltd*., [1967] 1 O.R. 18 (Ont. C.A.), per Schroeder J.A., at pp. 21-22. This rule prevents unfair surprise, prejudice and confusion which could result if the Crown or the plaintiff were allowed to split its case, that is, to put in part of its evidence -- as much as it deemed necessary at the outset -- then to close the case and after the defence is complete to add further evidence to bolster the position originally advanced. The underlying reason for this rule is that the defendant or the accused is entitled at the close of the Crown's case to have before it [page474] the full case for the Crown so that it is known from the outset what must be met in response.

[47] Relevant to the rule against case-splitting is the concept of fairness. In a civil trial, the litigants are bound by rules of court that dictate trial process and which aim to prevent unfair surprise. However, the situation presented here is plainly distinguishable from that which exists at trial where prejudice may well occur if a party does not put its entire case forward in chief: see Sharpe J.'s statement in *Mead Johnson Canada, a Division of Bristol-Myers Squibb Canada Inc. v. Ontario (Ministry of Health)* [1999], 85 A.C.W.S. (3d) 265 (Ont., C.J.).

[48] I do not agree with the AGBC's objection that the Injunction Application constitutes improper case-splitting. The rule against case-splitting is intended to prevent unfair surprise, prejudice and confusion if the plaintiff is permitted to hold back during the course of a trial. That is not this case. The Injunction Application was brought in the context of a civil dispute where both sides have engaged in extensive discovery. The Plaintiffs pursue the injunction because of a legislative change brought during the middle of the trial. Policy reasons for restricting case-splitting do not apply in the circumstances presented here.

[49] In summary, I dismiss the objection framed as unfair prejudice. As set out above, I have taken into account the fact that the AGBC has not opened its case and the material on the Injunction Application must be assessed accordingly. I also agree that some of the affidavit evidence tendered contravenes rules against hearsay, opinion and argument. I have cautioned myself accordingly.

B. Evidence filed in support of Injunction Application

[50] The AGBC filed limited responding material on the Injunction Application. The AGBC submitted that "the fact that [the AGBC] has not responded on the evidence to any particular assertion of fact is not indicative of any form of concession that that fact is not in dispute, or is true." The AGBC takes the position that the Court must proceed with caution in accepting the Plaintiffs' assertions that facts are not in dispute. Specifically, the AGBC disputes the Plaintiffs' evidence regarding: (1) the distinction between benchmark wait times and the point at which waiting causes clinical harm; (2) measurement of wait lists; and (3) the medical effects of waiting.

[51] Bearing in mind the AGBC's caution about disputed facts and the frailties of some of the material filed, I set out, in the paragraphs that follow, the evidence relevant to my determination of the issues raised on the Injunction Application.

[52] Dr. Day swore an affidavit on January 26, 2018 which was to constitute, for the most part, his examination-in-chief at the trial. Before he was called to testify, the AGBC objected to about half of the content of Dr. Day's affidavit. The AGBC's objections (similar to many of those raised on this application) were argued over six days before Steeves J. and resulted in the *Ruling re Evidence of Dr. Brian Day*. Dr. Day's affidavit as amended pursuant to the trial judge's ruling is filed in support of the Injunction Application.

[53] I appreciate that the AGBC, at least on this application, disputes what remains of Dr. Day's affidavit. However, in my view, Dr. Day's affidavit #9, as amended, can be considered on the Injunction Application because the AGBC has had its objections, at least in part, addressed by the trial judge.

[54] To that end, in the paragraphs that follow, I briefly set out the evidence of Dr. Day that is relevant to the Injunction Application.

[55] Dr. Day, an orthopaedic surgeon, has been the president, CEO and medical director of Cambie Surgeries since it began providing surgical services in 1996. Dr. Day has been the president and CEO of SRC since it began providing specialist assessments in 2002. He says this about Cambie and its operations:

> 53 Cambie provides a broad range of surgical procedures, including orthopedic surgery, general surgery, neurosurgery, plastic surgery, urology, gynaecology, eye surgery and children's dentistry, as well as colonoscopies and other diagnostic procedures.
>
> 54 Based on data we have filed with the BC College, I estimate that Cambie has treated approximately 3,800 patients per year on average over the past 10 years, and approximately 70,000 patients in total since it opened in 1996.

[56] Dr. Day provides some history about the health care system in B.C. and described some factors that he believes have impacted wait times for health services. Those factors include restrictions on global billing, restrictions on elective and emergency surgeries and increased specialization of surgeons. As a physician, he has observed patients waiting for surgeries and says:

> 229 I have witnessed first-hand the significant problems – medical, financial and personal – that patients suffer when their surgeries are cancelled or otherwise delayed as a result of the restrictions I have reviewed above.
>
> 230 I have personally observed my patients suffering mentally and physically while they waited for medically necessary surgeries at public hospitals.
>
> 231 Many of my patients were in pain or had reduced mobility, but were required to wait long periods without the surgeries they needed.
>
> 232 My patients have often been on strong addictive narcotic pain killers and often needed surgery to reduce pain and give them the best chance of regaining functioning without suffering harm or permanent damage.
>
> 233 In addition, some of my patients were unable to work without the necessary surgeries and therefore the longer they waited for surgery, the longer they were out of work and the greater their financial and other hardships. I observed that this caused a great deal of stress and anguish for my patients.

[57] This affidavit evidence relates to Dr. Day's observations, at an earlier time, of the impact of wait times and serves to explain the basis for establishing Cambie (and SRC). This evidence also demonstrates, to a certain extent, how it is that waiting times for medically necessary health services may engage s. 7 *Charter* rights.

C. Evidence of Wait Times in B.C.

[58] The Plaintiffs described the measurement of wait times for specified medical procedures as including three different waiting periods: (1) "wait one" constitutes the referral time from when a general practitioner refers a patient to a specialist; (2) "wait

two" constitutes the time between the specialists' requisition for treatment/surgery and the time when the procedure is completed; and (3) "wait three" constitutes the time required for diagnostic testing, if any.

[59] Wait time data for surgeries and some treatments for both wait one and two are compiled in the surgical patient registry ("SPR").

[60] The Plaintiffs rely on a description of the SPR as given by the AGBC:

> 324. The SPR is a province-wide system that tracks patients (adults and pediatric) waiting for scheduled surgery in BC. Patient information and data gathered from health Authorities operating room booking systems are entered into the registry by way of a nightly batch upload and used to evaluate and monitor surgical wait times across health authorities and specific physicians.
>
> 325. The purpose of the SPR is to provide clinically relevant, accurate and comprehensive information on patients waiting for surgery identified by surgeon, by diagnosis/clinical condition, by procedure, by priority level, by hospital, and by Health Authority. Wait time data is also collected for performed surgical cases.
>
> 326. The SPR captures adult and pediatric surgical procedures that are typically completed in an operating room or another room that requires similar equipment and human resources and are scheduled in the hospital's operating room booking system.

[61] In their written submissions and in Affidavit #13 of Dr. Day, the Plaintiffs describe the maximally acceptable wait one times and BC's performance in relation to such wait one times as follows:

> 43. The Wait One information in the SPR is provided by the specialist to the Health Authority, along with the information relating to when a decision is made by the patient and the surgeon that the patient is ready for surgery. This Wait One information has been entered into the SPR since 2014. The SPR only contains Wait One information for patients who are booked for surgery – there is no tracking of Wait One for patients who are found to require treatment other than surgery.
>
> 44. There are no national or provincial benchmarks established for adult Wait One times. However, there are maximally acceptable Wait One targets for paediatric patients which were established by the Canadian Paediatric Surgical Wait Times (CPSWT) Project, which are known as the Pediatric Canadian Access Targets for Surgery ("PCATS").
>
> 45. The Government's Wait One data from the SPR shows that adult patients are waiting a very long time for surgical consultations, with some specialties, such as orthopedics, neurosurgery, plastic surgery and vascular surgery experiencing 90th percentile wait times for consultations of 28 to 37 weeks.

> 46. The Paediatric Wait One data in the SPR shows that most paediatric surgical specialties do no meet their Wait One targets and most patients wait far longer for surgical consults than the maximum acceptable consultation wait times.

[62] The Plaintiffs describe the maximally acceptable wait two times and BC's performance in relation to such wait two times as follows:

> 48. The Wait Two data in the SPR is measured against evidence-based wait time benchmarks that have been established by groups of national or provincial experts, and which have been accepted by the BC government as indicating the maximally acceptable wait times for various conditions and surgical procedures.
>
> 49. With respect to Wait Two times, the BC Government has developed maximum acceptable wait times for adult surgical procedures, through the use of "patient priority codes", which are used by physicians to categorize patients based on their diagnoses and conditions, and the comparative urgency with which they require treatment.
>
> 50. These patient priority codes were first adopted by the Province in 2010, following consultation with surgical specialists, and were revised in 2014-2015 following an extensive review involving specialist surgeons, and Ministry of Health and Health Authority representatives.
>
> 51. According to the BC Government, the target wait times set out in the adult priority codes indicate "the time beyond which patients presenting with the particular diagnosis/condition could suffer negative consequences".
>
> 52. The current list of adult conditions and diagnoses, with their corresponding priority levels and maximum acceptable Wait Two times (in weeks), published by the Ministry of Health and the Health Authorities in late 2015.
>
> 53. The Adult Priority Codes List indicates the maximum acceptable wait times for surgery for patients experiencing particular conditions. The different priority levels and their maximum acceptable wait times are: level 1 (2 weeks maximum), level 2 (4 weeks maximum), level 3 (6 weeks maximum), level 4 (12 weeks maximum), and level 5 (26 weeks maximum).
>
> 54. The Wait Two maximum acceptable wait times do not take into account the time it took a patient to see a specialist (Wait One) or the time it took for a specialist to make a decision that a surgery is required, which includes the time it takes to obtain the necessary diagnostic testing (Wait Three).
>
> 55. The current PCATS list of paediatric conditions and diagnoses, with their corresponding maximum acceptable Wait One and Wait Two times, which were issued by the Ministry of Health in March 2016.
>
> 56. The PCATS were adopted by BC Children's Hospital in 2009, and by the BC Government in 2010, when the adult prioritization codes were first established. The PCATS were revised following further cross-Canada expert review and consultation in 2015.

> 57. The PCATS have priority levels I through VI, for both Wait One and Wait Two, with priority I being highest urgency (surgery within 24 hours) and priority VI being lowest urgency (surgery within 52 weeks).
>
> 58. The patient prioritization codes and the collection of wait time data through the SPR is further discussed in a BC Government publication, entitled the "BC Surgical Patient Registry (SPR) Communications Backgrounder", updated September 2015. ("2015 SPR Communications Backgrounder").
>
> 59. As noted above, the priority levels and maximum acceptable wait times contained in the Adult and Paediatric Priority Code Lists reflect the period beyond which a patient could suffer negative consequences, such as treatment not being successful or as successful as it would otherwise have been.
>
> 60. However, even if there are no permanent consequences from waiting for medical treatment, patients suffer ongoing pain, may need narcotics (with the risk of addiction), and may suffer other significant limitations on their daily lives, while they wait for treatment. This suffering is compounded by the length of the delay.

[63] The Plaintiffs contend that the data shows many patients are waiting in excess of the maximally acceptable wait times, as established by the Patient Prioritization Codes for adults and the PCATS for children, and that, in many cases, these wait times are worsening rather than improving.

[64] The Plaintiffs provided an overview of adult wait times for surgery. Relying on provincial figures from 2017-2018, the Plaintiffs allege that:

a) 22% of patients in need of immediate treatment for cancer of the ovary, fallopian tube, or peritoneum, are treated within the maximum acceptable wait time of two weeks, which is down from a high of 49.6% in 2013;

b) 33% of patients with confirmed or suspected lung cancer receive surgery within the maximum acceptable wait time of two weeks;

c) 16% of patients in need of immediate treatment for "Bladder Cancer With Risk of Cancer Progression" are treated within the maximum acceptable wait time, which is down from a high of 31.1 % in 2015; and

d) 37.6% of patients in need of treatment for "Prostate Cancer with High Risk of Cancer Progression" are treated within the maximum acceptable wait time, which is down from a high of 55% in 2014.

[65] A similar overview was provided for pediatric wait times. The Plaintiffs allege "for BC children, there are long and harmful waits well beyond the maximum acceptable wait times for their condition as set out in PCATS, particularly in the

specialties of orthopaedics, dental surgery, otolaryngology and ophthalmology" and provided the following statistics from 2017:

a) 26% of children with advanced dental caries (moderate/severe carious lesions and/or pain with high or moderate medical status risk) received their surgery within their maximum acceptable wait times of one week or six weeks respectively;

b) 36% of children with strabismus received surgery within the maximum acceptable wait time of six weeks;

c) 46.5% of children with otitis media with effusion – documented moderate hearing loss and speech delay received surgery within the maximum acceptable wait time of six weeks;

d) Less than 20% of children with acute meniscal injuries received surgery within their maximum acceptable wait time of one week; and

e) Nearly 20% of children with acute ACL injuries waited longer than their maximum acceptable wait time of 12 weeks.

[66] Many of the procedures for which B.C. children are waiting for surgery are performed in private surgical clinics such as Cambie. At Cambie, over 1000 children each year receive dental surgery under anesthesia, which program will have to stop when enforcement commences. These children will then be added to the B.C. Children's Hospital wait lists.

[67] The Plaintiffs also provided examples of medical conditions that exceed the maximum acceptable wait times for various related procedures. Here, I consider the submission as it relates to colonoscopies. The Plaintiffs allege that the government data shows many patients waiting beyond the maximum acceptable wait times for a colonoscopy and state "for instance, the maximum wait time for patients following a positive fecal blood test is 8 weeks, as set out in the patient priority codes. This is consistent with the evidence-based maximum wait times established by the Canadian Gastroenterologists Association, and accepted by the BC Cancer Agency." The Plaintiffs state that the SPR data for patients receiving a colonoscopy

following a positive fecal occult blood test outside of the BC Cancer Agency screening program shows that:

a) 27.7% of BC patients received their colonoscopy following a positive FIT test received their colonoscopy within the 8 week maximum acceptable wait time in 2017, down to 21.1% of patients so far in 2018;

b) About 60% of patients with bright red rectal bleeding or chronic unexplained abdominal pain received a colonoscopy within the maximum acceptable wait time of eight weeks;

c) 50% of BC patients with a positive FIT test waited more than 15.4 weeks in 2017 (said to be about twice as long as the maximum acceptable wait time), and more than 27 weeks so far in 2018 (said to be over three times as long as the maximum acceptable wait); and

d) 10% of BC patients with a positive FIT test waited over 28 weeks in 2017 and over 44 weeks so far in 2018 (said to be over five times longer than the maximum acceptable wait).

[68] The Plaintiffs emphasize the importance of early detection for colorectal cancer. In that regard, such delays could be life-threatening.

[69] Some private clinics provide private-pay colonoscopies for symptomatic patients. Cambie provides between 50 and 75 colonoscopies a year. Cambie will not perform colonoscopies should enforcement commence.

[70] In addition to the above, I have considered the following:

a) Evidence about Kristiana Corrado's experience accessing private surgical services. In particular, I have relied on the excerpted portions of her trial testimony and her description about the physical and psychological impact on her of waiting for knee surgery. I have considered Ms. Corrado's evidence that access to private medically necessary surgical services reduced her wait time by approximately six months;

b) Ms. Corrado's experience occurred some six years ago. However, her experience as a teenage athlete is said to be representative of other young athletes awaiting knee surgery and the physical and psychological effects of waiting;

c) Dr. Day's specific observations regarding Ms. Corrado. In particular, his observations that "she had a knee that was not functioning well; it was unstable and painful when it shifted out of position and she was distraught about not being able to participate in physical activities… because of the delay in getting the knee fixed." In addition to his physical observations, he noted in her report that she was depressed, had trouble sleeping and concentrating on her school work because of her knee injury; and

d) The general observations to which Dr. Day deposed of "patients suffering from terrible pain that greatly affects their daily lives, the negative effects on their psychological state, their inability to return to work after being off work for a lengthy period, the serious financial consequences for these and their families and the long-term effects on their physical well-being and lives generally".

[71] I have considered some of the expert testimony tendered at the trial and filed in support of the Injunction Application, including:

a) Excerpted trial testimony of Professor Alistair McGuire (Professor of Health Economics at the London School of Economics and qualified as an expert in international comparisons of health care systems in countries that provide universal access to health care) explaining his opinion that "the empirical evidence supports a conclusion that waiting time for surgery can have harmful consequences and that the wait, in and of itself, causes harm." In his explanation, he testified:

> And on the basis of my experience and knowledge of econometrics, statistics and health policy that's how I came to my opinion, and the opinion relates largely in these documents to elective surgery, and it relates to whether or not there was a deterioration in quality of life, which is a measure which is

> used, as I've said, by regulatory bodies across the world to try to succinctly define health benefit.

b) Excerpted trial testimony of Nadeem Esmail (qualified as an expert in health care systems, policies and economics of Canada and other developed countries that maintain universal access to health care, including assessing the success of these systems in providing timely, high quality health care to patients) about delayed access to health care. Mr. Esmail testified, in part, on the impact of delay:

> There's a number of different measures that are used to measure the function, pain and disability of the patients. And based on these various different measures – and they don't always align between studies, but each of the studies that I've cited there did show that there was a relationship between delay and potential deteriorations in status, and in some cases to the extent that initial status at the time of surgery is related to the outcome these deteriorations can then affect the outcome from the surgery. So a delay might not only affect your pain and your function while you're waiting and it might get worse; the outcome post-surgery might now be worse because you weren't treated early enough in the degenerative process.

[72] The above overview serves as a basis for demonstrating evidence of wait times, the impact on patients waiting for health care services and the harm that may follow.

D. Evidence regarding impact of the *MPA* Amendments

1. Dr. Kevin Wade

[73] I turn to the evidence regarding the impact, if any, of the *MPA* Amendments on access to health care. I start with the affidavit of Dr. Wade sworn June 29, 2018. Dr. Wade is an ophthalmologist working in public hospitals in B.C. and at Cambie. He has a medical office and ophthalmological examination clinic in Vancouver. He performs approximately 900 cataract surgeries per year. Dr. Wade describes his patient list in this way:

> 4. …I have a lengthy wait list in the public health care system for cataract surgery. Currently, I have over 525 patients waiting for cataract surgery on one eye. I estimate it will take about 1.5 years to complete these surgeries based on my current operating room time allocation.

> 5. Over the past three years, an increasing number of my patients have elected to have their cataract surgery performed at Cambie Surgery Centre on a private pay basis. In 2016 and 2017, I performed 123 and 165 cataract surgeries each year respectively, at Cambie. In 2018, up to June 30th, I have performed 115 cataract surgeries at Cambie.
>
> 6. These surgeries are in addition to the approximately 700 to 800 surgeries I perform annually in the public health care system at Vancouver General Hospital. In 2017, for example, I performed 783 cataract surgeries at VGH. In addition, in 2017, for example, I did 1822 consultations either at my Kerrisdale medical office or at VGH, which were covered by MSP.
>
> 7. I perform the additional surgeries at Cambie because the wait list in the public health care system for cataract surgery is very long (about 1.5 years currently) from the date of consultation to surgery.

[74] A portion of Dr. Wade's affidavit addresses issues relating to billing and his use of the femtosecond laser in his procedures. I have not relied on any of his evidence regarding the femtosecond laser. Rather, I have considered his evidence that the amendments "will make it impossible for [him] to continue to provide any cataract surgeries at Cambie, using the femtosecond laser or otherwise." He deposes that this decision is based on the financial penalties and new set-off provisions, the consequences of which he cannot afford to risk. He estimates that approximately 150 patients per year for whom he currently provides cataract surgery at Cambie will have to go back into the public health care system and back onto public system wait lists.

[75] At para. 32 of his Affidavit, Dr. Wade estimates that his surgical wait list will increase from approximately 18 months (as it is now) to approximately 24 months if he is unable to perform cataract surgeries at Cambie. The AGBC objects to para. 32 on the basis that it is inadmissible opinion evidence. I have considered this evidence for what it is – an estimate only. That is, Dr. Wade is providing his estimate, based on his surgical practice, about the impact of the loss of Cambie on his surgical wait list.

[76] At para. 34 of his Affidavit, Dr. Wade provides his opinion about the impact of the amendments based on his experience and knowledge of the number of enrolled B.C. surgeons and private medical clinics currently providing cataract surgeries on a private-pay basis. I have relied on para. 34(a) only insofar as it relates to Dr. Wade's personal observations regarding his own patients.

2. Dr. Amin Javer (Affidavit #2)

[77] Dr. Javer is a sinus surgeon and describes his own lengthy wait list in the public health care system for endoscopic sinus surgery. He performs about three endoscopic sinus surgeries per week on a private-pay basis at False Creek Surgical Centre amounting to over 150 private-pay endoscopic sinus surgeries each year. He estimates that the wait list for endoscopic surgery in the public health care system to be approximately 2.5 years.

[78] With respect to the amendments, Dr. Javer deposes that he will not continue to provide surgeries on a private-pay basis due to the high financial penalties and new set-off provisions. He estimates that this will increase his surgical wait list from about 2.5 years to about 4 years. Again, I rely on this evidence for what it is – an estimate. I rely on para. 12(a) only insofar as it relates to Dr. Javer's personal observations regarding his own patients.

3. Dr. Navraj Heran

[79] Dr. Heran is a neurosurgeon, with a specialization in endovascular neurosurgery, who works within the public health care system and at False Creek Surgical Centre. He deposes that he has a very long wait list for neurosurgical consultations and scheduled medically necessary neurosurgeries in the public system. He estimates that his patients routinely wait six months to one year for neurosurgical consultations and an additional six months to one year for neurosurgery. Dr. Heran says he observed the impact of waiting on his patients noting that they suffered greatly from pain and loss of function.

[80] In response to the *MPA* Amendments, Dr. Heran states that he will not perform private consultations or surgeries for non-exempt patients. He describes the impact on his patients in this way:

> This will mean my non-exampt patients will not have access to the less invasive spinal stabilization surgery that I currently provide at False Creek. This is a serious loss to patients.

E. Correspondence of September 10, 2018

[81] The Medical Services Commission sent a letter, dated September 10, 2018, to physicians registered in B.C. to provide notice of the *MPA* Amendments. In part, the Medical Services Commission stated:

> The Government of British Columbia has announced that the *Act* is changing effective October 1, 2018. Please ensure that you are aware of these new provisions, as they may affect your practice. Please note these changes include that:
>
> - a beneficiary (or the person who pays for the service) will be entitled to a refund for an amount that is paid contrary to the extra billing provisions contained in the *Act*; (s. 20)
> - the general limits on extra billing by enrolled practitioners are being clarified; (s. 17)
> - there will be an increase in the scope of the limits on extra billing by non-enrolled medical practitioners; (s. 18)
> - there will be new offence provisions related to contravention of the extra billing provisions in the *Act*, including fines of up to $10,000 for a first offence and up to $20,000 for a second or subsequent offence; (s. 46(5.1) and (5.2)) and
> - the Commission will have "cause" to cancel the enrolment of a practitioner who: (a) contravenes; (b) attempts to contravene; or (c) authorizes, assists or allows someone else to contravene, the extra billing provisions in the *Act.* (s. 15)
>
> …
>
> You are required to comply with the *Act*, including the upcoming changes once they come into force. The changes to the *Act* do not prohibit practitioners from levying legitimate charges for completion of doctor's notes for employers or other non-benefits, including services that are not medically required (e.g. elective cosmetic procedures).

F. Previous enforcement measures

[82] I touch briefly on the Plaintiffs' submissions regarding earlier efforts to enforce compliance with the *MPA*. In their written submissions, the Plaintiffs contend:

> Clearly, there was not a need to enforce the prohibition on enrolled doctors providing medically necessary services in private clinics to non-exempt British Columbians over the course of the past 25 years. And up until now, the Courts, starting with Justice Smith and continuing with CJ Bauman and ACJ Cullen, recognized that this status quo should be maintained pending a ruling in the trial on the constitutionality of the prohibitions in the *MPA* on access to private health care.
>
> …

> All three judges who dealt with the previous enforcement attempts recognized the public interest in allowing non-exempt British Columbians to continue to obtain medically necessary services on a private pay basis from enrolled doctors at Cambie and SRC during the course of the trial [into] the constitutionality of the prohibitions on access to private health care.

[83] I have reviewed the reasons of Bauman C.J., Cullen A.C.J. and Smith J. I do not agree with the Plaintiffs that these decisions can be so broadly construed. Rather, I find that these rulings have little bearing on the Injunction Application. I say that because those earlier rulings were rendered at a time when some of the provisions of the *MPA* were different, or when the litigation was in its early stages and the issues to be resolved were different. For example, Cullen A.C.J.'s order seemed to be principally based on a concern about whether those responsible for enforcement had used material (subject to the implied undertaking rule) from the constitutional action in the enforcement proceedings. His order was crafted accordingly.

[84] Furthermore, Groberman J.A., in *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission),* 2010 BCCA 396, disagreed with Smith J. on her decision to grant an injunction requiring the medical clinics to allow inspectors from the MSC access to their premises and records in order to perform audits under s. 36 of the *MPA*. However, his disagreement was based on the irregular manner in which the application for an injunction came before the Supreme Court. He stated at para. 3:

> … The [*MPA*] makes adequate provision for orders facilitating audits where such orders are needed. The extraordinary powers of the Supreme Court to grant an injunction need not have been engaged in this case. Further, the procedure that was followed in this case obscured the legal issues surrounding the making of the order, and created unnecessary difficulties.

[85] Justice Groberman concluded that the Commission was entitled to proceed with its audit and stated at para. 46:

> If the appellants consider that an audit should not take place pending determination of their constitutional challenge, they are entitled to apply to a judge of the Supreme Court for an order exempting them from the relevant provisions of the [*MPA*] pending the determination of their challenge. Such an application could properly be brought as an interlocutory application in the extant proceedings. Such an application would clearly be an application for an interlocutory stay, and the *RJR-MacDonald* test would apply.

[86] I do not agree with the Plaintiffs that the enforcement decisions reflect a view that the three judges were attempting to recognize "the public interest in allowing non-exempt British Columbians to continue to obtain medically necessary services on a private pay basis from enrolled doctors at Cambie and SRC during the course of the trial". I simply consider these rulings to be part of the long narrative of this litigation.

G. AGBC's affidavits regarding *MPA* Amendments and enforcement

[87] In an affidavit sworn by Manjit Sidhu, Assistant Deputy Minister of Finance and Corporate Services Division of the Ministry of Health, the AGBC provided information about events that occurred in early 2018 regarding the CHT. In its written submission, the AGBC explained the evidence in this way:

> By agreement dated 18 March 2017, the Province agreed with Health Canada that it would conduct further audits of private clinics over a three-year period in order to identify more accurately the extent to which extra-billing was occurring in British Columbia.
>
> In March of 2018, based on the results of audits of private clinics that were carried out by the provincial Ministry of Health pursuant to the March 2017 agreement, the federal Minister of Health deducted $15.9 million from the CHT.
>
> On 8 August 2018, the federal Minister of Health wrote to the British Columbia Minister of Health to advise that beginning 1 April 2020, the federal government will require provinces and territories to prohibit any charges to patients for medically necessary diagnostic services. The federal Minister also advised that the federal government had implemented a new Reimbursement Policy that will permit the reimbursement to the provinces of amounts deducted from the CHT if the affected province demonstrates that they have taken action to prevent extra billing from recurring.
>
> Amounts deducted from March of 2018 onwards will be eligible to be reimbursed, which would include the $15.9 million deducted from British Columbia's CHT. However, contrary to the plaintiffs' submission, there is urgency in establishing compliance as the Reimbursement Policy provides that the Minister of Health has the discretion to provide a reimbursement if the province comes into compliance by the end of the calendar year. This suggests that if the Province is to be eligible for reimbursement of the $15.9 million deduced from the 2017/2018 CHT, it must come into compliance by January 2019.
>
> [Footnotes removed.]

[88] The AGBC says I should not question the timing of bringing legislation into force because that is a legislative decision and the Court should not inquire into the

wisdom of the policy decisions made by government in its legislative role. I agree. As such, I do not accept the Plaintiffs' submission that there was no good reason to disrupt the status quo pending the completion of the trial. I am satisfied that the decision to bring the amendments into force is a decision that should not be questioned on this application.

[89] The AGBC also tendered affidavit evidence from Stephanie Power, Executive Director of the Beneficiary Services and Strategic Priorities Branch employed with the Ministry of Health, to support their position that the Plaintiffs' have failed to prove imminent harm. Ms. Power deposed that she was part of a team responsible for planning the Ministry of Health's strategy and process for implementation of the new enforcement provisions of the *MPA,* including ss. 46(5.1) and (5.2). Ms. Power deposed that the operational details relating to the enforcement provisions are currently under discussion although the Ministry of Health does not intend to apply them retroactively.

[90] The AGBC submits that there are many decisions required to be made before a fine can be imposed against a doctor accused of violating ss. 17 or 18 of the *MPA*.

[91] In my view, despite Ms. Power's evidence about the many steps required before the imposition of a fine, it is reasonable for physicians to cease offering private-pay medically necessary health services due to the new enforcement provisions. I accept the evidence of the physicians who have deposed that they will not risk a prosecution by providing non-exempt services on a private-pay basis.

H. Summary of evidence

[92] As I have stated, the AGBC disputes much of the evidence on which the Plaintiffs rely. In particular, what constitutes acceptable wait times, whether B.C. is meeting wait time targets (whatever they should be), and the health impact, if any, of wait times on patients remain very much in dispute.

[93] For the purpose of the Injunction Application only, I am satisfied that there is sufficient evidence, as referenced above and taking into account the AGBC's objections, to make the following findings:

a) There exists waiting lists for medically necessary health services;

b) Some of those waiting lists exceed maximally acceptable targets;

c) Some medically necessary health services can be accessed through private-pay clinics, such as Cambie;

d) Some patients experience serious physical and/or psychological harm when medically necessary health services are delayed;

e) Some physicians will not offer private-pay medically necessary health services once the financial penalties are implemented;

f) Some patients will be unable to access previously available private-pay medically necessary health services when enforcement commences; and

g) For some patients, inability to access private-pay medically necessary health services will prolong pain and discomfort causing them physical and/or psychological harm.

VI. *CHAOULLI v. QUEBEC (AG)*

[94] In support of their claim that the impugned provisions violate the *Charter*, the Plaintiffs rely heavily on *Chaoulli*. I set out the circumstances of *Chaoulli* in some detail because many of the same legal arguments are advanced here.

[95] In *Chaoulli*, the plaintiffs contested the validity of the prohibition on private health insurance found in two of Quebec's health care statutes. They argued that the legislative provisions violated s. 7 of the *Charter*. The Superior Court concluded that the plaintiffs demonstrated a deprivation of the rights to life, liberty and security of the person guaranteed by s. 7 of the *Charter* but that the deprivation was in accordance with the principles of fundamental justice. The Court of Appeal affirmed that decision.

[96] The majority of the Supreme Court of Canada, in a 4-3 decision, ruled that the legislative provisions violated the Quebec *Charter of Human Rights and Freedoms*. With respect to the *Charter*, however, the Supreme Court of Canada was evenly split

(3-3 and one justice declined to determine the *Charter* issue) on whether s. 7 had been unjustifiably infringed.

[97] On the one side, McLachlin C.J.C. (as she then was) and Major J. (Bastarache J. agreeing) found the prohibitions on private health insurance violated s. 7 of the *Charter*. They framed the issue this way:

> 103. The appellants do not seek an order that the government spend more money on health care, nor do they seek an order that waiting times for treatment under the public health care scheme be reduced. They only seek a ruling that because delays in the public system place their health and security at risk, they should be allowed to take out insurance to permit them to access private services.
>
> 104. The *Charter* does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*. We are of the view that the prohibition on medical insurance in s. 15 of the *Health Insurance Act*, R.S.Q., c. A-29, and s. 11 of the *Hospital Insurance Act*, R.S.Q., c. A-28 (see Appendix), violates s. 7 of the *Charter* because it impinges on the right to life, liberty and security of the person in an arbitrary fashion that fails to conform to the principles of fundamental justice.
>
> 105. The primary objective of the *Canada Health Act*, R.S.C. 1985, c. C-6, is "to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers" (s. 3). By imposing exclusivity and then failing to provide public health care of a reasonable standard within a reasonable time, the government creates circumstances that trigger the application of s. 7 of the *Charter.*
>
> 106. The *Canada Health Act*, the *Health Insurance Act*, and the *Hospital Insurance Act* do not expressly prohibit private health services. However, they limit access to private health services by removing the ability to contract for private health care insurance to cover the same services covered by public insurance. The result is a virtual monopoly for the public health scheme. The state has effectively limited access to private health care except for the very rich, who can afford private care without need of insurance. This virtual monopoly, on the evidence, results in delays in treatment that adversely affect the citizen's security of the person. Where a law adversely affects life, liberty or security of the person, it must conform to the principles of fundamental justice. This law, in our view, fails to do so.

[98] Chief Justice McLachlin and Major J. were satisfied that the appellants had established that many Quebec residents face delays in treatment that adversely affect their s. 7 *Charter* rights that they would not sustain but for the prohibition on private medical insurance. They also determined that waiting for critical care may

have “serious psychological effects [that] may engage s. 7 protection for security of the person”. They stated at paras. 118-19:

> 118**.** The jurisprudence of this Court holds that delays in obtaining medical treatment which affect patients physically and psychologically trigger the protection of s. 7 of the *Charter.* In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, Dickson C.J. concluded that the delay in obtaining therapeutic abortions, which increased the risk of complications and mortality due to mandatory procedures imposed by the state, was sufficient to trigger the physical aspect of the woman's right to security of the person: *Morgentaler*, at p. 59. He found that the psychological impact on women awaiting abortions constituted an infringement of security of the person. Beetz J. agreed with Dickson C.J. that "[t]he delays mean therefore that the state has intervened in such a manner as to create an additional risk to health, and consequently this intervention constitutes a violation of the woman's security of the person": see *Morgentaler*, at pp. 105-6.
>
> 119. In this appeal, delays in treatment giving rise to psychological and physical suffering engage the s. 7 protection of security of the person just as they did in *Morgentaler*. In *Morgentaler*, as in this case, the problem arises from a legislative scheme that offers health services. In *Morgentaler*, as in this case, the legislative scheme denies people the right to access alternative health care. (That the sanction in *Morgentaler* was criminal prosecution while the sanction here is administrative prohibition and penalties is irrelevant. The important point is that in both cases, care outside the legislatively provided system is effectively prohibited.) In *Morgentaler* the result of the monopolistic scheme was delay in treatment with attendant physical risk and psychological suffering. In *Morgentaler*, as here, people in urgent need of care face the same prospect: unless they fall within the wealthy few who can pay for private care, typically outside the country, they have no choice but to accept the delays imposed by the legislative scheme and the adverse physical and psychological consequences this entails. As in *Morgentaler*, the result is interference with security of the person under s. 7 of the *Charter*.

[99] Having concluded that the ban on private medical insurance constituted an interference with security of the person, McLachlin C.J.C. and Major J. turned to whether that deprivation was in accordance with the principles of fundamental justice. They concluded that the impugned provisions were arbitrary and, therefore, the deprivation of life and security of the person could not be said to accord with the principles of fundamental justice.

[100] It was particularly here where the six justices differed (although Binnie and Lebel JJ. described differently the security of the person deprivation). Binnie and Lebel JJ. (with Fish J. agreeing) wrote:

> 207. As stated, the principal legal hurdle to the appellants' *Canadian Charter* challenge is not the preliminary step of identifying a s. 7 interest potentially affected in the case of some Quebeckers in some circumstances. The hurdle lies in their failure to find a fundamental principle of justice that is violated by the Quebec health plan so as to justify the Court in striking down the prohibition against private insurance for what the government has identified as "insured services".

[101] With respect to the principles of fundamental justice, they wrote:

> 209. Thus, the formal requirements for a principle of fundamental justice are threefold. First, it must be a legal principle. Second, the reasonable person must regard it as vital to our societal notion of justice, which implies a significant societal consensus. Third, it must be capable of being identified with precision and applied in a manner that yields predictable results. These requirements present insurmountable hurdles to the appellants. The aim of "health care of a reasonable standard within a reasonable time" is not a legal principle. There is no "societal consensus" about what it means or how to achieve it. It cannot be "identified with precision". As the testimony in this case showed, a level of care that is considered perfectly reasonable by some doctors is denounced by others. Finally, we think it will be very difficult for those designing and implementing a health plan to predict when its provisions cross the line from what is "reasonable" into the forbidden territory of what is "unreasonable", and how the one is to be distinguished from the other.
>
> [Emphasis in original.]

[102] The above paragraphs, from both sets of reasons in *Chaoulli* reflect the tension between the courts and law-makers when entering the health care debate.

[103] I would add here as well that since *Chaoulli*, there have been significant developments in the s. 7 *Charter* jurisprudence. Notably, in considering the constitutionality of the *Criminal Code*'s prostitution-related offences in *Canada (Attorney General) v. Bedford,* 2013 SCC 72 (“*Bedford*”), the Court consolidated and refined its jurisprudence concerning some of the principles of fundamental justice including arbitrariness, overbreadth and gross disproportionality. Writing for a unanimous Court, McLachlin C.J.C. recognized that there is "significant overlap" between these principles and that the case law tended to "conflate" some of them. Nonetheless, McLachlin C.J.C. emphasized that they were distinct principles. In *Chaoulli*, McLachlin C.J.C. and Major J. had concluded that the provisions violated s. 7 because they were arbitrary. In the underlying trial of this matter, the trial judge may very well find another principle of fundamental justice, as refined since *Chaoulli*, better suited to the analysis.

VII. INTERLOCUTORY INJUNCTIVE RELIEF – CONSTITUTIONAL CASE

[104] I commence this discussion with two preliminary observations that underscore the positions taken by the parties on the Injunction Application. The first relates to the separation of powers between the courts and law makers. The second relates to more generally to interlocutory motions for injunctive relief in *Charter* cases.

[105] The issues presented in this constitutional litigation very much engage a consideration of the role and interaction between legislatures and courts. In this regard, I turn back to early statements from the Supreme Court of Canada describing a judge's approach to *Charter* litigation in *Reference re Motor Vehicle Act (British Columbia) S 94(2),* [1985] 2 S.C.R. 486 starting at 496:

> 11. The novel feature of the *Constitution Act*, 1982, however, is not that it has suddenly empowered courts to consider the content of legislation. This the courts have done for a good many years when adjudicating upon the vires of legislation. The initial process in such adjudication has been characterized as "a distillation of the constitutional value represented by the challenged legislation" (Laskin, Canadian Constitutional Law (3rd ed. rev. 1969), p. 85), and as identifying "the true meaning of the challenged law" (Lederman (ed.), The Courts and the Canadian Constitution (1964), p. 186), and "an abstract of the statute's content" (Professor A.S. Abel, "The Neglected Logic of 91 and 92" (1969), 19 U. of T. L.J. 487, p. 490). This process has of necessity involved a measurement of the content of legislation against the requirements of the Constitution, albeit within the more limited sphere of values related to the distribution of powers.
>
> 12. The truly novel features of the *Constitution Act*, 1982 are that it has sanctioned the process of constitutional adjudication and has extended its scope so as to encompass a broader range of values. Content of legislation has always been considered in constitutional adjudication. Content is now to be equally considered as regards new constitutional issues. Indeed, the values subject to constitutional adjudication now pertain to the rights of individuals as well as the distribution of governmental powers. In short, it is the scope of constitutional adjudication which has been altered rather than its nature, at least, as regards the right to consider the content of legislation.
>
> 13. In neither case, be it before or after the *Charter*, have the courts been enabled to decide upon the appropriateness of policies underlying legislative enactments. In both instances, however, the courts are empowered, indeed required, to measure the content of legislation against the guarantees of the Constitution. The words of Dickson J. (as he then was) in *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576, at p. 590, continue to govern:
>
> > The Courts will not question the wisdom of enactments ... but it is the high duty of this Court to insure that the Legislatures do not

> transgress the limits of their constitutional mandate and engage in the illegal exercise of power.

[106] This sentiment remains. That is, there is an important line between making policies at the legislative level and testing public policy against constitutional standards. Chief Justice McLachlin, in *Canada (Attorney General) v. PHS Community Services Society,* 2011 SCC 44 more recently articulated this point at para. 105:

> The issue of illegal drug use and addiction is a complex one which attracts a variety of social, political, scientific and moral reactions. There is room for disagreement between reasonable people concerning how addiction should be treated. It is for the relevant governments, not the Court, to make criminal and health policy. However, when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the *Charter*: *Chaoulli,* para. 89 *per* Deschamps J., at para 197, *per* McLachlin C.J. and Major J., and at para. 183, *per* Binnie and LeBel JJ.; *Rodriguez*, at pp. 589-90, *per* Sopinka J. The issue before the Court at this point is not whether harm reduction or abstinence-based programmes are the best approach to resolving illegal drug use. It is simply whether Canada has limited the rights of the claimants in a manner that does not comply with the *Charter*.

[107] My second observation relates to the guiding principles underlying the *RJR-MacDonald* test in *Charter* litigation and, in particular, the limits of determining complex constitutional issues on an interlocutory application. Here, I borrow Justice Stinson's words in *Council of Canadians v. Canada (Attorney General),* 2015 ONSC 4601 where he was faced with a motion for an interlocutory injunction to suspend the operation of a provision of the *Fair Elections Act*. The interlocutory injunction was sought pending a full hearing on the constitutionality of the challenged legislation and the parties agreed that the full hearing could not be accomplished before the upcoming election. Starting at para. 39, Stinson J. said this about his role as the motion judge:

> 39. It is important to acknowledge that, as a judge hearing and deciding a preliminary motion such as this, I am constrained in several ways. First, I must recognize that I do not have at hand all the information and arguments that will be available when the case is fully argued. Secondly, and in part due to the factor I have just mentioned, my comments on the evidence and the merits of the case must be viewed as preliminary only and not determinative of the merits of the underlying arguments or my view of the merits. As stated by the Supreme Court of Canada in *RJR-MacDonald* v. *Canada*, "a prolonged examination of the merits is generally neither necessary nor desirable" at the interlocutory injunction stage.

> 40. Because the judge is being asked at an early stage in the proceedings to issue an order that will temporarily – and, potentially, significantly – affect the parties' legal rights, at a time before the parties have the opportunity to gather and present all their evidence and arguments and without the benefit of a full hearing, the courts have developed a well-recognized test to be applied when this type of judicial relief is sought …

[108] Justice Stinson's comments are apt. To reiterate, my remarks on the evidence and the merits of the constitutional issues must be considered as not only preliminary but also within the context in which they are made – as a judge presiding over an interlocutory application for injunctive relief where the issues to be determined are different and are based on an incomplete and to a certain extent, untested, evidentiary record.

[109] I turn then to the analytical framework established in *RJR-MacDonald*, requiring an applicant to establish that (1) there is a serious question to be tried; (2) the applicant will suffer irreparable harm should the injunctive relief be denied; and (3) the balance of convenience favours the applicant, having due regard for the public interest.

[110] In applying the *RJR-MacDonald* test, the Court is not to become the "prisoner of a formula." Rather, the fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case: see *British Columbia (Attorney General) v. Gitanmaax Band (B.C.C.A.)* (1987), 9 B.C.L.R. (2d) 333 (C.A.) at para. 52.

A. Serious Question to be Tried

[111] In *RJR-MacDonald*, Sopinka and Cory JJ. explained the underlying rationale for using the "serious question to be tried" test in *Charter* cases. In so doing, the Court referred at length to Beetz J.'s reasons in *Metropolitan Stores* and his analysis about why it was that "serious question to be tried" was better suited in *Charter* cases than a more stringent test. They stated it this way at 335:

> 45. In Metropolitan Stores, Beetz J. advanced several reasons why the American Cyanamid test rather than any more stringent review of the merits is appropriate in *Charter* cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a

> s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

[112] After reviewing several authorities suggesting a higher standard, Sopinka and Cory JJ. disagreed that something more than a serious question to be tried was required in *Charter* cases. They stated at 337:

> 48. The *Charter* protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged Charter violation to review the matter carefully. This is so even when other courts have concluded that no Charter breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in Metropolitan Stores, at p. 128, that "the American Cyanamid 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."
>
> 49. What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the Charter claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see Metropolitan Stores, supra, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.
>
> 50. Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

[113] The Court identified two exceptions to the general rule that a judge should not engage in a review of the merits. In my view, neither exception applies in this case.

[114] The first exception arises when the result of the interlocutory motion will, in effect, amount to a final determination of the action. The Court specifically recognized that the circumstances where this exception applies are rare, and provided two examples at 338-339:

> 52. In *Trieger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (Ont. H.C.), the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:
>
> > This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried in the sense of a case with enough legal merit to justify the extraordinary intervention of this court in making the order sought without any trial at all. [Emphasis added.]
>
> 53. In *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, the appellant Daigle was appealing an interlocutory injunction granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy, this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

[115] The second exception arises when the question of constitutionality presents itself as a simple question of law alone. In *Metropolitan Stores*, Beetz J. described the second exception in this way, at 133:

> 49. …There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the Canadian Charter of Rights and Freedoms, could not possibly be saved under s. 1 of the Charter and might perhaps be struck down right away; see Attorney General of Quebec v. Quebec Association of Protestant School Boards, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

[116] Again, in my view, neither exception applies here.

B. Irreparable Harm

[117] *RJR-MacDonald* provides, at 348, that:

> 79. At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. ‘Irreparable’ refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

[118] The Court in *RJR-MacDonald* described this branch of the test starting at 340 as follows:

> 57. Beetz J. determined in *Metropolitan Stores*, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.
>
> 58. At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> 59. "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, supra); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

[119] Sopinka and Cory JJ. recognized, at 341, that the “assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages but damages are not the primary remedy in *Charter* cases”.

[120] At the time the decision in *RJR-MacDonald* was rendered, the Court noted that there existed an uncertain state of the law regarding the award of damages for a *Charter* breach and, as such, it will in “most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial”. The Court concluded that it was appropriate to assume financial damage would be suffered by an applicant following a refusal of relief until the law in this area developed further (at 342).

[121] Since *RJR-MacDonald*, the availability of *Charter* damages has garnered some judicial attention albeit not necessarily in the context of interlocutory injunctions. For example, the Supreme Court of Canada divided in its analysis of *Charter* damages in *Ernst v. Alberta Energy Regulator,* 2017 SCC 1. Writing for the majority (4-4-1), Justice Cromwell stated:

> 25. Underlying the question of whether *Charter* damages could be an appropriate remedy is a broader issue. It concerns how to strike an appropriate balance so as to best protect two important pillars of our democracy: constitutional rights and effective government; see, e.g., *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, at para. 79. Granting *Charter* damages may vindicate *Charter* rights, provide compensation and deter future violations. But awarding damages may also inhibit effective government, and remedies other than damages may provide substantial redress for the claimant without having that sort of broader adverse impact. Thus there is a need for balance with respect to the choice of remedies. This concern for balance was emphasized recently in *Henry v. British Columbia (Attorney General)* in words that are especially apt in this case: "Courts should endeavour, as much as possible, to rectify *Charter* breaches with appropriate and just remedies. Nevertheless, when it comes to awarding *Charter* damages, courts must be careful not to extend their availability too far" (2015 SCC 24, [2015] 2 S.C.R. 214, at para. 91).
>
> 26. The leading case about when *Charter* damages are an appropriate and just remedy is *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28. Applying the principles set out in that case, damages are not an appropriate and just remedy for *Charter* violations by this Board. Not every bare allegation claiming *Charter* damages must proceed to an individualized, case-by-case consideration on its particular merits. *Ward* held that *Charter* damages will not be an appropriate and just remedy where there is an effective alternative remedy or where damages would be contrary to the demands of good governance. These considerations, taken together, support the conclusion that the proper balance would be struck by holding that damages are not an appropriate remedy.
>
> 27. Section 24(1) of the *Charter* confers on the courts a broad remedial authority. As has been said, "[i]t is difficult to imagine ... a wider and less fettered discretion": *Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 965. This broad discretion should not be narrowed by "casting it in a straight-jacket of judicially prescribed conditions": *Ward*, at para. 18. But this does not mean that *Charter* breaches should always, or even routinely, be remedied by awards of *Charter* damages. The remedy of damages is limited to situations in which it is "appropriate and just" because it serves one or more of the compensatory, vindicatory and deterrent purposes which support that choice of remedy: *Ward*, at para. 32. Countervailing factors may establish that damages are not an appropriate and just remedy even though they would serve these ends: *Ward*, at para. 33.

[122] The Supreme Court of Canada's recent decisions in *Ward*, *Henry* and *Ernst* demonstrate that *Charter* damages jurisprudence has developed since *RJR*-

MacDonald. However, the legal principles remain difficult to apply in the context of an interlocutory application.

[123] Earlier this year, in *Manitoba Federation of Labour v. Manitoba*, 2018 MBQB 125 ("*Manitoba Federation*"), Justice Edmond stated why it remained preferable to resolve the application for injunctive relief, in the circumstances before him, under the balance of convenience and not irreparable harm. He put it this way in para. 118:

> 118. To conclude on irreparable harm, I am mindful of the statement made by the Supreme Court of Canada in *RJR-MacDonald*, that until the law on *Charter* damages has developed further, 'it is inappropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.' Although the law on *Charter* damages has developed further since 1994, the law has not changed significantly and accordingly, I must be cautious in relying too heavily on this test in deciding whether to grant or dismiss the relief sought. At this stage of the proceeding, in the absence of other evidence sufficiently persuasive so as to justify a finding of irreparable harm, this motion ought not and cannot be determined based on the alleged irreparable harm suffered by the moving plaintiffs. In my view, like most *Charter* cases, granting an interlocutory injunction or a stay pending the trial will be determined primarily on the balance of convenience, public interest test.

[124] I agree with this analysis. That is, despite developments in *Charter* damages jurisprudence, this motion "ought not and cannot be determined based on the alleged irreparable harm suffered by the moving plaintiffs."

[125] In light of the AGBC's position, I have also considered the legal authorities regarding public interest standing in the context of the irreparable harm analysis.

[126] The AGBC says that the named Plaintiffs have failed to demonstrate that they will suffer irreparable harm. Relevant to this submission are the authorities addressing public interest standing. Here, I refer to Cromwell J.'s remarks in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society,* 2012 SCC 45 ("*Downtown Eastside*"), where he wrote:

> 1. This appeal is concerned with the law of public interest standing in constitutional cases. The law of standing answers the question of who is entitled to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly

> overburdened with marginal or redundant cases, to screen out the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government: *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, at p. 631. The traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations.
>
> 2. In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court: *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, at p. 253. The courts exercise this discretion to grant or refuse standing in a "liberal and generous manner" (p. 253).

[127] Justice Cromwell noted that, in exercising their discretion with respect to standing, the courts weigh three factors in light of the underlying purposes and the particular circumstances. Having reviewed the three factors in the *Downtown Eastside* decision, and after focusing on the third factor (whether the proposed suit is a reasonable and effective means to bring the issue before the court), Cromwell J. stated as follows:

> 73. I turn now to other considerations that should be taken into account in considering the reasonable and effective means factor. This case constitutes public interest litigation: the respondents have raised issues of public importance that transcend their immediate interests. Their challenge is comprehensive, relating as it does to nearly the entire legislative scheme. It provides an opportunity to assess through the constitutional lens the overall effect of this scheme on those most directly affected by it. A challenge of this nature may prevent a multiplicity of individual challenges in the context of criminal prosecutions. There is no risk of the rights of others with a more personal or direct stake in the issue being adversely affected by a diffuse or badly advanced claim. It is obvious that the claim is being pursued with thoroughness and skill. There is no suggestion that others who are more directly or personally affected have deliberately chosen not to challenge these provisions. The presence of the individual respondent, as well as the Society, will ensure that there is both an individual and collective dimension to the litigation.

[128] The Plaintiffs advance a similar position here.

C. Balance of Convenience

[129] The third branch of *RJR-MacDonald* requires an assessment of the balance of convenience to the parties. It is here where the interests of the public must be considered and it is here where a case such as this one is typically decided.

[130] I begin with the description provided by Sopinka and Cory JJ. in *RJR-MacDonald* at 342:

> 62. The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.
>
> 63. The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid*, Lord Diplock cautioned, at p. 408, that:
>
> > [i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.
>
> He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."
>
> 64. The decision in *Metropolitan Stores*, at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, at pp. 303-4:
>
> > Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

[131] As stated above, it is here where the public interest analysis predominates. The Supreme Court of Canada discussed public interest in *Metropolitan Stores* and *RJR-MacDonald*. I turn to both.

[132] Justice Beetz wrote considerably about the balance of convenience and the public interest in *Metropolitan Stores*. He started with a discussion about the difficulty (or impossibility) of deciding the merits of a case at the interlocutory stage. He then discussed the consequences of granting a stay in constitutional cases. He described it this way starting at 134:

> 54. In both sorts of cases, the granting of a stay requested by the private litigants or by one of them is usually aimed at the public authority, law enforcement agency, administrative board, public official or minister responsible for the implementation or administration of the impugned legislation and generally works in one of two ways. Either the law enforcement agency is enjoined from enforcing the impugned provisions in all respects until the question of their validity has been finally determined, or the law enforcement agency is enjoined from enforcing the impugned provisions with respect to the specific litigant or litigants who request the granting of a stay. In the first branch of the alternative, the operation of the impugned provisions is temporarily suspended for all practical purposes. Instances of this type can perhaps be referred to as suspension cases. In the second branch of the alternative, the litigant who is granted a stay is in fact exempted from the impugned legislation which, in the meanwhile, continues to operate with respect to others. Instances of this other type, I will call exemption cases.
>
> 55. Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically-elected legislatures and are generally passed for the common good, for instance: the providing and financing of public services such as educational services, or of public utilities such as electricity, the protection of public health, natural resources and the environment, the repression of what is considered to be criminal activity, the controlling of economic activity such as the containing of inflation, the regulation of labour relations, etc. It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good.
>
> 56. While respect for the Constitution must remain paramount, the question then arises whether it is equitable and just to deprive the public, or important sectors thereof, from the protection and advantages of impugned legislation, the invalidity of which is merely uncertain, unless the public interest is taken into consideration in the balance of convenience and is given the weight it deserves. As could be expected, the courts have generally answered this question in the negative. In looking at the balance of convenience, they have found it necessary to rise above the interests of private litigants up to the level of the public interest, and, in cases involving interlocutory injunctions directed at statutory authorities, they have correctly held it is erroneous to deal with these authorities as if they have any interest distinct from that of the public to which they owe the duties imposed upon them by statute.

[133] Justice Beetz then provided examples of the concern expressed by the courts for the protection of the common good in suspension and exemption cases. Following his review, he concluded at 146:

> 79. It has been seen from what precedes that suspension cases and exemption cases are governed by the same basic rule according to which, in constitutional litigation, an interlocutory stay of proceedings ought not to be granted unless the public interest is taken into consideration in the balance of convenience and weighted together with the interest of private litigants.
>
> 80. The reason why exemption cases are assimilated to suspension cases is the precedential value and exemplary effect of exemption cases. Depending on the nature of the cases, to grant an exemption in the form of a stay to one litigant is often to make it difficult to refuse the same remedy to other litigants who find themselves in essentially the same situation, and to risk provoking a cascade of stays and exemptions, the sum of which make them tantamount to a suspension case.
>
> …
>
> 83. This being said, I respectfully take the view that Linden J. has set the test too high in writing in Morgentaler, supra, that it is only in "exceptional" or "rare" circumstances that the courts will grant interlocutory injunctive relief. It seems to me that the test is too high at least in exemption cases when the impugned provisions are in the nature of regulations applicable to a relatively limited number of individuals and where no significant harm would be suffered by the public: it does not seem to me, for instance, that the cases of Law Society of Alberta v. Black, supra, and Vancouver General Hospital v. Stoffman, supra, can be considered as exceptional or rare. Even the Rio Hotel case, supra, where the impugned provisions were broader, cannot, in my view, be labeled as an exceptional or rare case.
>
> 84. On the other hand, the public interest normally carries greater weight in favour of compliance with existing legislation in suspension cases when the impugned provisions are broad and general and such as to affect a great many persons. And it may well be that the above mentioned test set by Linden J. in Morgentaler, supra, is closer to the mark with respect to this type of case. In fact, I am aware of only two instances where interlocutory relief was granted to suspend the operation of legislation and, in my view, these two instances present little precedent value.

[134] In cases where the authority of a law enforcement agency is constitutionally challenged, Beetz J. stated that “no interlocutory injunction or stay should issue to restrain the public authority from performing its duties to the public unless, in the balance of convenience, the public interest is taken into consideration and given the weight it should carry” (149).

[135] In assessing the balance of convenience, Sopinka and Cory JJ. added to Beetz J.’s discussion regarding public interest stating at 343 of *RJR-MacDonald*:

> 65. … It is the "polycentric" nature of the Charter which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a *Charter* Remedy", in J. Berryman, ed., Remedies: Issues and Perspectives, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:
>
> > While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in *Charter* litigation is not unequivocal or asymmetrical in the way suggested in Metropolitan Stores. The Attorney General is not the exclusive representative of a monolithic "public" in *Charter* disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.
>
> 66. It is, we think, appropriate that it be open to both parties in an interlocutory Charter proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.
>
> 67. We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in Morgentaler v. Ackroyd (1983), 150 D.L.R. (3d) 59 (Ont. H.C.), per Linden J., at p. 66.
>
> > The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that these women would suffer irreparable harm, such evidence would not indicate any irreparable harm to these applicants, which would warrant this court issuing an injunction at their behest. [Emphasis in original.]
>
> 68. When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

[136] Sopinka and Cory JJ. described the balancing of public interest considerations in *Charter* cases at 346:

> 71. In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant.

> This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.
>
> 72. A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.
>
> 73. Consideration of the public interest may also be influenced by other factors. In Metropolitan Stores, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law than when the application of the law is suspended entirely.
>
> [citations omitted].

[137] In other words, on an interlocutory application for injunctive relief in a *Charter* case, a court is required to assume irreparable harm to the public interest if the government action is restrained (so long as there is proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility). In large part, that is because the *Charter* does not authorize the court to conduct an inquiry into whether the government is “governing well.”

[138] In *Harper v. Canada (Attorney General),* 2000 SCC 57, the Supreme Court of Canada stayed an interim injunction granted by the chambers judge in circumstances where Mr. Harper was seeking a declaration that provisions in the *Canada Elections Act,* limiting third-party spending on advertising, violated s. 2(b) freedom of expression rights. The Court decided Mr. Harper’s application for interim injunction on the balance of convenience analysis. The Court stated it succinctly as follows at para. 5:

> Applications for interlocutory injunctions against enforcement of still-valid legislation under constitutional attack raise special considerations when it comes to determining the balance of convenience. On the one hand stands the benefit flowing from the law. On the other stand the rights that the law is alleged to infringe. An interlocutory injunction may have the effect of depriving the public of the benefit of a statute which has been duly enacted and which may in the end be held valid, and of granting effective victory to the applicant before the case has been judicially decided. Conversely, denying or staying the injunction may deprive plaintiffs of constitutional rights simply because the courts cannot move quickly enough: R.J. Sharpe, Injunctions and Specific Performance (loose-leaf ed.), at para. 3.1220.

[139] The Court determined that the chambers judge had not properly applied the balance of convenience analysis as articulated in *RJR-MacDonald*. The Court, in *Harper,* followed the majority decision in *RJR-MacDonald* and provided this further statement at para. 9:

> … Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.

[140] Applying those principles in *Harper*, the Court concluded that "the public interest in maintaining in place the duly enacted legislation on spending limits pending complete constitutional review outweighs the detriment to freedom of expression caused by those limits" (para. 11).

[141] I turn to *Manitoba Federation*. This appears to be the most recent example of an application for an interim injunction in a *Charter* case. The circumstances are briefly these. The Manitoba Federation of Labour and numerous unions representing public service bargaining units issued a statement of claim against the government of Manitoba seeking an interlocutory injunction restraining, enjoining and prohibiting the government from proclaiming into force (or, alternatively, staying/suspending) ss. 9–15 of the *Public Services Sustainability Act* alleging violations of ss. 2(d) and 7 of the *Charter*. The *PSSA* had not yet been proclaimed into force.

[142] Applying the *RJR-MacDonald* framework, Edmond J. concluded that there was a serious question to be tried and, if the interlocutory relief was not granted, there was a prospect that the applicants would suffer irreparable harm. He found,

however, that the applicants had not demonstrated that the balance of convenience favoured the injunctive relief sought. The court's analysis of balance of convenience included a review of five Supreme Court of Canada cases (all failed attempts to obtain interim injunctions staying/suspending legislation pending constitutional determination). Edmond J. commenced this case review as follows:

> 146. Both parties acknowledge that at this stage of the proceeding, the assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will rarely order that laws that parliament or the legislature have duly enacted for the public good will not operate or be enforceable in advance of a full constitutional review.
>
> 147. It follows therefore that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality or a violation of the *Charter* succeed. (see *Harper* at para. 9)
>
> 148. Counsel for the Government referred the court to five examples from the Supreme Court of Canada in the post-*Charter* era where injunctions have been sought to stay legislation pending constitutional determination. In all five, the court denied the motion seeking an injunction on the basis of public interest. (see *Gould*; *Metropolitan Stores*; *RJR-MacDonald*; *Harper* and *Thomson Newspapers*)
>
> 149. *RJR-MacDonald* dealt with declaring inoperable sections of the *Tobacco Products Control Act*, S.C. 1988, c. 20, which dealt with tobacco packaging. The public interest in health was found to be of such compelling importance that the applications for a stay were dismissed.
>
> 150. In *Metropolitan Stores*, the court had to consider whether to grant a stay with respect to the Manitoba Labour Board imposing a first collective agreement pursuant to the provisions of the *LRA*.
>
> 151. In *Harper*, the Supreme Court of Canada upheld sections of the *Canada Elections Act*, S.C. 2000, c. 9, regarding third party spending limits on the basis of s. 1 of the *Charter*.
>
> 152. In *Thomson Newspapers*, the Supreme Court of Canada declared inoperable sections of the *Canada Elections Act* regarding the publication of survey results.
>
> 153. In *Gould* (see on the merits *Sauvé v. Canada (Attorney General)*; *Belczowski v. Canada*, [1993] 2 S.C.R. 438), the Supreme Court of Canada declared inoperable sections of the *Canada Elections Act* regarding prisoner voting.
>
> 154. Although the facts of these cases are different, they make it clear that interlocutory injunctions or stays are rarely granted in constitutional cases because it is assumed that laws enacted by democratically elected legislatures are directed to the common good and serve a valid public purpose.
>
> 155. That does not mean that injunctions are never granted. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the moving plaintiffs who rely on the

> public interest must demonstrate that the suspension or exemption of the legislation would provide a public benefit. (see *Harper* at para. 9, quoting from *RJR-MacDonald* at pp. 348-49)

[143] Justice Edmond dismissed the application for interlocutory relief (raising a concern about sufficiency of the evidentiary record before the Court) on the basis that he was not satisfied that this was one of those clear cases of a *Charter* violation that an interlocutory injunction or stay should be granted pending a trial on the constitutionality of the *PSSA*.

[144] The above authorities set the stage for what the Plaintiffs must establish to succeed in the Injunction Application. Assuming, as I must, that the *MPA* Amendments and impugned provisions were implemented to advance the public good, the Plaintiffs must establish that the granting of an injunction will serve a valuable public purpose.

VIII. ANALYSIS

[145] I turn to an application of the *RJR-MacDonald* framework to the circumstances of this case and the nature of the relief sought. That is, the Plaintiffs seek to enjoin the government from enforcing the impugned provisions – the Plaintiffs do not seek an exemption from enforcement.

A. Is There a Serious Question to be Tried?

[146] The Plaintiffs submit that this branch is easily met and that the evidence overwhelmingly demonstrates that there is a serious question to be tried. The Plaintiffs say that answering this question requires the court to address whether the prohibition on private-pay medically necessary health services deprives individuals of their security of the person rights as protected by s. 7 of the *Charter* and, if so, whether that deprivation is in accordance with the principles of fundamental justice.

[147] The AGBC submits that the Plaintiffs have failed to meet even this low hurdle because the Plaintiffs do not challenge the enforcement provisions of the *MPA*.

[148] The AGBC says the trial judge denied the Plaintiffs' application to amend the claim to plead facts relating to enforcement. As such, says the AGBC, "the plaintiffs'

continued attempts to assert that they are entitled to injunctive relief suspending the implementation of the new enforcement provisions despite there being no material facts pleaded to support that relief cannot be characterized as anything other than an attempt to re-litigate the Amendment Reasons."

[149] I do not agree with this submission. In my view, the Plaintiffs' constitutional challenge is to the private-pay billing prohibitions captured in ss. 17, 18 and 45 of the *MPA*. The Plaintiffs have not challenged the constitutionality of the enforcement provisions of the *MPA*. Rather, the Plaintiffs challenge the provisions prohibiting private-pay medically necessary health services because it is the prohibition, not the enforcement of the prohibition, that limits access to timely health care in the province.

[150] In *Charter* litigation, it is often the case that the penalty attracts a *Charter* challenge because the risk of the deprivation of liberty engages s. 7. In *Bedford*, McLachlin C.J.C., writing for the Court, specifically recognized that s. 7 was engaged not because of the risk of deprivation of liberty due to enforcement of prostitution-related offences. Rather, she wrote, it was "compliance with the laws [that] infringes the applicants' security of the person". In the context of explaining why it was that security of the person rights were engaged, she wrote at paras. 59-60:

> Here, the applicants argue that the prohibitions on bawdy-houses, living on the avails of prostitution, and communicating in public for the purposes of prostitution, heighten the risks they face in prostitution – itself a legal activity. The application judge found that the evidence supported this proposition and the Court of Appeal agreed.
>
> For reasons set out below, I am of the same view. The prohibitions at issue do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing dangerous conditions on prostitution; they prevent people engaged in a risky – but legal – activity from taking steps to protect themselves from the risks.

[151] I am not satisfied, based on the circumstances presented, that a direct challenge to the enforcement provisions is required. The Plaintiffs' challenge is as it was before the *MPA* Amendments – the prohibitions on private-pay medically necessary health services increase wait times in a way that is harmful and thus engages patients' life and security of the person rights.

[152] The Plaintiffs contend, correctly in my view, that it is not the risk of a fine but the prohibition that engages s. 7 of the *Charter*. The *MPA* Amendments do not change or alter the nature of the constitutional challenge.

[153] I turn, then, to whether the Plaintiffs have established that there is a serious question to be tried. I am to determine whether the test has been satisfied on the basis of common sense and by conducting an extremely limited review of the case on the merits (*RJR-MacDonald* at 348).

[154] The Plaintiffs must show that the impugned provisions are sufficiently connected to the harm suffered before s. 7 is engaged. In addition, the Plaintiffs must show that the deprivation of life and/or security of the person is not in accordance with the principles of fundamental justice. Should a violation be found, the AGBC may seek to justify the infringement under s. 1 of the *Charter*.

[155] I have considered the evidence only insofar as to determine whether the Plaintiffs have demonstrated that there is a serious question to be tried. For the purpose of the Injunction Application, I am satisfied that this hurdle has been met. In finding that there is a serious question to be tried, I am satisfied that the Plaintiffs have established the following:

a) Some patients will suffer serious physical and/or psychological harm while waiting for health services;

b) Some physicians will not provide private-pay medically necessary health services after the *MPA* Amendments take effect;

c) Some private-pay medically necessary health services would have been available to some patients but for the impugned provisions;

d) Some patients will have to wait longer for those medically necessary health services that could have been available but for the new enforcement provisions; and

e) If those patients lose access to private-pay medically necessary health services, awaiting those health services in the public system can be

> significant and some of those patients are in pain, discomfort and have limited mobility.

[156] I am satisfied, based on the evidentiary record before me, that there are some patients who would have accessed private-pay medically necessary health services but now cannot due to the new enforcement provisions. I am satisfied, with respect to those patients, that their s. 7 security of the person rights are engaged.

[157] I am also satisfied that there is evidence on the Injunction Application that establishes (in a way that is not frivolous or vexatious) that the prohibitions are sufficiently connected to the harm suffered by some patients. I have concluded that there is sufficient evidence showing that some patients will experience delayed access to health treatment because they are denied access to private-pay medically necessary health services. This delay prolongs the physical and psychological harms to this group of patients. In this regard, I rely on McLachlin C.J.C. and Major J.'s statement in *Chaoulli* at para. 118, relying on *R. v. Morgentaler,* [1988] 1 S.C.R. 30 where they write:

> The jurisprudence of this Court holds that delays in obtaining medical treatment which affect patients physically and psychologically trigger the protection of s. 7 of the Charter.

[158] In *Chaoulli*, McLachlin C.J.C. and Major J. write at para. 119:

> … In *Morgentaler*, as here, people in urgent need of care face the same prospect: unless they fall within the wealthy few who can pay for private care, typically outside the country, they have no choice but to accept the delays imposed by the legislative scheme and the adverse physical and psychological consequences this entails. As in *Morgentaler*, the result is interference with security of the person under s. 7 of the *Charter*.

[159] I agree with the Plaintiffs that delays in treatment giving rise to psychological and physical suffering engage the security of the person *Charter* protections just as they did in *Morgentaler*.

[160] Finally, I note (although analyzed differently by the justices writing in *Chaoulli*) that the Supreme Court of Canada makes it clear that access to health care, and government decision-making relating to such access, are matters engaging s. 7 of the *Charter*.

[161] I agree with the AGBC that *Chaoulli* demonstrates a Court very much divided on this issue and it is certainly not a definitive answer on the constitutionality of private health insurance prohibitions. However, *Chaoulli* does more than crystalize the debate. Six justices confirmed that s. 7 was engaged when addressing serious infringements of access to health care (albeit viewed differently by each). Chief Justice McLachlin and Major J. put it this way at paras. 122-24:

> 122. In *Rodriquez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, Sopinka J., writing for the majority, held that security of the person encompasses "a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress." The prohibition against private insurance in this case results in psychological and emotional stress and a loss of control by an individual over her own health.
>
> 123. Not every difficulty rises to the level of adverse impact on security of the person under s. 7. The impact, whether psychological or physical, must be serious. However, because patients may be denied timely health care for a condition that is clinically significant to their current and future health, s. 7 protection of security of the person is engaged. Access to a waiting list is not access to health care. As we noted above, there is unchallenged evidence that in some serious cases, patients die as a result of waiting lists for public health care. Where lack of timely health care can result in death, s. 7 protection of life itself is engaged. The evidence here demonstrates that the prohibition on health insurance results in physical and psychological suffering that meets this threshold requirement of seriousness.
>
> 124. We conclude, based on the evidence, that prohibiting health insurance that would permit ordinary Canadians to access health care, in circumstances where the government is failing to deliver health care in a reasonable manner, thereby increasing the risk of complications and death, interferes with life and security of the person as protected by s. 7 of the *Charter*.

[162] I have considered the circumstances surrounding this constitutional litigation. After a preliminary assessment of the evidence demonstrating, for the purpose of the Injunction Application, that waiting for certain health care services may cause some patients serious physical or psychological harm and that, but for the prohibitions, those patients could have accessed private-pay medical services, I am satisfied that the Plaintiffs have established that there is a serious question to be tried.

B. Have the Plaintiffs Demonstrated Irreparable Harm?

[163] The Plaintiffs submit that irreparable harm will be suffered by British Columbians if the *MPA* prohibitions are enforced on enrolled doctors providing

private-pay surgeries to non-exempt British Columbians. That is because non-exempt British Columbians who require medically necessary health services will not be able to access private services. Physicians will not deliver private surgeries to non-exempt British Columbians because they will not expose themselves to the risk of substantial financial penalties.

[164] The Plaintiffs describe irreparable harm in two ways. First, enforcing the prohibitions will directly impact those patients seeking (and needing) private surgical services. Second, it will burden the public system (even further) because those who would have used private surgical services must now be integrated into the public health care system.

[165] The AGBC submits the Plaintiffs have failed to prove irreparable harm. The AGBC takes the position that the Plaintiffs must establish irreparable harm to the named Plaintiffs and not unidentified third parties because the claim is not pleaded as a systemic one nor do the Plaintiffs have public interest standing.

[166] Considering the nature of the harm alleged (and not its magnitude), I am wary of wading into the evidentiary record to determine whether adequate compensation could ever be obtained at trial. Conducting such an inquiry, at this preliminary stage of the analysis, would ignore the Supreme Court of Canada's caution in *RJR-MacDonald* and *Metropolitan Stores*. The irreparable harm analysis is further complicated by the public interest nature of the litigation and it may be ill-suited to a comparable assessment of harm in the private law context.

[167] I have concluded, for the purposes of the Injunction Application, that the Plaintiffs have established irreparable harm. This conclusion is based on the following:

a) Evidence from Dr. Day (and other physicians) deposing that Cambie (physicians) will not perform private-pay medically necessary surgical services once the *MPA* Amendments are brought into force;

b) Evidence about Kristiana Corrado's experience accessing private surgical services. In particular, I have relied on the excerpted portions of her trial

testimony and her description about the physical and psychological impact on her of waiting for knee surgery. I have considered Ms. Corrado's evidence that access to private medically necessary surgical services reduced her wait time by approximately six months;

c) Ms. Corrado's experience occurred some six years ago. However, her experience as a teenage athlete is said to be representative of other young athletes awaiting knee surgery and the physical and psychological effects of waiting;

d) Dr. Day's specific observations regarding Ms. Corrado. In particular, his observations that "she had a knee that was not functioning well; it was unstable and painful when it shifted out of position and she was distraught about not being able to participate in physical activities… because of the delay in getting the knee fixed." In addition to his physical observations, he noted in her report that she was depressed, had trouble sleeping and concentrating on her school work because of her knee injury;

e) The general observations to which Dr. Day deposed of "patients suffering from terrible pain that greatly affects their daily lives, the negative effects on their psychological state, their inability to return to work after being off work for a lengthy period, the serious financial consequences for these and their families and the long-term effects on their physical well-being and lives generally";

f) Excerpted trial testimony of Professor Alistair McGuire explaining his opinion that "the empirical evidence supports a conclusion that waiting time for surgery can have harmful consequences and that the wait, in and of itself, causes harm". In his explanation, he testified:

> And on the basis of my experience and knowledge of econometrics, statistics and health policy that's how I came to my opinion, and the opinion relates largely in these documents to elective surgery, and it relates to whether or not there was a deterioration in quality of life, which is a measure which is used, as I've said, by regulatory bodies across the world to try to succinctly define health benefit.

g) Excerpted trial testimony of Nadeem Esmail (qualified as an expert in health care systems, policies and economics of Canada and other developed countries that maintain universal access to health care, including assessing the success of these systems in providing timely, high quality health care to patients) about delayed access to healthcare. Mr. Esmail testified, in part, on the impact of delay:

> There's a number of different measures that are used to measure the function, pain and disability of the patients. And based on these various different measures – and they don't always align between studies, but each of the studies that I've cited there did show that there was a relationship between delay and potential deteriorations in status, and in some cases to the extent that initial status at the time of surgery is related to the outcome these deteriorations can then affect the outcome from the surgery. So a delay might not only affect your pain and your function while you're waiting and it might get worse; the outcome post-surgery might now be worse because you weren't treated early enough in the degenerative process.

[168] Based on my review of the pleadings, Steeves J.'s ruling on private and public interest standing, and the case authorities regarding *Charter* litigation and public interest standing, I am satisfied that, for the purpose of the Injunction Application, I can consider the impact of the prohibitions more generally.

[169] I do not suggest that the evidence before me proves that the province has failed to meet optimal waiting times for any particular health care service. I wish to make clear that the trial judge will determine, on the full evidentiary record before him, whether the evidence of waiting times (for any particular health service) infringes s. 7 *Charter* rights. For the purpose of the Injunction Application, I am satisfied that the evidence establishes a number of physicians will not perform private-pay medically necessary health services should the *MPA* Amendments be brought into force. As such, prospective private health care patients will be precluded from accessing health services in a manner that may alleviate their wait time. Furthermore, there is a sufficient causal connection between denying access to private-pay medically necessary health services and ongoing or greater physical and/or psychological harm that the delay may cause.

[170] I am satisfied that the Plaintiffs have established that some patients will suffer irreparable harm in this sense. But for the prohibitions, patients could obtain health care services much sooner at a private clinic (such as Cambie). The prohibitions infringe the s. 7 *Charter* rights of the patients by forcing them onto public health care waiting lists and the subsequent delay in receiving treatment causes some patients to endure physical and psychological suffering.

C. Balance of Convenience

[171] At this stage of the analysis, the Court must consider the damage each party alleges it will suffer and consider the public interest. Where, as here, the nature and declared purpose of the legislation is to promote the public interest, a motion judge should not be concerned with whether the legislation actually has such an effect. The motion judge must assume it does so. The Plaintiffs must demonstrate that the suspension of the legislation will itself provide a public benefit in order to overcome the assumed benefit to the public interest arising from the continued application of the legislation or that no harm is done to the public interest if the injunctive relief is granted. Put another way, it is the Plaintiffs who must prove a more compelling public interest.

[172] The AGBC submits that the public interest in ensuring the enforceability of validly enacted law weighs heavily in assessing the balance of convenience. The AGBC relies on *Harper* at para. 9 and *RJR-MacDonald* at 348-49 in support of its submission that this court should not order laws passed by a democratically-elected body to be inoperable in advance of complete constitutional review at trial. Moreover, the AGBC says that it is charged with promoting and protecting the public interest, including public health, and the *MPA* Amendments and impugned provisions were enacted pursuant to this duty. In addition and even though such evidence is not required, the AGBC says that it has provided evidence of actual harm.

[173] In the language of *Harper*, it follows that in assessing the balance of convenience, I must proceed on the assumption that the law – the impugned

provisions of the *MPA* – is directed to the public good and serves a valid public purpose.

[174] As well, in *RJR-MacDonald*, at 333-34, Sopinka and Cory JJ. considered the factors that must govern the balancing process:

> 38. On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.
>
> 39. On the other hand, the Charter charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of Charter rights. Such a practice would undermine the spirit and purpose of the Charter and might encourage a government to prolong unduly final resolution of the dispute.

[175] The AGBC says that the "plaintiffs cannot discharge the heavy burden of establishing that the *MPA* Amendments are unconstitutional and that this is not one of the clear cases where the Court ought to order duly enacted laws to be inoperable in advance of complete constitutional review." In addition, the AGBC submits that although not necessary to dismiss the application, there is evidence of real and immediate harm should the injunction be granted. The AGBC says that it can seek to recover $15.9 million that the federal Minister of Health deducted from its transfer payments in March 2018. This money can be reclaimed if the province establishes that it is taking steps to end the practice of extra-billing in B.C.

[176] During the hearing of the Injunction Application, considerable time was spent on the CHT deduction. The Plaintiffs invite the Court to speculate about whether the federal government will reimburse the province for the $15.9 million deduction in light of the enforcement steps the province has taken. The AGBC also invites the Court to speculate about whether, by the time a decision is rendered in the constitutional case, the "federal government would presumably have made further, and larger, deductions, thereby depriving B.C.'s public health care system of millions more dollars that could be used to provide publicly-funded services to all British Columbians..."

[177] I am not permitted on this application to second-guess legislative decision-making or, in particular, the basis for the timing of the *MPA* Amendments. I agree with the AGBC that the decision to bring into force the *MPA* Amendments is to be presumed to be for the public good and I accept that it is. Further, there is evidence suggesting that the province can take steps to reclaim $15.9 million because it has taken steps to enforce the prohibitions. The potential transfer of these funds is generally beneficial.

[178] In *RJR-MacDonald* at 346, the Supreme Court of Canada made clear that the Court should, in most cases, assume that irreparable harm to the public interest would result from the restraint of that action.

[179] It is clear from the authorities that the applicants usually fail in their efforts to obtain interim and/or interlocutory injunctive relief where they challenge the constitutionality of legislation. There is good reason for this and the AGBC has cited all of them.

[180] I accept that it is only in exceptional cases where the effect of democratically enacted legislation should be suspended before a finding of unconstitutionality or invalidity. In my view, this is an exceptional case. This case falls in the narrow category of exceptions. I have considered the circumstances surrounding this constitutional litigation and the submissions made during the Injunction Application. In addition to the findings as set out above, two factors tip the balance of convenience in favour of the Plaintiffs.

[181] The first is the nature of the constitutional challenge at issue. If nothing else, *Chaoulli* opened the door to *Charter* scrutiny of health care decision-making. Binnie and Lebel JJ. declined to engage in the public debate stating: “This issue has been the subject of protracted debate across Canada through several provincial and federal elections. We are unable to agree with our four colleagues who would allow the appeal that such a debate can or should be resolved as a matter of law by judges” (para. 161). McLachlin C.J.C. and Major J. agreed that decisions about the type of health care systems Quebec should adopt falls to the legislature of that province. However, they also stated that the resulting legislation is subject to

constitutional limits and the Court cannot avoid reviewing legislation for *Charter* compliance when citizens challenge it.

[182] It is an understatement to say that this is a complex constitutional case brought in the context of public health care legislation. The proceedings constitute a direct affront to the public health care system and, importantly, Canada's pledge to a universal public health care system. In *Chaoulli*, the much divided court revealed the tension between the laudable goal of providing universal (equal) access to health care and interfering with citizens' autonomy and dignity by prohibiting access to private health care options for medically necessary health services. The tension is all the more evident when access to health care is redefined as access to a wait list for health care. However, the determination of these complicated issues is for the trial judge, on a full record, with the benefit of legal submissions from the parties.

[183] The Plaintiffs must establish that limiting access to private medically necessary health services engages their life and/or security of the person rights. In the Injunction Application, the Plaintiffs provided sufficient evidence that waiting for certain medically necessary health services causes physical and psychological harm to some patients. There is a dispute about wait time targets, whether the province has met those targets and whether the Plaintiffs have proven a sufficient causal connection between harm and wait times. Those are all issues for the trial judge. For the purpose of the Injunction Application only, I am satisfied that the Plaintiffs have demonstrated, to the extent necessary, that the s. 7 *Charter* rights of some patients are engaged. I make that finding based on the evidence of the doctors who depose that they will refrain from providing private-pay medically necessary health services that are subject to significant financial penalties. Further, those doctors deposed that their own waiting lists for the same health services in the public system will increase. Any delay is thus twofold. First, for a patient such as Ms. Corrado, the *MPA* Amendments will remove access to private-pay medically necessary health services. Second, patients such as Ms. Corrado will be added to a waiting list that may be longer than what is in place today because the public health care system will need to accommodate those who (but for the *MPA* Amendments) would have otherwise utilized private health care services.

[184] The s. 7 analysis requires a consideration of the principles of fundamental justice as articulated in the recent jurisprudence and whether the AGBC can justify any infringement should one be found. Again, those are issues for the trial judge with the benefit of a full evidentiary record and submissions from the parties.

[185] I am satisfied that the Plaintiffs have demonstrated, for the purpose of the Injunction Application, a sufficient nexus between the prohibitions to private health care and being required to wait for treatment with no autonomous right to access private health care services. I am satisfied that there is evidence before me that at least some patients are at an increased risk of suffering physical and psychological harm by having to wait for public health care service. It is this waiting with no option to pursue an alternative that engages security of the person rights and tips the balance of convenience in favour of the Plaintiffs.

[186] The second reason I am satisfied that this is one of those exceptional cases warranting injunctive relief is based on the fact that the parties are in the middle of a trial that has, to date, been underway for over two years. This is not a case where a new law was brought into force and a trial on the merits is years away. Here, the Plaintiffs' case is almost concluded and the AGBC will open its case shortly. I am told there has been some 150 days of trial and 48,000 pages of evidence presented to date.

[187] Although not brought into force until this year, the *MPA* Amendments were pronounced fifteen years ago.

[188] In my view, the assumption that the *MPA* Amendments and impugned provisions service the public good and a valid public purpose must be measured against the evidence presented on the Injunction Application that private health services, as described here, will be unavailable once the financial penalties come into play and the s. 7 life and security of the person rights of some patients will be infringed because those patients will not have access to timely and necessary private medical health services. Both sides argued the status quo argument operated against the other. However, I am satisfied that the Plaintiffs will be impacted in a far greater manner than the AGBC should the injunctive relief not be

granted. I say that because I am satisfied that there are doctors who will not provide private-pay medically necessary health services with the new enforcement provisions, thereby potentially impacting the s. 7 rights of some patients. I also wish to address the AGBC's submission regarding the availability of equitable relief in the circumstances presented here. I am not satisfied based on the evidence before me that it has been established that the Plaintiffs are disentitled to equitable relief because they do not have "clean hands." The parties have a complicated history and one that has evolved since the litigation began. I therefore decline to make such a finding on the Injunction Application.

[189] I am satisfied in the circumstances presented on the Injunction Application that the special considerations raised on the Injunction Application can be addressed by granting an order that is limited in time. During the Injunction Application, I was advised that the case should be concluded by April 1, 2019. In that regard, I am prepared to grant the Plaintiffs' alternative form of relief as set out in the Injunction Application. The order will enjoin the province from enforcing ss. 17, 18 and 45 of the *MPA* until June 1, 2019 or further order of the Court. I grant the injunctive relief to June 1, 2019 (or further order of the court) to take into account the contingencies of this litigation. Neither party made any submission regarding Rule 10-4(5) of the *B.C. Supreme Court Civil Rules*. As such, I have not included it as a term of the order.

IX. CONCLUSION AND ORDERS

[190] In summary, for the purposes of the Injunction Application, I have determined the following:

a) Taking into account the circumstances of this constitutional litigation and a preliminary assessment of the evidence, the Plaintiffs have established that injunctive relief is appropriate in this case. I make that determination based on a preliminary assessment of the evidence and finding that the Plaintiffs have established that there is a serious question to be tried in that:

i. Some patients will suffer serious physical and/or psychological harm while waiting for health services;

ii. Some physicians will not provide private-pay medically necessary health services after the *MPA* Amendments take effect;

iii. Some patients would have accessed private-pay medically necessary health services but for the *MPA* Amendments;

iv. Some patients will have to wait longer for those medically necessary health services that could have been available but for the *MPA* Amendments and impugned provisions;

v. A sufficient causal connection between increased waiting times for private-pay medically necessary health services and physical and/or psychological harm caused to some patients.

b) The Plaintiffs have established irreparable harm in the context of a constitutional case that has proceeded in a manner that is consistent with public interest litigation in that some patients, but for the prohibitions, could have obtained private-pay medically necessary health services much sooner at a private clinic (such as Cambie) and the subsequent delay in receiving treatment causes some patients to endure serious physical and psychological suffering. The nature of this constitutional case complicates the assessment of damages at the interlocutory stage.

c) The Plaintiffs have established that the balance of convenience tips in their favour. This is so despite the Court's conclusion that the *MPA* Amendments are directed to the public good and serve a valid public purpose. The Plaintiffs have tilted the balance by establishing that restraint of the enforcement provisions will also serve the public interest in that private-pay medically necessary health services will be accessible in circumstances where the parties are in the midst of a lengthy trial to determine the complicated constitutional issues at play.

Enjoining the province from enforcing the prohibitions for a relatively short period of time serves that important public purpose.

[191] In the result, I make the following order:

a) The application for a stay or suspension of the operation of Order-in-Council No. 468 of 2018 (September 7, 2018), and/or B.C. Reg. 178/2018, to the extent that it brings into force the following provisions of the *Medicare Protection Amendment Act*, 2003, SBC 2003, c. 95: s. 1, s. 2, s. 4 as it relates to section 17(1.2) of the *Medicare Protection Act*, s. 8, and s. 12, pending a final determination of the constitutional issues raised in the action is dismissed;

b) The application for a stay or suspension of the coming into force of sections 1, 2, 4 (as it relates to section 17(1.2) of the *Medicare Protection Act*), 8 and 12 of the *Medicare Protection Amendment Act*, 2003, SBC 2003, c. 95, pending a final determination of the constitutional issues raised in the action is dismissed; and

c) The application for an order enjoining the enforcement of sections 17, 18 and 45 of the *Medicare Protection Act* is granted and such order will be effective until June 1, 2019 or further order of the Court.

"Winteringham J."