COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Cambie Surgeries Corporation v. British Columbia (Attorney General),* 2019 BCCA 29

Date: 20190124
Docket: CA45748

Between:

Cambie Surgeries Corporation, Chris Chiavatti, Mandy Martens, Krystiana Corrado, Walid Khalfallah by his litigation guardian Debbie Waitkus, and Specialist Referral Clinic (Vancouver) Inc.

Respondents
(Plaintiffs)

And

Attorney General of British Columbia

Appellant
(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

Attorney General of Canada

Pursuant to the *Constitutional Question Act*

Before: The Honourable Madam Justice Newbury
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated November 23, 2018 (*Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2018 BCSC 2084, Vancouver Docket S090663).

Counsel for the Appellant:	J.G. Penner J.D. Hughes
Counsel for the Respondents:	P.A. Gall, Q.C.
Place and Date of Hearing:	Vancouver, British Columbia December 21, 2018
Place and Date of Judgment:	Vancouver, British Columbia January 24, 2019

Written Reasons by:
The Honourable Madam Justice Newbury

Summary:

The Attorney General of British Columbia's application for leave to appeal the interim order of a Supreme Court judge in chambers enjoining enforcement of sections 17-8 and 45 of the Medicare Protection Act is dismissed.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] The defendant Attorney General of British Columbia seeks leave to appeal the order made in chambers by Madam Justice Winteringham in this matter on November 23, 2018. Her reasons for judgment are indexed as 2018 BCSC 2084. The order, which I am advised was entered on January 10, 2019, enjoined the enforcement of ss. 17, 18 and 45 of the *Medicare Protection Act*, R.S.B.C. 1996, c. 286 ("*MPA*") until June 1, 2019 or further order of the court. The order also dismissed applications for narrower orders staying or suspending the coming into force of certain provisions of the *MPA* and of the *Medicare Protection Amendment Act,* S.B.C. 2003, c. 95, pending final determination of the constitutional issues raised in this action.

[2] The injunction was sought and granted mid-trial, near the closing of the plaintiffs' case. The trial began in September 2016 (after an adjournment necessitated by the Province's disclosure of many thousands of pages of documents to the plaintiffs on the eve of trial) and has occupied about 150 days of court time thus far. It is clear that the case is being hard-fought: there have already been at least five other appeals to

this court, and according to the chambers judge, the trial judge has delivered at least 45 formal rulings. Half of the trial court's time has been spent on evidentiary objections. (See para. 31.) Similar objections were raised in the hearing of the injunction application.

The Legislation

[3] Sections 17, 18 and 45 of the *MPA* are reproduced on Schedule A attached to these reasons. These sections are the target of the constitutional challenge brought by the plaintiffs on the basis of s. 7 of the *Canadian Charter of Rights and Freedoms,* which provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The plaintiffs also rely on the decision of the Supreme Court of Canada in *Chaoulli v. Quebec (Attorney General)* 2005 SCC 35.

Canada Health Act

[4] The impugned provisions of the *MPA* are meant to dovetail with the scheme established by the *Canada Health Act*, R.S.C., 1985, c. C-6, which establishes conditions a province must meet in order to obtain federal funding for the operation of a public health-care system. Under ss. 18–19 of the *Canada Health Act*, a province is required to ensure that extra billing and user charges are not levied by physicians or private clinics under the provincial health insurance plan. Sections 18 and 19(1) of the federal statute provide as follows:

> *Extra-billing*
>
> 18 In order that a province may qualify for a full cash contribution referred to in section 5 for a fiscal year, no payments may be permitted by the province for that fiscal year under the health care insurance plan of the province in respect of insured health services that have been subject to extra-billing by medical practitioners or dentists.
>
> *User charges*
>
> 19 (1) In order that a province may qualify for a full cash contribution referred to in section 5 for a fiscal year, user charges must not be permitted by the province for that fiscal year under the health care insurance plan of the province.

Section 2 of the *Canada Health Act* defines "user charge" to mean any charge for an insured health service that is authorized or permitted by a provincial health-care insurance plan that is not payable, directly or indirectly, by a provincial plan, other than extra-billing. The latter phrase means billing for an insured health service rendered to an insured person by a medical practitioner in an amount in addition to any amount paid or to be paid for that service by a provincial plan.

[5] The *Canada Health Act* contemplates that where, because of the existence of extra-billing, the federal government has withheld or made deductions from the amount (the "CHT") payable to a province for the reimbursement of health-care costs, such deductions may nevertheless be reimbursed if the province makes efforts to come into compliance. The Attorney filed evidence at the injunction hearing that such compliance had to be shown by the end of the calendar year in respect of which the deduction was made: see the passage quoted by the chambers judge from the Province's argument at para. 87 of her reasons.

[6] However, in a hearing before the chambers judge on October 22, 2018 (i.e., one month before her main reasons were issued) the parties brought to her attention certain provisions of the *Budget Implementation Act*, *2018, No.1*, S.C. 2018, c. 12 which amended s. 25.01 of the *Federal-Provincial Fiscal Arrangements Act*, R.S.C. 1985, c. F-8 to read:

> A cash contribution provided to a province under section 24.21 may be increased by reimbursing, in whole or in part, a deduction referred to in paragraph 25(b).
>
> *Certificate for reimbursement of deduction*
>
> (2) If the Minister of Health is of the opinion that the circumstances giving rise to a deduction made under section 20 of the *Canada Health Act* no longer exist, he or she may issue a reimbursement certificate that sets out
>
> (a) the details of the deduction, including the amount of extra-billing or user charges, the province to which it applies and the fiscal year in which the deduction was made; and
>
> (b) the amount to be reimbursed.
>
> *Time period*
>
> (3) The Minister of Health may issue a reimbursement certificate under subsection (2) in the fiscal year in which the deduction was made or in the following two fiscal years and he or she must provide it to the Minister of Finance no later than March 6 of the final fiscal year in which the reimbursement may be made.
>
> *Reimbursement*
>
> (4) A reimbursement under this section must be made by the Minister of Finance upon receipt of a reimbursement certificate within the time period set out in subsection (3).
>
> *Application*
>
> (5) This section only applies to deductions made after March 31, 2017. [Emphasis added.]

It appears that ss. (3) allows a longer period than the one-year period which the Attorney had previously asserted. The parties were given the opportunity to make submissions on the reimbursement policy in addition to those they had already made in the three-day hearing in chambers in September 2018.

The Challenged MPA Provisions

[7] British Columbia's health-care insurance plan, the Medical Services Plan (“MSP” or the “Plan”), is governed by the *MPA*, under which physicians enrolled in the Plan are paid by the Medical Services Commission in return for providing medically necessary services (“benefits") to residents of the Province who are enrolled in the Plan.

[8] Sections 17 and 18 of the *MPA* (which were enacted in 1995) and s. 45 (enacted in 1992) have been amended in minor ways over the years. In general terms, however, s. 17 prohibits a medical practitioner from charging for a benefit or related service (including the use of a clinic or other place) other than as provided for in the *MPA* or regulations thereto, or permitted by the Commission; and s. 17(1.2) makes unenforceable any contract to pay such a charge. Section 17(2) provides that s. 17(1) does not apply if the person receiving the medical service is not enrolled as a beneficiary under the MSP; if the Commission does not consider the medical services to be a “benefit", if the practitioner elects or is deemed to have elected to be paid for the service directly by the beneficiary under the *MPA*; or if the practitioner is not enrolled in the Plan.

[9] Section 18 of the *MPA* prohibits extra billing for benefits rendered by medical practitioners who are not enrolled in the Plan. Subs. (2) clarifies that subs. (1) applies only to benefits rendered in certain provincially-regulated medical care facilities. Subs. (3) prohibits extra billing by practitioners who elect, or are deemed to have elected, to be paid for benefits directly by a beneficiary. Subs. (4) makes contracts to pay extra billing charges to practitioners who are not enrolled in the Plan, unenforceable.

[10] A new s. 18.1 is due to come into force on April 1, 2019, prohibiting direct and extra billing for benefits rendered by enrolled medical practitioners in diagnostic facilities that are not approved by the Commission. Section 18.1 is not the subject of the plaintiffs’ constitutional challenge in this proceeding.

[11] Section 45 prohibits and renders void all private contracts of insurance covering the costs of benefits under the *MPA*. It does not apply to those classes of costs or insurance described in s. 45(2).

[12] Section 45.1 came into force on December 1, 2006. It enabled the Commission to apply to the Supreme Court of British Columbia for orders restraining contraventions of ss. 17, 18, 18.1 or 19 of the *MPA*. Under s. 45.1(3), the Court may grant an interim injunction “until the outcome of an action commenced under subsection (1)”.

[13] Section 46 of the *MPA* first came into force in 1992. Subsections (1) to (6) thereof created offences as follows:

> (1) A beneficiary or practitioner who misrepresents the nature or extent of the benefit in a claim for payment commits an offence.
>
> (2) A person who knowingly obtains or attempts to obtain payment for a benefit to which he or she is not entitled commits an offence.
>
> (3) A person who fails to pay or to collect and remit premiums in accordance with an agreement referred to in section 32 (1) commits an offence.
>
> (4) A person who obstructs an inspector in the lawful performance of his or her duties under this Act commits an offence.
>
> (5) A person who contravenes section 12 or 49 commits an offence.
>
> (6) A person who knowingly assists another person to commit an offence under this section commits an offence.

[14] By virtue of amendments made to the *MPA* in 2003, the following subsections (5.1) and (5.2) were added to s. 46, *but were not proclaimed into force*:

> ...
>
> (5.1) A person who contravenes section 17 (1), 18 (1) or 3 [words not in force] 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.

It is worth re-emphasizing that the plaintiffs’ *Charter* challenge in this proceeding targets only ss. 14, 17, 18 and 45 of the *MPA* and does not extend to s. 46 before or after amendment. At the same time, since s. 46(5.1) refers to contraventions of ss. 17 and 18, it would lose much of its effect if s. 17 or 18 were ruled unconstitutional.

[15] Since at least 2009 when this action was commenced, the Province has taken various steps to enforce and restrain the corporate plaintiffs’ operations in contravention of ss. 17 and 18 of the *MPA*. These steps were described by Associate Chief Justice Cullen (as he then was) in reasons indexed as 2015 BCSC 2169 at paras. 14–27, reproduced at para. 16 of the chambers judge's reasons. They included inspections, “targeted audits” and searches of the premises of the corporate plaintiffs. In November 2015, Cullen A.C.J. granted a limited order which was in effect until the commencement of the trial, precluding 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.” (See para. 138.)

[16] It was not until September 7, 2018 that the Province proclaimed in force (effective October 1) what became subsections 5.1 and 5.2 of s. 46. There was in evidence before the chambers judge an affidavit of the Hon. Gordon Campbell, who was Premier of British Columbia between June 2001 and March 2011. Mr. Campbell deposes that when he first took office, he was aware that the *MPA* effectively prohibited enrolled specialists from providing medical services to patients in private clinics, subject to some exceptions such as services related to workplace injuries. He was also aware that the previous government had permitted private surgical clinics in the Province to provide surgeries to non-exempt British Columbians in contravention of the *MPA*. His affidavit continues:

> 7. Because of the information we had about long wait times for surgeries in the public health care system and the increasing costs of the health care system, the Government decided to carry on the practice of allowing enrolled surgeons to provide some private surgical services to non-exempt British Columbians in private medical clinics in the Province to allow them to deal with their personal health care needs outside of the public system.
>
> 8. The Government had no credible evidence that permitting enrolled specialists to perform additional surgeries privately would harm the public system, or the delivery of medical service through the public system.
>
> 9. While the government considered formally eliminating the restrictions on access to private health care in the *MPA*, we did not take steps to do so because of the possible loss of health transfer payments from the Federal Government.
>
> ...
>
> 13. Following the enactment of the amendments, the government decided that, given the wait times in the public system, the amendments would be harmful to the health of British Columbians.
>
> 14. Therefore, the Government did not to proclaim the amendments, and took no further steps to enforce the restrictions on dual practice in the *Act*.
>
> ...
>
> 16. The Government's conclusions about access to private health care can be summarized as follows:
>
> a) The large and consistent growth of provincial health care costs over the previous decade was unsustainable when taken in conjunction with other essential public services financial requirements since there was no equivalent growth in the provincial economy and therefore provincial revenues.
>
> b) To contain costs, it would be necessary to continue to ration surgeries and diagnostic services in the public system.
>
> c) Delays in receiving what had been considered medically necessary surgeries – and the inability for the province to meet the established wait time guidelines – caused suffering and the risk of permanent harm to many British Columbians. Many patients were already waiting too long for needed diagnostic services and surgeries.
>
> d) The delays in the public system could not be shortened given the constraints on funding, even if additional efficiencies could be found.
>
> e) Surgeons and other specialists had excess capacity due to the limited operating time and use of other facilities and equipment made available to them in the public system.
>
> f) Allowing these specialists to use their excess capacity to provide private diagnostic services and surgeries would cause no harm to the public system. It would also result in more medical treatments being provided to British Columbians, benefiting the overall health and wellbeing of British Columbians, while conserving capital and operational costs in the public system. It would also increase patient choice.
>
> g) Enforcing the prohibitions against private medical services would therefore only harm and not benefit British Columbia's patients.
>
> ...
>
> 18. After the *Chaoulli* decision, I stated publicly that the Government did not want a two-tier health care system in Canada – one in Quebec after *Chaoulli* and a second, lower tier in the rest of Canada, including British Columbia. British Columbians should have the same right as the residents of Quebec to access private health care to avoid lengthy waits in the public system, and patients, not the Government, should be free to make that choice for themselves.
>
> ...
>
> 21. In 2006, in an effort to satisfy the concerns of the Federal Government, even though the concerns were not supported by credible evidence or arguments, the Government proclaimed certain of the amendments. In particular, it proclaimed amendments which empowered the [Medical Service Commission] to audit private clinics and to obtain an injunction. The amendments proclaimed in 2006 did not include the financial penalties or the new prohibition on private diagnostic testing, because the Government was of the view that those amendments would have prevented British Columbians from accessing these private medical services to protect their personal health care.

The Chambers Judge's Reasons

[17] Winteringham J.'s reasons are lengthy and detailed, and reflect a careful weighing of the complex considerations of law, fact and policy raised by the parties below. I do not intend to attempt to rehearse those reasons here except to the extent necessary to address the parties' arguments on this leave application. The reasons, to which I refer the reader, described the parties' respective positions at paras. 9–11; and the "background circumstances" of the case relevant to interlocutory injunctive relief at paras. 12–26. At paras. 27–93, the judge reviewed the evidence before her, noting that she had been "guided by the evidentiary rulings of [the trial judge] as I assess the affidavit evidence of several doctors including the weight, if any, to be attributed to that evidence". She then briefly reviewed *Chaoulli* at paras. 94–103 and considered the law concerning the granting of interlocutory relief in constitutional cases at paras. 104–44.

[18] The judge's analysis began at para. 145 and employed the well-known framework affirmed by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311 for the granting of injunctive relief (including stays.) At p. 334 of *RJR*, the Court stated:

> *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interrogatory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. [At 334.]

[19] It is trite law that the three factors do not form a checklist of items each of which must be satisfied before injunctive relief may be granted. As stated by McLachlin J.A. (as she then was) for this court in *British Columbia (Att'y-General) v. Wale* (1986) 9 B.C.L.R. (2d) 333, *aff'd*. [1991] 1 S.C.R. 62, the three parts of the test are not intended to be separate watertight compartments, but factors that "relate to each other", such that "strength on one part of the test ought to be permitted to compensate for weakness on another." (At 346–7.) Further, she observed:

> The checklist of factors which the courts have developed – relative strength of the case, irreparable harm, and balance of convenience – should not be employed as a series of independent hurdles. They should be seen in the nature of evidence relative to the central issue of assessing the relative risks of harm to the parties from granting or withholding interlocutory relief. [At 347.]

Serious Question to be Tried

[20] With respect to whether there was a serious question to be tried, the chambers judge began with the Attorney General's argument that this "low hurdle" had not been met because the *enforcement provisions* of the *MPA* were not being challenged in the underlying case. Indeed, the trial judge had dismissed an application by the plaintiffs to amend their notice of claim to plead facts relating to enforcement. (At para. 148.) However, the chambers judge did not agree with the Province's position. In her analysis:

> 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.
>
> 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. [At paras. 150-151; emphasis added.]

At para. 152, she adopted the plaintiffs' contention that it was not the risk of a fine *per se* that engaged s. 7 of the *Charter*, and that the enforcement provisions of the *MPA* did not change the nature of the plaintiffs' constitutional challenge to the prohibitions on "private-pay medically necessary health services".

[21] Returning to the existence of a serious question to be tried, the chambers judge noted that this determination was to be made on the basis of "common sense" and on a very limited review of the case on the merits, citing *RJR* at 348. She continued:

> 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.* [At para. 154.]

She found that the plaintiffs had established the following on the evidence before her that:

> 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.
>
> 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.
>
> 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.
>
> 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*.
>
> 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.* [At paras. 155-159; emphasis added.]

[22] On the basis of her preliminary assessment of the evidence demonstrating 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", the chambers judge was satisfied there was a serious question to be tried. (At para. 162.)

Irreparable Harm

[23] The judge then turned to the second factor – whether the plaintiffs had demonstrated irreparable harm. This subject was also contentious. The Province argued that the plaintiffs were required to establish irreparable harm *to themselves* and not to "unidentified third parties" because (again in the Attorney's submission) the claim was not pleaded as a systemic one and the plaintiffs did not have public interest standing. (At para. 165.)

[24] The 'standing' issue was problematic. The trial judge had in 2016 received written submissions on the question of whether the plaintiffs Cambie Surgeries Corporation and Specialist Referral Clinic (Vancouver) Inc. had standing to bring the constitutional challenge in this case. For reasons indexed as 2016 BCSC 1292, he had ruled that the corporate plaintiffs had *private* interest standing. (See paras. 57–8.) At para. 59, he said he did not find it necessary to decide whether they had public interest standing for purposes of the application before him; but he noted that they nevertheless met the "purposive and flexible" test for *public i*nterest standing enunciated in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society* 2012 SCC 45.

[25] Then, in later reasons indexed as 2018 BCSC 1141, in ruling on the plaintiffs' application to amend their pleading in light of the enactment of s. 18.1 of the *MPA*, the trial judge appears to have found that the plaintiffs did not meet the second part of the test for public interest standing and did not have a real stake or genuine interest in *s. 18.1* of the *MPA*. (As earlier noted, s. 18.1, which deals with diagnostic services, is not yet in effect and was not a subject of the plaintiffs' *Charter* argument.) Yet at the same time, he said at para. 60 of his ruling that the corporate plaintiffs had been "previously granted public interest standing after being granted private interest standing." (Quoted by the chambers judge at her para. 14.)

[26] Winteringham J. stated at para. 168 that given the authorities and the trial judge's ruling on standing, she was in a position to analyse the impact of the impugned legislation on the s. 7 *Charter* rights of patients *generally*, as opposed to its impact on the rights of the named plaintiffs specifically, in assessing the issue of irreparable harm.

[27] The chambers judge was understandably "wary" of trying to determine on the record whether adequate compensation could ever be obtained at trial should the plaintiffs succeed in their constitutional challenge. Conducting such an inquiry at this stage, she observed, would ignore cautions given by the Supreme Court of Canada in *RJR* and in *Manitoba (A.G.) v. Metropolitan Stores Ltd*. [1987] 1 S.C.R. 110. Thus cautioned, she concluded that irreparable harm had been demonstrated, 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.
>
> [At para. 167.]

(I note that Ms. Corrado is a plaintiff in this case. Both she and Ms. Martens had been successfully treated by one or both corporate plaintiffs and their avoidance of the waiting lists they would otherwise have had to endure in the public system is alleged to have saved much pain and suffering and perhaps, in Ms. Martens' case, her life.)

[28] The chambers judge emphasized that she did not intend to suggest that the evidence before her 'proved' that the Province had failed to meet optimal waiting times for any particular health care service. That, she said, was to be determined by the trial judge on all the evidence. For purposes of the injunction application, however, she was satisfied that prospective private health-care patients would be precluded from accessing health services in a manner that might alleviate their wait times, and that there was a sufficient causal connection between denying access to private-pay health services and ongoing harm that might be caused by such delay. (At para. 169.) Thus she ruled:

> 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. [At para. 170; emphasis added.]

Balance of Convenience

[29] Turning finally to the balance of convenience, Winteringham J. noted that where, as in this case, the purpose of the challenged legislation was to promote the public interest, it was not for her to determine whether it actually had such effect. Rather, she was required to assume that the legislation promoted the public interest. The onus was then on the plaintiffs to demonstrate that its suspension would:

> ...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. [At para. 171.]

The judge also acknowledged that applicants usually fail in efforts to obtain interim injunctive relief when they challenge the constitutionality of legislation, and for good reason. It was only in "exceptional" cases, she stated, that democratically-enacted legislation should be suspended before an actual finding of unconstitutionality or invalidity at trial.

[30] The Attorney General argued below that this was not one of the "clear cases" in which a court should order duly enacted laws to be "inoperable in advance of complete constitutional review" and that the Province would suffer immediate harm should the injunction be granted. The federal health minister had already deducted the sum of $15.9 million from its transfer payments to B.C. in March 2018. This money could be reclaimed if the Province established that it was "taking steps to end the practice of extra-billing in B.C." (At para. 175.)

[31] The chambers judge characterized this point as speculative:

> During the hearing of the Injunction Application, considerable time was spent on the CHT [Canada Health Transfer] 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..." [At para. 176.]

She noted at para. 177 that there was evidence that suggested the Province could seek to recover the $15.9 million because it had already taken steps to enforce the prohibitions in the *MPA*. The potential transfer of those funds would, she said, be "generally beneficial".

[32] She found, however, that this *was* an exceptional case. She reached this conclusion on the basis of the findings set out above and additional factors that, in her analysis, tipped the balance of convenience in the plaintiffs' favour. First, *Chaoulli* had "opened the door to *Charter* scrutiny of health care decision-making." (At para. 181.) In particular, Chief Justice McLachlin and Major and Bastarache JJ., as well as Deschamps J. in her separate reasons, had agreed that health-care legislation similar to the *MPA* was subject to constitutional review and that a court could not avoid reviewing legislation for *Charter* compliance when citizens challenge it. The chambers judge commented:

> 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. [At para. 182; emphasis added.]

and further:

> ... 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. [At para. 183.]

The chambers judge was satisfied on the evidence before her that at least some patients are at increased risk of suffering physical and psychological harm by reason of having to wait for public health-care services. It was such waiting, "with no option to pursue an alternative", that in her analysis engaged the rights of such persons under s. 7 of the *Charter* and tipped the balance of convenience in the plaintiffs' favour.

[33] The judge's second reason for finding that the case was "exceptional" in the context of the balance of convenience was that the parties were in the middle of a trial that had been underway for over two years. This was not a case in which the law had been brought into force prior to a trial on the merits. In fact, the plaintiffs' case was almost concluded and the Attorney General was to open its case in the near future. There had already been some 150 days of trial and 48,000 pages of evidence had been presented at trial.

[34] Perhaps more significantly, the new additions to s. 46 of the *MPA* had in fact been enacted in 2003 but had not been proclaimed into force until September 2018 – some 15 years later. Both parties attempted to rely on a "*status quo* argument", but the chambers judge found that the plaintiffs would be affected in a far greater manner than the Attorney General should injunctive relief not be granted. In her words:

> ... 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. [At para. 188.]

[35] In the result, Winteringham J. was satisfied that the "special considerations" raised by the application could be addressed by a time-limited order. Having been advised that the case at trial should be concluded by April 1, 2019, she was prepared to grant the *injunction* (the alternative to the *stays* sought by the plaintiffs) enjoining the Province from enforcing ss. 17, 18 and 45 of the *MPA* until June 1, 2019 or further order of the Court.

[36] The judge ended by summarizing her conclusions at para. 190:

> ...
>
> 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. [At para. 190.]

Application for Leave

[37] In support of his application for leave to appeal, the Attorney General asserts that the chambers judge:

> a. exercised her discretion on a wrong principle by:
>
> i. enjoining the enforcement of validly-enacted legislation despite failing to find that the Plaintiffs had established a clear case of the legislation's unconstitutionality; and
>
> ii. finding that the Plaintiffs had satisfied the irreparable harm branch of the test of an interlocutory injunction by establishing the possibility of harm to unnamed third parties, rather than harm to themselves;
>
> b. failed to exercise her discretion judicially by granting the broadest possible remedy, sought by the Plaintiffs only in the alternative, without any explanation of why that was necessary;
>
> c. erred in law by making critical findings of fact based on inadmissible expert opinion evidence; and
>
> d. erred in fact and law by finding that the Plaintiffs had established irreparable harm on the evidence before her.

I propose to address subpara. (a)(ii) and para. (d) together since the arguments advanced by the Province on those issues are essentially the same.

[38] At paras.18 and 19 of his written argument, the Attorney General cited the well-known 'tests' for the granting of leave to appeal in this court, namely:

> a. whether the appeal is prima facie meritorious, or on the other hand, whether it is frivolous;
>
> b. whether the points on appeal are of significance to the practice;
>
> c. whether the points raised are of significance to the action itself;
>
> and
>
> d. whether the appeal will unduly hinder the progress of the action.

The Attorney acknowledges that the overarching consideration is whether it is in the interests of justice to grant leave.

[39] The plaintiffs agree with the four factors as stated, but join issue on the application of each in the circumstances of this case. They submit that:

> In this case, the application for leave to appeal should be dismissed because the proposed grounds of appeal are not meritorious, the proposed appeal raises no legal questions of significance to the practice, it will unnecessarily delay the underlying trial, and there is no public interest in granting leave to appeal of this time-limited and discretionary decision.

As well, they emphasize the discretionary nature of the chambers judge's decision and the deferential standard of review that this court would be bound to apply in any appeal. Counsel appear to agree that the standard is whether the chambers judge erred in principle or made an order not supported by the evidence, or whether the order appealed from will result in an injustice: see the authorities cited by Mr. Justice Fitch in *Independent Contractors and Businesses Association v. British Columbia,* 2018 BCCA 429 at paras. 35–6.

Merits of the Appeal: A Wrong Principle?

[40] Although the Attorney agrees that an "arguable case" must be shown in all cases by an applicant for injunctive relief, he also contends (or at least so I infer) that a higher or different standard must be met where the applicant is seeking a suspension of the operation of duly enacted legislation. The Attorney says that the chambers judge had to find that the impugned legislation was unconstitutional or, put in slightly different terms, that she had to find a "clear case of unconstitutionality" before she could, in law, grant the injunction. It is said that such proof would have to extend beyond the 'engagement' of s. 7 rights, to include a *finding* that any violation of s. 7 rights is not in accordance with the principles of fundamental justice. In support, the Attorney cited *Metropolitan Stores* at 130-3; *RJR* at 343-7; and *Harper v. Canada (Attorney General)* 2000 SCC 57 at paras. 5–9.

[41] In *Metropolitan Stores*, Beetz J. for the Court addressed the 'arguable case' test as follows:

> In the case at bar, it is neither necessary nor advisable to choose, for all purposes, between the traditional formulation and the [*American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396 (H.L.)] description of the first test: the British case law illustrates that the formulation of a rigid test for all types of cases, without considering their nature, is not to be favoured (see Hanbury and Maudsley, *Modern Equity*. (12th ed., 1960) pp. 736-43). In my view, however, 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. [At 128; emphasis added.]

He also approved the *dictum* of Lord Diplock in *American Cyanamid* that:

> 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 consideration. These are matters to be dealt with at the trial. [At 130; emphasis added.]

The Supreme Court acknowledged that interlocutory procedures rarely allow a chambers judge to decide questions of constitutionality prior to trial. In the words of Beetz J., "…the court is generally much too uncertain as to the facts and the law to be in a position to decide the merits." (At 133.)

[42] The Court in *RJR* took a similar view. In its analysis:

> 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."
>
> 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.
>
> 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. [At 337–8; emphasis added.]

[43] In *Harper*, the majority of the Supreme Court observed at para. 4 that the first factor is whether there is a serious issue to be tried. The majority found this had been shown "without prejudging the appeal."

[44] Each of the foregoing decisions involved a *Charter* challenge to existing legislation, and there is no doubt that such a challenge imports special considerations where an injunction is sought pending trial. In *Metropolitan Stores*, Beetz J. considered how the usual tests for injunctive relief are applied in these circumstances. (See 129.) None of the parties in that case, he observed, had disputed the existence of a discretionary power to grant a stay in such cases, and he agreed with their assumption. (See 126.) He noted that "the courts consider" that they should not be restricted to the application of the traditional criteria and that unless the public interest is also taken into consideration *in evaluating the balance of convenience*, courts often "express their disinclination" to grant injunctive relief before constitutional invalidity has been finally decided on the merits. (At 129; my emphasis.) Following a review of the relevant cases and various practical consequences of granting injunctive relief in the form of the suspension of legislation, Beetz J. stated:

> … I respectfully take the view that Linden J. has set the test too high in writing in *Morgentaler* 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 Soc. of Alta. v. Black* and *Vancouver Gen. Hosps. v. Stoffman*,] … can be considered as exceptional or rare. Even the *Rio Hotel* case, *supra*, where the impugned provisions were broader, cannot, in my view, be labelled as an exceptional or rare case.
>
> 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* … 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, those two instances present little precedent value. [At 147–8; emphasis added.]

[45] In *RJR,* the Supreme Court again emphasized that the public interest is a "special factor" to be considered in assessing the balance of convenience in constitutional cases and that it must be given "the weight it should carry". The Court suggested it should be open to both parties in an interlocutory *Charter* proceeding to rely on considerations of the public interest. In the words of Sopinka and Cory JJ. for the Court:

> 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. [At 344; emphasis added.]

[46] Sopinka and Cory JJ. stated that a motions court should in most instances assume that irreparable harm to the public interest would result from the restraint of the action sought to be enjoined. They recognized at pp. 346–7 that public interest considerations will "weigh more heavily" in a 'suspension' case than in an 'exemption' case, in which a discrete and limited number of applicants are exempted from the application of the legislation; and that even in suspension cases some relief might be provided if the court is able to limit the scope of the applicant's request for relief. All things being equal, the court said, it is, in Lord Diplock's words, a "counsel of prudence to… preserve the *status quo*."

[47] In *Harper*, the Court re-affirmed that in injunction applications based on constitutional challenges, the motions judge must presume that the impugned law will "produce a public good." In the words of the majority:

> The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or 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. [At para. 9; emphasis added.]

[48] This is presumably the source of the "clear case" requirement asserted by the Attorney General in the case at bar. The same phrase was employed in a lengthy passage quoted by Winteringham J. from a more recent case involving interlocutory relief, *Manitoba Federation of Labour et al. v. The Government of Manitoba* 2018 MBQB 125. The quoted passage includes the conclusion of Edmond J. that "… only in clear cases will interlocutory injunctions against the enforcement of the law on grounds of alleged unconstitutionality or a violation of the *Charter* succeed." In his analysis:

> 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 enacted legislatures are directed to the common good and serve a valid public purpose.
>
> 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. [At paras. 154–5; emphasis added.]

[49] As I have already suggested, the "clear case" requirement in cases where the constitutionality of legislation is challenged does not in my view affect the first *RJR* factor by imposing a higher standard in *the sense of a strong or highly meritorious argument.* Instead, it informs the court's task in assessing the *second* factor of the analysis, *irreparable harm*. Given that a court is required to assume the existence of a public good underlying challenged legislation, it could hardly be otherwise: the applicant for an injunction must, as the chambers judge said, "prove a more compelling public interest" if it is to offset the presumption of public good. (See paras. 171, 177.) The chambers judge clearly accepted these propositions of law, but found that the balance in this case had been tipped in the plaintiffs' favour.

[50] As far as the Attorney's first ground of appeal – that the chambers judge proceeded on a wrong principle in granting an injunction in the absence of finding that a "clear case" of unconstitutionality had been established – is concerned, none of the authorities supports the assertion that a motions judge should find facts or reach conclusions on the outcome of the issues that stand to be decided at trial. I see no merit in the Attorney's first proposed ground of appeal, which rests on a misconception of the nature of an interlocutory injunction. Indeed it would have been erroneous for the chambers judge to have attempted to reach any final conclusion on the constitutionality of the impugned provisions of the *MPA*.

Harm to "Unnamed Third Parties"

[51] I turn next to the Province's argument that the chambers judge exercised her discretion on a wrong principle in finding that the test of irreparable harm had been met by the demonstration of harm to "*unnamed third parties*". It will be recalled that Winteringham J. concluded (based on her review of the pleadings, the trial judge's ruling on private and public interest standing, and the case authorities regarding *Charter* litigation and public interest standing) that it was open to her to consider the impact of the *MPA* prohibitions "more generally" – presumably as a systemic challenge. In the Attorney's submission, this was erroneous: the judge had to find harm to *the plaintiffs themselves* before she could be satisfied on the second *RJR* factor.

[52] Although I would describe the Attorney General's argument on this point as a weak one, I cannot say it is frivolous or vexatious. Part of the difficulty stems from the fact that the trial judge declined to reach a conclusion in his 2016 reasons on the question of the public interest standing of the corporate defendants – despite also finding the plaintiffs had met the applicable criteria for that status. Regardless of the public/private interest standing of the corporate plaintiffs, however, the plaintiffs' claims here, like those advanced in *Chaoulli*, are systemic in nature. In the words of Binnie, LeBel and Fish JJ. in *Chaoulli* at para. 189, their argument is not limited to a case-by-case consideration and they do not limit themselves to the circumstances of any particular patient. (Binnie, LeBel and Fish JJ. were not in dissent on this point; Deschamps J. agreed on this point at para. 35; and Chief Justice McLachlin and Major and Bastarache JJ. agreed with her conclusions: see para. 102.) In addition in the case at bar, one or more of the individual plaintiffs has or had at some point (and I see no meaningful difference on that point) a direct interest in the outcome of

the litigation. The corporate plaintiffs have been found to have (at the least) a direct interest as well. In these circumstances, the question of law advanced by the Attorney seems to be of theoretical interest at best.

Inadmissible Evidence?

[53] Setting aside subparagraph (b) of the Attorney's grounds of appeal for the moment, we come to his third ground – that the chambers judge erred in law by making critical findings of fact and law based on inadmissible expert opinion evidence. As noted earlier, Winteringham J. stated she was guided in her analysis by the evidentiary rulings of the trial judge in assessing affidavit evidence of several doctors that was filed in chambers by the plaintiffs. Yet the Attorney contends that she relied on evidence the *trial judge* had ruled inadmissible. (When questioned at the hearing in this court, counsel for the Province said that in using the word "inadmissible" he meant the trial judge had given the evidence "no weight". On this point, see para. 6 of the trial judge's reasons at 2017 BCSC 156.) The evidence objected to by the Province included parts of the "lay" evidence (as opposed to expert opinion evidence) of Dr. Brian Day, the president and medical director of the plaintiff Cambie Surgeries Corporation (see 2018 BCSC 514); opinion evidence of Professor Alistair McGuire on the issue of medical harm to individuals waiting for medical care; and opinion evidence of Mr. Nadeem Esmail, an economist. The Attorney says that because Mr. Esmail had no *medical* training or expertise, he was not qualified to opine on the medical effects of waiting or harm caused by waiting.

[54] The plaintiffs respond that, just as it was not for the chambers judge to rule on the constitutionality of the impugned legislation, it was not for her to resolve the many evidentiary disputes that have confronted and will continue to confront the trial judge. They contend that only *portions* of the disputed evidence were ruled inadmissible by the trial judge and that the chambers judge was entitled to consider the rest. (Neither party before me cited any case-law as to whether the chambers judge was bound by the trial judge's evidentiary rulings; as Mr. Penner observed, the trial judge is usually the judge who rules on injunctive relief.) As well the plaintiffs say that even if the expert evidence relied on expressly by the chambers judge was "inadmissible" (which they deny), the conclusions reached by Professor McGuire and Mr. Esmail were also supported by various other experts whose reports *were* admitted, including those of Drs. Masri, Matheson, Chambers and Younger. Last, they emphasize that evidence that may have been excluded as unhelpful on issues at trial may well have been found to be relevant to issues on the injunction application; and that the expert opinions given at trial were similar to those admitted in *Chaoulli*.

[55] Even if one assumes the Attorney is correct in his assertion that the chambers judge relied on evidence the trial judge had found to be truly inadmissible, it is in my view very unlikely a division of this court would, prior to the conclusion of the trial and issuance of the trial judge's reasons, express views on his evidentiary rulings. As this court (with a division of five judges) observed recently in another appeal in this litigation indexed as 2017 BCCA 287:

> This Court has repeatedly held it does not have jurisdiction to hear free-standing appeals from evidentiary and other rulings made during the course of a trial. The modern genesis of that line of authority is *Rahmatian v. HFH Video Biz, Inc.* (1991), 55 B.C.L.R. (2d) 270 (C.A., Chambers), wherein Chief Justice McEachern declined to entertain an application by a defendant in an on-going trial for leave to appeal the dismissal of a no-evidence motion. In his view, the dismissal was not an order but rather, "a ruling, or a ruling on evidence which is part of the trial process, and is not appealable until after the trial has been completed": at 272. This reasoning is in accord with older authorities to which I will refer later in these reasons.
>
> To hold that an evidentiary ruling made during a trial juridically constitutes an appealable order would be inconsistent with the long-accepted principle that it is always open to a trial judge to revisit such rulings: see *R. v. Adams*, [1995] 4 S.C.R. 707 at paras. 29–30; *R. v. Cole*, 2012 SCC 53 at para. 100, [2012] 3 S.C.R. 34. If such rulings gave rise to orders and those orders were formally entered, then the doctrine of *functus officio* would preclude reconsideration even in the face of a material change in circumstances. [At paras. 40, 63.]

Overly Broad Terms?

[56] The Attorney's final ground of appeal is that Winteringham J. failed to exercise her discretion judicially by granting a "broad" injunctive order, rather than a stay restricted to the enforcement provisions of ss. 46(5.1) and (5.2) of the *MPA*, "without any explanation of why that was necessary." This assertion tests the limits of the court's discretion in such cases, and more particularly the extent to which a decision reached by a judge in chambers must be explained in reasons for judgment. Again, given the nature of the motions judge's task on an application such as the one before Winteringham J., the broad similarity of injunctions and stays, and the deferential standard of review that would have to be applied by this court, I conclude that this ground is a weak one, but not one that could be said to be frivolous or vexatious.

Summary on Merits of the Appeal

[57] To summarize my conclusions regarding the merits of the issues proposed to be advanced on appeal by the Province, I find that:

(i) There is no merit to an appeal based on the proposition that the chambers judge exercised her discretion on a wrong principle in granting injunctive relief in the absence of a finding of a "clear case" of unconstitutionality. The law is clear that an "arguable" or "serious" case is sufficient at this point, and there is no doubt that "low hurdle" was met;

(ii) The argument that the chambers judge proceeded on a wrong principle in finding harm to "unnamed third parties" rather than to the plaintiffs themselves is highly problematic and overlooks the evidence of the individual plaintiffs in this case, the trial judge's rulings on public interest standing and the fact that as in *Chaoulli*, the *Charter* challenge here is a 'systemic' one. Nevertheless, the point is not frivolous or vexatious;

(iii) The argument that the chambers judge considered inadmissible opinion evidence is also problematic given that this court will not rule in an appeal at this stage on whether the trial judge's evidentiary rulings are correct or not. Nevertheless, the point

cannot be said to be frivolous or vexatious; and

(iv) The argument that the chambers judge was required to explain in her reasons why she granted an injunction on the terms she did rather than a stay in the narrower terms sought by the plaintiffs (the injunction being their second alternative) is also arguable, although highly theoretical.

Significance to the Practice

[58] For the reasons given above, I am of the view that those questions raised by the Attorney which I have found to be arguable, are not of significance to the practice generally.

Significance to the Action / Will Appeal Unduly Hinder the Action?

[59] It is the final two branches of the test for granting leave to appeal (see para. 38 above) that in my view are decisive of this application. First, an appeal that answered the questions described above would be of very little significance to the action itself. As held in the previous appeal in 2017, this court would in all likelihood decline to rule on the evidentiary issue(s) raised by the Province. Nothing would change at trial if this court were to rule that the chambers judge should not have considered "harm" in a general way, given that direct harm to at least Ms. Corrado and the corporate plaintiffs was shown to the trial judge's satisfaction. If this court were to rule that the chambers judge should have explained at length why she chose to grant an injunction as opposed to a stay, the practical effect is unclear: the court might still grant an injunction or a stay of some kind. At bottom, the issues are at best theoretical distractions from the constitutional issues that are the subject of the underlying case. Given the amount of time and resources, including judicial resources, that have been devoted to this proceeding thus far, an appeal on these issues simply cannot, in my respectful view, be justified – even if it were the case that both parties have unlimited funds and time, which they do not.

[60] This brings me to the fourth factor – the effect that an appeal would have on the trial. The Attorney submitted that two previous appeals in this proceeding were mounted and completed without apparent difficulty on the part of the plaintiffs, suggesting that the same could occur with respect to this appeal. Again with respect, I am doubtful that no real difficulties were encountered by the parties and their counsel by reason of the two appeals. Obviously, *judicial* time and resources are taken up by appeals, and have been taken up in this case by five of them. More to the point, I reiterate that the appeal of the issues described above would be virtually irrelevant to the resolution of the *Charter* challenge that has been underway in the Supreme Court of British Columbia since 2016. It is now 2019. The parties and their counsel should be encouraged to complete their cases in the court below, not to pursue distractions in the form of appeals to this court.

[61] The ultimate question on this leave application is of course whether the proposed appeal would be in the interests of justice. It will be apparent that in my opinion, the proposed appeal is not in the interests of justice. The authorities are clear than a motions judge is not expected to rule on the issues of fact and law before the trial court, nor to carefully weigh and make rulings on admissibility or findings of harm. The injunction is merely an interim measure, and generally the preservation of the *status quo* pending the trial court's decision will be the appropriate course.

[62] Here we have three highly theoretical questions that are irrelevant to the important *Charter* issues in the case; a discretionary decision reached after careful consideration and explained in lengthy reasons; and the granting of relief that effectively preserves the *status quo* that was in place from 2003 until mid-trial when the Province suddenly decided to attach penalties to contraventions of ss. 17 and 18 of the *MPA*. Granting leave would only add another layer of expense and complexity to a proceeding that has already occupied 150 days of court time over two years, and presumably many more months of counsel's time. It is time for counsel and the parties to focus on the completion of the trial process.

[63] In all the circumstances, I would dismiss the application.

"The Honourable Madam Justice Newbury"

SCHEDULE A

General limits on direct or extra billing

17 (1) Except as specified in this Act or the regulations or by the commission under this Act, a person must not charge another person

(a) for or in relation to a benefit, or

(b) for materials, consultations, procedures, use of an office, clinic or other place or for any other matters that relate to the rendering of a benefit.

(1.1) The commission may determine that a person charges in relation to a benefit for the purposes of subsection (1) (a) if the charge is for anything done, provided, offered, made available, used, consumed or rendered

(a) at any time in relation to the rendering or refusal to render the benefit, and

(b) in circumstances that a reasonable person would consider would result in

(i) a refusal to render the benefit if the thing were not done, provided, offered, made available, used, consumed or rendered, or

(ii) the beneficiary being rendered the benefit in priority over other persons or being given preferential treatment in the scheduling or rendering of the benefit if the thing were done, provided, offered, made available, used, consumed or rendered.

(1.2) If a person charges or attempts to charge another person contrary to subsection (1), another person is not liable to pay the amount charged.

(2)Subsection (1) does not apply:

(a) if, at the time a service was rendered, the person receiving the service was not enrolled as a beneficiary;

(b) if, at the time the service was rendered, the service was not considered by the commission to be a benefit;

(c) if the service was rendered by a practitioner who

(i) has made an election under section 14 (1), or

(ii) is subject to an order under section 15 (2) (b);

(d) if the service was rendered by a medical practitioner who is not enrolled.

Limits on direct or extra billing by a medical practitioner

18 (1) If a medical practitioner who is not enrolled renders a service to a beneficiary and the service would be a benefit under this Act or the *Hospital Insurance Act* if rendered by an enrolled medical practitioner, a person must not charge another person for, or in relation to, the service, or for materials, consultations, procedures, use of an office, clinic or other place or for any other matters that relate to the rendering of the service, an amount that, in total, is greater than

(a) the amount that would be payable under this Act, by the commission, for the service if rendered by an enrolled medical practitioner,

(b) if a payment schedule or regulation permits or requires an additional charge by an enrolled medical practitioner, the total of the amount referred to in paragraph (a) and the additional charge, or

(c) the amount that would be payable under the *Hospital Insurance Act*, for the service if rendered by an enrolled medical practitioner.

(2) Subsection (1) applies only to a service rendered in

(a) a hospital as defined in section 1 of the *Hospital Act*,

(b) a facility as defined in section 1 of the *Continuing Care Act*,

(c) a community care facility or assisted living residence as defined in section 1 of the *Community Care and Assisted Living Act* that receives funding for the service through a regional health board, the Nisga'a Nation or the Provincial Health Services Authority, or

(d) a medical facility or diagnostic facility if

(i) a regional health board as designated under section 4 of the *Health Authorities Act*, or

(ii) the Provincial Health Services Authority

has contracted to have the service rendered.

(3) If a medical practitioner described in section 17 (2) (c) renders a benefit to a beneficiary, a person must not charge another person for, or in relation to, the benefit, or for materials, consultations, procedures, use of an office, clinic or other place or for any other matters that relate to the rendering of the benefit, an amount that, in total, is greater than

(a) the amount that would be payable under this Act, by the commission, for the benefit, or

(b) if a payment schedule or regulation permits or requires an additional charge, the total of the amount referred to in paragraph (a) and the additional charge.

(4) If a medical practitioner who is not enrolled charges another person contrary to subsection (1) or (3), another person is not liable to pay the amount charged.

Private insurers

45 (1) A person must not provide, offer or enter into a contract of insurance with a resident for the payment, reimbursement or indemnification of all or part of the cost of services that would be benefits if performed by a practitioner.

(2) Subsection (1) does not apply to

(a) all or part of the cost of a service

(i) for which a beneficiary cannot be reimbursed under the plan, and

(ii) that is rendered by a health care practitioner who has made an election under section 14 (1),

(b) insurance obtained to cover health care costs outside of Canada, or

(c) insurance obtained by a person who is not eligible to be a beneficiary.

(3) A contract that is prohibited under subsection (1) is void.