No. Court File No. VLC-S-S-212175
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

DR. MELODY JESSON

Petitioner

And

THE COLLEGE OF CHIROPRACTORS OF BRITISH COLUMBIA

Respondent

NOTICE OF APPLICATION

Name(s) of applicant(s): Dr. Melody Jesson (the "Applicant")

To: The College of Chiropractors of British Columbia
200 Granville St #900
Vancouver, BC V6C 1S4
Attention: Registrar

And to: The Attorney General of the Province of British Columbia
Ministry of Attorney General
Parliament Buildings
Victoria, BC

TAKE NOTICE that an Application will be made by the Applicant to the Presiding Judge at the Courthouse at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia, on March 22, 2021 at 9:45 a.m., for the Order(s) set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An interim injunction and/or prohibition pursuant to section 2(2) of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 (the "***JRPA***"):

    a) enjoining the Respondent from giving effect to the decision of the College of Chiropractors of British Columbia (the "**College**") made on February 4, 2021 (the "**Decision**") to amend the Professional Conduct Handbook ("**PCH**") by the addition of Part 15 thereof; and

    b) enjoining the Respondent from taking any potential professional disciplinary action against the Applicant in relation to or arising out of the Decision.

2. A permanent injunction and/or prohibition pursuant to section 2(2) of the *JRPA*:

    a) enjoining the Respondent from giving effect to the Decision of the College to amend the PCH by the addition of Part 15; and

    b) enjoining the Respondent from taking any potential professional disciplinary action against the Applicant in relation to or arising out of the Decision.

    In the alterative

3. An interim injunction pursuant to Rule 10-4 of the *Supreme Court Civil Rules*:

    a) enjoining the Respondent from giving effect to the Decision of the College to amend the PCH by the addition of Part 15; and

    b) enjoining the Respondent from taking any potential professional disciplinary action against the Applicant in relation to or arising out of the Decision.

4. A permanent injunction pursuant to Rule 10-4 of the *Supreme Court Civil Rules*:

    a) enjoining the Respondent from giving effect to the Decision of the College to amend the PCH by the addition of Part 15; and

    b) enjoining the Respondent from taking any potential professional disciplinary action against the Applicant in relation to or arising out of the Decision.

5. Costs; and

6. Such further and other relief as this Honourable Court deems just.

Part 2: FACTUAL BASIS

A. NATURE OF RELIEF SOUGHT

1. The Applicant Dr. Melody Jesson seeks an injunction against the Respondent to preserve the status quo pending the hearing of the Petition under the *JRPA* in which the Applicant is seeking the following relief:

    a) A Declaration pursuant to section 2(2) of the *JRPA* that the Decision is of no force and effect;

    In addition or in the alternative,

    b) an Order under sections 2(2) and 7 of the *JRPA* in the nature of certiorari quashing and setting aside the Decision; and

    c) A Declaration that the Decision be set aside as its scope and effect exceeds the statutory authority of the Respondent and is, therefore, *ultra vires*.

B. BACKGROUND

2. The Applicant is a Chiropractor and Registrant of the College. The Petition is a representative proceeding pursuant to Rule 20-3 of the *Supreme Court Civil Rules*. The Applicant represents the interests of all Registrants of the College.

3. The Respondent, the College, is a body continued pursuant to section 15.1(1) of the *Health Professions Act*, R.S.B.C. 1996, c. 183 (the "***HPA***"), with an address of 200 Granville St #900, Vancouver, BC V6C 1S4.

4. On August 11, 2020, the College announced a public consultation process on the use of radiography proposed amendments to the PCH.

5. On July 15, 2020, prior to the commencement of the public consultation, the College stated that it anticipated amendments to the PCH on the basis of:

    The clinical utility of routine spinal radiographs by chiropractors: a rapid review of the literature, published on July 9, 2020 by Corso et al.

    (the "**Review**").

6. At that time, the College anticipated significantly restricting the ability of Registrants to apply or requisition X-rays in their practices.

7. On September 8, 2020, the Applicant as part of the public consultation process, provided submissions to the College objecting to the proposed restriction on the use of radiography (the "**Submissions**"). In the Submissions, the Applicant specifically objected to the restriction in the proposed amendments on the use of radiography for diagnostic and treatment purposes, absent a contra-indication or so-called "red flag".

8. The Submissions set out the shortcomings of the Review, demonstrating that the Review is inconclusive, and where it purported to be conclusive, it was flawed.

9. The College ignored the Submissions, as well as the submissions of other Registrants and provided no response to the public consultation process**.**

10. On February 4, 2021, the Board of the College approved the amendments to Part 2 and Appendix "L" of the PCH. This Petition does not address any of these changes.

C. THE AMENDMENTS TO THE PCH

11. On February 4, 2021, in addition to the foregoing, the College made the addition of the new Part 15 to the PCH (the "**Amendments**"). The College cited the Review as its justification for the Amendments. The Amendments are the subject of the Applicant's Petition for the Judicial Review.

12. The Amendments, being the addition of Part 15 to the PCH, significantly restricts the ability of chiropractors to use and interpret radiographic imaging.

13. Part 15 of the PCH reads as follows:

> ***Part 15 Diagnostic Imaging***
>
> *15.1 A chiropractor may*
>
> *a) apply X-rays to a patient, or*
>
> *b) issue an authorization or instruction for another person to apply X-rays to a patient, including X-rays for the purpose of computerized axialtomography,*
>
> ***only if the application of X-rays is indicated by a patient history or physical examination that identifies serious pathology or clinical reasons to suspect serious pathology.***
>
> *15.2* ***Routine or repeat X-rays used as a regular protocol during the evaluation and diagnosis of patients are not clinically justified.*** *This includes*
>
> *a) X-rays to screen for spinal anomalies or serious pathology in the absence of any clinical indication,*

b) X-rays to diagnose or re-assess spinal conditions in the absence of any clinical indication, and

c) X-rays to conduct biomechanical analysis or listings to identify spinal dysfunction, whether called subluxation, fixation or by any other term.

[Emphasis added]

D. RADIOGRAPHIC IMAGING AND CHIROPRACTIC CARE

14. Radiographic imaging is fundamental to the Applicant's practice, and the practice of many other Registrants of the College in British Columbia.

15. Radiographic imaging to conduct biomechanical analysis and to identify spinal dysfunction and subluxation is taught in all accredited chiropractic Colleges, and is a fundamental aspect of the practices of the many of the Registrants.

16. As a result of the Amendments, the Applicant is potentially prevented from providing safe, ethical, and effective care to their patients.

17. As a result of the Amendments, the Applicant's trade is unfairly and unduly restrained.

18. Many chiropractic patients have found significant benefit from their access to chiropractic medicine techniques that use radiographic imaging. Many of these patients rely on this treatment to maintain their mobility, limit their pain, and maintain their health and wellness.

19. As a result of the Amendments, these patients of the Applicant are potentially prevented from accessing their chosen treatment.

20. As a result of these Amendments, the nature and viability of the Applicant's professional practice are at risk. The Application will suffer irreparable harm if the Amendments are allowed to stand.

E. STATUTORY FRAMEWORK

(i) Statutory Authority, Duties, and Objects of the College

21. The College, and its power to implement and amend standards for its registrants, are governed by the *HPA*.

22. The College is permitted to make bylaws to establish practice standards as set out in section 19 of the *HPA*. The following subsection is relevant to the herein proceedings:

19 (1) A board may make bylaws, consistent with the duties and objects of a college under section 16, that it considers necessary or advisable, including bylaws to do the following:

(k) establish standards, limits or conditions for the practice of the designated health profession by registrants; …

23. The College's statutory duties and objects are set out in section 16 of the *HPA*. The College has the following duties set out in subsection 16(1):

16 (1) It is the duty of a college at all times
(a) to serve and protect the public, and
(b) to exercise its powers and discharge its responsibilities under all enactments in the public interest.

24. The College has the following objects set out in subsection 16(2) of the *HPA* which are relevant to the herein proceedings:

(2) A college has the following objects:

(b) to govern its registrants according to this Act, the regulations and the bylaws of the college;

…

(d) to establish, monitor and enforce standards of practice to enhance the quality of practice and reduce incompetent, impaired or unethical practice amongst registrants; …

(ii) Jurisdiction to Review

25. This Honourable Court has jurisdiction to review the decision of the College Board at issue in the Petition filed in this proceeding.

26. The *HPA* provides the following powers and duties of the Health Professions Review Board under subsection 50.53(1):

50.53 (1) The review board has the following powers and duties:

(a) on application under section 50.54 (2), to review a registration decision;

(b) on application by a registrant or complainant under section 50.57 (1), to review the failure, by the inquiry committee, to dispose of a complaint made under section 32 (1) or an investigation under section 33 (4) within the time required under section 50.55;

(c) on application by a complainant under section 50.6, to review a disposition of a complaint made by the inquiry committee under section 32 (3), 33 (6) (a) to (c) or 37.1;

(d) to develop and publish guidelines and recommendations for the purpose of assisting colleges to establish and employ registration, inquiry and discipline procedures that are transparent, objective, impartial and fair.

27. The College's decision to approve the Amendments does not fall within the scope of the powers and duties provided to the Health Professions Review Board under the *HPA*. As such, the Health Professions Review Board does not have jurisdiction to review the decision of the College Board at issue in this petition.

28. Subsection 2(2) of the *JRPA* provides:

> *2 (2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:*
>
> *(a) relief in the nature of mandamus, prohibition or certiorari;*
>
> *(b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.*

29. The College purported to exercise its statutory powers under sections 16 and 19 in its decision to approve the Amendments, which were amendments to the standards of practice applicable to Registrants of the College.

30. Section 2(2) of the *JRPA* authorizes this Honourable Court to grant relief in relation to the College's exercise of statutory power in this instance.

F. THE AMENDMENTS ARE ULTRA VIRES THE AUTHORITY OF THE COLLEGE

31. It is the position of the Applicant that the College does not have authority under the laws of British Columbia to make the Amendments restricting the use of X-rays, and as such, its decision to approve the Amendments is *ultra vires*.

32. The authority of the College to govern its affairs is subject to the *HPA* and the *Health Professions General Regulation*, B.C. Reg. 275/2008 (the "***Regulation***"). Section 16(2)(b) of the *HPA* states that regulatory colleges have the duty to govern their Registrants according to the *HPA*, the *Regulation,* and the bylaws of the College. The *Regulation* states that:

> *4 (1) A registrant in the course of practising chiropractic may do any of the following:*
>
> *[…]*
>
> *(e) apply X-rays for diagnostic or imaging purposes, excluding X-rays for the purpose of computerized axial tomography;*

33. This section of the *Regulation* is clear. Chiropractors can apply X-rays for diagnostic or imaging purposes. The *Regulation* does not stipulate any further restrictions aside from X-rays for the purpose of CAT scans. The College does not have authority under the *HPA* to make the Amendments to the PCH as those amendments run contrary to the express permission granted to chiropractors in the *Regulation.*

34. None of the other activities that chiropractors are permitted to carry out under section 4 of the *Regulation* have been restricted by the PCH.

35. It should be within a chiropractor's clinical judgment to determine whether to recommend X-rays to their patients, and the frequency of their application in any particular patient's care.

36. The powers of the College arise from the statutory grant of power set out in the *HPA*. It is not open to the College to specifically override the Legislature and the *Regulation* by withdrawing the unqualified authority of the chiropractors to apply X-rays for diagnostic or imaging purposes.

37. The College's decision to approve the Amendments therefore contravenes the College's object under subsection 16(2) of the *HPA* to govern its registrants in accordance with the *HPA* and the *Regulation*.

G. FAILURE IN DUTY TO THE PUBLIC

38. By approving the Amendments, the College failed in its duties to serve and protect the public and exercise its powers in the public interest, in accordance with subsection 16(1) of the *HPA*.

39. The Amendments do not account for patients who have found tremendous benefits in chiropractic modalities that rely on X-rays. This failure to address the rights of patients to select the health care options of their choice runs contrary to the College's own stated policies and the laws of British Columbia, including the duties set out in subsection 16(1) of the *HPA* to serve and protect the public and exercise its powers in the public interest.

40. Rather than relying on the expertise and clinical discretion of chiropractors, the Amendments arbitrarily limit the use of X-ray imaging exclusively to circumstances where serious pathology, or clinical reasons to suspect serious pathology, are identified.

41. The Amendments arbitrarily state that routine or repeat X-rays used as a regular protocol during the evaluation and diagnosis of patients are not clinically justified. As a result, the Amendments significantly limit the ability of chiropractors to make use of radiography in patient care.

42. The PCH (at page 2) states that:

> *"registrants are reminded of their obligation to know and abide by the Health Profession Act, the Bylaws and other legislation that governs the practice of chiropractic in British Columbia, including: … the Health Care (Consent) and Care Facility (Admission) Act."*
>
> (the "**HCCFA**").

43. The *HCCFA* defines health care to mean anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other purpose related to health. Section 4 of the *HCCFA* states that:

> *4 Every adult who is capable of giving or refusing consent to health care has:*

> *(a)* ***the right to give consent*** *or to refuse consent on any grounds, including moral or religious grounds, even if the refusal will result in death,*
> *(b)* ***the right to select a particular form of available health care on any grounds****, including moral or religious grounds,*
> *(d)* ***the right to expect that a decision to give, refuse or revoke consent will be respected****, and*
> *(e)* ***the right to be involved to the greatest degree possible in all case planning and decision making****.*
>
> [emphasis added]

44. The Amendments propose to take away this statutorily-given right from the patients who have found significant benefit from chiropractic treatment involving X-rays.

45. Given that the College and its Registrants are bound by the *HCCFA*, the Amendments put many chiropractors in the position of having to act contrary to their patients' rights under the *HCCFA* or face professional repercussions under the PCH and the College's bylaws.

46. Accordingly, by approving the Amendments, the College failed in its duties to the public as required under the *HPA*.

H. RESTRAINT OF TRADE

47. As stated above, X-rays are a necessary and fundamental part of the Applicant's practices, and the practices of many of the Registrants. As a result of the Amendments, the Applicant is not able to continue to practice effectively amounting to a restraint of trade.

48. The restraint of trade is against public policy in that it contravenes the principle of freedom to conduct business. The restraint of trade in this instance cannot be justified as reasonable in the interests of the parties nor of the public. The decision of the College to approve the Amendments that resulted in the restraint of trade affecting the Applicant was made through an inappropriate and unauthorized exercise of the College's statutory authority, and should be set aside.

I. LACK OF FAIRNESS AND BIAS

49. The College displayed a lack of fairness and bias in its decision-making process relating to the Amendments.

50. The Review was created at the behest of the College to provide a basis for the Amendments. However, the Review is inconclusive, and where it is potentially conclusive, its methodology is flawed.

51. The Applicant made the College aware of the significant flaws in the Review by providing the College with the Submissions. The Submissions set out the following issues and concerns, among others:

a. The Review is inconclusive in relation to its objective;

b. The Review's methodological limitations call its conclusions into question;

c. The College should prefer the findings from the available more reliable sources over the findings of the Review; and

d. The Review lacks substantive data to justify its conclusions on radiation in chiropractic practice.

52. Further, the College stated that it "anticipate[d] amendments" to the PCH on the basis of the Review alone, before the public consultation process had even begun. This indication of the College's intended course of action prior to the findings of the purported consultation was inappropriate and demonstrated the College's bias in its decision-making relating to the Amendments.

53. Events during the meeting of the College Board on February 4, 2021, at which the Amendments were authorized, also demonstrate bias and lack of fairness, including:

a) disabling the comment function on the video conferencing platform hosting the Board meeting, effectively disallowing Registrants from participating in the meeting and asking questions of the Board;

b) members of the Board repeatedly pushing for an early vote; and

c) questions and concerns of Board members relating to the proposed amendments to the PCH going unanswered.

54. The College's reliance on the Review in arriving at its decision to approve the Amendments, despite its myriad flaws, demonstrated a lack of fairness in its decision-making process.

55. Further, the decision-making process was tainted by the actual or perceived bias of the College arising from its reliance on the Review despite conducting a public consultation.

56. As a result, the College failed to act as an impartial decision-maker in relation to the Amendments, and its decision should be set aside.

J. TIMING OF THE AMENDMENTS

57. The College is facing amalgamation with other professional relating businesses.

58. The end of the consultation period for the Amendments arrived only twelve days after the Minister of Health Adrian Dix announced, namely on August 27, 2020, that the College will

be amalgamated into a multi-profession regulatory body tentatively referred to as the Regulatory College of Complementary and Alternative Health and Care Professions ("**RCCAHCP**"). There is no date yet set for the formal amalgamation to take place.

59. It is not appropriate for the College to make the Amendments when the College is facing amalgamation. In light of the shortcomings of the Review, the Amendments' disregard for patients' rights, and the lack of authority for the College to make the Amendments, the College should not make a decision that will necessarily have to be reconsidered by the RCCAHCP when it drafts new guidelines.

60. There is no justification for the College's unauthorized and unjustified exercise of its statutory authority in approving the Amendments when its Decision will ultimately be nothing but a short holdover until a new PCH is considered.

61. It will be up to the RCCAHCP to consider the future of its registrants. Further, the *HPA* and the *Regulation* will be redrafted and the Legislature will have the opportunity consider the appropriate scope of chiropractic practice, including radiography.

Part 3: LEGAL BASIS

62. At the hearing of the Petition, the Applicant intends to rely on the following Rules and Enactments:

a) Rules 2-1, 10-4, 14-1, 16-1, 20-3, and 21-3 of the Supreme Court Civil Rules;

b) *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241;

c) *Health Professions Act*, R.S.B.C. 1996, c. 183; and

d) *Health Professions General Regulation*, B.C. Reg. 275/2008.

A. Injunctive Relief: Common Law Basis

The test for the granting of an interlocutory injunction

63. The test for granting interim injunctive relief is set out in *British Columbia (Attorney General) v. Wale*. The Court may grant an injunction if:

a) there is a fair question to be tried as to the existence of the right which is alleged and the breach thereof, actual or reasonably apprehended; and

b) the balance of convenience favours granting the injunction.

British Columbia (Attorney General) v. Wale, [1986] B.C.J. No. 1395 (C.A.) at 45, aff'd at [1991] 1 S.C.R. 62 *("Wale");*
Onkea Interactive Ltd. v. Smith, 2006 BCCA 521 at ¶ 9 *("Onkea")*

64. While the Supreme Court of Canada in RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 (S.C.C.) has also approved a three-pronged test for granting interim injunctive relief, in which the question of irreparable harm is a separate inquiry, the two pronged test set out in Wale is commonly applied by the British Columbia courts. The Wale test considers the issue of irreparable harm at the balance of convenience stage of the analysis. The fundamental question of the analysis is whether the granting of an injunction is just and equitable in all the circumstances of the case.

Onkea at ill 10, citing *Roxum (West) Inc. v. 445162 B.C. Ltd.,* 2001 BCCA 362; *Expert Travel Financial Security (E.F.T.S.) Inc. v. BMS Harris & Dixon Insurance Brokers Ltd.,* 2005 BCCA 5 at 11 54-55

65. With regard to the first prong of the test for interim injunctive relief, the applicant's burden is low; the applicant need only demonstrate that its claim is not frivolous or vexatious.

Onkea at 1116 citing *RJR-McDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311

66. The question of whether an interlocutory injunction should be granted requires a weighing of the relative risks of harm to the applicant if the injunction is refused and to the respondent if the injunction is granted.

Onkea, supra, at 28

67. The general principles governing the granting of interlocutory injunctive relief in British Columbia was stated as follows by Mr. Justice Smith in Expert Travel Financial Security (E.F.T.S.) Inc. v. BMS Harris & Dixon Insurance Brokers Ltd., 2005 BCCA 5:

> **54** The test for the granting of an interlocutory injunction has been expressed as both a three-part test (see *RJR-MacDonald Inc. v. Canada (Attorney-General)*, [1994] 1 S.C.R. 311 at [paragraph] 77) and a two-part test (see *A.G. British Columbia v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.) at 345, aff'd [1991] 1 S.C.R. 62). As Madam Justice Saunders said in *Coburn v. Nagra* (2001), 96 B.C.L.R. (3d) 327, 159 B.C.A.C. 299, 2001 BCCA 607:
>
> > [7] Whether the criteria for an injunction is two part or three may be a topic of debate for scholars. In British Columbia the common test for injunctions has been two-pronged since British Columbia *(Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (B.C.C.A.), with the issue of irreparable harm being subsumed into the discussion of balance of convenience (or inconvenience). As Madam Justice McLachlin (now C.J.C.) noted in *Wale*,

> the distinction is likely without practical effect. The question in most cases is the relative weight of the convenience and inconvenience of the order sought, always considering the paramount measure, the interests of justice.
>
> **55** The test set out in *A.G. British Columbia v. Wale, supra*, was described in *Canadian Broadcasting Corp. (CBC) v. CKPG Television Ltd.* (1992), 64 B.C.L.R. (2d) 96 (C.A.) at p. 101:
>
> > The two-pronged test is this: "First, the applicant must satisfy the court that there is a fair question to be tried as to the existence of the right which he alleges and a breach thereof, actual or reasonably apprehended. Second, he must establish that the balance of convenience favours the granting of an injunction."
>
> **56** The burden on the applicant to show a fair question to be tried is a low one; generally, unless the case can be said to be frivolous or vexatious, this part of the test will be satisfied: see *RJR-MacDonald Inc. v. Canada (Attorney-General), supra*, at [paragraph] 49, 50, 78.

68. In *Doubleview Capital Corp. v. Day, 2016 BCSC 231* at para.75, the Court confirmed the test in RJR and elaborated that the Applicant must show that there is a serious case that would entitle it to the injunction it seeks.

Serious question to be tried

69. In this case, on the evidence before this Honourable Court, the Applicant submits that there is clearly a serious question to be tried.

Irreparable Harm

70. Irreparable harm is caused when a party will suffer harm that is not capable of being adequately compensated in monetary terms.

71. As set out in the Affidavits filed in support hereof, the Applicant will suffer irreparable harm if the Amendments are allowed to stand.

Balance of convenience

72. The test is not to be applied as a rigid formula. As stated by the Court of Appeal in *Coburn v. Nagra*:

> "*The question in most cases is the relative weight of the convenience and inconvenience of the order sought, always considering the paramount measure, the interests of justice*."

73. In assessing the balance of convenience, the Court of Appeal said that the Judge should consider these points:

(a) the adequacy of damages as a remedy for the applicant if the injunction is not granted and for the respondent if an injunction is granted;

(b) the likelihood that if damages are finally awarded they will be paid;

(c) the preservation of contested property;

(d) other factors affecting whether harm from the granting or refusal of the injunction would be irreparable;

(e) which of the parties has acted to alter the balance of the relationship and so affect the status quo;

(f) the strength of the applicant's case;

(g) any factors affecting the public interest;

(h) any other factors affecting the balance of justice and convenience.

74. The balance of convenience (perhaps better called the balance of inconvenience) is a determination of the question of which of the opposing parties will suffer the greater harm from the granting or refusal of an interlocutory injunction.

Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers, Local 832 [1987] 1 SCR

75. These factors are not to be analysed and weighed separately, but rather, all of the relevant factors must be assessed together to reach an overall conclusion about where the balance of convenience rests.

Rand v. Anglican Synod of the Diocese of British Columbia, [2008] B.C.J. No. 1302, 2008 BCCA 294

76. In reaching its conclusion, the Court held as follows:

> "*[9] There is a fair question to be tried as to the plaintiff's claim that its right to use the road for public access to its property has been breached by the blockades and would be breached by continuation of them."*
>
> *"[11] The balance of convenience clearly favours the granting of the injunction sought and it will go in the terms set out in the notice of motion*."

77. The balance of convenience also includes consideration of the public interest. The granting of an injunction to prevent the irreparable harm set out above all weighs heavily in favour of the public interest.

Yahey v. British Columbia, 2015 BCSC 1302

78. In the case at bar, the balance of convenience requires the granting of the injunctive relief requested by the Applicant.

79. The Respondents' conduct, if not enjoined, has and will continue to have the effect of preventing the Applicant from pursuing her professional practice as she has done to date.

80. The granting of the Injunction will not cause any prejudice or harm to the Defendants.

81. In the decision of *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, the Plaintiffs were two corporations (Cambie Surgeries Corporation and Specialist Referral Clinic) and 4 individuals. The Plaintiffs successfully brought an application for an interlocutory injunction restraining the BC government from enforcing legislation that prohibited private-pay medically necessary health services. The larger action was a constitutional challenge of the legislation and the impact on wait times for medical services.

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

82. The Plaintiffs argued that irreparable harm would be suffered by BC residents in two ways:

(1) the prohibition would impact those patients seeking private surgical services; and

(2) it would burden the public system because those who would have used private surgical services must now be integrated into the public health care system (at para. 164).

83. The evidence the Court relied on in finding irreparable harm is set out at para 167.

84. The Court emphasized the “balance of convenience” branch of the RJR MacDonald test in its analysis, saying *“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”* (at para 129).

85. The Court was satisfied that the Plaintiffs established a sufficient nexus between the prohibition and wait times for medical services, which resulted in increased risk of suffering physical and psychological harm by having to wait for public health care service. This tipped the balance of convenience in favour of the Plaintiffs (at para 185). The Court was also satisfied that the Plaintiffs would be impacted in a far greater manner than the government of BC were the injunctive relief not granted.

86. In the case of *Perimeter Transportation Ltd. v. Vancouver International Airport Authority*, the Plaintiff bus service company successfully applied for an interlocutory injunction compelling the Defendant to provide the Plaintiff with road, parking and pedestrian access to the Vancouver International Airport. The purpose of the application was to preserve the viability of the Plaintiff's Whistler Express bus service, which amounted to fifty percent of the Plaintiff's revenues.

Perimeter Transportation Ltd. v. Vancouver International Airport Authority, 2006 BCSC 684

87. The Court was satisfied that there was a likely prospect of irreparable harm if an interlocutory injunction was not granted in the circumstances (at paras. 26-27).

88. The Court considered public interest factors in the "balance of convenience" analysis, noting that the Plaintiff's passengers would be inconvenienced if the Plaintiff's access to the Airport were not continued (at para. 34). Additionally, granting the injunction did not create unmanageable conditions for the Defendant.

89. In the case of *Summerside Seafood Supreme Inc. v. Prince Edward Island (Minister of Fisheries, Aquaculture & Environment)*, the Minister of Fisheries sought to overturn the decision of the Motions Judge granting an injunction prohibiting the Minister from withholding a fish processing licence to the Plaintiff fish processing plant.

Summerside Seafood Supreme Inc. v. Prince Edward Island (Minister of Fisheries, Aquaculture & Environment), 2006 PESCAD 11 (Prince Edward Island Supreme Court Appeal Division)

90. The Plaintiff argued that its business would be severely impacted, if not put out of business, without the licence at issue. At the least, the Plaintiff argued it would lose goodwill from being unable to meet its customers' demands while fighting this matter in Court.

91. The Minister cited no irreparable harm on its part, and the Court noted that there did not appear to be any difficulty on the Minister's part in maintaining its past practices (at para. 90).

92. Similarly, there was no inconvenience cited by the Minister. The inconvenience to the Plaintiff was that without its license it could not process fish, hire workers, or meet the requirements of its suppliers, and may have gone out of business (at para 91).

93. There was therefore overwhelming reason to support continuing of the status quo between the parties. The Appeal Court varied the wording of the injunction to state that the minister was enjoined from refusing to issue a fish processing license to the Plaintiff on the basis that it was indebted to the Province.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Dr. Melody Jesson, made March 10, 2021;
2. Affidavit #1 of Dr. Brian Bittle, made March 10, 2021;
3. Affidavit #1 of David Nicol, made February 23, 2021;
4. Affidavit #1 of Dr. Shawn Thomas, made February 23, 2021;
5. Affidavit #2 of Dr. Shawn Thomas, made March 10, 2021;
6. Affidavit #1 of Dr. Joshua Korten, made February 24, 2021;
7. Affidavit #1 of Dr. David Beaudoin, made February 24, 2021;
8. Affidavit #1 of Dr. David MacKenzie, made February 23, 2021;
9. Affidavit #1 of Dr. Surdeep Dhaliwal, made February 23, 2021;
10. Affidavit #1 of Jaye Kim Jarvis, made February 23, 2021;
11. Affidavit #1 of Kevin Kirechuk, made February 24, 2021;
12. Affidavit #1 of Jen Temple, made February 25, 2021;
13. Affidavit #1 of Ellen Stolting, made February 23, 2021;
14. Affidavit #1 of Dr. Michael Foran, made February 23, 2021;
15. Affidavit #1 of Dr. Michael Foullong, made March 5, 2021; and
16. Affidavit #1 of Makaela Peters, made March 10, 2021.

The applicant(s) estimate(s) that the Application will take 1.5 hours.

☒ This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9.7, within 8 business days after service of this notice of application.

(a) file an application response in Form 33,

(b) file the original of every affidavit, and of every other document, that

(i) you intend to refer to at the hearing of this application, and

(ii) has not already been filed in the proceeding, and

(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

(i) a copy of the filed application response;

(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

(iii) if this application is brought under Rule 9.7, any notice that you are required to give under Rule 9.7 (9)

Date: March 10, 2021

Name and address of lawyer for the applicant:

Signature of **Claire Immega**
Lawyer for the applicant

Singleton Urquhart Reynolds Vogel LLP
1200 – 925 West Georgia Street
Vancouver, BC V6C 3L2
Tel: 604-682-7474
Fax: 604-682-1283
Email: cimmega@singleton.com
Attention: Claire Immega

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs _____ of Part 1 of this notice of application

[ ] with the following variations and additional terms:

_____

_____

_____

Date [*day/month/year*]

_____

Signature of [ ] Judge [ ] Master

APPENDIX

[*The following information is provided for data collection purposes only and is of no legal effect.*]

THIS APPLICATION INVOLVES THE FOLLOWING:

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ other matters concerning document discovery
- ☐ extend oral discovery
- ☐ other matter concerning oral discovery
- ☐ amend pleadings
- ☐ add/change parties
- ☐ summary judgment
- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts.