



Affidavit #4 of Dr. Brian Day
Sworn October 2nd, 2012
No. S090663
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

**CAMBIE SURGERIES CORPORATION, CHRIS CHIAVATTI by his litigation guardian
RITA CHIAVATTI, MANDY MARTENS, KRYSTIANA CORRADO by her litigation
guardian ANTONIO CORRADO and ERMA KRAHN.**

PLAINTIFFS

AND:

**MEDICAL SERVICES COMMISSION OF BRITISH COLUMBIA, MINISTER OF
HEALTH SERVICES OF BRITISH COLUMBIA AND ATTORNEY GENERAL OF
BRITISH COLUMBIA**

DEFENDANTS

AND:

SPECIALIST REFERRAL CLINIC (VANCOUVER) INC.

DEFENDANT BY COUNTERCLAIM

**DR. DUNCAN ETCHES, DR. ROBERT WOOLARD, DR. GLYN TOWNSON, THOMAS
MCGREGOR, THE BRITISH COLUMBIA FRIENDS OF MEDICARE SOCIETY,
CANADIAN DOCTORS FOR MEDICARE, MARIËL SCHOOFF, DAPHNE LANG,
JOYCE HAMER, MYRNA ALLISON, and CAROL WELCH**

INTERVENORS

AFFIDAVIT #4 OF DR. BRIAN DAY

AFFIDAVIT

I, **DR. BRIAN DAY**, Physician, of 2836 Ash Street, in the City of Vancouver, Province of British Columbia, MAKE OATH AND SAY AS FOLLOWS:

1. I am an orthopedic surgeon and the President of Specialist Referral Clinic (Vancouver) Inc. (herein referred to as "SRC"). I am also the President of Cambie Surgeries Corporation (herein referred to as "CSC"). As such, I have personal knowledge of the matters hereinafter deposed to except where stated to be on information and belief, in which case I believe them to be true.
2. I make this affidavit in support of SRC's opposition to the injunction sought by the Medical Services Commission to prohibit SRC from continuing to provide medical services to British Columbia residents in a manner which allegedly contravenes certain provisions of the *Medicare Protection Act* (the "Act") (specifically sections 17(1) and 18(3), which relate to billing practices for benefits under the Act) prior to a ruling on the constitutionality of these provisions in the Action commenced by CSC in August 2009 (the "Constitutional Challenge").
3. In my respectful view, if the injunction were granted prior to the constitutionality of the provisions in issue in the Act being adjudicated, it would, as I explain below, have a serious negative impact on the health of the residents of British Columbia.
4. With the reduction in available operating room availability in the public health care system and long wait times for required diagnostic procedures, which I have discussed in detail in my Affidavit #3, specialists were increasingly underutilized in respect of their ability to provide assessment and treatment to patients. In the public health care system, unless surgical treatment can be provided to patients within a reasonable time frame (six months to one year) of a diagnostic assessment, the assessment must often be redone. Further, it is pointless for a specialist to see more patients potentially in need of surgical or other interventional treatment than available resources permit him or her to treat. As a

result, specialists do not book assessments in the public health care system for a greater number of patients than those for whom they are able to provide the necessary treatment or procedures.

5. As a result, many specialists in British Columbia, in order to sustain a practice and to ensure that they were maximizing their opportunities to provide timely and effective medical treatment to British Columbians, have turned to providing various medical services which fall outside the scope of the public health care system, and outside the scope of the *Medicare Protection Act* (the "*Act*"). These include medical-legal assessments and opinions, expedited assessment and treatment of patients falling within categories excluded from the *Act*, such as WCB claimants, ICBC claimants, RCMP officers, veterans, federal prisoners, certain aboriginal Canadians, out-of-province patients, and persons seeking non-medically required services which are not defined as benefits under the *Act* such as plastic surgery and personal health assessments.

Specialist Referral Clinic

6. SRC is one of several private medical clinics in British Columbia which provide medical assessments to these categories of patients. SRC was established in 2002 by a group of orthopaedic and other specialist physicians in British Columbia in order to maximize their ability to provide medical assessment and expedite treatment for British Columbia patients.
7. SRC also provides patients with access to the Cambie Surgery Centre ("Cambie") if they choose to pursue surgery as a treatment option. Many of the surgeons who have privileges at Cambie provide consultations at SRC.
8. SRC arranges for clients to have assessments with a specialist associated with SRC, in SRC's offices at 555 West 12th Avenue, Vancouver. SRC also arranges for all required diagnostic testing ordered by the specialist, for the invoicing of the client or third party

payors. SRC employs a staff of approximately 10 people, performing functions such as Executive Director, Clinic Manager, medical records, scanning, and reception.

9. If the patient subsequently undergoes surgery at Cambie, SRC performs the billing function for Cambie in relation to the surgery, pursuant to an administrative services agreement between SRC and Cambie. SRC retains an administrative fee from the amount charged by Cambie to the client for the services received at Cambie. This fee covers SRC's services in obtaining and compiling medical records for the patient, arranging diagnostic tests, communication with the patient with respect to booking the surgery and pre-surgery requirements, and completion of required paperwork, as well as invoicing the patient or third party payor and collecting and remitting payment to Cambie.
10. SRC provides expedited assessments and consultations to a large spectrum of client groups, as follows:
 - (a) BC residents who have been injured in the course of their employment who receive expedited assessment and treatment outside the public health care system, which is paid for by WorksafeBC – these assessments are largely conducted through the Expedited Injured Worker Clinic and the Visiting Specialist Clinics which are designated arrangements between SRC and WorksafeBC;
 - (b) Members of the RCMP, who receive expedited assessment and treatment outside the public health care system which is paid for by the RCMP;
 - (c) BC residents who have been injured in a motor vehicle accident who receive expedited assessment and treatment outside the public health care system, which is paid for ICBC;
 - (d) Inmates of federal penitentiaries who receive expedited treatment outside the public health care system, which is paid for by the federal government;
 - (e) Residents of other Canadian provinces or territories or of other countries who have travelled to Vancouver to receive assessment in BC;

- (f) Lawyers seeking medical-legal assessments and opinions for the purposes of litigation (this is the single largest component of SRC's services);
 - (g) Employers or insurers seeking assessments and opinions as to fitness to work, treatment review and/or prognosis for recovery of a particular patient (who is usually a BC insured resident); and
 - (h) British Columbia insured residents who are seeking consultations and assessments for their own individual purposes and who privately pay a fee for such service.;
11. So far as I understand it from the materials filed by the Commission in this proceeding, the Commission asserts that it is the services provided to clients referred to paragraph (h) which are contrary to the Act, on the basis that the services provided are "medically required". From a review of the Audit Report, it also appears to me that the Commission asserts that the private provision of services to clients referred to in paragraph (g) is contrary to the *Act*. This latter point surprises me as I had always understood such services to be considered to be excluded from the *Act*.
12. The Government of British Columbia and the Commission have been aware since SRC commenced operations in 2002 that SRC intended to and did offer specialist consultations to British Columbia residents without a referral from a family physician and for a fee. Attached hereto as Exhibit "A" to my affidavit is a copy of an article from the Vancouver Sun dated April 2, 2002 (which is currently found on my website) with respect to the opening of SRC.

Assertions by the Commission of Contraventions of the Act by SRC

13. Over the last two years, the provision of independent assessments to private pay BC residents has accounted for approximately 10% of the cases seen by specialists at SRC. If individual assessments requested by third parties (such as employers or insurers) are included, this number is approximately 18 or 19%.

14. On behalf of SRC, I do not agree that SRC has charged British Columbia insured patients for benefits under the *Act* – i.e., for the provision of medically required services by a enrolled medical practitioner which are or could be billed by the physician to the Medical Services Plan (“MSP”) -- contrary to s. 17(1)(a) of the *Act*, or that SRC has charged patients more for the services of a opted-out medical practitioner than the amount payable under the *Act* by the Commission for the service, contrary to s. 18(3)(a).
15. First, I do not agree with the Commission’s position that the assessments done by specialists at the SRC for BC insured residents are benefits under the *Act*. The assessments done at SRC on a private pay basis are not pursuant to a referral from a general practitioner and are done for the information of the patient. They are akin to comprehensive health assessments performed by Executive Health providers in this regard. A general physical examination (annual or otherwise) requested by a BC insured resident is not considered an insured benefit under the *Act*. SRC’s position is that a localized or regional examination requested by a BC resident without a referral is also not a benefit under the *Act*.
16. Nor do I agree with the Commission that the fact that some clients may, following an assessment at SRC elect to have surgery at Cambie (or through the public system or at another private clinic) means that the original assessment was therefore “in relation to a benefit” – see, for example, paragraphs 36 and 79 of the Affidavit of Bob de Faye. Further, this interpretation is not consistent with the manner in which the Commission treats other situations in which a physician provides assessment or treatment which is not a benefit under the *Act* (such as cosmetic surgery or an IME, an annual general physical examination, or a comprehensive health review by an Executive Health provider such as Medisys) which leads to the patient receiving surgical or other treatment which is a benefit under the *Act*. Likewise, in BC, an MRI that is not “medically necessary” or “medically required” is considered an uninsured service. When a medical condition is discovered at such an MRI examination, subsequent treatment for that condition is considered an insured service, but private payment for the original MRI is not thereby prohibited.


17. As I understand it, the Commission relies upon a document entitled "Surgery Cost Breakdown Report" (Exhibit 31 to the Affidavit of Bob de Faye, final page) to support its assertions that SRC is charging BC insured residents (on behalf of Cambie) a fee for the services of the surgeon and the anesthesiologist during surgical treatment at Cambie. This is incorrect. I have asked the SRC Clinic Manager, Zoltan Nagy, about this document and I am informed by him and do believe that this document was prepared in error on his part, as set out in his affidavit filed in these proceedings.
18. I do admit that SRC invoices patients who have surgical treatment at Cambie for the facility fee charged by Cambie, and collects and remits payment by patients to Cambie. Thus, to this extent, SRC is in the same position as Cambie with respect to contravention of the *Act* in relation to charging patients a facility fee.
19. The Commission also asserts that the \$340 charged to some clients who have surgical treatment at Cambie for "cold therapy equipment" constitutes charging patients for a benefit under the *Act*, as this is "standard equipment required for post-operative care": see, for example, paragraph 79 of the Affidavit of Bob de Faye. This is incorrect. The "cold therapy equipment" provided to some patients, at their request, is an electrically-powered cold therapy device for patient use at home following surgery. Such equipment is never, to my knowledge, provided to patients in the public system free of charge – in the public system, patients would pay the same, if not a greater, price for this equipment as charged by Cambie. It is provided to patients who request it on a strictly cost-recovery basis by Cambie as an element of enhanced client service (patients would otherwise have to purchase this unit themselves at a retailer).
20. It appears to me that the Commission is taking the broadest view possible of what constitutes a "benefit" under the *Act* as well as the most restrictive view possible of what constitutes permissible "extra billing" for the purposes of this proceeding and its attempt to enjoin or restrict the activities of Cambie and SRC.

Impact of an Injunction against SRC

21. However, even if the Commission is correct in its interpretation of the *Act*, and the assessments provided by specialists at SRC on a private pay basis to BC residents (or to their employers or insurers) contravene the *Act*, it would work a significant hardship to many of these patients for the Court to grant an injunction preventing SRC from charging clients privately for these assessments prior to the adjudication of Cambie's Constitutional Challenge to the *Act*. This would be particularly so for those clients who subsequently undergo surgical or other treatment at Cambie or elsewhere.
22. Many BC residents who choose to pay privately for a consultation with a specialist at SRC do so only when it becomes evident that it will be months or years before they are able to see a specialist through the referral process in the public health care system. An appointment with a specialist is, in all cases, a necessary first step to surgical or other specialized medical treatment in either the public or the private health care system. Essentially, these patients have been told by the public health care system that their condition is not sufficiently serious that early medical assessment and intervention is medically necessary.
23. It is important to understand that specialists providing individual assessments at SRC do so only after maximizing their availability in the public system. Specialists associated with SRC provide SRC with their availability to perform assessments at SRC only after they have scheduled in advance all available time for referrals in the public system for a particular time frame. As discussed above, the number of referrals that a specialist may legitimately accept in the public system is constrained by the availability of operating room time and other forms of potentially necessary treatment. It is simply incorrect to assert that allowing specialists to perform additional assessments privately is reducing their availability to the public system. The opposite is true – many surgeons would have left British Columbia and Canada if they were not able to increase their practices by providing services at SRC.

24. Thus, the effect of an injunction prohibiting SRC to bill BC residents for individual assessments, particularly those which lead to subsequent surgical treatment, pending adjudication of CSC's Constitutional Challenge, would force those patients back onto the wait lists in the public health care system, with resulting delays in treatment, increased pain and suffering, poorer prognosis for recovery and outcome, and ultimately greater costs to the public health care system. It will also further exacerbate the inequality of access to medical diagnosis treatment that already exists as between those who are injured at work or in a motor vehicle accident, come to BC from another province or are otherwise excluded from the *Act*, who are entitled to expedited medical assessment and treatment, and ordinary British Columbians who are prevented from accessing timely and effective medical treatment.
25. In addition, even though the injunction application is only directed at CSC and SRC (despite the existence of many other private pay clinics in the province which are providing BC insured residents with medically required treatment for a fee), the issuance of an injunction would almost certainly affect the willingness of other private clinics to continue to provide these services for fear of being found to be in breach of the *Act* and suffer similar injunctive action or other penalties. This would detrimentally affect thousands of patients in BC and substantially increase the burden on the public health care system, including a potentially catastrophic increase in public wait times for treatment.
26. In my view, the only fair and appropriate way to protect BC patients is for Cambie to be able to advance its Constitutional Challenge to the provisions of the *Act* prohibiting private payment for or in relation to benefits under the *Act*, prior to SRC being subject to an injunction.

SWORN BEFORE ME at the City of
Vancouver, in the Province of British
Columbia, this 2nd day of October, 2012


A Commissioner for taking Affidavits for
British Columbia
DR. BRIAN DAY



Dr. Brian Day

Brian Day

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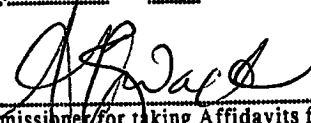
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[Welcome Page](#) [News & Press](#) [Quotes](#) [Brian's CV](#) [Contact](#)

This is Exhibit " A " referred to in the
Affidavit of BRIAN DAY #4
sworn (or affirmed) before me on
2nd OCTOBER/ 20 12


A commissioner for taking Affidavits for
British Columbia

THE VANCOUVER SUN

The Vancouver Sun
Apr 02, 2002

Private clinic offers quick
access to specialists
Patients who pay up to
\$500 can jump waiting lists

Pamela Fayerman
Vancouver Sun

Tuesday, April 02, 2002

A group of specialist doctors is banding together to open a clinic where -- for a fee of \$350 to \$500 -- patients can bypass their family doctors to see a specialist without waiting the weeks or months it usually takes to get such appointments.

The Specialist Referral Clinic, which begins limited operations this week, is believed to be the first such clinic of its kind in Canada.

Dr. Brian Day -- Dr. Profit, as he was recently labelled on a magazine cover -- is the inspiration behind the clinic and is no stranger to private medicine.

A high-profile orthopedic surgeon, he is one among several doctors who own the Cambie Surgery Centre on Ash Street, a private, soon-to-expand Vancouver hospital that caters mainly to people who have third-party insurance coverage for their operations.

Day said the new clinic will be loosely based on a model operated by the B.C. Workers' Compensation Board where injured WCB claimants can arrange speedy appointments with specialists.

While the Canada Health Act permits WCB claimants to jump waiting lists, it is not clear

what position the federal and provincial authorities will take on the latest private clinic incarnation when it comes to other patients referring themselves to the clinic.

"We're just going to be offering the rest of the community the same rights that injured workers have," Day said.

Day said legal opinions he has obtained indicate that there is nothing actionable about what he and his medical colleagues are going to do, even though the Canada Health Act prohibits doctors from billing patients for medically necessary services that would normally be paid by the publicly funded system.

Day, who will spend a week at Yale University as a visiting professor, contends that people who self-refer themselves to specialists are not insured by the public system. The act does not define what medically necessary means, however, and the whole area of what is and isn't covered by medicare is the subject of much debate as officials seek to cut costs by de-insuring some of the services that doctors provide.

Federal and provincial health ministers could not be reached for comment Monday.

The number of doctors at the The Specialist Referral Clinic, or their exact areas of expertise, has not yet been determined, Day said. There are currently a half-dozen doctors at the clinic, including Day, another orthopedic surgeon, a hand surgeon and a spinal specialist.

But 36 specialists have expressed a preliminary interest and they will come from a range of disciplines, such as orthopedics, neurosurgery, general surgery, vascular surgery, plastic surgery and rheumatology -- all areas in which patients must wait up to several months for a consultation, depending on their doctor's patient load.

Day said in his own practice, patients referred by a family doctor to him must wait more than a year for an appointment. Because he is given only four hours of operating room time per week at the University of B.C. Hospital, he can only operate on a few patients each week in the public system.

At the new clinic, the waiting period for an appointment would be a week or two and if patients require surgery, they could be booked quickly through the private hospital.

Day said most of the patients who book appointments at the clinic will be those not covered by the government-funded Medical Services Plan. Paying clients will include private insurers, but it will not be limited to them alone. He expects a bustling business with law firms seeking expert opinions in legal cases from doctors.

While he concedes the cost of seeing a specialist at the clinic is going to be prohibitive to all but the most well-heeled, he said individuals can claim the visits as a tax-deductible medical expense and the costs are not out of line with what top lawyers charge on an hourly basis.

B.C. residents who head to the United States for consultations can save time by remaining in the province.

Wait lists depend on many variables, especially the popularity and reputation of individual

doctors. But the Fraser Institute found that across Canada, waiting times between referral from a family doctor to a specialist grew significantly in 2000/2001.

According to the report, which is based on surveys of doctors, B.C. residents face an average wait of 6.5 weeks from the time a family doctor makes the referral to the time the patient sees the specialist. An even longer waiting period, however, is from specialist to treatment, when the average waiting time is 12.3 weeks, according to the report, entitled Waiting Your Turn.

A brief description of the Specialist Referral Clinic, at 501-1367 West Broadway, can be found on the Internet at: www.specialistclinic.ca