



This is the 7<sup>th</sup> affidavit  
of DR. BRIAN DAY in this case  
and was made on September 28, 2015

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, WALID KHALFALLAH by his  
litigation guardian DEBBIE WAITKUS, and SPECIALIST REFERRAL CLINIC  
(VANCOUVER) INC.**

**PLAINTIFFS**

AND:

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

**DEFENDANTS**

AND:

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

**INTERVENORS**

**AFFIDAVIT #7 OF DR. BRIAN DAY**

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"), and Cambie Surgeries Corporation (herein referred to as "Cambie") (together, referred to as the "Clinics"). 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 the Plaintiffs' application to seek orders restraining the Medical Services Commission (the "**Commission**") from enforcing the *Medicare Protection Act* (the "**Act**") against Cambie and SRC and individuals affiliated or associated with Cambie and SRC (the "**Notice of Application**").
3. I have read the Notice of Application and the Pleadings in this Action, and have reviewed the Exhibits contained in the Affidavit of Cindy Chu, referred to below.

#### **The Commission's Current Activities against the Clinics**

4. In June 2015, the Plaintiffs in this Action made certain admissions (the "**Admissions**"), in order to expedite the trial. Immediately following this, I was informed by my counsel that counsel to the Commission sought to use the Admissions against physicians affiliated or associated with Cambie and SRC (the "**Selected Physicians**") with respect to audits the Commission was conducting (the "**Targeted Audits**").
5. It was my understanding that the Admissions could only be used in the Action, and not for separate enforcement proceedings, and the Admissions were made based on that understanding.
6. Moreover, I believed that the Selected Physicians themselves would have to agree to the use of the Admissions before the Admissions could be provided to the Defendants.
7. I understood my counsel communicated this position to the Defendants.
8. Despite this, I understand that the Defendants repeatedly demanded the Plaintiffs' consent to allow the Admissions to be used against the Selected Physicians.
9. My counsel proposed to the Defendants that they should contact the Selected Physicians to advise that the Defendants sought to have the Admissions and certain documents for use in the Targeted Audits, and to obtain the consent of the Selected Physicians directly.
10. I was informed by my counsel that the Defendants refused this proposal.
11. Instead, in or around July 2015, I was informed by my counsel that the Commission was contemplating bringing a motion before the Case Management Judge, Associate Chief Justice Cullen, to have certain Admissions and documents be made available to the Commission's auditors.
12. On August 12, 2015, the Director of the Billing Integrity Program of the Ministry wrote to me in my capacity of President of the Clinics, providing notice that the Commission had obtained evidence that physicians or their corporations have received payments from SRC and Cambie, and accordingly, the Commission intended to enter the Clinics' premises to obtain a range of confidential and private documents relating to physician billing practices. Attached hereto and marked as **Exhibit 'A'** is a true copy of that letter.

13. In or around August 2015, I was informed by my counsel that the Commission was contemplating obtaining a warrant outside of these proceedings in order to search Cambie and the SRC.
14. On September 23, 2015, my counsel forwarded to me the search warrant obtained by the Commission from the Provincial Court, dated September 23, 2015. The warrant permits entry into the Clinics on October 5, 2015, and the four days immediately following, to inspect the Clinics' records (the "**Inspection**") in relation to audits of the Selected Physicians.
15. The affidavit in support of the warrant to search the premises, purportedly in order to conduct audits of the Selected Physicians, was made by Mr. Stephen Abercrombie. Mr. Abercrombie was present at my examination for discovery in the Action and was consulted by the lawyer for the Defendants conducting the discovery.
16. To my knowledge, other than the Admissions or evidence provided in the Action, neither the Clinics nor the Selected Physicians have provided with the Commission with any information or evidence regarding payments from Cambie or SRC to the Selected Physicians in the past 18 months.

#### **The Inspection Will Seriously Disrupt the Clinics**

17. The Inspection authorized by the search warrant will be an intrusive and time-consuming process for the Clinics; it is not simply a matter of allowing the auditors' access to the premises.
18. As set out in the Commission's letter to me of August 12, 2015, the Commission is seeking a broad range of sensitive and confidential documents, with respect to 30 of the physicians who work at Cambie. Many of the procedures performed by these physicians at Cambie lie outside the jurisdiction of the Commission, in that they are not procedures in relation to beneficiaries under the *Act* or are not insured services under the *Act*.
19. The warrant does not specify what materials the Commission can collect, and does not expressly limit the scope of the Commissions' search to the materials mentioned in the August 12, 2015 letter.
20. The Inspection will require considerable expenditure of time and resources by the Clinics. The Inspection will cause considerable disruption at the Clinics, directly impacting the ability of the Clinics to provide medical care to its patients, delaying medically necessary surgeries, and obstructing trial preparation.
21. The previous SRC/Cambie audits required significant time from the Clinics' accountants and Executive Directors, as well as various support staffs' time, which created major delays in the overall operation of the Clinics.
22. For example, prior to the actual auditors' on-site visit of Cambie, the accountants, Executive Directors, and support staff spent a full week preparing and organizing the files

that the Commission sought to review. This preparation included retrieving off-site files on an urgent basis, for which Cambie incurred significant costs.

23. The current Inspection will be particularly onerous for Cambie because Mr. Paul Colosie, Cambie's in-house accountant and financial manager for 18 years, unexpectedly passed away on May 17, 2015 after a sudden and unforeseen serious acute terminal illness. Mr. Colosie had been intimately involved in the previous audit.
24. On May 20, 2015, counsel to the Plaintiffs informed counsel to the Commission that Mr. Colosie had passed away.
25. Cambie has not yet been able to fill Mr. Colosie's position. As a result, Cambie does not have an appropriate financial officer to assist in and ensure that the Inspection and audit is conducted efficiently and in a manner which protects the privacy of patients to the greatest extent possible.
26. As a result, the preparation for the Inspection, and the Inspection itself, will require the undivided attention of a number of the Clinics' key personnel, whom will not be able to complete their regular duties, which is problematic, given the nature of the services the Clinics provide.
27. The Defendants' course of conduct in seeking to use the Admissions in the Targeted Audits has already required significant time and resource investments from Cambie and SRC.
28. It has also occupied the attention of my counsel, which needs to be directed to trial preparation if the underlying Action is to be heard in a timely manner.
29. In January of 2013, the Defendants informed the Court that they would put the injunction application against the Clinics into abeyance on the understanding that the Action, including the Commission's counterclaim seeking a permanent injunction, would proceed to trial in a timely way.
30. The Commission has stated that the current Inspection and audit relates solely to the Selected Physicians. However, the audits of the Selected Physicians effectively amounts to another audit of the Clinics, both in terms of its practical implications for the operation of the Clinic, and in terms of the potential consequences flowing from the audits.
31. Following the Commission's audit of Clinics, the Commission sought damages against the Clinics, and brought an application for an injunction to prevent the Clinics from continuing to operate as they had been operating.
32. I am concerned that following the Targeted Audit the Selected Physicians, the Commission may apply for an injunction against the Selected Physicians, similar to its course of conduct following the SRC/Cambie audit.

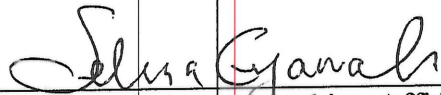
33. If the Commission seeks an injunction against the Selected Physicians, or takes other steps at enforcing the *Act* against them, the Selected Physicians will not be able to provide timely medically necessary services to British Columbians who require it.
34. The Selected Physicians may also decline to further provide services through Cambie or SRC, on the basis that an association with Cambie/SRC render them vulnerable to targeting by the Commission.
35. Moreover, the Commission says these audits are ongoing audits. To my knowledge, there have been no steps to obtain information from Cambie, SRC, or the Selected Physicians for one and a half years.
36. I had interpreted this inactivity as being consistent with my understanding that the Commission had agreed to take no further steps to enforce the *Act* against Cambie, the SRC, or is affiliated physicians, until such time as the Court had determined the constitutionality of the provisions the Commission is now seeking to enforce against physicians who work at Cambie.
37. As one of the Selected Physicians, I did not personally receive notice that the audits would be revived, nor did I receive personal notice that a warrant was being sought, or obtained, in order to search the premises of Cambie and the SRC, in order to collect evidence for the purpose of the audits. I was only made aware of the audits through my participation in the Action.
38. None of the Selected Physicians has advised me that the Commission has initiated or resurrected audits against them.
39. To the best of my knowledge, no other private clinics have been audited; only the Selected Physicians providing services at the Clinics are being audited.

#### **No Urgency for the Commission to Seek Inspection**

40. The Commission has been aware that Cambie and SRC have operated in breach of the *Act* since 1996 and 2002, respectively. Since the opening of Cambie, this has been a matter of public record and debate. I have been open and honest about Cambie and the SRC's operations and its billing practices. Multiple media outlets have recorded our approach and I am personally aware, through discussions with representatives of the Commission, that the Commission has had knowledge of this fact.
41. The Commission has not provided any reason to me or my counsel for treating the Inspection as urgent. The Clinics have admitted that they are in violation of the *MPA*. They have admitted that they remit payments to their physicians, above and beyond the funding that the physicians receive from their MSP billings. The constitutional question will determine whether those actions were unlawful.
42. Contrary to what was falsely implied in the warrant application, Cambie has never unlawfully destroyed its records. It has previously, and will continue, to abide fully by its legal obligations in regards to the retention of its records.

43. I am aware of no reason why the Commission must conduct a sudden and urgent inspection and audit prior to addressing the constitutional question being asked of the Court. The Commission has not explained to me the reasons for such urgency.

SWORN BEFORE ME at the City of )  
Vancouver, in the Province of British )  
Columbia, this 28<sup>th</sup> day of September )  
2015 )

  
A Commissioner for taking Affidavits in )  
the Province of British Columbia )  
)

  
DR. BRIAN DAY

**SELINA GYAWALI**  
GALL LEGGE GRANT & MUNROE LLP  
Barristers & Solicitors  
Suite 1000-1199 West Hastings Street  
Vancouver, B.C. V6E 3T5  
Phone: 604-669-0011 Fax: 604-669-5101



AUG 12 2015

Dr. Brian Day  
President, Cambie Surgeries Corporation  
President, Specialist Referral Clinic  
2836 Ash Street  
Vancouver BC V5Z 3C6

PERSONAL AND CONFIDENTIAL  
This is Exhibit "A" referred to in the VIA COURIER  
affidavit of Dr. Brian Day  
sworn before me at Vancouver 1038616  
this 28<sup>th</sup> day of September 2015 File: 40920-25/CSC  
*Jelina Byawa*  
A Commissioner for taking Affidavits  
for British Columbia

Dear Dr. Day:

**Re: Audits of Specialist Referral Clinic and Cambie Surgery Centre Physicians**

As you are aware, the Medical Services Commission (the Commission) is conducting audits of selected physicians, including yourself, who rendered Medical Services Plan (MSP) services (benefits) at the Specialist Referral Clinic (SRC) and Cambie Surgery Centre (CSC) and, in many cases, made claims of MSP. The scope of the audits includes all physicians involved with providing the surgery benefits.

The audits are being conducted under the authority of section 36 of the *Medicare Protection Act (the Act)*. Mr. Stephen Abercrombie, an inspector appointed under section 36 of *the Act*, is leading the audits with the assistance of other inspectors, as necessary. I am overseeing the audits and am also an inspector appointed under that section of *the Act*. Relevant sections of *the Act* are enclosed for your information.

As part of the audits, the Commission has requested that we determine what payments CSC and SRC, or any of its agents, have made to the physicians and what connection such payments had to benefits rendered. We have obtained evidence that physicians, or their corporations, have received payments from CSC and SRC for medically-related services.

As a result, I am providing notice that we intend to visit CSC and SRC to examine the basis for those payments. For that purpose, I am requesting of you, in advance of such visits:

1. a meeting to gain an overview of the timing and nature of the payments to physicians and to find ways to minimize any disruption of the audit visits to CSC's and SRC's operations; and
2. arrangements for the audit team to be able to examine:
  - a) the payable sub-ledger(s) and payment registers (cheque or EFT), covering all payments to physicians, including, but not limited to, contractor professional and consulting fees, salaries, bonuses, employee and shareholder loans, reimbursements and dividends, starting with the 2008 to 2013 period;
  - b) the general ledger accounts for the income statement and balance sheet entries corresponding to the above; and
  - c) the source data, records and calculations generating those payment entries, including, in the case of services rendered, the supporting daily service register or schedule to identify the specific services and payers.

...2

Where necessary, we may request access to other records and have questions of yourself and other CSC and SRC representatives to ensure the information we have is complete and correctly understood.

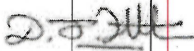
I am proposing that the visits to SRC and CSC commence on August 26, 2015. Please provide me with a reply to this letter by **no later than August 19, 2015**, confirming the timing of our initial meeting and audit visits. In the interim, should you have any questions or suggestions, or wish to schedule a time to be called, please contact Mr. Abercrombie at 250 952-1986.

We appreciate that we are requesting sensitive and confidential information. I am advising you that:

- as inspectors, we are committed to obtain the information we require for discharging our duties under *the Act* and are equally committed to keeping that information confidential, to the extent required, under *the Act* and the *Freedom of Information and Protection of Privacy Act* (relevant extracts enclosed);
- it is an offence under *the Act* to obstruct an inspector in the lawful performance of their duties; and
- we will pursue alternate means of obtaining the information we require, if it is not forthcoming in a reasonably complete and timely manner from SRC and CSC representatives.

Thank you in advance for your assistance.

Sincerely,



Marie Thelisma, CMA  
Director  
Billing Integrity Program

Enclosures

pc: David Fairbotham  
Executive Director, Audit and Investigations Branch

Dr. C.B. (Kit) Henderson, MD  
Chair, Audit and Inspection Committee

Mr. Tom Vincent  
Chair, Medical Services Commission