

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, 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 OF BRITISH COLUMBIA,
and ATTORNEY GENERAL OF BRITISH COLUMBIA

DEFENDANTS

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, CAROL WELCH,
and the BRITISH COLUMBIA ANESTHESIOLOGISTS' SOCIETY

INTERVENORS

NOTICE OF APPLICATION

(Re: pertaining to Rule 22-7(2) of the Rules of Court and
Request to Appear, ACJ Cullen #626149260301)

Names of applicants: The Defendants Medical Services Commission of British Columbia,
Minister of Health of British Columbia, and Attorney General of British Columbia

TO: The Plaintiffs Cambie Surgeries Corporation, Chris Chiavatti by his litigation guardian Rita
Chiavatti, Mandy Martens, Krystiana Corrado by her litigation guardian Antonio Corrado, Erma
Krahn, Walid Khalfallah by his litigation guardian Debbie Waitkus, and Specialist Referral Clinic
(Vancouver) Inc., and their solicitors;

ON NOTICE TO: The Intervenors, and their solicitors.

TAKE NOTICE that an application will be made by the applicants to the Associate Chief Justice
at the courthouse at 800 Smith Street, in the City of Vancouver, in the Province of British
Columbia, on Tuesday, 22 July 2014 at the hour of 10:00a.m., for the orders set out in Part 1
below.

Part 1: ORDER SOUGHT

1. That TCS Forensics Limited "TCS Forensics" be appointed an officer of the Court to conduct the following electronic media tasks:
 - a. Identify to counsel for the parties the computer systems, digital storage devices, servers, printers and other electronic devices in the possession, power, or control of the plaintiffs Cambie Surgeries Corporation ("Cambie") and Specialist Referral Clinic (Vancouver) Inc. ("SRC") from which TCS Forensics considers that documents that form the subject of this Court's Order of 21 May 2014 (the "Documents") may be recoverable (the "Devices");
 - b. Create a mirror-image copy of the electronically stored information ("ESI") stored on the Devices as quickly as reasonably possible, if necessary by sealing some or all of the Devices and removing them to a secure offsite location until imaging is complete and verified;
 - c. Using the mirror-image copy, identify and extract as many of the Documents as possible, including all available remnants of unallocated, slack, or system data, which TCS Forensics will reassemble into as much of its original, active (non-deleted) state as possible;
 - d. Provide the Documents and other data extracted to counsel for the Plaintiff for review;
 - e. Maintain all information in confidence and not disclose information that it learns except pursuant to the terms of this Order or further direction of the Court.
2. That Cambie and SRC cooperate with TCS Forensics to facilitate any necessary inspection of the hard drives, servers, and other devices in their possession, power, or control, and provide any information that TCS Forensics considers necessary in order to enable it to carry out the tasks assigned to it pursuant to this Order.
3. That Cambie and SRC deliver the Devices to TCS Forensics, or if delivery is impracticable, otherwise allow TCS Forensics access to the Devices within 48 hours of TCS Forensics identifying

the Devices.

4. That counsel for the plaintiffs review the Documents and other data provided by TCS Forensics, and list and produce to the defendants all non-privileged Documents within 7 days of receipt.

5. That the defendants may direct TCS Forensics to cease work prior to the completion of any of the tasks assigned to it pursuant to this Order.

6. That TCS Forensics shall direct any requests for clarification regarding its work under this Order to all parties, and all parties shall copy one another in responding to TCS Forensics, except that TCS Forensics and the defendants may communicate regarding billing and payment for TCS Forensics' services without copying the plaintiffs.

7. Special costs of this application.

Part 2: FACTUAL BASIS

1. There are two groups of documents that the plaintiffs have failed or refused to produce. The first is referred to herein as the "Consulting-pediatric Documents" and the second is referred to herein as the "SIS Documents".

The Consulting-pediatric Documents

2. On 21 October 2013, Associate Chief Justice Cullen ordered the plaintiffs to produce, within 30 days, *inter alia*, annual accounting trial balances and general ledgers of both Cambie Surgeries Corporation ("Cambie") and the Specialist Referral Clinic (Vancouver) Inc. ("SRC") for the preceding five years.

3. The plaintiffs delivered PDF versions of the Cambie and SRC general ledgers for the fiscal years 2008, 2009, 2010, 2011, and 2012 to the defendants on 25 November 2013. After repeated

requests by the defendants, the plaintiffs produced Excel versions of the Cambie general ledgers on 26 February 2014.

4. On 21 May 2014, Cullen A.C.J. ordered Cambie to produce, within 30 days, *inter alia*:

Documents showing, for all payments to Cambie physicians reflected in Cambie Surgeries' Corporation's general ledger under the "Consulting-pediatric" account for the five fiscal years covered by the order of October 21, 2013, the nature of the services provided, the fees paid, the basis for deriving the fees, and all source documents, in an electronic format which would allow for efficient use of automated data analysis functions.

5. On 16 June, Cambie produced five Excel documents in response to this Order, and a covering letter that asserted:

[T]he Plaintiff Cambie advises that the primary purpose of the Consulting payment is to compensate physicians for their overall assistance and availability to provide various services to Cambie. Such services include providing physician-to-physician consultations, general assessments for whether an individual is suitable for surgery, anesthesia consultations to patients, and overnight care to patients. The latter three of the services listed above may be provided to pediatric dental patients, patients obtaining care that is not medically necessary, and also to patients obtaining medically necessary care.

These payments are made as a 'lump sum' payment once per month, and are not provided on a fee-for-service basis.

Cambie advises that the Consulting payment amount is determined each month based on Cambie's assessment of a physician's availability, assistance, and overall contribution to Cambie's efficient operations. Cambie advises that beyond this explanation, further documents that show the nature of the services provided, the basis for deriving the fees, or other source documents do not exist.

Brossard Affidavit, Ex. A.

6. The information contained in the Excel documents produced on 16 June is essentially identical to the "Consulting-pediatric" information contained in the Excel documents produced in February, except that (a) the February documents contained two fields that were not included in the June documents (which do not appear to be of any consequence), and (b) the document

relating to the 2008 fiscal year that was produced on 16 June was devoid of any data at all. The two sets of Excel documents are referred to collectively herein as the "Cambie General Ledger Data".

Affidavit #2 of Paul McEwen, sworn 4 July 2014, paras. 10-11.

7. With respect to the absence of data relating to fiscal year 2008 in the most recent set of Excel documents, the plaintiffs stated in a subsequent email:

Cambie advises that the record for consulting-paediatric payments for 2008 is not recoverable. As explained in our letter of May 20, Cambie changed accounting systems that year and cannot recover the records prior to that change.

Brossard Affidavit, Ex. B.

8. The Canada Revenue Agency requires that all books and records "be supported by source documents that verify the information in the books and records", and that "books, records, and their related accounts and source documents ... have to be kept for a minimum of six years from the end of the last tax year to which they relate."

McEwen Affidavit, Ex. B.

The SIS Documents

9. Also on 21 May, Cullen A.C.J. ordered the plaintiffs to produce the following within 30 days:

For each Cambie Surgeries Corporation or Specialist Referral Clinic (Vancouver) Inc. general ledger entry containing a reference to "SIS", the following in electronic format which would allow for efficient use of automated data analysis functions for the five fiscal years covered by the order of October 21, 2013

- i. For revenue accounts: date of service, service provided, the patient invoice number, patient invoices, attending physicians providing the service, and the component element of the aggregate fees charged to the patient;
- ii. For all other accounts: the invoice number and patient invoices. [the "SIS Documents"]

10. It was not until 11 June, three weeks after the Order was made, that the plaintiffs wrote the defendants regarding the SIS Documents. At that time, the plaintiffs asserted that it was simply not possible to extract the required information from the SIS software without disclosing confidential patient information, and suggested that as a result they may seek direction from the Court.

Brossard Affidavit, Ex. C.

11. The defendants responded, the next day, that: (a) Cambie's assertion was not credible, as any database could be queried to retrieve information from only specified fields; and (b) the data required would in any event be retrievable from Cambie's accounting records. The defendants suggested several alternatives that Cambie could investigate to obtain the required information.

Brossard Affidavit, Ex. D.

12. The plaintiffs did not contact the defendants again until late in the day on 19 June (the day before the 30 day deadline expired). At that time, the plaintiffs admitted that it was possible to obtain most of the information required to be produced from the SIS software, but it would require incurring a cost of \$1,500, and they were not prepared to proceed unless the defendants agreed to reimburse them for that cost.

Brossard Affidavit, Ex. E.

13. In addition, the plaintiffs refused to produce the invoices that had been ordered produced, and asserted for the first time that there was no breakdown of the component elements of the aggregate fees: "Cambie and SRC advise that the only information that is stored, in SIS or elsewhere, is the aggregate fee for each patient."

Brossard Affidavit, Ex. E.

14. The defendants refused to pay for the cost of producing the SIS Documents.

Brossard Affidavit, Ex. F.

15. The plaintiffs wrote on 26 June asking, *inter alia*, for clarification with respect to the defendants' willingness to pay for the cost of producing the SIS Documents.

Brossard Affidavit, Ex. G.

16. The defendants responded the same day confirming their refusal to pay the cost in the first instance, and seeking clarification as to whether the plaintiffs would be producing the SIS Documents. Having had no response, the defendants again sought clarification as to the plaintiffs' intentions on 30 June.

Brossard Affidavit, Ex. H.

17. On 1 July the plaintiffs refused to produce any SIS information without a direction from the Court.

Brossard Affidavit, Ex. I.

18. On 2 July Cullen A.C.J. directed the defendants to be responsible for the cost of producing the SIS documents, but that production could proceed in advance of payment.

Part 3: LEGAL BASIS

1. Rule 22-7(2) provides that if there has been a failure to comply with the Rules, the court may make any order it considers will further the object of the Rules.

2. Rule 22-7(5) provides that if a plaintiff, contrary to the Rule and without lawful excuse, refuses or neglects to produce any document, the court may dismiss the proceeding. Rule 22-7(6) provides for the same sanction if a plaintiff, without lawful excuse, refuses or neglects to comply with a direction of the court.

3. On an application under this rule, the onus is on the party who has allegedly failed to comply with the Rules to present a lawful excuse and an adequate explanation for the noncompliance: *Eisele v. B.A. Blacktop Ltd.*, 2004 BCSC 52.

A. The “Consulting-pediatric” Documents

4. With respect to the “Consulting-pediatric” payments, in counsel’s letter of 16 June the plaintiffs have made two relevant assertions:

- a. The payments made to physicians reflected in this account “are made as a ‘lump sum’ payment once per month, and are not provided on a fee-for-service basis”; and
- b. “[F]urther documents that show the nature of the services provided, the basis for deriving the fees, or other source documents do not exist.”

5. Both of these assertions are inconsistent with sworn evidence provided by the plaintiffs’ representatives, with sworn evidence provided by doctors who have provided services at Cambie, with evidence in the possession of the Medical Services Commission, and with the Cambie General Ledger Data themselves.

6. Furthermore, Paul McEwen, an expert investigative and forensic accountant, has testified that it would be “highly unusual” for Cambie’s accounting records not to include source documents or other constituent documents that would support the basis for the “Consulting-pediatric” entries in the Cambie General Ledger Data.

McEwen Affidavit, para. 13.

7. If accurate, Cambie’s assertions would also mean that Cambie has not complied with the record-keeping requirements of the Canada Revenue Agency.

8. Cambie’s assertions can only be interpreted as an attempt to evade Cambie’s obligation, pursuant to both the Rules and the 21 May Order, to produce documents relevant to the issues in this litigation.

(a) Inconsistent Evidence

(i) Patient RD

9. Patient RD, referred to in the Affidavit of Bob de Faye, paid \$7,520 to Cambie for surgery that took place on 29 October 2008, plus \$1,050 for an overnight stay.

Affidavit #1 of Bob de Faye, sworn 20 August 2009, Ex. 75.

10. The Operative Report, completed by Dr. Ramesh Sahjpaul, identifies himself as the surgeon, Dr. Samaroo as the assistant, and Dr. W. Penz as the anaesthetist.

de Faye Affidavit, Ex. 78.

11. The Cambie General Ledger Data include three entries for 29 October 2008 under the "Consulting-pediatric" heading:

- Ramesh Sahjpaul \$1,100.00
- Dr. William Penz \$400.00
- Dr. Leslie Samaroo \$300.00

McEwen Affidavit, Ex. E.

12. As well, the MSP billing data for 29 October 2008 shows that Dr. Sahjpaul and Dr. Penz both billed MSP for the surgery performed on Patient RD.

Affidavit #6 of Stephen Abercrombie, sworn 4 July 2014, para. 5.

13. On its face, this is evidence that the three physicians involved in Patient RD's surgery were paid by Cambie, on a fee-for-service basis, for that surgery. This is clearly inconsistent with Cambie's assertion regarding the basis for the calculation of the payments to physicians. It also makes Cambie's assertion regarding the absence of source documents less likely to be accurate.

(ii) *Patient SL*

14. Patient SL, also referred to in the de Faye Affidavit, paid \$7,215 to Cambie for surgery that took place on 5 August 2008. The physicians involved in the surgery were Dr. Michael Gilbert, Dr. Anne-Marie Bedard, and Dr. Kurt Samer.

de Faye Affidavit, Ex. 84; Abercrombie Affidavit, para. 6.

15. The Cambie General Ledger Data include two entries for 5 August 2008 under the "Consulting-pediatric" heading:

- Dr. Michael Gilbert \$5,950.00
- Dr. Kurt Samer \$2,245.95

McEwen Affidavit, Ex. F.

16. The MSP billing data for 5 August 2008 show that Dr. Gilbert and Dr. Bedard both billed MSP for three surgeries that day, including the surgery on Patient SL, while Dr. Samer billed for two surgeries that day, including the surgery on Patient SL.

Abercrombie Affidavit, para. 8.

17. Again, this is evidence that two of the physicians involved in Patient SL's surgery were paid by Cambie, on a fee-for-service basis, for that surgery. Again, this is clearly inconsistent with Cambie's assertion regarding the basis for the calculation of the payments to physicians. It also makes Cambie's assertion regarding the absence of source documents less likely to be accurate.

(iii) *Patient JH*

18. Patient JH was one of the patients whose records the Commission's auditors reviewed during their audit of Cambie and SRC. Patient JH was operated on by Dr. Jordan Leith on 13 May 2009; the assistant was Dr. Anne-Marie Bedard, and the Anaesthetist was Dr. Phyllis Money.

Abercrombie Affidavit, para. 9.

19. The Cambie General Ledger Data include the following entries for 13 May 2009 under the "Consulting-peadiatric" heading:

- Dr. J.M. Leith Inc. \$1,650.00
- Dr. Phyllis Money \$550.00

McEwen Affidavit, Ex. G.

20. The MSP billing data for 13 May 2009 show that Dr. Leith, Dr. Bedard, and Dr. Money all billed MSP for the surgery performed on Patient JH.

Abercrombie Affidavit, paras. 10-11.

21. Once again, this is evidence that two of the physicians involved in Patient JH's surgery were paid by Cambie, on a fee-for-service basis, for that surgery. And once again, this is clearly inconsistent with Cambie's assertion regarding the basis for the calculation of the payments to physicians, and also makes Cambie's assertion regarding the absence of source documents less likely to be accurate.

(iv) *Correspondence with MSP Data*

22. As set out in Affidavit #2 of Paul McEwen, when the information in the Cambie General Ledger Data is correlated with billing records of the Medical Services Plan, there is compelling evidence that at least some of the physicians providing services at Cambie are being compensated on the basis of the surgical services that they have provided to patients. Specifically, with respect to Cambie's fiscal years 2008 and 2009:

- On 80 dates on which Dr. Day was credited with a payment under "Consulting-peadiatric" in the Cambie General Ledger Data (a "CP Payment"), he submitted a claim to MSP for performing surgery on a beneficiary (an "MSP Billing"); on 634 other dates, there was neither a CP Payment nor an MSP Billing. There were only 6 days

when he received a CP Payment that did not correspond with an MSP Billing, and only 11 days when an MSP Billing did not correspond to a CP Payment.

- There were 53 days on which Dr. Michael Gilbert had both a CP Payment and an MSP Billing; there were 378 days when he had neither, and only 2 days when he had a CP Payment that did not correspond with an MSP Billing.
- There were 52 days on which Dr. Jordan Leith was credited with a CP Payment and also billed MSP; on 294 days he had neither. There were only 5 days on which he received a CP Payment and did not have an MSP Billing.
- There were 10 days on which Dr. Farhad Moola had both a CP Payment and an MSP Billing; there were 299 days when he had neither; and no days at all on which he received a CP Payment without also billing MSP.
- There were 78 days when Dr. William Regan had both a CP Payment and an MSP Billing; there were 444 days when he had neither, and only 2 days on which he had a CP Payment that did not correspond with an MSP Billing.
- There were 33 days when Dr. Alistair Younger had both a CP Payment and an MSP Billing; there were 353 days on which he had neither, and only 1 day on which he had a CP Payment that did not correspond with an MSP Billing.

McEwen Affidavit, paras. 16-25.

23. Paul McEwen's evidence is that the data are consistent with what would be expected if the "Consulting-pediatric" entries were derived based on the performance of surgeries at Cambie.

24. The inference from these data is irresistible: the payments made to these physicians relate directly to their provision of surgical services to patients. This is clearly inconsistent with Cambie's assertion regarding the basis for the calculation of the payments to physicians. It also makes Cambie's assertion regarding the absence of source documents less likely to be accurate.

(v) *Evidence from Other Physicians*

25. Pursuant to this Court's Order of 5 March 2014 under Rule 7-5, the defendants examined under oath several physicians who provide services at Cambie. Several of them testified that they are compensated by Cambie on the basis of the surgeries they have performed there.

26. One of them, Dr. Richard Kendall, testified as follows:

Q And do you bill MSP for the surgeries you perform at Cambie?

MS. GILL: He's answered the question, but ~

THE WITNESS: So for the WCB, no. And for the private IMA cases, I believe the answer is yes. So I think MSP was billed for that, and then Cambie, yeah. Absolutely. So MSP is billed for those four cases, yeah.

MR. EVANS:

Q Okay. And does ~ did Cambie provide you any compensation for the surgeries you performed there?

A In addition to the MSP?

Q Yes.

A Yeah. So Cambie I believe sent a small ~ sorry, I won't say small ~ but sent a cheque following procedures that were done there for compensation for using their facility.

Q Okay. So just to break that down a little?

A Right.

Q So because you've provided services relatively infrequently ~

A Correct.

Q ~ you will get compensation from Cambie specific to surgeries that you perform there?

A Correct.

Q And that's regardless of whether the patient is ~ regardless of the type of patient that the surgery was on?

A I assume so, and again I'd have to look back. It's been so long since I've received any

compensation from Cambie, but again the majority have been WCB and other private payers, and there usually is some sort of compensation for that as part of the user fee for the facility.

Q Okay. And that comes to you from Cambie?

A Correct.

Q And does it come with a breakdown or a statement?

A It usually comes as a cheque, just a cheque saying for this period of time.

Q But it's your understanding that that's compensation for the provision of the surgical services?

A That's my understanding, yes.

Q Okay. And so, I mean, you would consider the same as the income you receive for other – for provision of other medical services?

A Yes.

Q Okay. And do you have any understanding on the basis for which it's calculated?

A I do not.

Q But it is based on the provision of the surgical services?

A Well, it's my understanding, because it only had happened the days that I had been there.

Brossard Affidavit, Ex. M.

27. Another physician who was examined under oath, Dr. Michael Gilbert, testified as follows:

Q ... And I want to be very clear on what you've told me, so I'm going to tell you what I think you've told me and you can correct me if I'm wrong. But you get a cheque from Cambie every month, the basis of which you have no insight into; is that right?

A That's correct.

Q And it doesn't relate to any services you're providing to Cambie; is that right? You've told me you have no ~

A The only service that I do at Cambie is I operate as a surgeon at Cambie.

Q That's right. And you have no insight into why you're getting money from Cambie, but it can only relate to surgical services you provide at Cambie; is that right?

A Yeah, that's what I do at Cambie, yes.

Brossard Affidavit, Ex. M.

28. This testimony is further evidence that physicians providing surgical services at Cambie are compensated on the basis of the surgeries they perform. Again, this contradicts Cambie's assertion regarding the basis on which physicians are compensated, and renders less likely Cambie's assertion regarding the lack of supporting documentation.

(vi) *Other Invoices*

29. Affidavit #3 of Stephen Abercrombie, sworn 20 September 2013, identifies two examples of patient invoices that have come into the possession of the Medical Services Commission that include a "surgeons fee" component in the amount charged to the patient. The first relates to Patient GM; the second relates to Patient NC.

Affidavit #3 of Stephen Abercrombie, sworn 20 September 2013, paras. 11-13.

30. These invoices suggest not only that the patients in question paid specifically for the provision of surgical services (i.e., in addition to a facility fee), but that Cambie's records included a breakdown of the aggregate fee that was paid.

31. Zoltan Nagy, the Manager of the Specialist Referral Clinic, swore an affidavit in which he attempted to explain the Patient GM invoice as having been the result of an error on his part. He stated:

This document was prepared by me in October, 2006 in response to a request from the patient (referred to as "GM" in Mr. de Faye's affidavit) for a breakdown of the fee he paid for his surgery.

SRC invoices private pay patients who are either BC residents or out-of-province patients who have had surgery at Cambie following an assessment by a Specialist who is a member of SRC. SRC collects payment from the patient and remits the facility fee to Cambie, less an administration fee which is retained by SRC. In the case of out-of-province patients, they are also charged a surgeon's fee and an anesthesia fee which is over and above the facility fee charged to BC residents. SRC also collects the surgeon's fee and the anesthesia fee from out-of-province patients and remits this to Cambie.

At the time of this request, I had only recently assumed the position of Clinic Manager at SRC and was still in the process of mastering the administrative processes associated with the position, including the different fee structures for different patient groups. Normally, SRC only receives requests for and prepares Surgery Cost Breakdown Reports of this type for out-of-province patients, in particular patients from Alberta, who require such breakdowns, which include the fees paid to the surgeon and the anesthesiologist for their services, for the purposes of submitting a claim for reimbursement to the Alberta Health Care Insurance Plan.

To the best of my recollection, when I received the request from GM for a surgery fee breakdown, I assumed that he was an Alberta patient, who would have been charged a surgeon fee and an anesthesia fee. I prepared the cost breakdown accordingly, without checking the records as to what GM was actually charged. This was an error on my part. GM was not charged and did not pay a fee for the services of the surgeon or the anesthesiologist during his surgery. BC residents who are paying privately for surgery at Cambie are never charged fees for the services of the surgeon or the anesthesiologist.

Affidavit of Zoltan Nagy, sworn 27 September 2012, paras. 2-5.

32. Mr. Nagy's explanation is inconsistent with the facts, as well as being incoherent. He was unable to answer questions regarding Patient GM's invoice on his examination for discovery, where he testified as follows:

Q Now, the affidavit explains, Mr. Nagy, that the surgery cost breakdown report that we're looking at contained some errors that you made inadvertently; is that right?

A This was prepared ~ this was prepared by an error, basically.

Q Yes. And so it was in error because it was prepared on the basis of your mistaken understanding that the person requesting it was out of province?

A That's normal, yes. That was ~ that would have been ~ that was a long time ago. That would have been my assumption, that this person was out of province.

Q Sorry. When you prepared this ~

A Yes.

Q ~ you were acting under the mistaken assumption that the person was an out-of-province patient?

A Out-of-province patient.

Q Yes. And do you recall where you got that assumption from?

A No. No, I don't.

...

Q All right. Now, your affidavit explains this inadvertence that you've indicated that the individual requesting the breakdown was in fact a BC beneficiary and not an out-of-province resident? Is that the error that was made?

A The ~ sorry. Could you repeat that?

Q Your affidavit explains that the error you made inadvertently ~

A Right.

Q ~ was that you assumed the patient was from out of province when in fact the patient was a BC beneficiary?

A Right.

Q All right. And so the error is that the surgery cost breakdown report reflects a fee for the surgeon, the anaesthesiologist and the assistant that shouldn't be there?

A Yes.

Q Now, if you flip back to the invoice to this patient, which is at page 85 we were just looking at.

A Right.

Q So the total on your surgery cost breakdown report is the total that this patient was billed by SRC?

A Right.

Q Do you see that? And so if this patient was wrongly charged for the physician's fees, was he given a refund after you discovered this error?

A Sorry, are you referring to discovering an error?

Q Well, I think you've just indicated to me that those fees, the surgeon's fees, the anaesthesiologist's fees and the assistant's fees should not be on this document.

A I learned about this when I was ~ when this was presented in one of the court documents, basically. And the error was made that I prepared something with an incorrect assumption. So my assumption must have been that this was an out-of-province patient.

Q Right. And so you mistakenly indicated a fee for the surgeon, the anaesthesiologist and the surgical assistant that shouldn't be there.

A These ~ the details, I don't remember how I came up with these numbers. That's what I was referring here. I just assumed my position there not long before that. There was a lot more of administration I was dealing with. I must have mixed up numbers.

Q Well, isn't your fundamental point, Mr. Nagy ~

A Yes.

Q ~ that this patient shouldn't have been charged the surgeon's fees, the anaesthesiologist fees and the assistant fees? Those were listed in error ~

A The patient wasn't charged the surgeon's fees, the anaesthetist fees, the assistant fees.

Q I see.

A The patient was charged for the usage of the operating theatre.

Q Is the facility fee different ~

A We charge ~

Q ~ for out-of-province residents and BC beneficiaries?

A We charge for the use of the operating theatre. That's what we charge BC residents. Out-of-province residents are charged the operating room costs and the physician's fees.

Q I understand. Is the operating costs that are charged to BC residents the same as the operating costs charged to out-of-BC residents for the same surgery?

A You would probably need to find that out from the Cambie Surgery Centre.

Q Well, you're ~ SRC is the one doing the invoicing, Mr. Nagy.

A Right.

Q So presumably you know if the facility fee is the same when you're invoicing the patients.

A Why would I know?

Q Because you're doing the invoicing.

A This is ~ we invoice BC residents basically for the use of the operating room -

Q I understand that point.

A ~ fees. Okay.

Q The simple point I'm trying to get at ~

A Sure.

Q ~ and I think you should be able to answer it for me, given the nature of your job duties at SRC ~

A Okay.

Q ~ is whether the facility fee charged to British Columbia residents ~

A Right.

Q ~ is the same as the facility fee which is charged to out-of-BC residents.

A I wouldn't know that. That's why I said that you would need to ask the Cambie Surgery Centre.

...

Q Now, Mr. Nagy, do you know if ~ this particular patient that we've been discussing with the surgery cost breakdown report, do you know if he was ever given a refund of his fees as reflected in the invoice we've been looking at? Page 85.

A This patient paid for the ~ based on the invoice that you presented here, paid for the use of the operating theatre.

Q All right. And so the 3,000 ~

A And only for the operating room.

Q So is it just a coincidence that the total on the invoice is the same as the total on the surgery cost breakdown report, although the surgery cost breakdown report contains surgeon's fees that shouldn't be there?

A This breakdown was prepared by mistake. I cannot tell you how it ended up with that. I don't know.

Brossard Affidavit, Ex. 15, pp. 70-79.

33. The bottom line of Mr. Nagy's testimony is that patient GM:
 - a. paid \$3,068 for his surgery;
 - b. was subsequently provided with a breakdown of his invoice that showed payment of a "surgeons fee", "anesthetic fee", and "assistant fee" in addition to a facility fee and administration fee, all of which totalled \$3,068; and
 - c. was never offered a refund of the surgeons fee, anesthetic fee, or assistant fee.

34. This is certainly evidence suggesting not only that Patient GM paid for the provision of surgical services, but that a breakdown of the aggregate fee charged to him was available from Cambie's records two months after the surgery. Indeed, Mr. Nagy's affidavit states that he provided Patient GM with a cost breakdown "without checking the records as to what GM was actually charged".

35. Cambie has never offered an explanation for the invoice relating to Patient NC, which similarly shows a breakdown of the aggregate fee paid, including a "surgeons fee" and an "anaesthetic fee".

36. These two invoices, and the other evidence relating to them, are evidence that at least some physicians providing services to beneficiaries at Cambie are paid by Cambie with respect to those services, and that Cambie has, or had, the ability to provide breakdowns of the aggregate fees paid

for those services. This evidence contradicts both Cambie's assertion regarding the basis on which physician compensation is calculated, and Cambie's assertion regarding the absence of supporting documentation.

(b) Non-credibility of Assertion

37. Cambie's recent assertion that no documentation exists to support the calculation of the amounts paid to physicians, while on its face consistent with some of its earlier assertions, is simply not credible.

38. In Dr. Day's Affidavit #5, he asserted that there are no documents that document the nature of the contractual relationship between Cambie and the physicians providing services there, other than a one page document acknowledging that they are independent contractors.

With respect to Items (xiv) and (xv) referred to above, and in particular, the "contractual nature of the relationship" between CSC, SRC and the specialists and surgeons providing services at CSC, I understand that a copy of CSC's acknowledgment form was disclosed to the Defendants as CSC00002867. All physicians performing services at CSC sign this form, which acknowledges that they are independent contractors. To my knowledge there are no other documents that document the nature of the contractual relationship between CSC, SRC and the specialists and surgeons providing services at CSC.

Affidavit #5 of Dr. Brian Day, sworn 9 October 2013, para. 7.

39. The sworn evidence of several physicians who have been examined under oath is likewise to the effect that there is no agreement or arrangement between themselves and Cambie:

Q Now, you've told me that you don't have any form of agreement with SRC relating to the services that you provide there and the compensation that you get. How about Cambie? Is there an agreement between you and Cambie?

A No.

Examination of Dr. Michael Gilbert, Brossard Affidavit, Ex. L, pp. 53-54.

Q Okay. So periodically you receive a payment from Cambie?

A Correct.

Q And you don't have any understanding on the basis for which you're receiving that ~ funds?

A Well, understanding in that I know that if I stopped working there at all, I presume that it won't continue. I don't know that.

Q But it's ~ you don't know whether it's based on, you know, the number of patients you see or the type of patients you see, or?

A I don't. I don't ~ I couldn't tell you if it's gotten greater or less since I've been there.

...

Q ...Okay. So you don't have any understanding of the basis on which the compensation is calculated?

A No.

Examination of Dr. Trevor Stone, Brossard Affidavit, Ex. M, pp. 65-66.

40. These assertions, however, sit uncomfortably with the following assertion by Dr. Day in his Affidavit #6, filed more recently:

As described earlier, "Consulting- paediatric" is a heading that covers various payments to physicians who provide services at Cambie. There is no uniform manner in which each payment is made, as those payments depend on the particular arrangement that Cambie has made with the individual physician and the services that that physician provides at Cambie. There is therefore no way in which anyone can answer questions relating to the entries under "Consulting - paediatric" for a particular physician without first knowing the specific arrangement between CSC and that physician and the services that the physician provided in the relevant year.

Affidavit #6 of Dr. Brian Day, sworn 8 May 2014, para. 17.

41. Cambie now says that "the Consulting payment amount is determined each month based on Cambie's assessment of a physician's availability, assistance, and overall contribution to Cambie's efficient operations". This assertion is difficult to reconcile, both with Dr. Day's assertion in his Affidavit #6, and with the earlier testimony of both Dr. Day and the other physicians.

42. Furthermore, Cambie has not specified who precisely it is who determines the "Consulting payment amount" for each participating physician. It seems unlikely that it is Dr. Day, as when he was questioned about the "Consulting - paediatric" account entries at his examination for discovery, he was unable to explain what the amounts related to.

Examination of Dr. Brian Day, Brossard Affidavit, Ex. N, pp. 170-180.

43. It also seems unlikely that Cambie's accountant, Paul Colosie, would have the necessary knowledge of the comings and goings of Cambie's physicians, and the necessary expertise, to assess the value of any given physician's "availability, assistance, and overall contribution". Certainly one would expect that, if he were responsible for this process, there would be some kind of documentation relating to how he was to discharge his responsibilities, and some kind of record of the basis on which he made the determinations that he did.

44. The plaintiffs have provided a list of 83 physicians who provide services at Cambie. It seems unlikely that *anyone* would be able to track all of the comings and goings of that number of physicians in order to make an "overall assessment" of the value of their contribution to Cambie, on an ongoing basis, without committing something to some form of document. That, however, is how Cambie says its business functions.

Brossard Affidavit, Ex. J.

45. The defendants say that Cambie's assertion is simply not credible.

(c) Conclusion re "Consulting-pediatric" Documents

46. All of the above, taken as a whole, provides compelling evidence that Cambie is being less than forthcoming, to the defendants and to the Court. Cambie is attempting to avoid its obligations, under the Rules and under the Order made on 21 May, to disclose documents in its possession and control that are relevant to matters in issue in this litigation.

47. The defendants say that they are entitled to an Order pursuant to Rule 22-7(2) that they may attend at Cambie with appropriate technically-trained personnel, appointed as officers of the Court, to locate, extract, and copy the documents that this Court has ordered to be produced, which Cambie has denied exist.

B. SIS Documents

(a) Component Elements of Aggregate Fees

48. The assertion by Cambie and SRC that they do not have in their possession any information relating to the components of the aggregate fees charged to patients is likewise not credible, and is inconsistent with other evidence before the Court.

(i) *Patient Invoice*

49. Bob de Faye's affidavit exhibited an invoice provided to Patient GM in 2006 that included a breakdown of the fee that had been charged to him:

Facility Fee:	\$1,900
Surgeons Fee:	\$500
Anesthetic Fee:	\$200
Assistant Fee:	\$150
Administration:	\$318

De Faye Affidavit, Ex. 29.

50. Mr. Nagy's sworn explanation of the reason why this information was provided to Patient GM was that he had erroneously believed that Patient GM was from outside BC, and so he had provided him with a costs breakdown that would have been applicable to such a patient. Neither in his affidavit nor his subsequent examination for discovery, however, was there any suggestion that either Cambie or SRC was incapable of providing such a fee breakdown.

51. Indeed, as noted above, Mr. Nagy asserted during his examination for discovery that his error occurred because he failed to *check* the records.

(ii) *Response to Application*

52. When the defendants applied for an Order requiring Cambie and SRC to produce the SIS Documents, Dr. Day swore an affidavit in response. In that affidavit, he said:

9. ... The SIS system is designed to assist the operational, clinical and business processes of Cambie and SRC. Businesses such as Cambie and SRC can choose various components of the SIS system. Currently, Cambie and SRC use the scheduling, inventory, billing and reporting components of the system.

10. ... The SIS entries reflect the costs incurred in relation to the services provided to Cambie and SRC's payments, as well as revenues that are derived from those services.

Affidavit #6 of Dr. Brian Day, pp. 3-4.

53. It would be remarkable that Cambie would have invested in software for purposes of inventory, billing, and reporting that was incapable of providing information on the component elements of the fees charged to patients. It would be even more remarkable in light of the fact that the software apparently reflects the costs incurred, as well as the revenues derived.

54. What is most remarkable, however, is that in his affidavit Dr. Day did not assert that the SIS software did not include the component elements of the aggregate fees that the defendants were seeking to have produced. This assertion has only been made belatedly, and without any explanation of how that fact is consistent with Dr. Day's earlier evidence.

(iii) *Discovery Evidence*

55. At the examinations for discovery of Dr. Day and Mr. Nagy, a process was described by which SRC identifies a number of components that go into the calculation of the cost of a surgery. Their sworn testimony was that SRC compiles the information regarding those components and provides that information to Cambie, after which Cambie prepares an estimate of the cost and provides it to SRC for provision to the patient. The information includes such things as the nature of the procedure, whether extra equipment or implants will be required, and whether an overnight stay will be required.

Examination of Dr. Brian Day, Brossard Affidavit, Ex. N, pp. 33-39; Examination of Mr. Zoltan Nagy, Brossard Affidavit, Ex. O, pp. 40-45.

56. Mr. Nagy also testified that out-of-province patients are invoiced for more than merely a facility fee: their invoices include amounts for the surgeon's time, the anaesthesiologist's time, and any surgical assistants. Those amounts are calculated by Cambie and provided to SRC.

Q Now, if we can just go to paragraph 3 of your affidavit, Mr. Nagy. The first sentence indicates that SRC invoices private patients who are either BC residents or out-of-province patients who have had surgery at Cambie following an assessment.

A Right.

Q Do you see that? In the case of out-of-province patients what SRC is invoicing for is not just the facility fee; right? It's also the surgeon's time and the anaesthesiologist's time and any surgical assistants.

A That is correct.

Q And how are those amounts determined by SRC?

A Calling the surgery centre and then they will tell us.

Q Which surgery centres?

A Calling the Cambie Surgery Centre and they will tell us.

Q I see. So the amounts may differ from patient to patient, and how you get them is through a call to Cambie?

A Yeah, most of the times, I'd say yes.

Q Is there some times that SRC determines those amounts?

A The surgical fees?

Q Yes.

A No, that's not an SRC business.

Examination of Mr. Zoltan Nagy, Brossard Affidavit, Ex. O, pp. 65-66.

57. Cambie has not explained how it is that their system can generate these amounts and then aggregate them into a final fee without also being able to disaggregate them.

58. In addition, Dr. Day and Mr. Nagy testified that if surgery ends up being less complicated than expected, the patient will be refunded the amount attributable to the extra equipment or other expense that was not required.

Q Now, Dr. Day, are there ever instances in which the surgery ends up being less complicated than the surgeon anticipated when the prepayment is calculated?

A Yes.

Q And in that instance, is the plaintiff - or patient, pardon me, reimbursed?

A Yes.

Q And how often does that occur, if you can give me a rough guess?

A I can't tell you, because I don't follow all of those details, but we ~ you know, we go through ~ every single patient that's treated there, their file is gone through, and if less or more ~ I mean, we're in a situation ~ if we do more than we contemplated, we absorb the cost. If we do less, we refund the difference.

Q So if the original estimate was that the surgery would take an hour and it ends up being less complicated and takes less than a half an hour, is it Cambie that goes back and recalculates what the proper fee is?

A Yes.

Examination of Dr. Brian Day, Brossard Affidavit, Ex. N, pp. 41-42; see also Examination of Mr. Zoltan Nagy, Brossard Affidavit, Ex. O, pp. 45-46.

59. Cambie has not offered any explanation of how such a refund would be possible if they have no record of the component elements of the aggregate fee charged to the patient.

(b) Conclusion re SIS Documents

60. The defendants say that Cambie's assertion that it is unable to produce information from the SIS data relating to the component elements of the aggregate fees charged to patients is not credible, and say that the defendants are entitled to an order permitting TCS Forensics to attend at Cambie Surgery Centre as an officer of the Court to locate and extract the information in question.

C. Costs

61. The defendants seek their costs of this application as special costs, payable forthwith and in any event of the cause.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #9 of Carol Brossard, sworn 3 July 2014.
2. Affidavit #1 of Bob de Faye, sworn 20 August 2009.
3. Affidavit #1 of Stephen Abercrombie, sworn 8 August 2012.
4. Affidavit #3 of Stephen Abercrombie, sworn 20 September 2013.
5. Affidavit #6 of Stephen Abercrombie, sworn 4 July 2014.
6. Affidavit #1 of Paul McEwen, sworn 29 April 2014.
7. Affidavit #2 of Paul McEwen, sworn 4 July 2014.
8. Affidavit #1 of Michael Connelly, sworn 10 July 2014.
9. Affidavit #5 of Dr. Brian Day, sworn 9 October 2013.

10. Affidavit #6 of Dr. Brian Day, sworn 8 May 2014.
11. Affidavit #1 of Zoltan Nagy, sworn 27 September 2012.

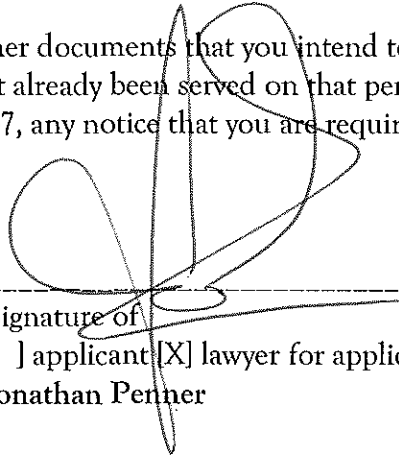
The applicant estimates that the application will take one day.

- ☐ This matter is within the jurisdiction of a master.
☒ 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: 11 July 2014

Signature of 
☐ applicant ☒ lawyer for applicant(s)
 Jonathan Penner

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:[dd/mm/yyyy].....

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:

[Check the box(es) below for the application type(s) included in this application.]

- ☐ 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

This NOTICE OF APPLICATION is prepared by Jonathan Penner, Barrister & Solicitor, of the Ministry of Justice, whose place of business and address for service is 6th Floor - 1001 Douglas Street, Victoria, British Columbia, V8W 9J7; Telephone: (250) 952-0122; Facsimile: (250) 356-9154; Email Address: jonathan.penner@gov.bc.ca.