



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, 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

**NOTICE OF APPLICATION**

**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 and their Solicitors; 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 Smithe Street, Vancouver, BC on May 12, 2014 at 9:45a.m. for the orders set out in Part 1 below.

## Part 1: ORDERS SOUGHT

1. That the plaintiffs shall, within 14 days of the date of this order deliver to the defendants an amended list of documents that includes all documents that are or have been in the plaintiffs' possession or control that fall into the following categories:
  - a. 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 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;
  - b. An excel version of the Specialist Referral Clinic (Vancouver) Inc. general ledger for the five fiscal years covered by the order of October 21, 2013 that has not been redacted in any way, including redactions that relate to physician payments; and
  - c. 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 other accounts: the invoice number and patient invoices.
2. The plaintiffs shall forthwith make the originals of the newly listed documents available for inspection and copying by the defendants in accordance with Rules 7-1(15) and (16).
3. An order that the accountant for the plaintiff, Cambie Surgeries Corporation, attend for ½ day of examination for discovery.
4. The costs of and incidental to this application shall be paid by the plaintiffs to the defendants in any event of the cause.

## Part 2: FACTUAL BASIS

### Nature of the Claims

1. In this action, the plaintiffs seek declarations that ss. 14, 17, 18, and 45 of the *Medicare Protection Act*, R.S.B.C. 1996, c. 248 (the "Act") infringe sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*; and an order pursuant to s. 52(1) of the *Constitution Act, 1982*, that ss. 14, 17, 18, and 45 of the *Act* are of no force or effect to the extent of the inconsistency.

2. The plaintiffs include two corporate entities, Cambie Surgeries Corporation (“CSC”) and Specialist Referral Clinic (Vancouver) Inc. (“SRC”), which operate respectively a “multi-specialty surgical and diagnostic facility” and a “medical clinic”. Dr. Brian Day is a co-owner and the president of both CSC and SRC. The five individual plaintiffs were added as parties in 2012. Four of the plaintiffs received services from either CSC or SRC or both.
3. The defendant Minister of Health is the provincial minister responsible for the Medical Services Plan, and the defendant Medical Services Commission pursuant to the *Act*, and the *Ministry of Health Act*, R.S.B.C. 1996, c. 301. The defendant Attorney General is the chief law officer for the Crown.
4. Each of the defendants has counterclaimed against CSC and SRC. MSC seeks declarations that CSC and SRC have contravened ss. 17 and 18 of the *Act* and permanent injunctions restraining CSC and SRC from contravening those sections of the *Act*. The Minister of Health seeks to recover damages flowing from the unlawful billing practices of CSC and SRC, which are contrary to the *Act*. The Attorney General seeks a declaration relating to the use of “acknowledgment forms” by the Clinics that are unconscionable, oppressive, unlawful, and inconsistent with public policy.

#### Background to this Application

5. The defendants began examinations for discovery of the plaintiffs in 2013. Dr. Brian Day, representative of CSC, was examined on June 17, 2013 for 3 hours, 28 minutes. Zoltan Nagy, representative of SRC was examined on June 18, 2013 for 1 hour, 43 minutes.
  6. Following those examinations and responses from the plaintiffs respecting requests made at those discoveries, the defendants applied in October 2013 for further production of documents from the plaintiffs. The Court, in oral reasons given on October 21, 2013, granted orders for further document production, including that the plaintiff produce the following:
    - a. Annual accounting trial balances and general ledgers of Cambie Surgery Centre for the past five years; and
    - b. Annual accounting trial balances and general ledgers of the Specialist Referral Clinic (Vancouver) Inc. for the past five years.
- Affidavit #1 of Heather Lewis, Exhibit “A”  
(Order made after Application, October 21, 2013, the “Disclosure Order”)
7. The plaintiffs produced some of the documents required by the Disclosure Order, including the general ledgers as set out above. The defendants continued their examination of Dr. Day, representative for CSC, on April 1, 2014 for 2 hours, 35 minutes.

8. Counsel for the defendants wrote to counsel for the plaintiffs on April 7, 2014 to request immediate production of three categories of documents:
  - a. Source documents for all payments to physicians reflected in the CSC general ledger under “Consulting – paediatric” for the five fiscal years covered by the Disclosure Order (the “Consulting- paediatric Documents”);
  - b. A unredacted Microsoft Excel version of the SRC general ledger (the “SRC General Ledger”);
  - c. All source documents relating to “SIS” entries in the general ledgers of both clinics (the “SIS Documents”).
9. Also in the letter of April 7, counsel for the defendants sought agreement of the plaintiffs to conduct a ½ day examination of the accountant for CSC. The defendants remaining questions for the CSC and SRC plaintiffs relate to their respective accounting records.

Lewis #1, Exhibit “B”

10. Counsel for the plaintiffs responded to these requests by letter on April 11, 2014. The plaintiffs objected to production of the “Consulting – paediatric Documents” and the unredacted SRC General Ledger.

Lewis #1, Exhibit “C”

11. Plaintiffs’ counsel did not object to production of the SIS Documents except to the “extent they contained privileged or irrelevant information”. However, by way of email dated April 17, counsel for the plaintiffs requested clarification on the “precise scope and nature of the documents” sought by the request for the SIS Documents. Counsel for the defendants responded by email dated April 17 with the request as it had been formulated at the examination of Dr. Day on April 1. There has been no further response from plaintiffs’ counsel.

Lewis #1 at paras. 4-5, Exhibits “C” and “D”

12. In February 2014, the defendants applied for an order permitting pre-trial examination of various physicians. This Court granted that order on March 5, 2014 (reasons at 2014 BCSC 361). To date, pre-trial examinations of four physicians have been completed: Dr. Jean Lauzon, Dr. Michael Gilbert, Dr. Jordan Leith, and Dr. Farhad Moola.

#### The “Consulting-Peadiatric Documents”

13. Within the CSC general ledgers is an expense account entitled “Consulting - peadiatric”. (The account is spelled “peadiatric” in the general ledger, which will be used throughout this application and supporting affidavit material where quoting from the general ledger. The spelling “paediatric” was used in the correspondence and is reproduced where quoted from that material in this application.)

14. The account contains a record of expenses incurred by CSC in relation to various payees, including physicians that practice at SRC and/or CSC. Generally, there is not more than one entry per month for each physician. The amounts in the "Consulting - peadiatric" account for a given physician vary from month to month and from year to year. The amounts also vary from physician to physician.

Affidavit #1 of Paul McEwen at paras. 9-11

15. The "Consulting - peadiatric" entries, while indicating the amounts by payee by month, contain no information as to how individual monthly entries were derived, or on what basis the amounts varied from month to month. Without access to the source documents, it is not possible to determine how amounts appearing in the account were derived.

McEwen #1 at para. 15

16. The "Consulting - peadiatric" account includes entries for over 140 payees over the last five fiscal years. The aggregate annual totals for the account range from approximately \$1.46 million to \$1.76 million. For reference, the annual expenses for CSC for the period from 2008 to 2012 range from \$7.6 million to \$9.2 million.

McEwen #1 at para. 13

17. At his discovery on April 1, Dr. Day was asked about the "Consulting - peadiatric" account and specifically about a payment to him from that account in the amount of \$44,025 for the month of September 2011. Dr. Day confirmed that he does not do paediatric work. He could offer no explanation for why those types of entries were under the "Consulting - peadiatric" account. When asked what the payment could relate to, Dr. Day responded that it was for his work as medical director and potentially for services provided to non-BC residents.

McEwen #1, Exhibit "D"

Lewis #1, Exhibit "J" pp. 170-74

18. Dr. Day was asked about a similar entry for Dr. Michael Gilbert from September 2011 in the amount of \$9,900. Dr. Day confirmed that Dr. Gilbert is an orthopedic surgeon, and could offer no explanation of what the \$9,900 payment related to. Dr. Day was asked about a similar entry for Dr. William Penz in the amount of \$13,000. Dr. Day confirmed that Dr. Penz is an anesthesiologist and stated that the payment related to "consulting services and medical services provided to Cambie".

McEwen #1, Exhibit "D"

Lewis #1, Exhibit "J" pp. 174-77

19. Each physician examined by the defendants to date has confirmed that they receive periodic payments from CSC. Each of them also confirmed that they have no understanding of the basis on which these payments are calculated.

Lewis #1, Exhibits "E", "F", "G", "H"

20. Dr. Day, in his discovery on June 17, 2013, confirmed that physicians would only receive compensation from CSC in cases where the patient was a non-BC resident or for a "non-insured" service. On the plaintiffs' explanation of its business structure, physicians should not receive compensation from CSC in relation to workers' compensation patients, RCMP patients, other third party payer patients, or BC beneficiaries under the Medical Services Plan (MSP) receiving insured services. MSP patients receiving medically required treatment for which the physician could bill MSP represent approximately 10 percent of CSC patients. It is impossible to determine, based on the information provided by CSC to date, what percentage of patients fall into each category of patients and thus for what percentage of patients CSC would provide compensation directly to a physician.

Lewis #1, Exhibit "N", Exhibit "T" pp. 114

Affidavit #3 of Dr. Brian Day at paras. 36, 81

#### SRC General Ledgers

21. The plaintiffs have provided the general ledgers of SRC in two formats: "pdf" and Microsoft Excel. The Microsoft Excel version has been redacted to remove the names of physicians from the payee field. Dr. Day, at his discovery on April 1 admitted that this redaction was deliberate.

McEwen #1 at para. 18-21, Exhibits "E" and "F"

Lewis #1, Exhibit "J" pp. 180-186

22. The difference in format is significant. Performing analyses and calculations using the "pdf" versions of the general ledgers would require extensive manual tabulation and cross-referencing of thousands of individual entries. If Excel versions were produced, various automated data analysis functions in Excel could be used in place of the manual tabulation and cross-referencing tasks.

McEwen #1 at para. 17

#### "SIS" Entries

23. The CSC general ledgers contain numerous account entries with references such as, "SIS REVENUES", "SIS PAYMENTS", "SIS RECEIPTS" and "SIS DEPOSITS RECEIVED". Dr. Day stated at his examination for discovery on April 1 that "SIS" refers to a specific software program that is used widely in surgery centres in the United States.

McEwan #1 at para. 22

Lewis #1, Exhibit "J" pp. 187-89

24. The "SIS" entries in the CSC general ledger indicate that a subsidiary or supporting ledger exists that contains greater detail as to the derivation of amounts making up the entry. In the case of CSC, the subsidiary or supporting ledger in this context would likely be generated using the "SIS" software. The additional detail could include, for revenue accounts, the date of service, the service provided, the patient name, the patient invoice number, the attending physician providing the service and the component element of the aggregate fees charged to the patient

McEwen #1 at paras. 24-26

25. Without access to the source data for "Consulting – paediatric" account and the "SIS" entries described above, it is impossible to understand how the data entries provided were calculated or determined. In the absence of that information, it is impossible for the Province to gain a thorough understanding of the billing practices of SRC and CSC and how financial arrangements differ for physicians as between SRC or CSC and the public system

McEwen #1 at para. 27

#### CSC Accountant

26. At various points in the discovery of Dr. Day, he referred to the accountant for CSC, Paul Colosi, and the functions performed by him. The CSC accountant was responsible for assembling documents in response to this Court's order of October 21, 2013 for production of certain documents. Dr. Day stated that, while he had probably received the order, he had not read it.

Lewis #1, Exhibit "J" pp. 167-68

27. Dr. Day indicated in his discovery on April 1 that the CSC accountant is responsible for setting the fees for surgery performed at CSC based on information supplied by the surgeon. Dr. Day was shown three documents setting out surgical prices for CSC. The three documents were entered as Exhibits "5", "6", and "7" for identification at Dr. Day's Discovery. Dr. Day initially stated his assumption that Exhibit "5" had been prepared by the accountant for CSC. However, he later stated that he did not prepare the documents and did not know who created the three documents.

Lewis #1, Exhibit "J" pp. 199-210, Exhibits "K", "L", "M"

28. Dr. Day was asked about a statement in his Affidavit #3, which provided a breakdown of patients that privately paid a facility fee to CSC for 2011 and estimated that numbers for 2012 and 2013 would be similar. This was contrasted with a response from plaintiffs' counsel that records from CSC and SRC would not permit such a breakdown. Dr. Day stated that the accountant was "likely" responsible for preparing the breakdown that appeared in his affidavit.

Lewis #1, Exhibit "J" pp. 257-60

29. Dr. Day could offer no explanation for the entries in the “Consulting – peadiatric” account of the CSC general ledger, and account representing a significant proportion of the total expenses of CSC.

### Part 3: LEGAL BASIS

#### Documents

30. Rule 7-1(1)(a) of the *Supreme Court Civil Rules* requires a party to list all documents in its possession or control that could be used at trial to prove or disprove a material fact. A party may demand additional documents under sub-rules 7-1(10) or 7-1(11) and the court may, on application under Rule 7-1(13) order a party to comply with such a demand under Rule 7-1(14).

31. Rule 7-1 thus creates a two-tiered process for disclosure. A party must in the first instance list all documents that may go to prove or disprove a material fact. On application under Rule 7-1(14), the court may order broader production of documents that “relate to any or all matters in the action” on a *Peruvian Guano* standard.

*XY, LLC v. Canadian Topsires Selection Inc.*, 2013 BCSC 584.

32. The test set out for broader disclosure is “whether a document can properly be said to contain information which may enable the party requiring the document either to advance his own case or damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, or if it may have either of those two consequences”.

*Global Pacific Concepts Inc. v. Owners of Strata Plan NW 141*, 2011 BCSC 1752 at paras. 8-9

33. The plaintiffs contested the relevance of the documents sought by the defendants on their application in October 2013. With respect to relevance, this Court concluded that the costs, billing practices, and potential profits of CSC and SRC are relevant to the matters at issue between the parties.

*Cambie Surgeries Corporation v. Medical Services Commission of British Columbia*, 2013 BCSC 2066 at para. 62 (the “*Document Decision*”)

34. On the defendants’ application for examinations of physicians under Rule 7-5, the relevance of the proposed inquiries was again the central point of dispute. The plaintiffs and counsel for the physicians also argued that the *Document Decision* was determinative of that issue.

35. This Court disagreed and concluded that the *Document Decision* was not determinative of the relevance of inquiries the defendants sought to make of the physicians (at para. 54). This Court went on to accept the relevance of questions about how the financial differences between the public and private systems affect how physicians deal with their patients.



*Cambie Surgeries Corporation v. Medical Services Commission of British Columbia,*  
2014 BCSC 361 at paras. 54, 64 (the “Physician Decision”)

36. This Court has thus already determined the relevance of documents which pertain to the costs, billing practices and potential profits of CSC and SRC. It has also determined that the differences in the financial arrangements for physicians as between the public system and SRC and/or CSC are relevant.
37. The documents at issue on this application fall into one or both of these categories. The “Consulting – paediatric” account and “SIS” entries in the general ledgers represent expenses and revenues for CSC. Without the source data for the entries, it is impossible to determine how the amounts were derived or calculated. This Court already determined that the general ledgers were relevant and ordered disclosure. All the Province seeks now is further information which would permit an understanding of the general ledgers.
38. The plaintiffs object to production of the “Consulting – paediatric” source documents on the basis of an assertion that this Court has found the direct or indirect financial interest of physicians in CSC to be irrelevant. However, the inquiry is not into the direct or indirect financial interest of physicians, but rather how the financial arrangements at CSC affect physicians’ relationship with their patients. If physicians are compensated by CSC for the services they provide to patients at CSC, as appears to be the case from the CSC general ledgers and the examination of physicians to date, that has obvious implications for how physicians interact with their patients as between the public system and at CSC.
39. The plaintiffs similarly object to production of an unredacted Microsoft Excel version of the SRC general ledger. They state in their correspondence to defendants’ counsel that only information relating to physician payments was redacted and such information is irrelevant as it related to the financial interest of physicians in SRC. As with the “Consulting – paediatric” account the plaintiffs cast the scope of relevant material too narrowly. Payments to physicians from SRC for services performed by physicians at SRC are relevant to how the different financial arrangements as between the public system and SRC affect how physicians interact with their patients.
40. Further, the Order of October 21 compelling production of the SRC general ledgers did not provide for any redactions. The plaintiffs have provided the information, including physician payee names in “pdf” format. It is contrary to the purpose of the rules to require the defendants to analyze the material by hand, when it could easily be provided by the plaintiffs in a more convenient format.

Additional Discovery Representative

41. The defendants seek discovery of an additional representative of the plaintiff CSC under Rule 7-2(5)(a). Under that rule the Court has discretion to grant discovery of an additional representative. In general terms, the discretion is to be exercised when the initial discovery representative cannot satisfactorily inform himself or herself about the subject matter of the examination.

*Order of the Oblates of Mary Immaculate in the Province of British Columbia  
v. Dohm, Jaffer & Jeraj*, 2007 BCSC 1709 at para. 16

42. In making the determination Court should consider such factors as the circumstances of the case; the responsiveness of the witness under examination and the degree to which he has taken pains to inform himself; the nature and materiality of the particular evidence sought to be canvassed with the second representative; and what appears to be the most practical, convenient and expeditious alternative.

*Order of the Oblates* at para. 16

43. In *Vancouver Wharves v. Continental Insurance* (1999), 15 C.C.L.I. (3d) 52, Mr. Justice McEwan commented on the appropriate evaluation of whether a representative can adequately inform himself or herself. In that case, the applicants argued that the first representative could not satisfactorily inform himself because the answers given on information from others would necessarily give rise to further questions which he could not answer. Mr. Justice McEwan stated the following:

[12] Having reviewed the material, including the discovery, the requests, and the responses given in writing, I have some appreciation for the defendant's position. The claim arises out of circumstances concerning which Mr. Arnott is, in a number of respects, a second hand source. While I do not think it would be appropriate to give examples, there are, in the responses to questions upon which Mr. Arnott has informed himself, any number of occasions upon which follow-up questions might well be posed, the shape and direction of which would be influenced by the answers as they were given.

[13] I think it evident that at times the legitimate objectives of discovery can be hampered by the mechanics of this rule. The process of posing follow up questions - no doubt in the form of alternatives to accommodate different responses in the series - which the representative must then inform himself of in an ongoing series of relays, may not always contribute to the "just, speedy and inexpensive determination", which is the ultimate objective of the Rules (Rule 1(5)). There are clearly circumstances where assessing the onus on the plaintiff to show that a representative cannot satisfactorily inform himself will require consideration not only of the literal ability to find things out, but the practicalities of doing so in a given case.

[Emphasis in original.]

44. Practicality is a significant factor, including the possibility of delaying an imminent trial date.

*Order of the Oblates* at para. 16

*Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Co.*,  
2013 BCSC 1392 at para. 38

45. In the present case, the defendants have not yet exhausted their allotted time for discovery of the representative of CSC. Despite the plaintiffs' assertion that the defendants be held to the 7 hours provided for in the rules, it is appropriate considering the size and complexity of the present case to provide further time for discovery.
46. The remaining inquiries the defendants have for discovery relate to the accounting records of CSC and other functions Dr. Day referred to as being carried out by CSC's accountant. Rather than asking the questions of Dr. Day, who may inform himself on those topics, the most expedient and practical solution is to permit examination of the accountant directly. This will permit the defendants to ask follow up questions as they arise.
47. It should also be noted, considering the imminent trial date, that the time taken by the plaintiffs to respond to requests made at discovery has been lengthy. Following Dr. Day's discovery in June of 2013, the defendants made repeated attempts to obtain answers to requests made at that discovery. Those requests remained unfulfilled at the time of the defendants' application for further documents in October of 2013.

Affidavit #2 of Carol Brossard, Exhibits "J", "K", "L", and "U"

**Part 4: MATERIAL TO BE RELIED ON**

1. Affidavit #3 of Brian Day, Sworn October 2, 2012
2. Affidavit #2 of Carol Brossard, Sworn September 23, 2013.
3. Affidavit #1 of Paul McEwen, sworn on April 29, 2014.
4. Affidavit #1 of Heather Lewis, sworn on April 29, 2014.

The applicants estimate that the application will take 2 hours.

This matter is within the jurisdiction of a master.

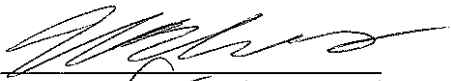
This matter is not within the jurisdiction of a master as Associate Chief Justice Cullen is seized as the case management judge.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to the 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 the 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: April 29, 2014

  
 \_\_\_\_\_  
 [ ] applicant [X] lawyer for applicants  
**Karen Horsman**

***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/mmm/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 **Karen Horsman**, Barrister & Solicitor, of the Ministry of Justice, whose place of business and address for service is 1301 - 865 Hornby Street, Vancouver, British Columbia, V6Z 2G3; Telephone: (604) 660-3093; Facsimile: (604) 660-2636; Email Address: \*\*\*\*.