Affidavit #1 of Dr. Derryck Smith
Sworn October 11th, 2012
No. S090663
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

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

PLAINTIFFS

AND:

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

DEFENDANTS

AND:

SPECIALIST REFERRAL CLINIC (VANCOUVER) INC.

DEFENDANTS BY COUNTERCLAIM

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

INTERVENORS

AFFIDAVIT #1 OF DR. DERRYCK SMITH

I, Derryck Smith, physician, of Suite 505 – 805 West Broadway, Vancouver, MAKE OATH AND SOLEMNLY AFFIRM THAT:

1. I am a psychiatrist who works within the public health care system in British Columbia and a former member of the Medical Services Commission (the "**Commission**"). As such, I have direct knowledge of the information stated herein, except where stated to be on information and belief.

2. I make this affidavit in support of Cambie Surgeries Clinic's (herein referred to as "**CSC**") and Specialist Referral Clinic's ("**SRC**") opposition to the injunction sought by the Commission to prohibit CSC and SRC from providing medical services in contravention of certain provisions of the *Medicare Protection Act* (the *"**Act**"*) (specifically sections 17(1) and 18(3), which relate to billing practices for benefits under the *Act*) prior to a ruling on the constitutionality of these provisions.

3. As I explain below, I believe that if the residents of British Columbia are not able to pay a facilities fee for surgeries at CSC or receive timely medical consultations at SRC, just as residents, for example, of Alberta can lawfully do, it will have a negative impact on the ability of the residents of British Columbia to access timely health care.

My Professional Qualifications

4. My academic training includes a B.Sc. in Chemistry from the University of Waterloo in 1970, a medical doctorate from the University of Western Ontario in 1974 and the completion of a Psychiatry Residency at the University of British Columbia in 1984. I became a Fellow of the Royal College of Physicians of Canada in 1984.

5. I have been a Clinical Professor in the Department of Psychiatry, Faculty of Medicine at the University of British Columbia since 1993.

6. I was the Head of the Division of Child and Adolescent Psychiatry at the University of British Columbia for 25 years.

7. I served as the President of the British Columbia Medical Association from 1996 to 1997.

8. From 2008 to 2010, I served as the President of the Medical Legal Society of British Columbia. I was also on the board of the Canadian Medical Association in from 1998 to 2006.

9. I was a member of the Commission from 1998 to 2006.

10. I also perform independent medical examinations for the British Columbia courts.

My work in the health care system in British Columbia

11. I have been a psychiatrist in British Columbia for over 25 years.

12. I have a full time clinical psychiatry practice at 805 West Broadway. I see patients three days a week. On average, I see six patients a day, and approximately 800 patients a year. I have been running this practice for 25 years. In the recent past I was working 5 to 6 days per week and seeing more than 2,000 patient/visits per year.

13. Psychiatry is a specialized domain of medicine and psychiatrists are trained in diagnosing and treating mental illnesses. The medical benefits offered by psychiatrists are covered under British Columbia's *Medical Services Plan* ("**MSP**"), however patients need to obtain a referral from their family doctor or other specialist in order to access to diagnosis and/or treatment by a psychiatrist.

14. Approximately 40% of my patients come from referrals for treatment of patients with attention deficit disorder ("**ADD**") or a brain injury. About 40% of my practice is referrals from lawyers requesting psychiatric assessments for the purposes of litigation. Approximately 20% of my practice is assessing individuals who have been disabled or injured in their workplace for the Workers Compensation Board ("**WCB**"). I also Chair Claims Review Committees on a regular basis.

15. Through my experiences as a physician in clinical practice and as a member of various medical and legal associations, I have direct knowledge of the limitations to access and the unreasonable wait times that British Columbians face in trying to obtain medical care.

16. In British Columbia, a patient can only obtain a specialist consultation upon referral by a family physician. The limited access to family physicians results in limited access to specialists.

17. The public health care system in British Columbia is considered to be universal, providing care based on a patient's medical need and urgency. However, the referral procedure between family physicians and specialists is based on relationships and connections between physicians. The general practitioners who work in 'walk-in' clinics generally lack the long-term relationship that family physicians have with their patients, and often do not have relationships with specialists. A patient's long-term relationship with a family physician facilitates obtaining a specialist consultation in a timely manner, both through earlier identification of a potential need for a specialist referral and also as a result of the more established relationships between the family physician with his or her specialist colleagues. Therefore, a patient who uses a walk-in clinic does not have the same access to specialists as does someone with a designated family physician. The result is that patients are essentially provided with or denied access to timely medical care depending upon whether they have a family physician. In my opinion, this is not equal access to medical services.

18. After a referral to a specialist has been made, a patient may wait for months or even years for a consultation with the specialist. The longer the wait, the greater the likelihood that their condition deteriorates and becomes more difficult to treat.

19. I have observed people who require psychiatric care being made to wait for many months or even years after the manifestation of symptoms indicates a need for a before receiving a consultation with a psychiatrist. Once a referral is made, the wait time to see me for a psychiatric consultation/evaluation is currently two to six months.

20. The detriment that results from patients waiting for psychiatric care is significant, given the nature of psychiatric illnesses. If left untreated, psychiatric conditions deteriorate over time. Patients will experience the exacerbation of their conditions, such as depression, self-harm behaviours, and anxiety. Without timely access to care, these patients are often unable to handle work and life stressors. Lack of access can also lead to suicidal ideation, which leaves the patient in a very dangerous situation.

Unequal access to medical services in rural areas of British Columbia

21. In my practice, I serve many patients outside of the greater Vancouver area, and had for 20 years provided psychiatric outreach services in Dawson Creek, British Columbia, which is approximately 1500 kilometers north of Vancouver.

22. Through this work, I know that there are not enough general practitioners or specialists in rural British Columbia. There are significant access issues outside of the Greater Vancouver area, particularly for the populations in the remote north. The wait times for medical services are much longer in rural British Columbia than in urban areas. These facts further point to unequal access to medical services based on geographic location.

Preferential access to medical services for employees covered by the Worker's Compensation Board (WorksafeBC)

23. As described above, part of my patient base is made up of individuals who have been injured at work. These individuals receive preferential medical coverage through the WCB, and thereby receive expedited access to medical services. The WCB is funded by employers. It is exempt from the *Act* and is allowed by legislation to purchase health care services, either publicly or privately, for injured workers. WCB strives to get workers treated effectively and expeditiously and back on the job as quickly as possible, to reduce the overall costs of health care resulting from their injury or illness.

24. The WCB developed this preferential insurance scheme after realizing the huge costs involved in paying out benefits to individuals while they wait for surgery or other medical procedures. The WCB found it more cost-effective to expedite the medical care, and have individuals return to work as soon as possible. This preferential access to medical care is obviously of significant benefit to injured workers and their families.

25. In my opinion, the same reasoning should apply for the general public. Beyond the personal harm endured by the patient, there is a significant cost to the economy of British Columbia by keeping patients waiting for medical care, and thereby rendering them unable to work or attend to other responsibilities and ultimately increasing the cost of their medical care as a result of delayed treatment.

26. In my opinion, the distinctions in the *Act* between the types of health care services that British Columbians can, and generally must, pay for out-of-pocket or through private insurance, such as physiotherapy and prescription drugs, and the types of services which are deemed "medically necessary" under the *Act* and for which private payment and private insurance is prohibited, are generally arbitrary and make little sense from a medical or health care perspective. I also believe that the distinctions created by the *Act* in access to timely medical diagnosis and treatment, and access to what is effectively private insurance, as between those who were injured or became ill at work and those who were injured or became ill outside of work, are unfair.

Medical services offered by CSC and SRC

27. I have no financial interest in CSC or SRC. Through my work at the BC Women and Children's Hospital, I have learned that CSC performs most of the province's pediatric dental surgery, because the B.C Children's Hospital does not have enough surgical facility time. Furthermore, I am informed by physicans who have had experience at both the BC Children's Hospital and CSC and do believe that CSC provides better technology, accessibility and cost effectiveness for the pediatric dental surgery than B.C Children's Hospital is able to provide.

28. The SRC and CSC maintain an excellent reputation amongst patients and physician colleagues. Further, I am informed through my discussions with physicians involved with SRC and CSC and do believe that people with varying financial circumstances obtain medical services at SRC and/or CSC.

29. As a former of the Commission, I am troubled by the Commission's actions in limiting its enforcement of the billing provisions of the *Act* to SRC and CSC. I am aware of at least 40 other private medical clinics in British Columbia offering similar service to British Columbia residents which likely contravene the *Act* and with respect to which the Commission has not taken any steps to prohibit or restrict their practice to only accepting preferred beneficiaries or not billing BC residents for their services.

30. I am also very troubled by the Commission's actions in taking these enforcement actions now, given that the Commission has known for years of the billing practices of SRC and CSC, and many other private clinics in the Lower Mainland, with respect to charging a fee to British Columbia residents in relation to the provision of medically required services.

31. When I served on the Commission from 1998 to 2006, it was known among the Commission members that private clinics in Vancouver provided medically necessary care to beneficiaries under the *Act* for a fee. This was a major discussion point for the Commission. We discussed on several occasions whether the Commission should take action to stop this from occurring at CSC and other private clinics, but we decided not to do so because it would have a negative impact on the provision of timely and effective health care service to British Columbians. Also, as result of the *Chaoulli* decision, we were aware that the restrictions in the *Act* on British Columbian's access to private health care services were likely unconstitutional.

32. In my opinion, it is only fair and appropriate that the constitutionality of these provisions in the *Act* be determined by a Court prior to these provisions being relied upon to limit the medical services which CSC and SRC can offer to British Columbians who are seeking

timely and effective medical diagnosis and treatment.

AFFIRMED BEFORE ME at the City of Vancouver, in the Province of British Columbia, this 11th day of October, 2012

A Commissioner for taking affidavits in the Province of British Columbia

DR. DERRYCK SMITH

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