

## Legal challenges may imperil medicare, public health care advocates say

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Single-tier medicare is in peril because of legal challenges to provincial legislation that limits private sector medicare, delegates to a one-day session on the lawsuits were told Monday in Toronto, Ontario.

“This is a fight for the hearts and minds of Canadians,” Natalie Mehra, director of the Ontario Health Coalition, which sponsored the session, told roughly 70 medicare advocates, public interest lawyers, health professionals and representatives of seniors and people living with AIDS.

“Unless we fight, we will lose public health care,” Mehra added.

Among the court challenges is one in British Columbia brought by former Canadian Medical Association President Dr. Brian Day, whose lawsuit claims that the province’s Medicare Protection Act contravenes section seven of the Canadian Charter of Rights and Freedoms. Day’s suit contends that the “rights to liberty, life and security of the person are a constitutional guarantee of access to medical care, and include both a right to access to medical care of one’s choice, whether public or private, and a right of access to adequate and timely medical care” ([www.courthousenews.com/2009/01/30/CanadaClinics.pdf](http://www.courthousenews.com/2009/01/30/CanadaClinics.pdf)).

Day’s Cambie Surgery Centre openly charges patients for medically necessary services, which is illegal under provincial law, said Rachel Tutte, cochair of the British Columbia Health Coalition. If Day’s case is successful, Tutte warns that Charter challenges would inevitably follow suit across the country, leading to “the dismantling of the universal Medicare system.”

Day launched his case in early 2009 after BC’s quasi-judicial Medical Services Commission attempted to audit his and other private clinics. (Other private clinics were originally plaintiffs in the case, but they have since withdrawn.)



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Current legal challenges to limitations on private sector medicine are based on the proposition that the legal right “to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice” under the Canadian Charter of Rights and Freedoms should guarantee access to medical care.

The audit requests came about after a group of patients filed a lawsuit alleging the government wasn’t fulfilling its role to uphold medicare.

When private centres charged for essential services, said Stephanie Drake, a lawyer representing the BC Nurses Union, “the BC government’s

policy was to ask the doctor nicely to pay back that patient and then leave him alone.”

Tutte said the number of private clinics in BC has grown to 33 over the past decade partly as a result of funding shortfalls in medicare. She added that BC clinics have become “more bold in openly violating” the province’s medicare legislation since the Supreme Court’s landmark 2005 ruling that Quebec’s ban on private health insurance for medically necessary services violated provincial human rights law, given the long wait times in the public system. (*Chaoulli and Zeliotis v. A.G. Quebec et al.*, [www.canlii.org/en/ca/scc/doc/2005/2005scc35/2005scc35.html](http://www.canlii.org/en/ca/scc/doc/2005/2005scc35/2005scc35.html)).

Meanwhile, in Ontario, two patients are also demanding the Ontario Superior Court of Justice allow doctors and companies to charge for essential medical services. Shona Holmes and Lindsay McCreith both travelled to private clinics in the United States for care and have alleged in a statement of claim against the province of Ontario that their health suffered because they were denied access to care outside of Ontario “government-run monopolistic” health care system.

Ontario legislation deprives residents “of the opportunity to secure timely access to essential health services and thereby violate the right to life and security of the person guaranteed by section 7 of the Charter,” the lawsuit states ([www.law.utoronto.ca/healthlaw/docs/case\\_McCreith.pdf](http://www.law.utoronto.ca/healthlaw/docs/case_McCreith.pdf)). “The prohibitions on direct billing, extra billing, private medical insurance and MRI [magnetic resonance imaging] facility fees also deprive Ontarians of the right to make fundamental personal choices

with regard to their life and health and therefore violate the right to liberty as guaranteed by section 7 of the Charter.”

A similar case was filed in Alberta in 2006 in which a 59-year-old man challenged a provincial law that precluded residents from purchasing private health insurance for provincially insured services ([www.law.utoronto.ca/healthlaw/docs/case\\_WilliamMurray.pdf](http://www.law.utoronto.ca/healthlaw/docs/case_WilliamMurray.pdf)). The case remains on the books but has not moved forward.

Mehra said the Canadian Constitution Foundation is behind both the Alberta and Ontario cases and had been “trolling” for patients they could use to launch a constitutional challenge. The foundation, which describes itself as “a registered charity, independent and non-partisan” that acts as a “voice for freedom in Canada’s courtrooms and law schools,” lists *McCreith & Holmes v. Ontario* as one of its court cases ([www.canadianconstitutionfoundation.ca/court.php](http://www.canadianconstitutionfoundation.ca/court.php) and [www.canadianconstitutionfoundation.ca/files/1/September%202006.pdf](http://www.canadianconstitutionfoundation.ca/files/1/September%202006.pdf)).

“The cases [in BC, Alberta and Ontario] are brought by a very closely aligned, small group of private clinics, think tanks and lobby groups,” said Mehra. “They’re magnificently politically connected and they know this is their time.”

Vancouver-based family physician Dr. Duncan Etches told delegates that a two-tier system for essential medical services would cripple medicare. Private clinics “take the easy work,” picking and choosing patients who generate the most revenue, he said.

Without the simpler cases to offset the costs of the more complex ones, public

clinics can become unsustainable, he argued.

More health workers will leave the public system if extra billing (charging patients for medically necessary procedures) is allowed, he said, adding that already “it’s sometimes hard to get an ultrasound for prenatal care because the ultrasound techs are over at the private clinics.”

Glyn Townson, chair of the British Columbia Persons with AIDS Society, which is an intervenor in the Day case, said there have been cases in which physicians in public hospitals have recruited patients to their private clinics by exaggerating wait times. “A close friend of mine had a back injury and he was told he could either walk across the hallway and get the procedure done immediately if he paid \$1800, or he could wait several months,” he said. “When you’re under duress and in a lot of pain, if someone gives you an option, you’re going to take it.”

Various speakers argued the solution to the threat to medicare lies in governments stemming the tide of funding cuts. In Alberta, there were twice as many hospitals 20 years ago than now, said David Eggen, executive director of Friends of Medicare in Alberta.

The participants claimed provincial governments would be unlikely to surmount a strong defence against the lawsuits, arguing that BC, Ontario and Alberta are uninterested in upholding legislation that protects medicare. “It’s like the fox guarding the henhouse,” said Tutte. — Wendy Glauser, Toronto, Ont.

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