

Medicare on trial

British Columbia's top court will hear a constitutional challenge in September that may set the legal precedent for two-tier health care in Canada. The two-month trial, which starts Sept. 7, will test whether laws restricting extra billing and patient access to private health care violate Canadians' charter rights to "life, liberty and security of the person."

Interveners in the case say it's the biggest threat to Medicare in this generation, and likely headed to the Supreme Court of Canada.

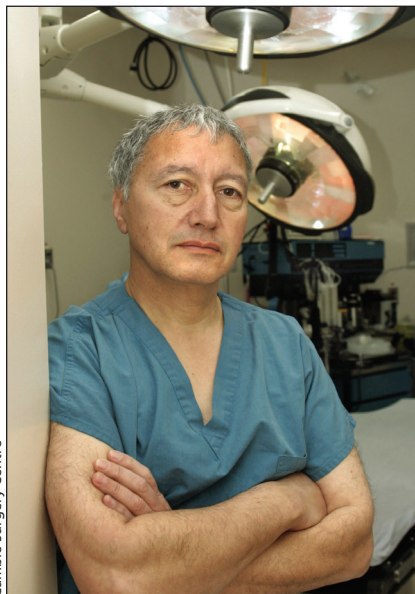
With few exceptions, federal and provincial laws currently prohibit doctors from providing — and patients from purchasing — medically necessary services outside the public system. These laws include bans on extra billing for services covered by public health insurance and user fees for facility costs.

"We believe governments act unlawfully when they promise but fail to deliver timely care, and at the same time outlaw other options," says key plaintiff Dr. Brian Day, co-owner of the for-profit Cambie Surgery Centre in Vancouver and former president (2007–08) of the Canadian Medical Association.

Day launched the case against the BC government in January 2009, at the same time provincial auditors were investigating billing practices at his clinic. The audit uncovered more than 200 cases of extra billing and double-billing in a 30-day period.

Day argues that denying patients the option of spending their own money on health care is tantamount to "medical enslavement." His case builds on a 2005 Supreme Court of Canada ruling in the Jacques Chaoulli and George Zeliotis case. It states that Quebec residents have the right to purchase private health insurance in the face of long wait times. That decision is binding only in Quebec; Day is hoping to set a national precedent.

Since 2012, six patients who say their health has suffered from long waits in the public system have joined Day as plaintiffs in the challenge. One, a 16-year-old with a progressive spine deformity, waited 27 months for corrective surgery in Canada before seeking the procedure privately, and was



Cambie Surgery Centre

A legal showdown between the British Columbia government and private-clinic owner Dr. Brian Day may decide the future of Medicare in Canada.

subsequently paralyzed for life. Two others have died.

These patients would have been better served in Europe "where public and private systems operate alongside each other and improve each other through competition," says Day. He cites Belgium, France, Denmark, Sweden, The Netherlands, Switzerland, Austria and Germany as examples of countries with two-tier systems where wait lists are "essentially nonexistent."

But comparisons with European systems can be misleading, says Colleen Fuller, a public-policy researcher speaking on behalf of the BC Health Coalition, an intervener in the case.

"Many countries in Europe don't collect wait times data on a regular basis, including those Brian Day points to as having no wait lists," she says.

And Canadians already rely more heavily on the private health sector than their European peers. "Our private insurance industry contributes almost 12% of total health expenditures; in Europe, there are only three or four countries where private insurance contributes more than 5%."

Fuller acknowledges that wait lists are "very poorly managed" in Canada, but notes that doctors ultimately decide

who waits and whether a case should be expedited or referred to someone with a shorter list. Meanwhile, patients may not ask for a referral because of widespread misinformation about what their options are within the public system.

There's also evidence that the proliferation of private clinics across Canada is eroding public health care. According to a 2008 report from national and provincial health coalitions entitled *Eroding Public Medicare: Lessons and Consequences of For-Profit Health Care Across Canada*, wait times are highest in areas with the most privatization, as for-profit clinics poach resources — financial and human — from the public system.

Private clinics also tend to cherry-pick patients, leaving more complex cases to the public system and furthering health inequalities, says Fuller. Under the changes Day is demanding, these clinics would be able to charge their patients, private insurers, the public system or all three for the same service.

"Likely we would have to institute some kind of a means test for people to access publicly subsidized services," Fuller notes. It will come as a rude awakening for everyone who has grown up under Medicare. "We haven't had to pay for doctor's visits, we haven't had copays and a lot of other charges that exist in other countries for hospital care, and that will come to an end."

Day dismisses concerns that a two-tier system would usher in greater health inequities and an exodus of doctors to the private sector.

"That evidence will all be refuted at trial," he says. "This is part of blaming and assigning evil intentions to doctors."

For now, it's business as usual at Cambie Surgery Centre.

The province has postponed further action against the clinic "in order to permit things to move ahead more speedily towards a final trial resolution," says Kristy Anderson, media relations manager for the BC Ministry of Health. A court order to stop further inappropriate billing is part of the relief the government is seeking at trial. — Lauren Vogel, *CMAJ*

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