

## Medicare challenge heads to trial

A constitutional challenge that some health advocates say is the [biggest threat to Medicare of this generation](#) will be heard in British Columbia's top court beginning on Sept. 6.

The trial will test whether Canadians' charter rights to "life, liberty and security of the person" are violated by laws that ban private health insurance and extra fees for procedures already covered by Medicare.

The plaintiffs, led by private clinic owner Dr. Brian Day, say overturning these laws will make private health care more affordable for patients who don't want to wait in the public system. Their opponents contend that changing the rules will create an American-style two-tier system in which access to care is based on ability to pay.

"If the plaintiffs win this case, it will expand opportunities for wealthy patients to access care faster," says Dr. Vanessa Brcic, executive member at large of [Canadian Doctors for Medicare](#), an intervener in the case. "That's where you get the fundamental undermining of the Canada Health Act and its principles of universality and equity."

The crux of the case is whether governments have the right to dictate how patients pay and doctors bill for private health care. Patients in BC can pay out-of-pocket to jump the queue for some services covered by Medicare but they can't buy private insurance to help them do it. Doctors can set their price for private procedures, but they can't bill both patients and the government for the same service. For example, they can't collect the provincial fee for performing a surgery and also charge patients for a facility cost.

Day told *CMAJ* these restrictions are tantamount to "medical enslavement," forcing those who can't afford the full price of private health care to wait in the public system. His case builds on a 2005 Supreme Court of Canada ruling in the Jacques Chaoulli and George Zeliotis case, which allows Quebec res-



Courtesy of Cambie Surgery Centre

**Vancouver orthopedic surgeon Dr. Brian Day says legal restrictions on access to private health care are unconstitutional.**

idents to purchase private health insurance in the face of long wait times.

"The government doesn't want to deal with the reality that suffering patients will be focus of this court case," Day says. "Our question is very straight forward: Should residents who aren't living in Quebec have the same constitutional protection?"

Day launched the challenge against the BC government in 2009, at the same

time provincial auditors were investigating his Vancouver clinic, Cambie Surgery Centre. The audit uncovered 200 cases of extra billing and double billing in a 30-day period, although Day says those numbers have been distorted and will be clarified in court.

He also takes issue with the notion that he charges patients "extra," arguing that the fees his clinic bills on top of those paid by the government are

necessary to cover running costs. “Patients are being allowed to rent their own operating room because the government won’t let them into theirs.”

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. Walid Waitkus, a teenager with a progressive spine deformity, [waited 27 months for corrective surgery](#) in Canada before seeking the procedure privately. The surgery left him paralyzed from the waist down, although it’s unclear what the outcome might have been if he’d had the surgery earlier.

Day says these patients would have been better served under a parallel public and private system like those in European countries which routinely outperform Canada on measures of quality and cost. Enabling more patients to opt out of the public system will reduce pressure on Medicare and ultimately improve it through competition, he argues. “A monopoly provider is under no pressure to provide service and that’s what we’re seeing in hospitals right now.”

Asked whether it’s fair for some patients to pay for faster access while others wait, Day contends that countries with hybrid systems don’t have queues in the first place. “If you’re poor you get health care right away. If you’re rich you get health care right away.”

Brcic acknowledges that Canada’s public system performs poorly in international comparisons, but argues that it’s an oversimplification to chalk up other countries’ success to how they pay for care.

Some countries, like the United Kingdom, have a more centralized public health care system that provides more continuity of care for complex patients and enables quicker system-wide improvements, she explains. Others, like France or Sweden, have a system of copayment for public care, but also a stronger social safety net “so even poor people can afford these copayments.”

European systems also control costs by paying doctors less and covering more preventive care, which in turn improves health outcomes and reduces more costly acute care down the road, she says.

“No doctor will deny that patients are not getting the quality of service they need, but we need to make changes in the public system so that everyone can benefit from it,” says Brcic.

Federal Health Minister Dr. Jane Philpott [echoed that sentiment in an address](#) to the Canadian Medical Association General Council on Aug. 23. She argued that Canada could learn from European countries’ more integrated approach to public health care. At a press conference, she noted this doesn’t require introducing a parallel private system.

“We are absolutely committed to upholding the principles of the Canada Health Act, and that means having universal, publicly funded health insurance for all medically necessary care,” Philpott said.

The federal government will intervene against Day’s challenge, and it’s expected the case will continue to the Supreme Court. — Lauren Vogel, *CMAJ*

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