

Public health care challenged in BC court

A constitutional challenge of the ban on doctors' ability to bill privately while still working in British Columbia's medicare system aims to put [public health care on trial](#).

Lawyer Peter Gall, acting for Cambie Surgery Centre, an affiliated clinic and several patients, opened the long-awaited trial Sept. 6 by asserting BC legislation designed to keep physicians from operating dual or "blended" practices fosters longer waiting lists and rationing of services.

In an opening argument expected to take three or four days, Gall said the BC Medicare Protection Act forces doctors to choose whether to operate within the public system or outside it. It also prohibits BC residents from using private insurance to pay for medically necessary services.

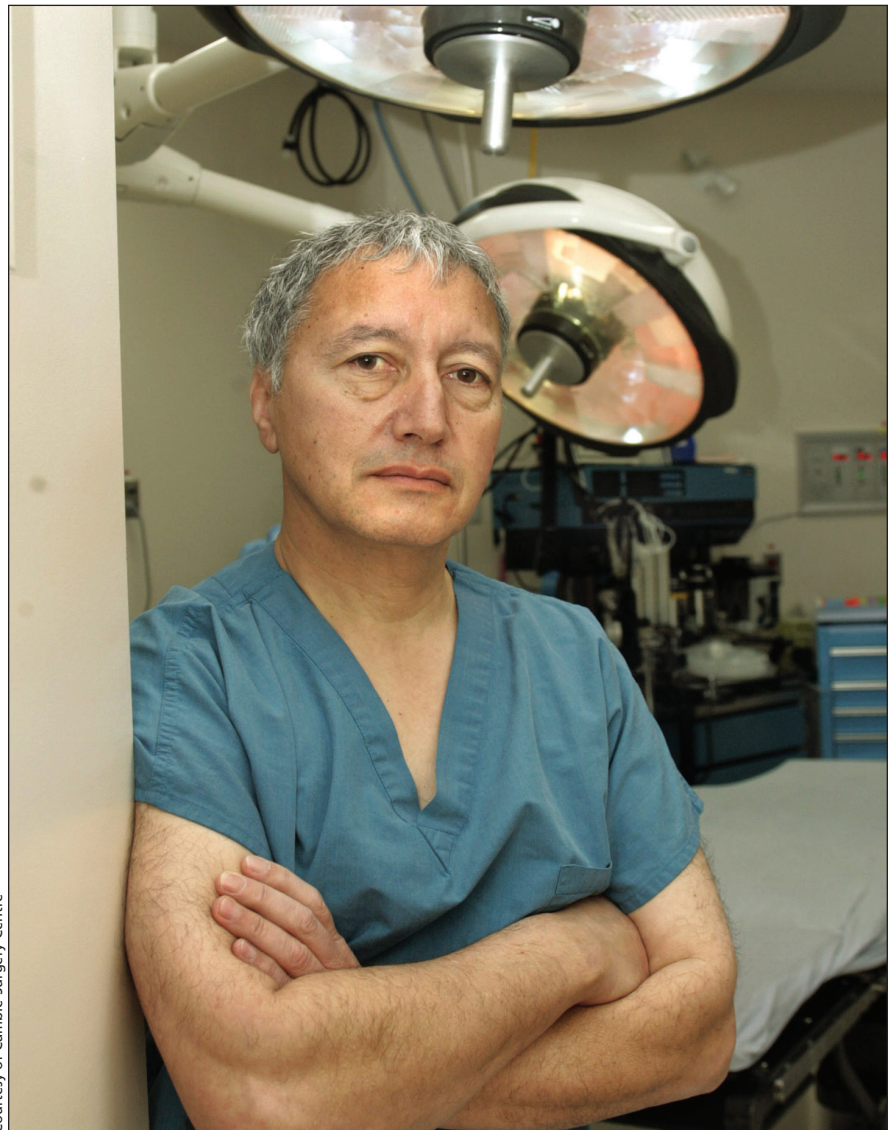
The law, he contended, violates Section 7 of the Charter of Rights and Freedoms guaranteeing "right to life, liberty and security of the person." The fact some BC residents have legal access to expedited private care via WorkSafe BC and government-run auto insurance programs, while others don't, violates the Charter's equality provisions under Section 15, Gall said.

A standing-room crowd of more than 100 people filled one of the Vancouver Law Courts' larger courtrooms as the trial began before BC Supreme Court Justice John Steeves. The case is being watched closely for its potential to force fundamental changes to Canada's universal health-care system.

Cambie Surgery co-founder Dr. Brian Day, the prime mover in the court challenge, told reporters that allowing a private-care option would improve the overall system, not undermine it.

"[W]e're arguing the government doesn't need to trample on the constitutional rights of Canadians to deliver an effective health system," the former president of the Canadian Medical Association said outside court.

Inside court, Gall said the health care system in BC and elsewhere is



Courtesy of Cambie Surgery Centre

Dr. Brian Day has launched a constitutional challenge against restrictions on extra-billing.

under financial strain. Attempts to keep BC's annual budget increases to net 2.6% closed operating rooms, cancelled surgeries and other cuts.

"That results in lengthy waiting lists that cause considerable physical and psychological harm, as well as financial harm," he said. "I don't think this is in dispute."

He cited the example of co-plaintiff Whalid Khalfallah, whose degenerative spinal condition worsened during a 27-month wait for surgery. He eventu-

ally was operated on privately in the US, but was left, nonetheless, a paraplegic.

In another case, a physical-education teacher who injured his knee playing soccer with students received surgery promptly under a WorkSafe BC claim. Yet when the same teacher injured his other knee playing soccer recreationally, he had to wait 18 months for surgery.

"This distinction is absurd," said Gall.

The Supreme Court of Canada's [2005 decision in the Dr. Jacques Chaulli challenge](#) should have been a

warning shot for BC and other provinces, he said. The ruling affirmed Quebecers' right to use private medical insurance to pay for publicly insured services when the public system was inadequate.

That decision's impact was limited to Quebec because while the justices found the province's ban on private insurance breached the Quebec Charter of Human Rights and Freedoms, only a minority concluded it also breached the Canadian Charter.

Governments outside Quebec responded by tinkering at the margins, trying to reduce waiting lists with disputable success, said Gall.

Allowing physicians to have blended practices would not undermine medicare, Gall argued. If millions of Canadians were allowed to expand their existing extended health insurance to cover medically necessary treatment, it would inject money into the public system, Gall said, because presumably insurers would

pay for public hospitals to open more operating rooms.

Gall did concede this would not necessarily cut waiting times because there is a "pent-up demand" for needed surgery.

"Eliminating the prohibition on access to private health care will not harm the public system," Gall told the court. Countries with hybrid systems, such as Germany, Sweden and the Netherlands, provide timelier access and at a lower cost than Canada's approach, he added.

That assertion was challenged outside court by Dr. Rupi Brar, a family physician and spokesperson for Canadian Doctors for Medicare, an intervenor in the case. "We can't compare European countries to Canada. It's like comparing apples to oranges," she told *CMAJ*. "In fact the patients in the public system in Germany wait three times longer for care, compared to the patients who are in the private, for-profit sector."

The BC government and intervenors will present evidence there are solutions within the system to reduce wait times, said Brar. She pointed to a pilot study in Richmond, a Vancouver suburb, that cut waits for hip and knee surgery by 75%. Using for-profit care would drive up costs, not reduce them, she added.

Lawyers for the defendants — the BC government and several intervenors — may begin presenting their argument as early as Sept. 9. The trial is predicted to last several months with dozens witnesses. Whatever the outcome, the case is expected to eventually land in the Supreme Court of Canada. — Steve Mertl, Vancouver, BC

Highlights of the court case

The British Columbia Supreme Court is hearing a constitutional challenge against restrictions on extra-billing and private delivery of services covered by the BC Medical Services Act.

Who's in court?

Plaintiffs: Cambie Surgeries Corp., the affiliated Specialist Referral Clinic and several patients.

Defendants: BC Ministry of Health Services, BC Medical Services Commission, Attorney General of British Columbia.

Intervenors: BC Health Coalition, Canadian Doctors for Medicare, Dr. D. Etches, Dr. R. Woollard, G. Townson and T. McGregor, BC Anesthesiologists' Society and a patients' group.

What's at issue?

Cambie and its founder, Dr. Brian Day, are challenging BC rules forbidding doctors from extra-billing patients or charging for services covered by the provincial Medical Services Plan, arguing they violate the Charter of Rights Section 7 guaranteeing "life, liberty and security of the person."

What's at stake?

Day and his supporters argue medicare's billing restrictions exacerbate chronic waiting lists and cause undue suffering to those who must wait for needed treatments, such as hip or knee surgery.

Opponents contend sanctioning wider access to private care will undermine medicare's universality and equality of access, and encourage queue-jumping by those with money or private insurance.

What will happen?

Nothing much for a while. The trial could run six months or more. A decision from Justice John Steeves won't come for months, at least. Whatever the outcome, observers expect it to be appealed and likely end up before the Supreme Court of Canada.

CMAJ 2016. DOI:10.1503/cmaj.109-5326