Two-tier healthcare after Cambie

Colleen M. Flood, BA-LLB(Hons.), LL.M., SJD., FRSC, FCAHS

Abstract

In 2019, a British Columbia (BC) court decided against a Charter challenge, launched by Cambie Surgical Services (a private clinic). Cambie claimed that various laws in BC suppressing a two-tier system are contrary to the Canadian Charter of Rights and Freedoms and should be overturned. The trial judge carefully weighed the evidence for and against a two-tier system as a “safety valve” for long wait times in public Medicare, finding overall that two-tier will do more harm than good in the BC context. It is a small victory and a reprieve for public Medicare, which is increasingly under attack from various forms of privatization. But the courts cannot save healthcare on their own nor should they be expected to. The commitment and participation of all levels of government to improving waiting times is crucial.

Introduction

Canada’s public Medicare, once a shining star, is tarnished with problems of wait times, lack of access to family doctors, concerns about sustainability and pass-the-buck wrangling by federal and provincial governments. Strong private interests will profit should public Medicare unravel and are increasingly turning to the courts, using Medicare’s problems to argue for further privatization. The latest instance of attempts to rollback public Medicare was recently rebuffed in Cambie Surgeries Corporation v. British Columbia (Attorney General) (Cambie). However, given the stakes it is not surprising that an appeal has been announced, and in time this case, or one similar, will wend its way to the Supreme Court.

The challengers, including a private clinic, Cambie, Cambie Surgeries Corporation, led by dogged orthopedic surgeon, Dr. Brian Day, said, it was simple: Canadians should be able to use their own money to buy healthcare given the fact of wait times for many services in many regions. And the court should overturn any laws or policies that impede this as contrary to the Canadian Charter of Rights & Freedoms (the Charter).

Intuition was on Dr. Day’s side—most agree that people should be able to use their own money to buy needed healthcare services. Most of us would spend down to our last dollar to avoid pain and suffering or just to buy hope, particularly for those we love. And part of the simple fable piped by Dr. Day and his ilk is this silvery lining; once the wealthy spend their dollars on private care resources are liberated in the public sector. And indeed, this beguiling notion was endorsed by 3 Supreme Court judges in the 2005 case, Chaoulli v. Quebec (Attorney General) (Chaoulli) and infamously described by Justice McLachlin, as “common sense.”

The trial judge in Cambie, Justice Steeves, was unpersuaded by the “common sense” narrative. The 3.5 years of the Cambie trial was a tortured one, beset with delays and involving over 100 witnesses alone (2 of whom passed away prior to the end of the trial). The battle was rancorous, with Dr. Day simultaneously arguing his case before the media as much as in the courtroom. When the day arrived in November 2020 for Justice Steeves to deliver his judgment, he did so via a tome of 883 pages, painstakingly assessing and weighing the evidence for and against overturning the challenged laws in British Columbia (BC) that seek to throttle off prospects for a two-tier system.

As a preliminary matter it is important to acknowledge as Justice Steeves did that in BC there are no outright restrictions on British Columbians buying private care, but a range of laws that act as “suppression measures” to make it less appealing for doctors to devote their labours to servicing a private tier rather than Medicare. Indeed, across Canada, no provincial laws outright stop patients buying private care instead of receiving public Medicare (and, of course, anyone can buy care not covered by Medicare, such as cosmetic surgery or invitro fertilization services or chiropractors, etc). In some provinces including BC, there are laws stopping the sale of private health insurance coverage; again, only for services covered by public Medicare. If you want to buy private insurance for other healthcare services, then knock yourself out and Canada has a very large private health insurance market because prescription drugs are not within the universal system. All provinces have laws targeted toward limiting doctors’ ability to double-dip (ie, get paid once by the public plan and then again by their patient) and to extra-bill (ie, get paid by the public plan but then to demand of patients an additional fee). Most provinces too limit dual practice and effectively require that doctors pick their horse: opt into the public system or opt...
out and bill privately. British Columbia had a middle ground where doctors can bill only the patient, but the patient can be reimbursed by Medicare but only up to the amount that Medicare would pay.

Thus, any BC doctor may opt completely out of public Medicare and in that case could charge any fee they wanted to their patients at private clinics (although not within hospitals or similarly publicly-funded facilities). Very few doctors, however, choose this route because of the financial allure of the public plan. The Cambie challenge was thus not to open a pathway to private care (for that already exists in BC) but to permit doctors to have the income security of the public plan and to be able to bill patients who come to their private clinics more than the public fee schedule.

Doctor Day’s simple fable of how private finance can save Canadians from public Medicare starts with the proposition that public Medicare is failing patients—harming them and indeed killing them, with dangerously long wait times. The solution is to unleash the power of private markets, not he comforts to totally supplant public Medicare, but just a little bit, to act as a “safety valve.” The obvious flaw in the tale is if private markets work so well, why have public Medicare at all? Even a cursory intake of health economics literature reveals that private healthcare markets do not function well. Take for example, private health insurance, which without regulation, will increase premiums for the sick (who are often poor) and may not offer insurance at all to those with chronic illnesses or the elderly because of their risk profiles. This means, over time, those who are most in need of private health insurance are the least likely to get it. Further, private health markets function poorly because, for many services, patients are not price sensitive or, to put it in economic terms, demand is inelastic. If a doctor tells a patient they need a particular treatment to recover or to stop pain, then most will pay almost any price with little real choice except to forego the treatment. Moreover, the normal economic assumption that having to pay will appropriately regulate consumption simply does not fly in healthcare: even for so-called elective surgery, most of us do not want more hip operations than are truly needed. Healthcare is generally not a consumption good like i-phones and cars.

Justice Steeves’ judgment carefully assesses the arguments for and against two-tier, calibrated to the specific BC laws under challenge (sections 14, 17, 18, and 45 of the BC Medicare Protection Act) and Charter jurisprudence. Justice Steeves’ decision suggests he absorbed a deep understanding of the economics and politics of healthcare and was not lured by ideologies of public (good), private (evil), nor, the argument, that private options will surely save Canadians from the “monopoly” of public Medicare. It likely did not help the plaintiffs’ case that several of their expert witnesses were discounted because of their lack of true expertise, their conflict of interest (because of their stake in the Cambie private clinic) and/or because they had been counselled by Dr. Day as to what to include in their expert reports. Of interest too is the failure to bring any expert testimony to validate the suffering claimed by patient claimants. In what follows, I list some of the key findings by Justice Steeves, grounded in the evidence and the applicable law.

How long is too long to wait? Justice Steeves finds that how long is too long to wait for the purposes of the Charter cannot be a subjective assessment. The court will consider clinical assessments of appropriate wait-times and provincial wait-time benchmarks act as a surrogate for this. Relatedly, there is “no constitutional right entitling patients to choose public or private healthcare on demand.”

Do long wait time jeopardize one’s Charter right to life? Section 7 of the Charter guarantees the right to “life, liberty and security of the person.” However, on the extent evidence in BC, Justice Steeves finds there is no breach of the right to life as the public system, despite its flaws, ensures that life-saving care is delivered in a timely way and private clinics do not provide life-saving care.

Do long wait times jeopardize one’s Charter right to security of the person? Justice Steeves finds that wait times for some services are longer than provincial benchmarks. Given this and other extant evidence before Justice Steeves as to the ill-effects of waiting (eg, further deterioration of a medical condition, pain, and suffering over the waiting period), one’s s. 7 Charter right to “security of the person” may be in jeopardy. However, to be proven a s. 7 breach the deprivation must be shown by the applicant not to be “in accordance with the principles of fundamental justice.”

What is the relationship between the impugned BC laws and wait times? Justice Steeves finds wait times may be caused by many factors, including patient preferences and the preferences of referring physicians (eg, a family doctor referring to a specialist with a long wait list rather than another quicker possibility). Consequently, there is no clear line of causation between laws that suppress a two-tier system and a wait time a patient must face. Nonetheless, following Chaoulli, Justice Steeves accepted that s. 45 of the BC Medicare Protection Act (a ban on private health insurance) could infringe one’s s. 7 right to security of the person. He also accepted that ss. 17(1) and 18(3) of the Act are similarly suspect as they make it so economically unattractive for doctors to work in the private tier (because they cannot charge for the overhead of the clinic itself).

Much ink was spilt in Justice Steeves’ analysis of causality and the law is far from clear on this score. However, with due respect to Justice Steeves and the majority in Chaoulli, it is in my view incorrect to attribute causality between long wait times and the impugned BC laws so as to conclude that in the absence of those laws the citizens of BC may escape the yoke of long wait times. For example, with respect to private health insurance, most of those with high needs would not qualify for or afford private health insurance. While it is true that surely “some” Canadians could benefit if a two-tier system were to flourish, the Supreme Court has also counselled that “[i]n interpreting and applying the Charter courts must be cautious to
ensure that it does not simply become an instrument of better situated individuals to rollback legislation which has as its object the improvement of the condition of less advantaged persons."

Have rights to security of the person been denied “in accordance with the principles of fundamental justice?” Despite finding that the Charter’s section 7 right to security of the person is potentially jeopardized by the BC laws that suppress a two-tier system, Justice Steeves explains that s. 7 rights are not absolute: there is no infringement provided a government has acted “in accordance with the principles of fundamental justice.” He concludes the plaintiffs failed to prove the government has not acted in accordance with those principles, namely in this context that the government has acted “arbitrarily,” that the laws are “overbroad,” and/or they are “grossly disproportionate.” For example, with respect to the question of arbitrariness, he concludes that the plaintiffs had failed to “demonstrate that there is no connection or no rational connection between the purpose of the legislation and its effects.”

Is there evidence that a two-tier system will harm the public system? The burden of proof in establishing the BC government has not acted in accordance with the principles of fundamental justice rest with the plaintiff, Cambie, a burden they failed to meet. Not only did the extant evidence not meet this burden Justice Steeves finds, there is evidence that private healthcare will harm the public system by, for example, creating or exacerbating inequity, increasing demand for services and increasing overall costs, and reducing the capacity of the public system as medical manpower is lured to the private tier.

But what about all those countries with two-tier systems? A part of the simple story that Dr. Day and colleagues use is that Canada is an outlier as most other countries have two-tier healthcare in tandem with public healthcare, and ergo, so can Canada without ill effect. And, indeed, this simple story also was endorsed by the majority in Chaoulli. Subsequently, there was heavy criticism of the Chaoulli majority’s superficial analysis of both the functioning and regulation of other healthcare systems. Justice Steeves exhibits much more caution in inferences to be taken from other countries’ experiences and their applicability to the Canadian context: he digs deeper into the dynamics of other healthcare systems. For example, a superficial look at the United Kingdom may suggest that as it has a two-tier system and (presently) short wait times that one is correlated with another. In fact, reviewing expert testimony reveals that private finance played at best a “supportive role” in wait time reduction and that “the reasons for the decrease of wait times in the United Kingdom were primarily decisions by the government there to substantially increase funding and capacity (including by way of funding care in private clinics), to set wait time targets, to impose a star rating system on hospitals and perhaps the introduction of patient choice within the public system.”

Because Justice Steeves finds there is no breach of s. 7 it is unnecessary for him to go on to determine whether the government can defend the infringement under s. 1 of the Charter by arguing it is “demonstrably justified in a free and democratic society.” However, for completeness, he undertakes a s. 1 analysis and finds for the BC government, given the extant evidence and acknowledging government’s policy choices within complex social programs, that must by necessity weigh many competing interests, warrant a high degree of deference. He also dismisses the applicants’ claim that the relevant laws were in contravention of s. 15 of the Charter (which guarantees equality under the law), finding the impugned laws did not discriminate on any relevant ground, for example, disability or age.

Going forward
At stake in Cambie was not only the future of Medicare in BC but, in truth, all of Canada. A win for Dr. Day would have undoubtedly caused a ripple effect, with provincial restrictions falling such as dominoes across the country. Justice Steeves’ carefully nuanced account of the evidence for and against two-tier healthcare and his finding of facts in this regard will, with luck, reduce the possibilities for overturning the judgment on appeal and provide something of a bulwark against future challenges in other provinces—at least for a time.

That being said, there are strong financial incentives for private clinics and other interests to push the limits on two-tier healthcare. Going forward, it will be naive to think that these interests will not regroup to launch further challenges to public Medicare, whether within the courts or, as they did for years in BC, either ignoring the law or skirt ing and testing grey areas within provincial legislation.

In terms of the potential for future challenges, Canadian laws suppressing two-tier health vary by province are a complicated patchwork. There are many similarities but there are also differences and the Cambie trial decision is very much grounded in the context of laws and facts relating to BC. Different results could emerge depending on provinces’ particular problems with wait times and also the outcome may be different depending on the particular nature of laws under challenge. For example, in assessing the constitutionality of governmental measures, an important lens is what the government’s objective is in passing these laws (the legislative purpose is relevant to assessing whether or not any deprivation has been “in accordance with the principles of fundamental justice.”) The BC Medicare Protection Act makes it blisteringly clear that its goal is equity: access on the basis of need and not ability to pay. By contrast, in the 2005 case of Chaoulli, a majority of the court interpreted the legislative objective as to ensure merely “reasonable” access to the public system. Interpreting the government’s objective as limited to that of reasonable access gives a court more space to argue that a two-tier system would not be incompatible with the legislative objective. Take for example, Alberta’s governing
legislation, which states its goals as to ensure reasonable access and then, within the public system to ensure access on the basis of need rather than ability to pay. A court could potentially interpret this as permissive of two-tier provided that within the residual public system services are allocated without a fee.

Going forward, doctors who want to defend Medicare on the basis that “it may be bad but at least it is better than private finance,” is likely, over time, to be a losing proposition, whether in the courts or in the court of public opinion. Wait times must be wrestled to the ground to regain Canadians’ faith in public Medicare. It is problematic that progressives have been so mute on the need to do this, given there are relatively straightforward means that won’t break the bank. For example, a straightforward mechanism is a central triage process for access to specialists rather than leaving it up to individual family doctors and their cottage industry networks to organize specialty care for their patients. Other countries have wrested long wait times down, for example, in the United Kingdom, with wait time guarantees for patients, and yes, even (shock) bringing on board more private clinics within the public healthcare system. Of course, none of these are perfect solutions; all have their own problems. But standing by as patients struggle and suffer in their attempts to access timely care will undoubtedly result in economic and political demands for a two-tier system.

The Canada Health Act speaks to “reasonable” access to healthcare and this includes timely care. In the wake of COVID-19, the need for timely access to healthcare will be even more acute as diagnoses and treatments have not occurred or been delayed. The Federal government needs to deliver on the promise of universal healthcare which is timely—the provinces have clearly failed to do so being caught between a rock and hard place, namely soaring costs of healthcare and physicians who don’t want to change the status quo. The Federal government should make any additions to health transfers conditional on each province ensuring that no Canadian falls through the cracks of public Medicare that wait time guarantees are in place, and there are central triage processes for access to specialty care.

Acknowledgments

The author would like to thank Kelli White, JD, candidate at the University of Ottawa for her assistance with citations.

Declarations of conflicting interests

The author assisted the B.C. Attorney General with selection of expert witnesses.

Funding

Dr. Flood is funded via a CIHR grant, “A Comparative Evaluation of Canada’s Regulation of Two-Tier Care and the Relationship to Wait Times.”

Notes

1. Cambie Surgeries Corporation v British Columbia (Attorney General), 2020 BCSC 1310 [Cambie].
2. The appeal is scheduled to be heard June 14-18, 2021, see Cambie Surgeries Corporation v British Columbia (Attorney General), 2020 BCCA 349 at para 1.
3. For a full discussion of the possible ramifications of this case, see Flood CM, Thomas B, eds. “Is Two-Tier Health Care the Future?” Ottawa: University of Ottawa Press. 2020. Available open access at: https://press.uottawa.ca/is-two-tier-healthcare-the-future.html.
4. Chaoulli v Quebec (Attorney General), 2005 SCC 35 at para 137 [Chaoulli].
5. In the courtroom, see Cambie Surgeries, para 64. In the media see for example Ian Mulgrew, “Dr. Brian Day Takes the Stand in Court, Has His Say on Access to Private Health Care,” Vancouver Sun (September 17, 2018), online: <https://vancouversun.com/news/local-news/ian-mulgrew-dr-brian-day-takes-the-stand-in-court-has-his-say-on-access-to-private-healthcare>; Keith Fraser, “Appeal Court Grants Relief to Private Surgical Clinics to Continue Operations,” Vancouver Sun (December 9, 2020), online: <https://vancouversun.com/news/appeal-court-grants-relief-to-private-surgical-clinics-to-continue-operations>, Amy Smart, “Closing Arguments Begin in Legal Case Over Private Health Care in BC,” CBC News (November 18, 2019), online: https://www.cbc.ca/news/canada/british-columbia/closing-arguments-begin-in-legal-case-over-private-healthcare-in-b-c-1.5364329, Camille Bains, “Health Care Battle in Judge’s Hands but Expected in Land in Canada’s Top Court,” CBC News (February 28, 2020), online: <https://www.cbc.ca/news/canada/british-columbia/private-healthcare-court-1.548097>.
6. Medicare Protection Act, RSBC 1996, c 286.
7. Cambie Surgeries Corporation v British Columbia (Attorney General), 2020 BCSC 1310 at para 116.
8. Cambie Surgeries Corporation v British Columbia (Attorney General), 2020 BCSC 1310 at para 1728.
9. R v Edwards Books and Art Ltd., [1986] 2 S.C.R. 713 at para 141.
10. What constitutes the principles of fundamental justice are terms of art, developed in the Charter jurisprudence and contextual to the context of each challenge. For further elaboration on the principles see Hamish Stewart, Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms, 2nd ed (Toronto: Irwin Law, 2019).
11. Cambie Surgeries Corporation v British Columbia (Attorney General), 2020 BCSC 1310 at para 2272.
12. Cambie Surgeries Corporation v British Columbia (Attorney General), 2020 BCSC 1310 at para 2188.
13. R v Allen, 2015 ABCA 277.
14. Medicare Protection Act, RSBC 1996, c 286. The preamble to the BC Act states: “the people and government of British Columbia believe it to be fundamental that an individual’s access to necessary medical care be solely based on need and not on the individual’s ability to pay.”
15. Canada Health Act, RSC 1985, c C-6.
16. Hogan S, Glaz M, “Oncologist Fears Tsunami of Cancer As COVID-19 Lockdowns Limited Screening” (December 17, 2020) CBC on-line <https://www.cbc.ca/news/health/cancer-tsunami-screening-delays-covid-1.5844708>.