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B.C. upholds ban on private health-care clinics, but case expected to go to Supreme Court

Sharon Kirkey · Postmedia News ; Posted: a day ago ; Updated: 9 hours ago ; 6 Min Read

Vancouver surgeon Brian Day, one of the country's most vocal promoters of private medicine, has lost another court battle to undo the laws that prevent extra billing and user charges in Canada.

In a unanimous decision released Friday involving a case that goes to the core of one of the country's most sacrosanct social programs, the British Columbia Court of Appeal upheld a lower court's dismissal of Day's challenge of B.C.'s Medicare Protection Act, ruling that bans on extra billing and private insurance do not violate the Charter of Rights and Freedoms, even though people are at risk of dying while languishing on wait lists.

It's the latest chapter in Day's 13-year-long constitutional challenge against the B.C. government over whether private surgery clinics can charge patients for publicly insured services normally done in hospitals.

Brian Day: Canadian health-care system's failings amount to social cruelty
It's unanimous: Canada's health care is crumbling, premiers agree

The orthopedic surgeon co-founded Vancouver's private Cambie Surgery Centre and a specialist referral clinic. He's fought to make the case that Canadians should be free to pay privately for medically necessary care, and that doctors should be free to charge them for it. The British ex-patriate once described medicare as "madness," compared Canada's health system to a one-star airline and argues that forcing people to endure lengthy waits for needed care violates their charter right to life, liberty and security of the person. He's also seeking legalization of "dual practice" that would allow doctors to bill both the public system and private patients.

The Canada Health Act "is a law that is literally killing Canadians," Day told the National Post's Tom Blackwell in a 2016 interview.

Six years later, the horror stories abound. A New Brunswick man this week said he witnessed the death of an elderly man who died in his wheelchair after waiting hours for treatment in a Fredericton emergency room. An Ontario man with a shattered femur languished on a stretcher in a hospital hallway for four days before getting surgery

Thursday. The Ontario Medical Association has warned people face waits not of months, but in some cases years to get cancer screenings and surgeries. The country's premiers warned this week the system is "crumbling" and will continue to crumble unless the federal government increases its share of health-care spending.

According to the think tank Second-Street.org, at least 11,581 people across Canada died in 2020-21 while waiting for surgery, scans like MRI's or an appointment with a specialist.

Day launched his lawsuit in 2009. In September 2020, after a 194-day trial, B.C. Supreme Court Justice John Steeves ruled that Day and his co-plaintiffs had failed to show that patients' rights are being infringed by B.C.'s medicare act. Steeves said its focus is on equitable access, not ability to pay, and that the richer and healthier would benefit most from a two-tier scheme.

In its judgment released Friday, the three-justice panel said Steeves erred in his analysis of the right to life and say in their ruling that the impugned provisions infringed on some patients' section 7 right to security of the person and their

right to life.

The panel said people were waiting beyond target benchmarks for tests and surgeries for life-threatening conditions, and that some faced an increased risk of death as a result of the law.

But they found that breach can be overruled by another section of the charter that says rights can be limited if shown to be justified in a democratic society.

In written reasons, Chief Justice Robert Bauman and Justice David Harris concluded the fundamental purpose of the province's medicare protection act is to ensure access to care for all eligible, based on need, and not a person's ability to pay.

"The conclusion we are compelled to reach is far from a satisfactory one," Justice Mari-Ann Fenlon lamented in a concurring decision.

"The record establishes that thousands of patients every year are waiting beyond medically acceptable times for care," Fenlon wrote.

"We reach the decision we do in this case, constrained by the record, and recognizing that the impugned provisions are upheld at the cost of real hardship and suffering to many for whom the public system is failing to provide timely necessary care."

Look at what's happening in our health-care system -- people are dying and suffering

Peter Gall

"This is such a lost opportunity," lead lawyer Peter Gall said on behalf of Day and the Cambrie Surgery Centre. "The courts had to unblock the political paral-

ysis. Look at what's happening in our health-care system -- people are dying and suffering."

The restrictions in B.C. are similar to a raft of laws across provinces that "try to dampen down the incentives for doctors to work in the private sector and try to keep them working in the public system," said Colleen Flood, a law professor and research chair in health law and policy at the University of Ottawa.

Day has argued that having an "escape valve" would improve wait lists by taking people who could afford it out of the public system and into a private one, she said.

"The trouble with that is you're also taking away physicians and labour. And all other things being equal, doctors probably would prefer to get paid more, treat easier patients, and spend more time working privately than publicly. That's the danger," Flood said.

"That's why most policy people are not at all keen on two-tier health-care systems, because you're just going to divert a system that's already strapped for numbers -- where do the nurses come from to work in these private clinics?"

She doesn't have any doubt the case will go to the Supreme Court of Canada. "He will want his moment there."

With evidence everywhere of increasing wait times and an overstrained system, a two-tier system "does seem like an attractive option," said Western University bioethicist Maxwell Smith. "Clearly something pretty dramatic needs to happen. Small tweaks don't seem to be quite doing it anymore."

"The public universal health-care sys-

tem is so sacrosanct that we have an aversion to even thinking about a two-tier system," Smith said. "I think the conclusion ought to be that we shouldn't go down that route, but it shouldn't preclude us looking at other jurisdictions... there are a lot of different things we might consider."

Wait times at airports are getting a lot of attention. "I think that the wait times we are seeing in health care are more objectionable," Smith said.

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