Alberta Doctors' Digest

The last chapter?

Given the recent turmoil in the health care system generally and the spotlight on the topic in Alberta's recent provincial election, we thought it might be timely to reflect on the progress of the Cambie Medical Clinic litigation and the impact that the final result might have on the management of health care in Alberta.

As readers may recall, in our January 2021 and October 2022 articles, we summarized the Tolstoy-length decision issued by the Supreme Court of British Columbia and the relatively brief follow-up British Columbia Court of Appeal decision, wherein both courts held that four provisions relating to the prohibition of private health care and health insurance (the impugned provisions) under British Columbia's (BC) *Medicare Protection Act*, R.S.B.C. 1996, c 286 (MPA) were constitutional.

Encompassing well over 10 years, the litigation began after Cambie Surgeries Corporation (Cambie), a private surgical facility in BC, challenged the provincial laws that prohibited extra billing and private health care for medically necessary treatments. Cambie argued that these restrictions infringed upon patients' rights to timely access to health care and violated their rights under the *Canadian Charter of Rights and Freedoms*, therefore they sought to strike down the laws prohibiting private health care.

In 2020, the Supreme Court of British Columbia released its decision, wherein Justice Steeve concluded that, while unreasonable wait times did jeopardize patients' well-being, the plaintiffs had failed to show that the right to life, liberty and security of the person was deprived contrary to the principles of fundamental justice through "arbitrariness, overbreadth and gross disproportionality under *section 7* of *the Charter*" and that the impugned provisions were otherwise demonstrably justified in a just and democratic society.

Questions linger, especially in Alberta, where conversations on public versus private health care remain at center on the podium. (Banner image credit: Fathromi Ramdlon, Pixabay.com)

In 2022, British Columbia's Court of Appeal agreed with Justice Steeve's decision and confirmed that, in its view, the deprivations to the plaintiffs caused by the impugned provisions were still in accordance with the principles of fundamental justice.

Following these rulings, the plaintiffs sought leave to appeal to the Supreme Court of Canada. In a case such as this, there is no automatic appeal to our highest court – rather, the Court triages applications for leave on the basis of national importance and need for clarification. Many of us thought this would be a slam-dunk for Cambie, but on April 6, 2023, the Supreme Court of Canada dismissed the plaintiff's application, thereby upholding the lower court's ruling and leaving intact the restrictions on private health care in British Columbia.

Needless to say, the decision surprised many in the legal community, given the opportunity the previous decisions posed for the Supreme Court to clarify many unanswered questions at law.

Readers may also recall the Supreme Court of Canada's decision in *Chaoulli v Québec (AG)*, 2005 SCC 35, wherein the Supreme Court did tackle a very similar issue surrounding the prohibition of private health insurance in Québec. The plaintiffs in that case also argued that Québec's legislation violated patients' rights due to unreasonable wait times for essential medical service. Some members of the Supreme Court of Canada ruled that residents of Québec were entitled to the benefit of private insurance given the violation of the right to life and liberty pursuant to *section 7* of the *Charter of Rights and Freedoms*. Others came to the same conclusion, based on Quebec human

rights legislation. The important point was that there was no majority ruling arising from the Charter complaints and therefore *Chaoulli* was not binding on the other provinces.

So, while *Chaoulli* provided some clarity on the issues, there were still unresolved questions and uncertainties regarding the extent to which private health care could be permitted across Canada. The decision did not establish a nationwide precedent for a universal right to private health care, but rather applied solely to Québec, leaving the question on the validity of private health care options open for other provinces.

The British Columbia Court's departure from *Chaoulli* was due in large part to evidence that Québec, in 2005, had no established standards or priority codes, resulting in a lack of determinable wait times. In *Cambie*, the Courts were satisfied that while the wait times were excessive, they met the relevant standards and guidelines in that province.

Given this, the legal community was hopeful that the Supreme Court would use the opportunity presented by the *Cambie* decisions to update and clarify the balance between public and private health care legislation and to further examine the potential legal implications on private health care options in relation to patient access, affordability and the overall integrity of the public systems. However, the Supreme Court's decision not to grant leave to appeal leaves these questions unanswered, resulting in a level of ambiguity on the legal landscape once again.

Following the decision by the Supreme Court, Adrian Dix, British Columbia's Minister of Health, released a statement expressing appreciation for the refusal to grant leave to appeal and noting the decision's affirmation of British Columbia's "ongoing efforts to preserve and uphold [their] public health-care system…" and that the decision sent "a strong message that [Canada's] highest court supports the principles of universal health care where access to medical care is determined by a patient's needs, not their ability to pay their way to the front of the line." (As an aside, some residents of BC may still openly question the availability of universal health care in that province).

Questions linger, especially in Alberta, where conversations on public versus private health care remain at center on the podium. While the Supreme Court of Canada's decision leaves open the Government of Alberta's ability to regulate or restrict private health care options, the *Cambie* decision as it stands does underscore the principles of equitable access to health care. The British Columbia Court of Appeal's decision, while persuasive, is not binding on the Alberta Courts, so the debate will continue.

In order to better align with these principles, the federal government may take the opportunity to review provincial health care policies and legislation to ensure alignment with the principles upheld by the Supreme Court of Canada, requiring Alberta to take a hard look at wait times, resource allocation and patient access to health care services. The fact remains that wait times are excessive; the public system is strained; and resources continue to be limited.

Private clinics in Alberta may also need to adapt their business models and strategies to comply with the existing regulatory framework and operate within the boundaries of the law, while exploring and uncovering alternatives within. Whether we are to see any changes with the newly elected provincial government remains to be seen.

Post-Script:

As an additional update to our January 2023 article regarding Annette Lewis's attempt to allow her access to the transplant list notwithstanding her refusal to secure a COVID vaccination, her application for leave to appeal to the Supreme Court of Canada was also denied in June.

As a reminder, Ms. Lewis, who was diagnosed with a terminal condition, sought a lifesaving organ transplant during the COVID-19 pandemic. She was ultimately denied the transplant as she had refused to be vaccinated against COVID-19, which was a specific requirement of the program. Ms. Lewis sued AHS and several physicians for *Charter* violations, but the case was dismissed by the Alberta Court of Appeal. The Supreme Court of Canada's decision to deny her leave to appeal confirms Alberta's decision that a medical program's requirement to have a COVID-19 vaccination did not affect Ms. Lewis' *Charter* rights.

It is important to re-emphasize that this decision was not about Ms. Lewis's decision to remain unvaccinated, as the court agreed that it was her right to refuse the vaccine.

Editor's note:

The views, perspectives and opinions in this article are solely the author's and do not necessarily represent those of the AMA.

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