Alberta Doctors' Digest

Cambie Surgeries Corporation vs. British Columbia (Attorney General)

In Justice Steeves's Tolstoy-length and long-awaited decision in *Cambie Surgeries Corporation* vs. *British Columbia (Attorney General)*, 2020 BCSC 1310, the plaintiffs [Cambie Surgeries, an owner and operator of a private surgical clinic in Vancouver; the Specialist Referral Clinic (the SRC), a medical clinic providing expediated assessments and consulting; and other individual plaintiffs] sought to have four provisions of British Columbia's *Medicare Protection Act*, R.S.B.C 1996, c 286 (MPA), struck as unconstitutional.

The plaintiffs stated that their rights under section 7 of the *Charter*, the right to life, liberty and security of person, were infringed by the governments of British Columbia and Canada (collectively the Government). They also claimed their equality rights under section 15 were violated.

The four impugned provisions of the MPA (Impugned Provisions), which are sections 14, 17, 18 and 45, prohibited the availability of private health care and health insurance. [The equivalent sections in the *Alberta Health Care Insurance Act* are sections 6, 9, 10, 11, 12 and 26 for those keeping score.]

The plaintiffs' action was likely sparked by an expressed intention on the part of the federal government to enforce the portions of the *Canada Health Act* cutting transfer payments to the province based on breaches (most notably, the suggestion of billing privately for publicly funded services).

In summary, the plaintiffs argued that given the wait times for elective surgery and care in the public system, patients should be allowed to choose between private or public health care in order to avoid prolonged wait times. Since the government and the health regions could not guarantee timely care, the plaintiffs argued the government could not maintain a monopoly over medical services and prevent the plaintiffs from accessing private alternatives at their own expense. The trial took 194 days.

Evidence

In his decision, Justice Steeves outlined the "patient journey," or the steps a patient will take while in care, and noted factors that prolonged the patient's journey such as pain, the need to work and the need to arrange child care or time off work. Various patient-intervenors and doctors, including Dr. Brian Day, also provided evidence on the wait times between the public and private health care systems.

In general, the evidence showed that prioritization was based on the patient's needs, a factor which rings true in both the public and private systems. Likewise, all physicians who testified agreed that there were many other reasons that influenced wait times.

A total of 40 experts gave evidence on the medical effects of wait times, health care policy, economics and the effects of parallel private health care in countries that allow private health care systems to operate alongside universal public systems.

The Court also noted the structure of prioritization for wait times and the three categories used: urgent, emergent and elective. Significantly, the consensus among both parties' experts was that emergent and urgent needs were provided in a timely fashion in BC Justice Steeves noted that private surgical facilities were only permitted for certain elective surgical procedures, not emergent or urgent matters.

In arriving at its decision, the Court began by reviewing the Supreme Court of Canada's seminal and relevant decision in *Morgentaler, Chaoulli and Health Services and Support – Facilities Subsector Bargaining Assn* v *British Columbia*, 2007 SCC 27. *Chaoulli* is the landmark 2007 decision of the Supreme Court of Canada out of Québec that found that residents of Québec were entitled to the benefit of private insurance to cover services that were not available promptly through the public system.

Justice Steeves noted that what constituted "reasonable time" in the *Chaoulli* decision was difficult to determine because, when *Chaoulli* was decided, there were no established manageable standards or priority codes in place in Québec or BC. However, given the new "comprehensive and sophisticated diagnostic prioritization mechanism," reasonable wait times could be properly determined by professionals.

Section 7

Section 7 of the *Charter* provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

The plaintiffs claimed that the Impugned Provisions violated section 7 as patients could not access private financing and private delivery of medically necessary services outside the public system. As a result, they suffer prolonged pain and disability, serious psychological harm or deterioration and irreparable harm.

The Court correctly determined that a claim challenging a law under section 7 of the *Charter* has two stages. First, a person making a claim challenging a law under section 7 must establish that the impugned law deprives the person of the right to life, the right to liberty or the right of the security of the person. Second, if there has been a deprivation of a right under section 7, then the claimant must also demonstrate that the deprivation was not in accordance with the principles of fundamental justice.

First stage

In this case, the Court followed the majority in *Chaoulli,* stating that the threshold for determining whether the plaintiffs section 7 rights were deprived in the circumstances of waiting for surgical care was whether the wait was "clinically significant."

The Court found that the evidence did not establish that wait times in the public system put patients at greater risk of death but rather showed that patients who faced imminent harm were provided with "timely and high quality care."

In terms of the question of liberty, the Court explained that these interests were engaged only where the law or state interfered with the person's ability to make fundamental personal choices. The Court concluded the plaintiffs had not established that the Impugned Provisions denied patients any freedom to accept or deny medical treatment or choose their physician.

Turning to the right to security of person, Justice Steeves noted that this was engaged where the law "caused or increased the risk of physical or serious psychological suffering." Justice Steeves explained that the Impugned Provisions did exacerbate some individual's pre-existing conditions or subjected them to pain and suffering as they had to wait beyond their assigned benchmark for elective surgery.

Expert evidence also showed that, for some patients, waiting beyond their assigned benchmark for their elective surgery resulted in an increased risk in deterioration and reduced surgical outcomes such as for those with joint disease or cataracts. As such, the Court concluded that in these situations, denying patients the ability to avoid unreasonable wait times did violate their right to security of the person.

Second stage

However, under the second stage of section 7, Justice Steeves concluded that the plaintiffs failed to establish that the right to security of the person was deprived contrary to the principles of fundamental justice through "arbitrariness, overbreadth and gross disproportionality."

Weighing the expert evidence, the Court found that the Impugned Provisions were not arbitrary as their purpose was to preserve and ensure the sustainability of a universal public health care system based on need, not on one's ability to pay.

Moreover, the evidence demonstrated that there were multiple rational connections between the purpose and effect of the Impugned Provisions of the MPA, since a duplicative private health care would increase demand for public care and costs and reduce the capacity of the public system. It would also create perverse incentives for physicians.

As a result, Justice Steeves found that the Impugned Provisions were not overbroad or grossly disproportionate and therefore did not violate the section 7 rights of the plaintiffs.

Section 15

With regards to the section 15 *Charter* claim (an allegation based on breach of equality rights), the Court simply declined to consider the plaintiffs' "interest-based" theory claiming that a breach of their equality rights arose because persons who suffer workplace injuries were exempted from the Impugned Provisions and therefore could legally access private surgical care through WorkSafeBC.

Justice Steeves explained that section 15 protected substantive not formal equality. In other words, the aim was to prevent law "from perpetuating systemic disadvantages that certain groups have historically faced and it recognizes that differential treatment may be necessary to do so." As such, not every distinction under the law would give rise to a breach.

Section 1

Despite finding no breach of the *Charter,* Justice Steeves nevertheless performed a section 1 analysis under the “notwithstanding clause” which provides that legislation otherwise breaching *Charter* rights may be demonstrably justified in a “just and democratic society.”

Under this analysis, the Court noted that a high amount of deference was owed to the government in the context of a complex social program such as health care. This deference is required when there is a need to balance conflicting interests and claims over limited resources. Moreover, the Court found that the objectives of the Impugned Provisions, i.e., preserving and ensuring the sustainability of the universal public health care system and ensuring access to necessary medical services, to be pressing and substantial. Therefore, the Court concluded that the Impugned Provisions were demonstrably justified, and the claims were subsequently dismissed.

What’s next?

This is a very thoughtful, thorough and well-written decision which exceeds 700 pages. It underlines a legal maxim that “good evidence makes for good decisions.” It also provides a very detailed and plausible explanation for departing from the principles in *Chaoulli*. Nevertheless, it is our understanding that Dr. Day intends to file an appeal to the BC Court of Appeal, which will extend the process and, regardless of that outcome, likely result in another appeal to the Supreme Court of Canada.

Alberta’s situation

Currently, Alberta does not have the level of private provision of health care services that BC has, although there are pockets of delivery throughout the province. Many have been waiting the result of this decision before making that determination. Others have been recommending transport of patients to BC for the provision of such services.

Alberta’s *Health Care Insurance Act* has provisions very similar to those in the MPA. While BC decisions are not binding on Alberta courts, this decision will certainly give prospective litigants pause before considering a similar action in Alberta.

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.