

# UNIVERSAL HEALTH CARE ON TRIAL



A case before the British  
Columbia Supreme Court could  
have implications for Canada's  
public health care system

September 2017



# Universal health care on trial

A COURT CASE in Vancouver could lead to a 2-tier health care system in Canada. Wealthy individuals would be able to buy their way to the front of the line and the vast majority of Canadians would face even longer waits for treatment. This will make it more difficult to have a high quality health care system that serves everyone, regardless of income.

The owner of 2 private, for-profit clinics, Brian Day, is trying to use the *Canadian Charter of Rights and Freedoms* to overturn sections of British Columbia's *Medicare Protection Act* that prevent doctors from extra-billing for medically necessary procedures. The constitutional challenge was initiated in early 2009—4 months after British Columbia's Medical Services Commission (MSC) announced that they were going to audit Brian Day's clinics as a result of complaints about extra-billing.

## FOR MANY YEARS THE BC GOVERNMENT FAILED TO PROTECT PUBLIC HEALTH CARE

Brian Day opened his first clinic, the Cambie Surgery Centre, in 1996. Then in 2002, he opened another clinic, the Specialist Referral Clinic. In 2003, he expanded the Cambie Surgery Centre.

Far from taking action, in 2001 the British Columbia Liberal government allowed regional health authorities to contract out services to private for-profit clinics. Then, 2 weeks after allowing health authorities to use for-profit clinics, a 3-year freeze on health funding was announced. Like most funding cuts, it was the public system, not expensive consultants or contracting-out schemes, that suffered.

In 2003, the government seemed to realize the potential for private, for-profit clinics to undermine Medicare and introduced legislation to deal with the problem. But less than a month after passing the legislation, it backed away from its own proposals. Premier Gordon Campbell announced that the legislation would not be proclaimed, meaning it had no legal status.

While the British Columbia government said it would fight Brian Day's court challenge, then premier Christy Clark's comment that "both sides are making compelling arguments"<sup>1</sup> left people worried about the government's commitment to protecting public health care.

## EVENTUALLY THE BRITISH COLUMBIA GOVERNMENT WAS PRESSURED TO ACT

Eventually complaints from patients and public pressure forced the provincial government to act. Patients complained about being extra-billed. If the law wasn't enforced, extra-billing was likely to become more common. An audit of Brian Day's clinics, the Cambie Surgery Centre and Specialist Referral Clinic, was to be the first step.

## PRIVATE CLINICS FOUGHT ATTEMPTS TO AUDIT THEM

The timing of the legal challenge to Medicare makes it look suspiciously like part of a larger effort by Brian Day and his associates to block the audit of his clinics. While Brian Day claimed he and his clinics had nothing to hide, there were repeated efforts to block the audit or prevent the auditors from getting the information they needed.

Given what a very limited audit did uncover, Brian Day and his associates had good reason for not wanting the public to find out about what was happening at the clinics. In addition to extra-billing, the audit uncovered “overlapping claims” where both the patient and public health care system received bills related to the same treatment.

## LEGAL CHALLENGE TO MEDICARE ONLY CAME AFTER AUDITS ANNOUNCED

In September 2008, the Medical Services Commission (MSC) sent a notice of audit to the Cambie Surgery Centre, the Specialist Referral Clinic, to Dr. Brian Day and other doctors working in those clinics. In response, the Cambie Surgery Centre and the Specialist Referral Clinic prevented MSC inspectors from carrying out the audit by refusing to allow them into the clinics or let them see the records.<sup>2</sup>

Then on January 29, 2009, the 2 clinics being audited, and 3 other for-profit clinics, filed a Charter challenge to sections of the *Medicare Protection Act*. The Cambie Surgery Centre and the Specialist Referral Clinic also launched a series of legal manoeuvres to delay the audit.

## PRIVATE CLINICS PREVENT FULL AUDIT FROM TAKING PLACE

As a result of the delaying tactics, the audit was not released until almost 4 years after the first notice was sent out. Instead of conducting a full audit, the auditors were able to look at records from only 3 months.

## AUDITORS WERE PREVENTED FROM SEEING IMPORTANT INFORMATION

It took the threat of a warrant to get Brian Day and his clinics to agree to an audit, but that didn't end their efforts to obstruct the auditor.<sup>3</sup> According to the audit report, "Representatives were unwilling to provide us access to each corporation's financial statements, ledgers, and contractual arrangements with physicians."<sup>4</sup>

## AUDIT FOUND CLOSE TO \$500,000 IN ILLEGAL BILLINGS

Even though the audit only covered a short period of time, it found plenty of evidence of extra- and double-billing. For just the 3 months covered by the audit, there was a total of \$491,654 in illegal billings.<sup>5</sup> There was also \$66,734 in overlapping claims.<sup>6</sup>

These are just the amounts the auditors managed to find for 3 months, even though they were prevented from accessing key information. If a full audit had been done, it is safe to assume the level of illegal billing would have been far higher.

## CASE FINALLY BEFORE THE COURTS

Over 7 years after it was launched, the legal challenge by Brian Day and his for-profit clinics is finally before the courts. Officially, the plaintiffs are Brian Day's 2 for-profit clinics, Cambie Surgeries Corporation and the Specialist Referral Clinic and 4 individual patients. The defendants are the British Columbia Minister of Health Services, the Medical Services Commission and the Attorney General of British Columbia.

Because of the impact the case is likely to have on Medicare, there are a number of intervenors. These include the federal government, the British Columbia Health Coalition and Canadian Doctors for Medicare.

## NUPGE AND COMPONENTS HELPING INTERVENORS DEFEND MEDICARE

NUPGE and its Components HSABC and the BCGEU, are assisting the BC Health Coalition's efforts as an intervenor in the case. Other

NUPGE Components are supporting efforts to fight 2-tier health care in their provinces. The Canadian Health Professionals Secretariat, which brings together NUPGE members from across Canada, is also supporting the fight against for-profit health care.

## **T**RIAL MOVING SLOWLY

The trial has already taken far longer than expected, and it is only at the halfway point. Based on comments from those who've attended the trial, the problem appears to be attempts by Brian Day and his lawyers to make last-minute additions to their list of witnesses or to the list of reports they're submitting as evidence.

Normally each side in a trial provides its list of witnesses and other evidence well in advance so there is a chance to address concerns about things like the qualifications of expert witnesses and whether particular reports are relevant to the case. When evidence or requests to call expert witnesses are submitted at the last minute, it slows down the process.

In June, Brian Day and his lawyers took another unusual step that will slow things down even more. Normally courts of appeal look at entire cases instead of specific rulings. However, Brian Day's lawyers are appealing specific rulings. A lawyer for the British Columbia government has expressed concern that, if individual rulings can be appealed, this could be used to delay trials indefinitely.<sup>7</sup>

## **F**OR-PROFIT HEALTH CARE PROPONENTS SLOWING DOWN PROCESS WHILE COMPLAINING ABOUT DELAYS

A consistent feature of the court case and the period leading up to it has been the attempts of Brian Day to say one thing and do another. From the start, there have been attempts to slow down the process, including fighting the audit in court and the recent attempt to appeal individual rulings on what evidence can be heard to the court of appeal. But that hasn't stopped Brian Day and his allies from complaining about how long the process is taking.

## IF THE CHALLENGE SUCCEEDS, IT WILL UNDERMINE MEDICARE

Our Medicare system is based on the idea that all Canadians should have the same access to quality health care. Allowing private for-profit clinics to perform medically necessary procedures undermines accessibility. With private for-profit care, we end up with a 2-tier system that allows the wealthy to buy their way to the front of the line.

Experiences in Canada and other countries have shown what happens when 2-tier health care is allowed. People who can't afford private health care will end up waiting a lot longer for treatment.

The potential consequences for medicare make it important that everything possible be done to fight the challenge in court. Governments must also have contingency plans to minimize the damage that will be done if the courts rule in favour of those attacking Medicare.

The problems we are already seeing with 2-tier health care provide a taste of what we could face if Brian Day's court challenge is successful.

## MOST CANADIANS CAN'T AFFORD PRIVATE HEALTH CARE

For most Canadians, private health care is not affordable. The extra-billing and double-billing by private for-profit clinics that are already taking place provide an indication of how much private health care can cost.

A recent report by the Ontario Health Coalition lists some of the fees for-profit clinics are charging. An annual checkup can cost \$400, while a "comprehensive health assessment" costs \$1,850. Prices for cataract surgery range from \$1,000 to \$5,000.<sup>8</sup>

For many patients those fees were not affordable. Patients responding to the Ontario Health Coalition survey reported cutting back what they spent on groceries or other necessities.<sup>9</sup> Others had to seek help from family members.



## PRIVATE HEALTH CARE TAKES RESOURCES OUT OF THE PUBLIC SYSTEM

The fact that people felt that they had to pay fees they couldn't afford for medical treatment reflects another problem with private for-profit health care—it takes resources out of the public system.

While the privatization industry tries to claim that allowing private for-profit health care will reduce waiting times in the public system, the evidence suggests that the exact opposite will occur. An increased role for private for-profit health care is linked to longer waiting times in the public system.

Brian Day's own specialty, orthopedic surgery, is a good example. There are more private orthopedic surgery providers in British Columbia than in any other province, but British Columbia also has the longest waiting lists for orthopedic surgery.<sup>10</sup> This is the reverse of what Brian Day and other promoters of private health care claim is supposed to happen.

Another example is a study of waiting times for surgery in the late 1990s by the Manitoba Centre for Health Policy and Evaluation. At that time, patients in Manitoba could opt to pay a \$1,000 fee to have cataract surgery in a private clinic. The study found that, when surgeons practised in both the private and public systems, waiting times for cataract surgery in the public system were more than double what they were when surgeons only practised in the public system.<sup>11</sup>

Internationally, a comparison of countries in the Organisation for Economic Co-operation and Development also found private health care can damage the quality of the public system. According to the authors of this study, "a parallel private sector may in fact draw resources out of the public sector, and/or put in place incentives that have the effect of increasing waits in the public sector."<sup>12</sup>

It's not surprising that an increase in private health care harms the public system. When the wealthy are able to buy their way to the front of the line, there are fewer voices complaining when governments underfund health care.

As well, the federal government can deduct extra-billing amounts from transfer payments. Financial penalties for extra-billing are intended to pressure provincial governments into taking action to end extra-billing and are the only tool the federal government has to enforce the *Canada Health Act*. However, that tool becomes less effective when a provincial government doesn't care about the quality of the public system.

### CONFLICTS OF INTEREST UNAVOIDABLE WITH PRIVATE HEALTH CARE

Conflicts of interest are unavoidable when both public and private health care systems exist side by side.

There is a built-in conflict of interest for any doctor practising in both the public and private health care systems. Doctors practising in both systems usually charge private patients higher fees. That means they make more money when waiting lists in the public system are longer and patients are more willing to pay to use private clinics. As a result, doctors practising in both the public and private systems have a financial incentive to do as little as possible to reduce waiting times in the public system.

In addition, there are more blatant conflicts of interest. It is common for doctors to refer patients to private clinics in which they have a financial interest. Both the Ontario Health Coalition and the *Globe and Mail* reported recently that attempting to sell patients expensive, medically unnecessary services appears to be standard operating procedure for some private clinics.<sup>13</sup>

### CONFLICTS OF INTEREST FROM PRIVATE HEALTH CARE CAN PUSH UP COSTS IN PUBLIC SYSTEM

The tendency to sell medically unnecessary procedures in the private system also pushes up costs in the public system. As a British cardiologist wrote when explaining why he felt doctors should not practise in both the public and private systems, "It is difficult to justify sub-

jecting private patients to unnecessary tests and treatments if you avoid doing them to NHS patients. So you have to operate the same system in both wings of your practice to ease the stress of this cognitive dissonance.”<sup>14</sup>

## **ALLOWING PEOPLE TO BUY THEIR WAY TO THE FRONT OF THE LINE UNDERMINES CANADIAN VALUES**

Among the values that Canadians share are that everyone should have the same rights and that we should look out for the most vulnerable people in our communities. Medicare is one of the best expressions of those values. Many Canadians see Medicare as one of the things that defines us as a country, particularly when compared to the United States.

Private health care, on the other hand, is incompatible with both of those values. Research on private health care shows it contributes to greater income inequality. It’s not possible for everyone to be treated equally when some people are able to use their wealth to queue-jump.

When the only options are paying hefty fees for health care or long waits for treatment, it means we’ve abandoned the most vulnerable people in society. When how long you wait for treatment is based on wealth, not need, the vulnerable will be left behind.

## **IT’S POSSIBLE TO IMPROVE THE HEALTH CARE SYSTEM AND KEEP IT PUBLIC**

Contrary to what proponents of private health care would have us believe, we can protect medicare and reduce waiting times. The BC Health Coalition has shown a number of ways to make better use of existing resources. An example of how to better use resources is introducing a national pharmacare program to bring down drug costs and free up money to use elsewhere in the system.

Governments need to be meeting their responsibility to adequately fund health care. The excuse given for failing to increase health care funding to keep pace with need is we can't afford it. That doesn't stand up. Regardless of whether health care is funded through taxes or user fees, it's the public that are footing the bill. The only difference is income taxes are based on ability to pay and user fees are not.

And the money is there. We're hearing more and more details of how wealthy Canadians and large corporations are hiding funds in tax havens. Instead of claiming to be short of funds, both the federal and provincial governments need to do more to make sure our tax system is fairer.

## CONCLUSION

It is clear that the court challenge spearheaded by those profiting from private health care will not be decided until it reaches the Supreme Court.

NUPGE and its Components will continue to do everything we can to help those intervening in the case in support of public, universally accessible health care. We will also be continuing our work to strengthen the health care system to address issues like waiting times for treatment.

# ENDNOTES

- 1 Georodon Omand, “Case debating private health care heads to BC Supreme Court,” *CTV News*, September 6, 2016, <http://bc.ctvnews.ca/case-debating-private-health-care-heads-to-bc-supreme-court-1.3059873>.
- 2 MSC Statement of Defense and Counterclaim, <http://www.bchealthcoalition.ca/sites/default/files/uploads/2009%2002%2020%20MSC%20Statement%20of%20Defence%20and%20Counterclaim.pdf>.
- 3 Justine Hunter, “Private clinic opens doors to auditors,” *Globe and Mail*, January 23, 2011, <https://www.theglobeandmail.com/news/british-columbia/private-clinic-opens-doors-to-auditors/article563149/>.
- 4 Specialist Referral Clinic (Vancouver) Inc. and Cambie Surgeries Corporation Audit Report, Ministry of Health, Billing Integrity Program, Audit and Investigations Branch, June 2012, 5, <http://www2.gov.bc.ca/assets/gov/health/practitioner-pro/medical-services-plan/srccsc-audit-report-2012.pdf>.
- 5 Specialist Referral Clinic and Cambie Surgeries Audit Report, 6.
- 6 *Ibid.*, 6.
- 7 Ian Mulgrew, “Province’s top appeal court judges now seized with medicare challenge,” *Vancouver Sun*, June 6, 2017, <http://vancouversun.com/news/local-news/ian-mulgrew-provinces-top-appeal-court-judges-now-seized-with-medicare-challenge>.
- 8 Natalie Mehra, “Private Clinics and the Threat to Public Medicare in Canada, Results of Surveys with Private Clinics and Patients,” Ontario Health Coalition, June 10, 2017, <http://www.ontariohealthcoalition.ca/wp-content/uploads/final-report.pdf>.
- 9 Mehra, “Private Clinics and the Threat to Public Medicare in Canada.”
- 10 Dr. Vanessa Brcic, “Evidence is in: privately funded health care doesn’t reduce wait times,” CCPA Policy Note, June 14, 2015, [http://www.policynote.ca/the-evidence-on-wait-times-and-private-care/#\\_ftn1](http://www.policynote.ca/the-evidence-on-wait-times-and-private-care/#_ftn1).
- 11 DeCoster et al., “Waiting Times for Surgery: 1997/98 and 1998/99 Update,” Manitoba Centre for Health Policy and Evaluation, November 2000, <http://mchp-appserv.cpe.umanitoba.ca/reference/waits2.pdf>.
- 12 Carolyn Hughes Tuohy, Colleen M. Flood, and Mark Stabil, “How Does Private Finance Affect Public Health Care Systems? Marshalling the evidence from OECD Nations,” *Journal of Health Politics, Policy and Law* 29, no. 3 (2005), <http://homes.chass.utoronto.ca/~mstabile/oecd.pdf>.



**national  
union**

***NATIONAL UNION OF PUBLIC  
AND GENERAL EMPLOYEES***

B. C. Government and Service Employees' Union  
Health Sciences Association of British Columbia  
Health Sciences Association of Alberta  
Saskatchewan Government and General Employees' Union  
Manitoba Government and General Employees' Union  
Ontario Public Service Employees Union  
Canadian Union of Brewery and General Workers  
New Brunswick Union of Public and Private Employees  
Nova Scotia Government and General Employees Union  
PEI Union of Public Sector Employees  
Newfoundland & Labrador Association  
of Public and Private Employees

■ 15 AURIGA DRIVE  
NEPEAN, ONTARIO  
CANADA / K2E 1B7

■ [613] 228-9800  
FAX [613] 228-9801

■ [www.nupge.ca](http://www.nupge.ca)

■ [national@nupge.ca](mailto:national@nupge.ca)



The National Union of Public and General Employees is an affiliate of the  
Canadian Labour Congress and a member of the Public Services International