British Columbia Court of Appeal upholds provisions of the Medicare Protection Act

August 02, 2022

Introduction

On July 15, 2022, the British Columbia Court of Appeal released its decision in *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2022 BCCA 245 (*Cambie Surgeries*).

The case addresses provisions of the *Medicare Protection Act*, R.S.B.C. 1996, c. 286 (the MPA) that limit the development of a parallel private medical system in British Columbia. The plaintiffs contended that the provisions breach patients' rights to life, liberty, and security of the person under section 7 of the *Charter* by preventing patients in British Columbia from accessing private medical treatment that would otherwise be available to them when the public healthcare system cannot provide timely care.

A majority of the Court of Appeal held that the provisions do not breach section 7 of the *Charter*. However, if there was a breach, the entire panel agreed it could be justified under section 1.

The Court's decision is important from a public policy perspective, as it upholds key legislative provisions for public healthcare in British Columbia. The decision also addresses important issues under section 7 of the *Charter*, particularly in the context of a complex regulatory framework.

Background and trial decision

The plaintiffs/appellants – two clinics and four individual patient plaintiffs – claimed that three provisions of the MPA violate sections 7 and 15 of the *Charter*. Two of the impugned provisions, sections 17 and 18, prevent medical practitioners enrolled in the Medical Services Plan (MSP) from billing patients beyond the rates paid by MSP (known as the ban on extra billing). Section 45 effectively prevents the sale of private insurance covering the same medical services as those provided under MSP. Together, these provisions effectively limit the development of a parallel private medical system that is duplicative of the public system for some surgeries and diagnostic tests.

A key issue in this case was the extent to which patients in British Columbia are waiting for scheduled surgeries and diagnostic procedures beyond the acceptable wait times set by the Ministry of Health. The plaintiffs argued that the consequences (or risk thereof) of lengthy waits for medically necessary care breach patients' *Charter* rights.

The trial was lengthy and complex, lasting 194 days and resulting in an 880-page decision. The judge heard from 145 expert and lay witnesses. There were 590 exhibits and 40 expert reports and tens of thousands of pages in the evidentiary record. Ultimately, the trial judge dismissed the plaintiffs' claim, rejecting arguments advanced under both sections 7 and 15 of the *Charter*.

Decision of the British Columbia Court of Appeal

The plaintiffs appealed the dismissal of their section 7 claim on a number of grounds. Their claim under section 15 of the *Charter* was not at issue on appeal. The British Columbia Court of Appeal dismissed the appeal, holding that the impugned provisions of the *Medicare Protection Act* are constitutional.

In joint reasons, Chief Justice Bauman and Justice Harris held that although the impugned provisions deprive some patients of their rights to life and security of the person, they do so in accordance with principles of fundamental justice, so there was no breach of section 7.

Justice Fenlon issued concurring reasons. She agreed with the disposition of the appeal and all points of the majority's analysis, except that in her analysis the effects were grossly disproportionate and therefore she found a breach of section 7. However, she would have held that the breach was justified under section 1 of the *Charter*. The majority agreed with Justice Fenlon's analysis under section 1.

Section 7: Right to life, liberty and security of the person

Section 7 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."

Demonstrating a violation of section 7 is a two-step process. First, the claimant must show that the law interferes with, or deprives them of, their life, liberty or security of the person. If successful at the first stage, the claimant must show that the deprivation is not in accordance with the principles of fundamental justice.

Right to life

The right to life is engaged “where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly.”[1]

The Court held that it is not necessary for a claimant to prove that a particular identifiable individual with an excessive wait time caused by the impugned provisions experienced an increased risk of death. The existence of admissible expert evidence

identifying a class of persons for whom the excessive wait times caused increased risk of death could show a deprivation of the right to life. Further, a deprivation of a section 7 right can be made out in respect of only one person who need not be before the court.

Insofar as the impugned provisions of the MPA caused patients with life-threatening conditions to wait beyond their benchmark and foreclosed the possibility of obtaining private care, the Court held that the provisions deprive some patients of their section 7 right to life.

Right to liberty

The right to liberty is a right to make fundamental personal decisions without interference from the state. In the medical context, this has been interpreted as limited to the right to consent to or withhold consent from certain medical interventions.

The Court rejected the appellants' argument that the choice of private or public medical care was a fundamental choice protected by section 7. In the Court's view, the real issue was the consequences of patients' lack of choice on life and security of the person in light of long wait times.

Right to security of the person

The Court stated that to establish a deprivation of the right to security of the person, a claimant must establish a proper evidentiary foundation for the claim by showing constitutionally significant or serious consequences of being required to wait beyond the benchmarks established by the Ministry.

Similar to its analysis of the right to life, the Court held that the wait times caused by the impugned provisions deprived patients of the right to security of the person.

Principles of fundamental justice

Section 7 requires that the state will not interfere with a person's life, liberty, or security of the person in a way that violates the principles of fundamental justice. The relevant principles of fundamental justice in this case were arbitrariness, overbreadth, and gross disproportionality. The norms against arbitrariness and overbreadth target the absence of rational connection between the law's purpose and effects (the deprivations). The norm against gross disproportionality targets a law that is connected to its purpose but where the impact on section 7 rights is so severe that it violates our fundamental norms.

The Court considered at some length the legislative objective of the MPA, noting the foundational importance of the correct articulation of the purpose of the legislation. The Court viewed the MPA as having one central and underlying purpose: the provision of medical care based on need and not the ability to pay. In light of this purpose, the Court held that the impugned provisions are neither arbitrary nor overbroad, agreeing with the trial judge that the provisions are necessary to preserve a publicly funded system delivering necessary services based on need and not the ability to pay.

Disproportionality under section 7

A legislative measure is grossly disproportionate where the seriousness of its impact on section 7 interests is "completely out of sync with the object of the law."[2] The disproportionality analysis is a qualitative (rather than quantitative) comparison between the importance of the law's object and the magnitude of its impact on an individual whose section 7 rights are engaged. The focus of the analysis at this stage is on the individual. In contrast, under section 1 the government bears the burden of showing that a law that breaches an individual's rights can be justified, which includes a qualitative and quantitative balancing of the negative and positive impacts of the law.

The Court of Appeal interpreted a subtle shift in the Supreme Court of Canada's approach to the analysis of principles of fundamental justice. In *R. v. Brown*, 2022 SCC 18, the Supreme Court of Canada suggested that where conflicting *Charter* rights are each directly implicated by state action, recognition of the conflict may be relevant to the analysis of the principles of fundamental justice.

Chief Justice Bauman and Justice Harris held that the *Charter* rights of different patients were in conflict and directly implicated by state action. Although the justices did not recognize a freestanding constitutional right to healthcare, they endorsed the proposition that when the province assumes a monopoly of power over the provision of medical services, it is under a constitutional duty to ensure that the service is provided in a timely fashion. Under the majority's analysis, this duty created potentially conflicting section 7 rights amongst individual patients. If the impugned provisions were struck down, parties who could not avail themselves of a private alternative would suffer the consequences of reduced capacity and quality in the public system, which would engage their section 7 rights.

The majority found that the impacts of the impugned provisions were not beyond societal norms. To support its analysis, the majority posed a Rawlsian proposition at para. 364: "If everyone had to choose a distributional principle, but did not know if they would turn out to be able to make private provision or not, it is plausible that many or most would opt for a system the protects distribution according to need, rather than ability to pay."

Justice Fenlon disagreed with the majority's approach to the question of gross disproportionality. Although she accepted that *R. v. Brown* may signal a shift in the analysis of principles of fundamental justice, in her view, this case did not involve conflicting *Charter* rights. Given that there is no *Charter* right to healthcare itself, Justice Fenlon stated that it was not clear that section 7 would be engaged if the government decided to stop suppressing private healthcare. However, such a decision would engage the interests of parties who could not afford private care. According to Justice Fenlon, these interests were properly balanced under section 1.

Justice Fenlon would have held that asking patients to wait beyond a medically determined benchmark and thereby incur an increased risk of death and irremediable harm was grossly disproportionate. As such, Justice Fenlon found a breach of section 7.

Justification under section 1

Justice Fenlon held that the infringements of patients' security and life interests were justified under section 1. The majority agreed with her analysis. She applied the test set

out in *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 to justify the infringements of *Charter* rights:

1. the law must pursue an object that is sufficiently important to justify limiting a *Charter* right;
2. the law must be rationally connected to the objective;
3. the law must impair the right no more than is necessary to accomplish the objective; and
4. the law must not have a disproportionately severe effect on the persons to whom it applies.

At issue on appeal were the third and fourth criteria of the test. Justice Fenlon found that the impugned provisions of the MPA met the criterion of minimum impairment of rights. She afforded a high degree of deference to legislative choice given the complexity of the issue, competing interests, and interests of vulnerable patients. She then held that the effect of the provisions was proportionate, finding that striking down the provisions could decrease access and increase wait times in the public system.

Prior to *Cambie Surgeries*, there has been only one appellate court decision in which a majority found that a breach of section 7 was justified under section 1: *R. v. Michaud*, 2015 ONCA 585, leave to appeal refused [2015] S.C.C.A. No. 450. Justice Fenlon recognized the legal dissonance in finding that a law that does not accord with the principles of fundamental justice is nonetheless constitutional. However, she found that, in the context of complex health policy, the common good of maintaining a quality public health system based on need justified the infringement of individual section 7 rights.

Key takeaways

It is likely that the appellants will seek leave to appeal *Cambie Surgeries* to the Supreme Court of Canada. At this point, the Court of Appeal's decision raises a number of important points for *Charter* litigation going forward:

- A deprivation of a section 7 right can be established in respect of only one person who need not be before the court.
- The case presents a rare situation where a breach of section 7 *Charter* rights may be justified under section 1.
- Going forward, there may be questions on whether and how courts will account for conflicting *Charter* rights in the analysis of the principles of fundamental justice.

If you have further questions about the decision in *Cambie Surgeries,* please reach out to any of the key contacts below.

[1] *Carter v. Canada (Attorney General)*, 2015 SCC 5, at para. 62.

[2] *Carter* at para. 89; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 125.

By

Sarah McEachern, Roark Lewis, Laura M. Wagner

Expertise

Health Law, Disputes, Health Care & Life Sciences, Government & Public Sector

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2026 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.