

ing, opening the door to private health care in Quebec, may bring renewed optimism to those who hoped Canada's Charter would prove a powerful weapon for ensuring access to social programs.

But while it may lead to some "creative" legal arguments on how the inability to obtain government services can violate the right to security of the person — producing psychological or physical harm — the decision doesn't translate into a free-standing right to social benefits,

for debate over the delivery of health care, said Lorne Sossin, associate dean at the University of Toronto's faculty of law.

"It doesn't legally bind a lot of people to do many things," he said, noting, however, that he wouldn't be surprised if the 4-3 ruling leads to more lawsuits from health-care providers, patients and insurance companies on the question of two-tier versus universal medicare.

What lies beyond that is hard to predict, he said yesterday.

Many social welfare groups felt the Charter's promise for guaranteeing rights to social programs had been "emasculated" by some recent Supreme Court rulings, said Errol Mendes, a professor at the University of Ottawa's faculty of law.

They included a ruling last year in which the court found the British Columbia government was not required to fund the treatment of autistic children. In 2003, the court found Quebec's system of reduced

The court's decision this week involved a challenge by a Quebec doctor and patient, but on different grounds. They argued that provincial legislation banning private health insurance violated guarantees to life, liberty and security of the person under the Canadian Charter of Rights and Freedoms and the Quebec Charter.

In recent years, the Supreme Court has interpreted those guarantees narrowly, saying security of the person usually becomes an issue only in cases in-

There's another important difference, Sossin said.

But it gets complicated, Sossin said.

The right to security of the person under the Quebec Charter differs from the right to security of the person under the Canadian Charter, he said.

For a challenge to succeed outside Quebec, a litigant would not only have to show their right to security of the person had been infringed, but that it resulted from a breach of a principle of

In the earlier cases, the issue was whether governments had a positive duty to fund programs, while the issue in the Quebec case was whether the province's ban on private medical services violated the Charter, he said. Still, Mendes said the case raises several "mega-issues." One is whether social programs designed to benefit the majority should be put at risk by individuals asserting Charter rights.

★ PAYING

Health cost plan already here

Your care's not covered by OHIP?

Company will loan what you need

KAREN PALMER
HEALTH REPORTER

Ten years ago, Ann Kaplan took a look at the health-care sector and started thinking about loans.

She predicted people would skip the country's ailing, chronically cash-strapped public health system if they could be treated faster somewhere else, but she also knew they'd need a way to pay for it.

Now, after paying the bills of some 65,000 patients, Kaplan is at the forefront of private health care, just as a Supreme Court ruling is opening the door to private health insurance.

"I don't think people will necessarily jump at (private health care), but when they anticipate they will need it, or when they need it, people will look at it," she said yesterday.

Kaplan runs Medicaid Finance Inc., a financing company devoted to funding medical procedures. After approving a loan application, the company pays the patient's bills in return for monthly payments of 2 per cent of the total bill, with interest starting at 9.95 per cent.

Although the company mostly funds cosmetic surgery, laser eye surgery, veterinary expenses and dental bills, Kaplan says it has also paid for fertility treatments and MRI images.

She predicts the Supreme Court decision will bring more franchise clinics and physicians will start offering more non-OHIP services and more private-pay options. "If you build it, people will come," she said.

On Thursday the court determined that it is unconstitutional to ban private insurance where the public system fails to provide reasonable service.

Private health-care options in the GTA are limited to fertility treatment clinics; a couple of general clinics that offer services to people, such as new immigrants, who aren't OHIP-insured; and the swanky downtown Medcan Clinic, which uses a third-party referral loophole to offer expensive employee physicals to companies.

But the province will probably see an explosion in innovative private-care options, predicts professor Brian Golden, a health sector strategist at U of T's Rotman School of Management.

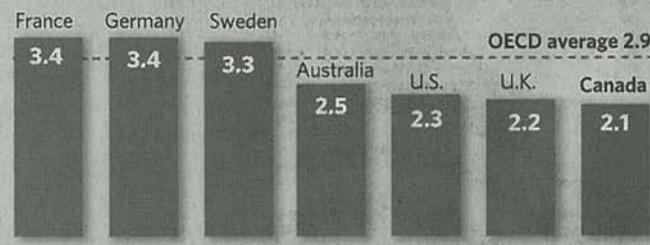
He said a parallel system funded by private insurance would act as a pressure valve for the public system and force it to work harder to satisfy patients.

"We've got insatiable demand," he said. "What this will do is attract greater resources into the system and make it more attractive for some physicians to continue practising in Canada; it will decrease the burden on nurses."

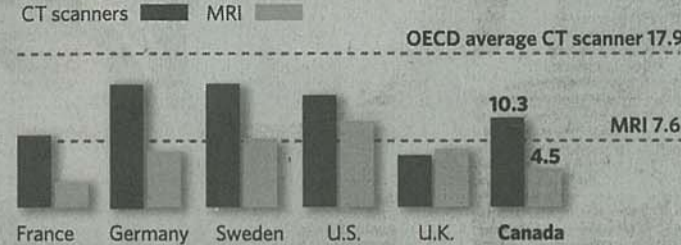
How Canada compares

Despite federal government commitments to improve the health-care system, Canada lags behind selected OECD countries in its rate of physicians and diagnostic equipment.

PHYSICIANS PER 1,000 POPULATION



DIAGNOSTIC EQUIPMENT UNITS PER 1 MILLION PEOPLE



PROVINCES COMPARED PER CAPITA EXPENDITURE, 2003

Quebec had the lowest per capita health expenditures among the provinces and territories.

Northwest Territories	\$5,832.81	B.C.	2,739.51	Ontario	2,432.73
Nunavut	5,147.01	Alta.	2,645.13	Nova Scotia	2,397.87
Yukon	3,129.40	Sask.	2,620.78	New Brunswick	2,395.47
Nfld. and Labrador	2,881.87	P.E.I.	2,589.20	Quebec	2,294.97
Manitoba	2,836.56	CANADA	2,495.97		

SOURCE: OECD; Canadian Institute for Health Information

TORONTO STAR GRAPHIC

Public system endorsed

► Health From A1

is we'll see a national response."

Only then will officials be able to properly manage the country's health-care system, and Canadians will be able to figure out where to get treatment the fastest — whether it's in their hometown, home province or somewhere else across the country, said Caplan, who later became federal minister in Jean Chrétien's government.

"If you know that another doctor... can do an operation in a month and you're on a waiting list that's 14 months, you should have a choice," she added.

The waiting lists would have to be measured against recommended, reasonable waiting times for certain procedures, Caplan added, and travel costs paid, if necessary, for people falling beyond that threshold.

As an example, Caplan told the story of her husband's squash partner, who was told in the late 1980s he would need a bypass operation. His heart wasn't bad enough yet to make it urgent for another year, but he would have to stop vigorous exercise.

So he did research and found a Sudbury hospital with an excellent record in bypass operations and virtually no waiting list, paid his own travel costs, and had the operation done there under his Ontario Health Insurance Plan coverage.

"That's the kind of thing that can happen when people have information," Caplan said.

Carolyn Bennett, the federal minister of state for public health, agreed that the best way to thwart an extensive private health-care system from developing is to strengthen publicly funded medicine.

"We want Canadians to feel confident in choosing the public system and we are working on that," Bennett, a physician, said in an interview. "My job is to make sure that we are doing everything in our power to strengthen the public system."

The federal government has offered little by way of interpretation of the court ruling or fresh ideas about how to tackle the potential shift in the way health care will be delivered.

"Let's not rush to a parallel private health-care system," Health Minister Ujjal Dosanjh told reporters yesterday. "It's not going to happen in Canada."

Yet Dosanjh continued to say that the government's strategy for fixing the health-care system

is the appropriate way to take on the failures in delivering appropriate health care that formed the basis of the court's ruling.

The Liberals' "fix for a generation" of health care is pegged on a \$41 billion payout to the provinces over 10 years and a plan to slash the time patients have to wait to have key medical procedures done.

"We are busy trying to establish benchmarks, set the comparable indicators, expand home care, bring more international medical graduates into the mainstream so that we have a health-care system that is thriving," Dosanjh said in question period.

That answer did little to satisfy opposition politicians.

"All that he's done since he's become minister is to talk about talk," said former NDP leader Ed Broadbent (Ottawa Centre). "He hasn't sat down, for example, with the ministers or he hasn't more precisely said in light of this decision, which is quite conceivably the most serious non-constitutional-related decision of the Supreme Court in modern history, he hasn't said well, maybe I'd better get the health ministers together and develop an action plan."

In the interview, Bennett warned against accepting that private insurance and for-profit clinics would be a quick fix that takes the pressure off an overextended medicare system that doesn't have enough health-care workers or hospital beds, and where waiting times are un-

acceptably long.

"I think private insurance will have serious, deleterious effects to our economy," Bennett said, pointing to companies like General Motors that have been attracted to Canada because they don't have to provide workers the gamut of health benefits.

"As a family doctor who has watched some of the real questionable practices of some of the for-profit people, I also have a strong message of buyer beware," Bennett said. "We want people to know that they will get what they need, but what people need and what they think they want is different."

One of the potential pitfalls of for-profit health care is that doctors push unnecessary procedures on patients to turn a bigger profit, Bennett said.

"If you are focused on quality of care, in a for-profit system, the research has shown either the price goes up or the quality goes down."

Dennis Timbrell, a Progressive Conservative health minister under Bill Davis in Ontario more than 20 years ago, said the Supreme Court decision "doesn't have to" mean the end of medicare as we know it.

"The message is 'clean up your act,' turn the rhetoric into real progress. There are ways to do that," said Timbrell, now a health-care consultant.

"I am one of those who believes there are ample resources in the health-care system," he said from his Toronto home. "I do have concerns how productive

and effective components of the system are."

The current Liberal government in Ontario is taking the right steps to get wait times under control with plans to track waiting lists and by demanding more accountability from hospitals in terms of how they spend money, Timbrell added. Health Minister George Smitherman has said wait times should be available on a ministry website by the end of 2006.

But it remains to be seen whether the government will have the guts to use the "clout" in its new legislation to bring hospitals in line, said Timbrell. Another former Tory health minister, Tony Clement, said politicians will have a harder time defending medicare now that the Supreme Court has ruled timely access to treatment is a basic right. "If government insists on a monopoly... and then breaks its promise and doesn't provide service in a timely manner, then people have the right to access private insurance," he said.

While wealthy Canadians have the option of seeking quick treatment abroad because of long waiting lists here, the middle class will now twig to the possibilities that private insurance holds for them in getting care closer to home.

The Canadian Medical Association, meanwhile, appears to be welcoming privately insured health care.

"The reality is that there are 20 jurisdictions in Europe that are similar to ours, except they all have a small slice of private on the edge, somewhere between 3 per cent and 8 per cent," said Dr. Albert Schumacher, president of the CMA. "In the fullness of time that's where we may be moving towards."

Schumacher and others want the federal government to "face that reality" and to begin formulating a strategy about how to move toward that kind of health-care delivery system.

"We need to start that kind of dialogue and the federal government needs to be involved in that," he said.

On Monday, provincial health ministers will hold a conference call to discuss the implications of the Supreme Court decision, which suggested that Quebecers have the right to private health insurance since the wait times for publicly funded services in the province are unduly long and endanger health.

★ ONTARIO

Premier won't override top court

Says focus is on cutting wait times

Notwithstanding option 'premature'

ROBERT BENZIE
QUEEN'S PARK BUREAU CHIEF

OTTAWA—Ontario has no plans to use the notwithstanding clause to override the Supreme Court of Canada to protect the public health-care system from privatization, says Premier Dalton McGuinty.

McGuinty said yesterday it is "premature and speculative" to consider invoking the extraordinary constitutional measure at some point in the future after the historic ruling Thursday that invalidated Quebec's ban on private health insurance.

"Why should I spend any time talking about hypotheticals and whether or not a Supreme Court of Canada ruling in connection with a Quebec law is somehow going to lead to somebody doing something here in the province of Ontario?" he said.

"Look, I'll cross any of those bridges when I come to them. But I can tell you what the people of Ontario are concerned about today. Not some debate at a high level.

"What they really want to know is: 'When am I going to be able to get in and get that hip replacement? When am I going to be able to get in and get my cataracts done? When am I going to get that CT scan?' Those are the things that we are focused on."

The premier, who is here for the annual general meeting of the Ontario Liberal Party, said his energy is focused on reducing waiting lists so the province's law is not challenged.

"The Supreme Court of Canada has thrown down the gauntlet to all of us now and said that it's up to all of us to attack wait times as aggressively as we can," McGuinty said.

"What Ontarians want is not an academic debate about the future of medicare. They want us to work on the ground in their interest to shorten wait times for them in a way that's real and measurable."

McGuinty pointed to his government's decision to spend \$154 million for more cardiac and cancer care, hip and knee replacements, cataract surgeries and MRIs and CT scans.

Attorney General Michael Bryant acknowledged that behind the scenes, provincial lawyers are poring over the Supreme Court decision.

"We never, ever, ever speculate about any possible use of the notwithstanding clause and we're not in this case," said Bryant.

"My first impression is that it's a decision about a Quebec law and that the primary analysis was based upon the Quebec charter... But we're looking at it closely to see what the implications are for Ontario."



'If you know that another doctor can do an operation in a month and you're on a waiting list that's 14 months, you should have a choice.'

Elinor Caplan, former Ontario health minister