Rights and freedoms

4 May 2021

I am writing this editorial as the provincial government just announced sweeping restrictions preventing British Columbians from moving between three defined regions.

Stuck between a rock and a hard place, the government made this difficult decision due to rising COVID-19 case numbers with hospitalizations and ICU admission levels reaching all-time pandemic highs. Despite pleas from our provincial health officer, people continue to travel and are propagating viral spread through their actions, albeit often unknowingly. Pandemic fatigue has led to the population craving some degree of normalcy and perhaps reducing their commitment to follow provincial guidelines.

Worried that this third viral wave has the potential to overwhelm our hospital resources, the powers that be made travel restrictions more stringent with the threat of roadblocks and fines. Tourism providers have been asked to cancel and refund customers who are from outside their regions. All recreational vehicles have been banned on BC Ferries.

As soon as these restrictions were announced, angry comments began to appear on social media about infringement of our basic rights and freedoms. I even had some patients complain that this was just another way that "they" were trying to control us. These are often the same individuals who are against vaccines and mask wearing. (I also suspect many of them have red MAGA hats hidden in their closets.)

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I have often wondered who "they" are. I have even asked some of my patients, but I never seem to get a clear answer. As best as I can tell, "they" is some secret level of government or a collection of sinister wealthy individuals (Bill Gates is often mentioned) who want to track and control our movements. When I ask to what end would "they" want to restrict us, I do not get a definitive answer. I do, however, receive increasingly suspicious glances thrown in my direction as the belief grows that maybe I am part of "they."

A quick evaluation of our elected officials should be enough to doubt the government conspiracy idea. In addition, if you have ever had to deal with any government body, you'll recognize that the level of organization required to form a secret agency seems an unobtainable goal. Furthermore, I am pretty sure Bill Gates has enough money and access without monitoring or restricting the population's activities.

Society already limits many individual choices for the good of the majority. For example, I'm not allowed to drive drunk as a skunk without my seatbelt on at my chosen speed down the wrong side of the highway with a baby smoking on my lap.

The current temporary travel restrictions are no different and were created to buy time while the vaccination process continues.

"They" are simply trying to save some lives. ■

—David R. Richardson, MD

Restrictions on private health insurance

"Without a right of challenge through an independent body such as the judiciary, our legislative and executive bodies would be free to make arbitrary and discriminatory decisions respecting the health care benefits provided to Canadians with little or no consequence. Such a result would be contrary to the societal values upon which Canadian society is built." Chief Justice Christopher Hinkson of the BC Supreme Court made this statement in November 2005.

This month, Justice John Steeves' 2020 BC Supreme Court decision supporting government restrictions on private health insurance and physicians' dual practice will face a judicial review by the BC Court of Appeal. This appeal will rely almost exclusively on the evidence at trial, focusing on errors in law by the trial judge. Justice Steeves had, coincidentally, received government-funded surgery at the private False Creek Surgical Centre.

Our legal challenge began in January 2009. We had expected that government would want a quick decision on whether its laws violated the Canadian Charter of Rights. However, the trial did not start until late 2016 and consumed 194 court days going into a fourth year. The 880-page written decision was unusually lengthy.

Like for many doctors, my courtroom experience has mostly been as an expert in patient injury trials, but I had some previous informal legal education. In the early 1960s I enjoyed a long-running and successful television show, *Boyd QC*, and a decade later, *Rumpole of the Bailey*. More recently I watched *Suits*. Perhaps more impactful was my even earlier "hands-on" experience as a 5-year-old Crown witness (then one of the youngest in legal history) in a Liverpool criminal trial. I gave evidence identifying a thief I had witnessed stealing a watch (from my own wrist). He was convicted and sentenced to jail time. My recollection of that courtroom appearance remains vivid. The judge arrived in an escorted and chauffeured Rolls-Royce limousine with a small Union Jack flag on the front. He wore impressive crimson and black robes. He and the barristers wore wigs and went through scenic and impressive court formalities and rituals. All of these experiences, together with our intervention in the 2005 *Chaoulli* trial, gave me some insight into our legal case.

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Significant differences between *Chaoulli* and our case included the multiple patient plaintiffs and the fact that we had authenticated, government-accepted, maximum wait times for thousands of procedures. Courts no longer had the burden of interpreting or defining what was acceptable. Governments had done that for them, and the trial judge acknowledged that, despite downplaying their relevance.

This data will, we hope and believe, prove to be vitally important and pivotal in later hearings. For example, in 2017–2018, only 16% to 38% of patients needing treatment for serious cancers of the bladder, ovary, prostate, lung, and colon were treated within the maximum acceptable benchmark. Unfortunately, for the tens of thousands of BC patients waiting, suffering, and sometimes dying on wait lists, the government's own self-incriminating data were largely ignored by the lower court.

Government lawyers implied that private care was for the "wealthy and healthy," despite the fact that not one patient witness was either. The BC government did not call a single BC patient witness or a single BC physician as an expert. They focused on demonizing doctors for not accurately "triaging" patients and foreseeing and forestalling any complications that waiting patients might possibly suffer. The judge accepted that harms and deaths were avoidable if doctors did their job properly. Government lawyers described desperate and suffering patients accessing private clinics as "parasitic."

The world has seen changes since the lower court hearings concluded, with the COVID-19 pandemic being the most impactful. Our already underperforming health system now faces even greater pressures.

We will argue before the higher courts that Canadian jurisdictions, which ban patient choice and exclude a safety valve, violate human rights. Even government experts at trial gave evidence that Canada's monopolistic system is unique, and that all countries permit private sector participation.

Chaoulli also lost at the lower-court level in Quebec. We remain optimistic that the higher courts will take some guidance from the *Chaoulli* precedent. In discussing the *Chaoulli* case, Canada's most renowned constitutional scholar, the late professor Peter Hogg, QC, opined that no provincial government would risk arguing that their citizens deserved less freedom under the law than those living in Quebec.

BC has proven him wrong.

Hogg also wrote: "No one was watching the *Chaoulli* case as it bubbled on up, but people will be watching the second case very, very closely. I think in practical terms the ruling is extremely important even if not literally binding for the rest of the country."

I have no doubt he will be proven right on that. ■

—Brian Day, MB