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## *Long waiting lists make barriers to private health care vulnerable to Charter challenge, says C.D. Howe Institute study*

**Toronto, May 14, 2002** — Provincial laws that effectively ban the private purchase of health care services are legally unenforceable because of the long waiting lists Canadians must endure for publicly provided services. That is the key finding of a *C.D. Howe Institute Commentary* released today, which argues that, since the public health care system fails to deliver medically necessary services in a timely manner, such laws violate section 7 of the Charter of Rights and Freedoms.

The study, “The Charter and Health Care: Guaranteeing Timely Access to Health Care for Canadians,” was written by lawyers Stanley H. Hartt and Patrick J. Monahan.

The authors note that, despite recent increases in provincial health budgets, long waits are common for many medically necessary services. At the same time, provincial barriers to the private purchase of services covered by the public system — provisions that support the monopoly funding condition of the *Canada Health Act* — prevent affected patients from accessing alternative treatments inside Canada. This, the authors say, is a clear violation of Canadians’ Charter rights.

Hartt and Monahan point out that the Charter does not guarantee a right to health care. And they note that the courts have ruled that the Charter can be used as a shield to protect citizens from government action but not as a sword to compel government to act. Nevertheless, in key precedents regarding abortion and decisions affecting the medical care of a child, courts have determined that delays that endanger life or health violate guarantees of “security of the person” and “liberty” provided by section 7 of the Charter.

A section 7 challenge would have to show that measures limiting access to timely care were consistent with the principles of “fundamental justice” guaranteed under that section, since courts have yet to define those words definitively or comprehensively. But key decisions have established that laws structured so as to fail to achieve their stated goals are necessarily inconsistent with the principles of fundamental justice. Since the purpose of public health care is to deliver timely medical services, denying access to such care in the public system while forbidding the use of private resources to obtain it is contrary to that

purpose. For similar reasons, section 1 of the Charter, which permits limits to Charter rights that are reasonable or demonstrably justified in a free and democratic society, would also not protect these restrictions.

Hartt and Monahan argue that the constitutionally required remedy is for governments to fund the public system to enable it to provide reasonable access to medically necessary services or permit citizens to purchase such services themselves. If Canadians are denied timely access to publicly financed care, provincial bans on private medical services would be legally unenforceable, and the federal government could not use the financial penalties in the *Canada Health Act* to compel the provinces to enforce them.

The obvious obstacle to a section 7 challenge on these grounds is that a patient with a life-threatening illness will give priority to retaining the services of doctors, rather than lawyers, and may not survive the process. A practical response to this problem would be for an institution with the financial resources to promote and fund patient litigation. Should the plaintiffs die before the case reached the Supreme Court, an appellate court could permit it to proceed to a final resolution.

Stanley H. Hartt is a former federal deputy minister of Finance and former chief of staff to the prime minister. Patrick J. Monahan is Associate Dean, Osgoode Hall Law School, York University, a former senior constitutional advisor to the premier of Ontario, and a Research Fellow of the C.D. Howe Institute.

This study is the latest in a special *C.D. Howe Institute Commentary* series entitled "The Health Papers."

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"The Charter and Health Care: Guaranteeing Timely Access to Health Care for Canadians," *C.D. Howe Institute Commentary* 164, by Stanley H. Hartt and Patrick J. Monahan (May 2002). 28 pp.; \$12.00 (prepaid, plus postage & handling and GST — please contact the Institute for details). ISBN 0-88806-557-4.

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