

Chaoulli v. Quebec (Attorney General): The Supreme Court of Canada Deals a Blow to Publicly Funded Health Care

By Timothy Caulfield, LL.B., LL.M.*
tcaulfld@law.ualberta.ca

The Ruling

On June 9, 2005, the Supreme Court of Canada overturned a Quebec law that bans people from buying private health insurance for services covered by the public health care system.¹ Technically, the ruling applies only to Quebec. But Quebec's law is similar to prohibitions found in other Canadian provinces – prohibitions that are designed to protect the public system from an expanding private sector. As such, the case could have a profound impact on the face of health care in Canada. Indeed, one commentator went so far as to suggest that that the case could emerge as the “Two-tier Magna Carta.”²

In brief, the case involved a patient, George Zeliotis, on a waiting list for hip replacement surgery and a physician, Jacques Chaoulli, who sought to provide the service privately (i.e., outside of the public system). The appellants argued that the Quebec prohibition of private insurance was an infringement of both the Canadian Charter of Rights and Freedoms and the Quebec Charter of Rights. In a 4-3 decision, the Supreme Court agreed with the appellants. Indeed, Chief Justice McLachlin went so far as to say that waiting lists are jeopardizing Canadians' constitutional rights and, as a result, the state monopoly over the provision of medically necessary services was not, in this situation, legally justified:

This virtual monopoly, on the evidence, results in delays in treatment that adversely affect the citizen's security of the person. Where a law adversely affects life, liberty or security of the person, it must conform to the principles of fundamental justice. This law, in our view, fails to do so.³

The Reaction

In general, the case was met with surprise and disappointment.⁴ The public health care system is the most revered and politically sensitive social institution in Canada. As such, in most provinces, political leaders tried to minimize the implications of the case,

*Canada Research Chair in Health Law and Policy, Professor, Faculty of Law and Faculty of Medicine and Dentistry, Research Director, Health Law Institute, University of Alberta. Prof. Caulfield was a visiting professor with the University of Houston Law Center Health Law & Policy Institute in Winter 2005.

¹ *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.R. 35.

² Gregory Marchildon, *The Chaoulli Case: Two-Tier Magna Carta?* (Aug. 22, 2005), available at <http://www.longwoods.com/product.php?productid=17190&page=1>. See also Vincent Kurata, *Jacques Chaoulli and George Zeliotis v. Attorney General of Quebec and Attorney General of Canada* (June 2005), at <http://www.law.ualberta.ca/centres/hli/whatsnewinHL.html> (last visited Aug. 30, 2005).

³ *Chaoulli*, *supra* note 1, at paragraph 106.

⁴ Of course, the response was far from uniform. As we will see below, the ruling thrilled those who favor the introduction of more private options. See, e.g., Nadeem Esmail, *A Big Leap in the Right Direction*, FRASER FORUM, July/Aug. 2005, at 3.

suggesting that steps will be taken to insulate the health care system from a shift toward a more market-driven approach. For example, the Manitoba Minister of Health, Tim Sale, was quoted saying, “We may need to change how we protect medicare but there was determination from the two [Provincial Health Ministers] that I spoke with, and I’ve certainly heard the same from Saskatchewan, we want to defend a universal health care system.”⁵ Quebec Premier Jean Charest declared that his government is “going to do what we have to do to preserve the health-care system in which we believe.”⁶ At the federal level, Prime Minister Paul Martin vowed that “we are not going to have a two-tier health-care system in Canada”⁷

Academic commentators were particularly frustrated with the poor handling of available evidence on waiting lists and the potential adverse implications of an expanded private health care system. There is ample research, from Canada and abroad, that demonstrates that allowing a private “second tier” does not reduce waiting lists in the public system.⁸ Indeed, expanding the private tier may add inefficiencies (e.g., more administration) and costs to the running of the health care system. As noted by Steven Lewis, “Neither premiums, nor co-payments, nor surtaxes based on use, nor offloading programs will fix health care. They will merely increase citizens’ and businesses’ costs and erode equity.”⁹

Likewise, the extent and nature of the waiting list problem is far from clear. There are huge variations in the waiting lists across the country and between differing health care services. More importantly, waiting lists are a complex social phenomenon, not just a simple queue for care. Who are on the lists, why they are on the lists, and if it is necessarily unhealthy to be on one, are all questions that are still being explored.¹⁰ So, despite the Supreme Court of Canada’s declaration that waiting lists are causing inappropriate delays and “serious, sometimes, grave consequences,”¹¹ there is little more than anecdotal evidence that this is true.¹²

⁵ Dennis Bueckert, Canadian Press, *Provinces to discuss how to respond after high court health care ruling*, C-HEALTH NEWS, June 10, 2005, available at http://chealth.canoe.ca/health_news_details.asp?news_id=14804&news_channel_id=0.

⁶ *Id.* at A1.

⁷ Kirk Makin, Jeff Sallot & Rheal Sequin, *The New Face of Medicare*, GLOBE AND MAIL, June 10, 2005, at A1.

⁸ See, e.g., Claudia Sanmartin, Samuel Shortt, Morris Barer, Sam Sheps, Steven Lewis & Paul McDonald, *Waiting for Medical Services in Canada: Lots of Heat, But Little Light*, 162 CMAJ 1305 (2000): “The Canadian debate about access to care, and waiting lists in particular, is characterized by disturbing chasms between widely held views and research evidence.” See also Colleen Flood & Terrence Sullivan, *Supreme Disagreement: The Highest Court Affirms an Empty Right*, 173 CMAJ 142 (2005).

⁹ Steven Lewis, *Single Payer, Universal Health Insurance: Still Sound after All These Years*, 171 CMAJ 600 (2004).

¹⁰ See Tom Noseworthy, *From Chaos to Order: Making Sense of Waiting Lists in Canada* (Western Waiting List Project, March 2001).

¹¹ *Chaoulli*, *supra* note 1, at paragraph 112.

¹² See, e.g., Flood, *supra* note 8: “Although one can track down such cases, the evidence that the court relies on in concluding that Canadians are dying prematurely because of long waiting lists is entirely anecdotal.” See Kao-Ping Chua, *Waiting Lists in Canada: Reality or Hype?* (Aug. 22, 2005), available at http://www.amsa.org/studytours/WaitingTimes_primer.pdf. Indeed, the Supreme Court relies heavily on the testimony of several doctors, an ironic approach given the court’s critique of arguments that are mere “assertions of belief.” See *Chaoulli*, *supra* note 1, at paragraph 138.

It is also worth noting that there is evidence that Canadians are relatively happy with the existing system and wait times. A 2004 survey done for the province of Alberta found that 89% of those surveyed “were very or somewhat satisfied” with the health care services they received.¹³ The majority thought it was easy or very easy to access services, and only 3% stated that they were unable to get the services that they believed they needed.¹⁴

After weighing all available evidence, a recent Federal Commission on the Future of Health Care in Canada recommended against the use of a private tier as a means of addressing waiting lists. The Commission noted as follows: “[P]rivate facilities may improve waiting times for the select few who can afford to jump the queue, but may actually make the situation worse for other patients because much-needed resources are diverted from the public health care system to private facilities.”¹⁵

In *Chaoulli*, however, the Supreme Court largely ignored the existing data and the conclusions of the Federal Commission. The Chief Justice, for example, dismissed the research in the area, stating that it amounted to “little more than assertions of belief.”¹⁶ This conclusion was undoubtedly a surprise to the hundreds of health economists and health policy experts who have devoted their careers to studying the area.

The court was also heavily influenced by the experience of other jurisdictions with private insurance. The Chief Justice stated as follows: “In summary, the evidence on the experience of other western democracies refutes the government’s theoretical contention that a prohibition on private insurance is linked to maintaining quality public health care.”¹⁷ However, once again, this conclusion does not coincide with available data from other countries and the scholarly work done on point, much of which has pointed in exactly the opposite direction. As noted by Colleen Flood and Terrence Sullivan, “it appears that countries with two-tier systems appear to have longer, not shorter, wait times.”¹⁸

The Future

While the long-term legal and constitutional impact of the case remains unclear, it has already generated a significant amount of public debate and policy action. Indeed, in Alberta, which is the one province that has embraced the decision, *Chaoulli* has re-invigorated the “pro-privatization” camp – a camp that includes Alberta’s Premier, Ralph Klein. On July 30th, 2005, the Premier took the unusual step of publishing an editorial in one of the daily newspapers. He stated that “the Supreme Court of Canada decision has

¹³ Herbert Northcott & Jennifer Northcott, *The 2004 Public Survey About Health and the Health System in Alberta* vi (Population Research Laboratory, University of Alberta), available at <http://www.health.gov.ab.ca/resources/publications/publications/pdf/Survey2004.pdf>.

¹⁴ *Id.*

¹⁵ Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada* 139 (Ottawa, 2002).

¹⁶ *Chaoulli*, *supra* note 1, at paragraph 138.

¹⁷ *Id.* at paragraph 149.

¹⁸ Flood, *supra* note 8.

forever changed our health-care landscape.”¹⁹ He then suggested that Albertans should be able to obtain private health insurance and “buy the health care [Albertans] need.”²⁰ In August, the Alberta Government revised its health reform strategy to include a consideration of “how private, supplementary health insurance might play a role in funding accessible, high quality health care in Alberta.”²¹

In a world where many jurisdictions are struggling to contain the rising cost of providing health care services, one wonders if the ruling will have broader, international ramifications. As a believer in the economic advantages and social justice virtues of publicly funded health care systems, I hope that the Alberta response does not represent the beginning of a trend.

September 2005

¹⁹ Ralph Klein, *Time to Embrace Change in Health Care: Albertans Have a Right to More Choices in Obtaining the Health Care They Need*, EDMONTON JOURNAL, July 30, 2005, at A17.

²⁰ *Id.*

²¹ ALBERTA GOVERNMENT, HEALTH AND WELLNESS, GETTING ON WITH BETTER HEALTH CARE 12 (Aug. 24, 2005), available at http://www.health.gov.ab.ca/Key/reform/pdf/AHW_WebFinal_REV.pdf.