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HEALTH CARE AT THE SUPREME COURT OF CANADA II: *CHAOULLI* V. *QUEBEC (ATTORNEY GENERAL)*

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INTRODUCTION

In June 2004, the Supreme Court of Canada heard two appeals relating to the Canadian health care system. At issue in *Auton (Guardian ad litem of)* v. *British Columbia (Attorney General),*[1] which was heard on 8 June 2004, was whether the B.C. government's decision not to fund a particular type of autism therapy was contrary to the *Canadian Charter of Rights and Freedoms*.[2] At issue in *Chaoulli* v. *Quebec (Attorney General)*[3] was whether Quebec legislation that prohibited individuals from purchasing private health insurance for health services covered under the provincial plan was contrary to the Quebec *Charter of Human Rights and Freedoms*[4] and/or the *Canadian Charter of Rights and Freedoms*.

This paper summarizes the Supreme Court's decision in *Chaoulli* 2005, with references to the decision at the Superior Court and on appeal. It also reviews the multitude of reactions to the decision, including responses by the federal and provincial governments.

FACTS AND ISSUES

Quebec resident George Zeliotis claimed to have experienced a number of delays in obtaining treatment through the publicly funded health care system. He therefore wanted to obtain private health insurance that would cover treatment at a facility outside of the public system, as he believed that this would decrease the treatment delays he faced. However, he was

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(1) 2004 SCC 78.

(2) The decision in *Auton* is reviewed in Marlisa Tiedemann, *Health Care at the Supreme Court of Canada – I: Auton (Guardian ad Litem of)* v. *British Columbia (Attorney General)*, PRB 05-19E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 4 August 2005.

(3) 2005 SCC 35, hereinafter *Chaoulli* 2005.

(4) R.S.Q., c. C-12.

prevented from obtaining such insurance as a result of section 15 of the Quebec *Health Insurance Act*[5] and section 11 of the Quebec *Hospital Insurance Act*.[6] Section 15 of the *Health Insurance Act* stated that:

> No person shall make or renew a contract of insurance or make a payment under a contract of insurance under which an insured service is furnished or under which all or part of the cost of such a service is paid to a resident or a deemed resident of Québec or to another person on his behalf … .

Section 11.1 of the *Hospital Insurance Act* states that:

> No one shall make or renew, or make a payment under a contract under which
>
> (a) a resident is to be provided with or to be reimbursed for the costs of any hospital service that is one of the insured services;
>
> (b) payment is conditional upon the hospitalization of a resident; or
>
> (c) payment is dependent upon the length of time the resident is a patient in a facility maintained by an institution contemplated in section 2 … .

Jacques Chaoulli is a physician who had at times worked outside the scope of the provincial health insurance plan as a non-participating physician.[7] He had come into conflict with the Régie de l'assurance maladie du Québec (RAMQ – the Quebec Health Insurance Board) over his medical practice, which involved providing home visits on a 24-hour basis. He had also sought a licence to operate a private "opted-out" hospital, but his application was refused by the RAMQ. Dr. Chaoulli expressed his concern that, should he or his family require medical services, the existing system in Quebec would not be able to provide services fast enough, due to long waiting lists.

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(5) R.S.Q., c. A-29.

(6) R.S.Q., c. A-28.

(7) Section 1 of the *Health Insurance Act* defines two classes of professionals who operate outside the scope of the provincial health insurance plan: a "professional who has withdrawn" agrees to be remunerated in accordance with the established tariff, and his or her patients are reimbursed by the Régie de l'assurance maladie du Québec (section 1(d)); a "non-participating professional" does not agree to be remunerated in accordance with the established tariff, and his or her patients are not reimbursed for fees they incur (section 1(e)).

Mr. Zeliotis and Dr. Chaoulli believed that they should be able to purchase private insurance that would cover medical services provided outside of the public system. They brought a motion before the Superior Court of Quebec seeking a declaration that section 15 of the *Health Insurance Act* and section 11 of the *Hospital Insurance Act* violate sections 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms* and sections 1, 4, 5 and 24 of the Quebec *Charter of Human Rights and Freedoms*. As the Superior Court judge noted, the real issue that lay at the heart of their motion involved the introduction of a private health system parallel to the public system.(8)

THE JUDGMENTS

A. The Superior Court of Quebec

While Madam Justice Piché referred to the Quebec Charter early in her judgment, she did not analyze whether the Quebec Charter was violated by section 15 of the *Health Insurance Act* and section 11 of the *Hospital Insurance Act*. She focused instead on the Canadian Charter (an approach with which Madam Justice Deschamps of the Supreme Court of Canada took issue in her own reasons for judgment).

In her reasons, Madam Justice Piché reviewed the evidence of the many witnesses that appeared. These included doctors who were concerned about waiting lists (but who were hesitant to pronounce that allowing private insurance to cover insured health services would solve the waiting-list problem) and expert witnesses who expressed their opinions on the effect private insurance would have on the publicly funded health care system. The majority of expert witnesses cautioned against allowing private insurance to cover services insured under the provincial plan. The provincial government argued that the prohibition was necessary to protect the publicly funded health care system.

The key issue decided by the Superior Court judge was whether the provisions of the two provincial Acts violated the applicants' rights under section 7 of the Canadian Charter. That section states:

> 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.

(8) *Chaoulli* v. *Quebec (Attorney General)* (hereinafter *Chaoulli* 2000), 2000 RJQ 786, para. 121.

Madam Justice Piché noted that an analysis of section 7 requires a two-step approach: first, determining whether there has been a violation of the right to life, liberty or security of the person; and second, if there has been a violation, determining whether the violation was in accordance with the principles of fundamental justice.

She characterized the right to obtain private insurance or to contract for hospital services as an ancillary or incidental economic right (*Chaoulli* 2000: para. 225) and noted that while section 7 did not protect purely economic rights, economic rights that were intimately linked to life, liberty or security of the person could be protected (*Chaoulli* 2000: para. 221). She determined that this was a case for protecting such rights, as the provisions of the *Hospital Insurance Act* and *Health Insurance Act* hindered access to health services, and could therefore potentially infringe the right to life, liberty and security of the person (*Chaoulli* 2000: para. 225). However, *such an infringement would be found only in a situation where the publicly funded health care system could not guarantee access to services* (*Chaoulli* 2000: para. 227, emphasis added). Having found there to be a violation of the right to life, liberty and security of the person, the judge went on to determine that no principle of fundamental justice had been violated. As a result, there was no violation of section 7.

Madam Justice Piché also concluded that the applicants' rights were not violated under either sections 12 or 15 of the *Canadian Charter of Rights and Freedoms*.

B. Court of Appeal

All of the same issues were raised before the Court of Appeal.[(9)] Three sets of reasons dismissed the appeal, as there was no consensus on whether the right was purely an economic right or an ancillary or incidental economic right. Justice Délisle concluded it to be a purely economic right, and found there to be no violation of section 7. Justice Forget agreed with the analysis of the Superior Court of Quebec: it was an incidental economic right, and while there was a violation of the right to life and security of the person, it was in accordance with the principles of fundamental justice. Justice Brossard did not believe that it was necessary to characterize the right, although he was open to the possibility that a situation could arise in which the prohibition on private insurance could violate section 7. Since such circumstances did not arise on the facts of the case, he did not find it necessary to comment on whether the violation would be in accordance with the principles of fundamental justice.

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(9) *Chaoulli* v. *Quebec (Attorney General)*, [2002] R.J.Q. 1205.

C. The Supreme Court of Canada

Four of the seven justices that heard the appeal concluded that the prohibition on private insurance violated section 1 of the Quebec Charter. The Court was equally split on whether the prohibition also violated section 7 of the Canadian Charter, as Madam Justice Deschamps did not consider that section in her reasons. She instead restricted her analysis to the Quebec Charter. Section 1 of the Quebec Charter states, in part, that:

> Every human being has a right to life, and to personal security, inviolability and freedom.

Madam Justice Deschamps pointed out that while section 1 of the Quebec Charter is similar to section 7 of the Canadian Charter, it contains no reference to the principles of fundamental justice (*Chaoulli* 2005: para. 29). This means that the scope of section 1 is potentially broader than section 7 of the Canadian Charter, because under the Quebec Charter, an individual claiming a violation has to prove only that the violation occurred, and does not have the additional burden of proving that the violation was not in accordance with the principles of fundamental justice (*Chaoulli* 2005: para. 30).

Madam Justice Deschamps found that the evidence presented to the Superior Court of Quebec supported the conclusion that certain sectors of the health care system faced serious problems (*Chaoulli* 2005: para. 38), and agreed that the right to life and security of the person under section 7 was infringed. She noted that the right to personal inviolability is broader than the right to security of the person contained in section 7: therefore, if it is established that a right to security of the person has been infringed, it follows that the right to personal inviolability has been infringed (*Chaoulli* 2005: para. 43).

She also concluded that the prohibition was not justified under section 9.1 of the Quebec Charter.[(10)] In her review of whether the prohibition was justified, Madam Justice Deschamps considered the evidence presented to the Superior Court. She was not convinced by arguments that appeared to be based on the concern that private insurance would allow the private system to flourish, which would in turn result in the publicly funded system's decline.

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(10) Section 9.1 states that:

> In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.
>
> In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

After reviewing the expert evidence, Madam Justice Deschamps considered the approach taken by other provinces with respect to the private health care sector. She noted that six provinces have measures that discourage the use of the private sector, while the other three "in practice, give their residents free access to the private sector" (*Chaoulli* 2005: para. 70). She concluded that:

> the variety of measures implemented by different provinces shows that prohibiting insurance contracts is by no means the only measure a state can adopt to protect the system's integrity. In fact, because there is no indication that the public plans of the three provinces that are open to the private sector suffer from deficiencies that are not present in the plans of the other provinces, it must be deduced that the effectiveness of the measure in protecting the integrity of the system has not been proved. … It can therefore be concluded that the prohibition is not necessary to guarantee the integrity of the public plan. (*Chaoulli* 2005: para. 74)

Her review of measures taken by other OECD countries to protect their public plans supported her conclusion that the Government of Quebec could have taken less drastic measures, and that "prohibiting private insurance contracts appears to be neither essential nor determinative" (*Chaoulli* 2005: para. 83).

In separate reasons, the Chief Justice and Justice Major (Justice Bastarache concurring) agreed that section 1 of the Quebec Charter was violated, and that the prohibition was not justified under section 9.1. They also concluded that section 7 of the Canadian Charter was violated, and that the violation was not justified under section 1 of the Canadian Charter.(11)

In dissenting reasons, Justices Binnie and LeBel (Justice Fish concurring) disagreed that the "serious and persistent problems" in the publicly funded health care system could or should be remedied by the courts. They stressed that the decision will require courts to determine what are "constitutionally required 'reasonable health services,'" as the majority decision did not define "how much health care is 'reasonable' enough to satisfy s. 7 of the *Canadian Charter of Rights and Freedoms* … and s. 1 of the *Charter of Human Rights and Freedoms*" (*Chaoulli* 2005: para. 163).

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(11) Section 1 states that:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

They did accept Madam Justice Piché's conclusion that "the current state of the Quebec health system, linked to the prohibition against health insurance for insured services, is capable, at least in the cases of *some* individuals on *some* occasions, of putting at risk their life or security of the person" (*Chaoulli* 2005: para. 200, emphasis in the original).

RESPONSES AND REACTIONS

The *Chaoulli* decision has generated a considerable amount of commentary. Media reports have focused on the concern that has been ever-present in this case: that allowing private insurance to cover services that are insured by the provincial health plan will allow a private parallel health system to flourish at the expense of the publicly funded one. A number of arguments in support of that conclusion were rejected by Madam Justice Deschamps in her review of the evidence presented to the Superior Court judge. She referred to the following arguments as "human reactions" (*Chaoulli* 2005: para 63):

- that support for the public plan would decline because those with private insurance would not see the need for the public plan;
- that "the quality of care in the public plan would decline since the most influential people would no longer have any incentive to bring pressure for improvements to the plan";
- that health care professionals would be motivated by profit and leave the public plan;
- that there would be a decline in the professionalism and ethics of physicians working in hospitals due to the increase in supplying health care for profit.

She also noted that "for each threat mentioned, no study was produced or discussed" (*Chaoulli* 2005: para. 64).

There is no consensus with respect to the effect or the potential implications of the *Chaoulli* decision. Some see it positively, believing that it will result in more consumer choice in health care. Others share the somewhat alarmist view, popularized by the media, that the decision puts the publicly funded health system in jeopardy. Roy Romanow, who was appointed in 2001 to head the Commission on the Future of Health Care in Canada, stated that not only could the decision "sound the end of medicare as we know it," but also it could lead to other social programs being dismantled.(12) Some were frustrated that the majority decision did not set

(12) Tracey Tyler, "Romanow fears 'end of medicare'; Romanow slams health ruling, says buying health care violates Charter," *The Toronto Star*, 17 September 2005.

out what would be an unreasonable delay in treatment.[13] Many noted that there will likely be challenges to similar prohibitions in other provinces.

In September 2005, the NDP announced that it will table federal legislation in the form of a private member's bill that will "halt private health clinics and private insurance for procedures covered by medicare."[14]

A. Federal Government Response

After the decision's release, Prime Minister Martin stated that "we are not going to have a two-tier health-care system in Canada."[15] There was no further elaboration on the federal government's reaction to the decision until August 2005, when the federal Minister of Health addressed the Canadian Medical Association at its annual general meeting. Mr. Dosanjh focused on wait times, reviewing the steps that had been taken to reduce these, and what steps need to be taken in future. He affirmed that "Canadians want a publicly financed, single tier health system to which access is guaranteed by need rather than by wealth and where the availability of coverage is not dependent on personal insurability."[16] With respect to the implications of the *Chaoulli* 2005 decision, the Minister stated that the decision "did not, as some have suggested, rule that the Charter of Rights and Freedoms requires the creation of a parallel private system."

Mr. Dosanjh has also reminded provinces that they have until 31 December 2005 to establish evidence-based benchmarks for medically acceptable wait times, as agreed in the 2004 *10-Year Plan to Strengthen Health Care*. It has been suggested that the Minister's focus on these benchmarks is in response to the *Chaoulli* decision, as an "attempt to head off private health insurance."[17]

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(13) "Lament for a health care system," Editorial, *Canadian Medical Association Journal*, on-line version, 20 June 2005, http://www.cmaj.ca.

(14) Tim Naumetz, "NDP bill would halt private health care," *The StarPhoenix* [Saskatoon], 21 September 2005.

(15) Kirk Makin, Jeff Sallot, and Rhéal Séguin, "The Medicare Decision: The Decision," *The Globe and Mail* [Toronto], 10 June 2005.

(16) Health Canada, "Speaking Notes for The Honourable Ujjal Dosanjh, Minister of Health," Edmonton, 15 August 2005, http://www.hc-sc.gc.ca.

(17) Mike Sadava, "Private insurance won't hurt public health care," *The Edmonton Journal*, 17 September 2005.

B. Quebec Response

Because the Supreme Court granted a temporary stay on 4 August 2005, the Government of Quebec has 12 months from the date of judgment to comply with the ruling.

It is not yet known what action the Government of Quebec will take with respect to the decision. Premier Jean Charest has said that he wants public debate on the issue before the government redesigns its health care policy.(18) Philippe Couillard, Quebec's Minister of Health, has said that Quebec could benefit from the examples of countries that allow private health care, but notes the need to be cognizant of potential side effects, such as losing doctors to the private system.(19)

C. Alberta Response

Alberta has been contemplating increasing the private delivery of health services for a number of years. In January 2005, the province announced that it would be revising how it delivers health care services. Premier Ralph Klein stated that Alberta's health care renewal, referred to as the "Third Way," was

> about being open to new ideas to meet the needs of patients within the context of the Canada Health Act. It has to get us beyond the endless, pointless debates about private versus public health care and recognize that privately delivered health care is just one more option for delivering health care services.(20)

Details of the province's plan were released in July 2005, and elicited criticism that the province was moving towards a two-tier health system.(21)

Premier Klein openly supported the *Chaoulli* decision after its release, reportedly stating that he "fully support(s) any change that will allow Canadians more choice in getting timely access to the health care services they want."(22) Subsequent to the decision, Alberta

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(18) Mike de Souza, "Private care on hold for a year; Quebec finds new deadline tight; Public input and new health care plan will be Charest's response to June ruling," *The Gazette* [Montréal], 5 August 2005.

(19) Aaron Derfel, "Couillard urges more private care," *The Gazette* [Montréal], 17 September 2005.

(20) Government of Alberta, "Health care evolution gains speed in Alberta," News release, 11 January 2005.

(21) Michelle Lang, "Alberta unveils user-pay enhanced health care: Third way reforms assailed as move to two-tier system," *The Calgary Herald*, 13 July 2005.

(22) John Cotter, "Provinces respond to SCOC striking down Quebec private health insurance law," *The Globe and Mail* [Toronto], 9 June 2005.

Health and Wellness issued a request for proposals from insurance companies with respect to creating a parallel private health insurance system. Despite that request for proposals, Premier Klein dismissed the idea that Alberta would consider allowing private insurance to cover services covered under the provincial plan.(23)

D. The Canadian Medical Association Response

Dr. Albert Schumacher, president of the Canadian Medical Association (CMA) at the time the *Chaoulli* decision was released, stated that the decision was "a stinging indictment of the failure of government to respond … with real action [to wait times]."(24)

At its annual general meeting in August 2005, the CMA passed a motion proposed by Robert Ouellet, president of the Quebec Medical Association, stating that

> The CMA supports the principle that when timely access to care cannot be provided in the public health care system the patients should have access to private health insurance to reimburse the cost of care obtained in the private sector.(25)

The current president of the CMA, Ruth Collins-Nakai, noted that the vote does not mean that doctors do not support medicare, but that they are "frustrated at not being able to provide timely care."(26)

The CMA is preparing a discussion paper and policy principles relating to the relationship between public and private health care in Canada, to be released in 2006.(27)

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(23) John Cotter, "Klein's private health plan questioned: must benefit population as a whole, minister tells doctors during meeting," *The Globe and Mail* [Toronto], 17 September 2005.

(24) Canadian Medical Association, Patrick Sullivan, "CMA moves to reassure patients following "historic" medicare ruling," 9 June 2005, http://www.cma.ca.

(25) Canadian Medical Association, Patrick Sullivan, "Privatization if necessary, not necessarily privatization: CMA," 19 August 2005, http://www.cma.ca.

(26) André Picard, "Private health care should be available to all, doctors say," *The Globe and Mail* [Toronto], 18 August 2005.

(27) Canadian Medical Association, "Message from the President" ("Message to Canadians"), http://www.cma.ca.

E. Reactions of Canadians and Canadian Doctors

An Ipsos-Reid poll released on 5 August 2005 demonstrates the mixed reactions of Canadians and Canadian doctors to the *Chaoulli* decision. The poll found that:

- 52% of Canadians and 83% of Canadian doctors viewed the decision favourably;
- 70% of Canadians and 75% of Canadian doctors agree that the ruling "will pave the way for a two-tiered health care system in Canada";
- 78% of Canadians and 91% of Canadian doctors think that the decision will encourage the growth of private clinics;
- 65% of Canadians and 81% of Canadian doctors think that the decision will reduce waiting lists by increasing the supply of services; and
- 77% of Canadians and 88% of Canadian doctors "favour a health care system where core services are funded by governments, and which includes a guarantee of timely access to services backed by adequate new resources rather than the status quo or a system with a private pay/insurance option."

F. Other Reactions

Saskatchewan Premier Lorne Calvert was among those who expressed concern when the decision was released. He reportedly stated that he "was very disturbed about the concept of opening the door to an Americanized health-care system in Canada."(28) The Canadian Centre for Policy Alternatives echoed that concern, stating that the decision "will open the gates for multinational insurance corporations and for-profit health care companies to storm the Canadian health care system."(29)

Academics appear to agree that, because the majority found an infringement of the Quebec Charter and not the Canadian Charter, the decision applies only to Quebec. They disagree, however, on how future cases challenging similar provisions in other provincial medical insurance legislation would be decided. Some have suggested that if Madam Justice Deschamps had had to determine whether there was a violation of the Canadian Charter, she

(28) Cotter (9 June 2005).

(29) Scott Sinclair, "Supreme Court health ruling oblivious to trade treaty threats," Canadian Centre for Policy Alternatives, 30 June 2005, http://www.policyalternatives.ca.

would have found an infringement of section 7.(30) Others believe that her emphasis on the more onerous burden faced by someone claiming an infringement under section 7 of the Canadian Charter as opposed to claiming an infringement under section 1 of the Quebec Charter suggests that, in future cases, she might not find a violation of section 7.(31) Still others concede that the even split means that it is unclear how courts will respond to similar challenges in the future.(32)

What is clear is that, until a challenge is brought in one of the other provinces that prohibit private insurance, discussions about the implications of the decision may be expected to continue in full force.

(30) Marvin R. V. Storrow, Peter W. Hogg, and Angela D'Elia, "Commentary: bans on private medical insurance likely violate Charter," *The Lawyers Weekly*, Vol. 25, No. 13, 12 August 2005.

(31) Sack Goldblatt Mitchell, "SGM's Analysis of *Chaoulli* v. *Quebec* (*Attorney General*)," n.d., http://www.sgmlaw.com.

(32) Kent Roach, Colleen Flood, and Lorne Sossin, "A way forward for medicare," *The Toronto Star*, 16 September 2005.