Update
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SUPREME COURT OF CANADA STRIKES DOWN QUEBEC PROHIBITION ON PRIVATE HEALTH INSURANCE

Chaoulli v. Quebec (Attorney General), 2005 SCC 35

On June 9, 2005 the Supreme Court of Canada released its decision in *Chaoulli & Zeliotis* v. *Quebec (Attorney General),* 2005 SCC 35 ("*Chaoulli*"). This decision will have far-reaching implications for the provision of health insurance across Canada. This decision will be of interest to all health care professionals, health, welfare and pension plan providers and participants, health and insurance policy groups and equity-seeking groups.

Background

Dr. Chaoulli is a family physician in Montreal. Mr. Zeliotis was Dr. Chaoulli's patient. In 1997, Mr. Zeliotis suffered pain while waiting almost one-year for hip replacement surgery. When he discovered he could not pay privately for his surgery in Canada, he travelled to the U.S. to have the operation. When Mr. Zeliotis returned to Canada, he was reimbursed the portion of his costs that would have been paid if the operation had taken place in Quebec.

Dr. Chaoulli and Mr. Zeliotis subsequently challenged Quebec's *Hospital Insurance Act* and *Health Insurance Act*. This legislation prohibits private insurance paying for publicly-insured medical services. Similar laws exist in provinces across Canada.

Dr. Chaoulli and Mr. Zeliotis argued that the provincial laws prohibiting private insurance for publicly insured services are in violation of s. 7 of the *Canadian Charter of Rights and Freedoms*, and of Quebec human rights legislation that contains similar guarantees. Section 7 of the *Charter* guarantees 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."

The Quebec Superior Court and the Court of Appeal found against Dr. Chaoulli and Mr. Zeliotis, finding that there was a violation of s. 7 of the *Charter*, but that it was "in accordance with the principles of fundamental justice". On June 9, 2004 the Supreme Court heard their appeal.

The Supreme Court of Canada

At the Supreme Court, the appeal was heard by a 7-judge panel. The Supreme Court allowed Dr. Chaouilli's appeal in a 4-3 decision. The four-judge majority was reached by combining the result reached by Chief Justice McLachlin and Major J. (writing for themselves and Bastarache J.) who ruled that the laws violated s. 7 of the *Canadian Charter of Rights and Freedoms* and the result reached by Deschamps J. who concluded that the laws violated s. 1 of the Quebec *Charter* but did not address s. 7 of the Canadian *Charter*. Binnie and LeBel JJ. wrote in dissent for themselves and Fish J.

Reasons of McLachlin C.J.C., Major and Bastarache JJ

McLachlin C.J.C. held that where lack of timely health care can result in death, the s. 7 protection of life is engaged; where it can result in serious psychological and physical suffering, the s. 7 protection of security of the person is triggered.

McLachlin C.J.C. held in addition that the Quebec *Health Insurance Act* and *Hospital Insurance Act* are arbitrary, and the consequent deprivation of the interests protected by s. 7 is therefore not in accordance with the principles of fundamental justice. The Court found that in order not to be arbitrary, a limit on life, liberty or security of the person requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts, and determined that the evidence on the experience of other western democracies with public health care systems that permit access to private health care refutes the government's theory that a prohibition on private health insurance is connected to maintaining quality public health care. It does not appear that private participation leads to the eventual demise of public health care.

Further, the breach of s.7 is not justified under s. 1 of the Canadian *Charter*. The government undeniably has an interest in protecting the public health regime but, given that the evidence falls short of demonstrating that the prohibition on private health insurance protects the public health care system, a rational connection between the prohibition on private health insurance and the legislative objective is not made out.

Concurring Reasons of Deschamps J.

Deschamps J. only considered the *Quebec Charter.* She held that it is broader than that of the Canadian *Charter*, and this characteristic should not be disregarded. She held that patients on waiting lists are in pain and cannot fully enjoy any real quality of life. The right to life and to "personal inviolability" (the wording in the *Quebec Charter*) is therefore affected by the waiting times.

Deschamps J. held that the infringement of the rights protected by s. 1 is not justified under s. 9.1 of the *Quebec Charter*. The general objective of the health insurance scheme is to promote health care of the highest possible quality for all Quebeckers regardless of their ability to pay. She held that the preservation of the public plan is a pressing and substantial objective, but there is no proportionality between the measure adopted to attain the objective and the objective itself. While an absolute prohibition on private insurance does have a rational connection with the objective of preserving the public plan, it did not meet the minimal impairment test.

Dissenting Reasons of Binnie, LeBel and Fish JJ.

The dissenting reasons of Binnie, LeBel and Fish JJ. framed the question differently. They held that the question is whether the province of Quebec has the authority to discourage a second (private) tier health sector by prohibiting the purchase and sale of private health insurance. They held that this question cannot be resolved as a matter of constitutional law by judges. The Court found that the public policy objective of "health care to a reasonable standard within a reasonable time" is not a legal principle of fundamental justice. There reasoned that there is no "societal consensus" about what this non-legal standard of "reasonableness" means or how to achieve it.

They further held that the Quebec health plan shares the policy objectives of the *Canada Health Act*, and the means adopted by Quebec to implement these objectives are not arbitrary. In principle, Quebec wants a health system where access is governed by need rather than wealth or status. To accomplish this objective, Quebec seeks to discourage the growth of private sector delivery of "insured" services based on wealth and insurability. The prohibition is thus rationally connected to Quebec's objective and is not inconsistent with it. In practical terms, Quebec bases the prohibition on the view that private insurance, and a consequent major expansion of private health services, would have a harmful effect on the public system. The Court reasoned that designing, financing and operating the public health system of a modern democratic society remains a challenging task and calls for difficult choices. Shifting the design of the health system to the courts is not a wise outcome.

Impacts of the Decision

The immediate impact of this decision is that private health insurance is no longer prohibited in Quebec, effective immediately. Private insurance can be sold for listed health services in Quebec.

The longer-term impact of the decision is still uncertain. The federal and provincial governments have not substantially reacted to this decision yet.

There is still one technical difficulty with the decision. Although the Court examined the Quebec *Health Insurance Act* and *Hospital Insurance Act*, one judge found them in violation of the Quebec human rights legislation, three judges found them in violation of the Canadian *Charter*, and three judges in dissent found them to be justifiable violations of these guarantees. Technically, therefore, this decision would not apply outside Quebec. However, were similar litigation to be brought in other provinces, we believe that the substantive decision will be considered applicable outside Quebec, and will be viewed to apply to all provincial health care systems.

If private insurance is permitted in Canada, there are important questions of how that system will be designed. In particular, there are concerns about how it could be designed so as not to undermine the publicly funded system. One option the provinces could pursue is to directly tax the provision of private health insurance, and allocate those revenues to support the public health care system. This would make an effective link between the health of the public insurance system and the use of the private health insurance system, ensuring that resources

are allocated to both systems at the same time.

If private insurance is permitted, and a parallel private system of insurance and service providers evolves, there are likely to be significant labour relations issues arising as a result. Private health service provision will likely expand, increasing the demand for health care professionals, and in some degree, attracting them away from the public system. Membership in health sector unions could be affected. While the majority of the Court suggested that a private system would not affect the public health care system, a drain of health care professionals away from the public system would obviously have serious implications for servicing and ensuring access to public health care.

The surprising ruling also opens a series of questions for human rights and equity-seeking groups in Canada. The decision states that the provision of health care in Canada is not a constitutional right. However, the ruling holds that denial of the opportunity to purchase private health insurance is unconstitutional. While the outcome of this decision privileges a formal/individualist rather than substantive/collective approach to social and economic rights, the implications of the decision for scrutinizing access to social and economic rights more broadly will need to be considered.

In addition, the Supreme Court of Canada's decision in this case examined the complex issue of health care access solely from the perspective of whether denying individuals the option to seek private insurance as a counter to the physical and psychological stress of being on a waiting list violates the Charter. But private insurance is not the only remedy to the problem. The s. 7 impacts could be examined from a range of other perspectives which would themselves suggest a range of other remedies. For example, are the s. 7 impacts of waiting lists also caused by government failures to adequately fund the public system? To the extent the majority of the Court found current wait times unreasonable, what implications does the ruling have with respect to the requirement under s. 36 of the *Charter* that the federal and provincial governments are committed to "providing essential public services of reasonable quality to all Canadians"?

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