

THE FACTS

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Inside the Chaoulli ruling: Trade dangers of privatization

What are the trade implications of the Chaoulli decision?

The potential trade implications of the Chaoulli decision are enormous. While the ruling itself is clearly limited to Quebec, key provisions in two international trade agreements could expand the scope of the judgement to the rest of the country if private insurance is allowed to expand in Quebec. In this way, Canada's obligations under international trade agreements bring added danger to any privatization or commercialization of public health care.

The North American Free Trade Agreement (NAFTA) and the World Trade Organization's General Agreement on Trade in Services (GATS) both contain powerful provisions on investment and services that promote and cement privatization.

The most serious trade threat comes from NAFTA.¹ Public policies and services have already faced challenges under sweeping investment provisions that allow corporations to sue foreign governments if they think a government measure (regulation, law or policy) lessens their profits. Public services such as health care are mostly protected from these investment rules – as long as the services remain public.²

Adding to the risk, Canada "listed" – put on the negotiating table – private health insurance under the financial services rules of the GATS in 1994³, giving US and European private insurers new rights and powers and making future expansion of publicly-insured services much more difficult.

The GATS also contains related provisions concerning market access and national treatment, which could also be triggered by private insurance breaking into public health care.⁴ Quite simply, trade deals and medicare do not mix. Rather, "they rest on principles that are, at root, incompatible."⁵

Despite these realities, the Supreme Court decision did not consider the trade dangers of for-profit care. As trade analyst Scott Sinclair has noted, the ruling is a "Trojan Horse" for giant health care and health insurance corporations that want to gain access to and profit from Canada's "market".⁶

How could corporations use trade deals to gain access to Canadian health care?

If private health insurance companies are allowed to cover publicly-insured procedures in Quebec, it provides an entry point to pry open services in the rest of the

country, even if courts in other provinces have not ruled it is unconstitutional to ban private insurance.

Allowing private insurance to expand to cover publicly-insured services would throw Canada's provincial health insurance plans into competition with private suppliers, creating the opportunity for a potential trade challenge⁷. Responding to challenges about including private health insurance in the GATS in 1994, federal officials argued the existing public health insurance system was not affected, since the GATS excludes governmental services that are supplied...“neither on a commercial basis ... nor in competition with one or more service suppliers.”⁸ The Chaoulli ruling, if implemented, would eliminate that defence.

Private insurance for services not listed on public plans poses a further problem, especially as governments delist more services and fail to approve new ones. Governments already face many roadblocks to expanding insured services publicly – or bringing privatized services back under public insurance at a later date. Increased market access for private insurance corporations as a result of Chaoulli would further complicate what is already murky terrain.⁹

The GATS rules and NAFTA's tough “expropriation” provisions would work in tandem to accelerate the growth of private insurance markets and to make dislodging foreign insurers from the health sector next to impossible.

Provincial policies, guided by the Canada Health Act, deliberately discourage the

growth of private insurance markets by, for example, setting fee caps, restricting direct and extra-billing, preventing public subsidy of private practice and ensuring publicly insured health services are paid for by a provincially-run public authority.¹⁰

If private insurance is permitted to expand into what is currently forbidden territory, such public policies will be viewed as illegal trade barriers. In covered sectors such as health insurance, the GATS guarantees foreign service providers the right to enter the market and fully access the same government subsidies and other advantages given to domestic service providers.

But aren't there protections built into these deals?

Just as Canada's public health care system has been built around the public monopoly over health insurance, the limited protections for health care that Canada negotiated in the NAFTA and the GATS are based on the existing separation between private and public health insurance "markets." As Scott Sinclair notes, “It is the public, not-for-profit nature of Canadian health care that minimizes the risk of trade treaty challenges. If that foundation is shifted, our health care system's protection...crumbles.”¹¹

Trade rules would vastly expand their reach because the narrow protections granted under GATS and NAFTA do not permit governments to provide services that compete with private suppliers. The Supreme Court ruling could destroy this

basic separation, if private insurers, including foreign companies, are allowed to cover the full range of health services in Quebec. This would neuter the exemptions negotiated for Canadian health care.¹²

If Quebec's ban on private health insurance for publicly insured services is eroded or abolished, Canada's trade treaty

commitments will make it very difficult to curb the growth of two-tier medicine or to reverse course and restore a universal, public health insurance system. In particular, NAFTA's investor-to-state provisions "risk making experiments with for-profit health care essentially irreversible".¹³

One in a series of six fact sheets on the Chaoulli Supreme Court ruling. Other titles in the series are: What the court did (and did not) say, Assessing the international evidence, Real solutions for shorter wait lists, The role of drugs in rising health costs, and Taking action.

All can be found at cupe.ca.

¹ Grieshaber-Otto, J. & Sinclair, S. (2004). *Bad Medicine: Trade treaties, privatization and health care reform in Canada*. Ottawa: Canadian Centre for Policy Alternatives, p.15.

² Johnson, Jon R. How Will International Trade Agreements Affect Canadian Health Care. In Sanger, M. & Sinclair, S. (eds) (2004). *Putting Health First: Canadian Health Care Reform in a Globalizing World*. Ottawa: Canadian Centre for Policy Alternatives, p. 281.

³ Grieshaber-Otto, J. & Sinclair, S. (2004), p. 11.

⁴ Grieshaber-Otto, J. & Schacter, N. (2005, June 28) *Trojan Horse: Trade treaties, private health insurance and the Supreme Court decision*. Notes for a presentation sponsored by the Saskatchewan office of the Canadian Centre for Policy Alternatives, June 28, 2005), p. 8-9. Retrieved Aug. 16, 2005 from http://www.policyalternatives.ca/documents/Saskatchewan_Pubs/2005/trojan_horse.pdf

⁵ Sanger, M. & Sinclair, S. (eds) (2004), p. 17.

⁶ Sinclair, S. (2005, June 30). Opening the gate for a Trojan Horse, *Toronto Star*, p. A31.

⁷ Johnson, J. (2004), p. 322.

⁸ Grieshaber-Otto, J. & Schacter, N. (2005).

⁹ Ibid.

¹⁰ Johnson, J. (2005), p. 281.

¹¹ Sinclair, S. (2005).

¹² Ibid.

¹³ Grieshaber-Otto, J. & Sinclair, S. (2004), p. 11

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