THE FACTS

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Inside the Chaoulli ruling: What the court did (and did not) say

What did the court say?

A slim majority of judges ruled that Quebec's ban on private health insurance for publicly-insured services violated Quebec's *Charter of human rights and freedoms.* The decision, based on selective and at times flimsy evidence, is not a blanket overturning of the ban.

The judges were clear that the ban only violates Quebec's *Charter* when there are lengthy waiting times for treatment in the public system. The judges attempted to clarify the dividing line as "circumstances where the government is failing to deliver health care in a reasonable manner" – though the judges did not define what was a reasonable or unreasonable wait time beyond vague references to "quality and timeliness".[1]

The case was appealed to the Supreme Court by a doctor well-known for his support of privatized health care, Dr. Jacques Chaoulli[2], and his patient, who had encountered a year-long wait for hip surgery, George Zeliotis. They essentially argued that patients facing lengthy waiting lists should have the right to buy private insurance that would pay for privately-delivered medical services.

The majority on the court made this decision by interpreting the protections in Quebec's *Charter* (which are broader than protections in the Canadian *Charter*). In doing so, the majority overturned two lower court rulings that upheld the ban on private health insurance.

Further demonstrating that this case is clearly limited to situations where there are long waiting lists, the majority held that "[g]overnments have promised on numerous occasions to find a solution to the problem of waiting lists…it seems that governments have lost sight of the urgency of taking concrete action. The courts are therefore the last line of defence for citizens."[3]

Disturbingly, the majority rejected arguments that a ban on private care was necessary to protect the public health care system. They did so in the face of persuasive and compelling evidence supporting the Quebec government's argument, presented both at trial and by interveners at the Supreme Court. As an interesting aside, both the Quebec and federal government's arguments before the Supreme Court are comprehensive overviews of how private care can undermine public health care – advice they do not necessarily always follow in practice.[4]

The majority tacitly acknowledged accessing private insurance won't shorten wait times, saying it "does not necessarily provide a complete response to the complex problem of waiting lists."[5] They also summarize Chaoulli and Zeliotis' arguments in a way that highlights the underlying political agenda: "The appellants do not seek an order that the government spend more money on health care, nor do they seek an order that waiting times for treatment under the public health care system be reduced. They only seek a ruling that because delays in the public system place their health and security at risk, they should be allowed to take out insurance to permit them to access private services."[6]

The court's ruling struck down the sections of Quebec's *Health Insurance Act* and *Hospital Insurance Act* that outlaw private insurance. The judgment was issued on June 9, 2005. Two months later, the court issued a "stay", suspending the judgment's effect for a year.

Was it a unanimous ruling?

No. It was a deeply divided court that split 4-3. The four justices in the majority on the Quebec *Charter* issue didn't even agree on all of their findings. The three judges who disagreed with the majority ruling wrote a strongly-worded, evidence-based dissent which forms part of the judgment. There were two vacancies on the court at the time of the hearing.

The arguments got heated – the majority ruling accuses the dissenters of having an "emotional reaction" to the case.[7] However, the majority judges also rely on dramatic language that could evoke emotional responses, quoting evidence that a patient with coronary disease is "'sitting on a bomb' and can die at any moment."[8] They also base their ruling on "unchallenged evidence that in some serious cases, patients die as a result of waiting lists for public health care"[9] – without any supporting evidence that allowing private insurance would reduce the number of deaths.

Justice Marie Deschamps wrote for the majority on the Quebec *Charter*, but declined to make a decision under the Canadian *Charter*, leaving that issue tied 3-3. She scorned the dissenters' analysis of the evidence surrounding the dangers of private care as "characteriz[ing] the debate as pitting rich against poor"[10]. However, a few paragraphs later, she herself argues that a ban on private insurance "creates an obstacle that is practically insurmountable for people with average incomes. Only the very wealthy can reasonably afford to pay for entirely private services."[11] The other majority judges raise a similar argument.[12] However, as the dissenters point out, those who seek and qualify for private insurance will be the wealthier members of society.[13]

What did the dissenting judges say?

They argued that Quebec's ban on private insurance was a reasonable measure, accepting the evidence that allowing private insurance would fuel the growth of for-profit care, which in turn would undermine the public system.

Their blistering response made several other key points. Long waiting lists cannot be resolved as a matter of constitutional law, they stressed.[14] They also said the majority did not clearly define a way forward, and that the arguments behind the case were seriously flawed. They also pointed out the weaknesses in the reasoning underpinning the majority judges' ruling, questioning their use of evidence and bluntly stating that the evidence before the court did not prove private insurance was the appropriate solution[15].

The judges were clear that the case presented an issue the courts can't properly handle. They argued that public vs. private health care "has been the subject of protracted debate across Canada through several provincial and federal elections. We are unable to agree with our four colleagues…that such a debate can or should be resolved as a matter of law by judges."[16]

They further argue that courts are not "well placed to perform the required surgery" to solve problems with public health care[17], and that "the debate is about social values. It is not about constitutional law"[18]. The appropriate forum to resolve a concern about wait times is in the arena of politics, they argue.[19] Citing a 2003 Supreme Court ruling, the justices point out that "Members of Parliament are elected to make these sorts of decisions and have access to a broader range of information, more points of view, and a more flexible investigative process than courts do."[20]

The three dissenting judges point to the majority's vague use of "reasonable" to describe health services. They rhetorically ask, "How short a waiting list is short enough? How many MRIs does the Constitution require? The majority does not tell us. The majority lays down no manageable constitutional standard."[21]

It is worth quoting the dissenters' assessment of Chaoulli and Zeliotis' main argument, which they describe as "based largely on generalizations about the public system drawn from fragmentary experience, an overly optimistic view of the benefits offered by private health insurance, and oversimplified view of the adverse affects on the public health system of permitting private sector health services to flourish and an overly interventionist view of the role the courts should play in trying to supply a "fix" to the failings, real or perceived, of major social programs."[22]

They rightly pointed out that the evidence around waiting lists is "subject to contradictory evidence and conflicting claims", referencing both the Romanow and Kirby reports.[23]

Finally, the dissenters cautioned against the Charter being used to "'roll back' the benefits of a legislative scheme that helps the poorer members of society."[24]

Who does the ruling affect?

For now, nobody. After issuing the judgment, the government of Quebec requested an 18-month delay in the ruling's implementation. In early August 2005, the court granted a 12-month suspension of the ruling's effect.[25] Quebec has a year, from June 9, 2005, to improve the situation that led to the original court case. There have been many developments since the original case was launched in 1997, including increased federal transfers and numerous federal and provincial initiatives to improve many aspects of public health care, including work on waiting lists. This means the door is still wide open for Quebec to maintain its ban on private insurance and defend a single-tier, public health system. However, recent statements by both the province's premier and health minister call into question their commitment to public health care, signaling the need for renewed pressure on this front.

Does the ruling affect other provinces?

No. Even if the ruling had taken effect immediately, its impact was limited to the province of Quebec – and within the province, was contained to one aspect of the province's health care system. The court was split on whether Quebec's private insurance ban violated the Canadian *Charter of Rights and Freedoms* – which has a much narrower scope than the Quebec charter. The court split 3-3, with Justice Deschamps voicing no opinion on whether the Canadian *Charter* was violated.

Does this affect the *Canada Health Act*?

No. The CHA remains fully in effect. Chaoulli and Zeliotis did not challenge the constitutionality of the CHA in their case. None of the judges questioned the validity of the CHA. The dissenting judgment makes mention of "the commitment in principle in this country to health care based on need, not wealth or status, as set out in the Canada Health Act," and references the Act's principles in several places. (emphasis in the original)[26]

The legal tools for provinces to maintain single-tier public health care remain in effect. Even Justice Deschamps, one of the justices who ruled in favour of Chaoulli, said, "In this regard, when my colleagues ask whether Quebec has the power under the Constitution to discourage the establishment of a parallel health-care insurance plan, I can only agree with them that it does."[27]

What evidence did the majority rely on?

A very narrow and selective body of research. Justice Deschamps dismissed a wealth of evidence presented at trial – and reiterated in presentations before the court – saying she was "of the opinion" that the well-documented impacts of private care were "highly unlikely in the Quebec context."[28]

Amazingly, given the wealth of research, reports and studies before them, the majority cast themselves as "confronted with competing but unproven 'common sense' arguments, amounting to little more than assertions of belief. We are in the realm of theory."[29]One health policy analyst has described the majority's

analysis of health care research as "facile at best".[30] The dissenting judges emphasize that the expert witnesses offered "a good deal more" than just common sense.[31]

The majority judges relied mainly on the interim report of the Kirby committee – even though the report's findings differed from the final report. They paraphrase the Kirby report as finding that "far from undermining public health care, private contributions and insurance improve the breadth and quality of health care for all citizens."[32] However, as the dissenting judges point out, the final report of the Kirby committee draws conclusions that do not endorse two-tier care.[33] They quote the Kirby report conclusion that "allowing a private parallel system…will make the public waiting lines worse."[34]

The majority judges accepted the arguments of Dr. Edwin Coffey that private insurance wouldn't harm medicare, even though the trial judge concluded that "Dr. Coffey stood alone in both his expert evaluation and the conclusions he reached."[35] Coffey is a senior fellow at the right-wing Montreal Economic Institute, as is Chaoulli.

The majority also cited Dr. Eric Lenczner as an authority, even though both the trial judge and Zeliotis' lawyer agreed he was not qualified as an expert. Lenczner is an orthopaedic surgeon who operates at a private clinic in a wealthy Montreal neighbourhood.[36] His testimony was "largely anecdotal and of little general application", and included a story about a golfer whose wait for surgery meant he lost access to his golf membership for a season.[37]

The dissenting judges questioned the majority's use of evidence, saying "bits of evidence must be put in context." In their criticism, they argue it is "particularly dangerous to venture selectively into aspects of foreign health care systems with which we, as Canadians, have little familiarity."[38] In their dissent, the judges draw on a broad and diverse body of research and testimony to make their points.

Finally, the dissenters pointed to a more appropriate solution for lengthy wait lists. The Quebec government has a built-in "safety valve" that allows residents to get care outside the province when delays in the public system create problems. Patients who feel they aren't getting fast enough treatment can challenge the administration of this safety valve in court, the judges argue. This case-by-case approach is a more reasonable approach than Chaoulli and Zeliotis' full frontal attack on the entire public system, they conclude.[39]

Who is behind this case?

American conservatives call Dr. Jacques Chaoulli a "superstar", and he is equally at home with right-wing thinkers in Canada who favour privatization. Shortly after the court issued its ruling, Chaoulli met with a who's who of American right-wingers who want to keep public health care out of their country.[40] Chaoulli has waged a lengthy fight to deliver privatized health care, including running a private house call business in Quebec.

In bringing the challenge about private insurance, Chaoulli had one clear goal, as the dissenting judges noted: "[p]rivate insurance is a condition precedent to, and aims at promoting, a flourishing parallel private health care sector. For Dr. Chaoulli in particular, that is the whole point of this proceeding."[41] The dissenters also quote from the trial judgment, which found Chaoulli's motives to be "questionable".[42]

Dr. Chaoulli's patient, George Zeliotis, is equally problematic. The dissenters supported the trial judge's finding that "Mr. Zeliotis has not demonstrated that systemic waiting lists were the cause of his delayed treatment."[43] In fact, the judges point out, the trial presented ample evidence that "the delays Mr. Zeliotis experience…were caused not by excessive waiting lists but by a number of other factors including his pre-existing depression and his indecision and unfounded medical complaints…Mr. Zeliotis sought a second opinion, which he was entitled to do, and this further delayed his surgery. More importantly, his physician believed that Mr. Zeliotis was not an 'ideal candidate' for the surgery because he had suffered a heart attack and undergone bypass surgery earlier that year."[44]

One in a series of six fact sheets on the Chaoulli Supreme Court ruling. Other titles in the series are: Assessing the international evidence, Real solutions for shorter wait lists, Trade dangers of privatization, The role of drugs in rising health costs and Taking action.

All are available at cupe.ca.

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[1] Chaoulli v. Quebec (Attorney General), [2005] S.C.J. No. 33 at para 158

[2] See "A Doctor-Lawyer-Gadfly v. Canada's Medical System", *New York Times*, (2005, May 21) p. 4 and "In Blow to Canada's Health System, Quebec Law is Voided", *New York Times*, (2005, June 10) p. 3.

[3] Chaoulli v. Quebec (Attorney General), [2005] S.C.J. No. 33 at para 96

[4] Factum of Attorney General of Canada and Factum of Attorney General of Quebec (2004).

[5] Chaoulli v. Quebec (Attorney General), [2005] S.C.J. No. 33 at para 100

[6] Ibid, at para 103

[7] Ibid, at para 16

[8] Ibid, at para 112

[9] Ibid, at para 123

[10] Ibid, at para 16

[11] Ibid, at para 55

[12] Ibid, at paras 111, 137

[13] Ibid, at para 274

[14] Ibid, at para 191

[15] Ibid, at para 251

[16] Ibid, at para 161. See also para 276, where the judges note: "Shifting the design of the health system to the courts is not a wise choice."

[17] Ibid, at para 164

[18] Ibid, at para 166

[19] Ibid, at para 166

[20] Ibid, at para 176

[21] Ibid, at para 163. See also para 209.

[22] Ibid, at para 169

[23] Ibid, at para 217

[24] Ibid, at para 274

[25] Chaoulli v. Quebec (Attorney General), ruling on motion made Aug. 4, 2005.

[26] Chaoulli v. Quebec (Attorney General), [2005] S.C.J. No. 33 at para 230

[27] Ibid, at para 14

[28] Ibid, at para 66

[29] Ibid, at para 138

[30] Lewis, Steven. Medicare's fate: Are we fiddlers or firefighters, written for the *Winnipeg Free Press.* Retrieved from August 11, 2005, http://www.longwoods.com/product.php?productid=17186&page=1

[31] Chaoulli v. Quebec (Attorney General), [2005] S.C.J. No. 33 at para 213

[32] Ibid, at para 147

[33] Ibid, at paras 226, 230

[34] Ibid, at para 243. They further bolster this finding by citing the conclusions of the Romanow report, the Turcotte report and the expert witnesses who testified at the original trial.

[35] Ibid, at para 215. See also para 252, where Coffey again is singled out as the lone supporter of a two-tier system.

[36] Private clinics charge 'set-up' fees. (Feb. 14, 2005). *Montreal Gazette*

[37] Chaoulli v. Quebec (Attorney General), [2005] S.C.J. No. 33 at para 225

[38] Ibid, at para 229-230

[39] Ibid, at para 264

[40] McKenna, Barrie. (2005, June 22). Private-health activist a 'superstar', *Globe and Mail*, p. A12.

[41] Chaoulli v. Quebec (Attorney General), [2005] S.C.J. No. 33 at para 181

[42] Ibid, at para 187

[43] Ibid, at para 186

[44] Ibid, at para 211

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