

Supreme Court health ruling oblivious to trade treaty threats

By Scott Sinclair

Dr. Jacques Chaoulli, the Quebec physician whose complaint led the Supreme Court to strike down Quebec's ban on private health insurance, celebrated his victory by going to Washington to be feted by conservative U.S. think-tanks. He personally invited U.S. health care corporations to come to Canada.

The Supreme Court somehow failed to grasp what was immediately obvious to Chaoulli and the U.S. right-wing. Overturning the ban on private health insurance will open the gates for multinational insurance corporations and for-profit health care companies to storm the Canadian health care system.

The decision is a Trojan horse. Once U.S. and other foreign insurers are inside the walls of the Canadian health system, international trade treaties, such as NAFTA and the World Trade Organization (WTO), will give them the weapons to fight any government attempt to displace them or even control their market share.

The Supreme Court made a dangerous oversight when it ignored the Romanow Commission's warning that trade treaties pose serious risks that need to be considered before any major health care reforms are undertaken. Low and middle-income Canadians, especially the sick and the elderly, would be the big losers if our health care system assimilates with the U.S. market model.

It is the public, not-for-profit character of Canadian health care that minimizes the risk of trade treaty challenges. If that foundation is shifted, our health care system's protection from trade treaties crumbles.

Government measures affecting private health insurance are governed by the financial services rules of the WTO's General Agreement on Trade in Services (GATS). NAFTA's expropriation rules - which allow foreign investors to sue Ottawa for policies that reduce their expected profits - also apply fully to the health care sector.

Canada's trade negotiators covered health insurance under the GATS in 1994. They later argued that the existing public health insurance system was not affected since the GATS excludes governmental services that are not "in competition with one or more service suppliers."

But if the Supreme Court ruling were implemented, Canada's provincial health insurance plans would be thrown into competition with private suppliers. This would nullify the GATS "governmental authority" exclusion, exposing both private and public health insurance to the treaty.

Multinational insurance companies could then challenge regulations that aim to ensure that Canadians' access to health care services is based on need rather than the ability to pay.

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, and preventing public subsidy of private practice.

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 full access to the same government subsidies and other advantages given to domestic service providers.

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.

Just as Canada's public health care system has been built around the public monopoly over health insurance, the limited protections that Canada negotiated in the NAFTA and the GATS are based on the existing separation between private and public health insurance "markets".

The Supreme Court ruling would destroy this basic separation, by permitting private insurers, including foreign companies, to cover the full range of health services. This would neuter the trade treaty exemptions for Canadian health care.

In their scathing dissent, the minority on the court stated that "the proposed constitutional right to a two-tier health system for those who can afford private medical insurance would precipitate a seismic shift in health policy." For a slim majority of judges to trigger such a fundamental change in our country's public health care system is deeply disturbing. To do so without considering the long-term consequences under Canada's trade treaties is inexplicable.

Hopefully, this ruling will never be implemented. At the moment, it applies only to Quebec, which has asked for a stay. Government reinvestment in the public system may reduce wait times, resolving the issue. The Quebec government retains the right to invoke the notwithstanding clause. Finally, the arrival of two new justices on the Supreme Court bench may lead to a different outcome in future cases.

The crucial lesson here is that if the ban on private health insurance for medically necessary services is abolished, Canada's trade treaty commitments will make it practically impossible to curb the growth of two-tier medicine or to reverse course and restore a universal, public health insurance system.

For the sake of Canadians' most valued social program, let's leave this Trojan horse outside Medicare's gate.

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*Scott Sinclair is a trade policy specialist with the Canadian Centre for Policy Alternatives. He is co-editor, with Matthew Sanger, of **Putting Health First: Canadian Health Care Reform in A Globalizing World**, a collection of reports on globalization and health prepared for the Romanow Commission.*