

Ontario Health Coalition

Urgent Update:

The Supreme Court Ruling on Private Health Care



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On June 9, the Supreme Court of Canada ruled on a case brought by a Quebec physician and his patient who had to wait for his medical procedure. By a 4-3 majority, the Court found that two provisions of Quebec health insurance law banning private insurance for insured medical and hospital services (ie. the ban on 2-Tier healthcare) violate the Quebec Charter of Human Rights and Freedoms. As for the Canadian Charter, the court split evenly, 3-3.

The case comes as the Fraser Institute, Preston Manning, Mike Harris, Michael Kirby and others have launched a new campaign to try to open up the door to privatization, slammed shut by the Romanow Commissions definitive rejection of private health care. This campaign seeks to draw attention away from the US health system and focus on European health systems that involve a mix of public and private care. More information on this is contained below.

As matter of law, the damage caused by the case is limited in Quebec. No other health care statutes are affected, including other provincial schemes that include a similar ban on private insurance. It may be that legal challenges will now be launched in other provinces, but it is far from a foregone conclusion that these would succeed. The more immediate challenge is likely to be a political one as some provinces may use the Supreme Court's decision as an excuse for removing the bar to private insurance.

The majority judgment of Court is comprised on two sets of written reasons: one set written by McLaughlin and Major, and supported by Bastarache (M,M and B); the other written by Deschamps. It is because Deschamps limits her decision to the Quebec Charter, that no majority exists on the question of the Canadian Charter. A briefing note is enclosed and is available on our website at www.ontariohealthcoalition.ca. More resources on the case, called the Chaoulli case, are on the Canadian Health Coalition site at www.medicare.ca.

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Ontario Health Coalition Briefing Note

Supreme Court Ruling on Two Tier Health Care

Chaoulli v. Attorney General of Quebec: What the Supreme Court Really Said

By Steven Shrybman, Sack Goldblatt Mitchell *June 14, 2005*

On June 9th, by a narrow majority, the Supreme Court of Canada found that Quebec's ban on private insurance for insured health services violated the Quebec Charter of Human Rights and Freedoms.

The ruling is certainly a victory for the advocates of privatization and two-tiered health care, but it is far less significant than these forces claim. If their challenge represented a full frontal assault on the principles of Canada's health care system, the Supreme Court's decision has dealt Medicare only a glancing blow. The following Q and A attempts to shed some light on what the Court really decided.

Did the Supreme Court challenge the validity of the Canada Health Act?

NO. While the pro-privatization lobby has pounced on the decision as spelling the death of Medicare, in fact all of the Supreme Court Justices acknowledged the importance and validity of the Canada Health Act. Moreover, the legal effect of the Court's decision is limited to Quebec. For that reason it has no legal bearing on either the Canada Health Act or any other provincial health care insurance plan, including those that also ban private insurance.

Can provinces continue to maintain single tier health care systems?

YES. And this is true for Quebec as well. As Mme. Justice Deschamps (one of the four judges who ruled in favour of Chaoulli), states:

In this regard, when my colleagues ask whether Quebec has the power under the Constitution to discourage the establishment of a parallel health care system, I can only agree with them that it does. Justice Deschamps also points out that the provinces have several tools at their disposal to prevent the establishment of two-tiered health care, including the right to regulate what physicians may charge for their services.

Do Canadians now have the right to purchase health care services outside the public system?

NO. As noted, the Supreme Court ruling has no legal effect in or for other provinces. Moreover, even Quebec may maintain a ban on private insurance if it can demonstrate that Quebec residents have access to the health care services they need within a reasonable time frame. This is because, as acknowledged by the majority judgment, a ban on private insurance "might be constitutional in circumstances where health care services are reasonable as to both quality and timeliness ..."

It is important, therefore, to appreciate that Chaoulli's application arose from the circumstances of Quebec's health care system as it was in 1997 – before Romanow, Kirby and several federal-provincial health accords focused on the problem of reducing wait times. It is arguable that Quebec has already satisfied "reasonable" expectations about the delivery of timely care.

Will court challenges now be brought in other provinces?

Possibly – but there are good reasons to doubt whether these would succeed. As noted, many governments have now taken significant steps to reduce wait times. In addition, the Court was evenly split 3-3 on the question of whether a ban on private insurance offended the Canadian, as opposed to the Quebec, Charter of Rights and Freedoms. Powerful dissenting reasons given by Justices Binnie,

Lebel, and Fish present a sharp and compelling critique of the majority's treatment of the issues and evidence. These Justices take their colleagues to task for not only failing to define a "manageable constitutional standard" for judging questions of health care services in the context of Charter rights, but also for showing little regard for the evidence or findings of fact made by the Quebec Courts or for well-established norms of constitutional law.

Does that mean I don't have to worry about the Chaoulli decision?

Unfortunately, No. While the case may have few legal consequences, the more immediate challenge is a political one, as pro-privatization forces pressure other provinces to abandon single-tier care.

While the majority of the Supreme Court appears to believe that private insurance and public health care can co-exist without any adverse effects on the public system, there simply isn't any meaningful evidence to support that view. While the majority relies on evidence gathered by Senator Kirby, it ignores the fact that the Senator rejected the notion of two-tiered care to resolve wait list problems, stating:

The solution to this problem is not, as some have suggested, to allow wealthy Canadians to pay for services in a private health care institution. Such a solution would violate the principle of equity of access.

As the minority justices point out:

.... the Kirby Report states flatly that "allowing a private parallel system will ... make the public waiting lines worse", a conclusion strongly supported by the Romanow Report: "[P]rivate facilities may improve waiting times for the select few ... but ... worse[n] them for the many]", and by virtually all of the evidence adduced before the Quebec courts.

Two Tier Healthcare: Costly and Unfair

Two tier healthcare is the creation of two lines for health services - one for the poor and one for the wealthy. The world's biggest two-tier health system exists in the United States. It is also the world's most expensive health system. Those who support the principles of the Canada Health Act reject two-tier healthcare because it would drive up costs in the health system, inviting in private insurance companies, profit-taking, exorbitant executive salaries, expensive administrative systems and higher prices as patients compete for care. We also reject two-tier healthcare because it draws precious human resources and money out of the public system, creating longer waits for many, while those with less medical need but more money jump the queue. Two-tier health care is not a solution. It replaces taxes with higher out-of-pocket costs. It will replace the problem of wait times with new problems of out-of-control prices, higher costs, and diminished access for the majority of Canadians.

The problem of wait times is one of demand and supply. The forces that pushed tax cuts which created long wait lists now want to create a two-tier system to "solve" the crisis they created while creating profit-making opportunities for themselves and their colleagues. There are public solutions to the problems in the health system. If supply is increased, progressive reforms are adopted, profit-taking is curtailed and demand is managed in the public health system, there will not be a wait list problem. This relies on a rejection of the tax cuts agenda and a redoubled effort to improve the public health system according to the values of community, equality, inclusion and social solidarity embraced in the principles of the Canada Health Act.

Two-Tier Health Systems: A Quick Glance Around the World

One of the problems in comparing health systems around the world is that different systems cover a varying range of services and programs, cultures vary, social equality and the determinants of health differ and systems are in flux. In some cases drugs are covered, many countries have more robust social security systems, all European countries have national or other government housing strategies etc. Here is a quick briefing on some of the major observations about the two-tier health systems that are emerging or have emerged in other countries. The conclusion from more rigorous research is that two tiering creates new costs and leads to inequality of access.

Sweden: Sweden's health system covers far more than ours publicly and the country has a robust social security system. Drugs, dental care, rehab and other services are covered. Swedes pay far less out-of-pocket for healthcare than we do. Sweden has a relatively short experience with two-tier healthcare. Nonetheless, the Kirby Committee heard the testimony that the privatization has created a problem of queue-jumping. The unfairness of the system has become a political problem.

Australia: Australian two-tier health system has sucked resources out of the public system to the detriment of public patients. The problems created by the privatization were reported to Kirby by Dr. Roer Kilham from the Australian Medical Association who noted: "(...)there is more rationing in the public sector. People do not get access. It is very common to meet someone who has waited five years to get a hip replacement or even longer for a knee replacement...We call private health insurance "queue-jumping insurance." Basically, it buys a place further up the queue....they can jump queues if they have the money to do so."

France: France has a relatively robust social security system and a health system that covers more than ours. They also have two-tier healthcare and many problems in their health system. The system is rife with unnecessary duplication and over-capacity. (In a two-tier system, health facilities try to compete with each other by buying expensive medical equipment etc.). The high costs of these items are borne by health care professionals and workers. France's doctors are paid about half our rate. France's government is grappling with rising health costs, over-prescription and high drug costs and other issues.

United Kingdom: Under the privatization, restructuring and two-tier health system, the UK has seen its health care administrative costs skyrocket. Kirby heard the following testimony about the unfairness and queue-jumping in Britain from Clive Smee, Chief Economic Advisor, Economic and Operational Research Division of the U.K.: "In terms of jumping queues, yes it happens....That is seen, of course, as a cause of unfairness, which is one of the reasons that the government is committed to bringing down waiting times for National Health Service patients as rapidly as it can."

United States: The US private health system costs more than two times our cost per person and, in fact, Americans pay more in taxes for health care than we do. Even so, 43 million Americans have no health insurance. Costs are escalating at a rate that has thrown private industry into crisis and causing layoffs and pensions cuts. The huge private health industry in the U.S. continues to stand as a powerful barrier against those who want to create a public health system there.

For more information and resources on the Chaoulli case, see www.medicare.ca

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