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Dreaded two-tier zombie walks among us still

Most observers thought the concept was dead and buried

By Thomas Walkom

The zombie walks again.

It was released from the grave this week by a slim majority of justices on Canada's Supreme Court who ruled that, whether they want it or not, Quebecers have a right to two-tier medicine.

For a while, it looked as if we had buried that hoary old corpse. The idea of a private, parallel health-care system has been looked at, and rejected, by every serious inquiry into the state of the Canadian system.

It has also been rejected by every serious politician.

Roy Romanow's 2002 royal commission into health care recommended sticking with a single tier public system. That's well-known.

But Romanow was not unique. A 2002 panel handpicked by Alberta Premier Ralph Klein and headed by former Conservative finance minister Don Mazankowski also rejected the idea of a parallel, private health-care system.

So did a Senate committee headed by Senator Michael Kirby that reported the same year.

Dalton McGuinty's Ontario Liberal government has passed legislation committing his province to the Canada Health Act, the federal law that precludes two-tier health care.

But so has Klein's Conservative government in Alberta.

Even federal Conservative Leader Stephen Harper - a former admirer of two-tier health - says he is now on side. In April, he faced down the Fraser Institute, a right-of-centre think tank that harbours the last few remaining supporters of a parallel private system, and told them bluntly that their notion was a non-starter.

With this, it appeared that the health policy debate had finally moved on in Canada - from how to pay for medicare to how to deliver it.

But as a team headed by University of British Columbia health economist Bob Evans warned 11 years ago, the undead are difficult to kill.

"Like zombies in the night, these ideas may be intellectually dead but are never buried," Evans and his colleagues warned in a health policy paper done for the Ontario government.

"They may lie dormant for a time ... but when stresses build up, either in the health-care system or in the wider public economy, they rise up and stalk the land."

How prescient these comments were.

This time, it was Canada's Supreme Court that unlatched the coffins. Its 4-3 decision on Thursday set the stage for a full two-tier system in Quebec.

And three judges, including Chief Justice Beverley McLachlin, served notice that the rest of the country may soon be required to follow.

To read the decision is a depressing exercise. Supreme Court rulings even those with which one disagrees - are usually elegantly logical.

But in this case, Canada's latest zombie-rousters fall prey to many of the same old fallacies.

The minority judgment written by McLachlin and Justice John Major, saying that the Quebec laws offend the Canadian Constitution's Charter of Rights and Freedoms, is particularly curious.

Its authors were strangely casual in dismissing experts who disagreed with them, calling their conclusions little more than "assertions of belief."

Yet, as Justices Ian Binnie and Louis LeBel point out in a second minority judgment, the chief justice and her allies accepted without comment the equally non-scientific, anecdotal evidence of another witness whose arguments happened to support their position.

In this case, the testimony involved a golfer waiting for health services who was unable to enjoy his club membership for a season.

As well, noted Binnie and LeBel, the chief justice and her allies paid little heed to a raft of scientific evidence demonstrating that two-tier medicine may harm the public system.

In particular, they did not take into account evidence that parallel private systems can and do drain resources from public medicare schemes.

McLachlin and Major ignored not only the findings of Romanow whom the majority appeared to discount as overly emotional, but of Kirby, whom they cited approvingly. They made no reference to a Manitoba study presented to the court that didn't mesh with their conclusions.

Nor did they mention a similar report, done for the federal justice department and also provided to the court. It found that doctors in Australia's two-tier system favour their more lucrative private patients and cause wait times to increase in public medicare.

McLachlin and Major often cited Kirby's senate report to back up their assertion that permitting private insurance would not harm medicare overall. And, on the face of it, their arguments sound compelling.

If Sweden, France, Austria, Germany and Australia permit private insurance alongside medicare, why shouldn't Canada?

But as Binnie and LeBel note, this reading of the Kirby report was remarkably selective.

In the end, after examining health-care systems in Europe and elsewhere, Kirby and his colleagues recommended that Canada not cherry-pick from these jurisdictions but, instead, reform the existing single-tier system.

Exactly why the Supreme Court chose to breathe life into the corpse of two-tier medicine is not clear.

The complainants, George Zeliotis and Dr. Jacques Chaoulli, were not facing medical emergencies. Chaoulli is a long-time opponent of medicare whose motives the original trial judge called questionable. Zeliotis underwent the hip surgery he required, and for which he said he waited too long, well before he filed his original lower court case eight years ago.

Moreover, the judge who heard that first case ruled that the delays Zeliotis experienced in getting this surgery resulted not from any deficiencies in the Quebec medicare system but from "depression, his indecision and his complaints, which in many respects were unwarranted."

But, as Evans and his colleagues noted in their seminal zombie paper, worthless ideas may resurface for two reasons.

One is that they appear simple. To someone who must wait six painful months for surgery, the debate over two-tier health might appear a no-brainer.

Why shouldn't he be allowed to spend his own money to get faster service?

Indeed, if there were an infinite number of physicians and nurses, there would be no reason to prevent the practice. But there are not - in any country.

The problem with two-tier health comes in the aggregate, as the limited number of health professionals available gravitate to those who pay the most.

That's why a solution for one person can become a problem for someone else.

The second reason why zombies walk again is that some people benefit from two-tier medicine - particularly those who have enough money to take advantage of private health care (including most commentators in the metropolitan media) and those who hope to make more money from providing such services (including a good many physicians).

Evans and his co-authors called these people the zombie masters. This week's Supreme Court decision breathed new life into them, too.