

Chaoulli v. Quebec (Attorney General)

2005 SCC 35

1. ISSUE

Jacques Chaoulli, a Quebec doctor and George Zeliotis, his patient, challenged sections in the Quebec health and hospital insurance laws that make private health insurance illegal. They claimed 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. The Quebec trial judge dismissed the claim. The Quebec Court of Appeal agreed.

2. DECISION

The Supreme Court of Canada split 4 to 3 on the issue, giving three separate sets of reasons. The majority of 4 justices held that the appeal should be allowed and that the Quebec prohibitions on private health and hospital insurance are inconsistent with the Quebec Charter.

Justice Deschamps held that the Quebec Charter protection of life and personal security had been violated and the provision banning private health insurance is not justified. Chief Justice McLachlin and Justice Major (with Justice Bastarache concurring) held that the Quebec laws also breach s. 7 of the Canadian Charter of Rights and Freedoms. They held that delays in treatment could breach the right to life and security of the person. The laws prohibiting private insurance were contrary to the principles of fundamental justice because they were arbitrary and not justified under s. 1 of the Charter.

The majority ruling dismissed expert evidence accepted by the trial judge as well as the evidence of the Romanow Commission. Instead, they cited evidence from Senator Kirby's interim report (selectively citing OECD countries out of context) and Dr. Erwin Coffey of the Montreal Economic Institute, a libertarian think tank funded by the Donner Foundation. These two "experts" form the basis of Justice Deschamps' assertion that a private parallel health insurance system does not impact negatively on the public system. [Senator Kirby, a senior director of Extencicare Inc., and Dr. Coffey have a combined total of zero (0) peer-reviewed publications to their credit.]

In a blistering dissent, Justices Binnie and Lebel (with Justice Fish concurring) held that waiting times could violate the right to life or security of the person. Even so, they held the prohibition on private health insurance is not arbitrary because it is intended to protect equality of access in the health care system:

“...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 Quebec. We do not believe that such a seismic shift is compelled by either the Quebec Charter or the Canadian Charter.” (par. 176).

The dissenting judges also criticized the majority for selective use of evidence:

“The appellants’ argument about ‘arbitrariness’ is based largely on generalizations about the public system drawn from fragmentary evidence, an overly simplistic view of the benefits offered by private health insurance, an oversimplified view of the adverse effects on the public system of permitting private sector health services to flourish and an overly interventionist view of the role of the courts..” (par. 169)

They found that on the legal issues raised, the appeal should be dismissed:

“The public cannot know, nor can judges or governments know, how much health care is ‘reasonable’ enough to satisfy s. 7 of the Canadian Charter of Rights and Freedoms.” (par. 163).

3. IMPLICATIONS

This judgment raises important legal and political questions. While it applies in Quebec, the reasoning could be used to challenge similar laws in other provinces on the basis of the Canadian Charter.

It is not clear how other provinces can meet the test the court applies for Charter compliance. There is no standard to measure against. The implications for other provincial health insurance regimes have to be carefully reviewed. In addition to the legal uncertainty, there is a major political challenge, especially because of the ideological commitment to privatize health service delivery by the current governments in Quebec, Alberta and British Columbia.

4. ACTIONS

The Canadian Health Coalition is calling on the federal government to:

- A. Recommit to defend the right of all Canadians to universal and equal access to health services regardless of ability to pay.
- B. Develop benchmarks for waiting times and strategies for applying them to ensure timely access and to conform with the Canadian Charter and other human rights law.
- C. Work with provincial and territorial governments to ensure their Medicare laws protect equality of access with equal terms and conditions and shield health insurance and service delivery from commercialization and international trade rules.
- D. Enforce compliance with the *Canada Health Act* and stem the tide of privatization that undermines the objectives of the *Act* and threatens the viability of Medicare.

Ottawa, June 23, 2005
www.medicare.ca

