The Impact of the Supreme Court of Canada's Decision in Chaoulli v. Québec (Attorney General)

CASE SUMMARY

On June 9, 2005, the Supreme Court of Canada released its landmark decision in Chaoulli v. Quebec (Attorney General). Dr. Chaoulli challenged the constitutionality of section 11 of the Québec Hospital Insurance Act and section 15 of the Québec Health Insurance Act, which together establish a prohibition in Québec on private insurance for health care services that are available in the public system.

Dr. Chaoulli and his patient George Zeliotis launched the legal challenge in 1997 after Mr. Zeliotis had waited a year for hip-replacement surgery. The Québec Superior Court and the Québec Court of Appeal upheld the ban on private insurance and dismissed Dr. Chaoulli’s action. The case reached the Supreme Court of Canada during a one-day hearing on June 8, 2004.

By a narrow 4-3 majority, the Supreme Court of Canada ruled that the ban on private health insurance in Québec violated the Québec Charter of Human Rights and Freedoms (“Québec Charter”), and was therefore void and unenforceable. The majority of the Court (McLachlin C.J., and Justices Deschamps, Major and Bastarache) held that the ban on private health insurance contributed to lengthy waiting lists for some procedures in the province of Québec. They ruled that those waiting lists had become so long that they violated some Québec patients’ rights to life and personal inviolability protected by section 1 of the Québec Charter. The majority further held that the infringement of those rights protected by section 1 was not justified under section 9.1 of the Québec Charter. As a result, the majority found the prohibition to be unconstitutional.

McLachlin C.J., and Justices Major and Bastarache also held that where delays in the public health care system are unreasonable, the ban on private health insurance violates the right to life and security of the person protected by section 7 of the Canadian Charter of Rights and Freedoms (“Canadian Charter”), and is not justified under section 1 of the Canadian Charter. Justice Deschamps agreed that the trial judge did not err in finding that the prohibition violated section 7 of the Canadian Charter. However, while Justice Deschamps noted there were differences between section 1 of the Canadian Charter and section 9.1 of the Québec Charter, she did not rule as to whether the breach would be saved under section one of the Canadian Charter.

Justices Binnie, LeBel and Fish wrote in dissent that the ban on private health insurance did not violate either section 1 of the Québec Charter or section 7 of the Canadian Charter.

IMPACT OF THE DECISION

The Supreme Court of Canada decision does not alter the Québec public health care plan. Rather, it permits private insurance companies to sell health insurance in Québec for all medical and hospital services. In essence, it allows for alternative methods of insurance and health care delivery to operate in addition to the public system, leaving to the Québec government the task of regulating how a private system of this sort can function alongside a public system. Although the decision takes effect immediately, the government of Québec has indicated that it will apply for a delay in the application of the decision.
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The decision has no immediate impact outside of Québec, where the Canadian Charter applies. On this issue (whether the Québec legislation violated the Canadian Charter), the Court did not reach any determination, and the six judges who considered the issue were evenly split.

However, the long-term implications of the decision on provinces other than Québec are less clear. It is widely accepted that the decision will lead to changes in the Canadian health care system, yet at this early stage it is premature to assume any particular impact. The full result of the decision is hard to predict and largely speculative.

(a) The Prospect of Similar Legal Challenges in Ontario

That said, litigation challenging similar legislation in other provinces can be reasonably anticipated.

Like Québec, the province of Ontario also bans private health insurance. Section 14 of the Ontario Health Insurance Act states:

14.(1) Every contract of insurance, other than insurance provided under section 268 of the Insurance Act, for the payment of or reimbursement or indemnification for all or any part of the cost of any insured services other than,

(a) any part of the cost of hospital, ambulance and nursing home services that is not paid by the Plan;

(b) compensation for loss of time from usual or normal activities because of disability requiring insured services;

(c) any part of the cost that is not paid by the Plan for such other services as may be prescribed when they are performed by such classes of persons or in such classes of facilities as may be prescribed,

performed in Ontario for any person eligible to become an insured person under this Act, is void and of no effect in so far as it makes provision for insuring against the costs payable by the Plan and no person shall enter into or renew such a contract.

(2) A resident shall not accept or receive any benefit under any contract of insurance prohibited under subsection (1) whereby the resident or his or her dependants may be provided with or reimbursed or indemnified for all or any part of the costs of, or costs directly related to the provision of any insured service.

This prohibition is similar to the prohibitions considered by the Court in Chaoulli, which read as follows:

Section 15 of the Québec Health Insurance Act:

15. No person shall make or renew a contract of insurance or make a payment under a contract of insurance under which an insured service is furnished or under which all or part of the cost of such a service is paid to a resident or a deemed resident of Québec or to another person on his behalf...

Section 11 of the Québec Hospital Insurance Act:

11.(1) No one shall make or renew, or make a payment under a contract under which (a) a resident is to be provided with or reimbursed for the cost of any hospital service that is one of the insured services;
(b) payment is conditional upon the hospitalization of a resident; or

(c) payment is dependent upon the length of time the resident is a patient in a facility maintained by an institution contemplated in section 2…

Despite the similarity of these prohibitions, it is difficult to speculate whether a challenge to the Ontario legislation would have the same outcome as in the Chaoulli decision. This is due to a significant difference in a related element of their health care delivery systems. Québec does not limit the amount charged by physicians who do not participate in the Québec public health care plans. Thus, physicians in Québec who opt out can charge higher amounts in exchange for making medical services available to a patient sooner than they would receive them in the public system. In contrast, Ontario legislation bans payments of amounts greater than that paid by OHIP. Section 10 of the Commitment to the Future of Medicare Act, 2004 provides:

10(1) A physician or designated practitioner shall not charge more or accept payment or other benefit for more than the amount payable under the Plan for rendering an insured service to an insured person.

(3) A physician or designated practitioner shall not accept payment or benefit for an insured service rendered to an insured person except,

(a) from the Plan, including a payment made in accordance with an agreement made under subsection 2(2) of the Health Insurance Act;

(b) from a public hospital or prescribed facility for services rendered in that public hospital or facility; or

(c) if permitted to do so by the regulations in the prescribed circumstances and on the prescribed conditions.

As a result, striking section 14 of Ontario’s Health Insurance Act alone would likely result in little change in Ontario. Because private insurance plans could not pay physicians a greater amount than medicare for a service, there would be no financial incentive for physicians to opt for the private sector. Unless there are other factors, financial or otherwise, enticing physicians to provide care in the private sector, there would appear to be no benefit to Ontarians to purchasing private insurance.

That said, Ontario’s ban on accepting greater payment from a private insurer might also be challenged if the matter of access to timely medical care were considered by an Ontario court. To the extent that it contributes to the waiting list problem, there is a possibility that it might be found to infringe the right of Ontarians to life and security of the person as provided for in the Canadian Charter.

However, there are additional factors which make the outcome of a constitutional challenge to the Ontario legislative provisions unpredictable. One is the difference between the right to security of the person under the Québec Charter and the right to security of the person under the Canadian Charter. The protections afforded by the two Charters are not identical:

**Canadian Charter**
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

**Québec Charter**
1. Every human being has a right to life, and to personal security, inviolability and freedom.
To establish a violation of the Canadian Charter, the claimant must prove not only that his or her right to security of the person has been infringed, but also that the infringement is not in accordance with the principles of fundamental justice. There is no such dual burden of proof under the Québec Charter.

In addition, future challenges reaching the Supreme Court of Canada could go in unexpected directions given that two of the present justices did not take part in the decision (Justices Abella and Sharon), and a third did not take a position on the Canadian Charter issue (Justice Deschamps). On the fundamental Charter issue, our highest court has expressed a 3-3 split, with the position of the remaining three judges unknown.

That said, the use of Charter litigation to compel health care policy reform has become a popular response to perceived bureaucratic and legislative inaction to citizen demands for better health care. The favourable decision for the plaintiffs in this case serves as a precedent, and may spark a flurry of other legal challenges from those who might previously have hesitated launching a lawsuit.

(b) A Catalyst for Debate and Reform

While it is presently unclear what the implications the decision will have on provinces other than Québec, it is clear that the issue of growing access problems and unreasonable waiting lists can no longer be avoided by governments. In many respects, the ruling is a warning that if governments do not take action to address the problem of lengthy waiting lists, the courts will intervene.

The prospect of avoiding the rise of private health care by strengthening the public system is reflected in the decision of McLachlin C.J., who wrote that while “the prohibition on obtaining private health insurance might be constitutional in circumstances where health-care services are reasonable as to both quality and timeliness, (it) is not constitutional where the public system fails to deliver reasonable services.”

From this statement it appears that bans on private health insurance could withstand a Charter challenge if the public health care system were managed and administered in a way that avoids long waiting lists. Other provinces could potentially meet the spirit of the ruling by reducing waiting lists for care, without inviting private care and insurance. However, in order to do so governments must act quickly to ensure people have timely access to safe and reasonable quality health care.

In this sense, the ruling has the effect of imposing an ultimatum on provincial governments to either build into their health care delivery systems an assurance of timely care, or allow the development of a private medical and insurance system. It is this aspect of the decision that provides the powerful impetus for governments to speed up efforts to reform the system. Whether or not the federal and provincial governments will take such action remains to be seen.

(c) Impact on Ontario Hospitals

Because the ruling in Chaoulli applies only in Québec, it has no direct or immediate impact on the manner in which public hospitals in Ontario are currently delivering their services.

If the Ontario government continues to focus on waiting list strategies and is successful, the factual basis for the Charter challenge in the Chaoulli decision (lengthy waiting lists) may not be present in Ontario in the future. To achieve reduced waiting times the government will no doubt continue to focus on the accountability mechanisms available to it under Ontario’s Commitment to the Future of Medicare Act.

In the end the government has the ultimate authority to regulate the terms under which health care, both public and private, is delivered. It is important to note that the Supreme Court of Canada in Chaoulli acknowledged that a provincial government has the authority to legislate in a manner that discourages the establishment of a parallel private system.
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However, where waiting lists have become unreasonably long, deterrents that amount to a total prohibition of a private system may be unconstitutional. That said, the decision appears to leave open the possibility that a government could lift the ban on private health insurance but put in place other measures aimed at discouraging the establishment of a private system.

(d) Impact on Patient Care

Given that the ruling is limited to the province of Québec, the Chaoulli decision has no immediate or direct impact on the provision of publicly funded medical care to patients in Ontario hospitals. However, the decision has opened the debate about private health care services, and is placing enormous pressure on government to take action to reform the delivery of health care services.

In Chaoulli a number of arguments were raised about the potential negative impact of a private system on the publicly funded system. After considering the evidence of other jurisdictions which have both a public and private system, the Court found these arguments to be unconvincing. The majority was not persuaded that removing the prohibition on private health insurance, in and of itself, would have a detrimental impact on public health care.

It would be premature at this point to speculate about what the long-term impact of the decision on patient care in Ontario might be. That will ultimately depend on a variety of factors which are too numerous to canvas fully within the scope of this bulletin.

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