

CHAULLI AND UNIVERSALITY — A TIMELY CHARTER TEST CASE

Stanley H. Hartt

In the *Chaoulli* case, the Supreme Court decided that Quebec's prohibition against private health insurance violated Quebec's Charter of Human Rights and Freedoms. The decision set off "paroxysms of shock and horror," writes Stanley Hartt, from what he terms "the single-tier lobby" on health care. Though the case was based on the unacceptability of unreasonable wait times for elective surgery, and Quebec has since passed legislation for reducing waits, for example, for eye surgery, the other provinces are a study in inaction. "Ontario," he writes, "has gone to the mat" with a patient who went to England to receive a procedure not available in Ontario. Refused reimbursement by Ontario's OHIP program, he has since sued, claiming his security of the person rights under section 7 of the Charter have been violated. Read on.

Dans l'affaire Chaoulli, la Cour suprême a établi que l'interdiction au Québec de souscrire une assurance maladie privée violait la Charte des droits et libertés de cette province. Le jugement a déclenché « des réactions horrifiées » chez le « lobby du système à vitesse unique », écrit Stanley Hartt. La cause reposait sur le caractère inacceptable des temps d'attente en chirurgie électorive et Québec a voté depuis une loi visant à réduire ces délais, en chirurgie des yeux notamment. Mais les autres provinces sont restées inactives. L'Ontario est montée au créneau lorsqu'un patient s'est rendu en Angleterre pour bénéficier d'une procédure non offerte dans la province. Le programme OHIP de l'Ontario ayant refusé de le rembourser, ce patient a engagé une poursuite au motif d'une violation des droits de sécurité des personnes inscrits à la section 7 de la Charte canadienne. Lisez ce qu'il en est.



The reaction to the 2005 decision of the Supreme Court of Canada in *Chaoulli v. Quebec* on the part of staunch defenders of our public system was most perplexing. Instead of rejoicing that the justices had drawn a constitutional bright line telling us the circumstances under which the government monopoly provider could validly prohibit private payment or insurance for services covered by the state plan (i.e., delivery within medically advisable delays), they saw only a wedge driven into the universal medicare system which would ultimately pave the way for parallel private delivery and payment.

These "I-like-it-just-the-way-it-was" adherents of the *Canada Health Act* failed to grasp that the alternative to the test developed by the Court was to strike down the entire system as violating the Charter's guarantees of security of the person. Were it not for the intervention of members of the Senate, led by Michael Kirby and Dr. Wilbert Keon, who posited the concept of a health care guarantee as the solution to the rights infringement identified by the majority, the stark choice for the Court would have been between the status quo and the dismantling of the system which prom-

ised universal, single-tier care but failed to deliver while it still mattered.

What part of the good news did they not understand? Your beloved system is okay. It meets the constitutional test as long as services are delivered in a medically timely manner. Why all the long faces? Could it be because they really don't believe that Canada's single-payer health insurance plan can meet this simple test? Are they actually contending for allowing the status quo to continue to inflict pain, deterioration of health, permanent tissue damage and even death on randomly selected unfortunates who fall through the cracks in order to ensure the greatest good for the greatest number?

Why are they not marching in the streets to demand more funding for the provincial health schemes? The adherents of government-run programs always assume that more funding can solve any problem (even though the Alberta experiment which dramatically shortened wait times for hip and knee replacements demonstrated that it is reorganization of the delivery system, including the prerogatives of medical and non-medical participants — and

not cash — that is needed). The failure of the apologists to demand whatever it takes to provide medically timely care in order to protect the system from constitutional challenge is positively eerie.

A year after the *Chaoulli* judgment, when the government of Quebec responded with its Bill 33, the single-tier lobby went into paroxysms of shock and horror. Rather than seeing Quebec's method of complying with an order from Canada's highest court as ingenious and minimalist, they reacted with "beginning of the end" scenarios.

The Supreme Court had acceded to Quebec's belated request for time to bring its legislation onside with the *Chaoulli* ruling (belated, because the lawyers for Quebec were so sure they were going to win that they never asked for a delay to implement the decision in the course of the hearing before the Court) by allowing one year for the Quebec government to amend the impugned sections of the *Health Insurance Act* and the *Hospital Insurance Act*.

Quebec had originally toyed with a much broader solution than what was ultimately proposed. If part of the problem which led to lengthy waiting times endured by patients was that physicians were capped as to the number of hours per month they could bill the public system (and thus closed their offices or did paid insurance examinations for the rest of their productive time), why not allow doctors to work privately once they had reached their monthly maximum? It didn't take long for the policymakers to figure out that such a dual monthly roster would encourage practitioners to divide patients into "can-pay" and "can't-pay" categories, and advise the former that they would be seen much more quickly if they made a pay-side appointment instead of wait-

ing for two or three months to see the same doctor in the same office on the public side of the cap.

So Quebec's response was much more modest and much less threatening to the public system than its loyalists pretend. Three operations were identified where there were lengthy waiting lists — hip and knee replacements and cataract surgery. It would be legal to insure for these three procedures and to have them paid for in private clinics if they could not be obtained within a medically reasonable time in the public system — a sort of mini health care guarantee.

A strong argument could be made that Quebec had failed to comply with the Supreme Court's ruling by restricting the availability of insurance to these three types of interventions. The saving grace for the Quebec response was that it legitimately targeted those procedures where the waiting times were most egregiously long (the *Chaoulli* case had been about the hips of co-plaintiff George Zeliotis and had nothing to do with knees or eyes), but made provision for other procedures to be added to the list of privately insurable services by regulation, presumably when wait times for those treatments surpassed the constitutional test of medical advisability.

No one remembers the Supreme Court coming up with this particular list. The tribunal's order was much more general — fix your waiting times to make them medically acceptable or face the generalization of access to private care, private payment and private insurance. In that sense, the purists ought to have been delighted. But no, they saw the fact that these privately paid services would have to be delivered in private surgeries as the end of the world as they knew it. What next? Private diagnostic imaging? Private emergency care?

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Future litigation in Quebec would, therefore, likely take the form of a complaint that a patient had been waiting for a particular service longer than the consensus of medical opinion generally thought was safe, and yet the province had not adopted a regulation adding that particular procedure to the list of insurable services. Quebec has probably successfully skated around the Court's intent, even though any insurance expert will tell you that it is very difficult to design a insurance plan for three surgical operations that no one but people who already need them would think of buying in advance.

But what of the other provinces? At the time of the *Chaoulli* decision, the supporters of the status quo breathed a collective sigh of relief audible in Victoria and St. John's: the judgment only applied in Quebec! Of course it only applied in Quebec: the only ruling sought was the invalidity of two provisions of Quebec law. The Court could not generalize the disposition of the case by extending it to the laws of other provinces which were not in issue. Moreover, the justices wisely decided to allow the deciding vote to be cast by a Quebec jurist who based her decision on the Quebec Charter alone, without coming to any conclusion about the

application of section 7 of the Canadian Charter of Rights and Freedoms, as to which the other six were evenly divided.

There is an expression used by lawyers which distinguishes between a case which is a valid precedent “by reason of authority” and one which has influence “by the authority of reason.” Clearly, *Chaoulli* applies only in Quebec on the first ground — the rule of stare decisis does not make this law in Ontario or Alberta. But the reasoning of the four judges of the majority puts the issue squarely before the attorneys general of every other province. How would they like to appear before any court, first instance, appellate or last resort, arguing the view of the dissenting minority: yes, people are suffering and dying in my province because we can’t get our act together and deliver the Canadian dream of universal, single-tier health care in a manner that medical professionals agree is timely, but the expenditure of public funds is a political matter. Money doesn’t grow on trees. So in just this one instance, the state has the right to kill you by oversight or neglect for no particular reason attributable to you, but, despite the fact that this is arbitrary as hell, it is somehow consistent with the principles of fundamental justice because no one can tell the state how many MRIs the Constitution requires!

In fact, the only imaginable defence to a *Chaoulli*-like suit commenced in any of the nine other provinces that has the least chance of not ending the political career of the justice minister or attorney general who authorizes it is that there are no wait times in the province that go beyond the norms established in *Chaoulli*; that is, though people may have to wait for care, none of the lists extend beyond the times which, for the particular diagnosis, treatment, procedure or surgery, exceed what medical consensus generally regards as timely.

So one would expect the other provinces to be labouring mightily to reduce waiting times, implement health care guarantees and avoid the



The Gazette, Montreal

And the winner is...Dr. Jacques Chaoulli, whose lawyers argued in the Supreme Court that Quebec’s ban on private health insurance not be upheld. The Court agreed, by a 4-3 margin, that the ban violated Quebec’s Charter of Human Rights and Freedoms.

Chaoulli wolf at their doors. If this is going on, there is no external evidence for it. Granted, the same medical acts are not in short supply in each province. Some, like Ontario, already have substantial cancer care and heart bypass programs in place so that surveys of delinquent availabilities would not include those. But the lists might well include these two all-too-common life-saving treatments in other provinces. Although federal health minister Tony Clement is said to be beavering away behind the scenes, working with individual provinces to create a viable health care guarantee (and, incidentally,

honour one of the five key planks in the Conservative government’s election platform), there is no evidence of progress on the political surface. There is no need to come up with a national, blockbuster, budget-busting great-for-announcing solution: the problems are different in every province, and the responses should be different too.

This is not a question of money. There is already plenty of money being pumped back into the system thanks to the 10-year Health Accord agreed to between the federal and provincial governments in 2004.

Moreover, as argued above, the need may not in fact be for more money so much as for hospital administrators, doctors, nurses, bureaucrats and patients to stop assuming that "state-paid" requires that delivery be in a huge pile of bricks and mortar called a "hospital," where it costs a fortune to heat and light the building and invite the unionized staff in.

Meanwhile, does it appear that the administrations of other provincial health plans are bracing themselves for a *Chaoulli* defence? Not at all. They appear to be doing business-as-usual, one-size-fits-all medical care with budget-preserving rules that make no sense and are extremely vulnerable to attack.

Alberta has chosen to contest the case of one Bill Murray (not the one from *Lost in Translation*, though an examination of the facts of his case might lead one to conclude that comprehension was at least part of the problem).

Murray is a chartered accountant who was plagued with two painful hips. He waited for over a year in severe pain to see a specialist about his left hip. Once under the care of the specialist, a procedure called "Birmingham hip resurfacing surgery" was recommended rather than an outright joint replacement. "Gotcha," said the Alberta government. "We can't be expected to pay for this expensive treatment for old guys" (Murray was 57 at the time). "We only pay for this for people 55 and younger. You'll have to pay for it yourself!" Pain has a way of altering priorities, and Murray came up with \$15,000 to improve his quality of life.

It gets better: when the right hip started acting up, the same specialist recommended the same procedure, which had been successful in retaining mobility while alleviating pain. "We've got a new rule," said the Alberta medical bureaucracy. "If you're not eligible for the insured service, we're sorry but you can't have it here even if you pay for it." So poor old Murray went to Montreal, where he paid

(much less than in Alberta) and is now claiming that the denial of treatment to him on the grounds of his age, in light particularly of the enormous pain he suffered, was unconstitutional. He is citing *Chaoulli* as an applicable precedent, clearly by the authority of the reasoning in

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the judgment, not because he asserts that the Court's ruling is binding on Alberta.

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Both these cases make a point that is different from *Chaoulli*: they are not about waiting times but about being denied medical services entirely, in the first case because of an artificial age limitation and in the second because Ontario couldn't afford the newest techniques commonly practised in other jurisdictions. Both are based on parsimony, but in *Chaoulli* the claim was for the right to be able to pay or insure privately for services that are covered but not delivered in a timely fashion. Murray and Flora were not denied the right to pay for their treatments, only the right to pay for them in their home province.

It seems a shame that other provinces should need to run the traps all the way to the Supreme Court to get the point: there is no right to health care which a citizen can claim from his or her government, but if a government chooses to provide a

health insurance plan, and determines that a monopoly provider arrangement will keep costs lower for everyone, all they have to do to enforce the prohibition against private or insured care is to provide it themselves. They can't arrogate the monopoly to themselves and not provide timely care.

Eventually, plaintiffs with more *Chaoulli*-like claims (undue waiting times in the public system) will be identified and defenders of patients' rights will take these cases as far as needed to establish that *Chaoulli* applies in every part of Canada.

Sooner or later the supporters of medicare will get it too: *Chaoulli* doesn't threaten medicare. It gives governments a prescription for how to preserve it. If care delayed or denied is unconstitutional, organize your system so that care within medically advisable time-frames is available. The health care guarantee is the way to save medicare, not the hand-wringing and grousing of the stand-pat crowd!

Stanley H. Hartt, deputy minister of finance in Ottawa from 1985 to 1988, was later chief of staff to Prime Minister Mulroney from 1989 to 1990. He was counsel to members of the Senate Committee on Social Affairs, Science and Technology who intervened at the Supreme Court on behalf of Dr. Chaoulli.