THE CHAOULLI CASE

AND

ITS IMPACTS

ON

PUBLIC AND PRIVATE HEALTH INSURANCE

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On June 9, 2005, the Supreme Court of Canada rendered judgment in the matter of Chaoulli and Zeliotis against both the Province of Quebec and Canada. Chaoulli and Zeliotis pretended that the prohibition of obtaining private insurance covering hospital and medical services that are covered under the provincial health care program of Quebec but are not timely available because of unduly long waiting lists is in contradiction with both the Canadian and the Quebec charters of rights and freedoms. Chaoulli and Zeliotis had been turned tuned down by lower courts and made an appeal to the Supreme Court. This appeal was allowed by the Supreme Court, at a simple majority (4 against 3)

This case was the first serious challenge to the Canadian public health system and, among other things, addressed the question of whether a province can prevent its residents from using private insurance to pay for services that are normally covered by the provincial Medicare program. Beyond this rather straightforward question, the Chaoulli decision has a very special importance because not only does it open the door to private health insurance, but it also surely fuels the debate about the shortcomings of the provincial health care programs and the role that private insurance can play in an area that has long been considered the exclusive realm of the provincial governments.

It must not be forgotten that the judgment was made at a very narrow majority. Even though most of the attention will be given to the opinion of the majority Justices, the arguments presented against the appellants by the dissenting Justices deserve consideration, especially considering that the final decision might have been different if any of the two Justices who did not take part to the deliberations has sat in place of one of the majority Justices.

This Study Note summarizes many of the more relevant issues discussed by the Court. We often used words and sentences drawn directly from the text of the judgment, which can be found on the following website: http://www.lexum.umontreal.ca/csc-scc/en/index.html. This Note also summarizes the reaction of the Quebec government to the judgment and briefly analyses some of the potential impacts of this situation.

GENERAL CONTEXT

The Canadian Medicare system consists of provincial plans that cover physician care, surgery and hospitalization in a public ward in Canada, at no cost to the patient. The system is a quasi-monopoly as there is little incentive for patients, except the waiting lists, to seek treatment outside the system.

Although an overwhelming majority of physicians are under contract with the provincial Medicare programs and do provide services within the framework of the provincial plan, no law forces them to contract with Medicare. As a result, there are physicians in each province who practice privately, outside the provincial system. These physicians charge their patients directly for the same services as those that are available at no cost to patients who see a physician who has contracted with Medicare. By practicing outside the system, these physicians are not subject to quotas or cost containment schemes set up by the provincial program.

Currently, six Provinces (Quebec, Ontario, Manitoba, British Columbia, Alberta and Prince Edward Island) prohibit private insurance of hospital and medical services obtained outside their provincial Medicare program, if these services are available under the provincial program. The other Provinces (New Brunswick, Newfoundland and Labrador, Nova Scotia and Saskatchewan) allow private insurance to cover these services.

All provinces (except Newfoundland and Labrador), including the four who allow private insurance of services that are available under the provincial Medicare program, take steps to protect the public health system by discouraging the private sector:

- Quebec, Ontario, Alberta, British Columbia, Manitoba, and Prince Edward Island prohibit private insurance of services that are available under the provincial Medicare plan.
- In addition to prohibiting private coverage, Quebec, Alberta, British Columbia and Prince Edward Island allow non-participating physicians to set the amount of their fees, but the cost of the services is not refunded by the provincial plan.
- Ontario, Manitoba and Nova Scotia prohibit the doctors who opt out of the public sector from billing their private patients more than the public sector tariff, thereby dulling the incentive to opt out
- Quebec, Alberta, British Columbia, Saskatchewan, New Brunswick and Prince Edward Island have eliminated any form of cross-subsidy from the public to the private sector

On the other hand, Saskatchewan, New Brunswick and Newfoundland and Labrador are open to the private sector:

- New Brunswick allows physicians to set their own fees.
- In Saskatchewan, this right is limited to non-participating physicians. The cost is not refunded by the public plan, but patients may purchase insurance to cover those costs.
- In Nova Scotia patients may purchase insurance to cover health care obtained in the private sector.
- Newfoundland and Labrador agrees to reimburse patients, up to the amount covered by the public plan, for fees paid to non-participating physicians. In Newfoundland and Labrador, patients may subscribe to private insurance to cover the difference.

Ontario and Manitoba are somewhat more neutral toward the private sector as they prohibit insurance contracts but refund amounts paid by patients to non-participating physicians.

The attitude of the provinces that are hostile to private delivery of medical care is based on an interpretation of the Canada Health Act, whereby the provinces judge that growth of the private sector would undermine the strength of the public sector and its ability to achieve the objectives of the *Canada Health Act,* (mostly the objective of accessibility) by diverting resources from the public sector to the private sector.

THE PROTAGONISTS

It is not surprising that even though the issue merely opposed two citizens to the Quebec and to the Federal governments, many persons and associations were granted the status of interveners by the Supreme Court. The interveners included the Attorneys General of three Provinces (Ontario, New Brunswick, and Saskatchewan), four physicians' associations (along with the former president of another physicians' association), 14 clinics (mostly surgical clinics), 10 senators, the Canadian Labour Congress, and the Charter Committee on Poverty Issues and Canadian Health Coalition.

The Appelants

George Zeliotis is a patient who has suffered from a number of health problems that prompted him to speak out against waiting times in Quebec's public health care system.

Dr. Jacques Chaoulli is a physician who has tried unsuccessfully to have his home-delivered medical activities recognized and to obtain a license to operate an independent private hospital.

The Respondents

The **Federal government**, through the ***Canada Health Act***, sets criteria for Provinces to qualify for a federal cash contribution under the Canada Health and Social Transfer.

If the Medicare program of a Province meets the following criteria, the Province is eligible for Federal funding:

- The program must be publicly administered;
- The program must be comprehensive;
- The program must be universal;
- Coverage must be portable form one province to another;
- Coverage must be accessible.

The ***Canada Health Act*** does not make it illegal to sell or buy private insurance covering services that are similar to those covered by a provincial Medicare plan. However, it specifically discourages user fees and extra-billing by providing that transfers to a Province are to be reduced by $1.00 for every dollar collected in the Province as user fees or extra-billing. As a result, all services provided under a Medicare plan are provided free of charge.

The **Quebec government**, like the other provincial governments, has legislation covering hospital and medical services insured under the Provincial Medicare program. This legislation is in conformity with the ***Canada Health Act***. The Quebec laws go further than the requirements of the Canada Health Act by expressly by making it illegal to obtain insurance covering hospital and medical services if the Quebec Medicare program offers similar services.

THE LAWS AT STAKES

Health Insurance Act (Quebec)

The relevant paragraphs of Section 15 of the Health Insurance Act of the Province of Quebec read as follows:

> CONTRACT OF INSURANCE AND SUBROGATION
>
> *Coverage under contract of insurance prohibited.*
>
> **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 temporary resident of Québec or to another person on his behalf.
>
> (...)
>
> *Excess cost.*
>
> The first paragraph does not apply to a contract covering the excess cost of insured services rendered outside Québec or the excess cost of any medication of which the Board assumes payment nor does it apply to a contract covering the contribution payable by an insured person under the Act respecting prescription drug insurance (chapter A-29.01).

"Insured Services" referred to in the first paragraph of Section 15 are basically all services that are medically required and that are rendered by a physician within the Province of Quebec to a resident of Quebec. As a result, the Quebec law creates a public insurance monopoly as it makes it illegal to privately insure any service that is medically required and that is provided by a physician.

It must be noted that the law does not force physicians to practice within the provincial Medicare scheme. A physician must practice either completely within Medicare or completely outside Medicare. A physician who practices within the Medicare scheme is paid directly by Medicare for all services that are medically necessary. This physician can charge the patient for services that are not medically necessary (e.g. filling a form to justify the patient's absence from work), though. A physician who practices outside the Medicare scheme is paid directly by the patient for all services, whether they are medically necessary or not. The cost of such services cannot be reimbursed by a private insurance plan, because of the prohibition in the first paragraph of Section 15.

Hospital Insurance Act

The relevant paragraphs of Section 11 of the Health Insurance Act of the Province of Quebec read as follows:

Contracts prohibited.

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 to be 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.

Restriction.

(2) This section does not apply for such time after a person arrives in Québec as a resident as he is not an insured person.

Contracts permitted.

(3) This section does not prohibit a contract or a payment under a contract under which a resident is to be reimbursed or indemnified for

(a) the cost of any hospital service other than the insured services; or

(b) (subparagraph repealed);

(c) loss of time because of disability, whether or not the date of the commencement of the benefit is determined by reference to the date of admission to the institution contemplated in section 2, if the rate of payment is not increased by the hospitalization of the resident.

Limit.

(4) No resident shall receive, under one or more contracts to which the next preceding subsection applies, a total sum, in respect of the cost of any hospital service that is not an insured service, that is in excess of the actual charges made for the service by the institution contemplated in section 2.

The definition of "insured services" includes lodging and meals, nursing care, diagnostic services, medication, prostheses and ortheses, use of operating rooms, delivery rooms and anaesthetic facilities including the necessary equipment and supplies, the furnishing of routine surgical supplies, the use of physiotherapy and radiotherapy facilities and the services rendered by hospital centre staff.

By contrast with the Health Insurance Act, the Hospital Insurance Act does not provide for the existence of private hospitals that would charge their patients with the full cost of hospitalization. However, the Regulation respecting this act allows hospitals to charge short-term care patients a tariff prescribed in the Regulation for the use of a private or semi-private room. This tariff can be reimbursed by a private insurance plan.

Charter of Human Rights and Freedoms (Quebec)

Section 1 of the Charter of Human Rights and Freedoms reads as follows:

> Right to life.
>
> **1.** Every human being has a right to life, and to personal security, inviolability and freedom.

Section 9.1 of the Charter of Human Rights and Freedoms is the provincial counterpart to the "Notwithstanding Clause". It reads as follows:

> Exercise of rights and freedoms.
>
> **9.1.** In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.
>
> Scope fixed by law.
>
> In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

Canadian Charter of Rights and Freedoms

Section 1 of the Canadian Charter of Rights and Freedoms reads as follows:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 7 reads as follows:

> 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.

Even though it was not referred to per se in the judgment of the Supreme Court, Section 33 of the Canadian Charter of Rights and Freedoms, commonly known as the "Notwithstanding Clause" must not be overlooked because it is a powerful tool that any province can use if it feels that the integrity of its public health care system is challenged. It reads as follows:

> Exception where express declaration
>
> **33.** (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
>
> Operation of exception
>
> (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration
>
> Five year limitation
>
> (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration

Re-enactment

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

THE LOWER COURTS

By means of a motion for a declaratory judgment, the appellants, Zeliotis and Chaoulli, contested the validity of the prohibition on private health insurance provided for in Section 15 of the *Health Insurance Act* ("*HEIA*") and Section 11 of the *Hospital Insurance Act* ("*HOIA*"). They contended that the prohibition deprives them of access to health care services that do not come with the waiting times inherent in the public system. They claimed, *inter alia*, that Section 15 *HEIA* and Section 11 *HOIA* violate their rights under Section 7 of the *Canadian Charter of Rights and Freedoms* and Section 1 of the Quebec *Charter of human rights and freedoms*.

The Superior Court dismissed the motion for a declaratory judgment. In the court's view, even though the appellants had demonstrated a deprivation of the rights to life, liberty and security of the person guaranteed by Section 7 of the *Canadian Charter*, this deprivation was in accordance with the principles of fundamental justice. The Superior Court Judge also noted that the real issue at the heart of the motion by Zeliotis and Chaoulli involved the introduction of a private health system parallel to the public system. The Court of Appeal affirmed the decision of the Superior Court.

THE SUPREME COURT

The following Justices participated to the Supreme Court deliberations:

- Chief Justice McLachlin, from British Columbia
- Justice Bastarache, form the Atlantic region
- Justice Binnie, from Ontario
- Justice Deschamps, from Quebec;
- Justice Fish, from Quebec;
- Justice LeBel, from Quebec; and
- Justice Major, from the Prairie region.

The two other members of the Supreme Court, Justice Charron and Justice Abella, both from Ontario, did not participate in the deliberations. As can be seen from the preceding list, all members of the Supreme Court originating from Quebec heard the Chaoulli case.

The questions that were considered by the Supreme Court were:

- Does the prohibition depriving Quebec residents of access to private health care services not coming with waiting times inherent in public system infringes rights to life and to personal inviolability guaranteed by Section 1 of the Quebec Charter of human rights and freedoms?
- If so, can the infringement be justified under Section 9.1 of the Charter?
- Does the prohibition depriving Quebec residents of access to private health care services not coming with waiting times inherent in public system infringes rights to life, liberty and security guaranteed by Section 7 of the Canadian Charter of Rights and Freedoms?
- If so, is such deprivation in accordance with principles of fundamental justice?
- If there is violation, can it be justified under Section 1 of the Charter?

The Supreme Court concluded, at a majority of four against three, that the prohibition on private insurance violated Section 1 of the Quebec Charter of Human Rights and Freedoms. Regarding Section 7 of the Canadian Charter of Rights and Freedoms, the Court was equally split (three against three) on whether this Section was violated, as one of the Justices did not address this issue.

The opinion of the Majority

Justice Deschamps

Challenge under Section 1 of the Quebec Charter

The greater portion of the Supreme Court judgment comes from Madam Justice Deschamps. She pointed out that in the case of a challenge to a Quebec statute, it is appropriate to look first to the rules that apply specifically in Quebec before turning to the *Canadian Charter*, especially where the provisions of the two charters produce cumulative effects, but where the rules are not identical.

She also considered that the absence in Section 1 of the *Quebec Charter* of the reference to the principles of fundamental justice found in Section 7 of the *Canadian Charter*, makes the scope of the *Quebec Charter* potentially broader than that of the *Canadian Charter*. As a result, she based most of her analysis on the Quebec Charter.

Justice Deschamps and the Supreme Court agreed with the Superior Court that the right to life and liberty guaranteed by both Charters had been infringed. She also pointed out that the Quebec Charter protects the right to personal inviolability ("intégrité"), a concept that, in her opinion, is broader than the right to security granted under the Canadian Charter. The fact that, in certain cases, long waiting times increase the risk that injuries may become irreparable and the fact that, for other cases (such as cardiovascular disease), the mortality increases with the time spent on a waiting list are two examples of an infringement of the right to security and inviolability. Justice Deschamps then concluded that the Superior Court correctly considered that the right to security and inviolability had been infringed.

Impact of Section 9.1 of the Quebec Charter

Justice Deschamps then turned to the question of whether the infringement can be justified under Section 9.1 of the Quebec Charter. In order to be justified, the infringement must meet the following conditions:

- The objective of the legislation producing the infringement must be pressing and substantial (Answer: YES)
- The means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society; this requires meeting the three following tests:
  - There must be a rational connection between the measure and the aim of the legislation (Answer: YES);
  - The measure must minimally impair the protected right (Answer: NO);
  - The effect of the measure must be proportional to its objective (No answer because the prohibition of private insurance in the Health Insurance Act and the Hospital insurance Acts already fails the test above).

Regarding the test of minimal impairment, Justice Deschamps pointed out that under Section 9.1 of the Quebec Charter, the onus was on the Attorney General of Quebec to prove that the prohibition is justified and that the trial judge had not considered the evidence on that basis. Justice Deschamps further pointed out that no study regarding either the reduction in the popular support for the public plan, the decline in quality of care in the public plan, the reduction in human resources in the public plan or the decline of professionalism and ethics of physicians, resulting from allowing private insurance, was produced or discussed in the Superior Court.

As to potential adverse impacts on the public plan, such as an increase in overall health expenditures, selection of better patients by insurers and actions by physicians to lengthen waiting times in the public sector in order to direct patients to the private sector, Justice Deschamps considers such impacts as unlikely.

According to her analysis, an increase in the overall health expenditures because individuals put more money in the system would not necessarily lead to increased cost in the public system. Keeping only the "bad" cases in the public system would not increase the cost of the system as these cases are already in the public system. As to the practice of physicians who offer private services, the state can establish a framework of practice for them. Also, since the regimes of the provinces where a private system is authorized demonstrate that public health services are not threatened by private insurance, it can be concluded that the prohibition is not necessary to guarantee the integrity of the public plan.

Deference owed to the Government

Next, Justice Deschamps addressed the question of deference owed to the government by the courts: should the Court defer this issue to the government, considering that the role of a court is to judge a case based on evidence provided and not to create social policies? A court must show deference where the evidence establishes that the government has assigned proper weight to each of the competing interests. In this particular case, the Court held that the government had plenty

of time to act on the problem of waiting lists and has not given reasons for its failure to act. The government may have lost sight of the urgency of taking concrete action.

Conclusion

In her reasons for judgment, Justice Deschamps finally answers only the two following questions:

- Does the prohibition depriving Quebec residents of access to private health care services not coming with waiting times inherent in public system infringes rights to life and to personal inviolability guaranteed by Section 1 of the Charter of human rights and freedoms?
  Answer: YES
- If so, can the infringement be justified under Section 9.1 of the Charter?
  Answer: NO

Chief Justice McLachlin and Justices Major and Bastarache

Challenge under Section 7 of the Canadian Charter

While concurring in the conclusion of Justice Deschamps, the other majority Justices concluded that, in addition to the relevant sections of the Quebec Crater of Human Rights and Freedoms, the anti-insurance provision also violates Section 7 of the Canadian Charter of Rights and Freedoms since it impermissively limits the right to life, liberty and security of the person protected by Section 7 of the Charter and has not been shown to be justified as a reasonable limit under Section 1 of the Charter.

In their analysis, they point out that under the current system, only the very rich, who can afford private care without need of insurance, have unrestricted access to private health care.

In their review of testimonies presented before the Court, the pay particular attention to problems arising from delays to treat the following medical conditions:

- Cardiovascular surgery for life-threatening problems, where delays increase the risk of death;
- Hip fractures among persons aged 65 and older, where pre-operative delays increase the risk of death within six months after surgery and create undue pain;
- Knee replacement, where delays create undue pain;
- Psychological suffering due to delays in treatment.

Based on this analysis, they conclude that prohibiting health insurance in circumstances where the government is failing to deliver health care in a reasonable manner, thereby increasing the risk of complications and death, interferes with life and security of the person as protected by Section 7 of the Canadian Charter.

Fundamental Justice

They then turned to the question as to whether this interference is in accordance with the principles of fundamental justice. The principle of fundamental justice implicated in this case is that laws that affect the life, liberty or security of the person shall not be arbitrary. A law is arbitrary if there is no real connection between the facts and the purpose that the law is said to serve. After reviewing the experience of other Western democratic countries that allow private health insurance alongside a public system, they concluded that the Quebec government's contention that a prohibition on private insurance fosters the quality of public health care is not founded. As a result, such a prohibition is not in accordance with the principles of fundamental justice. Hence, prohibition of private health insurance violates Section 7 of the Canadian Charter.

Impact of Section 1 of the Canadian Charter

The next question to address was whether this violation can be justified under Section 1 of the Canadian Charter as a reasonable limit demonstrably justified in a free and democratic society. Since the prohibition of insurance is arbitrary and impairing and since the benefits of the prohibition do not outweigh its deleterious effects, they concluded that, while it 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.

The opinion of the dissenting Justices

Three Justices dissented with the majority verdict. Their major objection is that the issue of the prohibition of private insurance is a political issue to be addressed by the Quebec government and not a legal issue to be settled by the Court. From their point of view, it is a matter of social policy and not a matter of constitutional law and, in the absence of a violation of a recognized principle of fundamental justice, the opinions that prevail should be those of the legislature. Also, it must be noted that both the trial judge and the judge of the Quebec Court of Appeal rejected the appellants' case unanimously; as a matter of deference to lower courts, the Supreme Court should not reverse their verdict unless there is material evidence that the initial verdicts were wrong. The following paragraphs summarize their reasoning.

In their view, the debate is about social values, not about constitutional law and the majority Justices extended too far an interpretation that was made under the Canadian Charter in the Morgentaler case, which was a matter of criminal justice, not of civil justice. The Morgentaler case dealt with the right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. The situation here is significantly different. The "manifest unfairness" test applied in the Morgentaler case by the Supreme Court and invoked by the majority Justices in the Chaoulli case has never been adopted outside the criminal law and certainly not in the context of the design of social programs. Also, the Morgentaler judgment fastened on internal inconsistencies in the Criminal Code, which find no counterpart here.

From the Castonguay-Nepveu report in 1967, that lead to the establishment of the Quebec Health Insurance Plan, to the Kirby report in 2001, it has always been held that the provision of health care is a collective responsibility. The underlying health policies of the provinces flow from the Canada Health Act and are the same: as a matter of principle, health care should be based on need, not wealth, and as a matter of practicality the provinces judge that growth of the private sector will undermine the strength of the public sector and its ability to achieve the objectives of the Canada Health Act. This statement has most recently been confirmed in both the Romanow report and the Kirby report. On the other hand, access to private health care based on wealth rather than need contradicts one of the key social policy objectives expressed in the Canada Health Act.

Now Quebec takes the view that significant growth in the private health care system would inevitably damage the public system. The minority Justices are of the opinion that even though there is no absolute evidence that this would happen, governments are entitled to act on a reasonable apprehension of risk of such damage.

Challenge under the Canadian Charter

Regarding the application of Section 7 of the Canadian Charter, the minority Justices accept the trial judge's conclusion that even though in some circumstances some Quebeckers may have their life or "security of the person" put at risk by the prohibition against private insurance, this situation is not capable of resolution as a matter of constitutional law. They also consider that the Quebec Health Insurance Plan does not put the liberty of Quebeckers at risk and that Section 7 of the Canadian Charter does not guarantee Dr. Chaoulli the "liberty" to deliver health care in a private context.

Regarding waiting lists, the minority Justices agree that if the public system fails to deliver life-saving care and an individual is simultaneously prevented from seeking insurance to cover the cost of that care in a private facility, then the individual is potentially caught in a situation that may signal a deprivation of his or her security of the person. However, they consider that there is contradictory evidence and conflicting claims about waiting lists and that it is even more difficult to generalize about the potential impact of a waiting list on a particular patient. They also consider that waiting lists are a normal consequence to the need of rationing services. In the absence of such rationing, we would have a substantially overbuilt health care system with idle capacity. It must also be considered that patients who need immediate medical care actually "jump the list" and receive it. Also, the Quebec Plan contains a "safety valve" as it allows residents to obtain essential health care outside the province when they are unable to receive such care in Quebec in a timely way.

Fundamental Justice and Arbitrariness

The minority Justices also address the principles of fundamental justice that were considered by the majority in allowing the appeal. Based on earlier case law, they define a principle of fundamental justice as a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. In this context, they consider that the aim of obtaining health care to a reasonable standard within a reasonable time is not a legal principle,

that there is no societal consensus about what it means or how to achieve it and that it cannot be identified with precision.

Regarding the arbitrariness of the prohibition against private insurance, the minority Justices consider that it is actually consistent with and related to the preservation of access to a health system based on need rather than wealth in accordance with the Canada Health Act. In principle, Quebec wants a system governed by need rather than wealth and where uninsurable people are not left behind. In practical terms, Quebec bases the prohibition on the view that private insurance, and a consequent major expansion of private health services, would have a harmful effect on the public system. This view is consistent with the conclusions of several reports, including Kirby and Romanow, and a similar adverse impact is seen in other countries that have a mostly public system, such as Australia and the United Kingdom, but also in countries that have two-tier systems such as the United States, Israel and New Zealand.

Another area of concern is that private insurers would select the better risks and the higher income patients and leave the others to the public system. They could also provide incomplete coverage and leave the "high-risk" surgery to the public system. In such a situation, private patients would go through the preliminary steps faster than other patients and would arrive quickly in the area of expensive public services, increasing the demand in the public system for such services.

A single-tier public system needs to be protected because it is more efficient in terms of the ratio of productivity to administrative costs compared with private insurance, because these costs are lower in a public plan where there are no advertising expenses and less overhead. (They could also have added that there are no commissions paid to insurance agents in a public plan). Also, during the recent years, the public has invested very large sums of money in a series of authoritative reports to analyze health care in this country and in other countries. The reports uniformly recommend the retention of single-tier medicine. The reliance on these reports cannot be dismissed as arbitrary. On the contrary, given its goal of providing necessary medical services to all Quebec residents based on need, Quebec's determination to protect the equity, viability and efficiency of the public health care system is rational.

Challenge under the Quebec Charter

The minority Justices point out that Section 9.1 of the Quebec Charter places the claimant under the obligation to exercise rights with proper regard to democratic values, public order and the general well-being of the citizens of Quebec. These limitations are relevant to the context of the appellant's claim.

Those who seek private health insurance are those who can afford it and can qualify for it. They are the most advantaged members of the society and are differentiated from the general population, not by their health problems but by their income status. Moreover, it has already been established in a previous Supreme Court judgment that the Charter should not become an instrument to be used by the wealthy to "roll back" the benefits of a legislative scheme that helps the poorer members of the society.

As a rational connection between the objectives of the Quebec Health Insurance Plan and the prohibition against private insurance has been demonstrated, the issue boils down to the question of whether the impairment created by the prohibition is minimal or substantial. In respect of questions of social and economic policy, this test leaves a substantial margin of appreciation to the Quebec legislature. These legislature attempted to find a solution that would be acceptable to everyone and the prohibition challenged by the Appellants is part of a system which is mindful and protective of the interests of all, not only of some. Consequently, the minority Justices would have dismissed the appeal.

QUEBEC'S RESPONSE

As the Quebec government was concerned that the Chaoulli judgment could jeopardize its entire public health system, at a time when much new money had already been invested in order to solve the problems raised in the Chaoulli case, the government requested and obtained a stay of the judgment, pushing back its effective date until June 9, 2006.

Concerns that Were Raised

Several concerns were raised when Quebec analyzed its response to the Supreme Court decision. Other concerns would have been raised if private insurance had been further analyzed. Some of the concerns that were or would have been raised are:

- If private insurance is allowed, it will probably not be available to those who cannot afford it, thereby negating the concept of access based on need and not on wealth;
- If private insurance is allowed, should the insurers be allowed to select their insureds? Or, put differently, why should insurers be allowed to select their insureds for medical insurance while selection for prescription drug insurance is illegal? Or, still in other words, what would a private system do for persons suffering from chronic diseases or having disabilities?
- Should individual medical insurance be allowed or only group insurance, as for prescription drugs?
- What control measures should be implemented to avoid siphoning –off of resources from the public sector to the private sector, considering the expected shortage of medical and nursing staff?
- How can the quality of services provided by the private sector be guaranteed?
- What links should be established between the public and the private sector in order to continue fostering a tighter integration of services?
- Would the presence of a private sector increase the overall costs of health for the people of Quebec?

To address these issues, and to set a course of action in response to the Chaoulli judgment, Quebec issued, on February 16, 2006, a consultation document titled "Guaranteeing Access – Meeting the challenges of equity, efficiency and quality", of which an English version was issued later. The following analysis and discussion rely heavily on this document.

The Options Considered

Quebec had to choose among various possible responses to the Supreme Court judgment. Before considering a number of potential options, the Quebec government established principles that would guide in the analysis of the various options.

These principles are:

- ***Universality and Equity:*** Access to health services must be based on need, not on wealth, and must consider the poor, the disabled and persons with chronic diseases;
- ***Integration of Services:*** the integration of services, especially the local health and socials services networks must not be jeopardized;
- ***Maintaining and Improving the Quality of Services:*** Mechanisms put in place to guarantee the quality of public services must be applied to all service providers, whether public or private;
- ***Availability of Human Resources in the Public Sector:*** Any changes in the manner in which services are provided must be accompanied by safeguards to protect the human resources necessary for the operation of the public health system;
- ***Increased Productivity and Better Control of Costs:*** Measures chosen must not generate major increases in the overall costs of health for the people of Quebec.

The three following options were considered:

a) Status Quo

The first option considered was to maintain the status quo by using the "notwithstanding clause" under the Canadian Charter of Rights and Freedoms (Section 33) and under the Quebec Charter of Human Rights and Freedoms (Section 52) to stipulate that Section 15 of the Health Insurance Act and Section 11 of the Hospital Insurance Act apply notwithstanding the Charters.

This option was rejected on the grounds that it would not intrinsically provide any concrete measure to address the concerns of the Supreme Court. Another reason for rejecting the status quo was the fact that in the past, the "Notwithstanding Clause" was used only to protect the unity and identity of Quebec (by protecting the French language, for example) and the Chaoulli case is not a challenge to the identity of Quebec.

b) Opening the Door to the Private Sector

Consideration was given to opening the door to the financing and production of services by the private sector, by either:

- Allowing private insurance to cover only elective surgeries that would be defined in regulations by the Minister of Health & Social Services, that would take place in a private clinic and that would be performed by physicians who have opted out of the public system.

- Allowing private insurance to cover only elective surgeries that would be defined in regulations by the Minister of Health & Social Services, that would take place either in a private clinic or in a rented operating theatre in a public health establishment, outside normal hours, and that would be performed by physicians who have opted out of the public system.
- Allowing doctors who participate in the public system to treat patients for private compensation for services normally covered by the public system; in exchange, physicians who wish to participate in the public system could be required to provide a fixed minimum level of service in the public system.

This option was rejected on the grounds that a number of controlling measures would have to be implemented in order to guarantee equity in access to healthcare and to minimize the impact on the availability of human resources in the health system as a whole. Such measures would probably have rendered private insurance non-viable, due to increased complexity and possible infringement of the principles underlying insurance.

c) Guaranteeing Access to Services in the Public System

The third option was to introduce a mechanism to guarantee access to services in the public system for hospital services whose waiting times warrant intervention, while allowing private insurance for various hospital services to be determined by regulation. Initially, these services would be limited to elective services (hip, knee and cataract) for which guaranteed access will be offered. Since the Quebec government selected this solution, it will be discussed in more details than the other two solutions.

This approach is presented as a patient-centered guaranteed-access mechanism intended to ensure that patients receive services within predetermined time limits, for the entire care episode. The radiation oncology and tertiary cardiology sectors are already covered by a form of guaranteed access to services. This mechanism would be extended to elective hip, knee and cataract surgeries, and to cancer-related surgeries. It could eventually be extended to other types of hospital services if it is relevant and feasible, on the basis of available resources.

The guaranteed-access mechanism aimed particularly at **hip, knee and cataract surgery** would involve a stepwise approach:

- The surgical intervention would be programmed within 30 days of the patient's being put on the waiting list. This would then trigger personalized monitoring of the patient by the establishment. If necessary, another establishment able to offer the service would be sought;
- After six months' waiting, the personalized monitoring would be stepped up. If necessary, the surgery would be offered in another Québec public establishment.
- After nine months' waiting, the range of treatment possibilities would be extended to privately financed Québec clinics and to establishments in the rest of Canada and in the United States; if the surgery is done in a private or foreign establishment, the public plan would pay the bill.
- At all times, patients could assert their option to be treated in the initial establishment.

Private insurance would be permitted, but limited to certain procedures defined by regulation **(elective hip, knee and cataract surgery)** and performed only in private clinics where doctors who have opted out of the public system are practicing. Insurance coverage and the service offering of private clinics must cover the entire care episode and thus include rehabilitation and home support.

All services subject to the service access guarantee would be determined by regulation by the Minister of Health and Social Services. The guarantee would only apply to patients who consult a doctor who has opted into the public system and who are officially registered on the waiting list of the establishment to which they were initially referred. The guaranteed access mechanism would be implemented gradually and progressively.

The watertight seal between public and private financing would be maintained: it would be impossible for a doctor to participate in the public and to opt out for certain actions. A ceiling on the number of doctors authorized to practice in the private sector would be considered. Doctors who would work in the private sector could also be prohibited form asking compensation higher than that provided in the pricing schedules of the RAMQ; alternatively, the reimbursement offered by the insurer could be limited to the amount set in the RAMQ pricing schedule. The Minister of Health and Social Services would be able to define through regulation the conditions of private insurance coverage.

It must be noted that access-guarantee mechanisms have been tried elsewhere (in the United Kingdom and in Sweden). This approach seems to work well for some time, after which the problem of waiting lists seems to come back. To make it work, this approach requires periodic reviews and the availability of human and financial resources in sufficient quantity.

Options Not Considered

It is interesting to note that the following options that would have looked simpler to insurers and to the public, were not considered:

- Allowing private insurance to cover all services rendered by physicians who practice outside the system only (That is, those physicians who are not under contract with the Quebec health Insurance Plan);
- Allowing physicians who are under contract with the Quebec Health Insurance Plan to work outside the system once they have reached their quotas and allow private insurance to cover all services rendered by physicians outside the system (That is, services rendered by "contracted physicians" who have reached their quotas and by "non-contracted physicians").

It must be understood that these options would not have satisfied the principles put forward by the Quebec government, especially accessibility and equity.

DISCUSSION

While the Chaoulli decision was initially hailed by many as creating room for a private sector in the provision of health services in Canada, its final impact turns out to be minimal. Private insurance is allowed, but only for services where the waiting lists have been recognized as too long. Moreover, these services must be specified by the Minister of Health and Social Services in a Regulation.

The government makes it virtually impossible for insurers to operate in the field of medical services because the services that can be covered are few and anti-selective. Who would buy insurance for hip replacement or cataract surgery?

Individual insurance – particularly renewable term insurance - of such narrowly-focused procedures may not make sense due to the combination of the following features:

- Anti-selective nature of the services covered;
- Low perceived need for these services;
- High distribution cost of insurance (commissions, etc.)
- High administration costs compared with the pure cost of insurance;
- Risk that the government might not allow insurers to select their clients
- Risk that the government change its regulation to forbid once again private insurance for hip or knee replacement or cataract surgery, once the waiting lists are sufficiently reduced that it is no longer a constitutional issue, if it ever was.

Group insurance, with its high participation, adjustable rates and its practice of experience-rating, could be a better vehicle for providing private insurance. Demand for this sort of coverage and employer willingness to pay for it is however in doubt. Considering that cataract surgery is not very expensive and is required by a greater proportion of workers than hip or knee surgery, it may be a good candidate for coverage under a group plan as a way of testing whether expanding health coverage to meet these new needs is a viable product innovation. This will probably happen gradually as employees and unions will ask for this coverage.

Opportunity for Critical Illness Coverage

Considering that the Chaoulli judgment does not really open the door to private insurance of medical services in Quebec (And the same can presumably been said of the other provinces that forbid private insurance of services offered by the public plan), insurers who want to offer reasonably comprehensive medical insurance cannot do so directly.

However, all the buzz generated by the Chaoulli decision, along with the probable disappointment of a portion of the Canadian population, creates an interesting opportunity for selling critical illness insurance. Since this product pays money upon the diagnosis of one among a certain number of medical conditions, it is not medical insurance per se. On the other hand, it can provide sufficient money to pay for private medical care, in Canada or in the US, thereby giving access to speedy care to persons with insurance. This interest would be mitigated in Quebec, though, as a significant portion of the population might be reluctant to obtain health services in a language other than French.