

A right to health care in Canada

Only if you can pay for it*

Chaoulli v. Quebec (Attorney General), 2005 SCC 35 [*Chaoulli case*]

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Canada's Chief Justice Beverly McLachlin once wrote that the poor in Canada ought not to be "constitutional castaways". Yet, this is how they have been treated in the first judgment from the Supreme Court of Canada on the right to adequate healthcare under the Canadian Charter of Rights and Freedoms 1982 (Canadian Charter) and the Quebec Charter of Human Rights and Freedoms 1975 (Quebec Charter).

The Supreme Court of Canada (the Court) in the *Chaoulli* case, for the first time, considered whether the right to "life, liberty and security of the person" should be interpreted to include the right to access health care, and if so, what role the court might assume in overseeing compliance with this right.

The case is important for the preservation of the public health care system that has been the subject of much political controversy and debate in recent years. It is also important for the protection of the right to health and other social and economic rights under the Canadian Charter and human rights legislation. The decision of the Court has generated intense public debate on the right to health care in Canada.

Facts and decisions of the lower courts

The appellants are Jacques Chaoulli, a self-represented doctor and long time campaigner against public health care, and his patient, George Zeliotis, who objected to waiting times he had endured in the public health care system in Quebec. The legislative prohibition challenged by the appellants prohibited private healthcare insurance for services covered by public healthcare insurance. It did not prevent access to private health care for those wanting to pay for it. Rather it prevented large health insurance and health care firms, primarily U.S. based, from creating a parallel system of health care for the more advantaged, one which would invariably benefit from the public financing of healthcare research, training and prevention in Canada, and drain the public system of key personnel and resources.

The appellants asked the Court to find that in the face of waiting times for health services in Quebec's public health system, legislation prohibiting private health insurance schemes that would allow those who can pay for them to access faster service, violates the right to "life liberty and security of the person" under the Canadian Charter and the right to "life, and to personal security, inviolability and freedom" under the Quebec Charter.

The application was first brought before the Quebec Superior Court and the Quebec Court of Appeal. The Superior Court dismissed the application, finding that the appellants had demonstrated a deprivation of the right to life,

liberty and security of the person within the meaning of section 7 of the Canadian Charter, but that the legislative prohibition was justified because it was in accordance with principles of fundamental justice and did not conflict with the general values expressed in the Canadian or Quebec Charters. The Superior Court found that allowing private health insurance would harm the public medicare system upon which all rely. (*Chaoulli v. Quebec Procureure Generale* [2000] J.Q. No. 479 (C. S. Q.) para. 263).

Similarly, the Court of Appeal dismissed the appeal, with the three judges putting forward different reasons. Delisle JA found that access to publicly funded healthcare was a fundamental right under s.7 of the Charter but that the right to purchase private health insurance was an economic claim and was not protected under s.7. Justice Forget agreed with the trial judge, finding that the right to healthcare was threatened, but that the province's decision to favour the broader collective interest was in accordance with the principles of fundamental justice. (para. 63) Justice Brossard found that the evidence failed to show that the restrictions on private healthcare had in fact violated the plaintiff's right to life or health (para. 66) [2002 J.Q. No. 759 (CAQ) (117-18)].

The appellants then appealed to the Supreme Court of Canada.

The decision of the Supreme Court of Canada

Surprisingly, the Supreme Court of Canada did not reach a decision under the Canadian Charter. Three judges out of seven found that the legislative prohibition of private insurance violated section 7 of the Canadian Charter, with three others finding that it did not, and one judge not ruling on the Canadian Charter. A majority decision was reached only under the Quebec Charter.

Since the Quebec Charter is the only human rights legislation in North America to include a section on social and economic rights (though not, unfortunately, a right to health), and it explicitly prohibits discrimination because of "social condition" (found by courts to include poverty), one might have expected a more progressive result for poor people under the Quebec Charter than under the Canadian Charter. However, applying the Quebec Charter, the Court reached a majority decision upholding the appellants' claim.

Four judges out of seven found that in the context of unreasonable wait times for services, Quebec's prohibition of private health insurance violated the right to life and personal security under the Quebec Charter. The Court further held that this violation was not justified under the limitations clause in the Quebec Charter as demonstrating "a proper regard for democratic values, public order and the general well-being of the citizens of Quebec".

Justice Deschamps, writing for the majority, did not proceed to consider whether the Canadian Charter had similarly been violated. Chief Justice McLachlin, writing also for Justices Major and Bastarache, agreed with Justice Deschamps' finding of a violation of the Quebec Charter, but also found a violation of the Canadian Charter, based on similar reasoning

A critique of the decision

In dismissing a challenge by more advantaged individuals to restrictions aimed at protecting the public healthcare system, the decisions of the lower courts in this case had drawn heavily on the central place accorded to equality rights and the protection of vulnerable groups in the Canadian Charter. In an oft cited observation of the former Chief Justice Dickson in an early case under the Canadian Charter, “the courts must be cautious to ensure that it [the Charter] does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.” (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 779. That concern led the Supreme Court in previous cases to assert that governments should not be held to too rigorous an evidentiary standard in justifying protective measures for vulnerable groups. Where evidence is uncertain, courts should err on the side of maintaining protections, not of striking them down.

However, equality concerns of this sort, though strenuously asserted by the dissenting judges, are absent from the majority’s analysis in the Supreme Court in this case. The majority largely ignores the rights of those who cannot benefit from private healthcare and focuses its analysis on whether the government can prove with certainty that permitting private health insurance for the more advantaged would damage the public system. In a surprisingly biased assessment of the evidence, entirely at odds with the assessments of the trial judge, the Court concludes that government cannot meet the evidentiary test.

Deschamps J is quite dismissive of Canadians’ attachment to equality, and to the idea of universally accessible and publicly administered health care that serves rich and poor alike. She observes that “[t]he debate about the effectiveness of public health care has become an emotional one”. She finds that the “tone” adopted by her colleagues (Binnie J and LeBel J) “is indicative of this kind of emotional reaction. It leads them to characterize the debate as pitting the rich against the poor when the case is really about determining whether a specific measure is justified under either the Quebec Charter or the Canadian Charter” (para 16). She states that “The appellants do not contend that they have a constitutional right to private insurance. Rather, they contend that the waiting times violate their rights to life and security” (para 14).

However, if waiting times in the public system violate the right to life and security, what about the plight of the many who cannot afford private insurance or who will not qualify for it because of illness? Are their rights to life and security also not in need of a remedy?

The majority simply ignores the plight of those who must, because of their circumstances, rely on publicly funded healthcare, and seems to assume that the court can play no role in ensuring that the state remedy any failures to provide adequate and timely health care to those in need. Justice Deschamps insists on framing the case exactly as the more advantaged appellants and their many supporters among private health care providers would have the Court frame it – as a challenge to government interference with the ‘rights’ of the more affluent to

avoid waiting lists rather than as a challenge to ensure that waiting lists do not violate the rights of those in need of care. “The choice of waiting lists as a management tool falls within the authority of the state and not of the courts. The appellants do not claim to have a solution that will eliminate waiting lists. Rather, they submit that the delays resulting from waiting lists violate their rights” (para 2).

Consequently, the Court did not engage in any meaningful assessment of what governments must do to comply with a right to life in the provision of healthcare. For example, Deschamps J states that the risk of dying of a cardiovascular ailment increases by 0.45% with every month of delay, so that “it is inevitable that some patients will die if they have to wait for an operation” (para 40). Of course, there is also some percentage chance that such patients may die waiting at a stoplight on the way to hospital as well, but surely this does not warrant a finding of a violation of the right to life by the state.

She further states that “the demand for health care is potentially unlimited and that waiting lists are a more or less implicit form of rationing” (para 39). Thus, she finds that insofar as the government assumes the role of allocating health resources on the basis of need rather than of ability to pay, it almost inevitably violates the right to life and personal security. Rather than ensuring that the government performs its ‘rationing’ function consistently with the human rights of all, as have courts in other jurisdictions, the Court restricts its role to protecting the rights of the more affluent to avoid the implications of rationing based on need. By refusing to consider the possibility of effective constitutional review of the decisions undertaken by governments as to the allocation of limited resources in health care delivery, the majority restricts the court’s role to one of guardian of the rights only of those who do not need the help of the state.

As noted by the dissenting judges, the majority decision lays down no “manageable constitutional standards” which the state might try to meet (para 165). “What then are constitutionally required “reasonable health services”? What is treatment “within a reasonable time”? What are the benchmarks? How short a waiting list is short enough?” The dissenting judges ask these questions rhetorically, as if the Court cannot be expected to answer them, but these are the very issues which a Court must be prepared to consider, and to give governments direction on, in assuming their role of guardians of the constitutional rights of all, including those who rely on the state for access to necessary healthcare. I

Social and Economic Rights “with a vengeance”?

Poor people and many other groups in Canada have been advocating for more than 20 years, since the adoption of the Canadian Charter, for an expansive interpretation of the right to “life, liberty and security of the person” and other open-ended rights in the Charter, so as to include economic, social and cultural (ESC) rights recognised and affirmed by Canada in international law. The

Charter Committee on Poverty Issues and other groups have emphasized that social and economic rights must be applied within a broad framework of equality, recognizing the important role of courts in protecting the rights of vulnerable groups, particularly by requiring adequate social programs and other positive measures. (B Porter, "20 Years of Equality Rights: Reclaiming Expectations" (2004) 23 *Windsor Yearbook on Access to Justice* 141). The claims advanced by poor people in Canada under the Charter have received strong support from comments and concerns from the UN Committee on Economic, Social and Cultural Rights (CESCR) and most other UN treaty monitoring bodies, which have encouraged interpretations of the Charter that would provide effective remedies to violations of economic, social and cultural rights. (B Porter, "Using Human Rights Treaty Monitoring Bodies in Domestic Social " And Economic Rights Advocacy: Notes From Canada" (1999) 2 *Economic and Social Rights Review*, no. 5).

Accordingly, the Charter Committee on Poverty Issues and the Canadian Health Coalition intervened in the *Chaoulli* case to advocate for the recognition of an inclusive right to health under the Canadian Charter in accordance with international human rights law and with the Charter's equality guarantee. We argued that the courts have an important role to play in protecting the right to health, but that it must ensure that the right to health is enjoyed without discrimination, regardless of ability to pay, or ability to qualify for private health insurance. The right to health, we argued, should be applied to strengthen and uphold universal access to quality healthcare through a publicly funded system.

Some, critics of the idea of using courts to promote social and economic justice will see the *Chaoulli* decision as our "just deserts" for being foolish enough to encourage an increasingly neo-liberal Supreme Court, with little sympathy evidenced for the plight of the poor, to adjudicate rights in the field of complex issues such as health care delivery. However, this kind of response misunderstands the nature of advocacy for inclusion of justiciable ESC rights in the framework of constitutional interpretation and it misunderstands what is dangerous and wrong about the *Chaoulli* judgment.

The judgment of the majority in *Chaoulli*, was not the result of a Court stepping into the field of social rights, but rather, of a Court refusing to do so. Its discriminatory abandonment in this case of the health care needs of disadvantaged groups is symptomatic of the McLachlin Court's increasing disavowal of the previously affirmed notion of "substantive equality" and a growing refusal of the Supreme Court of Canada to play any role in ensuring that governments take positive measures to ensure fundamental rights. Further, the decision is completely devoid of any reference to the right to health under international human rights law, or even to the non-derogable right to life under the International Covenant on Civil and Political Rights 1966 (ICCPR), which require positive measures by the state,. The Court simply refuses to consider what positive measures the state must take to protect

and ensure the right to life or the right to health in an inclusive and non-discriminatory manner, as required under international human rights law.

Had the Court considered the right to life and security of the person, and principles of fundamental justice, in this broader context of the right to health, the prohibition of private insurance would properly have been seen not as a violation of a right to life and personal security, but rather, as a positive legislative measure required for the non-discriminatory protection of that right.

Neither the majority nor the dissenting opinions in this case offer any positive vision of the role of Canadian courts in protecting the rights of disadvantaged groups in so critical an area as access to healthcare. Disappointingly, rather than following through on their insight that any alleged violation of rights in the public system must be assessed in the context of “manageable constitutional standards”, the dissenting judges largely urge judicial deference to governments’ policy choices in the health care field. That approach may yield the desired result in a case such as this one, where advantaged interests challenge legislative restrictions on which vulnerable groups rely, but what about other cases, where vulnerable groups rely on the courts to vindicate their rights?

We can only cringe at the dissenting judges’ pessimistic appraisal of the ability of the courts to protect fundamental Canadian values linked to equality and social rights when Justices Binnie and LeBel, after documenting the exclusions of African Americans, Hispanics and the poor from healthcare in the U.S., state that: “It would be open to Quebec to adopt a US style health care system. No one suggests that there is anything in our Constitution to prevent it. But to do so would be contrary to the policy of the Quebec National Assembly, and its policy in that respect is shared by the other provinces and the federal Parliament” (para 176).

The inability of the dissenting judges to put forward a more positive vision of judicial oversight of health care rights ultimately leaves intact the negative rights paradigm adhered to by the majority - with all of its discriminatory consequences for the poor.

Conclusion

Though many have referred to the Court in *Chaoulli* “striking down” the impugned legislation, this is not quite accurate. The Court simply declared that in the context of unreasonable waiting times violating the right to life and security in the public system, prohibiting access to private insurance violates article 1 of the Quebec Charter. The Court made no remedial order based on this finding.

Subsequent to the Court’s judgment, the Government of Quebec asked for a stay of the judgment in order to hold public consultations, review and overhaul its health care system in light of the ruling. The Court granted a stay of 12 months.

It is now up to the Government of Quebec, and other governments in Canada, to consider whether the appropriate remedy in light of the Court’s finding is to ensure the protection of fundamental rights in the public system, or instead, to provide a remedy of access to private insurance that can only be

effective for advantaged groups. It has been left to Quebec and the other provinces, , to consider the broad array of constitutional and human rights responsibilities under international human rights law, and under the Canadian and Quebec Charters, which were ignored by the Court, and which oblige governments to ensure equal access to adequate healthcare. Civil society will need to mobilize to ensure that governments in Canada recognize, in a way that the Supreme Court failed to, that the right to health is a right of everyone in Canada, and that it is not up for sale.

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The decision is available at website <<http://www.lexum.umontreal.ca/csc-scc/en/rec/html/2005scc035.wpd.html>> Pleadings and Commentary available at http://www.law.utoronto.ca/visitors_content.asp?itemPath=5/5/0/0/0&contentId=1109