



Chaoulli v. Quebec (Attorney General)
**The Supreme Court of Canada Sets the
Stage for Fundamental Health Care Reform**

By

[Ron A. Skolrood](#)

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please contact the author or any member of the Health Law Group or Administrative and Constitutional Law Group.*

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Chaoulli v. Quebec (Attorney General) The Supreme Court of Canada Sets the Stage for Fundamental Health Care Reform

Introduction:

On June 9, 2005 the Supreme Court of Canada released its landmark decision in *Chaoulli v. Quebec (Attorney General)* in which a majority of the Court struck down provisions of Quebec's *Health Insurance Act* and *Hospital Insurance Act* which prohibit private insurance for health care services that are available in the public health care system. This long-awaited decision is the first of its kind to consider in depth the constitutionality of Canada's public single-tier health care system and it has potentially profound implications for the way in which health care is delivered in Canada.

Background:

The challenge to the Quebec legislation was brought by a physician, Jacques Chaoulli and a patient, George Zeliotis. Over a number of years, Mr. Zeliotis experienced various health problems for which he received treatment in the public health care system, including heart surgery and a number of operations on his hip. He frequently experienced delays in obtaining this treatment. Dr. Chaoulli has long been involved in advocating for greater private sector involvement in health care and had unsuccessfully sought to obtain a licence to operate an independent private hospital. Dr. Chaoulli and Mr. Zeliotis came together to challenge the prohibition against private insurance, and effectively private delivery of health care services, on the basis that the prohibition violates the rights to life, liberty, personal security and inviolability guaranteed by section 1 of the Quebec *Charter of Human Rights and Freedoms* (the "Quebec Charter") and sections 7, 12 and 15 of the Canadian *Charter of Rights and Freedoms* (the "Canadian Charter").

Overview of the Supreme Court Decision:

Dr. Chaoulli and Mr. Zeliotis were unsuccessful in their challenge before both the Quebec Superior Court and the Quebec Court of Appeal. Their appeal to the Supreme Court of Canada was heard by a panel of 7 justices who produced 3 separate sets of reasons spanning some 135 pages that reveal a significant split in the Court's view of the issues. Chief Justice McLachlin together with Justices Major and Bastarache held that the ban on private insurance violates both the Quebec and Canadian *Charters* and is not justified under section 9.1 of the Quebec *Charter* or section 1 of the Canadian *Charter*. Justices Binnie, LeBel and Fish dissented and held that the prohibition is valid legislation aimed at protecting the public health care system and as such does not infringe either the Quebec or Canadian *Charters*. The tie was broken by Madam Justice Deschamps who held that the prohibition violates the

Quebec *Charter* but, having so found, she declined to decide the issue under the Canadian *Charter*. In the result, a slim majority of the Supreme Court struck down the provisions of the Quebec legislation as being in violation of the Quebec *Charter*.

Reasons for Judgment of McLachlin CJ and Major and Bastarache JJ:

Again, the Chief Justice and Justices Major and Bastarache held that the prohibition against private health insurance violates section 7 of the Canadian *Charter* and they agreed with Madam Justice Deschamps that it also violates section 1 of the Quebec *Charter*. Their Reasons for Judgment were jointly written by the Chief Justice and Justice Major and focus primarily on the section 7 analysis. That section guarantees all persons 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”.

At the outset of their Reasons, the Chief Justice and Justice Major emphasized that the Canadian *Charter* does not confer a free standing constitutional right to health care. However, they found that by creating a health care system that effectively imposes exclusivity but then fails to provide public health care of a reasonable standard within a reasonable time, the Government has created circumstances that trigger the application of section 7.

The Chief Justice and Justice Major noted that the evidence adduced in the lower courts established beyond doubt that many Quebec residents face significant delays in obtaining treatment in the public health care system resulting in adverse physical and psychological consequences:

“Access to a waiting list is not access to health care....[T]here is unchallenged evidence that in some serious cases, patients die as a result of waiting lists for public health care. Where lack of timely health care can result in death, section 7 protection of life itself is engaged. The evidence here demonstrates that the prohibition on health insurance results in physical and psychological suffering that meets the threshold requirement of seriousness.

We conclude, based on the evidence, that prohibiting health insurance that would permit ordinary Canadians to access health care, 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 *Charter*.” [paras. 123, 124]

Having found that the prohibition on private insurance constitutes a deprivation of life and security of the person, the Chief Justice and Justice Major then had to consider whether that deprivation is in accordance with the principles of fundamental justice as dictated by section 7

of the *Charter*. In their view, the prohibition is arbitrary and thus by definition is inconsistent with the principles of fundamental justice.

The Chief Justice and Justice Major's finding of arbitrariness was based primarily on the absence of clear evidence establishing that a prohibition against private insurance was necessary in order to properly sustain the public system. While both the Appellants and Quebec relied upon expert witnesses in the lower courts who argued both in favour and against the prohibition, the Chief Justice and Justice Major found that the experts simply based their positions on "common sense" arguments without any clear evidentiary foundation. In contrast to the sorts of assumptions relied upon by these experts, the Chief Justice and Justice Major looked to the actual evidence of the types of health systems in place in other western democracies. In particular, the Court considered Sweden, Germany and the United Kingdom, each of which has a universal public health care system but also allow for private health care insurance. According to the Chief Justice and Justice Major, the evidence from those countries establishes that, rather than undermining the public system, the existence of parallel private insurance serves to strengthen the public system and broaden the services available thereunder.

The Chief Justice and Justice Major thus concluded that the prohibition against private insurance violates section 7 of the Canadian *Charter*. They then went on to consider whether that violation could nonetheless be justified under section 1 of the *Charter*. Section 1 permits the government to justify measures that might otherwise violate the *Charter* if it can be shown that the offending provision is a "reasonable limit demonstrably justified in a free and democratic society".

In order for a measure to be saved under section 1, the government must demonstrate that the objective underlying the measure is pressing and substantial and further that the measure is proportionate in the sense that (i) there is a rational connection between the measure in question and the legislative objective; (ii) the measure impairs the guaranteed right as minimally as possible and (iii) the benefits of the measure outweigh the deleterious effects.

According to the Chief Justice and Justice Major, while the maintenance of a strong public health care system is a valid objective, given the absence of any evidence establishing that the prohibition on the purchase and sale of private health insurance protects the public system, there is no rational connection between the prohibition and the objective. The prohibition also fails the "minimal impairment" test in that it goes far beyond what is necessary to protect the public system. Accordingly, in the view of the Chief Justice and Justice Major, as concurred in by Justice Bastarache, the offending provisions of the Quebec legislation must be struck down.

One last point from the Reasons of the Chief Justice and Mr. Justice Major is of interest in that it suggests that they would not necessarily support a finding that a ban on private

insurance or private care is unconstitutional in all circumstances. At the conclusion of their Reasons, they said:

“In sum, the prohibition on obtaining private health insurance, while it might be constitutional in circumstances where health care services are reasonable as to both quality and timeliness, is not constitutional where the public system fails to deliver reasonable services. Life, liberty and security of the person must prevail.” [para. 158]

Precisely what constitutes reasonable service in a timely manner is not specified.

Dissenting Reasons for Judgment of Binnie, LeBel and Fish, JJ:

The dissenting justices disagreed with their colleagues that the prohibition against private health care insurance offends section 7 of the Canadian *Charter* and section 1 of the Quebec *Charter*. Underlying their dissent is the view that the question of private insurance and private versus public delivery of health care is fundamentally a social policy issue and not one that can or should be resolved as a matter of law by judges. In their view, the proposed constitutional right to a two-tier health system for those who can afford private medical insurance would precipitate a “seismic shift” in health policy for Quebec. Such a shift, in their view, is not compelled by either the Quebec *Charter* or the Canadian *Charter*.

The dissenting justices also took strong exception to the lack of specificity in the Reasons of the Chief Justice and Justice Major as to what constitutes reasonable health care within a reasonable time:

“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? How many MRIs does the constitution require? The majority does not tell us. The majority lays down no manageable constitutional standard. The public cannot know, nor can judges or governments know, how much health care is ‘reasonable’ enough to satisfy section 7 of the Canadian *Charter of Rights and Freedoms* and section 1 of the *Charter of Human Rights and Freedoms*. It is to be hoped that we will know it when we see it.” [para. 163]

The dissenting justices accepted that in some circumstances a delay in getting access to necessary medical care may create risk to both a patient’s psychological integrity and physical security so as to trigger the section 7 rights to life, liberty and security of the person. However, they disagreed that any deprivation would violate a principle of fundamental justice.

The dissenting justices disputed the majority’s analysis on three primary points:

1. First, in their view, a principle of fundamental justice within the meaning of section 7 of the Canadian *Charter* must be a legal principle upon which there is significant societal consensus and which is capable of being identified and defined with precision. The goal of “health care to a reasonable standard within a reasonable time” is not such a legal principle nor is there clear societal consensus about what it means or how to achieve it. With respect to this latter point, the dissenting justices note that there is no medical consensus regarding guidelines for timely treatment nor are there currently national standards for waiting lists.
2. Second, the dissenting justices disagreed with their colleagues’ treatment of the evidence adduced before the trial judge. Based upon that evidence, which included expert testimony and various government and independent studies, the trial judge found that it “was neither clear nor obvious that a reorganization of the health system with a parallel private system would solve all of the existing problems of delays and access”. The dissenting justices endorsed this conclusion and held that, as a matter of law, there was no basis to interfere with the trial judge’s findings. As well, they found that there was simply no comprehensive and accurate data establishing how serious the problem of waiting lists is and what the consequences of delay are.
3. Third, the dissenting justices challenged the conclusion of the Chief Justice and Justice Major that the prohibition against private insurance is arbitrary in the sense that it bears no relation to or is inconsistent with the objective of maintaining a strong public system. Again, the dissenting justices adopted the trial judge’s conclusions on the evidence that a parallel private system would harm the public system. For example, they point to some of the evidence adduced by Quebec that suggests a private system would divert necessary physician resources away from the public system, would deal only with low risk patients leaving the high risk/high cost procedures for the public system and would lead to lessened government support, and thus decreased funding, for the public system.

In sum, the dissenting justices found that it was not arbitrary for Quebec to discourage the growth of private sector health care in order to maintain and strengthen the public health system, particularly in light of the legislative objectives reflected in the federal *Canada Health Act* which sets as a fundamental value the principle of equal access for all to necessary medical services based upon need and regardless of status, wealth or personal insurability.

The dissenting justices applied a similar analysis to also reject the Appellants’ claims under section 1 of the Quebec *Charter*.

Tie-Breaking Decision of Deschamps J:

In some respects, the decision of Madam Justice Deschamps is the most interesting of the three sets of Reasons, not only because she resolved the even split existing amongst her colleagues, but also because of the manner in which she approached the issue.

Justice Deschamps framed the fundamental issue as “whether Quebecers who are prepared to spend money to get access to health care that is, in practice, not accessible in the public sector because of waiting lists may be validly prevented from doing so by the state”. Justice Deschamps noted that the debate over the effectiveness of public health care and the role of private care is a very emotional one and she took the dissenting justices to task for allowing such emotion to creep into their analysis of the legal issues. In Justice Deschamps’ view, it is essential to take a step back and to view the issues objectively.

Justice Deschamps based her decision upon section 1 of the Quebec *Charter* which guarantees all human beings the “right to life, and to personal security, inviolability and freedom”. As noted by Justice Deschamps, the most obvious distinction between this provision and section 7 of the Canadian *Charter* is the absence of any reference in section 1 to the principles of fundamental justice. Given the difference in wording between the two provisions, Justice Deschamps suggested that the Quebec *Charter* has a scope that is potentially broader than section 7 of the Canadian *Charter*.

Justice Deschamps had little difficulty in concluding that the prohibition on private insurance constitutes an infringement of the right to life and security. The balance of her decision therefore focused on whether or not that infringement can be justified under section 9.1 of the Quebec *Charter* (the parallel provision to section 1 of the Canadian *Charter*). Section 9.1 reads “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 Quebec”.

In a previous decision, the Supreme Court of Canada held that the test to be applied under section 9.1 is similar to the test under section 1 of the Canadian *Charter* namely that in order to justify or save legislation that otherwise infringes a guaranteed right, the objective underlying the legislation must be pressing and substantial and the means of attaining that objective must be proportionate.

Justice Deschamps accepted that the objective of the Quebec legislation of preserving the integrity of the public health care system is pressing and substantial. She further found that there is a rational connection between the prohibition and that objective. However, Justice Deschamps found that the prohibition failed the “minimal impairment” test. She reached that conclusion for the following reasons:

1. The evidence adduced by Quebec was insufficient to establish that the existence of private insurance or a parallel private system would harm the public system. Like her colleagues, the Chief Justice and Justice Major, Justice Deschamps characterized the evidence against private care as being based upon common sense rather than empirical data. As such, Quebec failed to meet its burden of establishing the elements of justification under section 9.1 of the Quebec *Charter*.
2. Justice Deschamps reviewed the medical service plans in place in the other Canadian provinces. That review suggests that there are a variety of approaches to the issue of private insurance and private care and further that a blanket prohibition on private insurance is by no means the only measure that a state can adopt to protect the integrity of the public system.
3. Justice Deschamps also reviewed the systems in place in several other OECD countries all of which permit some form of private insurance or private care without any demonstrative harm to the public system.
4. Justice Deschamps rejected the argument that the court should simply defer to the legislature on matters involving issues of social policy. According to Justice Deschamps:

“The courts have a duty to rise above political debate. They leave it to the legislatures to develop social policy. But when such social policies infringe rights that are protected by the *Charters*, the courts cannot shy away from considering them. The judicial branch plays a role that is not played by the legislative branch.” [para. 89]

Justice Deschamps concluded her decision as follows:

“The relief sought by the Appellants does not necessarily provide a complete response to the complex problem of waiting lists. However, it was not up to the Appellants to find a way to remedy a problem that has persisted for a number of years and for which the solution must come from the state itself. Their only burden was to prove that their right to life and to personal inviolability had been infringed. They have succeeded in proving this. The Attorney General of Quebec, on the other hand, has not proved that the impugned measure, the prohibition on private insurance, was justified under section 9.1 of the Quebec *Charter*.”

Having reached this conclusion, Justice Deschamps held that it was not necessary to go on to determine the issue under section 7 of the Canadian *Charter*.

What Does it all Mean?

Interpreted narrowly, the *Chaoulli* decision simply means that the prohibition against private insurance under the Quebec *Health Insurance Act* and *Hospital Insurance Act* has been struck down, although there has been some suggestion that Quebec will ask the Supreme Court of Canada to suspend the operation of the decision for a period of time to permit Quebec to consider a legislative response.

The implications of the decision however cannot be so narrowly confined as the Supreme Court's ruling will undoubtedly shape the public/private health care debate throughout Canada, both in terms of how other provincial governments structure their medical plans and potentially as a basis for further legal challenges.

There are a number of key findings in the decision as well as some lingering questions that will impact directly upon how the debate unfolds:

1. It is significant that all seven justices recognized that undue delay in obtaining necessary medical services and the resulting psychological and/or physical consequences may violate the guaranteed right to life and security of the person under section 7 of the Canadian *Charter*. Where the majority and the dissent differed was in whether those consequences could be justified as an unfortunate but inevitable price to pay in pursuit of the state's larger objective of preserving the integrity of a universal single-tier public system.
2. It is also significant that the split between the majority and the dissenting justices on the justification issue was resolved on the basis of the evidence. While the justices took very different views of what that evidence showed, the majority concluded that the Quebec Government had simply failed to establish a causal relationship between private insurance and increased private care on the one hand and harm to the public system on the other hand. Absent some major new study or data that can provide a comprehensive insight into the relationship between waiting times and acceptable standards of medical care, it is anticipated that other governments will face similar difficulties in justifying or defending bans on private insurance and private care.
3. The majority justices recognize that a ban on private insurance may not be unconstitutional in all circumstances, particularly if it can be shown that the public system has achieved the objective of reasonable care in a timely manner. As pointed out by the dissenting justices however, the majority gives no guidance as to what constitutes reasonable care or what an acceptable delay might be. That will no doubt have to be further developed in future cases. It also remains to be seen whether, if governments develop clear benchmarks for acceptable waiting times, those benchmarks will be sufficient to meet a constitutional standard.

4. The fact that Justice Deschamps declined to decide the issue under section 7 of the Canadian *Charter* leaves open the question of whether section 7 can in fact be successfully invoked to challenge similar prohibitions in other provinces, particularly given her observation that section 1 of the Quebec *Charter* is potentially broader in application than section 7. That said, Justice Deschamps' analysis under the Quebec *Charter* resonates very closely with the analysis of the Chief Justice and Justice Major under section 7, particularly in terms of how they viewed the evidence. As such, it is very arguable that a similar analysis will prevail in future legal challenges.
5. Lastly, it should be kept in mind that the *Chaoulli* case was decided by a panel of seven justices, who split 4-3 in the result. The most recent appointees to the court, Justices Abella and Charron, did not participate in the decision and it is therefore possible that their involvement in any future appeals to the Supreme Court may give rise to a different majority and result in a different outcome.

While some may question, as did the dissenting justices, whether the courts should be determining difficult social policy questions like those in issue in the *Chaoulli* case, the courts' involvement is a direct consequence of the failure of governments, both federal and provincial, to take concrete steps to address the problem of waiting times in the public health care system. It is now up to those governments to respond. If they do not, *Chaoulli* suggests that courts will intervene to protect the rights of patients to access reasonable and timely medical care when the public system fails to deliver.

For more information concerning the *Chaoulli* decision and its impact on how health care services are delivered in Canada, please contact Ron A. Skolrood by telephone at (604) 631-9134 or by e-mail at rskolrood@lawsonlundell.com.

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Vancouver

1600 Cathedral Place
925 West Georgia Street
Vancouver, British Columbia
Canada V6C 3L2
Telephone 604.685.3456
Facsimile 604.669.1620

Calgary

3700, 205-5th Avenue SW
Bow Valley Square 2
Calgary, Alberta
Canada T2P 2V7
Telephone 403.269.6900
Facsimile 403.269.9494

Yellowknife

P.O. Box 818
200, 4915 – 48 Street
YK Centre East
Yellowknife, Northwest Territories
Canada X1A 2N6
Telephone 867.669.5500
Toll Free 1.888.465.7608
Facsimile 867.920.2206

genmail@lawsonlundell.com
www.lawsonlundell.com

