

# Chaoulli v. Attorney General of Quebec: What the Supreme Court Really Said

*On June 9th, 2005, by a narrow majority, the Supreme Court of Canada found that Quebec's ban on private insurance for insured health services violated the Quebec Charter of Human Rights and Freedoms.*

*The ruling is certainly a victory for the advocates of privatization and two-tiered health care, but it is far less significant than these forces claim. If their challenge represented a full frontal assault on the principles of Canada's health care system, the Supreme Court's decision has dealt medicare only a glancing blow. The following Q and A attempts to shed some light on what the Court really decided.*

## **Did the Supreme Court challenge the validity of the Canada Health Act?**

**NO.** While the pro-privatization lobby has pounced on the decision as spelling the death of medicare, in fact all of the Supreme Court Justices acknowledged the importance and validity of the Canada Health Act. Moreover, the legal effect of the Court's decision is limited to Quebec. For that reason, it has no legal bearing on either the Canada Health Act or any other provincial health care insurance plan, including those that also ban private insurance.

## **Can provinces continue to maintain single tier health care systems?**

**YES.** And this is true for Quebec as well. As Mme. Justice Deschamps (one of the four judges who ruled in favour of Chaoulli), states: "In this regard, when my colleagues ask whether Quebec has the power under the Constitution to discourage the establishment of a parallel health care system, I can only agree with them that it does."

Justice Deschamps also points out that the provinces have several tools at their disposal to prevent the establishment of two-tiered health care, including the right to regulate what physicians may charge for their services.

## **Do Canadians now have the right to purchase health care services outside the public system?**

**NO.** As noted, the Supreme Court ruling has no legal effect in or for other provinces. Moreover, even Quebec may maintain a ban on private insurance if it can demonstrate that Quebec residents have access to the health care services they need within a reasonable time frame. This is because, as acknowledged by the majority judgment, a ban on private insurance "might be constitutional in circumstances where health care services are reasonable as to both quality and timeliness ..."

It is important, therefore, to appreciate that Chaoulli's application arose from the circumstances of Quebec's health care system as it was in 1997 - before Romanow, Kirby and several federal-provincial health accords focused on the problem of reducing wait times. It is arguable that Quebec has already satisfied "reasonable" expectations about the delivery of timely care.

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## Will court challenges now be brought in other provinces?

**POSSIBLY** - but there are good reasons to doubt whether these would succeed. As noted, many governments have now taken significant steps to reduce wait times. In addition, the Court was evenly split 3-3 on the question of whether a ban on private insurance offended the Canadian, as opposed to the Quebec, Charter of Rights and Freedoms. Powerful dissenting reasons given by Justices Binnie, Lebel, and Fish present a sharp and compelling critique of the majority's treatment of the issues and evidence. These Justices take their colleagues to task for not only failing to define a "manageable constitutional standard" for judging questions of health care services in the context of the Charter rights, but also for showing little regard for the evidence or findings of fact made by the Quebec Courts or for well-established norms of constitutional law.

## Does that mean I don't have to worry about the Chaoulli decision?

**UNFORTUNATELY, NO.** While the case may have few legal consequences, the more immediate challenge is a political one, as pro-privatization forces pressure other provinces to abandon single-tier care.

While the majority of the Supreme Court appears to believe that private insurance and public health care can co-exist without any adverse effects on the public system, there simply isn't any meaningful evidence to support that view. While the majority relies on evidence gathered by Senator Kirby, it ignores the fact that the senator rejected the notion of two-tiered care to resolve wait list problems, stating: "The solution to this problem is not, as some have suggested, to allow wealthy Canadians to pay for services in a private health care institution. Such a solution would violate the principle of equity of access."

As the minority justices point out: "... the Kirby Report states flatly that "allowing a private parallel system will ... make the public waiting lines worse", a conclusion strongly supported by the Romanow Report: "[P]rivate facilities may improve waiting times for the select few ... but ... worse[n] them for the many]", and by virtually all of the evidence adduced before the Quebec courts."

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