Comment on *Chaoulli v. Quebec*

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In a recent New Yorker article, Justice Antonin Scalia of the U.S. Supreme Court is quoted as telling an audience member who questioned the Court's controversial decision in *Bush v. Gore*, which ended the 2000 presidential election in George Bush's favour, "The only issue was whether we should put an end to it." In *Chaoulli v. Quebec*, the case that may come to be viewed as Canada's *Bush v. Gore*, a majority of the Supreme Court Justices of Canada adopted a similar approach. After years of debate and dispute over the state of health care in Canada and the virtues and vices of "single-tier medicine", including the First Ministers' conferences, federal elections, and numerous reports and Commissions of Inquiry, the Justices believed it was time someone acted decisively. Madam Justice Deschamps put it succinctly:

> "Governments have promised on numerous occasions to find a solution to the problem of waiting lists. Given the tendency to focus the debate on a socio-political philosophy, it seems that governments have lost sight of the urgency of taking concrete action. The courts are therefore the last line of defence for citizens."

If this does not seem the most modest statement by a Court, the decision it accompanies justifies the bravado. The Court's judgment in *Chaoulli v. Quebec* may not mean the end of medicare, but it seems likely to be the end of medicare as Canadians have known it.

At first glance, this might appear an overstatement. The case concerned a single statutory provision, the ban on private health insurance, in a single province, Quebec. It was only that provision which the Court ruled invalid. Moreover, the Bench was divided evenly on the question of whether the provision violates section 7 of the *Charter of Rights and Freedoms* (the right to life, liberty and security of the person), a finding that would have immediate implications for the five other provinces which utilize the same prohibition (B.C., Alberta, Manitoba, Ontario, and Nova Scotia). The deciding vote on the Quebec legislation was cast by Justice Deschamps, who limited her ruling to the effect of Quebec's *Charter of Human Rights*.

In these circumstances, Canadian governments and political leaders might seem to have room to manoeuvre, and to save as much of the existing single-tier system they or their constituents wish. A closer reading of the decision suggests this is not true. While Justice Deschamps limited her views to the situation in Quebec, Chief Justice McLachlin, and Justices Major and Bastarache did not. Their sweeping opinion signalled a much more profound dissatisfaction with the principles of the *Canada Health Act* ("*CHA*"), which has long stated to provide the legal underpinnings for public health care across Canada.

Justice Deschamps parsed in detail the different ways in which Canadian governments have sought to achieve the goal of protecting the public health care system under the CHA. She noted the following techniques: prohibiting extra-billing by physicians, requiring physicians who wish to bill outside the public system to opt-out for the whole of their practices, and denying the contribution of any public funds to payment for private services. These measures "discourage

people from turning to the private sector." (Para 70). Justice Deschamps used their existence in other provinces to demonstrate the ineffectiveness of the insurance prohibition in Quebec. She thereby implied that these mechanisms would remain available to Quebec. She noted with approval how several OECD countries use different methods to discourage a flight of doctors, patients and services to the private sector.

Justices McLachlin, Major and Bastarache did not adopt such a cautious approach. To them, barriers to private services of whatever kind are of dubious validity. This is a much more serious challenge to the principles of the *CHA*. The Justices cited the *Act* as part of the problem. Along with the impugned Quebec statutes, it creates a "virtual monopoly" for the public health care system, a "virtual monopoly, [which] on the evidence, results in delays in treatment that adversely affect the citizen's security of the person." (Para 106) The monopoly has failed "to provide public health care of a reasonable standard within a reasonable time" (Para 105). The position of the Quebec and other governments, that the monopoly is needed to protect the quality of public health care is purely a theoretical construct, built on questionable "common sense" notions. Those notions are undermined by the experience of such OECD countries as Germany, Sweden and the United Kingdom:

> "This brings us to the evidence called by the appellants at trial on the experience of other developed countries with public health care systems <u>which permit access to private health care</u> [the evidence shows these countries have] delivered to their citizens medical services that are superior to and more affordable than the services that are presently available in Canada." (Para 139-140, Emphasis added)

The issue here is not simply the mechanism chosen to maintain the virtual monopoly of the public system, but the limiting of access to private services. Access to private services is the solution to the problem of waitlists, and waitlists are the evidence of the failure of the public system. On this reading, it may not be enough to permit private insurance while maintaining other barriers to access, in order to ensure a limited role for private medicine.

It's true that Justices McLachlin, Major and Bastarache said that a better performance by the public system could save it from a constitutionally-mandated overhaul:

> "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." (Para 158)

However, the context shows this to be less a warning about what needs to be done in the future, than a verdict on what has not been done in the past. The facts are in.

One of the most striking aspects of the decision is the ease with which Justices McLachlin and Major brush aside decades of health economic research and cast it as merely anecdotal and based largely on "common sense." They discount in a single phrase the great volume of work done on the Romanow Report, which included numerous empirically based research papers, as "a matter of some debate...that cannot be determinative of this litigation."(Para 151) This is all the more

frustrating for the majority's unquestioning reliance on the opinions of three physicians given at trial about the problems with waiting lists. Justices Binnie, Lebel and Fish sharply disagreed with the majority's conclusions on the facts of health care. Many familiar with the literature may concur with them, but this is not likely to change the momentum created by the majority judgment.

In the end, the question of what governments must do in response to the Supreme Court's decision may be less important that what they can do. Quebec must eliminate its statutory ban on private health insurance. Provinces like Alberta, which have chafed under the restrictions of the *CHA*, will feel comfortable doing the same, and going further, perhaps significantly so. Much remains to be worked out in the political domain. What can be said is that the Supreme Court has kicked the legal struts out from under the structure of the Canadian public health care system, and given its imprimatur to the development of a vital private sector in medically necessary health services.

Justice Scalia also told his unhappy audience member, "Get over it." In five years time, a similar admonition may be the common response to lingering concerns about how the Canadian Supreme Court changed the shape of public and private health care in this country.

Note: all paragraph references are to: Supreme Court of Canada *Chaoulli v. Quebec*

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