

# The Supreme Court Missed a Good Opportunity

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## **Background**

Mr. Zeliotis, a Quebecker, claims that he was on a waiting list for hip replacement surgery. Private insurance would have granted him access to the surgery he required within a reasonable time frame. However, evidence submitted before a Quebec court showed that the waiting times Mr. Zeliotis faced were based on factors outside the healthcare system, “including his pre-existing depression, his indecision and his unfounded medical complaints” (Supreme Court of Canada, *Chaoulli v. Quebec*, 2005 SCC 35, para. 186, 211). According to the justices of the majority, Mr. Zeliotis’s case has nothing to do with the waiting times he experienced, given their total failure to mention his case in their arguments. The issue, rather, is access to healthcare by all Quebeckers and, perhaps, all Canadians. And it is here that the majority judgment of the Supreme Court failed miserably in its task. It contains weak arguments, sells off Quebeckers’ rights, and stands as an exercise in casuistic denial. The judgment is remarkable in that two Quebec courts rejected Chaoulli’s and Zeliotis’s claims, while the Supreme Court upheld them.

## **First element of the majority judgment: denial**

The central question of the appeal is “whether the prohibition [of private health insurance] is justified by the need to preserve the integrity of the public system” (SCC, 35, para. 14). The question is raised because waiting times under the Quebec healthcare system apparently threatened Mr. Zeliotis’s rights to life and personal security. It can be assumed that, with private insurance, these waiting times would be shortened or eliminated, hence the challenge to the Quebec statute, which prohibits private insurance.

This line of argument is complex and presupposes the existence and demonstration of cause and effect. In a rational debate, one would seek to establish the following: 1) Does private health insurance threaten the integrity of the public system? 2) Do waiting times in the public system threaten the integrity of Quebeckers? 3) Would the introduction of private insurance settle the waiting time problem? 4) Would the introduction of private insurance lengthen waiting times in the public sector for those people who cannot contribute to a private health insurance plan?

In an exercise of amazing denial, the justices of the majority decided that the onus is not on the appellants to prove that private insurance would provide a solution to the problem of waiting lists (SCC 35, para. 59, 100), and they completely avoid examining the possibility that introducing private insurance would lengthen waiting lists in the public sector. While I am not in a position to draw a conclusion on the soundness of the majority position, appears obvious to me that it was sheer denial that led these judges to recommend rejecting the offending sections of the Quebec statute.

In an inelegant ruling, the justices of the majority state that “it must be possible to base the criteria for judicial intervention on legal principles and not on a socio-political discourse that is disconnected from reality” (SCC 35, para. 85). Here, legal principles exclude the fundamental assessment of political decisions, and are completely disconnected from socio-political reality. The parable of the eye and the beam applies perfectly here: “You hypocrite, first take the log out of your own eye, and then you will see clearly to take the speck out of your brother’s eye” (Matthew, 7.1–5). It is obvious to me that if the Supreme Court can legitimately avoid discussing the vital points of a debate on a public policy, then it has no place in this debate.

## **Second element of the majority judgment: selling off rights**

The Supreme Court’s judgment is the conclusion of a long case. Two Quebec courts had rejected Chaoulli’s and Zeliotis’s claims. It was clear from the start that the case affected not only Chaoulli and Zeliotis. The tone and content of the judgment do not limit it to the right of two individuals to obtain private health insurance. The issue is the right of all Quebeckers who are prepared to pay to have access to this type of insurance (SCC 35,

para. 4). The justices of the majority then discuss the harm that the introduction of private insurance may cause the public system, rather than the waiting times that people who lack private insurance may experience with its introduction. The majority overlooks how the exercise of the rights by a few people will affect the rights of others to acceptable access to healthcare. The goal was not only to determine whether the introduction of private insurance would affect the public healthcare system in general, but to ask specifically whether the rights to access health services within acceptable time frames would be lengthened for Quebeckers who do not take out private insurance.

The facts to that effect are conclusive, and the justices of the minority picked up on this (SCC 35, para. 175, 217, 219, 221, 251, 254). The majority therefore sold off the rights – to acceptable access to healthcare – of those Quebeckers who will use the public healthcare system, in favour of the rights of those who wish to purchase private health insurance. But the rights of certain people must not cancel out the rights of others, even if the former are richer and more willing to pay than the majority. There is a delicate balance of rights here, and the justices of the majority have begged the question.

### **Third element of the majority judgment: weak arguments**

The justices of the majority have a very personal, unseemly way of presenting their arguments for introducing private insurance into the public healthcare system. It would be better if they just threw up their hands and held the debate in a strictly ideological forum.

It would seem that “on this point, we are confronted with competing but unproven ‘common sense’ arguments, amounting to little more than assertions of beliefs” (SCC, para. 138) – in other words, anecdotal evidence. And yet, Justice Deschamps lists seven anecdotes relating to the possible effects of private insurance on healthcare (SCC 35, para. 63, 65), concluding that the impact on the public system would be negligible – a point that may perplex the reader.-

The justices of the minority were more prudent, read the studies and analyses more attentively, and came to different conclusions.

### **Conclusion**

The justices of the majority argue throughout their decision that the impact on the Quebec public healthcare system of introducing private insurance will be minor. They base their opinion on the example of other Canadian provinces that allow private insurance for healthcare and on the experience of other countries. Here, as elsewhere in their decision, they fail to consider the political, social, and economic dynamics that oversaw the emergence and maintenance of public plans in other provinces and countries, and the characteristics of those systems. For example, coverage in several countries, and in Quebec, is much more generous. Press reports in Quebec, since publication of the Supreme Court’s judgment, clearly show that champions of a private healthcare system see this judgment as an ideal opportunity. The justices of the minority read the socio-political reality of Quebec, and the dynamics of healthcare systems in the Western world, in a purely abstract manner.

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