

Pressure, not progress

The Supreme Court has made it harder for governments to maintain their health care monopoly—but not impossible



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After a 10-year battle, Dr. Jacques Chaoulli partly won his case before the Supreme Court of Canada. The court struck down the prohibition of private health insurance in Quebec, a prohibition in force in half a dozen Canadian provinces. In these provinces, people are allowed to buy *supplementary* private health insurance, but not insurance that covers the services insured by the public monopoly. This means that only the

very rich can obtain private health care, often out of the country. This is what former Quebec premier Robert Bourassa, a great defender of the single-tier system, did in the 1990s when he was diagnosed with cancer.

Perhaps the most interesting part of the 279-paragraph ruling by the Supreme Court is the minority opinion.

The three dissenting judges (out of seven) in *Chaoulli v. Quebec* agree that “people die while on waiting lists,” but accept that queues are just a management tool, failing to distinguish between frictional queues (like at the grocery store) and structural queues caused by non-clearing prices (zero prices, in this case). They cite a lower court’s opinion that the goal is “to guarantee that virtually all the existing health care resources in Québec would be available to all the people,” a formula that is totally empty until a rationing mechanism has been established. The honourable minority’s ignorance of economics is abyssal.

If the state declared all the food resources to be available to all the people, and created a food distribution monopoly, you would soon see waiting lines at grocery stores.

The three dissenting judges don’t care. Egalitarianism is the highest, if not the only, value they espouse. “The argument that ‘liberty’ includes freedom of contract,” they write, “is novel in Canada.” They cite approvingly Fernand Turcotte, a Laval University health fascist. I don’t think it would violate their charter rights to force them to watch *Les invasions barbares*, a very good and relevant film.

Strangely enough, as opposed as they are to a

“two-tier health system,” the dissenting judges don’t mind a two-tier legal system. The courts, they explain, “are available to supervise enforcement of the rights of those patients who are directly affected . . . on a case-by-case basis.” In other words, anybody suffering in a waiting list is free, like Dr. Chaoulli, to spend hundreds of thousands of dollars to obtain relief from judges.

Compared to that, the majority’s opinion looks almost revolutionary. In fact, it is rather moderate and limited in scope. “[N]o one questions the need to preserve a sound public health care system,” declares the judgment. It concludes that “where the public system fails to deliver adequate care, the denial of private insurance subjects people to long waiting lists and negatively affects their health and security of the person,” thus violating the Quebec Charter of Human Rights and Freedoms. The majority chose not to rule on whether the prohibition of private health insurance violates the Canadian Charter of Rights and Freedoms, although a subset of three judges argued that it did.

If a parallel private health care system develops in Quebec, other provincial governments would be under pressure to rescind their own prohibitions. With his usual humour, Gerry Nicholls of the National Citizens Coalition observed: “You can’t give Quebecers health care choice, but deny it to the rest of Canadians. That would in a sense be a two-tier health care system.”

However, there are many ifs. There are other ways for government to stifle private

health care, as shown in the provinces and in many of the countries where private insurance is not banned. (Private health insurance is officially banned in no other OECD country.) The Quebec government could amend its charter or simply invoke its notwithstanding clause, as it has done many times in the past.

It remains to be seen whether *Chaoulli v. Quebec* will open the gates to a full-fledged private sector, or just bring the state to better plug the leaks of tyranny. But it does create pressure for change. Can we hope that the Quebec Liberal party and the Canadian Conservative party will not, like the Parti Québécois, side with the three irremediably statist minority judges? **W**

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