

Personal Inviolability and Public Health Care: *Chaoulli v. Québec*

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While much of the recent discussion about health care in Canada has been dominated by economic reasoning concerning the effects of privatization on the public health care system, the recent case of *Chaoulli v. Québec (Attorney General)*¹ is important because it applies rights-based, constitutional arguments to the issue of whether private insurance can legally be prohibited in order to promote the goals of the existing public health care system.

The case had its origins in the ordeal of George Zeliotis, a 73 year-old retiree from Montreal, who waited one year in order to receive hip replacement surgery from Canada's public health care system.² Purchasing private health insurance was not an option for him because Québec prohibited the purchase of private insurance to pay for medically necessary services and he could not afford to pay out-of-pocket for private surgery. At the same time, Dr. Jacques Chaoulli was unable to obtain a licence to operate an independent, private hospital. As a result of their dissatisfaction, the two combined forces to launch a challenge to the prohibition of private insurance under the Québec *Charter of Human Rights and Freedoms*³ ("Québec Charter") and the Canadian *Charter of Rights and Freedoms* ("Charter"). After suffering two losses before Québec courts, they appealed to the Supreme Court of Canada.

In *Chaoulli v. Québec (Attorney General)*, the Supreme Court of Canada characterized the 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."⁴ In a defense of the right to personal physical and mental inviolability in the health area, it decided that it was not permissible to prevent the purchase

of health insurance in such circumstances and narrowly struck down Québec laws⁵ prohibiting its sale to Québec residents. The prohibition infringes the right to personal inviolability under s. 1 of the Québec *Charter* and is not justified under s. 9.1 of the Québec *Charter*, since the prohibition does not minimally impair the right.⁶

One limitation of the judgment is that the inviolability right that was affirmed may be criticized as empty, since without a flourishing private health insurance market, the right has little value.⁷ Another limitation is that, strictly speaking, the judgment applies only to Québec. Nevertheless, it will be of interest to the other provinces, especially Alberta, British Columbia, Manitoba, Ontario, and Prince Edward Island, which similarly prohibit private health insurance and are subject to the *Charter*.⁸ Writing for the majority, Deschamps, J. does not directly address *Charter* rights, but does so indirectly. The remaining six justices do address the *Charter* issues but differ 3:3 on whether the prohibition violated the life, liberty and security rights of persons under s. 7 of the *Charter*.

The Supreme Court left a fundamental health rights issue unanswered. The issue is this: even if a prohibition of private medical insurance were necessary to ensure the goals of the public health care system, to what extent can a public scheme that distributes (certain) health care goods justifiably prevent individuals from obtaining such goods outside the scheme when the allocation within the scheme sometimes adversely affects their physical and psychological well-being? Arguably, if personal inviolability is so strong that even the welfare of society as a whole cannot override it,⁹ then, promoting a healthier society does not justify prohibiting someone from purchasing health care insurance.



In other words, are the health care benefits to individuals proportional to the loss of rights for some? Unfortunately, the decision is inconclusive on this “proportionality” matter. Deschamps J. does not directly determine the *Charter* issues and does not consider proportionality at all. The concurring majority of three agree that the benefits of the prohibition are outweighed by the deleterious effects on *Charter* rights¹⁰ and, while the three dissenters do not address limitations of the *Charter’s* s. 7 rights directly, they hold, astoundingly, that under the Québec *Charter*, the legislative goals of a democratic government outweigh the personal inviolability of individuals.¹¹

Some of the reasoning of Deschamps J. concerning the Québec *Charter* has direct implications for how she would decide the *Charter* issue.¹² In her analysis, Deschamps J. reasoned that, since delays in relation to medical treatment were considered a violation of security of the person under the *Charter*, the same applies to inviolability under s. 1 of the Québec *Charter*.¹³ In previous cases, the right to inviolability contained in the Québec *Charter* has been interpreted more broadly than “security” under the *Charter*, and includes physical, psychological, moral and social inviolability.¹⁴ It follows that Deschamps J. would consider the prohibition to be a violation of s. 7 *Charter* rights as well.

Section 9.1 of the Québec Charter contains the provision that, “in exercising 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 Québec.”¹⁵ In Deschamps J.’s view, s. 9.1 is a saving provision corresponding to the *Charter* s. 1 provision and that the test developed in *R. v. Oakes*¹⁶ is applicable. On that test, the prohibition would be justified if: (i) the objective of the legislation, to promote health care of the highest possible quality for all Quebecers regardless of their ability to pay, is pressing and substantial; (ii) there is a rational connection between the prohibition and the aim of the legislation; (iii) the prohibition minimally impairs the rights of Quebecers; and (iv) the harm to rights from the prohibition is less than the benefits of health care for Quebecers.¹⁷

Deschamps J. finds that the first two conditions hold but, crucially, does not deal with the fourth proportionality condition. Instead, the core of her reasoning is designed to establish the third condition, that the legislative measures enacted by Québec are not necessary, in the sense that they do not minimally impair the s. 1 Québec *Charter* rights. In so finding, she holds that the claims that the integrity of the public system of health care would be jeopardized by abolishing the prohibition on private insurance are unfounded.¹⁸

In her view, the existence of public health care is not threatened by permitting private insurance, given that public health care and private insurance coexist elsewhere, i.e., in New Brunswick, Newfoundland, Nova Scotia and Saskatchewan¹⁹ and other OECD countries surveyed.²⁰ Further, 30 percent of health care in Canada is already privately purchased.²¹ Thus, she reasons, the prohibition does not minimally impair s. 1 Québec *Charter* rights and is not justified under s. 9.1 of the Québec *Charter*. It follows, on her

analysis, that the prohibition would not be justified under s. 1 of the *Charter*, although she refrained from deciding that point.

Since the reasons for judgment directly deal only with the Québec *Charter* rights it is left to the other members of the Supreme Court to deal with *Charter* issues. The concurring opinion written by McLachlin., C.J. and Major, J. (with Bastarache J. concurring) applied the decision of *Morgentaler*,²² which struck down laws which interfered with access to therapeutic abortions, to conclude 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 s. 7 of the *Charter*.”²³

They further find that the limitation on s. 7 *Charter* rights is not in conformity with principles of “fundamental justice” since the provisions, in their view, are arbitrary in that the prohibition of insurance is not necessary to maintain quality public health care.²⁴ On their view, the fact that witnesses suggest that the prohibitions are necessary to reduce wait

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times amounts to “little more than assertions of belief”²⁵ and similar conclusions in the reports of Commissioner Romanow and Senator Kirby are “a matter of debate” and “cannot be determinative.”²⁶ Instead, the evidence shows 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.”²⁷

In terms of s. 1 of the *Charter*, the concurring majority find that while access to health care is pressing and substantial, the prohibition was neither rationally connected to the objective nor minimally impairs the s. 7 *Charter* rights.²⁸ Unlike Deschamps J. they do address the proportionality issue and find that:

prohibiting citizens from obtaining private health care insurance may... leave people no choice but to accept excessive delays in the public health system. The physical and psychological suffering and risk of death that may result outweigh whatever benefit...there may be to the system as a whole.²⁹

Despite arguing that there is no liberty right to purchase insurance, and that *Morgentaler* does not apply, the dissenting reasons, written by Binnie and LeBel JJ. (Fish J. concurring), acknowledge that “it may also be that a lack of timely medical intervention will put the physical security of the patient at risk”³⁰ and that “there are serious problems with the single-tier health plan in Canada.”³¹ They hold, however, that the prohibition is justified under s. 1 of the Quebec *Charter*. It should be troubling for those who believe in strong human rights that, instead of applying a “large and liberal” interpretation of life, liberty and security rights embodied in the *Charter*, the minority notes that because s. 7 *Charter* interests concern “difficult moral and ethical issues,”³² it is prudent for the court to “proceed cautiously and incrementally in applying s. 7.”³³ They find that the prohibition on medical insurance does not violate principles of fundamental justice since arbitrariness and necessity are not equated and the prohibition only need promote the goals of the health care plan in order to escape a charge of being arbitrary.³⁴

The dissent questions the factual assumptions of the majority. They accept the Kirby report that allowing a private parallel system will make public system waiting times worse.³⁵ However, they also accept the Romanow report statement that, while private facilities may worsen waiting times for most, they may also improve the waiting times for some,

presumably those who are using private facilities.³⁶ They hold that a parallel system will decrease the funding for public health care.³⁷ The dissent also accepts that private insurers will avoid high risks and “skim the cream” of the population while not providing care to others.³⁸ It is further accepted that the “curative power” of private insurance is not borne out by the evidence³⁹ and that a single tier public system is more fiscally responsible and efficient than multiple tiers.⁴⁰

Given the multiplicity of factors that bear on the operation of the public health care system, it is difficult to accept the minority’s view that a combination of factors other than the existence of private insurance could not be invoked by the government to discourage the flourishing of a private market in health care, while not infringing security rights. Even one critic of the majority position has previously argued that it is *not* the prohibition of private insurance that has contributed to the lack of a flourishing private system, but other factors which prohibit subsidization of a private health care sector from the public plan.⁴¹

As interesting as the factual debate is about whether the prohibition of private insurance minimally impairs the rights of individuals, a resolution of that issue is unlikely, in and of itself, to resolve the issue of whether private insurance can, constitutionally, be prohibited where public health services are inadequate. For, the issue that remains is whether the value of access to health care irrespective of wealth outweighs personal life, liberty and security rights under s. 7 of the *Charter*. That issue, as mentioned, remains unresolved by the decision. If the concurring majority is correct, then provinces who want to preserve the prohibition of private health care insurance will likely move to lessen waiting times to avoid violating *Charter* s. 7 rights. In that sense, *Charter* s. 7 rights are not empty.

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1. *Chaoulli v. Quebec (Attorney General)* 2005 SCC 35 [Chaoulli].
2. CBC News, “Top court strikes down Quebec private health-care ban,” (9 Jun 2005), online: <<http://www.cbc.ca/story/canada/national/2005/06/09/newscoc-health050609.html>>
3. R.S.Q., c. C12, ss. 1, 9.1.



4. *Chaoulli, supra* note 1.
5. The Québec *Hospital Insurance Act*, R.S.Q. c. 28, s. 11. and the Québec *Health Insurance Act*, R.S.Q. c. 29, s. 15.
6. The Court has since granted a one-year stay of its ruling allowing Québec time to comply with the ruling.
7. Flood and Sullivan characterize inviolability as an empty right in Colleen M. Flood and Terrence Sullivan, “Supreme disagreement: The highest court affirms an empty right” (2005) 173 *Canadian Medical Association Journal* 2.
8. For additional details, see Colleen M. Flood & Tom Archibald, “The illegality of private health care in Canada,” (2001) 164 *Canadian Medical Association Journal* 6.
9. See John Rawls, *A Theory of Justice*. (Cambridge: Harvard University Press, 1970) at 3. Interestingly, economic liberty appears not to be one of the basic liberties. See Jan Narveson, “A Puzzle about Economic Justice in Rawls’ Theory,” online: <http://www.arts.uwaterloo.ca/~jnarveso/articles/Puzzle_in_Rawls'_Theory.pdf>
10. *Chaoulli, supra* note 1, at 157.
11. *Ibid.* at 273.
12. Nevertheless, since only seven judges decided the case, it is unknown what the present full Supreme Court would decide should similar laws be challenged in other provinces.
13. *Chaoulli, supra* note 1, at 43.
14. *Ibid.* at 41, citing Quebec (*Public Curator*) v. *Syndicat national des employés de l’hôpital-St-Ferdinand*, [1996] 3 S.C.R. 211 at 95.
15. *Charter of Human Rights and Freedoms*, R.S.Q., c. C12, ss. 1, 9.1.
16. [1986] 1 S.C.R. 103.
17. *Chaoulli, supra* note 1, at 48ff.
18. *Ibid.* at 62.
19. *Ibid.* at 74.
20. *Ibid.* at 84.
21. *Ibid.* at 17.
22. *R. v. Morgentaler*, [1988] 1 S.C.R. 30.
23. *Chaoulli, supra* note 1, at 124.
24. *Ibid.* at 131. McLachlin and Major use the words “link” and “real connection” but they appear to mean necessary.
25. *Ibid.* at 138.
26. *Ibid.* at 151.
27. *Ibid.* at 152. This goes beyond saying that it is not necessary and hints that the decisive factor is proportionality.
28. *Ibid.* at 155-156.
29. *Ibid.* at 157.
30. *Ibid.* at 206.
31. *Ibid.* at 229.
32. *Ibid.* at 193.
33. *Ibid.*
34. *Ibid.* at 265 and 231 ff.
35. *Ibid.* at 243.
36. *Ibid.*
37. *Ibid.* at 248.
38. *Ibid.* at 249.
39. *Ibid.* at 251.
40. *Ibid.* at 252.
41. Flood & Archibald, *supra* note 8.

