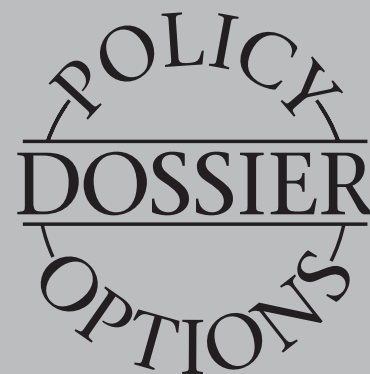


WHEN THE CHARTER TRUMPS HEALTH CARE — A COLLISION OF CANADIAN ICONS



Antonia Maioni and Christopher Manfredi

The Supreme Court decision in the *Chaoulli* case put two cherished icons of Canadian public policy, the Charter of Rights, and public health insurance, on a collision course. Few court-watchers saw it coming, even though, during arguments, the justices raked both Quebec and federal lawyers over the coals. Yet the Charter has been used as the argument of choice in previous health policy cases. “It is simply the most dramatic example,” write McGill’s Antonia Maioni and Christopher Manfredi, “of a phenomenon that became increasingly common throughout the 1990s: the use of Charter-based litigation to influence the development of health care policy. Indeed, throughout that decade the Supreme Court delivered important decisions on access to abortion, professional advertising regulations, assisted suicide, and the right to sign-language interpretation in the provision of health care.” The authors, noted authorities on health care and the Constitution, bring us up to date on the implications of a landmark case.

La décision de la Cour suprême dans l’affaire Chaoulli a fait s’entrechoquer deux emblèmes politiques chers aux Canadiens : la Charte des droits et le régime public d’assurance-maladie. Peu d’observateurs avaient prévu le coup, même si les juges avaient quelque peu secoué aussi bien les avocats de Québec que d’Ottawa pendant leurs plaidoiries. Ce n’était pourtant pas la première fois qu’on invoquait la Charte dans des litiges liés aux soins de santé. Mais « c’est tout simplement l’illustration la plus spectaculaire d’un phénomène qui s’est banalisé tout au long des années 1990, écrivent Antonia Maioni et Christopher Manfredi (McGill), et qui consiste à tenter des procès au nom de la Charte en vue d’influer sur les politiques de santé. Pendant toute cette décennie, la Cour suprême a ainsi rendu des jugements clés sur l’accès à l’avortement, la réglementation publicitaire, le suicide assisté ou le droit à l’interprétation gestuelle dans la prestation des soins de santé ». Spécialistes réputés en matière de Constitution et de soins de santé, les auteurs font le point sur les répercussions d’un jugement fondamental.

On June 9, 2005, a decision by the Supreme Court of Canada placed into conflict two of the national symbols most cherished by Canadians: the Charter of Rights and Freedoms and publicly funded health care. In a 4-3 judgment in *Chaoulli v. Québec*, the Supreme Court narrowly decided to invalidate Quebec’s prohibition against the provision of private insurance for core medical services provided through medicare.

Although only three of the seven justices concluded that the prohibition violates the Charter (Justice Marie Deschamps found that it violated Quebec’s Charter, but was silent about the Canadian Charter), the Court’s judgment in favour of Dr. Jacques Chaoulli and George Zeliotis places defenders of

the health care status quo on the defensive. As Chief Justice Beverley McLachlin wrote: “access to a waiting list is not access to health care.” While “the prohibition on obtaining private health insurance,” she concluded, “might be constitutional in circumstances where health care services are reasonable as to both quality and timeliness, [it] is not constitutional where the public system fails to deliver reasonable services.”

Where did this challenge to the status quo come from? Although to some observers the *Chaoulli* case seemed to come from nowhere, it is simply the most dramatic example of a phenomenon that became increasingly common throughout the 1990s: the use of Charter-based litigation to influence the development of health care policy. Indeed,

throughout that decade the Supreme Court delivered important decisions on access to abortion, professional advertising regulations, assisted suicide, and the right to sign-language interpretation in the provision of health care.

Only last November, in the *Auton* decision, the Court overturned two lower courts and held unanimously that there was no constitutional right to receive a particularly expensive — and controversial — treatment for autism through provincial medicare systems. Despite that ruling, autism litigation continues, especially in Ontario, where lower courts have creatively avoided the *Auton* decision to prevent the province from imposing age limits on the provision of treatment.

Chaoulli v. Québec has been making its way through Quebec's legal system since the late 1990s, and its emergence coincided with the most difficult years of cutbacks to the provincial health care system. In 1994, George Zeliotis, then 61, began having recurring hip problems; he was operated on his left hip in 1995 and, in 1997, after some delay, he was operated on his right hip. During his year-long wait in 1996, Zeliotis investigated whether he could pay privately for surgery and discovered that the terms of Quebec's health care laws prohibited him from either obtaining private insurance or paying directly for services provided by a physician in a public hospital. He pleaded his case with administrators, politicians and the local media, without success.

Although it was Zeliotis's condition and waiting time for surgery that led to the eventual court case, the key protagonist in the judicial battle was Dr. Jacques Chaoulli. Trained in France and Quebec, Chaoulli received his licence to practice medicine in Quebec in 1986. He soon became well-known in medical

circles through his attempts to set up a home-based, 24-hour practice for doctors making house calls in Montreal's South Shore region. After intense lobbying of government officials and the refusal of the regional board to recognize his practice in 1996, Chaoulli even began a hunger strike to draw attention to the situation. He then decided to become a "non-participating" doctor in the public health care system, but soon realized, like Zeliotis, that the disincentives for opting out are very high. Few patients were willing to pay

The Supreme Court granted leave to appeal in May 2003. By this time, the case had moved from a lone crusade to a public debate about private health care in Canada. Five other provinces (Ontario, Manitoba, British Columbia, New Brunswick and Saskatchewan) signed on as third-party interveners with Quebec and Canada, as did high-profile interest groups committed to protecting the public health care system (e.g., the Canadian Labour Congress and the Canadian Health Coalition). Meanwhile, organizations and businesses with a direct economic stake in the Supreme Court's decision sided with the plaintiffs.

directly for medical services without insurance coverage, and non-participating physicians were effectively barred from caring for their patients within publicly funded hospitals.

Chaoulli was not Zeliotis's physician at the time of his wait for surgery, but the two plaintiffs effectively teamed up in their legal challenge before the Quebec Superior Court in 1997. Together, they claimed that article 15 of the *Quebec Health Insurance Act*, which proscribes private insurers from covering publicly funded services, and article

11 of the *Quebec Hospital Insurance Act*, which prevents non-participating physicians from contracting for services in publicly funded hospitals, were unconstitutional under the terms of the Canadian Charter of Rights and Freedoms. In addition to Chaoulli (who, exceptionally, represented himself) and Philippe Trudel (representing Zeliotis), the case involved a host of expert witnesses, most of whom argued that the plaintiffs' claims would jeopardize the integrity of the public health care system. In her judgment rendered in February 2000, Justice Ginette Piché echoed these arguments, and was very severe in her criticism of the plaintiffs in *Chaoulli*.

Justice Piché ruled that access to health care is, indeed, a right but also pointed out that there exists no right to determine the source of that care. She also affirmed that existing limits on private insurance coverage might be in violation of these same rights since they could limit an individual's timely access to care, but that such limitations would only contravene life, liberty and security of the person if the public system could not guarantee access to similar care.

Justice Piché went further to argue that limitations on private insurance that impeded individual rights were legitimate as a way of protecting the collective rights of the rest of the population.

Chaoulli appealed to the Quebec Court of Appeal in November 2001, to no avail. All three appellate court judges upheld Justice Piché's decisions in concurrent decisions delivered in April 2002.

He then turned his efforts toward the Supreme Court of Canada, his ultimate objective at the start of the legal battle. Zeliotis once again joined the effort, with his counsel Philippe Trudel providing his services *pro bono* for the high-profile case. The Supreme Court

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deliberations). The justices were persistent in their questioning, but prudent and clearly cognizant of the implications of the case. Several of the justices were particularly exacting in questioning representatives of the Quebec and Canadian governments in the courtroom, neither of which delivered a particularly inspired defence of public health care. The justices also expressed exasperation with the plaintiffs, however, in particular Chaoulli,

quences. The Court was also more divided, with seven justices rendering three separate judgments. According to Justice Marie Deschamps, the existence of lengthy waiting lists for certain surgical procedures affected the rights to life and personal inviolability protected under the Quebec Charter of Rights and Freedoms. Consequently, the prohibition against private insurance for services provided publicly in Quebec's health insurance laws was viewed as

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invalid under the Quebec Charter. Chief Justice McLachlin, with Justices John Major and Michel Bastarache, agreed with Justice Deschamps on this point, but went further in declaring that the prohibition was also invalid under section 7 of the Canadian Charter of Rights and Freedoms, which protects "life, liberty and security of the person."

Coalition). Meanwhile, organizations and businesses with a direct economic stake in the Supreme Court's decision sided with the plaintiffs.

In addition, the case attracted a highly unusual third-party intervener in the form of a group of ten senators who had been signatories of the Senate Standing Committee on Social Affairs, Science and Technology report on health care reform. Known as the Kirby Report (after its chairman, Liberal Michael Kirby), it contained some controversial suggestions about the mix of public and private delivery of health care in Canada, including a "Care Guarantee" to establish a maximum waiting time for each treatment or procedure, after which time the provincial government would have to make that service available by other means (such as funding treatment provided elsewhere).

On June 8, 2004, the appellants brought their case before seven justices of the Supreme Court of Canada (two justices, Louise Arbour and Frank Iacobucci, had announced their intention to leave the Court and therefore did not participate in the

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Once the case had been heard, it almost disappeared from the legal radar screen; indeed, much more attention was focused on the *Auton* case, which was also heard in June 2004. That judgment, delivered in late November 2004, sent a shock wave through the interest group proponents of the Charter, as the Supreme Court unanimously overturned a provincial court decision and refused to consider the B.C. government's decision not to fund specific services for autistic children as discriminatory. Effectively, the court had put the brakes on the expansion of the public health care system to include these services. But few observers — from legal experts, to the media, to the federal government itself — saw the writing on the wall in terms of the impending *Chaoulli* decision.

A full year after the *Chaoulli* case was heard, the Supreme Court delivered its judgment. As in *Auton*, it reversed the provincial lower court decisions, but this time with very different conse-

Like Justice Piché in the trial court, Justices Ian Binnie and Claude Lebel, writing in dissent with Justice Morris Fish, argued that the question at issue in *Chaoulli* was better suited to the legislature than to the courtroom, and reiterated that allowing a parallel private system would be detrimental to the viability of the public system. In their view, it is impossible to try to determine what constitutes reasonable access to health care services through a constitutional standard.

The result of these judgments, of course, was that Quebec's ban on private insurance for publicly insured services was invalidated by a 4-3 margin. Since a majority of the Court did not reach this decision on federal Charter grounds, the decision did not have any immediate legal impact outside of Quebec. The Quebec government itself filed a motion with the Court on June 28, asking for the judgment to be suspended for a period of eighteen months to analyze its impact and design measures to respond to the judgment.

In so doing, it raised several issues that demonstrate the political

implications of the Court's ruling, such as the real concern of citizens and social groups about the future of the public system, and the way in which the rising costs of care and difficult choices are associated with the organization and administration of the health care system on the ground. In addition, the government alludes to something that needs more reflection: the potential consequences of opening up private markets with regard to trade relations, in particularly NAFTA, where a grandfather clause applies only to existing social legislation. Ironically, given the heated federal-provincial disputes over health care and the fact that the Supreme Court decision demon-

strates a bold move by a national political institution into the realm of provincial jurisdiction, the Quebec government points out that operationalizing the *Chaoulli* decision involves a careful examination of how this can be managed within the parameters of the *Canada Health Act*. Quebec's arguments on these points were persuasive, and on August 4 the Court granted its motion for a partial rehearing and stayed its judgment in *Chaoulli* for 12 months (to June 9, 2006).

While all sides prepare for the rehearing, the political impact of the case is already being felt.

Political leaders in Quebec have remained tight-lipped, but the political stakes for the Liberal government in Quebec, suffering in public opinion polls as never before, could not be greater. On the one hand, such a decision could be an unmitigated disaster, proving to Quebecers the incapacity of their provincial government to protect their collective rights to public health care against incursions from a federal institution. On the other hand, the popular Quebec minister of health and social services, Dr. Philippe Couillard, could emerge as a champion of Quebec's health care system. And in some circles, depending on who you talk to, another silver lining is that the



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Dr. Jacques Chaoulli with his wife Michiyo Miyazaki after a press conference about the Supreme Court of Canada ruling in Chaoulli's favour on Charter grounds, setting aside Quebec's prohibitions on private health care insurance. The Charter and health care have been set on a collision course.

Chaoulli case may give Premier Jean Charest the ammunition he needs to move forward in his quest for change in Quebec's public programs.

Just weeks after the court ruling, his hand-picked working group on the continuity of the health care system, led by Bank of Montreal executive Jacques Ménard, cited the *Chaoulli* decision in proposing the extension of the reach and numbers of private clinics in Quebec. As the battle lines form in preparation for the public consultations planned this fall on both the Ménard report and the *Chaoulli* decision, the Quebec government will have to engineer a finely tuned policy response.

One option is for Quebec to maintain the prohibition against private insurance, declaring that it applies despite the Quebec Charter (s.52) and notwithstanding the Canadian Charter (s.33). Another option is to remove the absolute prohibition against private insurance and replace it with some form of limited or highly regulated access. Other provinces have more room to maneuver, since the Court divided evenly on whether the prohibition violates the Canadian Charter. Nevertheless, litigation challenging similar laws in those provinces is inevitable after the decision. (Not only that, but the Alberta government has announced health reform plans to expand private clinics as a way of preempting such legal challenges.) Defenders of the status quo can take some solace in the fact that the Supreme Court that eventually hears those cases will be different from the one that heard *Chaoulli*: Justices Rosalie Abella and Louise Charron joined the Court after oral arguments in *Chaoulli*, and Justice John Major has announced his retirement effective December 25, 2005.

Chaoulli v. Québec brings into sharp focus the contours of the debate over the future of health care in Quebec and Canada, and in particular

the controversial role of private delivery in the health care system. And the broader political questions at stake are portentous. Why has Charter litigation become a preferred path to health policy reform? The answer lies at least in part with frustration with perceived bureaucratic and legislative inaction in responding to some citizen demands for access to certain types of procedures and health care alternatives.

Yet litigation is not without disadvantages. First, the articulation of policy demands in the form of constitutional rights can exclude alternative policy choices from consideration. Second, the adversarial nature of litigation is best suited to resolving concrete disputes between two parties by imposing retrospective remedies. Complex policy issues — like health care — involve multiple stakeholders, constantly changing facts and evidence, and predictive assessments of the future impact of decisions.

From seeking the provision of specific services, as in *Auton*, to claiming more timely access to health care, as in *Chaoulli*, some Canadians have obviously concluded that litigation is more effective than lobbying. The obvious advantage of litigation is that courts can order governments to act, or at least can remove the impediments to change that encourage policy inertia.

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Finally, rights-based litigation, particularly at the Supreme Court level, by definition imposes national solutions on inherently local problems. These solutions can ignore differences among provinces and suppress the provincial experimentation necessary to find inno-

vative approaches to policy problems. In this particular instance, it further exacerbates growing tensions between Quebec and Ottawa over who is responsible for health care and who decides what the future of the system will look like.

As the three dissenting justices argued in *Chaoulli*, the case also raises fundamental questions about the Court's appropriate role on issues of continuing political debate. Although

recognizing that the public health care system has "serious and persistent problems," the dissenters averred that the "resolution of such a complex fact-laden policy debate does not fit easily within the institutional competence or procedures of courts of law." In the context of jurisdictional quarrels and money disputes that characterize federal-provincial relations in Canada, it remains to be seen whose institutional competence and which legislative arena is to have the final say in such important matters as health care reform.

As this case reminds us, judicial activism is a double-edged sword. No political position has a monopoly on constitutional rights. Nor, it seems, does any political party. What does the federal Liberal Party, which has presented itself as the principal defender of both the Charter and "medicare" in Canada, do now, as it becomes difficult to defend both simultaneously?

Antonia Maioni is director of the McGill Institute for the Study of Canada (antonia.maioni@mcgill.ca) and Christopher Manfredi (christopher.manfredi@mcgill.ca) is chair of the Department of Political Science at McGill University.