The Supreme Court's unexpected ruling in Chaoulli v. Quebec (Attorney General), invalidating Quebec's legislated ban on private health insurance, has rekindled the simmering debate about judicial activism. In this instance, because the judgment dealt a blow to Canada's most important social program, the outrage is on the political left rather than, as usual, on the political right.

While four of the seven judges based their ruling on the Quebec Charter of Human Rights and Freedoms, the two opinions that split 3-3 on the Canadian Charter of Rights and Freedoms reveal deep divisions on basic questions of Charter analysis, facts, and remedy.

There was unanimity on the determination that delays in access to medical care in the public system impaired security of the person and, in the extreme, endangered life. The two judgments that dealt with the Charter agreed on almost nothing else.

The operative judgment determined that the legislated ban on private health insurance blocked access for "ordinary Canadians" to timely health services in the private sector and ordered the Quebec government to get rid of it. (The government of Quebec later secured an order suspending this remedy.)

The starting point of the analysis was the clear statement that there is no free-standing right to healthcare. The determination that the Quebec legislation breached the principles of fundamental justice rested on the finding that the ban permitted the "very rich" to pay for private healthcare but prohibited "ordinary Canadians" from getting health insurance for the same purpose.

Expert opinion, common sense, and comparison to the design of public healthcare delivery in other countries combined to support the conclusion that the ban was neither necessary nor useful to the delivery of quality health services.

The dissent, on the other hand, deferred to both the trial judge and the political arm of government. The delays served the necessary and acceptable function of rationing high-quality care at a reasonable cost for as many people as possible.

An unsupported assumption informed this conclusion that appropriate administrative standards for a well-functioning public system were in place, including priority for urgent cases based on clinical need, rather than wealth or social status; attention to exceptional cases; and access in rare cases to public funding for necessary services accessible only out of province or out of country.

While delays would be shorter if the system included "idle capacity," such excess would undermine the public interest as much as a system that occasionally fell short. In particular, private health insurance would undermine the interests of the less wealthy and the uninsurable.

Both of the judgments have attracted strong criticism. To its critics, the operative majority judgment on the Charter privileges economic liberty, ignores the many safeguards used by other countries to infuse their private healthcare arrangements with public values, and relies on unstated assumptions as to how the public system would withstand competition with an expanded private sector.

The dissent has fared no better. Its account of the rationality and public's acceptance of waiting lists goes against expert evidence before the court as well as media accounts and general experience of the system. Its upbeat account of the public system's strengths fails to register the suffering — physical, psychological, and economic — of those who wait for medical care and its impact upon their families and dependents. It also fails to note that in some cases, delays undermine the benefits that timely care would offer.

Missing from the Chaoulli judgments is a general account of how the public healthcare system stretches limited resources to meet demand over time. The Charter right to security of the person requires proper procedural and administrative safeguards before any consideration of legislative invalidity.

The court's first concern should therefore have been whether the system's administrative procedures met Charter standards. The petitioners had no interest in this issue because their prize was access to a private system. Their status as public

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interest litigants as well as the intervention of public interest groups and other governments should have opened the door to a wider set of concerns.

Had the court turned its attention to the procedural component of fundamental justice, it might have signaled the need for the best administrative practices in the administration of waiting lists, including centralized data collection and analysis, consistent standards based on the best clinical expertise, decision-making based on relevant objective and verifiable criteria, and attention to the exceptional cases.

Judicial review along these lines is better suited to the expertise of judges and the institutional capacity of courts of law than the invalidation of elements of complex social programs on the basis of a litigation record that lacked a sufficiently full picture of all the implications.

Moreover, this type of review cannot be said to undermine or usurp political authority. Indeed, it facilitates political accountability because it makes Canadians aware of aspects of public administration that governments might well prefer to keep out of the public eye.

A more detailed treatment of these and other aspects of the Chaouilli decision has just been published by the University of Toronto Press, Access to Care, Access to Justice, a collection of papers delivered at a conference held in September at the University of Toronto’s Faculty of Law.

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