



## **CDM BULLETIN: THE CHAOULLI DECISION**

What the Supreme Court said and what it means for Canadian healthcare

### ***What is the “Chaoulli case”?***

Chaoulli v. Quebec (Attorney General) involved a patient who had to wait several months for hip replacement surgery. Together with his physician, Dr. Jacques Chaoulli, the two challenged the Quebec law that prohibited private health care insurance for publicly insured health services. They argued that these provisions offended rights guaranteed by the Canadian Charter of Rights and Freedoms and its Quebec equivalent. Although the case was dismissed by both the trial court and the Quebec appeal court, the Supreme Court agreed to allow an appeal, which it heard on June 8, 2004.

On June 9, 2005, by a majority of 4-3, the Supreme Court of Canada ruled that Quebec’s ban on private insurance for publicly insured health care services violates the Quebec Charter of human rights and freedoms. Three of the same four judges also concluded that the ban violated the Canadian Charter, while three judges held that it did not, with the seventh judge not voicing an opinion on the matter. As a result, while the Court ruled that there was a violation of the Quebec Charter, it did not rule that there was a violation of the Canadian Charter.

### ***What does the decision mean?***

While the decision has been trumpeted as a victory by advocates of privatization and two-tiered health care, this is not the case. The direct consequences of the Court’s ruling are, in strict legal terms, limited to the application of the Quebec Charter and to the province of Quebec.

In addition, the judges allowed the Quebec government considerable latitude to address the Court’s concerns about waiting lists and the timeliness of treatment, while maintaining a single-tier publicly funded health care system.

The 4 judges merely concluded that the Quebec Charter guarantees a right to private insurance **where the public system is inadequate**. Thus, the Court’s decision was explicitly based on the failure of Quebec’s public health care system to provide reasonably timely access to health care in the mid-1990s, before government reinvestments into the public healthcare system. It did not rule that a parallel private insurance system is constitutionally guaranteed, nor did it hold that a single-tier publicly insured system is unlawful. It merely stated that under the Quebec Charter, if the public system fails to deliver care within a

reasonable time (including through publicly funded wait time guarantees), individuals have the legal right to purchase private insurance.

It is important to understand that even the judges who ruled there was a violation of the Quebec Charter did not conclude that citizens had a freestanding right to private insurance.

### ***If not the end of Medicare, then what?***

As a result, and contrary to the claims of the pro-privatization lobby, the decision is not the end of Medicare. In fact all of the justices of the Court acknowledged the importance and validity of the Canada Health Act, and at least four of the seven judges explicitly recognized the right of governments to enact laws and policies which favour the public over the private system and preserve the integrity of the public system. This includes limiting the number of physicians who can opt out of the public system, preventing physicians from practicing in both the public and private systems, and ensuring that the price for services provided privately do not exceed the publicly insured amount.

In fact it is arguable that Quebec (and other provinces) already satisfy (or are well on their way to satisfying) “reasonable” expectations about the delivery of timely care. This is because the foundation for Chaoulli’s case arose from the circumstances of Quebec’s health care system in 1997, before the Quebec government began to address the issue of waiting times. However, the situation in Quebec today, as well as in other provinces, is different than it was in Quebec in 1997. Furthermore, since 1997, the Romanow and Kirby Reports, as well as several federal-provincial health accords and provincial strategies have begun to seriously address the question of waiting times.

It is also important to recognize that the Court’s reliance on health care systems in European countries has been widely criticized, as a result of its failure to recognize the comparative evidence that wait times in the public system are actually longer in those countries with parallel private insurance. As well, the majority decision has been criticized for misunderstanding the relationship between private and public insurance in the majority of European countries that permit private insurance, since in those countries, private insurance does not allow those who can afford it to jump the queue and obtain preferential treatment.

“In a public system founded on the values of equity, solidarity and collective responsibility, rationing occurs on the basis of clinical need rather than wealth and social status ... Patients who are in greater need of health care are prioritized and treated before those with a lesser need...

For all these reasons ... it is not “arbitrary” for Quebec to discourage the growth of private sector health care. Prohibition of private health insurance is directly related to Quebec’s interest in promoting a need-based system and in ensuring its viability and efficiency.

- Justices Binnie, Lebel and Fish (dissenting justices), Chaoulli decision