

## *It's time the provinces were brought to account on health-care wait times*

ANDREW COYNE

When the Supreme Court of Canada handed down its decision in the case of *Chaoulli v. Quebec (Attorney General)* in 2005, everyone agreed this changed everything. The court's ruling — that Quebec's ban on private health insurance, so far as it condemned patients to wait for medically unsafe periods of time to be treated in the public system, was in violation of their rights — was cheered by the right and denounced by the left, each in the expectation that it meant profound changes to how health care was funded and delivered.

Seven years later, it's not evident how much impact the ruling has really had. Of course, to some extent its implications were always overblown. The court did not strike down the public health monopoly altogether, or suggest that it was unconstitutional in principle. It was only to the extent that it threatened patients' life and health that it could not be justified. The government was free to run health care as a public monopoly, if it chose. It just couldn't kill people with it.

Moreover, it was never clear just how far the ruling's shadow extended beyond Quebec. For starters, the law was not technically found in violation of the constitution. While three of the seven judges held the law was in violation of both the Quebec and Canadian Charters of Rights, a fourth confined herself to ruling only on the former. And in any case, it was only the law in Quebec that was at issue, not those of other provinces. If wait times were unacceptable in 2005, they are no less so today.

Still, it was widely understood that *Chaoulli* had put on notice, not only Quebec, but the six other provinces that maintain similar bans on private insurance: bring your wait times within medically acceptable limits, or face having the legal monopoly overturned. If you are going to deny people the right to buy their own insurance, you have an obligation to



John Carpay, founder of the Justice Centre for Constitutional Freedoms, is supporting an application to open the Alberta health care system to private medical insurance.  
Jen Gerson/National Post

provide them with timely care.

Yet if wait times were unacceptable in 2005, they are no less so today. Across the country, according to the 2011 edition of the Fraser Institute's annual survey of wait times, the average interval from the time a patient is referred to a specialist to treatment is now at a record 9.5 weeks, slightly longer than it was in 2005 and more than 40% longer than the 6.7 weeks the institute deems "reasonable." In only two provinces, Ontario and B.C., are wait times shorter now than they were at the time of *Chaoulli*. (In Quebec, they are almost a week longer.) In every province, they are substantially longer than they were in the mid-1990s.

So it's high time the provinces were brought to account. The principles the court held were valid in Quebec in 2005 are presumably no less valid now; the facts to which they were applied would seem no less present. It is time, in short, for *Chaoulli II*.

Enter Darcy Allen and Richard Cross, Alberta residents suffering from severe back pain who say they were obliged to seek care in the United States, at their own (considerable) expense, rather than wait the two years or more it would take to treat them in the provincial system. Backed by the Justice Centre for

Constitutional Freedoms, the two men have launched a legal challenge to the province's ban on private insurance, similar to that in *Chaoulli*.

The situations are not directly analogous. Alberta does pay for patients to go out of province where it cannot provide care in a timely fashion itself: The dispute in this case would seem to turn in part on the province's definition of timely. But there's no doubting the seriousness of the challenge this represents to public health care, or the implications should it be upheld.

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To be clear, between shortening wait times and abolishing the public insurance monopoly, the first is vastly preferable. Insurance markets are tricky things, especially for something like health care where, if you will, the consumer is also the product. Left to themselves, insurance providers would be tempted to refuse coverage to people they think are likely to need it. For their part, consumers might choose not to pay for insurance as long as they were well, only doing so when they get sick.

These well-known dilemmas, known respectively as "adverse selection" and "moral hazard," are not insoluble...

Whatever reforms come to medicare, surely everyone would prefer these arose from the political process, rather than judicial fiat...

Still, just the threat might well prove useful, as a means of concentrating governments' minds. Waiting lists are too long in Canada, and have been for far too long, at the cost of much needless suffering. If politicians won't fix the problem, the courts will.