

Socialized Health Care Violates Fundamental Rights

By Diana M. Ernst

Key Points

- Single payer health care is *not* universal health care; it just creates a government monopoly.
- In Canada, the Supreme Court has judged that the consequences of government monopoly health care violate citizens' constitutional rights.
- The U.S. Constitution generally protects individual rights better than the Canadian Constitution.
- Therefore, a single payer, government monopoly system in the U.S. would violate Americans' civil rights, and would not survive litigation.

understand is that government-controlled health care actually *violates* legitimate constitutional rights.

We only have to look to the experience of our northern neighbor Canada. Americans should reflect on the recent Canadian Supreme Court case *Chaoulli v. Quebec* when they consider a government monopoly to rectify health care problems in the United States. The case illustrates that a state-operated system is only attractive on the surface. In reality, it allows for the unconstitutional infringement of the fundamental rights of citizens.

A Misguided Policy

Supporters of newly proposed California bill SB 840, entitled "The Health Insurance Reliability Act," believe that government-run health care will solve America's health care problems. Last July, the California Democratic Committee Executive Board announced, "a universal, single-payer health insurance system...has been predicted in numerous American studies and demonstrated in other countries to result in greater efficiency, lower costs to businesses, individuals, and government."¹ Certainly, uninsured patients, rising costs of medical care, and emergency rooms flooded with patients for non-urgent care are evidence of a broken health care system. But socialized medicine is not the answer. Californians should seriously consider the constitutional consequences of a completely government-run system.

Some Americans are misguided by the dangerous illusion that health care is a constitutionally protected human right. The Constitution currently says nothing about health care because it is not the responsibility of government to provide rights. In a concession to this reality, Congressman Jesse Jackson, Jr., of Illinois and Congressman Pete Stark of California advocate a constitutional amendment that would require free health care for all Americans. What they don't

A Battle for Individual Rights

Last June, Dr. Jacques Chaoulli represented himself and his patient, George Zeliotis, in an unexpectedly successful case against socialized health care in the Supreme Court of Canada. Mr. Zeliotis needed hip replacement surgery. He estimated that the cost of waiting in Canada's lengthy queue for an operation (sometimes as long as two years) was higher than the actual monetary price for the surgery. In an effort to expedite the process, he tried to pay for the surgery privately. Canadian law stopped him. Out-of-pocket payment for medical services and private health insurance violated Quebec's Hospital Insurance Act and Health Insurance Act, which forbade private spending for all medical services already provided by the state.

Section 1 of the Quebec Charter of Human Rights and Freedoms states: "Every human being has a right to life, and to personal security, inviolability and freedom. He also possesses juridical personality." Section 7 of the Canada Charter of Rights and Freedoms states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Armed with these two provisions, Dr. Chaoulli and Mr. Zeliotis fought the most notorious element of Canadian public health care: waiting lists.

The Canadian Charter does not specifically define a right to health care, but until the *Chaoulli* decision, there was a growing belief in the lower courts that “public” health care is constitutionally mandated, lending more legal weight to the legitimacy of the government monopoly health care system. This defective belief is nurtured by increasing judicial supremacy and negligence of the written law in the federal courts. An example is their evolving interpretation of the term “equality,” which has moved away from equality of opportunity, and towards equality of results.²

Canada’s Supreme Court is often unsympathetic to individual rights, and this can have dangerous consequences in health care. Dr. Chaoulli witnessed patients experience pain and even death while on waiting lists in Quebec. What surprised him even more was the lack of response among citizens, who apparently accepted the consequences of a government-run system – as did the jurisprudence of the lower courts.³

At Dr. Chaoulli’s initial trial, Judge Ginette Piché dismissed his motion for a declaratory judgment, stating that the deprivation of rights to life, liberty, and security of person in this case stood in accordance with the principles of fundamental justice stated in section 7 of the Canadian Charter. Piché concluded, ironically, that a private health sector would *limit* the primary goals underscored in the Canada Health Act: “[T]o protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers.”⁴

The case was subsequently dismissed at the Canadian Court of Appeals, where two judges offered a new angle on the issue: that the right to choose private insurance is in fact an economic right, not “fundamental” to life and therefore, unprotected by the Canadian Charter. Remarkably, Judge Delisle believed that Dr. Chaoulli and Mr. Zeliotis had not demonstrated “real, imminent, or foreseeable deprivation” at all.⁵

Judge Delisle’s puzzling opinion represents a disturbingly common view in Canadian jurisprudence: limited government support for economic freedom (that is, an individual’s right to spend his own money as he sees fit) and a rising proclivity towards so-called positive rights, or benefits. Certainly, Judge Delisle was correct that the Canadian Charter does not provide economic rights to Canadians, but neither should it prohibit economic choice if it does not interfere with other peoples’ rights. Rights are not benefits.

They are protective measures against government interference. Mr. Zeliotis has argued against government interference with his freedom of choice, which prolonged his pain and was clearly a threat to his health and safety.

Where government power is concerned, there is a critical distinction between the words *provide* or *prohibit*, and *protect*. To the detriment of true liberty, government enforcement of positive rights creates more state regulations and demands more public financial support. When government tries to provide and prohibit, rather than simply protect individual rights, the consequence is fatal for freedom--and good health care.⁶

Dr. Chaoulli and Mr. Zeliotis struggled against significant restrictions that Canadian law imposes on privately delivered medical services. One example is section 30 of Quebec’s Health Insurance Act, which ensures the monopoly of the government health plan by restricting physicians from switching to private practice.⁷ That public health care could be jeopardized by a competitive private sector is worrisome to some Canadians who pledge fealty to the single-payer system. They believe that a competitive, private sector would cause reduced popular and financial support for the government system, leading to a decline in the quality of service in an already appalling system. They fear that doctors would abandon their ethics and seek out work in the private, for-profit realm.

A Victory for Canadians

Dr. Chaoulli and Mr. Zeliotis did not give up. After years of struggle, the Canadian Supreme Court heard their appeal and ruled in their favor. In delivering the opinion of the Court, J. Deschamps called the fears about the decline of the public system “less than convincing.”⁸ In *Chaoulli*, the Court found that prohibiting private health insurance is not necessary to guarantee the viability of a public plan. Helping less wealthy patients to receive health insurance and allowing wealthy patients to buy health insurance are not mutually exclusive. This is evident in other countries that have coexisting public and private services: the United Kingdom, Sweden, Austria, Germany, the Netherlands, and Australia are examples cited in the case. Even in the United States where two thirds of Americans have private health care, there are substantial public programs, namely, Medicare and Medicaid. The Court found that the Canadian fear of an emerging private health care system did not warrant such extreme government measures.⁹

However, the three dissenting justices in *Chaoulli* argued that the prohibition of private health insurance was justified under section 9.1 of the Quebec Charter of Human Rights and Freedoms, which states, "In exercising his 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 Quebec."¹⁰ Allowing private insurance in Quebec would, in their view, not maintain proper regard for democratic values or public order.

The dissenting justices also maintained that Quebecers want a health system where "access is governed by need rather than wealth or status," championing an outcome-based interpretation rather than an opportunity-based interpretation of equality: hence the rules to preserve the integrity of a single-payer system.

And if the system lacks integrity? Dissenting Justices William Binnie, Louis LeBel, and Morris Fish stated, "The public policy objective of 'health care to a reasonable standard within a reasonable time' is not a legal principle of fundamental justice. There is no 'societal consensus' about what this non-legal standard means or how to achieve it."¹¹ In other words, the government can provide "free" health care, but it is not actually required to meet any standards.

Implications for the United States

What does this Canadian Supreme Court decision mean for single-payer health care in America? Even Canada has recognized the negative impacts of government-run health care on human rights. Surely such a proposition would encounter many more difficulties in the U.S., where individual rights play an even more vital role in our society.

Section 1 of the Canadian Charter of Rights and Freedoms guarantees those rights and freedoms *subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*. The criteria for "reasonable limits" to these rights were determined in the Canadian Supreme Court Case, *R. v. Oakes*, in 1986. The justices decided that four conditions, together called the Oakes Test, were necessary to determine whether the law could override a plaintiff's fundamental rights: "[T]he [limiting] measures must be fair and not arbitrary, carefully designed to achieve the objective in question... [secondly, they must be] rationally connected to that objective... [Thirdly] the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective – the more severe the deleterious effects of a measure, the more important the objective must be."¹² The test gives the judges

power to curtail fundamental rights if they determine that doing so is appropriate to democracy. In the *Chaoulli* case, the majority found that the harm to individual rights was too great, given the consequences of so-called "free" and "universal" health care.

Although the majority in *Chaoulli* decided that the prohibition of private health care violated the Quebec Charter, they were tied 3-3 as to whether it violated the Canadian Charter because J. Deschamps abstained from ruling. The 4-3 opinion was not rooted in principles of personal choice and individual freedom; it was based on technical problems stemming from the public system's waiting lists, and inconsistency between the Canadian Charter and the Quebec Charter.¹³

Such reasoning is rightly disconcerting to Americans. In the United States, our fundamental individual rights are outlined in the Declaration of Independence and protected in the Fifth and Fourteenth Amendments by the substantive due process clause, which applies to the federal government and the states to ensure that no citizen is deprived of life, liberty, or property arbitrarily. Substantive due process guarantees fairness. It is a protection affecting all government action that could cause a range of civil and criminal deprivation of rights to individuals. A law that is arbitrary, or has a purpose that is not justifiable in light of its consequences, would violate due process provisions.

If Dr. Chaoulli took his case to trial in the United States, he could argue under the substantive due process clause for his right to life. Condemning a person without a fair trial is akin to state laws that prohibit private health care; they effectively *sentence* citizens to emotional anxiety, poor health, and in some cases, even death. The right to life includes one's right to choose one's own medical care.

Justices Binnie, LeBel, and Fish were correct in their opinion that an "overbuilt" system is not more effective than a system that "on occasion falls short," and Canada's biggest failing in health care was not that the system isn't perfect. Neither is ours. Rather, Canadian law has mandated that citizens use an imperfect system, and *only* that imperfect system.

In America, our legitimate rights refer to our actions that are unimpeded, not granted by government. This view does not neglect patients who cannot afford to pay for health care, but it fosters private interests, competition, and most important, personal choice in conjunction with (and as limits to) government programs. Private insurers in the United States are already selling policies heavily burdened with government mandates. The last thing we need is more bureaucracy to completely replace them.¹⁴

We have seen the typical and wasteful drawbacks to government-run systems. Health care in the U.S. could be more efficient, democratic, and less expensive if there were only less bureaucratic infrastructure, more competition among policyholders, and more choices for patients.

The more government control we allow over our health care system, the more likely such control will violate Americans' constitutional rights. Bills like California's SB 840 threaten our hard won civil liberties. On the one hand, we should be cautiously optimistic that our courts would not allow such a system to stand. On the other hand, we should not wait until years of suffering have passed.

Canada is the extreme, but it's dangerous even to take small steps in that unconstitutional direction. When we protect individual choice, we preserve our fundamental rights to life, liberty, and property.

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- ¹ Passed by the Executive Board of the California Democratic Party at its July meeting at the CDP Convention in Sacramento, <http://www.healthcareforall.org/>. Submitted by Assembly District Committees ^ 5th, 6th, 14th, 27th, 28th, 33rd, 35th, 53rd, 54th, 55th; Asian-Pacific Caucus of the Democratic Party of Alameda County; City of Alameda Democratic Club; County Central Committees ^ Los Angeles, Monterey, San Benito, San Francisco, San Luis Obispo, Santa Cruz, Sonoma; Wellstone Democratic Renewal Club.
 - ² Neil Seeman, "Measuring the Growing 'Democracy Gap' Between the Supreme Court and Parliament," Adjunct Research Fellow, News Releases, The Fraser Institute, August 6, 2003, <http://www.fraserinstitute.ca/shared/readmore.asp?snav=nr&id=540>.
 - ³ Jacques Chaoulli, M.D., "A Victory for Freedom: The Canadian Supreme Court's Ruling on Private Health Care," Heritage Lecture #892, July 22, 2005.
 - ⁴ Canada Health Act, 1984, c. 6, s. 3.
 - ⁵ Canada Supreme Court, *Chaoulli v. Quebec*, SCC 35 2005, p. 26.
 - ⁶ Tamara Friesen, "The Right to Health Care," *Health Law Journal*, vol. 9, - Health Law Institute, University of Alberta, 2001, pp. 205-222.
 - ⁷ Canada Supreme Court, *Chaoulli v. Quebec*, SCC 35 2005, p. 43.
 - ⁸ *Ibid.*, p. 51.
 - ⁹ *Ibid.*, p. 53; Health Series, "Two Myths About the U.S. Health Care System: Economic note on some of the myths surrounding the American health care system," June 16, 2005.
 - ¹⁰ Quebec Charter of Human Rights and Freedoms, Section 9.1.
 - ¹¹ Canada Supreme Court, *Chaoulli v. Quebec*, SCC 35 2005, p. 10.
 - ¹² Canada Supreme Court, *R. v. Oakes*, 1 S.C.R. 103, 1986.
 - ¹³ Sylvia LeRoy, "Health Policy Litigation and Reform: *Chaoulli v. Quebec*," *Fraser Forum*, July/August, 2005.
 - ¹⁴ John R. Graham and Nadeem Esmail, "PNHP 'Factless' on Canadian Health Care," *Health Care News*, The Heartland Institute, October 1, 2003; , Norma Kozhaya, Health Series: "Two Myths About the U.S. Health Care System: Economic Note on some of the myths surrounding the American health care system," Montreal Economic Institute, June 16, 2005.
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