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A Victory for Freedom: The Canadian Supreme Court's Ruling on Private Health Care

Jacques Chaoulli, M.D.

ROBERT E. MOFFIT: Ladies and gentlemen, I am happy to join my co-host, Grace-Marie Turner, President of the Galen Institute, in welcoming you to The Heritage Foundation. We are honored to have with us Dr. Jacques Chaoulli, whose recent case before the Canadian Supreme Court ended in a major victory for health care freedom in Canada.

In Canada, patients have long been legally prohibited from spending their own money to purchase medical care privately if that care was also provided under the Canadian government's health care program. Many Canadians who did not want endure the wait for treatment under the government program, or suffer the pain or inconvenience of these restrictions, would often have to travel to the United States to get the care that they wanted or needed. That is why Dr. Chaoulli's victory in the Canadian Supreme Court, allowing patients to secure private care in Canada, is historic.

The Canadian case has relevance for Americans. While ordinary Americans would consider government restrictions on their ability to spend their own money on legal medical services to be a shocking violation of their personal freedom, they should be reminded that the Clinton Administration and Congress enacted a similar restriction in the Balanced Budget Act of 1997 for the Medicare population. Under Section 4507 of the act, a Medicare patient could contract privately with a doctor for a medical service covered by Medicare only if the doctor would sign an affidavit to that effect, submit that affidavit to the Secretary of Health and Human Services within

Talking Points

- In Canada, patients have long been legally prohibited from spending their own money to purchase medical care privately if that care was also provided under the government's health care program.
- As a result, ailing Canadians had to endure long waits to receive medical care. Many seriously ill patients died before their names reached the top of the waiting list.
- For patients in Quebec, that ended in June 2005 when the Canadian Supreme Court stuck down the province's version of the prohibition. The decision's effects are expected to be felt in other provinces as well.
- The victory for freedom in Canada is relevant for America. The 1997 Balanced Budget Act contains a Medicare restriction similar to Canada's, and Vermont and California are looking at a health care system that could lead, like in Canada, to a situation whereby some patients will suffer and die on waiting lists.

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10 days, and forgo reimbursement from all other Medicare patients for two full years. Since the enactment of this bizarre law, subsequent litigation and regulatory modifications have softened its impact, but it nonetheless remains on Medicare's books.[1]

The Canadian Supreme Court decision is a landmark case for one reason: It reaffirms that personal freedom is the key value in health care policy. In the continuing debates over health care access, cost, and quality, American policymakers should not lose sight of why America exists.

—Robert E. Moffit is Director of the Center for Health Policy Studies at The Heritage Foundation.

GRACE-MARIE TURNER: Bob and I are honored to host Dr. Jacques Chaoulli, the courageous physician who challenged restrictions in Canada's government-run health care system—and won. The Supreme Court of Canada struck down on June 9, 2005, a Quebec law that had banned private health insurance and private payment for services covered under Medicare, Canada's socialized health care program.

Dr. Chaoulli was joined in the case by his patient, Montreal businessman George Zeliotis, who was forced to wait a year for hip replacement surgery. Zeliotis, 73, tried to skip the public queue to pay privately for the surgery but learned that was against the law. He argued that the wait was unreasonable, endangered his life, and infringed on his constitutional rights. The two fought their case all the way to the Canadian Supreme Court, which voted 4-3 that they were correct.

"Access to a waiting list is not access to health care," the court said in its ruling.

The case involved the Quebec Hospital Insurance Act and technically applies only to that province, but it is a wake up call to the other provinces, where private insurance also is banned. "This is indeed a historic ruling that could substantially change the very foundations of medicare as we know it," Canadian Medical Association president Dr. Albert Schumacher said after the ruling. The ruling means that Quebec residents can pay privately for medical services, even if the services also are available in the provincial health care system.

The court split 3-3 over whether the ban on private insurance violates the Canadian Charter of Rights and Freedoms (similar to our Bill of Rights). Clearly this was a difficult decision since the court delayed a year in issuing its verdict.

The United States has been a safety valve for Canadians unwilling or unable to tolerate the long waits for medical care in their country. Now, the Canadian government must face directly complaints about the long waiting lines, lack of diagnostic equipment, and restrictions on access to the latest therapies, including new medicines.

In an almost laughable defense, lawyers for the government argued the Canadian Supreme Court should not interfere with the government's health care system, considered "one of Canada's finest achievements and a powerful symbol of the national identity." Dr. Chaoulli had persevered in spite of two lower court rulings against him. They had ruled the limitation on individual rights was justifiable in order to prevent the emergence of a two-tier health care system.

Dr. Chaoulli was born in France and obtained his medical degree from the University of Paris, before moving to Canada in 1978. He has practiced medicine in Quebec since 1986. Welcome, Dr. Chaoulli.

—Grace-Marie Turner is President of the Galen Institute.

JACQUES CHAOULLI, M.D.: I am happy to be with you today, and I would like to thank The Heritage Foundation and the Galen Institute for hosting this public briefing.

1. For an account of the Medicare private contracting legislation and subsequent litigation, see Robert E. Moffit, Ph.D., "Congress Should End the Confusion Over Medicare Private Contracting," Heritage Foundation *Backgrounder* No. 1347, February 18, 2000, at *www.heritage.org/library/backgrounder/bg1347es.html*.

What I did in Canada, anybody willing to do it could have done. My background is quite simple.

I was born in France. During the time I was studying medicine there, I never heard about patients suffering or dying on a waiting list. After graduating in 1978 from the Paris University school of medicine, I moved to Canada. To my great surprise, while practicing as a physician during the 1990s, I saw patients suffering and dying on waiting lists under the Canadian single-payer health care system. Although I didn't have any knowledge of law at the time, I already felt it was unacceptable. Actually, I was even more surprised to see that nobody stood up against the government to claim that those patients were victims of an infringement upon their human rights.

I also felt the Canadian legal community was not up to speed. So, I studied the law, I studied the health care systems from around the world, and I studied more in the field of some medical and surgical specialties for which I noticed important problems of access to timely and quality health care services in Canada.

I launched the court case you know about, representing myself all along, and invited a patient, Mr. Zeliotis, to join me in the legal proceedings as a co-plaintiff, until my legal arguments eventually prevailed before the Canadian Supreme Court.

Astonished Elite

Up to the end, most of the commentators thought I would fail. But on June 9, 2005, I won. Across Canada, the elite was astonished.

The Dean of Canada's Osgoode Hall law school, Patrick Monahan, was quoted by Canada's *National Post* three days ago as saying, "I didn't expect a majority of the court to uphold Chaoulli's claim."

A constitutional law professor from the same law school, Jamie Cameron, was quoted as being "surprised at the judges' activism…. It's a huge step for Section 7 {of the Canadian Charter of Rights and Freedoms}. I think that the constraints that used to apply to Section 7 have pretty much blown out of the water."

It is significant that I won against a number of lawyers and top expert witnesses representing the government side. For example, during the trial I cross-examined Professor Theodore Marmor from Yale University. Justice Deschamps, concurring with the majority, rejected his testimony, on paragraphs 63, 64 and 67 of the judgment.

For many years, in survey after survey, a majority of Canadians said that they were in favor of private health care alongside the public system. After my victory, ordinary people felt a sense of relief to hear that, for the first time ever, the highest court in the land condemned the Canadian single-payer health care system for causing situations in which patients suffered and died on waiting lists, in violation of the rights to life, liberty, and security protected by Section 7 of the Canadian Charter of Rights and Freedoms.

As a result of this historic judgment, Canadian legal scholars have now classified Canada's legal history about rights and freedoms into two distinct periods: before Chaoulli and after Chaoulli.

For many years, I have been studying constitutional law, most of the time alone, and during a short period of time, in year 2000, as a full-time law student in Canada. As a law student, I argued against most of my Canadian professors of law, whose interpretation of the Canadian Charter of Rights and Freedoms was opposed to my own interpretation. Ironically, five years later, in 2005, the Canadian Supreme Court upheld my own interpretation of that Canadian Charter of Rights and Freedoms.

To my knowledge, it is the first time that a court has invalidated a government health care action that had effectively resulted in the suffering or deaths of individuals.

The Canadian Supreme Court ruled that a state may not force an individual to endure poor quality health care services or unreasonable waiting times for medically required services, and it cannot prevent average individuals from getting access to private health insurance.

Opportunity for Private Health Care

This Canadian Supreme Court ruling was like the fall of a second Berlin Wall. It opens up a unique opportunity, in the United States and in

several OECD countries, to counter what is called in the United States "liberal," and what I call "socialist," lobbies that are pushing their agenda for socialized medicine.

Some commentators believe that this ruling would apply only to Quebec and not to the rest of Canada. I respectfully disagree with their opinion. In my view, a proper reading of the judgment leads to the conclusion that similar legislation in other Canadian provinces may already be considered as violating Section 7 of the Canadian Charter of Rights and Freedoms, which protects the right to life, liberty, and security. For that reason, in my view, there is no need to launch additional legal challenges in other Canadian provinces.

About private hospitals, I was asking the court to declare my right to establish a private hospital in Montreal. The majority of the Canadian Supreme Court gave me the green light to go ahead in establishing a private hospital, when Justice Deschamps, concurring with the majority, ruled at paragraph 51 of the judgment that: "the Minister may not refuse to issue a permit solely because he or she wishes to slow down the development of private institutions that are not under agreement," and when at paragraph 54, she said: "Not only are the restrictions real but Mr. Chaoulli's situation shows clearly that they are."

Practically speaking, that ruling opens the door for a parallel private health care system in Canada running alongside the continuing socialized and compulsory Medicare program run by the "States" or "Provinces," as in other countries of Northern and Southern Europe, Australia, and New Zealand.

Obviously, in terms of public health policy, such a result is not good enough. Those who are unable to pay twice, through general taxation and the additional cost of parallel private health care services, will continue to fall through the cracks of a deficient Medicare program.

For a long time, several experts have suggested that legislators should permit individuals to opt out of a state's compulsory Medicare program. But as you well know, legislators from around the world, including here in the United States, have to deal with a potato which is not only hot, but also burning!

Lessons for the U.S.

This victory is particularly important for American people, since they are facing important health policy issues, both at the federal level, regarding the Medicare program, and at the state level. The states of Vermont and California have engaged, or are engaging themselves, in the process of establishing a single-payer health care system which—there is no doubt in my mind—shall lead, like in Canada, to a situation whereby some patients will suffer and die on waiting lists.

I believe that, were it not for particular interest groups pushing for their own agenda, most people around the world would reject such a health care system that inevitably leads to suffering and to death.

In 2002, particular interest groups thought they could introduce a single-payer health care system in Oregon, through the initiative and referendum called Measure 23. But three-quarters of the population of Oregon rejected that model. Then, legislators in Vermont passed a bill establishing a single-payer system.

A few weeks ago, the Senate of California passed a bill that is even more extremist, in the sense that, like in Quebec, it bans private health insurance covering services already covered under a new California State Universal Medicare program. That bill is likely to pass the Assembly as well. Maybe the governor of California will use his veto power to block that bill, but such a veto would last only as long as that same governor would remain in power. What about the people of California if the bill is passed again and the next governor fails to the veto that bill?

In Canada, in the United States, and elsewhere, liberal groups should be confronted with the failure of socialized medicine, which the four majority justices exposed in the so-called Chaoulli judgment. Moreover, and even perhaps more importantly, they should be confronted with the terrifying opinion of the three dissenting justices. Although the dissenting justices acknowledged that some patients die as a result of the state monopoly, they went on to say that the state monopoly is necessary in order to avoid what they call an unfair situation, whereby those

able to pay in a parallel private health care system would save their own life, while those unable to pay would have to wait in the public sector.

For the first time in Canada, a Supreme Court Justice criticized publicly a dissenting colleague sitting on the same bench. Justice Deschamps, about whom I have spoken, wrote at paragraph 16 of the judgment: "The debate about the effectiveness of public health care has become an emotional one…. The tone adopted by my colleagues Binnie and Lebel JJ. is indicative of this type of emotional reaction."

Also, she clearly challenged the view of the three dissenting justices, when at paragraph 85, she said: "It must be possible to base the criteria for judicial intervention on legal principles and not on a socio-political discourse that is disconnected from reality."

But make no mistake about it. Although the Berlin Wall fell in 1989, many groups driven by a socialist ideology are still very active in all the OECD countries, including here in the United States, and they share the view of the three dissenting justices I have mentioned.

You might hear from the legislators of Vermont that the Chaoulli judgment is irrelevant to them since the bill they passed doesn't ban private health insurance. They would be right to say that their bill doesn't ban a parallel private health care system. Still, down the road, like in Canada, in the UK, and in several other OECD countries, I believe some patients from Vermont shall inevitably suffer and die on waiting lists if the single-payer health care system is to be implemented in that state.

Justice Deschamps had it right when she wrote, at paragraph 96: "Given the tendency to focus the debate on a socio-political philosophy, it seems that governments have lost sight of the urgency of taking concrete action. The courts are therefore the last line of defence for citizens."

I suggest her comment applies as well to the United States and to many countries around the world. I suggest the time has come to take advantage of this historic judgment in order to inform people in Canada, in the United States, and elsewhere about the consequences in terms of human suffering from letting legislators adopt, or maintain, single-payer health care systems.

Conclusion

I feel close to the American people because of our common love for liberty and responsibility.

A long time ago, in 1776, the Virginia Declaration of Rights, drafted by George Mason and Thomas Ludwell Lee, showed the world what liberty means. I am afraid, within Western democracies, many people have forgotten the true meaning of liberty.

I have a dream. My dream is to show the world how to get rid of a new and subtle form of tyranny hidden under the cover of a Welfare State's compulsory health care program.

My dream is remind the world of the original sense of liberty that the founding fathers of the United States of America envisioned for generations to come, not only for American people, but also for people around the world.

Thank you.

—Jacques Chaoulli, M.D., is a Senior Fellow at the Montreal Economic Institute.