LEGAL MODESTY AND POLITICAL BOLDNESS: THE SUPREME COURT OF CANADA'S DECISION IN CHAOULLI V. QUEBEC

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When the Supreme Court of Canada decided in June 2005 to strike down Québec's ban on private health insurance, the impression was quickly created that the Court effected a legal and political revolution. This article suggests that the impression is only partly correct. The Court applied a jurisprudentially modest and well-established interpretation of the right to personal security to dispose of the appeal in Chaoulli v. Quebec. It created a right neither to public health care nor to private health insurance. However, in applying the reasoning in R. v. Morgentaler to a complex area of social policy, it inserted itself into the public policy process and may well have contributed to basic changes in health care policy in Canada. Morgentaler secured the ability to operate private abortion clinics in 1988 – a curious legacy of that victory may be the increasing privatization of health care following Chaoulli.

Lorsque la Cour suprême du Canada a décidé, en juin 2005, d'invalider l'interdiction, au Québec, de polices assurance santé privées, on a vite eu l'impression que la cour venait d'effectuer une révolution juridique et politique. L'article suggère que cette impression n'est correcte qu'en partie. La cour a donné une interprétation jurisprudentiellement modeste et bien fondée du droit à la sécurité personnelle de se prononcer sur l'appel dans l'affaire Chaoulli c. Québec. Cette interprétation a créé un droit ni à des soins de santé publics ni à une assurance santé privée. Cependant, en appliquant le raisonnement de R. c. Morgentaler à un domaine complexe de la politique sociale, la cour s'est mêlée au processus de politique publique et peut très bien avoir contribué à des changements fondamentaux sur la politique des soins de santé au Canada. Morgentaler a obtenu le droit d'exploiter des cliniques d'avortement privées en 1988 – dont un héritage intéressant pourrait être une plus grande privatisation des soins de santé suite à Chaoulli.

I. INTRODUCTION

Canadians consistently tell pollsters that health care is their number one political priority,[1] and health care policy represents one of the most salient and

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1 For example, a 2005 Strategic Council poll for the *Globe and Mail* and CTV suggested that health care was declared the top issue for 16 percent of Canadians – not a large number but a clear plurality and far ahead of other issues such as terrorism (8 percent), economic issues (7 percent), and corruption and the sponsorship inquiry (2 percent). See Campbell Clark, "Scandal off the radar for Canadians: Poll"

flattering comparisons they make between Canada and the United States. Roy Romanow, Chair of the Commission on the Future of Health Care in Canada, intoned at the beginning of his final report that in their discussions with him: "Canadians have been clear that they still strongly support the core values on which our health care system is premised – equity, fairness, and solidarity. These values are tied to their understanding of citizenship. Canadians consider equal and timely access to medically necessary health care services on the basis of need as a right of citizenship, not a privilege of status or wealth."[2]

The *Canadian Charter of Rights and Freedoms*[3] is the other great icon, a statement not simply of technical rights and interpretive provisions but of fundamental Canadian values,[4] of those threads that bind an otherwise fragmented, multicultural, disputatious political community. So profound has been the *Charter's* effect on the national consciousness that undergraduate students typically think that the *Charter is* the constitution. The courts' interpretation of the *Charter* is often associated (in the public mind, if not always in the case law) with all that is correct and proper: among other things, a woman's access to abortion,[5] laws that make it a crime to promote hatred,[6] the right of same-sex couples to marry,[7] and the provision of publicly funded interpreters for deaf patients seeking medical attention.[8] The least that can be said is that while public support for specific Supreme Court of Canada *Charter* decisions may waver, diffuse or general support for the *Charter* and its chief interpreter remains consistently high.[9]

Shocking it was, then, when in *Chaoulli v. Quebec*[10] the majority of a Supreme Court panel declared invalid a provision of Québec's health care legislation that prohibited the purchase of private health insurance (PHI). This was not supposed

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Globe and Mail (15 August 2005) A4.

2 Canada, Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada* – Final Report (Ottawa: The Commission, 2002) at xvi [Romanow Report].

3 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11 [*Charter*].

4 Jack Jedwab, "Canada's *Charter* of Rights and Freedoms Seen as Having a Positive Impact on Rights and is a Growing Symbol of Canadian Identity" (2002), online: Association for Canadian Studies <http://www.acs-aec.ca/Polls/Poll1.pdf>.

5 *R. v. Morgentaler*, [1988] 1 S.C.R. 30 [*Morgentaler*].

6 *R. v. Keegstra*, [1990] 3 S.C.R. 697 [*Keegstra*].

7 *Halpern v. Canada (Attorney General)* (2003), 169 O.A.C. 172. Also see *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79.

8 *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

9 Joseph E. Fletcher & Paul Howe, "Public Opinion and Canada's Courts" in Paul Howe & Peter H. Russell, eds., Judicial Power and Canadian Democracy (Montreal-Kingston: McGill-Queen's University Press, 2001) at 255-96. For signs of potential change to this view, see Lori Hausegger & Troy Riddell, "The Changing Nature of Public Support for the Supreme Court of Canada" (2004) 37 Canadian J. of Political Science 23.

10 *Chaoulli v. Quebec* (Attorney General), [2005] 1 S.C.R. 791, 2005 SCC 35 [*Chaoulli*].

to happen. The *Charter* is about rights, equality, and fundamental Canadian values; Canadian health care policy is egalitarian, efficient, and not American. The two should thrive in loving embrace. Alas, the *Charter*, in the hands of careless legal surgeons, became a knife that excised an element of the Canadian health care system that has kept it from the slide into market commodification. This looks like a judicial revolution, led not by the lefties whose victories are decried by the proponents of the Court Party thesis,[11] but instead by the forces of private property rights, neo-liberalism, and the business-friendly policies associated with the Fraser and C.D. Howe Institutes. Everyone was put off balance: the Charterphiliac equality-seekers who have looked to the *Charter* and the Supreme Court for the advancement of their agenda, and the Charterphobic types on the right who consider the Court captive to a gaggle of grievance groups that see the state as the answer to all problems.[12]

This article suggests that the decision is both narrower and broader than casual observers are likely to conclude. It is tempting to glean from the result that the Court has "discovered" in the *Charter* an economic right of property redolent of the *Lochner*[13] era in United States Supreme Court jurisprudence. In fact, the matter was decided on narrower, procedural terms that are traceable to the Court's 1988 decision in *Morgentaler*.[14] But *Chaoulli*, though jurisprudentially modest, is nonetheless a politically bold intervention into a sensitive, complex area of social policy and Canadian federalism.

II. THE CHAOULLI DECISION: WAIT LISTS, HEALTH RISKS, AND THE RIGHT TO PERSONAL SECURITY

Chaoulli[15] originated in a motion for a declaratory judgment that Québec's legislative prohibition on private health insurance was contrary to both Québec's *Charter of human rights and freedoms*[16] and the *Canadian Charter*.

11 F.L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000) [Morton & Knopff].

12 Richard Sigurdson, "Left- and Right-Wing Charterphobia in Canada: A Critique of the Critics" (1993) 7-8 International J. of Canadian Studies 95.

13 *Lochner v. New York*, 198 U.S. 45 (1905). In *Lochner*, the United States Supreme Court struck down a New York State law mandating a maximum ten-hour work day. The Court held that this was a violation of "liberty of contract" between employers and employees embedded in the Fourteenth Amendment of the United States Constitution.

14 *Supra* note 5.

15 *Supra* note 10.

16 *Charter of human rights and freedoms*, R.S.Q. c. C-12 [*Québec Charter*].

The case was brought jointly by an elderly man, George Zeliotis, who claimed he waited too long for various health services and that the delays impaired his health, and by Montreal doctor Jacques Chaoulli, who wished to obtain a license to operate a private hospital. The motion was denied and their appeal was dismissed by the Québec Court of Appeal.[17]

Before a panel of seven at the Supreme Court of Canada, Chaoulli and Zeliotis (hereafter, Chaoulli) scored a narrow but surprising victory. One justice, Justice Deschamps from Québec, relied solely on Québec's quasi-constitutional human rights law to dispose of the appeal. Three justices, led by Chief Justice McLachlin and Justice Major, concurred, with little comment, in Justice Deschamp's application of the *Québec Charter* but grounded their judgment much more firmly on an interpretation of section 7 of the *Canadian Charter*. Three justices in dissent accepted with little comment the argument that the appellants' rights were violated, but found the deprivations justified as a measure designed to uphold the integrity of a public health care system based on the principle of access according to need.

Not much is to be made of the differential legal bases for decision among members of the majority. Section 1 of the *Québec Charter* declares: "Every human being has a right to life, and to personal security, inviolability and freedom." The *Canadian Charter*'s section 7 declares: "Everyone has the right, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 7 of the *Canadian Charter* contains an internal limitation on the rights – the reference to the principles of fundamental justice. A section 7 *Canadian Charter* claimant must prove the rights deprivation and also suggest that the deprivation is not in accord with one or more principles of fundamental justice. If the claimants win on both counts, the government can still seek to upheld the infringement under section 1 analysis. Section 1 of the *Charter* reads: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The courts have generally maintained, however, that the limitation clause within section 7 obviates any need to use section 1.[18] Only in very exceptional cases will a right to life, liberty, or security of the person that

17 *Chaoulli c. Québec (Procureur général)*, [2002] J.Q. no. 759.

18 *Reference re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 518 [*B.C. Motor Vehicle Reference*]. In her concurring reasons, Justice Wilson argued that a section 7 violation could never be upheld as a reasonable limit under section 1. *Ibid.* at 531.

is found to be deprived in a manner not in accordance with the principles of fundamental justice nonetheless be deemed justifiable by the state as consistent with the operation of a free and democratic society.[19]

Courts have considered section 1 of the *Québec Charter* to be limited by section 9.1, which allows the defender of an impugned rule to justify a limitation on section 1 rights.[20] Section 9.1 reads: "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 Québec. In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law." So the *Canadian Charter*'s section 7 and the *Québec Charter*'s section 1 both guarantee similar rights to personal security, and rights in each document are limited. But while rights in both documents are subject to a general limitation clause, section 7 rights in the *Canadian Charter* are additionally subject to limits proceeding from principles of fundamental justice.

What is significant about the split within the majority is that one justice felt constrained to decide the matter based on Québec's quasi-constitutional *Charter of human rights* passed by the National Assembly. There are overt and covert reasons for Justice Deschamp's recourse to the *Québec Charter*. Overtly, she suggested that the *Québec Charter* is to the *Canadian Charter* what the *Canadian Bill of Rights*[21] is to the *Canadian Charter*. The latter does not invalidate the former, and the two living documents have "cumulative effects" that deepen our understanding and protection of rights. Her argument apparently is that the *Québec Charter* adds to the *Canadian Charter* and should remain alive to perform this function.[22] She notes that the *Québec Charter*'s section 1 applies to relations between private individuals, not simply to relations between individuals and the state. And there is no burden of proof with the *Québec Charter*'s section 1 upon the rights claimant to show that the right is deprived in a manner not in accordance with the principles of fundamental justice. Section 7 of the *Canadian Charter* imposes a dual burden on rights claimants, whereas only one burden is imposed on claimants under the terms of section 1 of the *Québec Charter*. Accordingly, section 1 of the *Québec Charter* is potentially broader than the *Canadian Charter*'s section 7 and thus should play a central role in rights litigation involving Québec.[23]

19 Peter Hogg, *Constitutional Law of Canada*, Student Edition (Toronto: Carswell, 2003), at 819-20.
20 *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 [*Ford*].
21 S.C. 1960, c. 44, s. 2, reprinted in R.S.C. 1985, App. III.
22 *Chaoulli*, *supra* note 10 at paras. 25-26.
23 *Ibid.* at paras. 29-31.

Now, before the *Canadian Charter*'s entrenchment, courts preferred to dispose of cases on the narrowest legal terms available and decide only what was necessary to satisfy the parties before the court. Courts in the old days were about solving particular parties' legal problems. Only interstitially were they legal and constitutional policy-makers.[24] An argument available to Justice Deschamps was that Chaoulli's case should be decided in terms of the *Québec Charter* because, as a quasi-constitutional document only, the *Québec Charter* afforded the narrowest legal means of disposing the legal conflict. To jump to the *Canadian Charter* would be an exercise in judicial policy-making overkill. She does not make this argument. Instead, she relies on the *Québec Charter* not because it is a narrow document but because it is a broad document whose interpretation best affords an *expansive* definition of rights.[25] For her, as for many of her colleagues, it is a race to the most liberal and generous interpretation of rights documents, whether constitutional or otherwise.

The covert reason for relying upon the *Québec Charter* is at least as persuasive as the overt. The politics of national unity lurk close to the surface of rights litigation involving Québec. There is reason to believe that Justice Deschamps and her colleagues considered that the decision would have greater legitimacy in Québec were it founded principally on a rights-based document emanating from that province. Such an interpretive tack has been taken before. On the explosive issue of language rights during the Meech Lake period, the Supreme Court relied on both the *Québec Charter* and the *Canadian Charter* to strike down the ban on English language commercial advertising in Québec's *Bill 101*,[26] though the Court could as easily have confined itself to the *Canadian Charter* analysis.[27] So, not too much should be made of the split within the majority on the precise legal instrument on the basis of which the law was struck down. What applies to Québec has pan-Canadian implications. As will become apparent, it is essentially the *Canadian Charter*'s section 7 that founds the *Chaoulli* decision. The arguments Justice Deschamps found persuasive with respect to the *Québec Charter*'s section 1 were those that her colleagues in the majority used in their *Canadian Charter* section 7 analysis.

24 See Paul C. Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell/Methuen, 1974); Robert J. Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2003), at parts 3-4.

25 *Chaoulli*, *supra* note 10 at paras. 26, 30.

26 *Charter of the French language*, R.S.Q. c. C-11 [*Bill 101*].

27 See *Ford*, *supra* note 20 at para. 39. Here, too, the Court read the *Québec Charter*'s limitation clause, section 9.1, in terms synonymous with those of section 1 of the *Canadian Charter*.

Justice Deschamps made clear that at issue in this case is not the right to health care or to private health care, but the right to personal security that is put at risk by delays in access to medically required care. Timely treatment is connected to the *Québec Charter* right to personal inviolability, not to private economic or property rights. Delays in access to medical treatment can cause both physical and psychological harm. It is the existence of delays, not the absence of private health insurance, that triggers the rights violation.[28]

Accepting, based on Mr. Zeliotis's evidence, that a violation has occurred, Justice Deschamps inquired into whether the violation was nonetheless justified under section 1 of the *Québec Charter*.[29] Her analysis of section 9.1 looks very much like a conventional section 1 analysis of the *Canadian Charter*, a point that counsels us not to make too much of her focus on the *Québec Charter* – though it is true that her six colleagues on the panel were preoccupied with the principles of fundamental justice, not section 1 analysis. The problem was essentially that the prohibition on PHI was not a minimal impairment of the right. She considered that there was no evidence that the existence of PHI would weaken support for the public health care model. Alleged negative influence of private health care on the public system she found unpersuasive. Perverse incentives can in any event be contained by well-designed policy measures – for example, three other Canadian provinces allow PHI and safeguard the public system in other ways. Furthermore, she held, OECD countries have many different schemes that are "less drastic, and also less intrusive in relation to the protected rights."[30] The government, she concluded did not justify the limit on the right to timely access to medical treatment.

This latter determination depends on the degree of deference the Court shows the government. For years, the Court's settled position was that in social policy fields, where sensitive balances among the interests of competing groups must be struck, and where the courts lack the expertise to make judgments about non-legal, extrinsic evidence, the government need not meet a high standard of justification. In areas where courts have developed particular expertise, and where the claimant is subject to the weight of the state as a "singular antagonist" – for example, criminal law – the courts ought to be trenchant rights-defenders, and require the state to meet high standards of justification.[31] Contrary trends developed in

28 *Chaoulli*, *supra* note 10 at paras. 14, 42-43.
29 *Ibid.* at para. 45.
30 *Ibid.* at para. 83.
31 See *R. v. Oakes*, [1986] 1 S.C.R. 103; *Irwin Toy v. Québec (Attorney General)*, [1989] 1 S.C.R. 927

the 1990s, and the clarity of the jurisprudence suffered.[32] Here, Justice Deschamps left little doubt that the Court should hold the government's feet to the fire:

> It cannot be said that the government lacks the necessary resources to show that its legislative action is motivated by a reasonable objective connected with the problem it has undertaken to remedy. The courts are an appropriate forum for a serious and complete debate. As G. Davidov said in "The Paradox of Judicial Deference" (2000-2001), 12 N.J.C.L. 133, at p. 143, "[c]ourts do not have to define goals, choose means or come up with ideas. They do not have to create social policies; they just have to understand what the other branches have created. No special expertise is required for such an understanding." In fact, if a court is satisfied that all the evidence has been presented, there is nothing that would justify it in refusing to perform its role on the ground that it should merely defer to the government's position. When the courts are given the tools they need to make a decision, they should not hesitate to assume their responsibilities. Deference cannot lead the judicial branch to abdicate its role in favour of the legislative branch or the executive branch.[33]

III. THE LINK BETWEEN *CHAOULLI AND MORGENTALER*

Chief Justice McLachlin and Justice Major, writing for Justice Bastarache, concurred with Justice Deschamps on the *Québec Charter* violation. But this was a mere prelude to their fuller examination of section 7 of the *Canadian Charter*. In a clever rejoinder to the conventional view that PHI restricts access to health care to the wealthy, they note that the Québec law creates a:

> virtual monopoly for the public health scheme. The state has effectively limited access to private health care except for the very rich, who can afford private care without need of insurance. This virtual monopoly, on the evidence, results in delays in treatment that adversely affect the citizen's security of the person. Where a law adversely affects life, liberty or security of the person, it must conform to the principles of fundamental justice. This law, in our view, fails to do so.[34]

[*Irwin Toy*] and *Keegstra, supra* note 6.

32 Perhaps the most famous case in this respect is *RJR-Macdonald v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 [*RJR-Macdonald*], in which the Court invalidated much of Canada's legislated tobacco advertising bans because the government could not prove to the satisfaction of a majority that tobacco advertising increases the consumption of tobacco, and that informational ads were as causally important as lifestyle ads in increasing tobacco consumption. The majority imposed a relatively high justificatory burden on the government. *Ibid.* at paras. 127-29. The dissenters, by contrast, adopted a more relaxed deferential burden on the government in view of the evidentiary difficulties governments inevitably face when legislating in fields of social policy. *Ibid.* at paras. 62-77.

33 *Chaoulli, supra* note 10 at para. 87.

34 *Ibid.* at para. 106.

For this group of three the Court's decision in *Morgentaler* [35] is critical. Section 251 of the *Criminal Code*[36] prohibited abortions in Canada, except those performed to save the life or health of the mother. The *Criminal Code* set out a structure for applying this exculpatory clause. It permitted hospitals with adequate surgical facilities to create therapeutic abortion committees staffed with a minimum number of doctors to which application could be made for a therapeutic abortion. Dr. Henry Morgentaler performed abortions in private clinics for a fee and without reference to the *Criminal Code's* life or health-related criteria. He was charged with violating section 251 of the *Criminal Code* and in his defence asked the courts to strike down section 251 as a violation of a woman's rights to liberty and security of the person as protected by section 7 of the *Canadian Charter*.[37] In a 5-2 decision in January 1988, the Supreme Court did just that.

The majority in *Morgentaler* was split three ways. Justice Wilson on her own behalf asserted a substantive right to privacy that protects a women's right to terminate a pregnancy.[38] The remaining four justices, in two opinions, took a more procedural approach, arguing that section 7 does not protect a right to abortion. Chief Justice Dickson and Chief Justice Lamer wrote that section 7 instead protects a right to security of the person that is violated when a statutory defence to a charge is effectively "illusory." They were persuaded by extrinsic evidence to the effect that most hospitals in Canada did not and could not create therapeutic abortion committees, and that women's effective access to abortion was slight. The law provided a defence to a charge of abortion, but its terms made the defence practically unattainable for many women. When a woman attempted to follow the *Criminal Code's* procedures for obtaining an abortion, she could face delays, and these would increase her psychological stress and risk of physical harm. Thus, a woman's right to security of the person was breached, and the state was unable to show that its scheme was consistent with the principles of fundamental justice, one of which is that defences to a criminal charge must not be illusory.[39] Justices Beetz and Estey, in a concurring opinion, concentrated on the effect delays in the procurement of a therapeutic abortion could have on the health and life of pregnant women. They concluded that the section

35 *Supra* note 5.
36 R.S.C. 1985, c. C-46, s. 251 [*Criminal Code*].
37 *Supra* note 5 at 45.
38 *Ibid.* at 161-84.
39 *Ibid.* at 45-80.

7 infringement was grounded in needless criminal regulations governing the constitution and operation of therapeutic abortion committees.[40] In their words:

> If a rule of criminal law precludes a person from obtaining appropriate medical treatment when his or her life or health is in danger, then the state has intervened and this intervention constitutes a violation of that man's or that woman's security of the person. "Security of the person" must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. If an act of Parliament forces a person whose life or health is in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand, inadequate treatment or no treatment at all, the right to security of the person has been violated.[41]

Note that for all members of the panel in this case, the section 7 rights at issue were those of women seeking abortions, not those of Dr. Morgentaler seeking to perform them. Undoubtedly, were Morgentaler to make a constitutional argument that his economic liberties to pursue his particular profession were violated by the structures of section 251 of the *Criminal Code*, he might not have become a celebrated abortion rights crusader; nor would he have succeeded before the courts. In the patriation negotiations of 1980 to 1982, economic liberty rights were expressly excluded from the draft *Charter* at the insistence of the New Democratic Party and provinces protective of their "property and civil rights" jurisdiction in the division of powers.[42] Instead, Morgentaler was permitted to argue that women's section 7 rights were at issue, even though *he* was charged under section 251 of the *Criminal Code*, and not any woman who sought an abortion. This fact caused dissenting Justice McIntyre some consternation.[43]

One can see how *Morgentaler* could come to Chaoulli's aid. If the medical system produces delays in access to medical treatment, if those delays cause stress and harm, if those delays are traceable to public measures that block timely, alternative access to care, and if the public measures do not have persuasive overriding justification, then the public measures may be in constitutional trouble. Chief Justice McLachlin and Justice Major came to the same conclusion:

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40 *Ibid.* at 80-132.

41 *Ibid.* at 90.

42 James B. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (Vancouver: Univ. of British Columbia Press, 2006) at 57.

43 *Morgentaler*, *supra* note 5 at 149-50.

> In this appeal, delays in treatment giving rise to psychological and physical suffering engage the s. 7 protection of security of the person just as they did in *Morgentaler*. In *Morgentaler*, as in this case, the problem arises from a legislative scheme that offers health services. In *Morgentaler*, as in this case, the legislative scheme denies people the right to access alternative health care. (That the sanction in *Morgentaler* was criminal prosecution while the sanction here is administrative prohibition and penalties is irrelevant. The important point is that in both cases, care outside the legislatively provided system is effectively prohibited.) In *Morgentaler* the result of the monopolistic scheme was delay in treatment with attendant physical risk and psychological suffering. In *Morgentaler*, as here, people in urgent need of care face the same prospect: unless they fall within the wealthy few who can pay for private care, typically outside the country, they have no choice but to accept the delays imposed by the legislative scheme and the adverse physical and psychological consequences this entails. As in *Morgentaler*, the result is interference with security of the person under s. 7 of the *Charter*.[44]

In *Chaoulli*, according to Chief Justice McLachlin and Justice Major, a law that infringes section 7 will be constitutional when it is in accordance with one or more principles of fundamental justice. One of these principles is that laws must not be arbitrary[45] – that is, there must be "not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts."[46] In health care, *Morgentaler* illustrates how this principle operates: rules that block effective access to a necessary service are arbitrary and thus constitutionally suspect.[47]

IV. THE *CHAOULLI* DISSENT: SOCIAL POLICY *VERSUS* CONSTITUTIONAL LAW

The *Chaoulli* dissenters took issue with the very institutional manageability of the Charter claim. They framed the issue rather differently than the majority, stating that what the appellants seek is a "two-tier" medical system.[48] According to Justices Binnie and LeBel, with whom Justice Fish concurred, courts lack standards for properly determining whether and when delays in access to health care engage *Charter* rights.[49] Fundamentally, the debate is about social values, not law. However problematic delays may be, they pose a problem the law cannot solve. A large part of the matter concerns the proper scope of section 7 *Charter* rights. Established

44 *Chaoulli, supra* note 10 at para. 119.
45 *Ibid.* at para. 128.
46 *Ibid.* at para. 131.
47 *Ibid.* at para. 133.
48 *Ibid.* at para. 161.
49 *Ibid.* at paras. 163-64.

jurisprudence, they suggest, indicates that section 7 rarely operates in a non-criminal context, and when it does, it is difficult to establish that a limitation on a right is contrary to a principle of fundamental justice – not least because it is hard to identify the principle of fundamental justice at issue. The most one can say in non-criminal cases is that a limitation on the right to life, liberty, or security of the person must not be arbitrary. And arbitrariness is hard to establish in social policy questions where the nature of the evidence requires courts to defer to governments.

It is easy, the dissenters hold, to find some Quebeckers who have experienced delays in access to medical treatment. It is much harder to demonstrate that the limitation on section 7 rights is contrary to the principles of fundamental justice.[50] These are legal principles; while the provision of reasonable health care within a reasonable time is a laudable principle, it is not a *legal* principle.[51] It also fails to enjoy sufficiently broad public support to meet the definition of fundamental justice. Furthermore, the goal is insufficiently precise to operate as a principle of fundamental justice. How long a delay is too long?[52] Finally, the experts disagreed among themselves about whether private health insurance would reduce delays. Waits lists are common to all health systems and are often preferable to idle health system capacity. Waits lists as evidence of delays are inaccurate measures because people put themselves on multiple lists, remove themselves before treatment, get treated through emergency means, find that medical treatment is no longer necessary, and so on.

While non-arbitrariness is a principle of fundamental justice, they argued, it is not breached in Chaoulli's case. It is not true that the ban on PHI bears no relation to the objective of Québec's health care legislation. The ban, in fact follows from its objectives. Finding no reason to disturb the factual findings of the trial judge that private health care creates perverse incentives, skims the cream from the public system, fails to eliminate the problem of delays, and has a record of increases total health care costs, the dissenters concluded that it is not arbitrary to ban PHI.[53]

As for the application of *Morgentaler* to *Chaoulli*, the dissent distinguished the two cases on the ground that *Morgentaler* was a criminal case – falling fairly within the courts' particular decision-making expertise, and involving criminal sanctions for those found to violate the law – whereas Chaoulli's application concerned social policy.[54] They continued:

50 *Ibid.* at para. 199.
51 *Ibid.* at para. 209.
52 *Ibid.*
53 *Ibid.* at para. 242.
54 *Ibid.* at para. 260.

> There is, we think, a world of difference between the sort of statutory analysis conducted by Beetz J. in *Morgentaler* and the re-weighing of expert evidence engaged in by our colleagues the Chief Justice and Major J. in this case. Having established that the s. 251 requirements had nothing to do with the avowed state interest in the protection of the foetus, all that remained in *Morgentaler* was to show that these requirements were inconsistent with the competing state interest in preserving the life and health of the mother. We see no parallel between the analysis of Beetz J. in *Morgentaler* and what is asked of the Court by the appellants in this case.
>
> On the contrary, given its goal of providing necessary medical services to all Quebec residents based on need, Quebec's determination to protect the equity, viability and efficiency of the public health care system is rational. The chosen means are designed to further the state interest and not (as in *Morgentaler*) to contradict it.[55]

V. A MODEST JURISPRUDENCE

A casual reading of *Chaoulli* might suggest that the Court has construed section 7 to protect negative economic rights and thus to give a constitutional blessing to marketized health care policy.[56] The decision does no such thing – at least, not as a matter of law. In *Chaoulli*, the appellants did not contend, nor did the Court find, that they had a constitutional right to private insurance.[57] As far as private property rights are concerned, the decision accords with established jurisprudence. In *Irwin Toy* the Supreme Court considered a section 7 argument to the effect that a corporation, subject to limits on its ability to advertise, could assert economic or property rights against government regulation. Chief Justice Dickson dismissed the argument, noting the conspicuous absence of "property" in section 7 and drawing attention to the phrase used in its place – "security of the person."[58] This, concluded Chief Justice Dickson, is a clear indication that the *Charter* was meant to depart from the American "classic liberal formulation."[59]

In the *Prostitution Reference*,[60] which tested the constitutionality of a *Criminal Code* regulation addressing solicitation for the purposes of prostitution, Chief Justice Dickson, writing for Justices La Forest and Sopinka,

55 *Ibid.* at paras. 262-63.

56 Media reports following the release of decision certainly invited such an interpretation. See for example Kazi Stastna & Irwin Block, "Champions of private health care find satisfaction in Supreme Court ruling" *CanWest News* (10 June 2005) at 1.

57 *Chaoulli*, *supra* note 10 at para. 14 [emphasis added].

58 *Irwin Toy*, *supra* note 31 at para. 95.

59 *Ibid.*

60 *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 [*Prostitution Reference*].

found it unnecessary to deal with an economic interpretation of section 7, adding that "this case does not provide the appropriate forum for deciding whether 'liberty' or 'security of the person' could *ever* apply to any interest with an economic, commercial or property component."[61] In the same case, however, Chief Justice Lamer was much less equivocal. He associated property rights and economic privacy arguments with the discredited *Lochner*[62] era in U.S. constitutional law and wished to steer Canada clear of it.[63] Summing up the jurisprudence, the Court declared that section 7 does not encompass "pure economic interests." Consequently, "[t]he ability to generate revenue by one's chosen means is not a right that is protected under s. 7 of the Charter."[64]

While it appears to be settled that section 7 does not protect economic enterprise as such, another possibility is that it protects a substantive zone of human liberty or privacy from state regulation, and that certain human activities with an economic component or dimension fall within that zone. Understanding rights as markers of individual liberty is among the classic formulations of the purposes of bills of rights, and Canadian jurists have appealed to this understanding repeatedly.[65] Perhaps the most famous such appeal was made by Justice Wilson in her 1988 application of section 7 (and section 2(a)) to Canada's abortion law.[66] Never mind the unconstitutionality of the procedures according to which a woman could obtain a lawful, therapeutic abortion, she argued. The prohibition itself is the problem. Abortion – at least to a certain point in the fetus's gestation – is a fundamentally personal, intimate, and private decision properly within a woman's zone of privacy. Justice Wilson's conception of rights and privacy is worth quoting at length:

> The *Charter* is predicated on a particular conception of the place of the individual in society. An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both. The *Charter* reflects

61 *Ibid.* at para. 15 [emphasis added].

62 *Supra* note 13.

63 *Prostitution Reference, supra* note 60 at para. 57. For support, Chief Justice Lamer referred to the Court's opinion in *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313. This reference tested the constitutionality of a legislated limit on the ability of government employees to strike. The Court almost entirely avoided an interpretation of the *Charter* that would embroil it in economic regulation (at para. 180). The Court noted that the administrative welfare state had transformed the market economy and the collective rights of workers, and that courts lack the expertise to intervene in sensitive balances of competing interests.

64 *Siemens v. Manitoba (Attorney General)*, [2003] 1 S.C.R. 6, 2003 SCC 3 at paras. 45-46.

65 See *R. v. Dyment*, [1988] 2 S.C.R. 417, La Forest J. ("privacy is at the heart of liberty in the modern state") at para. 17.

66 *Morgentaler, supra* note 5 at paras. 161-84.

> this reality by leaving a wide range of activities and decisions open to legitimate government control while at the same time placing limits on the proper scope of that control. Thus, the rights guaranteed in the *Charter* erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence.[67]

For Justice Wilson, abortion exists within the parameters of the fence erected for each individual.

When the Supreme Court in 1993 considered the constitutionality of Canada's criminal prohibition of assisted suicide, it extended Justice Wilson's reasoning in *Morgentaler*.[68] *Rodriguez* concerned a *Criminal Code* prohibition on assisted suicide, and while the Court ultimately upheld the law, it did rule that the law violated Sue Rodriguez's right to security of the person. The Court declared that security of the person encompasses "a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress."[69] Similarly, the Court found in 1999 that state apprehension of children was a *prima facie* intrusion into the private, intimate sphere and that such decisions harm the parents' security of person.[70]

One of the most interesting cases regarding protected activities falling with an intimate, private sphere concerned a municipal regulation requiring municipal employees to live within the boundaries of the municipality in order to retain their employment. In *Godbout v. Longueuil City*,[71] Justice La Forest began his reasons boldly:

> In modern times, the ability of individuals to make decisions free from unwelcome external interference is increasingly under pressure. Whether that pressure finds its roots in changing patterns of social organization, in technological advancements, in governmental action, or in some other source, its net effect has largely been to whittle down the scope of personal freedom. While the exigencies of community life clearly preclude the possibility that individuals could ever be guaranteed an untrammelled

67 *Ibid.* at para. 164.

68 *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 [*Rodriguez*].

69 *Ibid.* at para.136.

70 *New Brunswick (Minister of Health and Community Services) v. G.(J.)* [1999] 3 S.C.R. 46 [*J.G.*]. Other cases follow the logic employed in *J.G.* but apply the principles to the particular facts differently. For example, while the mother in *J.G.* was entitled to access to state-provided counsel in her complex child custody proceeding, in another case a majority of the Court held that warrantless apprehensions of children in non-emergency situations was not contrary to a parents' section 7 rights. *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, 2000 SCC 48.

71 [1997] 3 S.C.R. 844 [*Godbout*].

> right to do as they please, the basic ability to make fundamentally private choices unfettered by undesired restrictions demands protection under law, such that it can only be overridden where other pressing concerns so dictate.[72]

He ventured beyond the arguments submitted to the Court, and found within section 7 a robust substantive right to privacy that could not be violated even by means of the most careful and fair procedures. The right to liberty enshrined in section 7 of the *Charter* "protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference."[73] Choosing where to live is a "fundamentally personal endeavour, implicating the very essence of what each individual values in ordering his or her private affairs." It affects the "quality of one's private life."[74] Could state limitation of this right be consistent with the principles of fundamental justice? No, declared the majority. Limiting a privacy right is not just a matter of the use of fair procedures, but a matter of the just substantive ends the deprivation seeks to serve.[75] This regulation upsets the proper balance between individual and state interests by covering all employees, not just those whose job legitimately requires them to live close to work.

Godbout approaches section 7 in terms similar to those of Justice Wilson in *Morgentaler*, and also to some elements of Chief Justice Dickson's reasons, in that it seeks to map out a space of personal decision-making free of illegitimate state interference. In *Godbout*, the Court could have cast the residential qualification in economic terms – as an aspect of the right to work. Instead it mapped out a large area of privacy and placed decisions regarding location of residence within it. Effectively, a property-related interest is recast as a privacy interest. If the choice of where to live (as a condition of employment in local government) is a matter of personal privacy, many other decisions could be so construed. Even the decision about the terms of one's health care could conceivably be placed there. But the Court in *Chaoulli* chose not to follow this authority.

The Court had an entirely different option available. It could have declared that the *Canadian Charter* protects positive social rights to health that, in combination with egalitarian values, would found a right to adequate *public* health care delivered in a timely fashion. Classical formulations of constitutional rights set them as bulwarks against illegitimate state intrusion

72 *Ibid.* at para. 15.
73 *Ibid.* at para. 66.
74 *Ibid.* at paras. 67-68.
75 *Ibid.* at para. 74.

upon individuals and civil society. Rights are negative in that they limit state action. But what if the enjoyment of rights *requires* state action? For example, the section 11 right to a trial within a reasonable time places an affirmative, positive obligation upon the state to devote resources and act in conformity with rights.[76] The section 7 criminal legal right to disclosure of the Crown's case against an accused means that the accused also has a right to state action via the revealing of Crown evidence.[77]

Further, what if the enjoyment of all rights requires that one have the material wherewithal to exercise them? In other words, does not "security of the person" in section 7 plausibly and fundamentally mean that one is secure in the full sense of the term – materially and economically? Understandably, courts have been reluctant to read the *Charter* in such expansive terms, deferring to government both because governments have the expertise to make the myriad balances and trade-offs associated with economic and social policy and because governments are accountable for their financial and budgetary decisions to legislatures. But this is a live issue – many court-watchers and Charterphiles see positive economic rights as the new frontier for the courts to conquer.

Two decisions are notable in this regard. In the 2001 decision in *Dunmore v. Ontario (Attorney General)*,[78] the Court considered a section 2(d) claim that the *Charter* requires positive state action via the provision of a legislative framework to permit domestic farm workers to organize for the purpose of forming a union – different, significantly, from the ability or right to bargain collectively. Domestic farm workers as a class of workers were excluded from Ontario labour relations legislation in 1995. While some groups have the resources and security to organize into employee associations in order to articulate and defend their interests, some vulnerable groups, like agricultural workers (many of them migrant), need legislative protection. Justice Bastarache held that the Ontario labour relations law "does not simply enhance, but instantiates, the freedom to organize," which is protected by section 2(d) of the *Charter*.[79] Indeed, the absence of legislation produces a chilling effect, giving employers reason to discourage employees' associational conduct.[80] *Dunmore* suggests, then, that while some rights may be negative, requiring the state not to act, others are positive, requiring affirmative state action.

76 See *R. v. Askov*, [1990] 2 S.C.R. 1199.
77 See *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.
78 [2001] 3 S.C.R. 1016, 2001 SCC 94 [*Dunmore*].
79 *Ibid.* at para. 36.
80 *Ibid.* at para. 45.

Positive section 7 rights were addressed squarely in the Court's 2002 decision in *Gosselin v. Québec (Attorney General)*.[81] At issue was the constitutionality of a Québec social assistance regime that dramatically reduced benefits for young unemployed people if they refused to participate in work experience and/or training programs. The Court, by a 5-4 majority, upheld the regime against *Canadian Charter* challenges under sections 7 and 15, as well as attacks based on the *Québec Charter*. Chief Justice McLachlin, for the majority, affirmed the concept of negative section 7 rights:

> Section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at bar.[82]

Despite this apparently ringing and categorical affirmation of negative rights, Chief Justice McLachlin left the interpretive door ajar: because the Constitution is a living tree, she noted, one day the *Charter* may be interpreted to include positive rights. "The question therefore is not whether section 7 has ever been – or will ever be – recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of section 7 as the basis for a positive state obligation to guarantee adequate living standards."[83]

Two dissenters in *Gosselin* thought the time had come. Justice Arbour, with Justice L'Heureux-Dubé's support, wrote that section 7 does have a positive economic dimension, and that it is disingenuous to refuse to recognize economic rights of a social character simply because of a refusal to recognize economic rights of a negative, property-oriented character. Both types of rights have an economic dimension, but are entirely different.

Justice Arbour sought to return to fundamentals with her "two rights" interpretation of section 7. On this basis, she insisted that there is, first, a right to life, liberty, and security of the person and, second, a right not to be deprived of these except in accordance with the principles of fundamental justice. Justice Arbour seized on the right to life, asserting that it is an independent right guaranteed to all persons and, furthermore, is fundamental

81 [2002] 4 S.C.R. 429, 2002 SCC 84 [*Gosselin*].
82 *Ibid.* at para. 81 [emphasis in original].
83 *Ibid.* at para. 82.

to the exercise of all other rights in section 7 and the *Charter*.[84] The right to life, therefore, is not subject to the strictures of fundamental justice. To Justice Arbour, *Dunmore* is important in that it establishes positive rights beyond the section 15 context.[85] Regarding the argument that courts are unable to navigate the shoals of social and economic policy, Justice Arbour refused to equate difficulty with justiciability. This door was fully open for the enforcement of positive section 7 social rights.

If, in Justice Arbour's opinion, the right to adequate social assistance enjoys constitutional status, then the right to timely health care, regardless of means, would seem to follow in lock-step. *Gosselin* was decided in 2002; *Chaoulli* was before the Court only a couple of years later. The majority in *Gosselin* contemplated a future recognition of positive rights, and dissenters were prepared to do so in that case. Yet, the Court in *Chaoulli* greeted this interpretive possibility with silence.[86] *Chaoulli* is, therefore, a limited holding in some important respects. It follows a well-trodden liberal path of preserving individual rights against the careless or draconian state.

VI. POLITICAL BOLDNESS

While the Court avoided some expansive interpretations of section 7 in disposing of Dr. Chaoulli's claim, the decision is nonetheless expansive in several other respects. The Court in *Chaoulli* continues down the path of applying section 7 to areas of law and policy beyond the realm of criminal justice.

In one of its first encounters with section 7, the 1985 *B.C. Motor Vehicle Reference*, the Supreme Court tied its meaning to that of the other *Charter* provisions with which it is linked in the structure of the document. The relation of section 7 to the legal rights provisions of sections 8 through 14 gives section 7 an irreducibly criminal law cast. Writing for himself and two justices on this point, Chief Justice Lamer argued:

> Sections 8 to 14 address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are therefore illustrative of the meaning, *in criminal or penal*

84 *Ibid.* at para. 344.

85 *Ibid.* at para. 360.

86 In 2004, the Court refused even to consider expansive s. 7 arguments in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657, at paras. 65-66. In this decision the Court unanimously rejected a s. 15 *Charter* claim that a province's failure to fund certain autism treatments was disability-based discrimination.

> *law*, of "principles of fundamental justice"; they represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the *Charter*, as essential elements of *a system for the administration of justice* which is founded upon a belief in the dignity and worth of the human person and the rule of law.[87]

Later, in the 1990 *Prostitution Reference*, in which the Court was asked its opinion of the *Criminal Code* prohibition on solicitation for the purposes of prostitution, three justices disposed of the matter on section 2(b) freedom of expression grounds. On his own behalf, Chief Justice Lamer addressed the argument that section 7 secures an economic liberty to pursue one's chosen profession. He rejected the argument, maintaining the criminal law interpretation of section 7 that he developed in *B.C. Motor Vehicles*. "In my view," the Chief Justice wrote:

> the principles of fundamental justice can provide an invaluable key to determining the nature of the life, the liberty and the security of the person referred to in s. 7. The principles of fundamental justice are principles that govern the justice *system*. They determine the means by which one may be brought before or within the justice system, and govern how one may be brought within the system and thereafter the conduct of judges and other actors once the individual is brought within it. Therefore the restrictions on liberty and security of the person that s. 7 is concerned with are those that occur as a result of an individual's interaction with the justice system, and its administration.[88]

This relatively narrow understanding of section 7 was not to prevail. In several cases involving state apprehension of children, the Court has held that section 7 protects parents' liberty interests in the nurture of their children, the care for their development, and the making of decisions pursuant to these considerations. Thus, section 7 applies in the context of child protection proceedings, not just criminal proceedings.[89] In 2000, the Court heard an appeal involving a disgraced politician who was the subject of a human rights proceeding.[90] He argued that the delays in processing his case were unconscionable and imposed unacceptable trauma and stress upon him contrary to his right to security of the person. Although he lost his appeal, it was not because section 7 did not apply to his case. Four dissenting

87 *B.C. Motor Vehicle Reference, supra* note 18 at para. 61 [emphasis added]. In a previous decision, the Court in *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, applied s. 7 to Canadian refugee and immigration law, noting that in these circumstances s. 7 is engaged when the right in question is "freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself" (at para. 47). Penal consequences are of course the *sine qua non* of criminal law.

88 *Prostitution Reference, supra* note 60 at para. 63 [emphasis added].

89 See *R.B. v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *J.G., supra* note 70.

90 *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307.

justices were concerned about "collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7."[91] They would have dealt with the case on non-*Charter* grounds. The majority, however, while ultimately refusing Blencoe's claim, did hold that "there is no longer any doubt that s. 7 of the *Charter* is not confined to the penal context."[92]

In *Chaoulli*, the application of section 7 to a non-criminal context is more striking still. Here is a complex area of social policy that involves no state imputation of stigma or penal consequences for violations of law. It is also a field, contrary to criminal justice, in which courts in the past have expressed deep reservations about their own decision-making competence. The dissenters in *Chaoulli* conceded that section 7 cannot be confined to the criminal context, but that:

> [c]laimants whose life, liberty or security of the person is put at risk are entitled to relief only to the extent that their complaint arises from a breach of an identifiable principle of fundamental justice. The real control over the scope and operation of s. 7 is to be found in the requirement that the applicant identify a violation of a principle of fundamental justice. The further a challenged state action lies from the traditional adjudicative context, the more difficult it will be for a claimant to make that essential link. As will become clear, that is precisely the difficulty encountered by the claimants here: they are unable to demonstrate that any principle fundamental justice has been contravened.[93]

No matter. If section 7 of the Charter is unconfined to the criminal context, precedents like *Morgentaler* can travel to other areas of law and public policy. While principles of fundamental justice are harder to find in relation to non-criminal law, there is always "non-arbitrariness."

But what standard of proof shall be imposed on the defender of a law who must demonstrate that a deprivation of a right to security of the person is in accordance with a principle of fundamental justice? In criminal cases, the courts have imposed an onerous standard of proof on the state. Is the same standard appropriate in cases of social policy? A large body of case law has suggested that *Charter* strictures ought to be applied more deferentially to governments in cases of social and economic policy.[94] But the courts have been somewhat inconsistent on this point, in some cases relaxing rigorous section 1 standards of justification in criminal cases involving competing social interests;[95] and in other cases applying rather onerous burdens on the state even when complex social problems involving multiple and competing interests and conflicting social

91 *Ibid.* at para. 188, LeBel J.
92 *Ibid.* at para. 45, Bastarache J.
93 *Chaoulli*, *supra* note 10 at para. 199.
94 See *e.g. Irwin Toy*, *supra* note 30.
95 *Keegstra*, *supra* note 6 at 734-88.

science evidence were at issue.[96] In *Chaoulli*, the majority was unsatisfied with the government's evidence that the ban on PHI would endanger the integrity of public health care system in Canada. It revealed little reluctance to consider complex social policy questions.[97] The dissenters, considering the argument that removing the ban on PHI would damage the public system, explained that "governments are entitled to act on a reasonable apprehension of risk of such damage."[98] While the departure from the rule in B.C. Motor Vehicle is a legal move, it is fraught with political significance; it furthers the courts' engagement in public policy issues that legal criteria cannot persuasively settle.

Beyond the Court's interventions into social policy, the effect of the *Chaoulli* decision is likely to expand the realm of personal privacy in unintended ways. In *Morgentaler*, the Court's majority limited its section 7 reasoning to procedural issues, an interpretative focus followed in *Chaoulli*. But note that Justice Wilson's invalidation of section 251 of the *Criminal Code* was based on a substantive interpretation of section 7 – that the right creates a zone of privacy within which abortion is properly to be located. The subtleties of the procedural interpretation in *Morgentaler* have been lost on most Canadians. It was Justice Wilson's view that got all the press, and of course it is this view that has since framed the abortion debate. Similarly, following the June 2005 health care decision, one notices many popular interpretations suggesting that the Court has opened the door to private health insurance. If this view prevails, the Court, perhaps despite itself, will contribute to a popular opinion that the *Charter* protects an economic zone of privacy. Indeed the effect, if not the purpose, of Dr. Morgentaler's section 7 claim in 1988 was to be able to continue to operate a private, for-profit abortion clinic in Toronto. A constitutional right to obtain private health services would be a curious legacy of Morgentaler's abortion battles.

The Court's decisions are increasingly spun by the media according to their priorities, not necessarily those of the Court. Surely, one may suggest, the Court cannot be held responsible for others' interpretations of its decisions. But it cannot be let off the hook so easily. It is making its decisions more accessible to the public than in the past and tries to write its judgments in terms

96 *RJR-Macdonald, supra* note 31 at paras. 127-29, 133-41.

97 *Chaoulli, supra* note 10 at paras. 86-89. While the majority greeted the government's experts' evidence with skepticism, they were nonetheless confident that wait lists were due to the prohibition on private health insurance, and that removing this barrier would not make things worse for Quebeckers. *Ibid.* at paras. 66, 74, and 83.

98 *Ibid.*, para 176.

intelligent lay readers can understand.[99] It knows it is part of a spin cycle. And remember that the Court is in almost complete control of its docket. It bears some responsibility for the political implications of its decisions.

In *Morgentaler*, the Court was faced with a challenge to a policy that achieved a rough compromise among the positions in the abortion debate, but which advanced no one's view completely. Legislative change would have been difficult.[100] Arguably the same is true with medicare in Canada. We have a public system with significant allowance for private health spending that we tend to ignore. Reform of the system is difficult and politically perilous. In such rigidified political circumstances courts are called upon by resourceful individuals and interest groups to intervene. Wrote Justice Deschamps:

> The instant case is a good example of a case in which the courts have all the necessary tools to evaluate the government's measure. Ample evidence was presented. The government had plenty of time to act. Numerous commissions have been established . . . and special or independent committees have published reports . . . . Governments have promised on numerous occasions to find a solution to the problem of waiting lists. Given the tendency to focus the debate on a sociopolitical 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.[101]

The Supreme Court is not usually so brazen about its interventions in the political process. Here, however, we can discern an interest in raising the political stakes for the First Ministers, who in 2005, partially in response to *Chaoulli*, committed to formulating common standards for the determination of acceptable wait times for medical procedures. But does this interest take full account of the myriad legitimate and competing demands on governments? Is there good reason for wait lists to jump to the top of the list of health care policy priorities? Does this concern trump all others before governments? In a news release following the conclusion of an agreement on health care funding in September 2004, the First Ministers stated that access to timely care across Canada is "a national priority," not *the* national priority.[102] In a sense, these questions are unanswerable through the courts, for the process of judicial review is almost always triggered not by persons appreciative of all the competing

99 Richard Blackwell, "Doing the write thing" *Globe and Mail* (5 November 2005) F2. See also Florian Sauvageau, David Schneiderman & David Taras, *The Last Word: Media Coverage of the Supreme Court of Canada.* (Vancouver: Univ. of British Columbia Press, 2006).

100 For a discussion of judicial alterations of complex public policy settlements, see Morton & Knopff, *supra* note 11 at 162-66.

101 *Chaoulli*, *supra* note 10 at para. 96.

102 Canada, Privy Council Office, "A 10-Year Plan to Strengthen Health Care" (16 September 2004), online: <http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=archivemartin&Sub=newscommuniques&Doc=news_release_20040916_260_e.htm>.

demands on governments' resources, but by singular parties – individuals or interest groups – convinced that their particular issue is the most important. One could make a very good case for preventive policies being the greatest priority for governments. Yet it is hard to imagine the courts ever agreeing, or having the opportunity to agree.[103]

In the Court's defence, wait lists have become a major flashpoint in the Canadian health care debate. So the Court may not have rearranged the priorities of Canadians and their governments by giving the claim to speedy care its constitutional imprimatur. It does, however, take a particular position in that debate. Two poles are represented by recent reports on health care policy. The Romanow Report[104] essentially argued for more funding to solve the wait list problem. In response, the Liberal government of Prime Minister Paul Martin committed more money, partly to return to the provinces funding that was reduced during the federal deficit-cutting years of the 1990s, partly because it was running surpluses and therefore had the money to spare, and partly because the polls indicate continuing public demand for health care reform. If the Court in *Chaoulli* found a right to health care in section 7, it would have bowed in Romanow's direction.

Instead, the Court took Senator Michael Kirby's position. In its report of 2002, a Senate committee argued that wait lists are a major problem and that the outcome may very well be private health insurance – a solution imposed by courts, not governments.[105] If governments will not provide for more timely care, the Committee argued, then "the failure to deliver timely health services in the publicly funded system, as evidenced by long waiting lists for services, is likely to lay the foundation for a successful *Charter* challenge to laws that prevent or impede Canadians from personally paying for medically necessary services in Canada, even if these services are included in the set of publicly insured health services."[106] In support of this position, the Kirby Committee relied heavily on a C.D. Howe Institute

103 Said one observer, "My concern is that the court's concern with one waiting list problem in one city in one province is going to end up dictating priority setting by health organizations and governments throughout Canada, even further tipping the balance in favour of downstream illness care and away from prevention and promotion efforts that will keep us all healthier (and a less costly burden to our fellow citizens) in the long run." Gregory P. Marchildon, "The *Chaoulli* Case: Two-Tier Magna Carta?" (2005) Law & Governance, online: <http://www.longwoods.com/product.php?productid=17190&page=1>.

104 *Supra* note 2.

105 Canada, Senate Committee on Social Affairs, Science and Technology, *The Health of Canadians – The Federal Role: Final Report of the Standing Senate Committee on Social Affairs, Science and Technology*, vol. 6 (Ottawa: The Senate, 2002) at c. 5 (Chair: Sen. Michael Kirby) [Kirby Committee], online: <http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-e/soci-e/rep-e/repoct02vol6-e.pdf>.

106 *Ibid.* at 103.

study written by Stanley Hartt and Patrick Monahan that laid out the constitutional argument.[107] This was the argument the majority in *Chaoulli* accepted *in toto*.

Unsurprisingly, Senator Kirby and a number of his colleagues submitted an intervener's factum to the Supreme Court, which the authors of the C.D. Howe report prepared on their behalf. Whereas Kirby, with the help of Hartt and Monahan, persuaded the Senate and the Supreme Court, Romanow persuaded only the Commons – that's two "legislative" houses to one. The Kirby Committee did not recommend the legalization of private health insurance. Rather, it recommended a health care guarantee according to which patients obtain necessary treatment within a defined period or have that treatment administered in another jurisdiction and paid for by one's home government. The Committee did foresee that some market mechanisms could be used to deliver more efficient and timely care.[108]

The *Chaoulli* decision is expansive in at least one other way. It comports with both the logic of rights review and with the record of *Charter* decision-making vis-à-vis federalism. Federalism is all about the constitutional guarantee of territorial diversity in respect to certain areas of public policy. Rights litigation is inherently universalistic by contrast. Examined through the lens of federalism, health care is a matter of provincial jurisdiction, and indeed the Court in *Chaoulli* referred at length to the real diversity in health care policy that exists from province to province in Canada.[109] As a matter of federalism, this is not a fact to be lamented, but a reality readily to be accepted.[110]

Examined through the lens of *Charter* rights, however, health care policy shall conform to principles attaching to individual persons, regardless of territory or provincial residence. As many commentators have argued, *Charter* review has a homogenizing effect on the Canadian federation.[111] So, while the 2004 Accord

107 "The Charter and Health Care: Guaranteeing Timely Access to Health Care for Canadians" *C.D. Howe Institute Commentary: The Health Papers* 64 (May 2002), online: <http://www.cdhowe.org/pdf/commentary_164.pdf>.

108 See Thomas J. Courchene, "Medicare as a Moral Enterprise: The Romano and Kirby Perspectives" (2003) 4:1 *Policy Matters* 1.

109 *Chaoulli, supra* note 10 at paras. 70-74, Deschamps J.

110 Albert Breton, "The Theory of Competitive Federalism" in Garth Stevenson, ed., *Federalism in Canada: Selected Readings* (Toronto: McClelland & Stewart, 1989) 457.

111 The classic argument in the *Charter* era is made by Peter H. Russell, "The Political Purposes of the *Canadian Charter of Rights and Freedoms*" (1983) 61:1 Canadian Bar Rev. 30 [Russell]. In respect to health care, see Christopher P. Manfredi & Antonia Maioni, "Courts and Health Policy: Judicial Policy Making and Publicly Funded Health Care in Canada" (2002) 27:2 J. of Health Politics, Policy, and Law 213. A summary version of this argument is contained in Christopher Manfredi & Antonia Maioni, "The courts are no place to treat what ails Medicare" *Globe and Mail On-line* (10 June 2004).

on Health Care committed all First Ministers to a set of common principles – including access to medically necessary health care based on need, not ability to pay,[112] the five principles of the *Canada Health Act*,[113] and "reforms focused on the needs of patients to ensure that all Canadians have access to the health care services they need, when they need them, . . ." – it recognized the federal character of the country. In particular, the Accord contains a commitment to "jurisdictional flexibility" and an "asymmetrical federalism" that recognizes a special agreement between Ottawa and Québec. Québec "will apply its own wait time reduction plan" and will "pursue its objective of providing more first dollar coverage for short-term acute home care, short-term acute community mental health home care and palliative care, in accordance with its financial capacity." The Supreme Court has rocketed wait time reduction to the top of the list of health priorities for all governments, including Québec's. In this respect it fosters policy homogeneity in an area that the Court itself acknowledges is characterized by much interprovincial diversity.

VII. CONCLUSION

Chaoulli could have been decided differently. Not only could the Court, as I have suggested, have traveled down interpretive trails other than the one that was blazed by *Morgentaler*, but the composition of the panel hearing the appeal could have made all the difference to the result. The Court was two members short when it heard the appeal. The two justices subsequently appointed would quite possibly have weighed in on the side of the Québec government, were they participants in the decision. Madam Justice Abella, for example, a recent appointee, is widely known for her socially progressive views on equality and human rights.[114] Such views, it is reasonable to suggest, would incline her more to the dissenting than to the majority position in *Chaoulli*. This is simply to say that "the *Charter*" as such dictates almost nothing in regard to decisional output on rights. "The *Charter*," instead, is a euphemism for a complex interaction of court personnel, interest group mobilization, partisan discourse, public opinion, media reporting, and the state of the legal academy. It is of some interest that Dr. Chaoulli has been a campaigner for

For the contrary view, see James B. Kelly, "Reconciling Rights and Federalism During Review of the Charter of Rights and Freedoms: The Supreme Court of Canada and the Centralization Thesis, 1982-1999" (2001) 34 Canadian J. of Political Science 321.

112 *Ibid.* note 102.

113 R.S.C. 1985, c. C-16.

114 See for example Rosalie Silberman Abella, "Solidarity Attacked by Exclusion: Respecting Equality and Diversity" (Speech delivered to the Conference on Human Rights in the Twenty-First Century, Banff, Alberta, November 1990), online <http://www.supremecourtlaw.ca/english/speeches/Abella2.pdf>.

private health care in Québec for many years and has become something of a darling of those think tanks and interest groups that have long supported the insertion of market mechanisms in the provision of health services in Canada. He was looking for a fight.

This article has argued that the jurisprudence underlying the decision is rather narrow – or at least that it could have been much more expansive. But it also suggests that jurisprudence is not solely relevant in *Charter* politics. Decisions take on lives of their own. Media reporting of decisions may be as important as the text of the decisions. Further, the Court, in order to retain its authority and esteem, cannot stray far from the public temper, all the rhetoric about the vindication of minorities against majorities notwithstanding. It depends ultimately on public confidence. In this sense the Court is political and *Chaoulli* is a political decision, steering health care policy through a terrain whose contours have been defined by policy choices and proposals and established interests. It may have anticipated the future of health policy sagely, by urging a national standard and by encouraging more creative ways of managing health than simply dumping more money into a system with an insatiable financial appetite. It certainly handled with deftness and finesse a difficult case, and it did so in a manner that effectively silenced its harshest critics on the right of Canada's political spectrum. The Court is functioning just as Peter Russell thought it might: as Canada's third legislative chamber.[115]

115 *Supra* note 111.