

Trojan Horse

**Trade treaties,
private health insurance,
and the Supreme Court decision**

Notes for presentation
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Chaoulli goes to Washington

“I have a tear in my eye,” said Grace-Marie Turner, President of the right-wing Galen Institute and long-time advocate of private health insurance.

It wasn't a tear of sadness.

She had invited Montreal family doctor Jacques Chaoulli to address US conservatives in Washington, D.C. members of the institute she founded, the extreme right-wing Heritage Foundation, and the libertarian Cato Institute.

They were celebrating the recent 4-3 decision by Canada's Supreme Court striking down Quebec's law prohibiting residents from taking out private insurance for health care services already available under Quebec's public health care plan.

Dr. Chaoulli is one of the two individuals who brought the case to the Supreme Court. He's a staunch advocate for private health insurance.

He also has—as two of the dissenting Justices put it, (para. 187)—“a history of conflict with the Quebec health authorities and of disobedience to their rules governing medical practice.”

In the original trial, the judge stated that “It is impossible not to be struck ... by the impression that Dr. Chaoulli has embarked on a crusade...” (para. 187)

In Washington, fellow private health insurance crusader Grace-Marie Turner introduced Dr. Chaoulli to the assembled neo-conservative activists in glowing terms:

“He's truly a superstar in the health-care movement,” she said.

“This is truly a fight for fundamental liberty.”

Globe and Mail reporter Barry McKenna reports that Dr. Chaoulli says other right-wing organizations are now seeking him out for speaking engagements.

“Obviously enjoying his new international fame,” McKenna reports, Dr. Chaoulli is seeking out “U.S. companies eager for a piece of an emerging two-tier health-care system in Canada.”

Says this new darling of American conservatives:

“I would like to make a team with American entrepreneurs and go to Canada and create a private, parallel health-care system.”

Why aren't Canadians rejoicing in the streets at the prospect of the Americans coming to save us from ourselves!

- Imagine what we could learn about equity, accessibility and comprehensiveness from the land where 45 million people have no health insurance at all!

- Imagine what we can learn about administrative efficiency from a health system that is among the most expensive in the world...but where many health outcomes are poor.
- Imagine what we can learn about innovative health care solutions from these neo-conservative American lobby groups ... who advocate radical deregulation and market fundamentalism for what ails the U.S. system.

These same US private health insurance advocates have the audacity to denigrate Canada's system, calling it our "socialized health care program", and hail the Supreme Court decision as "the equivalent of the Berlin Wall ... tumbling down" (as Grace-Marie Turner wrote on June 9th).

(Incidentally, similar language appears in the Mazankowski report prepared for the Alberta government. The same theme also appears in the Preston Manning/Mike Harris report, advocating two-tier health care, which was published by the Fraser Institute during the last federal election.)

"[T]he equivalent of the Berlin Wall... tumbling down"

Hold on here!

American for-profit health insurance companies saving ordinary Canadians from Medicare – a defining feature of modern Canadian life and our most valued social program?!

What planet are these people from?

Most Canadians won't be celebrating this decision.

We are justifiably proud of our health care system.

While we face significant challenges in strengthening and reforming the system – including reducing waiting times—poll after poll shows that the vast majority of Canadians support our universally accessible, publicly-funded health care system.

We're simply not about to let Medicare die.

Despite the private health extremists' dreams of lucrative new markets, Medicare in Canada will remain as alive, as vital, as we Canadians choose it to be.

The Supreme Court Decision.

What is it about the Supreme Court ruling that is causing both glee and consternation?

In a narrow majority, the Supreme Court of Canada ruled that Quebec's ban on private insurance for services that are publicly-insured violates that province's Charter of Human Rights and Freedoms.

The Court was of the opinion that the government failed to provide a 73-year-old Montreal businessman a hip replacement in a reasonable time – he had to wait about a year. At the same time, Quebec's prohibition against private insurance prevented the patient from avoiding this delay by buying private insurance to pay for the surgery privately.

The focus of the Court was not on the individual circumstances, but on the generic issues involved. According to the majority, with long wait-times in the public system, the ban on private insurance

resulted in delays that caused suffering and increased the risk of complications and death – violating Quebec’s Charter.

Lawyers will continue to deliberate on the *legal* consequences of this ruling.

We have a different focus tonight.

Still, several important points should be made.

Legal scholars will examine how the decision, and the application of the Charter, affect the balance between individual and social rights in Canada.

They will also continue the debate, evident in the ruling itself, whether the Court intervened appropriately, or whether it improperly interfered in the role of elected legislators in directing the reform of major social programs.

But what legal impact does the decision have in the short term?

Ottawa lawyer Steven Shrybman notes...

“The ruling is certainly a victory for the advocates of privatization and two-tiered health care ... [but] it is far less significant than these forces claim.”

He points out that ...

- all of the Justices acknowledge the importance and validity of the Canada Health Act;
- the Court’s decision is limited to Quebec and has no direct legal bearing on other provincial health insurance plans;
- the ruling notes that the provinces have several legislative tools at their disposal to prevent the establishment of two-tiered health care;
- the requirement for “reasonable” timely care may arguably already be satisfied by federal-provincial accords to reduce wait times.

In their forceful and compelling critique, the three dissenting Justices point to other aspects of the majority decision that are of direct, practical interest to us tonight.

Firstly, they criticize the majority for failing to define a “manageable constitutional standard” by which waiting times can be judged under the Charter. In assessing the Majority’s proposed requirement for “health care to be a reasonable standard within reasonable time”, they note that the concept “cannot be ‘identified with precision.’” As a result,

“[I]t will be very difficult for those designing and implementing a health plan to predict when its provisions cross the line from what is “reasonable” into the forbidden territory of what is ‘unreasonable’, and how the one is to be distinguished from the other.”

In other words, the Court did not define what a reasonable wait time would be.

This lack of clarity will almost certainly invite further litigation in other provinces.

Secondly, the dissenting Justices highlight the fact that “[i]t is Quebecers who have the money to afford private medical insurance and can qualify for it who will be the beneficiaries of the appellants’ constitutional challenge.” (para. 165).

As Hugh O’Reilly and Fred Holms point out in a Globe and Mail article on June 21, private health insurance would be expensive. They wrote:

“The irony of the decision is that, if [the Montreal patient] were permitted to purchase private health insurance to get his hip operation, he would have had to pay a premium equivalent to the cost of the operation. In other words, it was not the lack of private insurance that caused [the patient’s] pain and suffering, it was the lack of money to pay for private health-care services.”

What are we to make of a Charter right of citizens to purchase private health insurance to obtain faster service?

Only the wealthy and the not-very-sick will be able to exercise this right to obtain private insurance.

Roy Romanow addressed this issue his Commission’s report:

“Some have described it as a perversion of Canadian values that they cannot use their money to purchase faster treatment from a private provider for their loved ones. I believe it is a far greater perversion of Canadian values to accept a system where money, rather than need, determines who gets access to care.” (p. xx; quoted at para. 166)

The dissenting Justices make another point.

This is the one that leads us into the importance of trade treaties.

These Justices sharply criticize the majority for – in their words – “an oversimplified view of the adverse effects on the public health system of permitting private sector health services to flourish”.

They conclude that:

“the proposed constitutional right to a two-tier health system for those who can afford private medical insurance would precipitate a seismic shift in health policy for Quebec.” (para. 176)

They add:

“Private insurance is a condition precedent to, and aims at promoting, a flourishing parallel private health care sector. For Dr. Chaoulli in particular, that is the whole point of this proceeding.”

Trade treaties – the neglected factor

Having touched on some of the key elements of the Supreme Court ruling, let’s turn our attention to the issue at hand.

Trade treaties...

The serious risks that trade treaties (like NAFTA and the World Trade Organization’s ‘services’ treaty the GATS [the General Agreement on Trade in Services]) pose for our health care system.

This is a crucial factor in this health care debate that is under-reported, often misrepresented, and all-too-often completely ignored.

Well-respected government, legal, academic and public interest researchers and organizations have conducted extensive research on this critical area, much of which is readily and freely available.

During and after the passage of NAFTA in 1994, the Government of British Columbia, under Premiers Harcourt and Clark, working actively with non-governmental organizations across the country, flushed out the fact that NAFTA's safeguard for health care and other public services is deeply flawed.

Later the B.C. Legislature conducted extensive expert and public hearings on the proposed Multilateral Agreement on Investment (MAI), which was based on NAFTA, and issued two authoritative reports on the dangers of the investment rules contained in these treaties.

More recently, the Canadian Centre for Policy Alternatives led a 13-organization research consortium to produce a comprehensive report, focused on the impact of international trade treaties on health care policy, for the Romanow Commission. This and related work was published by the CCPA last year as a book entitled "Putting Health First: Canadian Health Care Reform in a Globalizing World."

To its great credit, the Romanow Commission examined the issue of trade treaties, and incorporated substantive recommendations on the subject, in its final report.

Other CCPA books on this subject include "Reckless Abandon" by Matt Sanger, and "Bad Medicine" – a trade treaty analysis of the Mazankowski, Kirby and Romanow Reports on health care reform.

Many other individuals and organizations, in Canada and elsewhere, have contributed to our understanding of the important impact trade treaties can have on health policy.

In short, there is a lot of good research available.

A simple Internet search for "**NAFTA health Canada**" turns up over half-a-million reference 'hits'.

There'll be many duplicates in this list, of course, but you get the idea.

There's a wealth of information.

I asked my slow computer to be more specific...to search for

"GATS NAFTA private health insurance Canada".

In just under a quarter of a second, it turned up over 600 references.

Given so much readily-available information that is highly relevant to the issue at hand, how does the Supreme Court deal with it in its decision?

It doesn't. Nowhere in the entire 140-page decision do the words

"trade" "trade treaty" "GATS" or "NAFTA" appear.

They are simply absent.

Even though the issue of trade treaties and Medicare has been the subject of informed public debate for a decade-and-a-half,

... Despite the fact that the Romanow Commission report – which the Justice’s cite – deals with the issue . . . ,

... Even though the issue is *directly* relevant to key elements of the Justices’ ruling . . . ,

The Supreme Court decision doesn’t deal with it . . . at all.

The Supreme Court’s failure to consider international trade treaty rules in its decision on two-tier health care is a serious shortcoming.

As we shall see, trade treaty rules further undercut the assumption that a parallel private insurance scheme would not undermine Medicare.

The key features of trade treaties

So why are modern trade treaties so important?

What are their key features?

The most recent generation of trade treaties – those adopted since the mid-1990s—surpass previous types of trade agreements in their scope and reach. Exceptionally broad and far-reaching, they are designed primarily to facilitate international business by constraining and re-directing the regulatory ability of governments.

These treaties can scarcely be characterized as trade treaties, it would be more accurate to call them international treaties restricting government *regulation*.

They constitute, as Stephen Clarkson and others have said, a form of “external constitution”.

Treaties such as NAFTA and the WTO services treaty (the GATS) cover many government actions that are not directly trade-related.

Critically, as we will see, the rules of one treaty (the GATS, say) often interact with those of another, (like NAFTA).

They also operate under their own supranational enforcement and dispute resolution framework, and are legally binding. Under the World Trade Organization, for example, members are required to bring treaty-inconsistent measures into conformity with WTO rules or face trade sanctions until they do.

NAFTA contains a particularly vexatious provision. It allows foreign investors – by themselves, without the support of their host government – to sue under NAFTA rules for policies that reduce their expected profits. This process is called investor-to-state dispute settlement, and it bypasses domestic

legislatures and courts. It can result in Ottawa having to pay aggrieved investors many millions of dollars in monetary awards. There are no pre-set monetary limits to such awards.

Treaties typically contain exceptions to protect vital government measures in health care and other sectors, but these are often limited, uncertain or temporary. These protective provisions are almost always interpreted narrowly, giving the benefit of the doubt to commercial interests.

Unfortunately, contrary to repeated assurances, the safeguards in these treaties fall short of the full “ironclad” exemptions for health that were repeatedly promised to Canadians. What protection exists is a complex patchwork of qualified exemptions and conditional exclusions. There are serious gaps in this protection. For example, NAFTA’s broad “expropriation” rule requires mandatory compensation (which is broader than the version in Canadian law) applies with full force to all sectors, including health.

This rule makes it far more difficult and expensive for governments to reverse privatization and commercialization – in practical terms, it effectively “locks it in.”

These treaties don’t just cover government actions pertaining to “goods” such as medical equipment. They also apply to “services” – heart surgery, nursing services, hospital management, and patient records-keeping. These treaties also apply to “investments”—which is also very broad, covering investments in medical supply companies, for example, and investments in clinics and hospitals.

These treaties can also apply to *health insurance*.

Trade treaty rules and the Supreme Court decision

Let’s look at the possible implications of these trade treaty rules when combined with the recent Supreme Court decision.

Under the financial services rules of the GATS, the Canadian government recklessly made commitments covering *health insurance* when the treaty was concluded in 1994. Federal officials later argued that the existing public health insurance system was not affected, since the GATS excludes governmental services that are supplied ... “*neither on a commercial basis ... nor in competition with one or more service suppliers.*”

If the Supreme Court ruling were implemented if foreign, for-profit corporations are allowed to sell private insurance for publicly-insured, medically-necessary health services ... this would nullify any protective effect of the “governmental authority exclusion” for these services, exposing both private and public health insurance to the GATS.

There are at least two trade treaty issues that would arise as a result.

First, Canada’s Market Access commitment could be used to challenge those rules that provinces use to discourage the growth of private insurance markets – measures like setting fee caps, restricting direct and extra-billing.

All of these measures, which would help sustain the public system, would, on their face, violate Canada's GATS Market Access commitments in health insurance.

Critically, these very measures, which would be vulnerable to GATS attack, are the very types of alternatives that the majority of Supreme Court Justices argue Quebec could have used instead of its stronger ban on private insurance to maintain the integrity and sustainability of the existing public insurance system.

The second trade treaty issue that would arise concerns National Treatment and subsidies. As international trade lawyer Jon Johnson points out, "Canada's health care system is based upon the payment of subsidies." Unlike most other treaties, the GATS National Treatment rules apply to subsidies. And, as a result of Canada's GATS commitments in health insurance, GATS National Treatment rules apply to health insurance subsidies and other advantages. Canada and each province is obligated to provide foreign health insurance suppliers "equality of competitive opportunities."

In other words, Canada's National Treatment commitment could be used to challenge provincial measures that prevent private insurers from obtaining the same subsidies and other advantages that are now provided to the public insurance system.

In defending against these challenges, Canada would have one last line of defense. It stipulated in Canada's GATS schedule that (quote) "the supply of a service or its subsidization within the public sector is not in breach of this commitment." It would be unnerving to have to rely on this flawed provision to save Medicare. As pointed out in the CCPA book *Perilous Lessons*, this horizontal limitation raises more questions than it answers.

For example, it provides far less protection than Canada's limitation for research and development subsidies. It is also weaker than the equivalent version used by the United States. No one knows how it would be interpreted in a dispute. Moreover, as negotiations that are now underway to expand GATS coverage intensify, other WTO member governments will demand that Canada remove this limitation.

This trade treaty issue is also not addressed in the Supreme Court decision. And again, this issue calls into question the Court's faith that once provinces allow private insurance for medically necessary services, they will readily be able to stem the tide in the growth of private insurance markets.

Let's look at the issue from a slightly different perspective.

Imagine this plausible scenario. Suppose that Quebec or another province allowed, even encouraged, private health insurers to sell insurance for every medically-necessary service having a waiting list longer than some provincial standard. As a result, foreign investment companies promptly begin offering insurance for those services. Then, suppose the federal government provides additional funding so that waiting times can be reduced, and the province decides that the public interest would be best served by re-integrating those services into the public insurance scheme.

Trade treaties conflicts could thwart the re-establishment of single-tier medicine -- all but 'locking in' a two-tier system.

Note that U.S. companies, working with their Canadian business partners – one example would be John Hancock, which was recently purchased by Manulife Financial – could exploit Canada's commitments and trade treaty rules to expand in the Canadian market.

As the CCPA Research Consortium stated in its report to the Romanow Commission, under these trade treaties, and this applies to health insurance:

“Once foreign investors and service providers become involved in Canada's health care system – and the more involved they become—the more difficult and costly it will be to limit or reverse the trend towards commercialization.”

Even if waiting lists were reduced to such a degree that no Supreme Court would venture to suggest that delays constituted a Charter violation – and even if governments and the overwhelming majority of citizens desired it, trade treaties would seriously impede the re-establishment of single-tier medicine.

While less relevant to the Supreme Court decision, another trade treaty effect should also be noted. *Under these treaties, the involvement of foreign insurance and other service providers would complicate the long-anticipated **expansion** of Medicare's current coverage to include home care and prescription drugs – as recommended by both the Kirby report and the Romanow Commission.*

According to the CCPA Consortium, a claim for compensation for alleged expropriation of future profits, brought under NAFTA's investor-to-state dispute settlement rules, entails the greatest risk to such much-needed health care reform. Their report states:

“A successful claim would not prevent Canadian governments from extending Medicare, but it would make it much more expensive to do so – perhaps by hundreds of millions of dollars.”

Their recommendation is straight-forward:

“From a trade treaty perspective, the sooner the widely-supported proposals to expand public insurance to embrace new services such as home care or prescription drugs occur, the better.”

Let's encapsulate these points.

The neo-conservatives in Washington celebrated the Supreme Court decision by likening it to the fall of the Wall.

The image of a wall is indeed useful. But let's go further back in history to a story that holds important lessons for us today.

You remember the story of the Trojan Horse.

During the siege of Troy, the Greek army, battling the Trojans, left a large hollowed-out wooden horse, filled with Greek warriors, outside the sturdy gates of the city, and deceptively sailed away. The unsuspecting Trojans, convinced by a lone Greek that the wooden horse was a gift and would bring them good luck, dragged it into the city. Late that night, the Greek warriors emerged from the horse and opened the gates to the returning Greek army... whereupon they slaughtered the Trojans and destroyed Troy.

In essence, as our esteemed colleague Scott Sinclair puts it:

“The Supreme Court somehow failed to grasp what was immediately obvious to Chaoulli and the U.S. right-wing. Overturning the ban on private health insurance will open the gates for multinational insurance corporations and for for-profit health care companies to storm the Canadian health care system.

The decision is a Trojan horse.

Once U.S. and other foreign insurers are inside the walls of the Canadian health system, international trade treaties such as NAFTA and the [GATS] will give them weapons to fight any government to displace them or even control their market share.”

Tonight we have reason to end on a strongly positive note.

It may be too late to integrate the implications of trade treaty rules into the Supreme Court decision.

It's not too late for the two new Justices arriving on the Bench in cases involving other provinces.

Just as importantly, it's not too late for us.

And it's not too late for our governments to make use of this knowledge.

Let's get on with the job of revitalizing Medicare – reducing waiting times where necessary *within the public system*.

Let's *expand* public insurance to new services such as homecare and prescription drugs ... before creeping commercialization and trade treaty rules foreclose that option.

And yes, let's ensure that Canada begins to champion new international health protection treaties that supercede commercial trade treaties...treaties that *put health first*.

But first, the immediate issue: what about the Supreme Court proposal for two-tier medicine in Canada?

For the sake of Canadians' most valued social program, let's leave that Trojan Horse outside Medicare's gate.



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