

The Impact of *Charter*-based judicial review on social citizenship in Canada:

The Case of Health Care Litigation

by

Emmanuelle Richez

Introduction

On June 9th 2005, the Supreme Court of Canada rendered its judgment in *Chaoulli v. Quebec*. At issue was the validity of section 15 of the *Quebec Health Insurance Act* and section 11 of the *Hospital Insurance Act*, which prohibited private insurers from covering publicly-funded services. In a four to three decision, the Court held that sections 15 and 11 violated Québec's *Charter of Human Rights and Freedoms* (1976) (the "*Québec Charter*"). Three justices, including Chief Justice McLachlin, went even further and held that the law violated the *Canadian Charter of Rights and Freedoms* (1982) (the "*Charter*"). According to the Chief Justice, "[a]ccess to a waiting list is not access to health care... [Therefore,] prohibiting health insurance that would permit ordinary Canadians to access health care, in circumstances where the government is failing to deliver health care in a reasonable manner, thereby increasing the risk of complications and death, interferes with life and security of the person as protected by s. 7 of the *Charter*" (paras. 123-124).

The *Chaoulli* case is important for many reasons, not least of which is that it highlighted the conflicting principles underlying the *Charter* and the *Canada Health Act*. The importance of this clash stems from the common origins and purpose of these two laws. Both came into effect during the early 1980s as a federalist, nation building response to the threat posed to national unity by the Québec sovereignty movement (Weinstock, 2009). For Pierre Elliott Trudeau, the *Charter's* principal architect, its main purpose was to "strengthen the country's unity by basing the sovereignty of the Canadian people on a set of values common to all, and in particular on the notion of equality among all Canadians" (1990: 363). A similar objective lay behind the adoption of the *Canada Health Act*:

As regional tensions built up in the federation in the 1960s and 1970s, the federal government argue[d] that a strong federal presence in social policy was an instrument of national unity. Medicare [among others] created a set of benefits and rights founded not on region or language but on a common Canadian citizenship (Banting, 1998: 59).

The *Charter* and the *Canada Health Act* thus became perceived as important sources of Canadian identity.

The sudden, and largely unexpected, conflict between the universality of rights embodied in the *Charter* and the universality of access to health care mandated by the *Canada Health Act* is worthy of analysis for two related reasons. First, it revives an historical debate about the balance between individual and collective rights in the *Charter* that appeared to have been superseded by, among other things, emphasis on dialogue between the legislature and the judiciary, as well as explanations for judicial decision making. Second, the conflict highlights

important elements in the evolution of Canada's post-Second World War citizenship regime. The idea of an undifferentiated panCanadian citizenship, based on national standards and fairness that guided the implementation of postwar policies, now appears under threat (Jenson, 1997).

The purpose of this paper is to explore the tension between individual and collective rights in Canada by focusing on the conceptual and policy impact of *Charter* decisions involving social citizenship and, more specifically, the universal health care system. Three Supreme Court *Charter* cases pertaining to access to the public health care system by individuals will be submitted to our analysis: *Eldridge v. British Columbia*, *Auton v. British Columbia* and *Chaoulli v. Quebec*. We will further examine how these judgments have been translated into policies and the impact of *Charter*-based judicial review on social citizenship. It will be argued that the judiciary has brought about social reform and questioned panCanadian citizenship through its emphasis on individual rights.

Postwar Canadian Citizenship Regime

Before analysing the impact of the *Charter* on social citizenship, it is important to understand the nature of Canada's postwar citizenship regime. In the Canadian context, the term "citizenship regime" was first used by Jane Jenson and Susan D. Phillips (1996) and refined by the former over a period of a decade (Jenson, 1997; 2006). While many Canadians had argued for the need to reinforce national identity since Confederation in 1867, it was only after the Second World War that the federal government's efforts towards nation-building dramatically increased. In order to lift the linguistic, regional and social barriers that isolated Canadians from one another, a greater emphasis was put on individual citizens to the detriment of the particular communities spread throughout Canada.

Canada became engaged in a debate about its fundamental values. The outcome of that debate was the choice of a form of individualism tempered by fairness, the implementation of which was facilitated by the rise of the Keynesian welfare state, which was spreading across the Western world. Through state economic intervention and the creation of panCanadian social programs, such as the universal healthcare system, the federal government was able to establish national standards for Canadians. Social justice and solidarity would ensure that each citizen would receive a bare minimum. Consequently, Ottawa started transferring money to the provinces in the 1950s as part of the equalization program to reduce regional inequities. The federal government would also redistribute wealth directly to Canadian citizens through personal transfer payments such as unemployment insurance, social assistance and family allowances, thus establishing a direct link between the federal government and the citizens of Canada.

It was hoped that the granting of these new socio-economic rights would calm the mounting nationalist unrest in Québec. However, since the Quiet Revolution of the 1960s, the Québécois were creating their own welfare regime with their own state apparatus. In response to Québec nationalism, the federal government passed the *Official Languages Act* in 1969 and adopted a policy of multiculturalism in 1971. Yet, these new cultural rights were explicitly given to individuals and not collectivities, since according to the Canadian postwar ideology only individuals could be rights bearers. The enactment of the *Charter* in 1982 constitutionalised

pancanadian rights and enshrined the logic of individualism tempered by fairness. According to Jenson, while the *Charter* did recognize some collective and group rights, it made it more difficult to recognize that collectivities could also have rights.

The Canadian postwar citizenship regime also brought changes to the relationship between individuals and their political institutions. According to Jenson and Philips, “[s]ome efforts aimed to foster more equitable access to political power and the state via public funding for electoral and lobbying activity, and some limits were set on the political power of those most endowed with political resources” (1996: 118). Out of a concern for national cohesion, the federal government also strategically supported historically disadvantaged groups such as women, the disabled and Aboriginals. It also promoted the identity of linguistic minorities and particular ethno-cultural groups.

Postwar Canadian solidarity is now being challenged by neoliberal ideology and policies. Jenson thinks that the “[e]xperience with the constraining effects of global competition has led to expectations that restructuring of labour-management relations, state spending and citizen entitlements will occur” (Jenson, 1991: 220). This neoliberal tendency has already manifested itself in several ways. In 1988, Canada entered into a free trade agreement with the United States, thus furthering continental economic integration. Moreover, the federal government began transferring social services to the provinces who in turn off-loaded them to local authorities and the private sector. However, the privatization of social services through public-private partnerships now threatens national standards and fairness associated with postwar pancanadianism.

The Canadian *Charter* and Social Citizenship

The *Charter* was meant to constitutionalise an undifferentiated pancanadian citizenship founded in individualism tempered by fairness. In order to better grasp the type of social citizenship the *Charter* entails in practice, it is important to understand the principles that animated the vision of its spiritual father, Pierre Elliott Trudeau. For Trudeau, the *Charter* was based on the “purest liberalism, according to which all members of a civil society enjoy certain fundamental, inalienable rights and cannot be deprived of them by any collectivity (state or government) or on behalf of any collectivity (nation, ethnic group, religious group or other)” (1990: 363). The *Charter’s* main emphasis was thus to be resolutely focused on individuals as rights bearers, to the detriment of collectivities.

Trudeau’s vision of equality of opportunity for all guided his political agenda during his tenure as Prime minister of Canada (1990). While this concept is at odds with classical Lockean liberalism, it is consistent with the liberal egalitarianism promoted by John Rawls. For Rawls, freedom and thus individual rights must be limited in order to favour equality which concept represents the greater good. This principle is enshrined in section 36(1) of the *Constitution Act*, which embodies a commitment to promote equal opportunity for all. It is also found in section 15(2) of the *Charter* which states that equality before the law should “not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups”.

When the *Charter* was first adopted, its potential impact on the balance between individual and collective rights in Canada was much debated. While some authors contended that the *Charter*

was only, or mostly, a vehicle for liberal individualism, others thought that it retained some elements of communitarianism. It was argued that the originality of the new Canadian constitutional order stemmed from the fact that it represented a true compromise between individual and collective rights. But what is the real difference between the two? According to David J. Elkins:

Individual rights relate to benefits which accrue to a specific individual, with the “externalities” limited to the establishment of precedents for other individuals’ ability to exercise these rights. Collective or community rights, on the other hand, may convey benefits on individuals, but those benefits will “spill over” onto a specific community and not to all individuals, and perhaps not even equally to all members of the community (1989: 702).

Few argued that the *Charter* represented the definitive victory of individual interests over communal ones. Only adherents to the critical legal studies school adhered to this position from a social justice point of view (Mandel, 1989; Hutchinson, 1995; Schneiderman and Sutherland, 1997). If one looks at the language used in the sections on Fundamental Freedoms, Democratic Rights, Mobility Rights and Legal Rights, the liberal individualism conveyed by the *Charter* becomes apparent. However, if one looks at other sections, particularly the Equality Rights, Official Languages of Canada, Minority Language Rights, Aboriginal and Treaty Rights, as well as Multicultural heritage, this emphasis on individuals becomes less evident. According to Allan C. Cairns, “[t]he Charter gives constitutional recognition to a non territorial pluralism of women, ‘multicultural’ Canadians, official language minorities, and section 15 equality-seekers, among others” (1991: 84).

For some scholars (Monahan, 1987; Elkins, 1989), the *Charter* reflected a true compromise between individual and collective rights. They claimed that the limitation clause found in section 1 and the legislative override found in section 33 could allow collective goals aimed at the greater good to prevail over purely individualistic ones in certain instances.

The limitation clause found in section 1 of the *Charter* postulates that rights and freedoms are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. As Janet Hiebert explains:

An expansive interpretation of section 1 would allow Parliament and the provincial legislatures to promote, where justified, values other than those specifically enumerated in the Charter. This would enrich the Charter by embracing collective values that, like individual rights, are relevant to Canadian conceptions of a just and democratic society yet are not adequately captured by the Charter’s highly individualist language (1996: 138).

When a *Charter* right is found to be violated, the onus to prove that this violation is justifiable in a free and democratic society rests on the government. Elkins thus saw in the limitation clause what he calls *society’s rights* (1989). For Trudeau, the *Charter* permitted the pursuit of society’s common good, even though the language of its provisions served mostly the cause of individuals (1990).

As Hiebert has suggested, the courts first showed a certain reluctance to justify rights infringements under section 1 (1996). It is only two years after the implementation of the *Charter* that they developed a test for the application of the limitation clause in *R v. Oakes*. For

Hiebert, “[t]he evaluation of reasonableness involves policy analysis (not precedents, experiences and expertise): a task that requires subjective evaluations of the merits of legislation and discretionary assessment on whether better or alternative legislative means are available” (1996: 71). Therefore, section 1 not only gives power to the legislatures, it also gives a lot of power to the courts in deciding whether or not individual rights should take precedence over collective ones or not.

Originally, the ‘notwithstanding clause’ found at section 33 was not part of Trudeau’s grand constitutional scheme (1990). It was a concession made to the provinces in order to gain their support to repatriate the constitution and enact his beloved *Charter*. He knew this provision had the power to threaten his constitutional project of a panCanadian undifferentiated citizenship. The legislative override can be used by governments to overcome a *Charter* decision which strikes down one of their laws. Section 33 stipulates that “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.” This clause has a five year limitation period, after which the concerned government must either conform to the initial judgment or re-enact the override. What is interesting is that it can play both in favour of individual as well as collective rights.

According to many authors, this override mechanism is defective as its perceived abusive use by the Québec government has undermined its legitimacy (Russell, 1994; Hiebert, 1996; Manfredi, 2001). Paul Martin’s declaration during the 2006 federal election leaders’ debate to the effect that it should be abolished illustrates its perceived desuetude. Andrew Heard has argued that the lack of use of the notwithstanding clause has become a convention in Canada - if not in Québec, at least in English Canada (1991). Conventions do not however necessarily have the force of law. Therefore, governments continue to maintain their right to invoke it.

Patrick J. Monahan has called upon judges to recognize the communitarian tradition of Canadian politics when interpreting the *Charter* (1987). He believed that “[t]he *Charter* seek[ed] to give expression to the notion that state intervention in the market can often serve as the means to enhance individual freedom, rather than subvert it”(Monahan, 1987: 13). Whether this is wishful thinking remains to be seen. Surprisingly, the debate about the nature of the rights embodied in the *Charter* has been abandoned lately. Legal experts have shifted their emphasis toward constitutional dialogue and explanations for judicial decision making. The literature on this topic therefore appears to be in need of an update.

Charter-Based Health Care Litigation in Canada

Little has been written on the impact of *Charter*-based judicial review on social citizenship and more specifically healthcare in Canada. Even though the *Charter* does not confer explicit rights to state provided social protection, some have argued that section 7 which pertains to life, liberty and security of the person effectively guarantees social rights such as the right to access public health care services (Jackman, 1988; Johnstone, 1988). Writing just over a decade after the enactment of the *Charter*, Peter H. Russell claimed that its interpretation had, and would continue to have, a limited impact on public policy (1994). It would not bring about social reform given the restraining nature of the legal language used and the deference shown by the

courts to the legislatures. Conversely, Robert Howse believed that social policy would be affected by constitutional litigation and that this trend would grow with time (1995).

Only three *Charter* cases involving public health care services have been brought before the Supreme Court of Canada: *Eldridge*, *Auton* and *Chaoulli*. The first two pertained to the “scope of coverage with respect to insured services”, while the last one concerned the “structure of payment and delivery of health care” (Greschner, 2006: 43). An analysis of these three rulings will serve to enlighten us on the new type of balance that has been struck between individual and collective rights in Canada. It can tell us whether or not the undifferentiated model of pan-canadian citizenship, based on national standards and fairness, has been altered or not.

Eldridge v. British Columbia

In *Eldridge* (1997), the appellants were born deaf. They sought to contest the constitutionality of the *Hospital Insurance Act* and the *Health Care Services Act* of British Columbia. In their view, this legislation contravened their right to equality protected by the *Charter* by not considering sign language interpretation to be an insured service within the public health care system of the province. In this case, the Court did not want to declare unconstitutional the two provincial statutes. It nonetheless unanimously found in favour of the appellants and ruled that sign language interpretation services should be mandatory in the province’s hospitals.

The Court had to determine if the province’s decision not to offer sign language interpretation to deaf people contravened section 15(1) of the *Charter*, which reads as follows:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

For an equality right violation to be recognised, “[a] person claiming a violation of s. 15(1) must first establish that, because of a distinction drawn between the claimant and others, the claimant has been denied ‘equal protection’ or ‘equal benefit’ of the law... [T]he claimant must show that the denial constitutes discrimination on the basis of one of the enumerated grounds listed in s. 15(1) or one analogous thereto” (par. 58).

The Court conceded that, *prima facie*, British Columbia’s public health care system treated deaf people the same way it treated those without any disability. According to the Court, the regime “does not make an explicit ‘distinction’ based on disability by singling out deaf persons for different treatment” (par. 60). In theory, all had the right to benefit from state-funded medical services, but in practice, deaf people were being deprived of the ‘equal benefit’ of the law. The hard of hearing suffered a prejudice given that the lack of sign language interpreters in the public health care system affected the quality of their communications with medical personnel, thus increasing the risk of misdiagnosis and ineffective treatment. The Court held that “[e]ffective communication [was] quite obviously an integral part of the provision of medical services” (par. 69).

The Court also stated that the lack of effective communications between medical personnel and the hard of hearing constituted discrimination on the basis of one of the enumerated grounds

listed in s. 15(1), more specifically a physical disability. There was no doubt that deaf people belonged to a category of citizens with a physical disability. The Supreme Court of Canada added that having suffered past exclusion and marginalisation, this category of citizen deserved to have its historic disadvantage remedied. The judgment reiterated one of the *Charter's* goals identified by Justice Sopinka in *Eaton v. Brant County Board of Education* (1997):

[T]he purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons (par. 66).

Once it was established that the decision not to offer sign language interpretation for the deaf in the public health care system violated section 15(1) of the *Charter*, the Court had to assess whether this violation could withstand a section 1 analysis. It therefore applied the test defined in *R. v. Oakes* (1986) and clarified by Justice Iacobucci in *Egan v. Canada* (1995):

First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable (par. 182).

In *Eldridge*, the Court declared that to the extent that access to sign language interpretation was essential to effective communication in the delivery of health care services, the absence of such a service violated the right to equal treatment under section 15(1) of the *Charter* and did not constitute a reasonable limit in accordance with section 1. According to the Court, the decision not to offer sign language services to the hard of hearing was linked to a pressing and substantial objective, that of limiting the costs associated with the functioning of the public health care system. However, with regards to the means used, the justices held that even though there existed a rational connection between the policy of the province and the aim of the legislation, the implementation of this policy did not minimally impair the protected *Charter* right.

The Court deemed that the provincial government had not proven that its refusal to offer interpretation services for the deaf minimally impaired their rights. The Court further stated that “[g]iven the central place of good health in the quality of life of all persons in our society, the provision of substandard medical services to the deaf necessarily diminishes the overall quality of their lives” (par. 94). The government had not reasonably established that the hard of hearing had to tolerate such a situation in the name of the necessity to limit public spending in the area of health care, especially since it was demonstrated that offering sign language interpretation services would only make-up a minimal part of the province’s total health care budget.

Finally, the Supreme Court ordered that British Columbia ensure that the *Medical and Health Care Services Act* (now the *Medicare Protection Act*) and *Hospital Insurance Act* comply with the requirements of section 15(1) of the *Charter*. The Court gave the provincial government 6 months to implement this decision.

Auton v. British Columbia

Auton v. British Columbia (2004) is the second *Charter* case pertaining to the scope of health care services coverage that was brought before the Supreme Court of Canada. In this affair, autistic children sued the government of British Columbia for its refusal to fund Applied Behavioural Analysis (ABA) or Intensive Behavioural Intervention (ICI) to treat their syndrome. They thought that this decision went against the equality rights protected by the *Charter*. The province had financed certain treatments for autism but did not fund ABA/ICI therapy for all autistic children as requested by the claimants. It justified this decision on the basis of the necessity to limit government spending, as well as on the novelty and controversial nature of this type of therapy. The claimants won their case at the trial level, the Court ordering the provincial government to finance ABA/ICI therapy. The trial court also ordered that the claimants be awarded \$20 000 in damages. The Court of appeal upheld this judgment and further ordered the funding of the treatment pursuant to medical opinion. However, the Supreme Court of Canada unanimously reversed the decisions of the lower courts by relieving British Columbia from the obligation to fund this type of therapy for autistic children.

The Supreme Court of Canada found that British Columbia's decision not to fund ABA/ICI therapy for autistic children did not constitute a violation of section 15(1) of the *Charter*. While in *Eldridge* it had been held that there were two requirements to prove a violation of section 15(1), the decision in *Law v. Canada* in 1999 added a third criterion. By the time *Auton* was decided, the test was whether there was a "(1) differential treatment under the law; (2) on the basis of an enumerated or analogous ground; (3) which constitutes discrimination" (par. 22).

The claimants thus had to demonstrate how the law treated them differently. They argued that the inequality of treatment resulted from the fact that the health care system provided medically necessary services to all patients, yet refused to fund ABA/ICI therapy that they claimed was necessary to their health. To this argument, the Court replied that the *Canada Health Act* and British Columbia's health care legislation did not guarantee the funding of all medically necessary services. They guaranteed complete access to core services but only partial access to non-core services. The provincial health care system was thus non discriminatory by financing certain non-core services for certain groups but refusing to finance ABA/ICI therapy for autistic children. In *Eldridge*, the plaintiffs had sought equal access to medical services already offered by the province. In *Auton*, they sought to enjoy a benefit that was not currently provided for by law.

The evidence failed to convince the Court that autistic children had been discriminated against due to their disability. In order to do this, it would have been necessary to demonstrate that the claimants had been deprived of a benefit granted to a comparator group. In *Auton* however, non-disabled persons or persons with a disability other than autism could serve as comparator groups. The plaintiffs failed to establish that one of these groups had benefited from "funding for non-core therapy important to [their] present and future health, but which is emergent and

only recently becoming recognized as medically required” (par. 58). The Court thus concluded that the government had not acted in a discriminatory manner toward autistic children as it had not deprived them of a benefit given to a comparator group.

In *Auton*, the Court asked whether British Columbia’s refusal to fund ABA/ICI therapy for autistic children constituted a violation of section 7 of the *Charter*. This section stipulates:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The Court considered that the weak evidence gathered by the claimants failed to convince that section 7 of the *Charter* had been infringed. The claimants had not identified the principle of fundamental justice principle that had been flouted by the government’s refusal to fund ABA/ICC therapy. Moreover, they had not demonstrated that the provincial law was arbitrary or did not comply with procedural guaranties.

Chaoulli v. Quebec

The last judgment under analysis, and the most controversial of all, is the *Chaoulli v. Québec* case which was decided in 2005. The case was brought before the courts by Jacques Chaoulli, a doctor who was attempting to run a private hospital, and George Zeliotis, a patient who had suffered considerably from long waiting times which he had experienced in the public healthcare system. At issue, was the constitutionality of the legal restrictions on the purchase of personal private insurance for services covered by the public regime due to the perceived excessive wait times. Out of the seven justices who heard the case, four found in favour of the abolition of the restrictions placed on private insurance. Three separate opinions were rendered.

The first one, written by Justice Deschamps, invalidated section 15 of the *Health Insurance Act* and section 11 of the *Hospital Insurance Act* on the basis that they contravened the *Quebec Charter*. She declared that the Quebec legislation went against the first section of the *Quebec Charter* which states that: “Every human being has a right to life, and to personal security, inviolability and freedom”. Justice Deschamps found that the right to life and security of patients was being compromised by the waiting times they encountered in the public health care system. This wait not only greatly affected their quality of life, but also jeopardised their lives.

Justice Deschamps also determined that the violation of section 1 rights could not be justified under section 9(1) of the *Quebec Charter* which stipulates that the “[i]n 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”. This limitative clause is similar to section 1 of the *Canadian Charter* and is applied according to similar criteria of rational connection and proportionality. Justice Deschamps recognised that there was a pressing and substantial need to maintain the public character of the health care system, but did not find a rational connection between the absolute prohibition on private insurance and the safeguard of the system. She held that the legislator could use alternative means that would not impair as much the rights protected under the *Quebec Charter*.

The second decision, delivered by Chief Justice McLachlin and Justice Major and with which Justice Bastarache concurred, stated that section 15 of the *Health Insurance Act* and section 11 of the *Hospital Insurance Act* contravened not only the *Quebec Charter*, but also the *Canadian Charter*. For the three judges, these two sections violated section 7 on Legal Rights with regards to life, liberty and security of the person, since they prevented ordinary Canadians from purchasing private insurance for services insured by the public system which would allow better access to care services in a more timely manner. Justices McLachlin, Major and Bastarache also concluded that the restrictions placed on private insurance did not constitute a reasonable limit under section 1 of the *Canadian Charter*. They also agreed with Justice Deschamps that a rational connection between the government's will to preserve the public character of the health care system and the prohibition against private insurance could not be construed. They agreed that the absolute prohibition did not minimally impair the rights of patients.

In their dissenting judgment, Justices Binnie, Lebel and Fish were "unable to agree with [their] four colleagues [...] that such a debate can or should be resolved as a matter of law by judges" (par. 161). According to them, the Court could only invoke section 7 of the *Canadian Charter* if the current health care system went against a fundamental principle of justice. They did not consider that access to care in a timely matter constituted such a breach. They argued that it was difficult to agree on a precise definition of "access to care in a timely manner" meant and on the best way this could be accomplished. Moreover, they argued that the development of a parallel private health care system would probably prove harmful to the good functioning of the public system.

Discussion

We now turn to the conceptual and policy impact of *Eldridge*, *Auton* and *Chaoulli* on Canada's public health care system and more generally on pan-canadian social citizenship. *Charter* litigation pertaining to health care has affected the balance between individual and collective rights in the country. In the three cases outlined above, the claimants were demanding the recognition of individual rights. The appellants in *Chaoulli* were asking for the right for individuals to purchase private insurance for services offered in the public health care system in response to the excessive waiting times. In *Eldridge*, the hard of hearing claimed that they possessed a right to effective communications through sign language services. In *Auton*, autistic children demanded the right to state-funded ABA/ICI therapy.

Yet, the rights claimed in *Eldridge* and *Auton* cannot be considered as strictly individual in nature, given that they were claimed in the name of two groups, the hard of hearing and autistic children. As mentioned by Allan C. Cairns, the *Charter* adheres to a form of non territorialised pluralism that recognises equality-seeking groups (1991). Both *Eldridge* and *Auton* invoked the protection of section 15(1) of the *Charter* on Equality Rights for people with disabilities. The principles invoked by the claimants were compatible with Pierre Elliott Trudeau's idea of a pan-canadian citizenship, undifferentiated with regards to ascriptive characteristics. They relied on the idea of individualism tempered by fairness which seeks to empower disadvantaged groups.

By formulating demands for an entire group, the claimants in *Eldridge* and *Auton* sought to ensure greater equality of opportunities by increasing the responsibilities of the welfare state regarding their particular needs. By asking British Columbia to guarantee access to sign language interpretation services in the public health care system – a service which was estimated at \$150 000 – deaf people hoped to receive the same quality of care as that enjoyed by other members of society. They were thus firmly in line with what has been termed as “a barrier-free society” (Eldridge, 1997 : par. 92). Similarly, by requesting that the same province also cover the costs associated with ABA/ICI therapy - evaluated at \$45 000\$ to \$60 000 per year per child - autistic children hoped to attenuate their syndrome’s symptoms and thus live a more normal life. Obviously, without governmental help, the hard of hearing and autistic children would have to spend vast sums of money to overcome the social inequalities caused by their handicap.

In *Eldridge*, the Court recognized the validity of the appellants’ demands and thus effectively granted a right to an entire group by declaring access to sign language interpretation for the hard of hearing mandatory. It was believed that their disability should not deprive them of the equal benefit of the law enjoyed by the other patients. The Court also declared that the Right to Equality protected under section 15(1) of the *Charter* could not be reasonably limited in a free and democratic society in this particular instance. It thus favoured the interests of individuals belonging to a group rather than those of the rest of the population, which, represented by their provincial government, sought to curtail public spending.

The claimants in *Auton* did not enjoy an outcome similar to the claimants in *Eldridge* despite the similarity of the two cases. The Supreme Court of Canada refused to compel the government of British Columbia to finance ABA/ICI therapy for autistic children as this benefit was not envisaged by existing law. A legal victory for autistic children in this case would have created a precedent which could have triggered numerous demands of this sort which could have seriously dented provincial budgets for years to come. The Court thus decided that, even though they belonged to a disadvantaged group, autistic children would not gain greater equality through judicial means. It would however be difficult to argue that the refusal to fund ABA/ICI therapy for autistic children resulted in a collective gain for society as a whole.

The *Chaoulli* case did not pertain directly to the right to equal access, but rather, to the right to life and security. Justice Deschamps, basing herself on the *Quebec Charter*, and Justices McLachlin, Major and Bastarache, basing themselves on both the *Quebec Charter* and the *Canadian Charter*, recognised the individual right to access to quality care in a timely matter. As suggested by Patrick J. Monahan, the majority judgment added a sixth principle to the *Canada Health Act*, that of patient accountability:

Patient accountability means that those responsible for funding the healthcare system and providing care are ultimately answerable to patients for the timeliness of service provided and, further, that this accountability can be enforced through the legal system. (Monahan, 2006: 5).

With a view to guaranteeing patient accountability, the Court invalidated the absolute prohibition which prevented individuals from subscribing to a private insurance for services offered in the public health care system. In doing so, it *de facto* granted an individual economic right to purchase a more complete range of private insurance. Nevertheless, the *Canadian*

Charter was originally not supposed to recognise that type of right (*Irwin toy ltd. v. Quebec*, 1989).

The recognition of this economic right brought into question the quasi state monopoly in the area of health care services in Quebec and in the rest of Canada. Though the *Chaoulli* majority ruling did not explicitly indicate which type of health care services delivery system the legislator should choose, it clearly went to the core of the idea of a Canadian social citizenship that was, until then, based on a strong welfare state which established national norms and promoted solidarity. By giving individuals the right to subscribe to private health insurance, the majority of the Court was creating more space for private enterprise in the area of social insurance and, consequently, in delivery of medical services.

Does the creation of a parallel private health care system affect equality of opportunity in Canada? Does it create second class citizens? *Chaoulli* highlights the complex nature of the meaning of equity. On the one hand, it democratises access to health care services offered in the private sector which was until then reserved for the wealthy. By purchasing affordable private insurance, the middle class would theoretically gain better access to services which can be long delayed in the public system. On the other hand, the logic of profit could push private insurance companies to practice “cream skimming” by insuring only individuals who are wealthy and who do not present health problems (Canada, 2003: 301). In doing so, the sick and the poor would not be able to benefit from an alternative to the public health care system, thus fostering greater inequality.

Yet, perfect equality of opportunity does not exist. However, a scenario where only individuals who are healthy and wealthy enough can purchase private health insurance appears to be socially undesirable. Equality of opportunity, one of the supposed cornerstone of Canada’s welfare state, was meant to ensure that the most disadvantaged were guaranteed a minimum of dignity. Contrary to what the majority judgment asserts, there is definitely a rational connection between the desire to maintain the viability of the public system and a ban on duplicate private insurance (Marmor, 1998). As pointed out by justices Binnie, Lebel and Fish, the establishment of a two-tier health care system might drain the human and material resources from the public sector, and therefore place the most disadvantaged in an even worse situation than before. In that sense, the majority ruling has chosen to favour formal equality over substantive equality (Jackman, 2006).

Furthermore, *Chaoulli* goes against Quebec and the rest of Canada’s collective choice to operate a primarily public health care system based on need rather than on capacity to pay and the insurability of citizens. The choice to weave a tight social safety net was made following the Second World War and reaffirmed in the new millennium during the consultations of the Romanow Commission on the Future of Health Care Services in Canada:

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. (Canada, 2002: xvi).

By recognizing the individual right to access quality care in a timely manner, and *de facto* an individual right to subscribe to private insurance for services already publically insured, the Court has put into question the population's collective right to maintain the essentially public character of the health care system in Canada.

That being said, the real impact of the *Charter* on the health care system and pan-canadian citizenship can only be measured with facts. It is important to evaluate the scope of *Charter*-based judicial review as extramural rather than intramural. As described by F.L. Morton and Avril Allen, "[e]xtramural studies expand the focus of inquiry to what happens outside the courtroom and after the judgment" (2001: 64). Court decisions will have no policy impact unless they are enforced by government (Rosenberg, 1991). If a statute is found to be unconstitutional by the courts, the legislature may reverse, modify or avoid the judgment (Hogg and Bushell, 1997). If a statute is found to be constitutional, the policy *status quo* can still be altered when civil society forces politicians through electoral means to reverse a court decision which is perceived as unfair (Pal and Morton, 1986).

In practice, the three cases under review here brought about substantive legislative changes which affect the daily lives of citizens. The government of British Columbia complied with the *Eldridge* judgment by setting up a 24 hour toll-free line permitting deaf and hard of hearing patients access to interpreters in case of emergency medical situations. Moreover, the Western Institute for the Deaf & Hard of Hearing provides sign language interpretation services for urgent and non urgent situations all across the province's territory. The outpour of sympathy for the claimants in *Auton* convinced British Columbia to turn what was at the time only a pilot project for the treatment of autistic children into a full-fledged governmental policy (Manfredi and Maioni, 2005).

In the *Chaoulli* affair, the Quebec government also decided to comply with the Court's majority judgment even though many urged the province to invoke the notwithstanding clause. The government asked the Court for an 18 month stay so as to have time to implement the decision, but the Court only granted a 12 month stay. One year exactly after the *Chaoulli* judgment, the Quebec Minister of Health, Philippe Couillard, deposited before the Assemblée Nationale bill 33 which notably proposed to amend *An Act Respecting Health Services and Social Services*, the *Health Insurance Act* and the *Hospital Insurance Act*. This bill was given royal assent only six months later. It reaffirmed the government's will to maintain the essentially public character of the health care system while welcoming the contribution of the private sector.

This law provided for the implementation of a patient wait-time guarantee mechanism for three targeted surgeries (hip, knee and cataract). It also proposed that patients who could still not get access to these surgeries within an acceptable delay would be able to get them in private medical clinics affiliated to public sector at the government's expense. The Quebec government also maintained the prohibition that blocked doctors from practicing in the public and private systems concurrently. Finally, the law removed the ban on duplicate private insurance for the targeted surgeries and allowed government to add more insured services to the list by way of regulation. It must be noted that until this day, duplicate private insurance has not really developed in that province.

It is important to ask what has been the pan-canadian policy impact of the three judgments under consideration. Because health care delivery falls within the exclusive purview of provincial jurisdiction in Canada, Supreme Court decisions in this area only apply in practice in the province where the litigation originates. However, provinces refer themselves vulnerable to legal proceedings given the precedents and their obligation to respect the rights protected by the *Charter*. Yet, not many provincial governments have implemented interpretation services for the deaf following *Eldridge* and not many complaints have been brought before the tribunals since (Roach, 2002).

On the other hand, the Court's refusal to favour the claimants in *Auton* has increased citizen mobilisation for the cause of autistic children in other provinces (Manfredi and Maioni, 2005). According to Autism Society Canada, there were more than 180 other cases involving more than 1 600 families still pending in November 2004 (Ibid.). Moreover, in January 2005, the Ontario Superior Court of Justice granted an interlocutory injunction against the province in *Bettencourt v. Ontario*, ordering it to continue funding therapy for two autistic children despite the judgment in *Auton*. The judicial saga that lasted 6 years in total mobilised public opinion in favour of autism treatment funding, giving autistic children a clear political advantage (Ibid.).

The pan-canadian application of the *Chaoulli* majority ruling has attracted criticism since it is based on the *Quebec Charter* and not on the *Canadian Charter*. However, as Monahan suggests, the other Canadian provinces could not legally or politically ignore the arguments based on the *Quebec Charter* made by Justice Deschamps, since they were almost identical to the ones based on the *Canadian Charter* made by Justices McLachlin, Major and Fish in their opinion (2006). Moreover, it was recognized in political circles that the *Chaoulli* judgment would have consequences, not only in Quebec, but also across the country (McIntosh and Torgerson, 2006; Postl, 2006).

In 2004, the provincial premiers and the Prime Minister of Canada signed an historical agreement on health care that established wait-time guarantees for targeted health care services, even before the *Chaoulli* ruling (Canada, 2004). As the different governments had a one year stay to tackle the waiting times problem, significant changes were made in certain areas, but less in others (Monahan, 2006). Ironically, no other province demonstrated a similar will to that of Quebec to legally frame the waiting times in the public health care system. Moreover, when the New Conservative Party first took office in 2006, the establishment of wait-time guarantees was one of the five national priorities identified by the federal government (Canada, 2006). Additional transfer payments to the provinces were allocated to that effect in the 2007 federal budget (Canada, 2007).

Conclusion

In the final analysis, the conceptual impact of the *Canadian Charter of Rights and Freedoms* on Canadian social citizenship and in the area of health care is mitigated. Out of the three judgments rendered by the Supreme Court, two required social reforms while only one favoured the status quo. In *Eldridge*, it was ordered that sign language interpretation services for the hard of hearing be offered in the public health care system, while the decision in *Auton* refused to recognize that the government owed an obligation to fund ABA/ICI therapy for autistic children. The Court thus decided that the principle of equality of opportunity, on which was

based Canada's postwar citizenship regime, could only be judicially applied when benefits provided by law were at stake. In *Auton*, the Court recognised the government's role in establishing priorities in health care expenditures, expenditures which must however be balanced by the pursuit of social justice.

The Supreme Court of Canada did not show such deference to the legislature in *Chaoulli*. As suggested by many experts, the highest tribunal of the land showed unprecedented judicial activism in recognizing the right to purchase private insurance (Choudhry, 2005; Manfredi, 2005; Petter, 2005). By opening the door to the private sector in the area of health care services delivery, it put into question the values of social justice and solidarity associated with the idea of undifferentiated citizenship, and went against a collective choice made by Quebecers and Canadians in general to operate a public health care system. Health care jurisprudence thus markedly tipped the balance in favour of individual rights to the detriment of collective rights. And yet, this emphasis on individualism was not necessarily tempered by fairness as seen in the *Chaoulli* ruling.

The three decisions analyzed throughout this paper recognized the legitimacy of the demands of the claimants, though not always to the extent that had been hoped for. By offering the hard of hearing interpretation services in the delivery of health care services and by giving autistic children access to state-funded therapy, British Columbia strengthened equality of opportunity for certain disadvantaged groups. The repercussions of *Charter*-based judicial review in the area of health care were thus compatible with the postwar ideology that promoted a form of individualism tempered by fairness. In the social realm, while group rights promote welfare for particular individuals, they do not change the overall nature of the social infrastructure provided for society.

The same cannot be said for the recognition of individual rights that can dismantle the society's entire socio-economic organisation. Quebec's legislative response to the *Chaoulli* ruling constitutes an important reform of health care services in the province. We can thus say that the impact of the *Chaoulli* judgment is far more important than the combined one of *Eldridge* and *Auton*. Despite the government's desire to maintain the primarily public character of the health care system, the new measures put forward encourage a greater participation of the private sector. Nevertheless, the Quebec and Canadian health care systems remain primarily public in nature and it is probably still too early to appreciate the long term impact that *Chaoulli* will have on panCanadian social citizenship.

The postwar ideology based on a form of individualism tempered by fairness was in practice maintained and in some cases reinforced. However, the public health care system, which represents one of the pillars of panCanadian citizenship, was shaken by *Charter*-based judicial review in the *Chaoulli* affair. Finally, let us add that this exploration of constitutional jurisprudence and its political repercussions is only the beginning of a larger project on social citizenship in Canada. In the near future, the researcher hopes to analyse *Charter*-based Supreme Court judgments regarding social assistance and income security.

Bibliography

Court Decisions

- Superior Court of Ontario. *Bettencourt v. Ontario*, [2005] ONSC 462.
- Supreme Court of Canada. *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657.
- Supreme Court of Canada. *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241.
- Supreme Court of Canada. *Egan v. Canada*, [1995] 2 S.C.R. 513.
- Supreme Court of Canada. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.
- Supreme Court of Canada. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.
- Supreme Court of Canada. *R. v. Oakes*, [1986] 1 S.C.R. 103.

Bibliographical References

- Banting, Keith G. 1998. "The Past Speaks to the Future: Lessons from the Postwar Social Union". In *The State of the Federation 1997: Non-Constitutional Renewal*, ed. Harvey Lazar. Kingston: Institute of Intergovernmental Relations, Queen's University.
- Cairns, Allan C. 1991. "Constitutional Change and the Three Equalities". In *Options for a New Canada*, ed. Ronald L. Watts and Douglas M. Brown. Toronto: University of Toronto Press.
- Canada. 2004. *A 10-Year Plan to Strengthen Health Care*. Ottawa: Supply and Services.
- Canada. 2006. *Speech from the Throne*.
- Canada. Department of Finance Canada. 2007. *Budget 2007: A Stronger, Safer, Better Canada*. Ottawa: Supply and Services.
- Canada. Royal Commission on the Future of Health Care in Canada. 2002. *Final Report* [Commission Romanow]. Ottawa: Supply and Services.
- Canada. The Standing Senate Committee on Social Affairs. 2003. *The Health of Canadians - the Federal Role* [Kirby Report]. Ottawa: Supply and Services.
- Choudhry, Sujit. 2005. "Worse Than *Lochner*?". In *Access to Care, Access to Justice: The Legal Debate over Private Health Care Insurance in Canada*, ed. Colleen M. Flood et al. Toronto: Toronto University Press.
- Elkins, David J. 1989. "Facing Our Destiny: Rights and Canadian Distinctiveness." *Canadian Journal of Political Science* 22: 699-716.
- Greschner, Donna. 2006. "Charter Challenges and Evidence-Based Decision-Making in the Health Care System: Towards a Symbiotic Relationship". In *Just Medicare: What's in, What's out, How We Decide*, ed. Colleen M. Flood. Toronto: University of Toronto Press.
- Heard, Andrew. 1991. *Canadian Constitutional Conventions: The Marriage of Law and Politics*. Toronto: Oxford University Press.
- Hiebert, Janet. 1996. *Limiting Rights: The Dilemma of Judicial Review*. Montreal: McGill-Queen's University Press.
- Howse, Robert. 1995. "Another Rights Revolution? The Charter and the Reform of Social Regulation in Canada". In *Redefining Social Security*, ed. Patrick Grady et al. Kingston: School of Policy Studies, Queen's University.

- Hutchinson, Allan C. 1995. *Waiting for Coraf: A Critique of Law and Rights*. Toronto: University of Toronto Press.
- Jackman, Martha. 1988. "The Protection of Welfare Rights under the Charter." *Ottawa Law Review* 20: 257-338.
- Jackman, Martha. 2006. "The Last Line of Defence for [Which?] Citizens: Accountability, Equality, and the Right to Health in Chaoulli." *Osgoode Hall Law Journal* 44: 349-75.
- Jenson, Jane. 1991. "Citizenship and Equity: Variations across Time and in Space". In *Political Ethics: A Canadian Perspective*, ed. Janet Hiebert. Ottawa: Royal Commission on Electoral Reform and Party Financing and Canada Communications Group, Supply and Services Canada and Dundurn Press.
- Jenson, Jane. 1997. "Fated to Live in Interesting Times: Canada's Changing Citizenship Regimes." *Canadian Journal of Political Science* 30: 627-44.
- Jenson, Jane. 2006. "Introduction: Thinking About Citizenship and Law in an Era of Change". In *Law and Citizenship*, ed. Law Commission of Canada. Vancouver: University of British Columbia Press.
- Jenson, Jane and Susan D. Phillips. 1996. "Regime Shift: New Citizenship Practices in Canada." *International Journal of Canadian Studies* 14: 111-35.
- Johnstone, Ian. 1988. "Section 7 of the Charter and Constitutionally Protected Welfare." *University of Toronto Faculty Law Review* 46: 1-47.
- Mandel, Michael. 1989. *The Charter of Rights and the Legalization of Politics in Canada*. Toronto: Wall & Thompson.
- Manfredi, Christophe P. and Antonia Maioni. 2005. "Reversal of Fortune: Litigating Health Care Reform in *Auton V. British Columbia*." *The Supreme Court Law Review second series* 29: 111-36.
- Manfredi, Christopher P. 2001. *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*. Toronto: Oxford University Press.
- Manfredi, Christopher P. 2005. "Déjà Vu All over Again: *Chaoulli* and the Limits of Judicial Policymaking". In *Access to Care, Access to Justice: The Legal Debate over Private Health Insurance in Canada*, ed. Kent Roach et al. Toronto: University of Toronto Press.
- Marmor, Theodore R. 1998. Quebec. *Expert Witness Report*.
- McIntosh, Tom and René Torgerson. 2006. *The Taming of the Queue iii — Wait Time Measurement, Monitoring, and Management: Where the Rubber Meets the Road (conference report)*. Canadian Policy Research Networks.
- Monahan, Patrick. 1987. *Politics and the Constitution: The Charter, Federalism, and the Supreme Court of Canada*. Agincourt: Carswell.
- Monahan, Patrick J. 2006. "Chaoulli V Quebec and the Futures of Canadian Healthcare: Patient Accountability as the 'Sixth Principle' of the Canada Health Act". Paper presented at the Benefactor's Lecture of the C.D. Howe Institute, Toronto.
- Petter, Andrew. 2005. "Wealthcare: The Politics of the Charter Revisited". In *Access to Care, Access to Justice: The Legal Debate over Private Health Care Insurance in Canada*, ed. Kent Roach et al. Toronto: University of Toronto Press.
- Postl, Brian D. 2006. *Final Report of the Federal Advisor on Wait Times*. Ottawa: Supply and Services.
- Roach, Kent. 2002. "Remedial Consensus and Dialogue under the Charter: General Declarations and Delayed Declarations of Invalidity." *University of British Columbia Law Review* 25: 211-69.
- Russell, Peter H. 1994. "Canadian Constraints on Judicialization from Without." *International Political Science Review* 15: 165-75.

- Schneiderman, David and Kate Sutherland. 1997. "Toward an Understanding of the Impact of the Charter of Rights on Canadian Law and Politics". In *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics*, ed. David Schneiderman and Kate Sutherland. Toronto: Published in association with the Centre for Constitutional Studies, University of Alberta, by University of Toronto Press.
- Trudeau, Pierre Elliott. 1990. "The Values of a Just Society". In *Towards a Just Society: The Trudeau Years*, ed. Tom Axworthy and Pierre Elliott Trudeau. Markham: Viking.
- Weinstock, Daniel. 2009. "Frayed Federation. Challenges to Canadian Unity in the Wake of Trudeau's Failed Nation-Building Project". In *The Ties That Bind: Accommodating Diversity in Canada and the European Union*, ed. John Erik Fossum et al. Bruxelles: P.I.E. Peter Lang.