

DUE PROCESS — RIGHT TO MEDICAL ACCESS — SUPREME COURT OF CANADA HOLDS THAT BAN ON PRIVATE HEALTH INSURANCE VIOLATES QUEBEC CHARTER OF HUMAN RIGHTS AND FREEDOMS. — *Chaoulli v. Quebec (Attorney General)*, 2005 S.C.C. 35, 29272, [2005] S.C.J. No. 33 QUICKLAW (June 9, 2005).

For many Canadians, their country's publicly funded universal healthcare system is a national symbol of pride and superiority.<sup>1</sup> For others, it is a vestigial, deteriorating remnant of the socialist experiments of the 1960s and '70s, reflecting the worst excesses of the welfare state.<sup>2</sup> But few Canadians on either end of the political spectrum expected that the first significant crack in the Canadian healthcare fortress would come via judicial decision. Recently, in *Chaoulli v. Quebec (Attorney General)*,<sup>3</sup> the Supreme Court of Canada struck down two provincial statutes that banned the sale of private health insurance for medical services covered by the government insurance plan, holding that given the long waiting lists for medical procedures within the public system, the restriction violated Quebec's Charter of Human Rights and Freedoms<sup>4</sup> (Quebec Charter) and its protective guarantee of personal security and inviolability.<sup>5</sup> The court skillfully navigated the choppy waters of judicial review, moving boldly toward a pragmatic solution to Canada's healthcare crisis,<sup>6</sup> yet leaving the provincial legislatures with considerable flexibility to shape health policy in accordance with democratic principles.

The Canadian provincial governments provide all residents with health insurance.<sup>7</sup> In Quebec, two statutes banned contracts for private health insurance for procedures covered by the provincial plan.<sup>8</sup> Jacques Chaoulli, a medical doctor, and George Zeliotis, a Quebec resident with various health problems, challenged the statutes, alleging

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<sup>1</sup> See, e.g., Bill Prouten, Op-Ed, *Health Care Is About Values*, TORONTO STAR, Apr. 2, 2002, at A22 (arguing that public healthcare embodies Canadian values and is superior to the American system).

<sup>2</sup> See, e.g., Rick Anderson, Op-Ed, *Six Myths About Health-Care Reform*, TORONTO STAR, Dec. 1, 2002, at A17 (arguing that conventional wisdom about public healthcare is fantasy and that private options should be carefully considered).

<sup>3</sup> 2005 S.C.C. 35, 29272, [2005] S.C.J. No. 33 QUICKLAW (June 9, 2005).

<sup>4</sup> R.S.Q., ch. C-12 (1977), amended by 1982 S.Q., ch. 61 (Que.) [hereinafter Quebec Charter].

<sup>5</sup> *Id.* § 1.

<sup>6</sup> Although Canadians are divided on the virtues of public, universal healthcare, even its supporters generally acknowledge that there is a current or impending crisis. See, e.g., Ruth Collins-Nakai, Letter to the Editor, *Doctors Support Public Medicare*, TORONTO STAR, Aug. 27, 2005, at F7 (noting a "national crisis" in healthcare).

<sup>7</sup> For the provinces to receive federal funds, their plans must comply with the Canada Health Act, R.S.C., ch. C-6 (1985), which requires that plans be publicly administered, comprehensive, universal, portable, and accessible. *Id.* §§ 7-12.

<sup>8</sup> See Hospital Insurance Act § 11, R.S.Q., ch. A-28 (1977); Health Insurance Act § 15, R.S.Q., ch. A-29 (1977).

that they contravened both the Quebec Charter — a quasi-constitutional provincial statute — and the Canadian Charter of Rights and Freedoms<sup>9</sup> (Canadian Charter), which is part of Canada's Constitution. The plaintiffs claimed that by forcing patients to remain within a public healthcare system plagued by long waiting lists, the restrictions violated the personal security and inviolability guaranteed by the Quebec Charter and the analogous rights to “life, liberty, and security of the person” that cannot be infringed “except in accordance with the principles of fundamental justice” under the Canadian Charter.<sup>10</sup>

At trial, Justice Piché held that while the statutes may indeed have implicated constitutional rights, they reflected a careful balancing of individual and collective rights, as well as the legislative goal of maintaining a strong public health insurance plan. Thus, the statutes were justifiable “in accordance with the principles of fundamental justice” and constitutionally sound.<sup>11</sup> The Quebec Court of Appeal affirmed, with each of the three justices issuing a separate opinion. Justice Delisle categorized the right to enter into insurance contracts as an economic right and therefore denied that it deserved constitutional protection under either charter.<sup>12</sup> Justice Forget argued that while the statutes hindered access to necessary treatment and thus burdened rights to life and security of the person, they were nonetheless justified as reflecting an appropriate balance between individual and social rights.<sup>13</sup> Justice Brossard agreed that the statutes were constitutional and quibbled only with the characterizations of the rights involved.<sup>14</sup>

The Supreme Court of Canada reversed the lower courts and struck down both statutes,<sup>15</sup> holding that they infringed the rights to life, liberty, and personal inviolability in the Quebec Charter by inhibiting access to medically necessary procedures.<sup>16</sup> Justice Deschamps<sup>17</sup> tested the statutes against the Quebec Charter first,<sup>18</sup> as it arguably of-

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<sup>9</sup> Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.) [hereinafter Canadian Charter].

<sup>10</sup> *Id.* § 7.

<sup>11</sup> See *Chaoulli c. Québec (Procureure Générale)*, [2000] R.J.Q. 786, 822–28 (Que. Super. Ct.), translated in [http://law.utoronto.ca/healthlaw/docs/chaoulli/Chaoulli\\_English\\_Translation\\_Decision\\_Feb25-2000.pdf](http://law.utoronto.ca/healthlaw/docs/chaoulli/Chaoulli_English_Translation_Decision_Feb25-2000.pdf).

<sup>12</sup> See *Chaoulli c. Québec (Procureur Général)*, [2002] R.J.Q. 1205, paras. 24–25 (Que. Ct. App.) (opinion of Delisle, J.), translated in [http://law.utoronto.ca/healthlaw/docs/chaoulli/Court\\_of\\_Appeal\\_decision\\_eng.doc](http://law.utoronto.ca/healthlaw/docs/chaoulli/Court_of_Appeal_decision_eng.doc).

<sup>13</sup> See *id.* paras. 54–56, 60–63 (opinion of Forget, J.).

<sup>14</sup> See *id.* paras. 65–69 (opinion of Brossard, J.).

<sup>15</sup> See *Chaoulli*, 2005 S.C.C. 35, para. 101 (opinion of Deschamps, J.).

<sup>16</sup> See *id.* para. 45.

<sup>17</sup> Justice Deschamps's opinion is the controlling one. Three justices wrote separately, concurring in the result, and another three dissented. Only seven justices heard the case due to two vacancies on the court.

<sup>18</sup> See *Chaoulli*, 2005 S.C.C. 35, paras. 25–31 (opinion of Deschamps, J.).

ferred broader protection for the rights involved than did the Canadian Charter. Rejecting the “economic right” characterization,<sup>19</sup> she noted the evidence that the unreasonably long waiting lists in the public system, when combined with the restriction on private insurance, could actually result in health deterioration or even death.<sup>20</sup>

Justice Deschamps proceeded to analyze whether the justificatory provision in section 9.1 of the Quebec Charter could save the statutes. This provision restricts the scope of the substantive charter rights by instructing that they be applied with “proper regard for democratic values, public order and the general well-being of the citizens of Québec.”<sup>21</sup> Applying the standard tests to determine whether a rights-infringing statute can be saved under section 9.1,<sup>22</sup> Justice Deschamps held that while the statutes did bear a rational connection to a substantial state objective — namely, the protection of the public insurance system through monopolization<sup>23</sup> — the province did not demonstrate that they were minimally impairing;<sup>24</sup> the experience of other provinces<sup>25</sup> and other countries<sup>26</sup> showed that there are effective ways to maintain universal public health insurance without significantly impinging on individual rights. Having struck down the statutes as inconsistent with the Quebec Charter, Justice Deschamps declined to consider whether the laws also violated the Canadian Charter.<sup>27</sup>

Chief Justice McLachlin and Justice Major, joined by Justice Bastarache, concurred in the judgment of Justice Deschamps but issued a separate opinion arguing that the statutes contravened the federal constitution as well.<sup>28</sup> Agreeing that the statutes burdened the right to security of the person, the justices analyzed whether such deprivation was in accordance with the principles of fundamental justice and thus constitutional under the Canadian Charter nonetheless. Relying on international evidence that public insurance systems can operate just as

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<sup>19</sup> *Id.* para. 34.

<sup>20</sup> *See id.* paras. 40, 42. Medical testimony and evidence were presented at trial.

<sup>21</sup> Quebec Charter, *supra* note 4, § 9.1.

<sup>22</sup> *See Ford v. Quebec (Attorney Gen.)*, [1988] 2 S.C.R. 712, 769–71 (Can.) (requiring that such statutes respond to a substantial state interest, be rationally connected to that interest, be minimally impairing of rights, and have positive effects proportional to their harm).

<sup>23</sup> *See Chaoulli*, 2005 S.C.C. 35, paras. 49–58 (opinion of Deschamps, J.).

<sup>24</sup> *See id.* paras. 68, 75, 84.

<sup>25</sup> Three provinces have statutes nearly identical to those in force in Quebec. Another three use alternative statutory deterrents to private healthcare, and two of these also ban private insurance. The final three do not have any laws discouraging private healthcare. *See id.* paras. 70–73.

<sup>26</sup> Justice Deschamps reviewed systems in Australia, New Zealand, the United Kingdom, Austria, Germany, Sweden, and the Netherlands. None of these countries bans private health insurance entirely, although some regulate its use or doctors’ time to ensure the stability of public insurance schemes. *See id.* paras. 77–82.

<sup>27</sup> *See id.* para. 15.

<sup>28</sup> *See id.* paras. 102–160 (McLachlin, C.J. & Major, J., concurring in the result).

well without bans on private insurance, the justices argued that Quebec's ban had no rational connection to the effective functioning of its public system.<sup>29</sup> Viewed in such a light, the statutes violated the fundamental principle of justice that laws not be arbitrary; a law is arbitrary if it serves no legitimate government purpose.<sup>30</sup> The justices then held that the statutes failed the Canadian Charter's justificatory provision,<sup>31</sup> which, like its Quebec analogue, requires a rational connection as well as minimal impairment and proportionality.

Justices Binnie and LeBel, joined by Justice Fish, dissented. In a blistering opinion, the justices compared the decision to the U.S. Supreme Court's infamous decision to strike down social legislation based on economic rights in *Lochner v. New York*.<sup>32</sup> The dissenters rationalized the statutes by viewing them within a framework of "equity, solidarity and collective responsibility,"<sup>33</sup> animated by the principle that one should not be allowed to obtain treatment sooner simply by virtue of greater economic wealth. From this perspective, the statutes were clearly rational and minimally impairing, as they precisely reflected the underlying purpose: the public system must be a monopoly to ensure that treatment is rationed solely based on need.<sup>34</sup> Legalizing private insurance might not destroy the public system, but it would permit the type of queue-jumping that the dissenters viewed as anathema to the values implicit in Quebec health policy. The justices also criticized their colleagues for intervening in a controversial political issue driven by competing social values best debated in a legislature.<sup>35</sup>

The court boldly achieved a practical result by demanding that an adequate solution to the healthcare crisis be implemented, yet limited its holding such that Quebec and the other provinces retain considerable power to reform healthcare in accordance with democratic preferences. Canadian scholars have sharply criticized the decision as unduly activist,<sup>36</sup> but such criticism is misplaced. The controlling

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<sup>29</sup> See *id.* paras. 134–153.

<sup>30</sup> The court derived this principle from *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 110 (Can.) (Beetz, J., concurring), which struck down a criminal statute requiring that women obtain approval from a panel of doctors at an accredited hospital before receiving an abortion because the requirement caused considerable delay and did not serve its purported purposes.

<sup>31</sup> See *Chaoulli*, 2005 S.C.C. 35, para. 155 (McLachlin, C.J. & Major, J., concurring in the result).

<sup>32</sup> 198 U.S. 45 (1905); see *Chaoulli*, 2005 S.C.C. 35, para. 201 (Binnie & LeBel, JJ., dissenting).

<sup>33</sup> See *Chaoulli*, 2005 S.C.C. 35, para. 223 (Binnie & LeBel, JJ., dissenting).

<sup>34</sup> *Id.* paras. 256–257. It is this analytical distinction that most clearly differentiates the dissenting justices from their colleagues: Justice Deschamps viewed the purpose of the public insurance system as providing care to all Quebecers, *id.* para. 57 (opinion of Deschamps, J.), while the dissenters imputed a desire to ensure that wealth plays no role in determining access to care.

<sup>35</sup> See *id.* paras. 166, 258 (Binnie & LeBel, JJ., dissenting).

<sup>36</sup> See, e.g., Sujit Choudhry, *Worse than Lochner?*, in *ACCESS TO CARE, ACCESS TO JUSTICE* 75, 86–87, 95–96 (Colleen M. Flood et al. eds., 2005) (arguing that the court should have

opinion carefully tailored its approach to judicial review to maintain the potential for democratic engagement while avoiding the legitimization of a flawed and rights-infringing healthcare system.

The *Chaoulli* decision was certainly pragmatic. The sad reality of patients languishing in queues for medically necessary procedures required a solution, and the province was reluctant to implement one unilaterally.<sup>37</sup> Private insurance offers an alternative to those patients whose health cannot afford to wait and whose wallets cannot afford a trip to an expensive clinic in the United States. Further, the development of a private health insurance market would likely cause increased competition and a decreased load on the public system, improving access to health services for all citizens.<sup>38</sup> But even if private insurance is not the solution to Quebec's healthcare woes, *Chaoulli* forces the government to act by demanding that *some* solution be implemented. In contrast, simply deferring to the legislature would have done nothing to improve care and would have legitimized an unacceptable status quo.

Although the decision challenged a central pillar of Canada's welfare state, it also implicitly emphasized legislative action rather than judicial revolution as the proper means toward solving the dilemmas of health policy. The decision did strike down legislation, but it yielded much control over the future development of health policy to the political branches by limiting itself in several notable ways.

First, although three justices in *Chaoulli* argued that the Quebec statutes violated both the Quebec and Canadian Charters, Justice Deschamps's fourth decisive vote held only that there was a violation of the provincial charter. Significantly, she did not rule either way on whether the ban on private insurance violated the Canadian Charter. As a result, the decision does not apply to the statutory healthcare regimes of other Canadian provinces, some of which are nearly identical to Quebec's and others of which apply their regulatory weight in other ways.<sup>39</sup> This split effectively issued a warning to the other provinces — namely, that there are constitutional implications of healthcare policy and that ignoring these considerations could precipitate judicial involvement — without preemptively striking down or giving approval

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left the problem “to the political process” and “should have never heard this case”); Andrew Petter, *Wealthcare: The Politics of the Charter Revisited*, in ACCESS TO CARE, ACCESS TO JUSTICE, *supra*, at 116, 118–19, 131 (calling *Chaoulli* “new heights of judicial activism”).

<sup>37</sup> “For many years, the government has failed to act; the situation continues to deteriorate.” *Chaoulli*, 2005 S.C.C. 35, para. 97 (opinion of Deschamps, J.).

<sup>38</sup> See NADEEM ESMAIL & MICHAEL WALKER, HOW GOOD IS CANADIAN HEALTH CARE? 2005 REPORT: AN INTERNATIONAL COMPARISON OF HEALTH CARE SYSTEMS 7 (Fraser Inst. Critical Issues Bulletin, June 2005) (finding that the Canadian system is more expensive but less effective than many comparable public systems that incorporate the private sector).

<sup>39</sup> See *Chaoulli*, 2005 S.C.C. 35, paras. 70–73 (opinion of Deschamps, J.).

to any other legislation. Other provinces will therefore be forced to examine the concerns raised in *Chaoulli* and the potential application of the Canadian Charter to their own statutory schemes, but will not be burdened by any binding precedent.<sup>40</sup>

Second, Justice Deschamps's reasoning left substantial flexibility in the hands of the elected branches even within the province. The decision did not create a broad, new right with which legislators must contend;<sup>41</sup> rather, the right explicated was contingent and limited. If the public healthcare system constructs an internal solution to the problem of waiting lists such that reasonable care within a reasonable time is actually available to participants, there will be no constitutional obstruction to the type of statute invalidated in *Chaoulli*.<sup>42</sup> The Quebec legislature thus retains the option of undertaking reforms to reduce waiting lists; doing so will make the court's decision moot.<sup>43</sup> Nor did the decision necessarily forestall alternative restrictions having effects similar to those of the invalidated statutes, such as restrictions on when doctors may practice outside of the public system or the partial regulation of private insurance markets. The court considered such restrictions in the discussion of international approaches to the problem, and Justice Deschamps pointed to them as evidence that a complete ban on private insurance is not required.<sup>44</sup> Such alternative methods of regulation might indeed be constitutional. The decision thus left considerable room for the provinces to develop statutory healthcare regimes via democratic political processes.

Third, the unique institutional constraints on the Canadian judiciary when it acts in a constitutional capacity limit the decision. Section 33 of the Canadian Charter, also known as the Notwithstanding

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<sup>40</sup> This element of the decision can be characterized as minimalist; judicial minimalism often has democracy-promoting effects. See Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 6–9, 36–42 (1996).

<sup>41</sup> In contrast, some have suggested that the court recognize a freestanding positive right to healthcare, such that the government would have a constitutional obligation to provide health services to all citizens. See Factum of the Intervener, Charter Comm. on Poverty Issues & Canadian Health Coal. para. 48, *Chaoulli*, 2005 S.C.C. 35, 29272, available at <http://www.healthcoalition.ca/chaoulli-factum.pdf>; Kent Roach, *The Courts and Medicare: Too Much or Too Little Judicial Activism?*, in ACCESS TO CARE, ACCESS TO JUSTICE, *supra* note 36, at 184, 200 (arguing that the decision reflects “not nearly enough judicial activism to assist those who suffer in the public health care system”). The court rejected such views. See *Chaoulli*, 2005 S.C.C. 35, para. 104 (McLachlin, C.J. & Major, J., concurring in the result).

<sup>42</sup> “By imposing exclusivity and then failing to provide public health care of a reasonable standard within a reasonable time, the government creates circumstances that trigger the application of s. 7 of the *Charter*.” *Chaoulli*, 2005 S.C.C. 35, para. 105 (McLachlin, C.J. & Major, J., concurring in the result). The implication is that if the public healthcare met those criteria, section 7 would not be triggered.

<sup>43</sup> Reasonableness is a vague standard, but the court would likely be deferential if a system internally enforced any professionally approved guidelines on acceptable wait times.

<sup>44</sup> See *Chaoulli*, 2005 S.C.C. 35, paras. 77–82 (opinion of Deschamps, J.).

Clause,<sup>45</sup> gives the provincial and federal legislatures the power to override court decisions that strike down legislation for substantive constitutional reasons.<sup>46</sup> Invoking the clause, which requires simple majority support, allows a law to have force and effect notwithstanding most rights in the charter.<sup>47</sup> The Quebec Charter has an analogous provision.<sup>48</sup> Thus, any constitutional rights decision handed down by a Canadian court, including *Chaoulli*, is susceptible to legislative reversal. If the Quebec legislature feels strongly about the importance of egalitarian provision of medical services, it can legally reenact the statutes notwithstanding the right to personal inviolability — although invoking the clause does carry considerable political costs.<sup>49</sup>

Professor Alexander Bickel noted decades ago that courts have considerable discretion in deciding “whether, when, and how much to adjudicate.”<sup>50</sup> He urged the judiciary to view its decisions as part of a conversation with the people and their representatives<sup>51</sup> and to exercise its discretion with prudence.<sup>52</sup> The *Chaoulli* decision accords with his advice: it recognized the goal of successfully reforming healthcare and refused to legitimize an inadequate system, yet it initiated a dialogue between the court and the political branches.<sup>53</sup>

The decision actually promotes democracy, prompting reinvigoration of a public debate surrounding health policy — a debate that had long been stagnant and stale. By restricting the decision’s binding force to Quebec, *Chaoulli* permits the other provinces to engage the public meaningfully in the process of healthcare reform — constituent feedback will be gathered, policies will be debated, and elections will be held. There would have been little opportunity for these processes if a broad court decision had forced the provinces to revise their statu-

<sup>45</sup> Canadian Charter, *supra* note 9, § 33.

<sup>46</sup> Provincial legislatures can use the clause to override court decisions regarding the constitutionality of provincial statutes, and the federal Parliament can do the same for federal laws.

<sup>47</sup> See generally Jamie Cameron, *The Charter’s Legislative Override: Feat or Figment of the Constitutional Imagination?*, 23 SUP. CT. L. REV. 2D 135 (2004) (analyzing section 33). The clause can be used to override fundamental freedoms, as well as legal and equality rights, but not mobility, language, or democratic rights. See *id.* at 137 & n.10. Laws that invoke the federal clause are valid for a renewable five-year period. Canadian Charter, *supra* note 9, § 33(3)–(4).

<sup>48</sup> “No provision of any Act . . . may derogate from sections 1 to 38 . . . unless such Act expressly states that it applies despite the Charter.” Quebec Charter, *supra* note 4, § 52.

<sup>49</sup> Some might argue that the political dangers of using section 33 are so perilous that it is virtually irrelevant. However, provincial legislatures including Quebec’s have invoked it on a variety of occasions. Cameron, *supra* note 47, at 135 & nn.4–5.

<sup>50</sup> Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 79 (1961).

<sup>51</sup> See *id.* at 50.

<sup>52</sup> See *id.* at 79.

<sup>53</sup> Many scholars have written about the dialogic function of judicial review in Canada. See, e.g., Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures*, 35 OSGOODE HALL L.J. 75 (1997).

tory regimes immediately. By making the right contingent on the current inadequacy of the public system and refusing to comment explicitly on the constitutional validity of other regulatory approaches, *Chaoulli* grants Quebec substantial maneuverability to rework its healthcare system in accordance with democratic values.<sup>54</sup> The province can open its markets to private insurance, reform the public system, or adopt other regulatory regimes that maintain the values of Quebec health policy but minimize infringement of individual rights. Regardless of the outcome, the ultimate policy decision will inevitably be the result of democratic deliberation. Further, given the legislative power to override rights provided by the Notwithstanding Clause and its Quebec Charter analogue, the decision is also bound to stimulate discourse over whether the egalitarian distribution of medical services should trump competing individual rights.

Recent developments demonstrate that discussion of legislative responses to the *Chaoulli* decision is not mere speculation. After a request from the government of Quebec, the Supreme Court of Canada agreed to suspend its ruling for one year;<sup>55</sup> the understanding is that the province will craft a constitutionally valid alternative that protects rights yet reflects Quebec's democratically defined values. Likewise, in the wake of *Chaoulli*, the province of Alberta announced that it would commence comprehensive reform of its own healthcare system.<sup>56</sup> The *Chaoulli* court's balanced approach to constitutional adjudication thus appears to be paying legislative dividends.<sup>57</sup> Ruling more broadly would have threatened opportunities for democratic participation, while refraining from judicial review would have left intact — and perhaps even politically strengthened by virtue of judicial approval — a woefully inadequate healthcare system. The pragmatic yet respectful balance struck by the court is worthy of praise.

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<sup>54</sup> Some would critique this mode of adjudication as providing insufficient guidance to legislatures. The most potent Canadian illustration of the dangers of that approach is the issue of felon disenfranchisement: Parliament passed a revised statute after the original was struck down on narrow grounds, but the courts then pronounced the new law unconstitutional as well. See *Sauvé v. Canada* (Attorney Gen.), [1992] 7 O.R.3d 481, 488–89 (Ont. Ct. App.) (rejecting statute as underinclusive and overinclusive), *aff'd*, [1993] 2 S.C.R. 438, 439–40 (Can.); *Sauvé v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. 519, 539–57 (Can.) (striking down new statute).

<sup>55</sup> *Chaoulli c. Québec* (Procureur Général), No. 29272, 2005 CarswellQue 5795, 2005 WL 1870077 (Can. Aug. 4, 2005) (per curiam).

<sup>56</sup> Ralph Klein, Op-Ed, *Alberta Moving Ahead on Private Health Care*, TORONTO STAR, Aug. 9, 2005, at A13.

<sup>57</sup> Of course, sometimes legislatures fail to enact new statutes. See MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 164–67 (1991) (discussing the Supreme Court of Canada's 1988 compromise decision on abortion). Canada has not enacted an abortion statute since 1988, but a lack of legislation might simply indicate that democratic deliberation has reached the conclusion that government should take no action.