INSIGHTS

JULY 2005

IN THIS ISSUE..

Supreme Court Decision

A 4-3 ruling that it is unconstitutional to ban private insurance

The Supreme Court has handed down a landmark ruling that invalidates Quebec's ban on private health insurance and delivers a caustic critique of the shortcomings of Canada's public health system.

The Court ruled in a narrow 4 to 3 decision that it is unconstitutional to ban private insurance when the public system fails to provide reasonable services. The ruling is seen as a warning to governments not to let waiting lists get out of hand. Even though the ruling has a direct application only in Quebec, there is widespread agreement that it will lead to similar cases in other provinces, and increase the already strong tendencies toward a two-tier health system.

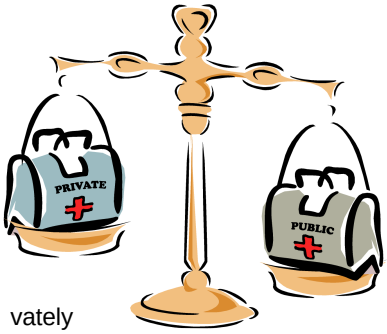
The case involved Quebec physician Jacques Chaoulli and his patient George Zeliotis. Zeliotis said his year-long wait for a hip replacement in 1997 violated his right to life, liberty and security.

While I agree with the majority opinion of the justices, that government bans on private-health insurance endanger the health, psychological well being and life of Canadians, the court ruling is troubling and profoundly wrong because no health care system - even one with a private component - can guarantee that 100 per cent of patients will receive speedy access to care 100 per cent of the time, with never a single, unreasonable wait.

Moreover, let's accept that some people today face long waits that endanger their health. What will happen, in the future, to Canadians who are too poor to afford private health insurance? Will they be served well by a public system robbed of talent and starved of cash - if such a system develops? Will their health, their psychological well-being, their very lives be jeopardized by the medicare system of the future?

The Prime Minister has down played the court's decision by saying that, "We are not going to have a two-tiered health care system in this country." Brave words, short on how he will stop this from happening. The Prime Minister must be aware of the legitimate concerns that the Quebec ruling will be repeated elsewhere in Canada. It is imperative that the federal government and the other nine provinces begin immediately to map out a plan of action that will prevent this from taking place.

Let's be clear, the Supreme Court identified problems in the medicare system that stand as a stinging rebuke to the federal and provincial governments in this country. The court bluntly stated that the health care system has not delivered what it said it would deliver and, as a consequence, lives are being lost and threatened by unreasonable waiting times. So what will the Prime Minister and the provincial leaders do? At the very least, governments should consider invoking the constitution's notwithstanding clause. That would give them five years to work with the existing system to improve it and make it better able to withstand the challenge from privately delivered health care. Having said this, let's admit that the notwithstanding clause isn't a popular option.



The best approach would be for governments to respond to the court ruling by continuing their efforts to improve public health care. But massive funding increases cannot be the only option. After all, health care spending in Canada from both public and private sources has increased from just under $90 billion in 1999 to $130 billion in 2004, a rise of about 45 per cent in just 5 years. Even that has not produced paradise.

As governments take up the challenge, they might look for guidance to European countries, such as Britain, that already have a mix of public and private health care. It may be that future court decisions, bolstered by charter of rights arguments, allow an unprecedented level of private health care options in this country. If that happens, how can the federal and provincial governments best regulate and manage the provision of health care in order to protect the public system?

Over the past four decades, public health care has become a pillar of the modern Canadian state. It supports a quality of life and standards of equality that are envied the

Supreme Court, continued on reverse

Mandatory Retirement - the end is near

On June 7th, 2005, the provincial government of Ontario introduced Bill 211, the Ending Mandatory Retirement Statute Law. If Bill 211 is passed, the use of mandatory retirement policies will no longer be lawful in most Ontario workplaces. The key element of the proposed legislation is the revision of the definition of 'age' in the Human Rights Code. The Bill also removes the requirement for retirement at age 65 in several statutes, including the Public Service Act.

The ban against mandatory retirement is not new. It has existed, in various forms, in the United States for over 25 years. Mandatory retirement has been prohibited in the province of Quebec for almost that long. Currently, it is not permitted in most Canadian jurisdictions, with the notable exceptions of Ontario and Canada itself.

Employers will want to turn their minds to any impact this change will have on their employees, their pension and benefit plans and their workplace policies.

Interestingly, the Supreme Court of Canada has held that mandatory retirement is constitutional and that legislatures cannot be faulted for failing to ban the practice. Mandatory retirement is justified, according to the Court, because it provides younger citizens with greater access to work and it allows employers and employees the freedom to negotiate employment contracts. The Court also accepted that older workers are generally less productive. Other arguments in favour of mandatory retirement were the existence of pension plans providing income after retirement and the support given to the practice by unions.

Our courts interpret human rights legislation generously, in favour of affected individuals. Ambiguities in legislation are almost always resolved against employers. The legislation does allow for mandatory retirement where age is a reasonable, bona fide requirement of employment (BFOR). Examples of this include firefighters, police and pilots. It is for the employer to demonstrate that age is such a requirement.

The amendments to the legislation will come into force one year after Bill 211 receives Royal Assent (i.e. June 2006 at the earliest). Nevertheless, employers will want to turn their minds to any impact this change will have on their employees, their pension and benefit plans and their workplace policies.

The Bill will not amend the Pension Benefits Act. Therefore, employees will still have the right to retire with a full unreduced pension on the 'normal retirement date'. This is defined in the PBA as no later than one year after employees turn 65. Revisions to the Human Rights Code are not expected to have significant implications for pension plans. Current pension legislation requires that plan members who remain employed after age 65 must be permitted to continue to participate in the pension plan. Therefore, the removal of the age 65 limit on age discrimination may simply mean that there are more active plan members over age 65.

On the other hand, the Income Tax Act (Canada) prevents a member of a pension plan, RRSP, RRIF, etc., from deferring receipt of retirement income from these plans beyond the end of the year in which the member attains age 69. Consequently, absent legislative change, those who continue to be employed past age 69 will collect both a salary and pension at the same time; however, further pension accrual would stop when payments under the pension plan begin.

Over the coming months, employers will want to review the provisions of pension plans which are related to age 65 - for example, provisions that do not allow employees hired on or after age 65 to enrol in a pension plan - to determine the impact of Bill 211.

It will also be necessary to consider the impact of the Bill on insured benefit plans, including long term disability plans (which typically cease benefit payments at age 65), life insurance and prescription drug benefits. In some cases these changes may result in employees receiving benefits beyond age 65, with a corresponding cost increase to employers.

The government has indicated that it will not be amending the 'Benefit Plans' regulations under the ESA (which on a very specific and limited basis permit differential treatment of employees in certain types of benefit plans on the basis of age, sex and marital status). However, these regulations will not assist employers with containing their benefits costs or defending existing practices that cease or limit benefits coverage beyond age 65.

Bill 211 would amend the Workplace Safety and Insurance Act to exempt its age-based provisions from the Human Rights Code. Thus, for example, employees who are injured after age 63 will continue to be eligible to receive Loss of Earnings benefits for a two-year period only, while employees who are injured before age 63 will continue to be eligible for Loss of Earnings benefits to age 65 only.

While Bill 211 may appear to represent a significant departure from established employment practices, the reality is that mandatory retirement has been under attack for several years. Moreover, many commentators predict that the elimination of mandatory retirement will not lead to a significant increase in the number of employees working past age 65. Nevertheless, employers are well advised to review current management practices to ensure they are not leaving themselves exposed to liability. As a result, a review with your professional advisor would be prudent.

Source: Hicks Morley Hamilton Stewart Storie LLP

Supreme Court, continued from reverse

world over. It upholds, as well, our sense of who we are as a people. The edifice of public health care, painstakingly built by generations of Canadians, is by no means free of flaws. But it is, nonetheless, a magnificent creation that has delivered life-enhancing, life-saving care across the board, to the rich, to the middle class but also to the millions of poor who would not otherwise have had access to quality medical care. It is this public system that Canadians must rally around now. Not because it's perfect, but because our failure to do so is a failure to understand that a two-tiered system caters only to those who are healthy.

Until next time…