COURTS AS GAME CHANGERS IN HEALTH POLICY

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1. Canada’s Health Care Silos

PUBLIC
• Hospitals
• Physicians

PRIVATE
• Rx Drugs
• Dental care
• Vision care
The “not really” “single-payer” system

- 70% public, 30% private
- 65% of Canadians hold private health insurance (PHI)

2. Tsunamis, Yo-Yos and Friends for Company
Spending Tsunami


Source: CIHI, National Health Expenditure Trends, 1975 to 2011, data sets (2011)

The Yo-Yo Effect

Per Capita Health Expenditure, Annual Percentage Change In Excess of Inflation – 1975-2011

Source: CIHI, National Health Expenditure Trends, 1975 to 2011, data sets (2011)
At least we have friends for company…

Health expenditure per capita, PPP (constant 2005 international $) – 1995-2010

…But could Canada do more with less?

Source: The World Bank

Total expenditure on health, per capita, US$ PPP
Life expectancy, Total population at birth, years
3. Numbers, Policy and Politics

3.1 Private-Sector Spending

What Does Canada’s Private Sector Look Like?

Source: CIHI
What Does Canada’s Private Sector Buy?


Private-Sector Drug Spending


Source: CIHI, StatsCan
3. Numbers, Policy and Politics

3.2 Public-Sector Spending

What Does Canada’s Public Sector Buy?


Source: CIHI
The Rising Wave of Public-Sector Drug Spending

Prescribed Drugs as Percentage of Total Public-Sector Health Expenditure - 1975-2011

Source: CIHI

Real Growth in Spending

Total (Public+Private Sector) Spending – Average Annual Increase in Excess of Inflation, 1975-2011
Feed the Monster vs. Tame the Monster

What Goes Up Must Come Down...?
The Canada Health Transfer (CHT)

Take-it-or-leave-it deal:
- 6% annual growth until 2016-17; after 2016-17, annual increases most likely around 4%
  - Parliamentary Budget Officer predicts this will be “significantly lower” than actual growth in provincial health spending
- NO STRINGS ATTACHED (provinces will get to govern their own misery)

We’ve got no money, so we’ve got to think.

– New Zealand physicist, Ernest Rutherford who conducted his research at McGill
4. Courts as Game Changers

**Patient Protection and Affordable Care Act**
(a.k.a. Obamacare)

- **Individual mandate:**
  - Penalizes Americans who do not purchase PHI
  - Upheld by Supreme Court under Taxing Clause but not Commerce Clause or Necessary & Proper Clause
- **Medicaid expansion:**
  - Threatened to withdraw all federal funding if states didn’t comply
  - Overturned as unconstitutional; Supreme Court said that it was coercive “economic dragooning” by the feds
Ireland’s Risk Equalization Scheme

- In July 2008, the Supreme Court of Ireland overturned a risk equalization scheme for private health insurers.
- The decision left a potential market failure without countervailing regulation.

Indian Right to Life Case

- In 1996, the Indian Supreme Court held that the constitutional right to life includes a positive obligation to provide medical facilities
- Monetary award to a man who was taken to 8 different hospitals after a head injury
A Two-Tier Constitution: *Chaoulli v. Quebec*

- 2005 Supreme Court of Canada decision that a PHI ban (plus long wait times) violated the *Quebec Charter of Human Rights and Freedoms*
  - Rights to life and security of the person violated
  - Only directly affects Quebec

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**Chaoulli 2.0:**
Dr. Brian Day’s *Charter* Challenge

- *Chaoulli*-like *Charter* s. 7 challenge to PHI ban by a doctor who runs a private hospital in Vancouver
- Also incorporates a far-fetched *Charter* s. 15 argument
Chaoulli 3.0

• Justice Centre for Constitutional Freedoms (JCCF) seeking to extend Chaoulli to Alberta, using the Charter
• Similar cases are before the courts in Ontario and British Columbia…

OMA Charter Challenge: A Possible Restriction on Government’s Ability to Bargain Hard in the Public Interest

• Ontario Medical Association (OMA) Charter challenge arguing lack of “good faith” bargaining by the Ontario government with respect to the physician fee freeze
CONCLUSION:

- Canada’s commitment to redistribution in health care is not about to collapse, but it is being slowly eroded by waves of technological change and an aging population.

- Provincial governments (and private health insurers) need to tame the monster rather than continue to feed it to expand the social contract but the incentives for this are not strong.

- Courts have the potential to be game changers, delivering an external shock that could significantly change the balance of public/private spending and thus the social compact around a one-tier system.

- Provincial governments should vigorously defend court challenges that would limit their ability to negotiate “tough” and be alert to the restrictive terms of upcoming free trade agreements.