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Introducing Inroads 18

BACK IN THE 1960S AND 1970S, IT SEEMED ODD TO ME AS A CANADIAN that American Supreme Court justices, such as Earl Warren and Thurgood Marshall, were major public figures and the cases they adjudicated (*Brown v. Board of Education*, *Roe v. Wade*) were household words. By contrast, Canadian justices were mostly obscure and what they did seemed of interest primarily to legal specialists.

All that changed when the Charter of Rights and Freedoms was entrenched in the constitution in 1982. The impressive list of cases with which Gareth Morley and Finn Poschmann open their introduction to our section on politics and the law is enough to indicate the current importance of the Supreme Court of Canada. Arguably, the red-robed men and women on this issue's cover are the nine most powerful people in Canada.

Not everyone is pleased with this turn of events. Some think the space the Supreme Court occupies in post-1982 Canada is excessive, and among them is Allan Blakeney, who as Premier of Saskatchewan helped craft the deal that brought the Charter into being. In an interview with Gareth Morley, Blakeney

examines the Supreme Court's record in the context of first ministers' intentions when they agreed to the Charter. He accepts the idea of the Constitution as a "living tree," but doesn't think it right "for the courts to decide that they don't like the tree we planted, dig it up and transplant another species."

Patrick Monahan, Dean of Osgoode Hall Law School in Toronto, has a much more favourable view of the way the Court has interpreted its mandate. In a conversation with Finn Poschmann, he says the Court has acted to protect minorities and limit the arbitrary exercise of cabinet power, which is what courts are supposed to do.

The Supreme Court, and specifically its June decision in *Chaoulli v. Quebec*, is also the subject of the listserv exchange

featured in this issue. The *Chaoulli* decision potentially opens the door to privately insured health care, and listserv participants debated both the substantive question of whether privately insured health care is a good idea and the institutional question of whether such matters should be decided by the Supreme Court.

Still in the realm of politics and the law, the question of the use of religious (and especially Islamic) tribunals in family law arbitration has been a subject of heated debate in both Ontario and Quebec. Marion Boyd, whose December 2004 report to the Ontario government has been at the centre of the debate, outlines her position and discusses the response to her report. Quebec MNA Fatima Houda-Pepin explains the reasons for her motion opposing Islamic tribunals, passed unanimously by the National Assembly. Representatives of the Muslim Canadian Congress and the Canadian Islamic Congress, two organizations on opposite sides of this question, respond to Boyd and Houda-Pepin respectively.

Also in this issue:

- Greg Marchildon explains why a pharmaceutical program run by the federal government could provide a needed boost both for health care and for federalism, helping to resolve the fiscal imbalance between Ottawa and the provinces and allowing for more efficient use of drug therapy in the health care system.
- Henry Milner reports on why a majority of voters in France rejected the proposed European Union constitution in a referendum held last May, even though only a minority of them reject the idea of European integration. In an accompanying diary, Axel Queval, a longtime insider

in the French Socialist Party, chronicles the resistance of Socialist voters to the party leadership's entreaties to vote for the constitution.

- Quebec film producer Roger Frappier tells Arthur Milner how Quebec films have achieved success in their home market, and what the rest of Canada could do to emulate that success. "Reward excellence," he says – give promising filmmakers the opportunity to make at least three or four films.
- Heather MacIvor recommends revitalizing Canada's political parties as a way out of our democratic malaise. Rather than just being electoral machines, she suggests, parties should engage their members in policy development. Brian Tanguay looks at another aspect of the democratic malaise, our skewed electoral system, in a review of two books on electoral reform.
- Green Party of Canada leader Jim Harris rejects Gord Perks's contention in the last issue of Inroads that the Green Party has moved away from the essence of green politics; Perks responds.
- In their editorial, Henry Milner and John Richards look at the recent manifesto signed by former Premier Lucien Bouchard and other prominent Quebecers, *For a Clear-Eyed Vision of Quebec*. While the manifesto has been dismissed by union leaders and Parti Québécois leadership candidates, Milner and Richards find that it poses some necessary if uncomfortable questions.
- Janet Ajzenstat reviews Philip Resnick's plea for a turn to Europe to find the sources of Canadian identity.

— Bob Chodos

Seeing Quebec – and not only Quebec – with clear eyes

IN MID-OCTOBER, A GROUP OF PROMINENT Quebecers led by former Premier Lucien Bouchard issued a manifesto, entitled *Pour un Québec lucide* in French and *For a Clear-Eyed Vision of Quebec* in English.¹ The language is stark, even moving. The survival of Quebec as a vibrant distinct society in North America is threatened, the manifesto's authors argue, by an aging population, mounting Asian competition in the global market and growing public debt. Drawing a parallel with the *grande noirceur*, the “great darkness” of the Duplessis period, they see contemporary Quebec society as blocked: “Social discourse in Québec today is dominated by pressure groups of all kinds, including the big unions, which have monopolized the label ‘progressive’ to better resist any changes imposed by the new order.” The primary victims of inaction, they insist, will be the next generation. When asked in his TV and radio appearances why he was taking this initiative, Bouchard answered that he could not look his sons in the face if did not try to do something.

The text acknowledges the accomplishments of the Quiet Revolution, which enabled Quebecers to realize education levels equal to those elsewhere in Canada, and to close much of the gap in per capita incomes.

But this catch-up is now blocked, argue the signatories, by the very groups born of the Quiet Revolution. Quebec is again falling behind. Quebecers must embrace efficiency-enhancing changes to public policy, such as higher university fees combined with income-contingent loans the better to fund postsecondary education, reforms that shift taxation from income to consumption, and an end to cheap electricity so as to raise public revenue and lower the provincial debt.

The group cannot complain that their manifesto has been ignored. It has elicited an outpouring of opinion, pro and con. The manifesto appeared in the midst of the Parti Québécois's leadership contest, and all candidates distanced themselves from it. In reality, many Péquistes share the underlying analysis – aside from Bouchard, a main author is Joseph Facal, who had been a key cabinet member under outgoing leader Bernard Landry and policy adviser to one of the leading candidates to succeed him, Pauline Marois. But the document states explicitly that becoming sovereign will not change Quebec's situation fundamentally – something no aspiring PQ leader can admit to.

The document comes at the onset of a confrontation between the Quebec government and its public-sector employees. Not



LA VILLE DE MONTRÉAL The authors of the manifesto *For a Clear-Eyed Vision of Quebec* argue that survival of Quebec as a vibrant distinct society in North America is threatened by an aging population, mounting Asian competition in the global market and growing public debt.

surprisingly, union leaders have rejected it. The response of Réjean Parent, head of the Centrale des Syndicats du Québec (composed largely of teachers and others employed in education) is typical:

Signatories of the manifesto accuse unions as systematically opposing change. They even accuse them of being builders of a “republic of the status quo.” ... Unions in Quebec have always been and always will be agents of change, but of changes wanted by and good for all Quebecers ... This manifesto is an unexpected gift from Heaven for Jean Charest (Inroads’ translation).

Supporters of this view, including spokespersons for the newly formed coalition of left-wing parties in Quebec, clearly see the manifesto as an attack on the “*acquis sociaux*,” the social gains of the Quiet Revolution. They dismiss the signatories as “*néo-conservateurs*” or “*néolibéraux*” – in French the two words have a similar meaning and negative connotation. But such labelling is

too easy. Among the manifesto's signatories is Pierre Fortin, perhaps the most influential left-wing voice among Canadian academic economists of his generation. Hence, rather than a neoconservative critique, the manifesto is better seen as a throwing down of the gauntlet in Quebec's version of similar debates on the European left.

If we step away from the immediacy of Quebec political jousting and take a broad look across the Atlantic, we can see that from the end of World War II until some time in the 1980s, the European left unapologetically championed expansion of the welfare state. Those on the left disagreed among themselves about the ultimate socialist goal, but they agreed that the welfare state could render society both more just and more productive. Universal state-managed health care would equalize access to health care *and* reduce the inefficiencies of market-based care; expansion of postsecondary education at low or no fees would equalize income opportunities *and* enhance productivity.

By the 1980s, many of these arguments were fraying. With variations across countries, European governments faced chronic deficits and rising debt/GDP ratios despite successive increases in tax rates. Electorates were clearly forming voting blocs based on preservation of their *acquis sociaux* and rendering reallocation of budgets within the public sector ever more complex. In the large continental countries of France, Germany and Italy, reforms languished. As a result, the unemployment rate in these countries has stubbornly remained at 10 per cent for a generation. Among the “socially excluded” minorities such as North African immigrants to France, the rate has been two to three times higher.

Only in Scandinavia, the Netherlands and Britain have parties of the left grappled adequately with problems of the mature welfare state and adopted domestic variants on Bouchard’s manifesto. These parties have been rewarded with continued electoral success. Elsewhere in Europe, the left has generally responded as Réjean Parent did to Bouchard, and has remained faithful to the set of ideas that underlie the original post-World War II construction of the welfare state. As former Socialist Prime Minister Michel Rocard recently stated, the French left cannot restrain itself from “always demanding more than is possible ... scornfully dismissing the limits set by the capacity to produce and to distribute – that which we, by convention, call the economy.”²

Where parties of the left have not grappled with the problems of a mature welfare state, the problems have not gone away: the debate over what to do about them has become the prerogative of the right. Prior to the rise of “New Labour” in Britain, Thatcherites had a clear run. In France, whatever one may

think of their answers, politicians on the right – and especially presidential aspirant Nicolas Sarkozy – have been alone in asking the fundamental questions about reforming the welfare state. (For more context about France, see Henry Milner’s article elsewhere in this issue.)

Meanwhile, back in Quebec, despite the record levels of unpopularity of the Charest government, there has been no outpouring of support for the public-sector unions which, compared to earlier such confrontations, have been careful to tone down the rhetoric. Confronted with almost weekly reports of plants closing, unable to compete with Chinese producers, *le Québec profond* is evidently more receptive to the message of Bouchard and his fellow signatories than is suggested on the letters pages of *Le Devoir*.

For a Clear-Eyed Vision of Quebec has added substance to what would otherwise have been a fall in which the main political events were the lacklustre PQ leadership campaign – dominated by debates over André Boisclair’s suitability for high office given his revelation of cocaine use – and fulminations over the sponsorship scandal. In the short run, the manifesto changes little. But given its timing, its eloquence and the stature of its authors, its contentions are not likely to fade away.

— Henry Milner and John Richards

Notes

¹ Available online in both languages at www.pourunquebeclucide.com

² Cited in a review of *Si la gauche savait: Entretiens avec Georges-Marc Benamou de Michel Rocard* (Paris: Laffont, 2005) by Christian Rioux, in *Le Devoir*, October 14, 2005 (Inroads’ translation).

The Green Party is willing to innovate to build a sustainable society

Dear Inroads editors,

The latest fad in critiquing the Green Party seems to be referencing report card grades on the environmental platforms of Canada’s political parties without actually providing the grades themselves (Gord Perks, “The not-so-green Green Party,” *Inroads*, Summer/Fall 2005).

Readers of *Inroads* would have been better served by knowing that Greenpeace awarded the Green Party three As and one A-minus, stating in its 2004 election release that “the issue for those concerned with the environment, however, is the grades given to the Liberals and Conservatives.” The Green Party’s platform grade from the Sierra Club was an A. So much for the “not-so-green” moniker that Mr. Perks diligently tried to affix to the Green Party.

And while the Green Party is also pleased by the gold medal our candidates received from the Sierra Club, we believe platform report cards reveal only part of the story. In fact, the Sierra Club’s report card on NDP provincial government performance differs markedly from its report card on the party’s federal election platform.

According to the Sierra Club, NDP governments in Saskatchewan, Manitoba and

British Columbia have had some of the worst environmental track records in Canada. Under former B.C. Premier Glen Clark, the NDP government was given a D-minus and an F in 1999. The NDP governments of Manitoba and Saskatchewan were each given Ds and Cs between 2001 and 2003.

It’s ironic that Mr. Perks, as an environmentalist, would not want to acknowledge the B.C. NDP government’s decision to carry out “the largest mass arrest of citizens in Canadian history” as a means of enforcing corporate industrial logging of Clayoquot Sound on Vancouver Island, the destruction of B.C.’s salmon fishery and coastal ecosystems with legislated aquaculture industry policies, and the pronouncement by former NDP Premier Glen Clark that “environmentalists are enemies of progress.” Instead of discussing the NDP’s environmental record when it is in government, he offered his appraisal of the current federal leader – as if a political party is only an embodiment of its leader.

He also failed to mention the current contradictions between stated federal NDP policy and the support of its MPs and provincial parties for the importation of toxic waste from New Jersey for incineration in New Brunswick, for the pesticide fogging of

residential neighbourhoods in Winnipeg and for the ongoing dumping of raw sewage into the Strait of Juan de Fuca, as well as its support of coal mining in Cape Breton and its multiple, simultaneous positions for and against the oil-and-gas moratorium off B.C.'s west coast.



Green Party leader Jim Harris

The truth is that NDP platforms can and do promise the moon. We need only remember Bob Rae's Ontario election platform in 1990. Provincial NDP government records across Canada testify to how far the party will go to deliver on those promises. Unlike the NDP, the Green Party of Canada is willing to try new and innovative policies used by Green parties in government around the world, as a means to help build an ecologically sustainable society.

Although Mr. Perks is correct in writing that I consult with corporations professionally, I do not shy away from exposing reckless corporate behaviour when it's warranted. However, the days when corporations could all be tarred with the same brush are over. Unlike the NDP and the Conservatives, the Green Party does not choose to demonize either unions or business. Both play a role in our communities and real progress will be achieved only by engaging both in the development of sustainable solutions.

While I was a member of the Progressive Conservative Party more than two decades ago, under my leadership today the Green Party stands in stark contrast to the Conservative Party. And a disinterested political observer would concede that my conversion

from the Progressive Conservatives to the Green Party was far more about principles than about power.

For the record, the Green Party supports gay marriage; we support the right of new Canadians to achieve their dreams and live in a peaceful society that is respectful of their rights; we have taken the

strongest position of all parties in defence of public health care; we oppose the war in Iraq and the Anti-Ballistic Missile defence system; and – contrary to what Gord Perks wrote – we respect the fact that we live in a finite world with very real limits. As David Suzuki put it at our policy convention and general meeting last year, “The Greens are the only party that has confronted the reality that there are limits. The Greens are the only party that has done that and I thank you for it.” He called us his “eco-heroes.”

With 5 per cent of the world's population, North Americans consume one third of the world's resources. If everyone on the planet consumed as much as we do, we would need another three planets to provide for the energy and material intensity. Clearly that's not sustainable.

Do we have further to go in some areas of policy development? Yes. But do not doubt our resolve to offer all Canadians a political option that is beholden solely to Canadians. I invite Canadians to visit our website (www.greenparty.ca) and judge for themselves.

— Jim Harris

Jim Harris is leader of the Green Party of Canada.

THE AUTHOR REPLIES

I have to wonder whether Mr. Harris read beyond the first few paragraphs of my article – specifically, past the comparison with the NDP. Rather than deal with the fact that Canada's major environmental groups want more from the Green Party, he attacks his competition. In this, Harris is less a champion of the planet than just another competitive partisan. Perhaps he realizes that a single-issue party that can't claim leadership on that single issue is a sad spectacle.

Instead of addressing the record of Jack Layton's federal New Democrats, who recently wrested significant transit and energy efficiency investments out of the federal Liberals, he writes as if he's running against Glen Clark. I have to ask: who in Canadian politics wouldn't rather run against Glen Clark?

Harris plays the partisan game of selective recall instead of noting any common ground with the federal NDP. Yes, Clark's government arrested protesters at Clayoquot Sound. Does it matter that Svend Robinson was arrested at Clayoquot? Does it matter that as leader of the opposition Bob Rae was arrested protecting the Temagami? Harris doesn't mention his own experience with the Rae government. In 1993 I brought representatives from several environmental organizations (including Harris) with me to meet four Rae cabinet ministers to push for tough regulation of one of Canada's worst polluters, the pulp and paper industry. Rae passed those regulations. The only North American jurisdiction to publish tougher standards was Mike Harcourt's NDP government in B.C.

So much for the issues Harris addressed directly. It's what he skirted that is most troubling. During the 2004 election the Green Party published both a short and a long form

of its platform. After several critical pieces (including mine) appeared, the long form was taken off the website that Harris directs readers to. Why won't Harris acknowledge and defend his detailed platform?

Worse, Harris won't answer the critique that his pro-market stance undermines environmental progress. Instead, he merely states that under his leadership the Green Party demonizes neither business nor labour. We aren't talking about choosing flavours of ice cream. The debate is about modes of economic decision-making. Do we rely on price signals and the profit motive (as Harris suggests)? Or, do we use public investment and regulation? Business and labour understand what's at stake. Big business lobbied against Kyoto, and is currently attempting to prevent improvements to Canada's Environmental Protection Act. Labour supports environmentalists in these and other areas. In my own career, I've enjoyed support for tough environmental campaigns from CUPE, CEP, CAW, USWA, OPSEU, CUPW, ATU, HERE and others.

Canada invests public dollars in education, infrastructure and health because these are areas where working together produces better results than the marketplace. We all have an intimate and urgent stake in the air we breathe, the water we drink and the soil that produces our food. Taxing commercial access to these common goods neither protects them nor reflects the fact that we all need them.

If Harris can't coherently defend the centerpiece of his approach, there is no reason for environmentally concerned Canadians to vote Green.

— Gord Perks

Two-tier health care and the Supreme Court

Making sense of the *Chaoulli* decision

Selected and edited from the Inroads listserv by Harvey Schachter

POLITICAL DRAMA THIS PAST SPRING FOCUSED ON WHETHER THE Martin government could survive its budget vote in the House of Commons. But more significant news was the Supreme Court ruling that upheld Dr. Jacques Chaoulli's challenge to medicare. In the wake of the decision, members of the Inroads listserv argued the meaning of the decision, for health care, freedom and democracy.

From: Tom McIntosh

If you actually read the *Chaoulli* decision it is a little different than the instant pundits are assuming. Justice Marie Deschamps, who declined to enter into the Canadian Charter part of the debate, writes for the majority, "The scope of the Quebec Charter is potentially broader than that of the Canadian Charter and this characteristic should not be disregarded." That means it is not clear that

the Quebec law, or similar provincial laws, violate the Canadian Charter. Furthermore, she goes on to say that "there are a wide range of measures that are less drastic and also less intrusive in relation to the restricted rights." That means the government could achieve its objective with different means.

So the door has clearly been left open for the government of Quebec to amend the offending statutes to preserve the restriction on purchasing private insurance. It is

premature for anyone to declare victory or concede defeat.

What is needed now is the long-delayed public debate on the kind of health care system we want – a debate that is open and honest about the tradeoffs involved in choosing one model over another.

Tom McIntosh is director of the Health Network of the Canadian Policy Research Networks and associate professor of political science at the University of Regina.

From: Jan Narveson

Perhaps it is a mistake to have a constitutional commitment to the things the Charter aims at: "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." Still, there it is – in the Charter (section 7).

American blogger Scott Lemieux says: "You'll note that this is simply a 'due process' clause, similar to the one in the 5th and 14th amendments in the States. There is no substantive right to buy private health insurance, or indeed any substantive rights at all." I would have thought that the right to life is substantive. For example, it entails that citizens can expect their government to pass a law against murder. Perhaps Lemieux thinks that the expression "principles of fundamental justice" is meaningless. I don't think that courts see it that way, nor do I.

What the court found is that the operation of the medical system, as it stands, deprives some people of the right to do what in context seemed to be necessary for maintaining their lives.

Jan Narveson is a professor of philosophy at the University of Waterloo.

From: Gareth Morley

The key question is institutional. Justice Deschamps says that the restrictions on private insurance were not necessary to protect the public system. For all I know, she's right. For all I know, Justice Deschamps would make an excellent minister of health. But if she were minister of health, then she would face some political accountability if she turned out to be wrong.

A few months ago, the Court rejected the claim of parents of autistic children that they had the right to provincial funding of Lovaas treatment under section 15, the equality clause. That was a hard decision, but I think it was the right one. Scarcity means someone has to make choices about the allocation of resources, and needs to know what the opportunity costs are. Courts can't play that role. Courts make their decisions based on evidence put before them by parties that, in the adversarial system, control the process. The traditional rules of standing and evidence are designed to keep the court focused on the dispute between the parties.

I don't know about section 1 of the Quebec Charter, but section 7 of the Canadian

The Inroads listserv is a means to link readers of the journal and others interested in policy discussion. With about 125 subscribers, it offers one of the few chances for people of diverse views to grapple with social and political issues in depth.

To subscribe, send an e-mail note to listserv@post.queensu.ca with your name as in the following example: `subscribe inroads-l Jacqueschaoulli@hotmail.com`

Charter was clearly intended to be restricted to procedural issues, and its authors were concerned with invasion of social policy by unelected courts. The Court first ignored those restrictions back in 1985 in the *Motor Vehicle Reference*, but claimed that it could be trusted to keep itself restrained, and would not become a superlegislature.

In the two decades since then, the courts have decided abortion, same-sex marriage and capital punishment (in other countries, no less), have made refugee policy unworkable, and have basically rewritten police powers and criminal procedure. Up until last week, they were still somewhat restrained about the core tax-and-spend areas of policy, but those days are now over. I doubt that left or right will consistently like the result.

Another thing that disturbs me in the fallout from *Chaoulli* is the sheer cowardice of the politicians in the face of an imperialist Court. I am for same-sex marriage and two-tier medicine. So, in a sense, I welcome our new overlords. But I have trouble with the Paul Martins of the world who thought that same-sex marriage and two-tier medicine were terrible, until they were blessed by the courts and became inviolable. I can understand wanting to shift responsibility and therefore blame. But what happens to the ever-narrowing space of democratic decision-making?

Gareth Morley is a Vancouver lawyer.

From: Matthew Barlow

So Gareth Morley is for two-tier medical care. So what about all the working-class people in my neighbourhood of Saint-Henri in Montreal who can't afford it? Or, for that matter, those people in Strathcona, Vancouver? Or Pointe-Saint-Charles in Montreal? Does the fact that they cannot afford to pay for their medical care make them second-class citizens? Will Mr. Morley, or anyone else who thinks two-tier medicare in Canada is a good thing, come down to Saint-Henri, or the east side of Vancouver, and tell the people who live there that they are second-class citizens?

I was raised in a Canada that took pride in its protection of the weak, that argued the measure of the greatness of Canadian democracy was the means and ways in which it protected its weakest and most vulnerable citizens, that was based on Pierre Elliott Trudeau's "Just Society."

Two-tier medicare does not jibe with the Canada that I grew up in, nor the Canada that I believe in. Perhaps there is something to be said for Gilles Duceppe and his ilk, who believe that an independent Québec will protect its most vulnerable citizens.

Finally, I reject the notion that I – and other Canadians – are sheep. I just read the most depressing article by Allan Gregg in *The Walrus*. He argues that Canadian politics have lost their bite because politicians and the populace are beholden to pollsters. Fine

words coming from a man who was the old Tories' chief pollster and is currently chair of the Strategic Council, a market-research conglomeration. The basics of Gregg's argument is that we are sheep. I reject that outright. I am young(ish), I have definite ideas about Canada and our history and contemporary culture. Does that mean I don't count if we are a nation of sheep? Why is it that Canadians are so meek and mild-mannered? This list proves we are not. So why isn't anyone asking questions like whether or not my neighbours in Saint-Henri are second-class citizens?

Matthew Barlow teaches history at Concordia University, where he is also completing a PhD in Quebec history.

From: Gareth Morley

But, Matthew, you beg the question. Would allowing people who can afford private insurance to obtain it hurt those who can't afford it? That is precisely what we might argue about.

I don't really know, and I don't think the Court does either. I suspect that it wouldn't; the private insurance option would improve public health care. (The effect will be relatively small, because no private insurer will really be able to compete with most publicly funded care, and because the United States already serves as a private tier for many single procedures.)

Take resources. Let's assume there is some political upward limit on the amount of taxes a provincial government can take in, and a downward limit on the amount it can spend on non-health care items like roads, schools and daycare. On those assumptions, there is a limit to the budget for public health care. Two-tier medicine can cover a lot of sins, but the only kind I would be in favour of would

require those who use a private provider to contribute the same to the public system as anyone else. It would follow that a private option, to the extent that it is used, would increase the resources available for the good people of Saint-Henri.

A health economist would protest at this point that those added resources might well go largely to administrative costs and provider incomes. Indeed. So we have to turn to incentives. No one really knows what incentives public health authorities operate under. If private insurers are able to make a go of it, that will be for services where demand outstrips the public system's ability to supply. The existence of a private market will show up this fact. Will public health authorities shift resources to those areas? If they did, then it would improve the health outcomes of the poor. I imagine there is some risk that the private insurers would consider this unfair competition, and would exercise some political influence to prevent it. At a minimum, it isn't obvious that the health outcomes of those left in the public system will be worse, and, in fact, it requires some pretty fancy argumentation to make that case.

As for Canadians being sheep, you don't need to be so sensitive. I'm a Canadian. My parents are Canadians. My wife and daughter are Canadians. Just look at what Jack Layton had to say today about clear judicial overreach in an area sacred to social democrats: it's a "wake-up call." Tommy Douglas or J.S. Woodsworth – even M.J. Coldwell – would surely have a fiery speech about the judicial bootlickers of their plutocratic masters worked out by now. I am ashamed for my generation.

Every human being has a right to life, and to personal security, inviolability and freedom. He also possesses juridical personality.

— Quebec Charter of Human Rights and Freedoms, section 1

From: Garth Stevenson

Unlike Matthew Barlow, I don't find two-tier health care particularly scandalous, nor do I think it will make anybody a "second-class citizen." It exists in almost every country except (theoretically) in Canada. More to the point, I think it is inevitable whether I approve of it or not. Those who can afford to do so are already deserting the public system. The late Robert Bourassa went to the U.S. – Johns Hopkins health centre – for treatment of his cancer, and I certainly don't blame him for that; I only wish he had gone sooner.

On a historical note: Trudeau's "just society" was mostly smoke and mirrors. The prime ministers who created our welfare state (with a little encouragement from the CCF-NDP) were named Mackenzie King, Louis Saint-Laurent and Lester Pearson.

If two-tier health care is really contrary to Canadian values, why don't we abolish private schools? Or first-class accommodations on Via Rail? If I like to eat a hot meal on the train and wait for it in a lounge rather than standing in line for an hour at Union Station like a refugee, does that make me un-Canadian? Does it make the people who ride in the other part of the train, as I did in the days when I had a lower income, second-class citizens? I think not.

What is really un-Canadian, and quite different from the Canada of my youth, is the growing tendency to impose some litmus test of ideological conformity for being a "real" Canadian. We used to criticize our American neighbours for this sort of thing, but in our efforts to distinguish ourselves from them we are starting, rather ironically, to resemble them.

Having said all that, I am increasingly disturbed, as is Gareth Morley, by the increasing

practice of public policy being made by the courts rather than by our elected representatives, whether it is medicare or same-sex marriage or the response to Quebec's independence movement. This practice, rather than the welfare state, is the real legacy of Trudeau's lengthy term in office.

Garth Stevenson is a professor of political science at Brock University.

From: Matthew Barlow

Gareth, allowing those who can afford private insurance to obtain it does hurt the poor because it tells them they're second-class citizens – they can't afford the better health care, so the hip replacement for my neighbour here in Saint-Henri isn't as important as the one for the guy living up the hill in Westmount. Simple as that.

As for the economics, you might be very right; it may work out that this helps the public system. But it still divides our society even more into the haves and the have-nots. And that is precisely what I have an issue with: it betrays Trudeau's Just Society and our social-democratic roots, not to mention ol' Tommy Douglas.

As for whether Canadians are sheep, I really have issues with the stereotyped portrayal of us good little Canadians, polite and baa-baaing behind our leaders. We have a leadership deficit right now, not just a democracy deficit. Our leaders are sheep; they go only so far as the latest poll tells them to go, as Gregg's article makes clear.

As for generations, well, it seems to me that I read *mea culpas* from the baby boomer generation everywhere I turn. It doesn't change the situation we're in right now, and it doesn't change the situation we're going to be in with the advancing years of the



JACQUES CHAULLI The Supreme Court of Canada found in favour of the 53-year-old physician from Montreal, ruling that the Quebec government cannot prevent people from paying for private insurance for health-care procedures covered under medicare.

From: Jan Narveson

Gareth wrote, "Would allowing people who can afford it to obtain private insurance hurt those who can't?" Note that the assumption of the word *hurt* in

that context is this: would they be worse off under non-public provision of health services? The very possibility that maybe, just maybe, it matters that under public provision it is paid for by others, involuntarily, is dismissed out of hand. Why?

Note that it is not dismissed out of hand in the case of foreigners. We Canadians aren't taxed to provide health care for, say, Bolivians but only for fellow Canadians, even though the two cases may be equally needy. The implication is that the Canadian government is allowed to raid the pockets of its citizens in order to help others of its citizens. It's interesting how many of today's political commentators make that assumption unhesitatingly.

But I don't.

However, at the same time I have no doubt at all that we could all, including the worst off among us, do better if government simply got out of the health care business altogether and let this matter take care of itself – let people take care of themselves, and one another, in whatever ways they think best.

boomers, and it's a burden that those of us who come after have to shoulder, whether we want to or not. But it's our responsibility as Canadians to shoulder this burden, just as it's the responsibility of all Canadians to shoulder the burden of a health care system that doesn't differentiate between someone from Saint-Henri and someone from Westmount who both need hip replacements.

From: Henry Milner

I wonder where the real problem is. Is a court imperialist when it interprets the rights that the politicians, with the approval of Canadians, put into federal and provincial charters of rights? Is it possible to say to the courts: ignore what is written in these charters and just leave the contentious decisions to the politicians? Surely the problem is that a bunch of "what if" questions that should have been asked before the various charters became law were not asked.

Henry Milner, co-publisher of *Inroads*, is Visiting Fellow (Strengthening Canadian Democracy) at the Institute for Research on Public Policy.

Today Canadians pay two ways for health care: in tax dollars, and in days, months, even years spent waiting for important services. The private provider will go for this latter set – which is almost everybody. Its pricing will be such as to make it worthwhile for a lot of these people to wait less long by paying more. (Those who go to the United States and have for years are willing to pay a *lot* more for this. Even there, someone whose time is worth \$100 per hour could find it a bargain to get a \$20,000 operation that gets him fixed six months earlier.)

By the way, all of Matthew's problems about "second-class citizens" are malarkey (although it is the kind of malarkey that induced our politicians and our people to go for this absurd system in the first place). If the citizens of Saint-Henri get moved up the line by six hours out of the eleven they would otherwise have to wait because the people who would have been ahead of them have decided to buy private services instead, those citizens are in the position of people moving up from Toyota Echos to Toyota Corollas; the fact that others are driving in Lexuses or Jaguars is beside the point from their perspective.

From: Gareth Morley

All public policy involves infringing the liberty and security of some for the benefit of others. Any allocation of resources in health care (or for highways or control of toxic substances, and so on) involves balancing risks to life. The key question is whether the court can substitute its own judgement of the way in which the legislature has balanced those interests, or should accept that of the people accountable to the voters. In legalese, the question is whether the courts

should "defer." This is not really a question of interpretation of language, or a specialized issue for lawyers. It is about institutional politics.

When the charter was first proposed, there was some debate about whether it would allow the courts to usurp the role of elected politicians. Some of this debate focused on the wording of section 7: "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." Those words present no obvious limit to the ability of a court to say that the government is not governing as it should.

In 1981, the assistant deputy minister for public law in the federal Department of Justice, the deputy minister and the minister (one Jean Chrétien) all testified that "fundamental justice" meant that the courts would review laws only to see if the procedures provided were up to snuff. They would *not* decide whether the law was substantively a good balance. Chrétien specifically said that abortion and the death penalty would not be subject to judicial review under the Charter.

Chrétien and the justice department officials were supported in their interpretation by the Court's rulings under the Diefenbaker Bill of Rights, which had interpreted the principles of fundamental justice as solely the right to an unbiased decision maker and to a hearing (what lawyers think of as procedural rights). They were concerned about this question because of the history of American constitutional jurisprudence. In the early part of the 20th century, the U.S. courts struck down state laws limiting work hours because these laws took away liberty of contract without "due process."



THE SUPREME COURT OF CANADA The justices voted 4-3 (two seats were vacant at the time) that Quebec's policy violates its provincial charter. But they split 3-3 on whether it violates the Canadian Charter.
PHOTO: PHILIPPE LANDREVILLE/SUPREME COURT OF CANADA

To put it simply: The authors of the Charter, to get it passed, told Parliament and the country that nothing like *Morgentaler* or *Chaoulli* could ever happen.

In 1985, shortly after the Charter was enacted, the British Columbia government asked the Supreme Court to rule on a section of the Motor Vehicle Act which made it an "absolute liability" offence to drive a car while under prohibition or suspension. That means the driver could not argue that he or she did not know they were under prohibition or suspension. The Court struck down the law.

Note that the inevitable result of the Court's decision is that some people died and others were injured on B.C. highways who would not have died or been injured otherwise. Their "life" and "security of the person" were sacrificed to someone else's liberty. Not that there is anything wrong with

that. The most banal traffic decision involves that very tradeoff. But the question is who gets to make these decisions.

The Court considered what the federal officials had said four years earlier, and what their predecessors had said in regard to the Diefenbaker Bill of Rights, and ignored both. But Justice Antonio Lamer recognized the problem of keeping section 7 under control. His solution was to restrict the term *liberty* to the interest taken away when a person is incarcerated. This restriction was never completely accepted by the Court, and has withered away. So courts could now consider the substantive justice of a government measure affecting security, life or liberty (which is pretty much everything).

In *Rodriguez*, a woman with Lou Gehrig's disease challenged the assisted suicide law. She argued that it infringed her liberty and security of the person, and was substan-

tively unjust. The Court narrowly refused her request to strike down the law. The majority judgement, written by Justice John Sopinka, tried to narrow the ability of a court to strike down a law because it substantively interferes with “principles of fundamental justice.” He said that the court could only find this if the law was arbitrary *in the sense that there was no possible policy justification*.

In *Chaoulli*, Chief Justice Beverley McLachlin and Justice John Major retain the word *arbitrary*, but they (and Justice Deschamps) clearly require the government to prove more than that it made a call that reasonable people could disagree about. They require the government to prove the effectiveness of its chosen measure “on the evidence.”

Let me try to demystify this a bit. Many on the list are social scientists. They know that there are few matters of policy on which social science is incontrovertibly clear. So what “prove on the evidence” really means is that one side must provide a social scientist/expert witness whom the court prefers to the other side’s expert witness. The analysis under section 1 of the Canadian Charter [see p. 26] is not legal alchemy: it is simple (arguably simplistic) policy analysis.

The job of getting technical expert witnesses to communicate with generalist judges effectively is challenging even when it is a question of two engineers arguing about the cause of a bridge collapse. It isn’t always the best engineer who wins. The majority in *Chaoulli* adopt a completely naive model of how expert trials work. Add to that a naive model of social science, which they conceive of as basically like engineering.

The result is that courts decide policy questions on a technocratic basis, without

any real accountability. The courts justify this using the “dialogue” model between themselves and legislatures but, as Ted Morton points out, it is the kind of dialogue a diner has with a waiter.

Personally, I wouldn’t mind this so much if our political culture weren’t so chicken about the courts. If politicians reacted to court decisions by seriously contemplating the use of the notwithstanding clause, then maybe it wouldn’t be bad to inject an additional aristocratic-technocratic element into our political system. But let’s call it like it is. Paul Martin’s most important decision will likely prove to be his appointment of Louise Charron and Rosalie Silberman Abella to the Court, and he did that before he met the House. One piece of legislation (judges’ salaries) is one the courts ordered him to do, and another (gay marriage) is one he pretends the courts ordered him to do. What’s left for democracy?

From: Jan Narveson

I must admit to being entirely baffled by Gareth’s discussion here. Which “interest” is the government “balancing” when it establishes a health system which deprives individuals of the option of improving their health, or trying to, by arranging with someone who is willing and presumably able to provide them with this service in exchange for a fee which they are willing and able to provide?

Someone on the list argued that the law doesn’t actually deprive people of that option. I pointed out that the Supreme Court didn’t seem to understand it that way, and neither do all sorts of writers about our system. The denial of “two-tieredness” is precisely that, so far as I can see.



SUPREME COURT JUSTICE LOUISE CHARRON was appointed to the Court, along with Rosalie Silberman Abella, by Paul Martin on August 30, 2004. These appointments, writes Gareth Morley, are likely to prove Martin’s most important decision, “and he did that before he met the House.”
PHOTO: PHILIPPE LANDREVILLE/SUPREME COURT OF CANADA

this now, but the service in question doesn’t serve a lot of people very well – they have a way of dying while they’re waiting for this duly guaranteed service to be provided, or at least of enduring a long, long period of painful or incapacitated waiting. How can it rationally be argued that in these circumstances, someone who is deprived of the option of buying the service from someone who is willing to provide it is nevertheless having his *liberty* respected? That’s what Chaoulli was going on about. It seems to me he was right, and that at least some of the Supreme Court justices, perhaps surprisingly, agreed with him on the point. Given what the Charter says, why weren’t they (and he) right?

By the way, a principle of “fundamental justice” that would seem applicable is this: if you can’t put up, then shut up. That is to say: a government that claims it will provide a service to all, and is unable to do so, is violating fundamental justice, specifically by what amounts to lying to the citizenry. A government that says, “Here, we will try to do the following,” and then is found unable to do it, is in no position to turn around and prevent individuals from doing it themselves. Yet that is exactly what the health system does, isn’t it?

Now, how is this a “balancing” of something against some other, legitimate value? And in particular, how on earth can it be claimed that the something against which it is balanced is another liberty?

If you’re going to have a constitution that entrenches various liberties, then it’s one thing to argue that one liberty conflicts with another, but quite another thing to insist that the liberty to do something that is fully agreed to by all the involved parties and appears to harm no one else is nevertheless properly subject to legal restriction.

Commentators like Matthew may insist that allowing people to make their own medical arrangements does harm someone else. How? Suppose we claim that the government will supply everyone with medical services, and tax accordingly. It claims to do

From: Gareth Morley

Jan asks: “Which ‘interest’ is the government ‘balancing’ when it establishes a health system which deprives individuals of the option of improving their health, or trying to, by arranging with someone who is willing and presumably able to provide them with this service in exchange for a fee which they are willing and able to provide?”

Technically, the Quebec law did not prohibit “fee for service” but private insurance contracts covering procedures covered by medicare. But this is a technical point. In effect, the Quebec government prohibited a consensual economic transaction. It did so, it said, because it thought the existence of a private insurance option would undermine the quality of public care. The Court thought this was untrue, but I think we can agree that the matter is complicated. Suppose that the existence of private insurance makes it more expensive for the public system to get an hour of a doctor’s attention: in that case, the legislature, by prohibiting private insurance, is in effect controlling doctors’ incomes for the benefit of public patients. It is “balancing” between the liberty of the doctors, the would-be private insurers and the folks willing and able to pay for private care, on the one hand, and the security of the person of those patients who cannot afford private care, on the other.

What the court effectively said was that the balance did not meet the “minimal impairment test” with respect to the liberties of those like Chaoulli because there are other ways of addressing the problem (see France, Australia and other countries). My point is that this amounts to the court legislating, and that, in doing so, the court had to stretch

section 7 past its original meaning, and past the leading precedents.

Matthew argues that even if the ban on private insurance had no positive effect on the health of those in the public system, it is still good because inequality in health outcomes makes the poor “second-class citizens.” In effect, it is good to make the rich sicker even if it does nothing for the health of the poor. The Quebec government did not argue that it was motivated by this consideration (although Chaoulli did), and it does not appeal to me as a normative principle. In fact, I think it is wrong to deliberately harm sick people, not to help other, poorer, sick people, but just out of an egalitarian ideological stance. But the right forum for this argument is the political forum.

From: Matthew Barlow

Prof. Stevenson’s comparison of two-tier health care to Via One service is, as I’m sure he is aware, asinine. Via One is a luxury. Health care is a right in Canada, as the Supreme Court has just noted. Unfortunately, the Supreme Court took the wrong tack and argued that it is the right of Mr. Chaoulli to seek private health care, not the right of *all* Canadians to the same health care system and benefits.

As for our courts taking a public policy leadership, I too have concerns, as do Prof. Stevenson and Mr. Morley. However, as I have noted in a previous posting, that is not because the court is “activist” or otherwise seeking to impose itself on Canadian culture and society. My concern comes, rather, from the tepid leadership this country has suffered under for at least the past generation. I fully agree with what Mr. Morley has termed

the “chicken” nature of our politicians vis-à-vis the courts.

I find some solace in Jean Charest’s seeming to have finally figured out how to govern: he has talked of invoking the notwithstanding clause in response to this decision. Note that if Mr. Charest does invoke the notwithstanding clause, he will be doing just what Mr. Morley, Prof. Stevenson, Prof. Milner, I and others have derided our politicians for not doing: showing leadership. (And the snide comment to that is, it’s about time Mr. Charest showed any signs of leadership as Premier of Quebec.)

I am not necessarily opposed to a society in which some of us are better off than others, but I maintain that the Canadian model, as Michael Ignatieff has termed it, is one which sees these inherent inequalities somewhat eased by the government, and this, as far as I am concerned, is especially critical in the field of health care. Not a single one of us on this list, or anywhere among the great and amorphous middle class, has a right to better health care than the fine citizens of Saint-Henri just because we happen to have more money than they do. That is not democracy.

Prof. Stevenson is correct to point out that the welfare state was birthed by Prime Ministers Mackenzie King and Saint-Laurent, with the prodding of Tommy Douglas, but that doesn’t mean that Trudeau didn’t also attempt to ease the inequalities of society somewhat. Trudeau was correct to note that democracy is measured by how well society protects its most vulnerable citizens.

As for Prof. Stevenson’s comments about the ideological determination of a “real” Canadian, I am not suggesting that he and Mr. Morley are not “real” Canadians because they have a different point of view from mine. I

am arguing that my Canada, insofar as I believe in this country, is predicated on this Trudeauesque model of democracy. I don’t necessarily believe that two-tier health care is an Americanization of Canada. In fact, as I have steadfastly argued over the years on this list, I do not see the United States as a viable counterpoint or point of comparison to Canada because of the great disparity in population size among other things, including a wide cultural disparity. I am simply arguing for what I believe Canada to be. And if Prof. Stevenson thinks that is the imposition of a litmus test for “real” Canadianness, well, so be it. But he is incorrect.

If two-tier health care is really contrary to Canadian values, why don’t we abolish private schools? Or first-class accommodations on Via Rail?

— Garth Stevenson

From: Harvey Schachter

Without getting into the specifics of the debate on two-tier medicine, and without wanting to sidetrack it, I would like to pick up on Matthew’s comment that Jean Charest is showing leadership by talking of using the notwithstanding clause.

Quebec premiers have been much more willing to use the notwithstanding clause than premiers or prime ministers outside Quebec. That has created a big difference between Quebec and the rest of Canada with respect to how morally correct it is to use the notwithstanding clause – it probably also reflects a basic difference on collective versus individual rights.

So I don't think it's nearly as hard for a Quebec premier to use it as it is for, say, a Canadian prime minister – on a scale of difficulty from 1 to 10, with 10 high, for a Quebec premier it is maybe in the 2 to 4 range and for a Canadian prime minister in the 9 to 10 range. I'm not hard and fast on those numbers, but I believe the divide is significant. I'm not sure where it is for an NDP leader to talk about using it, given that party's devotion to the collectivity, but I'd put it quite high as well.

Beyond that, when unpopular rulings come down from the Supreme Court, it is arguably often tougher to accept those rulings than to rail against them. So, leadership for Jean Charest might be to say, against the bulk of public opinion, that the ruling is right, rather than to say it's wrong and, heck, I'll use the notwithstanding clause.

I'm not saying that the ruling is right, or that I support it – I'm just musing on whether leadership is going along or going against the grain. My suspicion is that, because it went against the grain, Mr. Charest's economic program, which I don't particularly like, showed more leadership than this talk about using the notwithstanding clause.

Similarly, is Stephen Harper showing leadership by opposing two-tier medicine, presumably to fall in line with public opinion, or should he be following his philosophical instincts and supporting two-tier medicine?

Harvey Schachter is a freelance writer.

From: Gareth Morley

As I understand it, Matthew says private purchase of health care should be banned, even if banning it does nothing to improve the quality of public health care. I'd like to

hear that justified with something other than patriotic rhetoric and an appeal to the shade of Tommy Douglas (who might, or might not, agree with you – we'll never know and, surely, it can't matter).

Obviously, on a utilitarian account, that position is wrong. Allowing X to buy private health care reduces the time when X has to suffer crippling knee pain. It increases X's chance of spending time with her grandchildren, to their benefit and hers. X gives up money, but she prefers to reduce her aggregate wealth to get these things. So, by a simple utilitarian analysis, forbidding her from doing this causes unnecessary pain and denies harmless pleasures, and so is wrong.

On a Rawlsian view, the law is unjust. Arguably, it interferes with X's rights. But even if it doesn't, it harms X without benefiting anyone less advantaged than X. So it is contrary to the minimax principle.

In effect, Matthew is saying it is okay to cause pain (quite literally) for no other reason than that others (by hypothesis, unavoidably) feel that same pain. How Canadian is that?

From: Jan Narveson

There are two ways of altering an inequality: you can reduce the incidence of the unequal quality in those who have more, or increase it in those who have less – or, of course, both.

Now, I don't suppose that Matthew is in favour of reducing inequalities in health by making the healthy as sick as the rest of us. But he is in favour of forcibly preventing people from taking advantage of opportunities to make themselves less sick, in any case where those opportunities are extended by anyone other than the government.

Why?

If his answer is that he is an egalitarian, then he'd better ask whether he is so in the first sense indicated. Hey, let's have a government program to reduce all of us to the level of the least well person in society! Equality, folks!

I don't know why he isn't in favour of that, if he's in favour of equality. But I suspect that, on reflection, he will find that he's *not* in favour of equality.

From: Patrick Balena

Gareth, I do think that two-tier health will make things worse for those in the lower tier. After all, isn't the scarcity of needed health care resources the reason for the whole two-tier debate in the first place?

What is happening is that people with more wealth want a higher priority for essential medical services, based on their ability to bid higher for them. If allowed to happen, that will raise the costs for the public system by creating a bidding war for available resources.

Of course, in the international arena the bidding war already exists. For instance, Canada poaches doctors from countries like South Africa. Within Canada, larger centres often poach providers from smaller communities. But do we really need a domestic class dimension to this as well?

I also know that some health care providers would like to leave the public system not to raise their incomes, but to be free to practise the way they prefer, with a smaller caseload. Within the existing system, they cannot easily afford to do this. But with a second, higher-paying tier, they could

perform fewer services for the same pay. In other words, the lifestyle and professional preferences of a significant number of health care providers, combined with a two-tier system, could actually tend to reduce the overall number of health services performed. This, in turn, would further intensify the bidding war.

Now a market system might eventually ease tightness by encouraging investment in providing more services. Unfortunately, the lag time between investment and return, when it comes to training doctors, is quite considerable and more likely to result in a glut of health services after the boomers have passed on than it is to provide services in time for peak demand.

So no matter how we organize a health care system, we're talking about rationing – there's no getting around it. The only question is whether the rationing of medically necessary services proceeds mostly according to the assessed need of patients, or according to individual spending power.

When it comes to distributing things like cars or houses or various consumer goods, Canadians don't mind how unequal things are. With education, they're a bit fussier about fairness although they don't insist on it. But with medical care, I think most Canadians see the essential injustice of two-tier as just too much to take. Canadians lack ideological awareness – their reaction to two-tier health comes from the gut level. Of course, a generation or so of two-tier might well serve to cure this deficiency, with important long-term consequences in many areas, not just medical care. ■

Patrick Balena lives in Vancouver.