

WITH John Carpay, Executive Director, Canadian Constitution Foundation



JOHN CARPAY is Executive Director of the Canadian Constitution Foundation. He has served as Special Assistant to a federal cabinet minister and as an Executive Assistant to a Member of Parliament, and has also worked in sales and fundraising. Carpay earned his B.A. in Political Science at Laval University in Québec City, and his law degree at the University of Calgary. He was called to the Alberta Bar in 1999, and practiced civil litigation with Rooney Prentice in Calgary before joining the Canadian Taxpayers Federation as Alberta Director in 2001. In 2005, he became the first Executive Director of the Foundation, an independent and non-partisan charity whose mission is to defend constitutional freedoms through education, communication and litigation. He was interviewed following a speech to a Frontier luncheon February 8, 2007.

Frontier Centre: Can you briefly describe the Supreme Court's 2005 Chaouilli decision?

John Carpay: The Supreme Court majority ruling said that people have the right to use their own after-tax money to access healthcare services outside of the government's monopoly, through the vehicle of private medical insurance. The Court basically said that the ban on private health insurance creates a virtual monopoly. Only the very wealthy can afford to obtain medical services outside of that monopoly by going to the United States or the United Kingdom, so that everyone else – people who are not very wealthy – are forced to suffer on waiting lists. The Court said that violates the Charter rights to life and to security of the person.

FC: What was the decision's import for laws that outlaw private medical insurance? Would those laws effectively be null and void?

JC: In Québec, they would. Outside of Québec, however, the decision is not technically binding because of the way the decision split, with only three judges ruling that it was a Charter violation, three judges ruling it was not a Charter violation and the seventh judge making no ruling on the Charter outside of Québec. It is a very strong precedent outside of Québec, but not binding.

FC: Wasn't the original Chaouilli decision in 2005 placed in limbo awaiting a response from the government of Québec? What's the current status of the decision? Has it taken effect?

JC: There has been a partial response of the Québec government to comply. There's a short list of different surgeries for which people can now purchase private insurance. I expect that list eventually to grow longer with time, now that it exists.

FC: Can you tell us about a similar case in which you are involved, the Murray case in Alberta?

JC: Bill Murray was denied Birmingham hip resurfacing surgery. The Alberta government said that, at the age of 57, he was too old. So he's suing the Alberta government and claiming age discrimination but also asserting his Charter right to purchase private health insurance. If he had have been able to purchase private health insurance, he wouldn't have had to wait and he wouldn't have had problems getting access to that surgery. We're hoping that his case is going to expand the Chaouilli decision into Alberta and other provinces in the future.

FC: Why did the *Canada Health Act* forbid private insurance in the first place? Other countries with universal-access, public healthcare systems don't. Was it just an error in public policy?

JC: I think it was a grave error in public policy especially when you compare us with other countries. France, Germany, Australia, Singapore, Japan and Switzerland, among others, have better access to health services, better outcomes, and lower costs, and these countries all have parallel private healthcare insurance and healthcare services. Canada is unique, along with Cuba and North Korea, in making it illegal for citizens to spend their own money to preserve their own health.

FC: You point out that Canadians are allowed to buy health insurance for their pet animals, but not themselves. Please comment.

JC: It's both funny and sad that we have free-market efficiency and choice in so many other areas in life, but not this one. We have all kinds of varieties of free-market insurance for other things, auto insurance aside in some provinces. Food is more essential to life than healthcare because, without healthcare, you might still live for a while even if you're sick, whereas without food you die pretty quickly. So food is more essential than healthcare, and yet we have a free market in food and everybody gets fed. There's diversity, there's choice. And there are different levels

as well. Not everybody can afford to eat steak all the time.

FC: Have any of the justices who are now on the Supreme Court but who were not included in the seven who voted in the Chaouilli case indicated what they would have decided?

JC: No. They're pretty circumspect about things like that. Occasionally they say controversial things, but they're very careful about not saying things that would show their hand about how they would decide a future case. They're very cautious that way. The new judges that were not on board in June of 2005 have not tipped their hand as to how they would vote in the future. The next case of that sort is probably five years away, possibly longer. Who knows what will be happening at that time? The three dissenting judges might no longer be on the Court.

FC: Besides insurance, another important element in the Medicare monopoly is widespread state ownership of provider facilities. If we open up the insurance market, do we have to do the same thing for hospitals and clinics?

JC: Thirty percent of healthcare spending in Canada is already private. We have a flourishing private market in dentistry and vision care. Most clinics are already private. Doctors already pay rent for their offices, pay their staffs, pay for equipment and so on. Then they bill the government for various services they provide. So we already have a quasi-private system. I think the bogus political red herring is that people confuse private delivery with a pure privatization, where every person fends for himself or herself. They're not the same thing. You can have a publicly funded system with private delivery, so you have efficiency incentives, and yet still have access for everybody regardless of income. But there's confusion about that. I think the confusion will go away with time but there's still a lot.

FC: I'm sure you are familiar with the battles waged by Dr. Mark Godley and his colleagues at the False Creek clinic in Vancouver. Isn't it ironic that both in B.C. and Manitoba it's another provincial department, Worker's Compensation, that is contracting for services?

JC: It is ironic. Dr. Brian Day of the Cambie Surgery Centre in Vancouver says that his clinic has treaded NDP politicians at the highest levels. He left it ambiguous as to who it was. I'm not a doctor, but I suspect that doctors have that same confidentiality requirement that lawyers have so I assume that Dr. Day was adhering to some professional code of ethics

by not disclosing the name of the patient. It is ironic. It's also interesting that the first and most well-known and the most successful private clinic emerged and was set up under an NDP government. That should be of encouragement to everyone.

FC: Every time the Province of Alberta has threatened to bust open the *Canada Health Act*, it's backed down in the face of pressure from Ottawa. Can we expect more courage in the future?

JC: I don't want to predict what the Alberta government will do. I hope that the Stelmach administration will be more receptive to giving Albertans choice and better access than the Klein government. Klein's people were great on rhetoric but did nothing to reform the healthcare system. Premier Klein often said the right things but his actions were limited to pouring billions of tax dollars into an unaccountable and inefficient government monopoly.

FC: When we enacted our healthcare monopoly, we were considered first in the world in medical care. Now, in terms of the effectiveness of healthcare spending, the World Health Organization (WHO) rates us 30th. Do you think there's a connection?

JC: I have often referred to the WHO study because for some people it has more credibility than the Fraser Institute. To those people, I would say, "If you don't like what the Fraser Institute says, then listen to the WHO, whose ranking, by the way, is actually lower than what the Fraser Institute gives us." I don't think the Fraser Institute has done a global ranking, but in terms of various health outcomes, we come in 24th place, 17th place, 13th place – at least we're not 30th. Even the Fraser Institute is more generous than the WHO. I'm glad that both sources are available.

FC: What's your personal opinion about the state of medical care in Canada? Does access have any meaning in a context of waiting lists and delays?

JC: I think timely access is a principle that's missing from the *Canada Health Act*. If we are going to persist in having federal legislation in an area where the Constitution says unequivocally that it's a provincial jurisdiction, then timely access should be added as a fundamental principle. Of course, if that is added as a principle, I don't know if it can be achieved.

The whole idea of federalism is that you have ten laboratories in which you experiment with education policies, health care policies, social policies, labour policies and so on. The *Canada Health Act* severely

restricts us from having that experimentation because the provinces are terrified of doing anything that might jeopardize federal funding. Theoretically, the freedom is still there but Alberta is the only province in Canada that right now has the money to exercise it, and that might not always be the case. Alberta could experiment and tell Ottawa, “No thanks,” for the money. But practically speaking, provinces do not now have the freedom to experiment in the way that, according to the Constitution, they’re supposed to be able to experiment, as they do in other areas.

FC: Why have the groups and agencies that usually defend consumer rights been so silent in the case of socialized medicine?

JC: I think part of it is an irrational fear which stems from the confusion of private delivery and purely private funding. Another thing that is often claimed by these groups is that health care should not be a commodity and that patients should not be consumers. I don’t know what they’re getting at. As a consumer, I get treated a lot better in other field than the way I have seen loved ones getting treated in hospitals, where you’re just considered a drain on the hospital’s budget. I have never heard an explanation why it’s such an evil thing for us to be healthcare consumers. It’s never been explained to me why it’s necessarily a bad thing for healthcare services and healthcare products to be commodities and yet people from some quarters rail against that possibility: “We’re not consumers and this is not a commodity,” they say. Why not?

FC: Our Swedish friend, Johan Hjertqvist, believes that the healthcare monopoly will not be able to withstand tremendous consumer pressure from the “baby boom” generation as it enters the time of life where we consume the most health services. Do you think that will be the political *dénouement* of monopoly Medicare, because wealthy “baby boomers” won’t stand for waiting?

JC: I think your question contains the obvious answer in it. People now in their sixties and seventies will not put up with nine-month, six-month, twelve-month waits, especially not while they’re in pain.

FC: Do you find it odd that the *Charter of Rights* makes no mention of our common-law right to property? Should it be rewritten to include that?

JC: I think the right to own and enjoy property is a fundamental human right. It is as important as some of our other rights like freedom of expression, freedom of speech, freedom of association, the right to a fair trial and due process in the area of criminal law. I think the right to own and enjoy property as a basic human right is on par with those, so the Charter has a missing gap. It will be hard to fill because you would need at least eight governments, you would need the federal government and seven provincial governments at the same time, not consecutively, but simultaneously, having that political will to make that change to the Charter. So it’s not likely to happen any time soon.

In the interim, we need to develop a property-rights jurisprudence through cases like *Chaouilli*, where the Court may very well continue to denounce pure economic rights and property rights but at the same time recognize that you and I can spend our own money to access healthcare outside the government’s monopoly. Arguably, it is an economic right. The Court has said that it’s not an economic right. Ultimately, it doesn’t matter what we call it as long as we have it. We need to have the right to earn and own and enjoy property. If that has to be created over time using very different language, then so be it.

FC: Do you think a formal constitutional framework of the American sort is preferable to the common-law, British-style one that Canada inherited? Was the *Charter of Rights* a good idea?

JC: We’d be fooling ourselves if we thought that we didn’t have freedom of speech and freedom of religion and freedom of association prior to the Charter. Unfortunately some people believe that the Charter gave us rights. Here’s the crucial element, regardless of whether you have a British-style system of parliamentary sovereignty or an American-style constitutional democracy where judges have legislative power: Rights and freedoms flow from the culture. We’re all aware of the former Soviet Union and communist China and other countries across the world that have beautifully written constitutions guaranteeing all sorts of rights and yet, if there isn’t a culture of freedom and responsibility there, you can’t have one without the other. Without that underlying culture, then your freedoms are going to crumble regardless of whether you have parliamentary sovereignty or constitutional democracy.