

# Health Law Bulletin

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## Bill 33 now in force... authorizing private clinics and private health insurance in Quebec

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On December 13, 2006, the government of Quebec adopted Bill 33 on Quebec's health care system—*An Act to amend the Act respecting health services and social services and other legislative provisions*—(the “Act”), all sections of which came into force on January 1, 2008. This Act comes in the wake of a major controversy respecting Quebec's health care system.

This bulletin is an update of the one we published in June 2006 to take into account amendments that were made between Bill 33 and the Act, as well as the *Regulation respecting the specialized medical treatments provided in a specialized medical centre*<sup>1</sup>, the *Regulation respecting the issue of permits under the Act respecting health services and social services*.<sup>2</sup> and the *Regulation respecting the fees payable for the issue or renewal of a specialized medical centre permit*.<sup>3</sup>

### History of the Bill

The Act follows a major decision rendered by the Supreme Court of Canada in June 2005: the

*Chaoulli* case.<sup>4</sup> In that decision, the four majority judges held that the prohibition against taking out private health insurance was a direct threat to the life and safety of patients, thereby infringing the Quebec *Charter of Human Rights and Freedoms*.<sup>5</sup> According to the judges, the delays inherent in the waiting lists in the public system increase the suffering of some patients, can make their injuries irreparable and can even lead to their death. The Supreme Court thus invalidated two provisions of Quebec laws which prohibited taking out private insurance — section 11 of the *Hospital Insurance Act*<sup>6</sup> and section 15 of the *Health Insurance Act*.<sup>7</sup>

According to Justice Deschamps, the prohibition on private health care is not necessary to preserve the integrity of the public system and it does not constitute a minimal measure justifying impairment to human rights.

In addition, three of the four majority judges held that these provisions also infringe the rights

<sup>1</sup> Came into force on January 1, 2008.

<sup>2</sup> The regulation will come into force within 180 days following its publication in the Gazette officielle du Québec.

<sup>3</sup> This regulation will come into force within 15 days following the date of its publication in the Gazette Officielle du Québec.

<sup>4</sup> *Chaoulli v. Québec (Attorney General)*, [2005] 1 S.C.R. 791.

<sup>5</sup> *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, s. 1.

<sup>6</sup> *Hospital Insurance Act*, R.S.Q., c. A-28.

<sup>7</sup> *Health Insurance Act*, R.S.Q., C. A-29.

to life and security guaranteed by the *Canadian Charter of Human Rights and Freedoms*.<sup>8</sup>

In response to this decision, on February 16, 2006 the Premier of Quebec and the Minister of Health and Social Services tabled a consultation document entitled *Guaranteeing Access: Meeting the challenges of equity, efficiency and quality*. Following public consultations which took place in the spring of 2006, in which almost 140 groups or individuals participated, Bill 33 was drafted and has now become law.

### **The Act's purpose: improve access to health care**

The Act sets up a mechanism to guarantee access to certain specialized services. It is aimed at both creating centralized management mechanisms and guaranteeing that users receive specialized medical services within prescribed times.

#### **Management of waiting lists**

With respect to management mechanisms, the Act requires that each hospital centre implement a central mechanism for managing access to specialized services in its various clinical departments. Thus, each hospital centre is responsible for managing its own waiting lists. The central management mechanism must include (i) rules that must be followed to enter a patient on the list for specialized services in any department, (ii) procedures to determine and communicate to the user the estimated date on which services will be received, and (iii) in cases where these services cannot be provided to the user on this date, the alternative measures that can be offered (i.e., new date to be agreed

upon with the user, the use of the services of another physician in the department concerned or the use of another hospital centre). This mechanism is to be implemented after consultation with the heads of the clinical departments concerned and the institution's council of physicians, dentists and pharmacists. Each hospital centre must also identify a person responsible for seeing that each clinical department head concerned ensures the proper operation of the waiting lists mechanism in his department, as well as for offering the alternative measures specified in the mechanism to users unable to receive the services they require on the date they were given. A report must also be made by the executive director to the institution's board of directors at least every three months on the effectiveness of the central access management mechanism for waiting lists, and in particular as regards to waiting times, calculated from the moment patients are entered on the access list to the time they receive the services they require.

Hospital centres have until December 2009 to implement, for all of the services of the centre's clinical departments, the central mechanism for managing access to these services. This mechanism must be put in place in keeping with priorities and according to the time limits established for each service by the Minister.

#### **Waiting times**

With respect to the second aspect, the guarantee that users will receive specialized services within a certain time, if the Minister of Health and Social Services considers that the waiting time for a specialized medical service in Quebec or in a particular region of Quebec is unreasonable or about to become so, he may take any measure necessary to implement alternative access mechanisms so that the service in question may be made accessible within a time the Minister considers reasonable.

<sup>8</sup> *Canadian Charter of Human Rights and Freedoms*, Part I of the *Constitution Act, 1982*, which constitutes Schedule B of the Canada Act, 1982 (UK) 1982, c.11, s. 7.

He must first obtain the consent of the government. Those measures the Minister prescribes may include requiring an institution to adjust its central access management mechanism or requiring agencies to review service corridors available to patients in order to facilitate access to the service in question.

Finally, when a user will not be able to receive a specialized medical service from the institution within a time the Minister considers reasonable, the person responsible for a hospital centre's central access management mechanism must notify the director of professional services who must make an alternative service proposal to the user in the system without delay. The Minister may also assume the cost of any service received in accordance with his directives in a specialized medical centre (which we will discuss below) or even outside Quebec.

It is interesting to note that the six-month period put forward during the public consultation in reference to targeted elective surgery in orthopedics and ophthalmology does not specifically appear in the Act. It is all now left to the discretion of the Minister, who should, however, take into account generally recognized access standards during his evaluation.

### **Specialized medical centres**

The Act also creates a legal framework for carrying on medical activities in specialized medical centres. However, the services such a centre may provide are limited. The Act defines a "specialized medical centre" as a place, outside a hospital, that is maintained by an institution equipped to provide the medical services necessary for a hip or knee replacement, a cataract extraction and intraocular lens implantation or any other specialized medical treatment determined by regulation of the Minister, after consulting with the Collège des médecins. As we will see

below, this limited list corresponds to the specialized services covered by the opening made in private health insurance.

However, as set out in the Act, following a consultation with the Collège des médecins du Québec, the *Regulation respecting the specialized medical treatments provided in a specialized medical centre* adds a number of treatments to those provided for in the Act. These include, among others, cosmetic surgery, upper respiratory tract surgery, digestive system surgery, gynecological surgery, vascular and lymphatic surgery, breast surgery, orthopedic surgery, nervous system surgery, eye surgery, ear surgery, transsexual surgery, cutaneous surgery and breast biopsies. For a more detailed list of these treatments, see Part I and Part II of the Schedule of this regulation.

A specialized medical centre may only be operated under two options: (i) either the doctors practicing there are doctors subject to the application of the public health insurance plan exclusively or (ii) the doctors working there are exclusively doctors not participating in the public plan at all.<sup>9</sup> Thus, a specialized medical centre cannot be operated in part through doctors participating in the public plan and by others who are non-participating.

When the Minister adds another treatment to the list of specialized treatments, it must, among other things, take into account the risks associated with the treatment, the level of staff and amount of equipment needed to provide it, the type of anaesthetic used, and additionally,

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<sup>9</sup> A "non-participating professional" is a doctor who practices his profession outside the scope of the public health plan and whose patients alone assume payment of the fees. A doctor is prohibited from participating in the public health plan and being a non-participating professional for another party.

the length of hospital stay usually required. Any regulation can therefore provide that the surgery concerned can only be given under one of the two options indicated above, and also only at an associated medical clinic. This is what the government is doing in the *Regulation respecting the specialized medical treatments provided in a specialized medical centre* when it stipulates that a treatment requiring a postoperative stay exceeding 24 hours, as well as a hip or knee replacement, may only be provided in a specialized medical centre where the practicing doctors are exclusively non-participating.

Where a specialized medical centre only acts through non-participating doctors, all preoperative, postoperative, rehabilitation and home care support services must also be offered. Depending on the services offered, these obligations may also equally apply to a specialized medical centre where only participating doctors work.

If the Minister considers that the quality or adequate supply of medical services offered in Quebec would be affected by an increase in the number of non-participating professionals, he can also make an order suspending the possibility for some of them to become non-participating doctors. The suspension period cannot exceed two years, but it can be extended for the same period. The government hopes to thereby limit doctors moving from the public to the private sector. In response to certain delicate situations which the current Minister has had to face, the Act also provides that authorization from the Minister is required for a public or private institution under agreement to lease its facilities to a non-participating professional or to otherwise allow such a professional to use them. No legislative provision currently gives the Minister authority in this regard.

## Permits

The operator of a specialized medical centre must hold a permit issued by the Minister which is valid for a period of five years and which may be renewed, in accordance with the *Act respecting health services and social services*.<sup>10</sup> Within three years from the date the permit is issued, the operator of a specialized medical centre must also have the services provided in the centre accredited by an organization recognized by the Minister. The *Regulation respecting the issue of permits under the Act respecting health services and social services* establishes the conditions that must be respected by the permit applicant and the information that person must provide to support his or her application. *The Regulation respecting the fees payable for the issue or renewal of a specialized medical centre permit* provides that the fees payable for the issue or renewal of specialized medical centre permit are fixed at \$5,000. Despite the foregoing, if the permit indicates a number of beds that may be used for accommodation of the centre's clientele, the amount is increased to \$10,000. The fees will be adjusted annually based upon the Consumer Price Index for Canada as published by Statistics Canada.

## Who can operate a specialized medical centre?

The Act in question limits the definition of "operator" of a specialized medical centre to a doctor who is a member of the Collège des médecins du Québec. If the operator of the centre is a legal person or a partnership, more than 50% of the voting rights attached to the shares of the legal person or interests in the partnership must be held by physicians who are

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<sup>10</sup> *Act respecting health services and social services*, R.S.Q., c. S-4.2, s. 437.

members of that professional order. A producer or distributor of a good or service related to health and social services who is not a physician member of the Collège des médecins du Québec may not hold shares in the capital stock of a legal person operating a specialized medical centre or any interest in the partnership operating such a centre if such a good or such a service may be required by the centre's clientele before, while or after a medical service is provided. This is intended to avoid any conflict of interest.

A specialized medical centre must have a medical director, who must be a physician. The medical director is responsible for organizing the medical services provided, ensuring the quality and safety of those services and taking any other measure necessary for the proper operation of the centre.

Finally, the affairs of the centre must be administered by a board of directors or internal management board that includes a majority of physicians who are members of the Collège des médecins du Québec.

We can assume from the above restrictions that medical centres can use outside sources of financing, provided control of the day-to-day administration of the centre is held by physicians. Sophisticated and well-structured shareholder or partnership agreements will therefore be required to adequately protect such investments by outside investors who, in many cases, will provide a significant portion or even almost all the financing required, while leaving control to their partners.

### **Associated clinics**

An interesting idea emerged from discussions during the Clair Commission's work in 2000: the creation of associated clinics. This idea gained ground when the government included it

in its State modernization plan in 2004. It was restated in the consultation document published in February 2006 and is now an integral part of the Act.

The purpose of these clinics is to improve access to medical services by giving the public health system a new tool. The Act states that the Minister can allow, following a proposal by an agency which consulted with the regional panel of heads of departments of specialized medicine, any institution operating a hospital centre to become associated with a medical clinic for the provision of certain specialized medical services. These medical clinics may consist of private health facilities or specialized medical services centres where only doctors attached to the public health system practice. The advantage of this innovation is the complementarity between private and public at no cost to patients.

Before accepting an agency's proposal, the Minister must be convinced that it will improve the accessibility of the specialized medical services concerned and will not affect the capacity of the public health and social services network, in particular with regard to staffing requirements. After acceptance by the Minister, the establishment operating the hospital centre must enter into an agreement with the medical clinic specifying, among other things, the nature of the services to be provided, the minimum and maximum number of services that may be provided over certain periods, how those services are to be distributed on a quarterly basis to ensure their continued availability, the unit amount to be paid by the agency to cover the costs related to each specialized medical service provided in the clinic, and the monitoring mechanisms that will ensure the quality and safety of the medical services provided. Such an agreement has a maximum five-year term. The parties may not terminate the agreement

before its expiry, or amend or renew it without the Minister's authorization.

As opposed to the Bill, the Act now allows that the specialized medical services offered by an associated clinic need no longer be offered only to patients referred to the clinic by the institution that is party to the agreement, thus leaving the door open to each associated clinic being able to offer services concurrently to any other person who is prepared to pay the cost of the services that are not already covered by the public plan. Doctors who practice in such associated clinics must all be subject to the application of the health insurance plan for the purposes specified in the agreement. In addition, such doctors must have been appointed beforehand to practice in a hospital centre operated by an institution with which the clinic is associated, fully meet the requirements of the hospital centre and fulfil their obligations attached to the privileges granted them with a hospital centre as a doctor. Any agreement with an associated clinic may only be entered into if the specialist doctors offering the services covered by the activities of the clinic agree.

### **Private health insurance now available to Quebecers**

The final important aspect of this Act is the opening made to private insurance, in response to the Supreme Court decision in *Chaoulli*. This is not surprising, as the government had already announced its intention to respond to the highest court's concerns by strengthening the public health system while opening the door, in a limited way, to private insurance. This is exactly the direction taken by the Act, which for the moment limits the possibilities of turning to private clinics to three elective surgical procedures: hip, knee and cataract. For these three interventions, the offer of services is duplicated and allows part of the demand and the costs of the public sector to be moved to the

private sector. Quebec is thus maintaining its commitment to keeping the prohibition against using private insurance if there is not first guaranteed access to the treatments in question in the public system.

The government can add other medical or hospital treatments by regulations. However, such regulations must be preceded by a parliamentary commission. A regulation expanding the list of insured treatments has yet to be adopted. This opening to private insurance is not welcomed by everyone, as many people fear the creation of a two-tiered health system—one for the rich and one for the poor.

According to the Act, three conditions are currently necessary to be able to use private insurance for services otherwise offered by the public system:

- other than a total hip or knee replacement and a cataract extraction with intraocular lens implantation and care related to surgery or the treatment in question (preoperative, postoperative, rehabilitation and home care), the insurance contract or employee benefit plan must not include any service insured by the public plan other than those determined by the government by law or regulation;
- the insurance contract or employee benefit plan must include coverage for the cost of all services related to surgery;
- the coverage applies only to surgery performed in a specialized medical centre where only non-participating doctors practice.

The penalties imposed on insurers (or persons administering an employee benefit plan) who contravene the three conditions mentioned

above will be increased considerably compared to those currently in effect. In the case of a contravention, they may be liable to a fine of \$50,000 to \$100,000 and, for a subsequent offence, to a fine of \$100,000 to \$200,000.

The opening of private insurance is therefore targeted and limited as the medical and hospital services must be covered by a guaranteed access mechanism and be provided in a specialized medical centre where only doctors not participating in the public plan practice. On the other hand, surgeries or other procedures may be added to the list currently appearing in the Act by the simple adoption of a regulation.

### **Conclusion**

Despite the timid response to private clinics for care covered by the public plan and private

health insurance, the Act represents a step in the right direction in terms of providing private health care in Quebec.

Lastly, note that except for those provisions regarding the applicable penalties in cases of contraventions, the provisions relating to private insurance will be retroactive to June 9, 2006, as the Supreme Court of Canada gave the government of Quebec one year to correct the various infringements of individual rights.

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