No. 29272

COUR SUPRÊME DU CANADA
(En appel de la Cour d'appel du Québec)

E N T R E : **JACQUES CHAOULLI et GEORGE ZELIOTIS**

Appelants (Appelants)

E T : **PROCUREUR GÉNÉRAL DU QUÉBEC**

Intimé (Intimé)

E T : **PROCUREUR GÉNÉRAL DU CANADA**

Intimé (Mis en cause)

- et -

**PROCUREUR GÉNÉRAL DE L'ONTARIO,
PROCUREUR GÉNÉRAL DU NOUVEAU-BRUNSWICK,
PROCUREUR GÉNÉRAL DE LA SASKATCHEWAN,
SENATOR MICHAEL KIRBY, SENATOR MARJORY LEBRETON,
SENATOR CATHERINE CALLBECK, SENATOR JOAN COOK,
SENATOR JANE CORDY, SENATOR JOYCE FAIRBAIRN,
SENATOR WILBERT KEON, SÉNATEUR LUCIE PÉPIN,
SENATOR BRENDA ROBERTSON and SENATOR DOUGLAS ROCHE,
THE CANADIAN MEDICAL ASSOCIATION AND THE
CANADIAN ORTHOPAEDIC ASSOCIATION, AUGUSTIN ROY,
CAMBIE SURGERIES CORPORATION, FALSE CREEK SURGICAL CENTRE,
DELBROOK SURGICAL CENTRE, OKANAGAN PLASTIC SURGERY CENTRE,
SPECIALTY MRI CLINICS INC., FRASER VALLEY MRI LTD.,
IMAGE ONE MRI CLINIC, McCALLUM SURGICAL CENTRE LTD.,
4111044 CANADA INC., SOUTH FRASER SURGICAL CENTRE INC.,
VICTORIA SURGERY LTD., KAMLOOPS SURGERY CENTRE LTD.,
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THE BRITISH COLUMBIA ORTHOPAEDIC ASSOCIATION AND
THE BRITISH COLUMBIA ANESTHESIOLOGISTS SOCIETY,
CHARTER COMMITTEE ON POVERTY ISSUES AND
THE CANADIAN HEALTH COALITION, and
THE CANADIAN LABOUR CONGRESS**

Intervenants, Interveners

TRANSCRIPTION DES CASSETTES

**Le mardi 8 juin 2004
09:01 heures**

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TABLE DES MATIÈRES

Ottawa (Ontario)

--- La séance débute à 09:01 heures

MR. JUSTICE MAJOR : In the absence of the Chief Justice having a voice this morning, I'm going to introduce the case. *Jacques Chaoulli and George Zeliotis versus the Attorney General of Quebec and the Attorney General of Canada*; *Jacques Chaoulli* appearing in person; Philippe Trudel and Bruce W. Johnston for the Appellant, *Zeliotis*; Guy Pratte, Freya Kristjanson, Carole Lucock and Jean Nelson appearing for the Canadian Medical Association, et al.; Marvin R.V. Storrow, Q.C. and Peter W. Hogg, Q.C. for the Interveners, Cambie Surgeries Corporation, et al.; Earl A. Cherniak, Q.C., Stanley H. Hartt, Q.C., Patrick J. Monahan and Valerie D. Wise for the Interveners, Senator Michael Kirby, et al.; Robert Monette, Patrice Claude, Dominique A. Jobin, Ariel G. Boileau and Manon Des Ormeaux for the Respondent, *Attorney General of Quebec*; Jean-Marc Aubry, c.r. and René LeBlanc for the Respondent, *Attorney General of Canada*; Janet E. Minor, Shaun Nakatsuru and Laurel Montrose for the Intervener, Attorney General of Ontario; no one appearing for the Interveners, Attorneys General of New Brunswick and Saskatchewan; Martha Jackman for the Interveners, the Charter Committee on Poverty Issues and the Canadian Health Coalition; and no one appearing for the Intervener, Canadian Labour of Congress.

We will begin with Jacques Chaoulli.

APPELLANT *JACQUES CHAOULLI'S* ARGUMENTS

M. CHAOULLI: Good morning Justices, before the lower courts, it was in a private non-conventionned hospital and with a non-participating doctor that Mr. Zeliotis and myself asked for the right to use our own financial resources, at tabs 1 and 2. I agree with the arguments exposed by the Intervener Augustin Roy in his factum. As concerns the division of powers, Augustin Roy has written that, in the context of a suppression of a parallel private system through 15 *HEIA*, section 24 of the 1970 law became totally useless. He is right but we must here put ourselves in the place of the legislator who wanted to establish a universal and free public regime and, in that sense, it was section 24 that logically fit in this framework whereas 15 *HEIA* was an intruder as we shall see later.

The Attorney General for Saskatchewan has relied on case law from this court which calls for prudence before declaring a provincial law *ultra vires*, and when a province ... and the federal levels of government are in agreement, indeed, this Court has emphasized the necessity of stability in federal-provincial relations. I submit that the [inaudible] case does not apply in the present case because, here, the factual foundation is convincing according to the balance of probabilities and, moreover, the respondents have not refuted this factual foundation, rather their experts have confirmed it.

This appeal concerns all provinces and territories. Now, seven provinces and three territories have not expressed their opposition to my argument on the division of powers since they have not intervened or filed facta, which, I submit, reduces the impact of the agreement between the Attorney General of Quebec and the Attorney General of Canada.

As some Canadians suffer or die because of the deficiencies of the medicare system, the Kirby Committee, in the Attorney General of Canada's compendium of sources, Volume II, page 2322, has stated that the issue of the private financing of medical services has often been a source of discord between the federal government and certain provinces which have in fact decided not to intervene in this appeal or have decided to withdraw, namely British Columbia, Alberta, Manitoba, Newfoundland and Nova Scotia.

Now, no federal law prohibits a parallel private system which is totally dissociated from the public regime, and the *Canada Health Act* does not impose as a condition the

absence of a parallel private system, as exposed by the Intervener Augustin Roy in his factum at paragraph 34.1.

The respondents have stringently affirmed that Canadian society has looked for a national consensus on the fundamental orientations of the medicare system in Canada. Notably, for this reason, I submit that the issue of private voluntary financing in medical services outside the public regime is not of a merely local and private nature in the Province of Quebec. Also, Mr. Claude Forget, former Minister of Health of Quebec and successor of Minister Claude Castonguay, has said to the Kirby Committee that it is for ideological reasons that the Canadian health care system has trouble evolving, at tab 3, page 1450.

To the extent that four provinces are favourable to an increased place for the private sector in the realm of medical services, as stressed by Intervener Roy at paragraph 26 of his factum, an *ultra vires* declaration would agree with the needs of Canadians who hope that, on the question of private financing in the realm of medical services, the provinces and the federal stop passing the buck to each other.

Quite the contrary, I respectfully submit that if there was to be a declaration of *intra vires* and invalidation according to the *Canadian Charter*, the potential use by certain provinces of section 33 of the *Charter* with the authorization of a parallel private system in other provinces would lead to instability in federal-provincial relations. For all these reasons, I submit that in the present case, a declaration of *ultra vires* would favour stability in federal-provincial relations.

Also, as concerns health care, each level of government would continue to exercise their respective jurisdictions. Moreover, it is useful to identify the true purpose of the impugned provisions since it is the first step of the analysis under section 1 of the *Canadian Charter* because, under section 1 of the *Canadian Charter*, the appellant Zeliotis has not decided what the purpose was and because the lower courts and the respondents under the *Charter* have implicitly invoked two purposes for the impugned provisions.

I will specify two of my arguments. The first being the legislator's perception of the socially undesirable character of non-conventionned private hospitals and of disengagement by doctors, these two elements being of course related. Thee second being my argument

according to which for the viability of a universal and free public regime, the legislator did not consider the suppression of non-conventionned private hospitals and the suppression of disengagement by doctors as necessary so that the impugned provisions did not logically fit the framework of their respective laws.

Concerning the evidence on the socially undesirable character, between 1960 and 1964, under the Lesage government, with section 10(1) *HEIA* of 1960, the legislator's intention was not to prevent a resident from entering into a contract for consideration with a doctor for medically required services. Indeed, any doctor could bill any amount to a resident for his professional fees pursuant to section 10 (3) (b) *HEIA* and a resident could buy private insurance to cover these fees. For hospital costs, no hospital could receive additional money from a resident.

With respect to hospital costs, I invite you to go to tab 4 of my condensed book of authorities... the other tabs which I have referred to are to be found, of course, in the condensed book, at tab 4, at page 87, pursuant to section 13 which is the application regulation of the *HOIA*, all hospitals, hence including all private hospitals, had to be conventionned pursuant to this section 13. We are here in 1960.

In 1964, still under the Lesage government, the legislator revised the law on private hospitals by authorizing non-conventionned private hospitals this time by virtue of section 2.1 at tab 8. In the revised law in 1964, the legislator had omitted to include the application regulation including article 13 so that it was not forcing all private hospitals to be conventionned anymore, contrary to what had been the case in 1960.

It is reasonable to conclude that in 1964, the government had realized that the obligatory conventionning of all private hospitals was no longer necessary to the viability of a universal public regime of hospital insurance. For these reasons, I submit that section 10.1 (a) of the *HOIA* unchanged in 1964 applied only to public hospitals and to private conventionned hospitals for which the legislator wished to guarantee that they remain free. It is from 1966 that non-conventionned private hospitals and the disengagement of doctors came to be considered to be socially undesirable, as explained by Intervener Roy.

I invite you to go to tab 5, at the last page, 1872. I emphasise that in 1966, the president of the Commission, Mr. Claude Castonguay, was the one who had 15 *HEIA* adopted in 1970 and who had the *Private Hospitals Act* repealed in 1971. In the middle of the page, the Castonguay Commission described the situation in Quebec which, four years later, MNA Camille Laurin would describe as the new Quebec reality, as I say in my factum. At the paragraph beginning by "D'abord, il faut noter", the Commission was already taking note of consumers' opposition, a moderating ticket considered as an anti-social measure at footnote 3, which lead to opposition to the very principle of disengagement.

At page 1870, the Commission noted that consumers, that is civil society, would be represented by labour unions and noted that the latter's acts were crucial everywhere in Canada. This fact appropriately explains the legislator's perception, from then on, of the socially undesirable character. In 1970, Minister Castonguay had emphasized that four years earlier, hence in 1966, as he was presiding the Commission of the same name, the *Medical Aid Act* had already been criticized as a half-measure authorizing disengagement, at tab 5, page 1857.

Former Minister Cloutier had said that the principle of disengagement authorized in his *Bill 8* was cancelled in practice through the absence of any reimbursement, at tab 10, page 3713. Indeed, concerning his *Bill 8*, and I invite you to go at tab 5, at page 1861, the left column, Minister Castonguay had said, and I quote:

> "The analyses made of this *bill* ... meant in the end that doctors ... only had a theoretical capacity to disengage. This was the major argument put forward, that capacity to disengage. It was said: means economically, in fact is annulled economically.

Hence, Minister Castonguay had confirmed his predecessor's analysis. In 1970, the Commission had also expressed the socially undesirable character of profits made by for-profit establishments, at tab 6, pages 1908 to 1910.

Justices, I invite you to go to tab 11 of my book of authorities. This is during cross examination by Mr. Bruce Johnston. At page 1256, he was asking expert witness Wright whether the present system is based on values which were spelled out at the time of the

establishment of the system, to which the expert answered affirmatively. At page 1299, the expert answered Mr. Johnston that it was on the basis of the values that had been expressed in Canada that it became necessary to prohibit private insurance. And at page 1302, the expert specified that the relevant values consisted in preventing a resident from obtaining better access to health care by using his or her own financial resources.

Hence, I submit that, notably, this cross-examination, as well as that made by Mr. Philippe Trudel which I have cited in my factum at paragraph 80, corroborate the extrinsic evidence showing the socially undesirable character of a parallel private system in the 70's. Nonetheless the law has always authorized non-participating doctors and non-conventionned private hospitals, which can still exist and sell services which are not covered by the public regime, whether the doctors are participating or not, as is the case of the Intervener Cambie Surgeries of Vancouver.

In reality, it is by three roundabout ways that the legislator has prevented non-conventionned private hospitals. First, in 1970, through the prohibition of private insurance, second, in 1971, through the abrogation of the *Private Hospitals Act* while maintaining section 10 (1) (a) *HOIA* and while authorizing non-conventionned private hospitals through sections 8 and 12 of the *Act respecting Health Services and Social Services* of 1971. Third, in 1992, through the abrogation of section 11.3 (b) of the *HOIA* which had the legal effect of prohibiting a non-participating doctor, this time pursuant to 10.1 (a), from selling in a non-conventionned private hospital a service already covered by the public regime.

As concerns my second argument according to which the impugned provisions do not logically fit the framework of their respective laws, first, on the unnecessary character of the suppression of non-conventionned private hospitals, between 1970 and 1992, in favour of the viability of the universal public regime of hospital insurance, the legislator did not consider that the suppression of non-conventionned private hospitals to be necessary since it knew that there were no risks that a substantial part of the resources would be rerouted towards non-conventionned private hospitals, notably for the four following reasons.

First, I invite you to go to tab 6, the last page, the Castonguay Commission, in 1970, the critical analysis of the for-profit sector, and to read with me at paragraph 52:

"If, on the other hand, there are individuals who want to purchase from private entrepreneurs services of all kind and pay the price, we do not see why the State would be opposed to it."

Thus, it appears that the Commission did not recommend the suppression of non-conventionned private hospitals although it exposed in the preceding pages which are in the book of authorities the socially undesirable character of profit in health care, as corroborated by the cross-examination of expert-witness Turcotte, at paragraphs 80 and 81 of my factum.

We can thus conclude that in 1970, in the context of the socially undesirable character of disengagement, the Commission, like the legislator in 1964, did not consider the suppression of non-conventionned private hospitals to be necessary for the viability of a universal public regime of hospital insurance, but that it considered this suppression to be desirable in order to prevent for-profit activity that was socially undesirable.

Secondly, the law gave...

MR. JUSTICE BASTARACHE: Why was it said to be socially undesirable? Was it only because of the notion of profit which you invoke or is it, in fact, because of the two other arguments which we find in the facta here, namely that by which we would want equal access to medical services for all the population, the principle of absolute equality, and then, this last argument to the effect indeed that medical services accessible to all should not create different social classes and so on and so forth?

MR. CHAOULLI: Yes, Mr. Justice Bastarache...

MR. JUSTICE BASTARACHE: There is maybe also the impact on the public regime which is now argued, it is said that there would be a transfer of specialists in particular towards the private sector, which would impoverish the public system.

MR. CHAOULLI: Yes, Mr. Justice Bastarache, if I can just classify the different points which you have raised, in answer to the first point which you have raised, it was a whole, that is to say the notion of socially undesirable profit went ... it was like a 'package deal' ... at the time, what was considered to be socially undesirable, was at the same time profit in the

context of health care and that a person, with her own money, have better access than another outside of the public regime, which goes towards the concept of absolute equality which you have mentioned and not towards the present concept, the concept of equality before and under the law.

Hence, in my opinion, it is in this sense that we must understand … analyse the mind of the legislator at the time. It was the undesirable character not in relation to the viability, this is another point which you have mentioned, Mr. Justice Bastarache, you have asked if it was not in fact in order to ensure its viability? My answer is no. Because the evidence in the file, a contextual analysis of the extrinsic evidence, indicates that there was no such preoccupation. Quite the opposite, Minister Castonguay had said, as you will see in the condensed book of authorities, he had guaranteed with former Minister Cloutier, they had guaranteed that with section 24 there would be no risk of interfering with the viability so that there would be no access to care for all Quebeckers, and the evidence is clear, I respectfully submit.

MADAM JUSTICE DESCHAMPS: That section, 24, it is the same section which has now become section 30?

MR. CHAOULLI: Yes, Madam Justice.

MADAM JUSTICE DESCHAMPS: Okay, then … but is this section not indeed an indication that it was nonetheless necessary … there was a desire to protect the integrity of the public system.

MR. CHAOULLI: Absolutely, Madam Justice Deschamps. There was this desire, this desire was clear and it was met to the legislator's satisfaction, as you will see in the extrinsic evidence through, indeed, section 24 and sections 17, 18 and 19 of the *Act* of 1970 which prohibited overbilling by participating doctors, that is, 17, 18, 19 and 24 of the *Act* of 1970 guaranteed access to care.

MADAM JUSTICE DESCHAMPS: But when the purpose of the *Act* as a whole is analysed, we can see a desire for equality but we can also find a desire for protecting the integrity of the system.

MR. CHAOULLI: Yes, Madam Justice. Yes Madam Justice, so this gives me the occasion to specify this point, because the law as a whole, the purpose of the law as a whole is a valid purpose to ensure equality before and under the law to all medical services, yes of course, and that purpose is not contested, but within the law, the *HEIA*, there is this section 15 *HEIA* which, I respectfully submit, is an intruder to the extent that it does not logically fit within the framework for reaching that purpose, 15 *HEIA* was not meant to guarantee that equality of all before the law. Section 15 of the *HEIA* had another purpose, which was hidden, I submit, which was to prevent a parallel private system because of the socially undesirable character of access outside the public regime by people who would use their own financial resources.

It is somewhat in the same principle that the *ultra vires* declaration of free standing abortion clinics in *Morgentaler*, which we will see later, where the Nova Scotia legislature had decided that free standing abortion clinics were undesirable. Here, it was considered that it was socially undesirable to have non-conventionned private hospitals. I make this analogy because I think it is relevant.

In my view, it is necessary to distinguish the purpose that is valid from the rest of the *HEIA* which is to create a universal public regime that is viable and that everyone have access to the free universal public regime, there is this on the one hand; and there is on the other hand, another purpose, which is the purpose of 15 *HEIA*. Did 15 *HEIA* aim at guaranteeing a viable system? No. Nothing in the record demonstrates that and, to the contrary, everything points to an attempt to prevent …

MADAM JUSTICE DESCHAMPS: When you say, nothing in the record demonstrates that, maybe the debate at the National Assembly or in parliamentary commission does not mention the preoccupations which were raised by Doctor Marmor or which were raised by Mr… I believe it is Mr. Bergman, in their testimonies, but these preoccupations are maybe in a bit more details what could happen if there was not this section 15.

MR. CHAOULLI: I submit that section 15 … in fact, in the evidence it appears clearly and at trial, the experts called by my adversaries have said it, they have corroborated it, 15 *HEIA* was meant to prevent a parallel private system which would be completely dissociated from the public regime, that's all. In no way has 15 *HEIA* been invoked in order to favour the viability of the universal public regime at the time, at the time under consideration.

MADAM JUSTICE DESCHAMPS: Maybe not at the time but if we must evaluate a system, we must evaluate it with the potential consequences of our decision.

MR. CHAOULLI: The potential consequences of the decision at the time you mean?

MADAM JUSTICE DESCHAMPS: We must evaluate it because the witnesses have analysed the solution which you proposed, and the witnesses have mentioned potential consequences of such a proposition if there was not this prohibition.

MR. CHAOULLI: But, Madam Justice Deschamps, I respectfully submit that in the case of an analysis under the division of powers, we must refer to the perception of the law-maker. What was the law-maker's intention at the time at the moment when the impugned provision was adopted? And I submit that the evidence in the record based on the balance of probabilities shows that the law-maker's intent with respect to 15 *HEIA* was to prevent a parallel private system because of the socially undesirable character of this activity and that there was no other considerations in the mind of the law-maker at the time, and everything in the extrinsic evidence, I submit, corroborates this interpretation.

MADAM JUSTICE DESCHAMPS: Of course, this theory that we cannot prevent ... we cannot evaluate a law based on a goal which is completely new but can it really be said that the goal is completely new, considering the fact that there was already this section 24 which is now our section 30? You say that 15 is not necessary, that 24 is sufficient, but if we evaluate the goal ...

MR. CHAOULLI: Sections 24, 17, 18 and 19 of the *Act* of 1970.

MADAM JUSTICE DESCHAMPS: But if you evaluate the goal, and here, I thought you were already at section 1, but if you evaluate it in terms of division of powers, not evaluate the goal as a whole, then we come back to this desire to protect the system which is nevertheless reflected by section 24.

MR. CHAOULLI: Madam Justice Deschamps, what I respectfully submit is that the analysis of the overall objective of the *HEIA* in 1970 is of course useful in the division of powers

analysis, to have a viable regime, free universal public, of course. But we must go further by trying to determine whether, at the time, the legislator's intention for 15 *HEIA* was to contribute to the viability of the universal public regime or whether there was another purpose, true purpose, and I submit that there was another true purpose which had nothing to do with the first one and which was the purpose of wanting to suppress a socially undesirable activity and that it did not logically fit in the framework of the law, and I refer you to my factum for the whole of my argument in that respect.

There is a clear and obvious dissociation. You look at the legislative history … I take some of my time, if you look at the legislative history of the other provinces, it corroborates. Saskatchewan, for 35 years, had no prohibition on private insurance, it has never prevented the viability of the universal public regime, and there are multiple examples all over Canada in different provinces. There is a clear dissociation, Madam Justice Deschamps, I submit. Very clear dissociation, in my opinion.

I was thus at … I do not remember where I was, I apologize …

MR. JUSTICE BASTARACHE: The same argument which you are making is transferable to the analysis that you make pursuant to … or under the regime of section 7 because, really, in the case of section 7, when we come to …

MR. CHAOULLI: Of the *Charter* you mean.

MR JUSTICE BASTARACHE: Of the *Charter*, yes, once again we reach an analysis of the true purposes of the *Act*, the justification under section 1, and even when we consider the principles of fundamental justice, we must not skip over this stage of the analysis as well.

MR. CHAOULLI: Yes, that's right, Mr. Justice Bastarache. I must admit that I have lost track of … I do not know where I am. Ok, I was at tab 6, that's right, and I had read that extract, I was saying that we can conclude that in 1970, in the context of the socially undesirable character of disengagement, the Commission, as well as the legislator in 1964, did not consider the suppression of private non-conventionned hospitals as being necessary to the viability of a universal public regime of hospital insurance, but it considered this suppression

to be desirable in order to prevent a socially undesirable for-profit activity. I had already said that.

Secondly, the *Act* provided the government with the power to deny a request for a permit for a non-conventionned private hospital and to revoke such a permit, tab 7, section 13.1 and .4, and tab 8, article 3. Thirdly, the prohibition on private insurance discouraged in practice non-conventionned private hospitals. And fourthly, the *HEIA* of 1970 gave the Minister the power to force a non-participating doctor to submit to the public regime, at tab 9, sections 24 and 56 (a).

Further, concerning the unnecessary character of the suppression of disengagement, here again, the legislator knew that in order to guarantee the viability of the free universal public health care regime, the suppression of disengagement was not necessary. Indeed, the Minister noted that in Saskatchewan, it had not been necessary to suppress disengagement, Minister Castonguay in 1970, and in case of individual disengagement, he affirmed that he was in possession of rather impressive means in order to protect access to care, at tab 5, pages 1857 and 1858.

The Minister assured that the mere withdrawal of a small group of professionals could not deprive the population from care, at tab 5, page 1861. He affirmed that in the case of a lack of access to care, he would have to take measures to re-establish such access and that he would also have negative means which he could use in order to guarantee such access, at tab 10, page 3711 and at tab 11, page 1346. And former Minister Cloutier noted that section 24 enabled the prevention of individual disengagement, at tab 11, pages 1347 and 1359.

The government's response to the contestation of specialists was a total prohibition on overbilling by participating doctors at sections 17, 18 and 19 of the *Act* of 1970. They were sections, Madam Justice Deschamps, which logically fit within the framework of the establishment of a free universal public regime and not the prohibition on private insurance. The legislative history in other provinces, in my factum, confirms the unnecessary character of the impugned prohibitions for the viability of a free universal public regime.

In particular, the Attorney General for Saskatchewan has not opposed my argument, at paragraph 129 of my factum, according to which during 35 years and not 25 as I had

mistakenly written in my factum, between 1961 and 1966 (sic), the authorization for a private system in Saskatchewan had not threatened the viability of the universal public regime, that is to say until the *Act* adopted by the government of Premier Romanow, author of the report of the same name.

For these reasons, and for those which I have invoked in my factum, I submit that judge Piché has erred in holding that the provisions had not as their goal the prohibition of reprehensible behaviour per se, at tab 12, page 95, and by holding that the legislator had adopted these provisions because it feared that the establishment of a parallel private system would take a substantial part of resources to the detriment of the public sector, at tab 12, page 142.

I invite you to go at tab 13, it's the *Morgentaler* case, page 512. Justice Sopinka, for the Court has based his conclusion as to the undesirable character of free-standing abortion clinics, among other things, and I quote:

> "On the absence of evidence according to which the privatization and the cost and quality of health services were more than accessory preoccupations."

I conclude that this Court had placed an evidential burden on the Crown. In the present case, the respondents had the evidential burden to demonstrate that at the relevant times, the law-maker considered this attempt to suppress non-conventionned private hospitals and to suppress disengagement as being central for guaranteeing the viability of the free universal public regime. I submit that the respondents have not met this evidential burden, as exposed also by Intervener Roy at paragraph 6 of his factum.

With respect to the *Canadian Indemnity Rule* invoked by the trial judge and by the Attorney General for Saskatchewan, at paragraph 26 of its factum, I also refer you to the argument of Intervener Roy at paragraph 31 of his factum. Under section 7 of the *Canadian Charter*, the impugned provisions expressly forbid the relevant persons, natural and legal, from entering into contracts for consideration. It goes without saying that the freedom to choose paying services means the freedom to purchase them, hence freedom of contract.

For these reasons, I submit that the issue of freedom of contract is essential. My adversaries have quoted some extracts by Professor Hogg according to which freedom of contract would not be protected by section 7. Following the extract from the *Rollinson* case, quoted by the trial judge at tab 12, page 124, I submit that the freedom of the three contracting parties to enter into a contract with a natural person for a medically required service relates directly to the life and security of the natural person.

In support of my argument, I invite you to go at tab 14, it is the *Hitzig* case from the Ontario Court of Appeal in 2003. At page 9, the law prevented the Toronto Compassion Centre from selling marihuana to patients who needed it. This was a case of medically required services. At page 27, and I quote:

> "Hence the right to liberty in thus broader sense is also implicated by the *MMAR*... By putting these regulatory constraints on that access, the *MMAR* can be said to implicate the right to security of the person ... Those sanctions also apply to anyone who would supply marihuana to them ..."

Page 29, the law provided for a sanction against whoever would make such a sale. Page 44:

> "These barriers effectively prevent the emergence of lawfully sanctioned 'compassion clubs' or any other efficient form of supply to ATP (authorization to possess) holders."

It is reasonable to conclude that this Court of Appeal has also protected the right to freedom of a club, being a corporation, to enter into a contract for consideration which can be termed, I submit, an incidental right to a person's right to security.

To the extent that the Attorney General of Canada has decided not to appeal this decision, it cannot validly at the stage of analysis of the right to freedom at the same time accept a club's freedom to sell marihuana as a medically required service and not recognize the freedom of the three contracting parties concerned by this appeal. Also, the preamble of the *Constitution Act 1867* still in force, states that the *Constitution of Canada* is founded on

the same principles as that of the United Kingdom. And for a long time the latter has recognized freedom of contract.

With respect to the proof of the infringement, my adversaries have wrongly imposed on me an additional burden of proof. The trial judge has accepted my demonstration of the causal link between the impugned articles and the infringement to my rights. I add that it is precisely by reason of the very existence of this link between the absence of health insurance and the suffering or death of a sick person that the State had establish a public health insurance regime.

The trial judge's decision concluding to an infringement of 7 and sustained by Justice Forget and which is founded on a mixed question of fact and law is not mistaken and should stand. For these reasons, with respect, Justices Delisle and Brossard have erred by concluding that the demonstration had not been done that the infringement to the right to enter the impugned contracts jeopardized the appellant's right to health and to life.

With respect to the freedom to choose the origin of care and independently from the issue of waiting times, Professor Martha Jackman has referred to the *Collin* case from the Federal Court in which section 7 protects the freedom to access adequate care, at tab 15, pages 5 and 21. And one author, Marco Laverdière, has reached a similar conclusion, at tab 16, pages 189 and 192. For instances, if I were to have a heart condition, I submit that section 7 protects my right to choose a non-conventionned private hospital which, in order to dilate my coronary arteries, would provide me with an andoprosthesis called a 'stant' which would be of a better quality than that which I would receive in a public hospital.

As concerns my standing as a doctor, it is a mixed question of fact and law, and I submit that on this point, with respect, the trial judge has made a serious and dominant mistake. Indeed, faced with the obstacles erected by the public authorities and by the Quebec Federation of Doctors and General Practitioners, to home visits within the public regime, obstacle which she has described at tab 12, page 32, my testimony as a doctor reflected my desire to improve, within the public regime, access to home visits as shown by the letter by Professor Léon Schwarzenberg, former French Health Minister, at tab 25, and even without improving the equity of access to those private services, as shown by my testimony at tab 24.

With respect to the *International Covenant on Economic, Social and Cultural Rights,* if the analysis of the Attorney General of Canada and of the Intervener, Charter Committee, were to be followed, it would be the suppression of all voluntary private financing in medically required services that would conform to the *Covenant*. This would mean that all free and democratic societies which authorize such financing at the margin of the universal public regime would infringe the *Covenant* and that in order to conform to it, they should all, like Canada and Cuba, suppress a parallel private system.

With respect, I submit that this interpretation of the *Covenant* is mistaken and contradicted by the WHO 2000 Report to which I have referred in my factum at paragraph 140 according to which a univocal approach towards the private sector cannot do, and by many OEDC reports, it was in the context of this appeal (sic).

The intervener Charter Committee, at paragraph 37 of its factum, states that the UN has had a favourable opinion of the Canadian health system. But, as I have shown in my factum at paragraph 189, the provincial and federal governments have always failed to meet their obligation to report the relevant legislation to the UN, being in the present case the prohibitions impugned by this appeal and have omitted to report to the UN that some Canadians suffer or die while being on the public regime's waiting lists and these omissions are serious enough to be mentioned.

Indeed, in such conditions, how could we expect that the UN reach a sound judgment on Canada's conformity to the *International Covenant* and on the state of human rights in Canada in the health care realm? The position exposed in 1959 by Professor Frederick (sic) Hayek, Doctor of Laws and Nobel Prize in Economics, was wise and prescient. He did not call for a return to the past. He was in favour of intervention by the State which would lead to obligatory health insurance but he was already warning against the negative effects of a State monopoly leading to an infringement of the rights to freedom, at tab 17.

As concerns the second part of section 7, I respectfully submit that it is useful and possible to reconcile the English and French versions. Indeed, to the extent that the *Charter* concerns the relations between the State and an individual, in the French version, the word 'il', an impersonal pronoun, necessarily means that the State cannot infringe on the rights except in conformity with. Hence, this amounts to saying, the right of a person to be sheltered

from an infringement by the State unless the State infringes in conformity with, so that the French version protects, I submit, a distinct right as does the English version.

I respectfully submit that to conclude otherwise would amount to saying that in civil matters, the *Charter* would give lesser protection to the rights to life and security than it gives to the rights protected by sections 2 and 6. That said, it is clear that the person who decides to invoke this distinct right has the burden to prove it. In that sense, I follow the opinion of Justice Arbour who was dissenting in the case mentioned by Intervener Augustin Roy in his factum.

With respect to section 15 of the *Charter*, it does not only protect against stereotypes and prejudices, it also protects against a disadvantage or a burden as shown by *Law* at paragraph 88. The request for the same benefit of the law protected by the *Charter* is here the benefit of …

MR. JUSTICE MAJOR: Mr. Chaoulli, I should point out to you, your orange light has gone on which means you have five more minutes.

MR. CHAOULLI: Okay, I'm sorry –

MR. JUSTICE MAJOR: So you have to pick and choose what you think your best arguments.

MR. CHAOULLI: Okay, Mr. Justice Major. With respect to section 1 of the *Canadian Charter*, I submit that the trial judge has erred by applying the theory of 'shifting purpose' and that this Court has rejected this theory in *Big M*, at tab 18. Indeed, in her analysis of the division of powers, the trial judge has held that the purpose was the public regime's swift working, whereas under the *Charter*, she has implicitly added an additional purpose namely the prevention of a parallel private system which she qualified as being discriminatory, at tab 12, page 143. The Court of Appeal did the same.

I submit that the sole valid purpose is the viability of the universal public regime and that, in that respect, the respondents have not met their burden of proof. As it also appears at tab 20, being a comparative study made by the OECD in 2003 where it is said that some

countries prohibit specialist doctors from billing residents in public hospitals, which shows that a State can regulate. We shall also see it at tab 22, section 30 *HEIA* which also gives regulatory powers. I also submit that the impugned prohibitions go against public order.

For instance, the Kirby Report has shown that in public hospitals in Canada, clients of Workers Compensation Commissions get faster treatment as compared with others whereas if there were non-conventionned private hospitals with non-participating doctors, these clients would be treated in those hospitals and this would lower waiting times in public hospitals. We could, for instance, use expatriated Canadian doctors who would possibly be very happy to come back home.

MR. JUSTICE BASTARACHE: You say that the burden of proof has not been met but the expert evidence which is submitted here concerning the nefarious effects of a parallel private system, is there other evidence which contradicts this?

MR. CHAOULLI: Yes, there is contradicting evidence at tab 19 here, among other things, in the condensed book; also, I submit that this evidence, Mr. Justice Bastarache, does not meet their burden. Their burden was to show that there were no other less drastic means, first, irrational with respect to the valid purpose, they have not done it, they have not shown that there was an irrational (sic) with the valid objective, they have shown that there was a connection with the suppression of a parallel private system. Here, yes, there is an irrational (sic) but that was not the test, the irrational.

Minimal impairment, they have not shown that it was the least drastic means, especially as the written reports are not valid evidence, as I say in my factum, and the verbal testimonies have been contradicted, demolished so to speak by cross-examination, as you shall see ay tab 9, and nor has proportional effect been shown. Once again, with the valid purpose, it must be remembered with respect to the *Charter*, the valid purpose, the only valid purpose, is the viability of the universal public regime. Absolute equality between residents, this is not a valid purpose under the *Charter* so they have not met their burden of proof.

You shall also see at tab 21 a 2003 study on private insurance in Australia, which shows that a parallel private system is favourable under a public regime which goes against the opinion expressed by the Attorney General of Canada at tab 19 of its book of authorities.

Sweden gets better results while having a parallel private system, as you shall see in the tabs which are in the condensed book. As concerns the *Canada Health Act*, I submit that this Act is not legally enforceable as concerns the contracting parties concerned by the present case.

I would also like to say that my adversaries' main argument is based on values. They suggest that the suppression of a private parallel system would conform to the value of equality. In other words, according to them, individual freedom would be incompatible with their value of equality, but their equality is not equality before and under the law but rather absolute equality between residents with respect to medical services. In this context, the expression of a difference between individuals through liberty is indeed incompatible with absolute equality between residents.

I see that the red light is on, so I thank you, Justices.

APPELLANT *GEORGE ZELIOTIS'* ARGUMENTS, MR. PHILIPPE TRUDEL

MR. TRUDEL: Madam Chief Justice, Justices, my name is Philippe Trudel, I am one of appellant George Zeliotis' counsels. We have provided you with an appeal book which I hesitate to qualify as being condensed, unless we compare it to that of the Attorney General of Quebec, but you will be able to follow my presentation with the help of this book.

The debate that is before you today, in our view, can be summarized in one question, is then quite simple. Can one use his or her own resources in order to get medical care outside the public regime if the latter is not able to provide these medical services within acceptable delays and if, by doing so, the public system is not deprived from the resources which it needs? I said that the question being simple, there are many (inaudible), it can be simplified even more by simply asking the question also, very simply, can the State prevent individuals from purchasing medical resources which the State does not need? In our view, here is the debate.

Now, there are two fundamental propositions which we wish to put before the Court right away and which will come back during all of our presentation. The first proposition, in fact, is that we acknowledge that it is absolutely legitimate for the State to ensure that the public regime gets all the resources which it needs to function in priority. We thus concede it,

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if it is not in fact possible, we should not win this appeal. Now, the second proposition which is intimately linked with the first, is that the state cannot claim to need all available resources and, at the same time, ration them, limit the offer for them, there is a contradiction in this proposition.

For instance, there was talk of getting resources inside the system, to hijack resources from the public system, and this proposition does not hold water. Let's take the example of an orthopaedic surgeon, how can the State say, I need all that this surgeon can do while I limit the number of procedures which he can offer to his patient and I limit also at the same time surgery times?

So our presentation before you today will first briefly concern standing. I will then speak to the issue of the scope of the protection offered by section 7 in the context of whether it is necessary or not that there be a link with the justice system, with the principles, with the judicial system. I will then discuss the rights guaranteed by the *Charter* one by one, section 7, that is to say the right, first, to life, to security and to liberty, illustrating by examples the infringement to those rights specifically.

Mr. Johnson will then take over and will discuss the principles of fundamental justice and will convince you that the infringement is not in conformity with these principles. And Mr. Johnson will also discuss the questions of section 1 of the *Charter* and of justification under section 1 of the *Quebec Charter* since these are also issues which are before this Court.

So, briefly, on the infringement, I discuss it because reading the facta of the Attorney Generals, it seems ... there is a lot of stress on the fact that out client, Mr. George Zeliotis, is not in a situation presently where is state of health requires medical care. With respect, this is not the right question. The debate which has taken place before the Superior Court was not focussed on the facts relating to Mr. Zeliotis. There have been ... many experts have been heard, doctors which were not treating Mr. Zeliotis, there is an amply sufficient factual context in order to decide the issues which are before you today.

In fact, one must not mistake and I submit that my colleagues, with respect, do it, the issue of standing in constitutional matters. This Court has already decided what criteria had to be met for the discretion to be afforded and I submit to you that...

MR. JUSTICE LEBEL: Mr. Trudel, some of the facts which have been alleged which have been the object of actual allegations by Mr. Zeliotis as to his case were judged to be, in sum, not established or requiring a certain number of nuances, notably as concerns the availability of services, as to the reasons for certain delays in his case in particular.

MR. TRUDEL: Exactly, the first judge, judge Piché, has concluded that we could not conclude that the delays were only caused by the public medicare system, but what I say to you to that effect, is that it can certainly be said that some delays were caused by this waiting, and what can be said in that respect as well, is that, in fact, he has waited and the waiting in itself and the effects of the wait, whatever the reason, show the effects on his health: the pain, the psychological distress, the fact of becoming dependant to pain medication, so all of this, even if the State's responsibility is not taken into account, it remains that this demonstrates that the delay infringes his security.

MR. JUSTICE LEBEL: Is it any delay, is it a reasonable delay? How do you define a reasonable delay in such a context?

MR. TRUDEL: We have submitted some documents, for instance, from the College of Physicians which establishes the maximum waiting delay for heart surgery to three months. Dr. Doyle, when he testified, said that there should not be such a delay, we are sitting on a bomb, so, no, there is not a delay for all the procedures which a patient can ask for, and it is not our burden, I submit to you ... it was not our burden to establish what was an acceptable delay or not. Our burden was to establish that the delays were too long and the first judge has concluded that, in light if the evidence of the extent ... of the scope of the delays, Quebec citizens were not receiving the health services to which they were entitled.

Now, what I also submit, in the evidence, there was Dr. Nabid, a radio-oncologist who said, any delay in that context is unacceptable, so there is the evidence. Now, is the acceptable delay for hip or knee replacement, is it six months, one year or three months? I submit to you that as soon as there is pain, as soon as there is anxiety, such a delay is already too long.

MR. JUSTICE LEBEL: In sum, if I follow what you are telling us, in principle, any wait would be, according to your perspective, unconstitutional if the patient feels discomfort, a certain pain, some anxiety.

MR. TRUDEL: No, it would not be unconstitutional in itself, it could be justified if it is delivered within a reasonable delay. Now what will a reasonable delay be? I think it is the State's burden to establish it because, presently, in fact, there is no specific norm and, in fact, the infringement is to be found as such in the risks of a deteriorating health.

MR. JUSTICE LEBEL: Will the Courts have to take charge of this analysis under section 7 to themselves define reasonable delays, to define standards for the different categories of treatment and care?

MR. TRUDEL: Absolutely not. Absolutely not, the only thing which we ask, is that it be recognized that the sections which prohibit that people have access to medical care, to pay for hospital care or to get insurance to cover this care violate our right to life and to security. So it has nothing to do with a definition of delay, as soon as the evidence that is before you is that the delays are excessive.

And clearly, there has been abundant evidence which has been filed to the effect that the public system presently does not provide, even though there is no precise standard defined by professional associations save the state, I have told you, of heart surgery and radio-oncology, even though these standards do not exist, it is clear that patients wait and risk dying... die, Dr, Doyle has said it, patients die on waiting lists and as soon as this evidence is before you and as soon as there is a risk and a threat of infringement, I submit that citizens must have the choice to use their own resources in order to save their life or improve their lot.

Now, obviously, we must look at this right, I am not saying that it is a right ... it is not a liberty at large, there are circumstances, I think that the infringement would be justified indeed if care was delivered within acceptable delays but it clearly is not according to the evidence which is before you. In fact, on the infringement, it's important, the right to life, there aren't too many decisions of this Court on the right to life, but what I submit to you, is that it is a fundamental value. Life is sacred, you have already decided that in *Morgentaler*,

you have decided that in the *Burns* case and, in fact, it has even become a principle of fundamental justice.

So, does a prohibition which deprives me of the possibility of obtaining health care which can save my life infringe that right? I submit to you that it is the case. I have mentioned the testimony of Dr. Doyle on the right to life, it is not challenged that any delay in such matters is unacceptable. It is not challenged. He has said that each month, the first month, there is an increase of .45% of the risk to of death and, after that, come the second month, it becomes 2%. So this evidence is before you.

The evidence also that people who were waiting for procedures died. The evidence also for Dr. Doyle that the time for obtaining … the delays, the diagnostic tests, the evidence, is to the effect that they were of four to six months at this time, so imagine four to six months plus two or three months to be treated, it amounts to nine months. Hence, I submit in these circumstances that the right to life is clearly … there is a clear infringement of the right to life.

And as concerns security, of course, this Court has recognized that medical treatment, to force someone to get medical treatment or to deprive her, infringed on the right to security. I have given you … and that is at tab… I will not refer to all the evidence on this issue, it is at tab 2, there have been testimonies from the radio-oncologist, there have been the testimonies of Dr. Lenczner concerning orthopaedic surgery who has said, 1 year waiting lists, 2 years to undergo procedures and, in some cases, patients who, while waiting, their condition deteriorates to such a point that irreparable damage is caused to their condition.

Hence, the evidence is there that the delays are unacceptable. The evidence concerning the ideal delay, we have it for radio-oncology, we have it for cardiac surgery. We do not have it, it is true, for all the spheres of activity but I submit that this is sufficient.

Finally, the right to liberty… maybe before I address this issue, I will go back to the issue of the protection offered by the section of this Court and it may be that it is this case which will lead you to refine or to specify the extent of the protection because, indeed, this Court has never closed the door to giving protection when the administration of the justice system is not involved. It is not involved. Mr. Zeliotis is not involved in judiciary proceedings

in order to obtain care, it would be illusory if he were, but I submit that if protection is not afforded for such cases, this could lead to absolutely unwanted situations.

For instance, we could imagine in the case of *B.* against *Children's Aid*, let's imagine that the law would have given the doctor discretion without a hearing, without a review process, to impose the treatment on the child, to proceed with the blood transfusion without the parents' consent, could it have been argued that this violates the parents' right to liberty without there being an established process to go forward with such a challenge?

MR. JUSTICE LEBEL: I will perhaps bring you back to an issue which you have raised, quickly, the issue of opening section 7 to other problems than those which are linked to the administration of justice. You have told us that this Court had left this question open until now, at least, had not answered it expressly. You are probably referring to certain remarks made by the Chief Justice in *Gosselin.*

Now, if we took for granted that such is the case, what textual arguments, what arguments of principle would justify that we interpret section 7 for it to apply in situations which have no link with the administration of justice?

MR. TRUDEL: Two arguments, Mr. Justice LeBel. The first argument is that the text of section 7 itself does not limit protection to situations linked to the administration of the justice system and the evolution of decisions on this issue clearly supports this proposition. If it was not open, the door would have been closed a long time ago, and the text does not say that the door must be closed and the liberal interpretation in *Charter* matters must guide you in that direction, I respectfully submit.

Now, to restrict to situations which have no (sic) link with the administration of justice would lead to situations which are, in my opinion, a little more unreal. We can imagine examples of this where a law which would tell a doctor, here, the State would decide for economic reasons ... I don't know if this is a good example, but to say, we will limit the number of coronary bypasses by patient to (inaudible), it's in the law and the doctor, of course, could be fined if he performed them but the patient, what would his recourse be to say, no, I have a right to life, I want it to be respected, I want to challenge, this provision is unconstitutional.

In the case, I repeat, of *B. v. (R)* if the parents … if the doctor could have unilaterally decided without a process of review to say, your child is going to receive this blood transfusion, then, in the absence of any link, without a hearing, could the parent not have asked this Court the same question which he has asked a few years ago? I submit that the answer is obvious.

If we limit, if we close the door today to this liberal interpretation, it will shield the State's conduct from situations which will lead to a reduction of the right to liberty, to life and to security which, at bottom, the right to life, it is the mother of all rights, so to speak, it is on the right to life that all other rights depend, and how can it be given a lesser protection than other rights? In my opinion, this is not a desirable and acceptable result.

So I will very briefly address the issue of incidental economic rights since it was another issue, and my colleague will address the central question which is … issues which were indeed raised by Justice Deschamps and by Mr. Justice Bastarache, the issue of the effects of the introduction of the parallel private system on the public system in general.

But before we address this, it has also been said a lot, and this touches on widening the protection, it has been said that the right which we sought protection for was economic and did not deserve protection. So on this aspect I submit that the analysis of judge Piché is very, very convincing and must be followed, and it is clear in my view that the right to pay to get care in a hospital, it's not an economic activity, it is not strictly an economic activity, same thing for insurance, it's the goal, and the relation must be seen, the relation is evident with the possibility of saving one's own skin, to improve one's situation, to avoid irreparable damages, so this is intimately related to life and security.

So I will conclude by telling you that the evidence in the present case is telling to the effect that Quebeckers do not receive medical care within admissible, reasonable, delays, that therefore, there is an infringement of the right to life and security of persons and that Mr. Zeliotis, even though the evidence is not entirely conclusive, as the first judge has said, certainly has standing, and the debate goes well beyond the personal effects on Mr. Zeliotis, certainly has the required interest to submit the questions which he asks before this Court. I thank you for your attention and I will cede the floor to Mr. Johnston.

ARGUMENT OF THE APPELLANT, *GEORGE ZELIOTIS*, Mr. Bruce W. Johnston

MR. JOHNSTON: May it please the Court. I will be addressing the issues of the principles of fundamental justice, the section 1, *Oakes* test, as well as the section 1 of the *Quebec Charter*. We are in a situation where there's a fundamental imbalance which is really the reason which has brought us to this Court. The State has erected itself as a monopoly payer and a sole payer for insured medical services and there's no limit to the demand for those services. This is clear, it's in the evidence.

The only limit is the limit placed on the accessibility of care by the State itself. It has clearly been shown in the evidence that the State uses rationing as a means to control costs which is normal in the sense that there is no other way which it can limit the expense which will be incurred by the healthcare system. This is not a problem that's likely to go away anytime soon.

Costs are increasing, technology is increasing, population is aging, this problem will only get worse, and therefore, we are in a situation where there's a statement that care is available, it is not truly available because the fact that we have, for instance, an insufficient number of certain pieces of equipment to provide a certain service means that people have to wait for it. Well, that's an economic decision by the Government to say, well, we can afford to buy this number of machines and, therefore, the service is available in theory but in practice, people have to wait and that's how the State limits the cost of the system.

MR. JUSTICE MAJOR: -- (Off microphone) -- being given a preference -- (communication failure) -- in the line of getting ahead of the queue.

MR. JOHNSTON: There is evidence of that, Mr. Justice Major. It has been shown in this trial at first instance, for instance that if you know the specialist in question, you will not likely wait long on a queue. This is a form of preference which is not subject to any form of control or standards, it's just left to the discretion of the specialist in question. As well, there's no prohibition against going outside the country to receive care for services, and --

MR. JUSTICE MAJOR: There is if you don't have the money.

MR. JOHNSTON: That's right, but there is no -- I mean, this is an issue which I'll come to, but the object of this legislation, if it were to ensure that everyone gets equal treatment meaning that regardless of how bad that treatment is, you were actually preventing people from obtaining better treatment, I would submit to you, that would not be a valid objective because it would be completely discordant with the object of the *Charter* itself which is to confer rights, not to remove them. An ideal of equality inside the public system is an ideal which we subscribe to wholeheartedly, however, to simply remove rights from someone in order not to confer them on anyone else is, I submit to you, profoundly unfair.

It is absolutely valid, as my partner has exposed to you, for the public system to, in priority, obtain all of the resources that it needs in order to achieve its purpose. But beyond the needs of the public sector, what possible justification is there for the public system to say, no, no, I know you're waiting on a waiting list, you have a cancer inside you, everyday that you wait, you will worry about this and your condition will potentially

deteriorate, and yet, you are not allowed to buy the service outside even though it could be available without removing anything from the public sector. That's the issue of this case.

Is it fundamentally just or unjust to prevent someone from improving their own health if it doesn't remove any resources from the public sector? That's why the rationing is essential to our argument. The idea that the State has to ration, and does ration in fact, establishes, according to us, without a shred of doubt, that the impairment is excessive. It's overbroad and it could be done without limiting to the extent that they are limited, the rights of Quebeckers.

Now, the principles of fundamental justice are, with respect for this Court, a difficult concept to get your brain around, I though anyway. I believe that to the extent that section 7 is evolving, its interpretation -- the interpretation of the birth and place on the rights claimant must also evolve. It should not be that a rights claimant, if this Court were to consider that the right to life, security and liberty protected under section 7 extends to situations which are independent from the administration of justice, then, what possible justification is there for imposing heavier burden on the rights claimant in those circumstances for a right which is potentially the most fundamental, as my partner has exposed?

What possible justification is there for imposing a greater burden on the rights claimant in that situation than the rights claimant would have, if it had been one of the fundamental freedoms which had been fringed, that is once an infringement is shown, the burden shifts. This should be the result, we submit.

Now, regardless of how this Court concludes on that issue, we submit to you that there are principles of fundamental justice which satisfy the criteria of the *Malmo-Levine* case which have been breached and principally the question of overbreadth.

If it is shown, and simply the fundamental equation which I expose to you, we submit, exposes without a shred of doubt that this could be done with a less stringent impairment of the rights involved.

As well --

MR. JUSTICE BASTARACHE: That's a different argument, that's section 1 argument, but here, you're dealing with the principles of fundamental justice. I understand your position to be then that it's the overbreadth argument that is really relevant and this is where, I suppose, are engaged which means that you have to establish as the Appellant here that, basically, it is not necessary for the preservation or protection of the public system that this rationing of -- well, not even the rationing but the impossibility of having recourse to private services is required.

MR. JOHNSTON: The argument, Mr. Justice Bastarache, is the following: the infraction of rights comes from the prohibition to purchase services combined with the fact that the services are not available in a timely basis in the public sector. This is the infraction. If you cannot guarantee me services such as to protect my life, then I should be allowed to fend for myself basically.

MR. JUSTICE MAJOR: -- (Off microphone) -- funds to get the treatment you need elsewhere, if you're right on the section-7 argument, it doesn't necessarily mean to introduce a private possible system, you can satisfy the section-7 requirement if the Government ensures reasonable treatment within a reasonable time. They have at least two ways of doing that, sending you to the Mayo Clinic or elsewhere or permitting private care. It's a choice that the Government has, it surely doesn't fall on the patient to have to establish that.

MR. JOHNSTON: I would submit to you, Mr. Justice Major, that the choice of the Government is limited by public funds and you must distinguish in the fact of --

MR. JUSTICE MAJOR: Let me interrupt you, if they are limited by public funds, do they not have the obligation to say that they are so limited and that they cannot deliver what they have promised to deliver?

MR. JOHNSTON: Well, I would submit to you that would be basic fairness but you have to conclude, if you're not able to provide the services, how can you justify preventing me from accessing them on my own, and not only in the United States which favours those who have very high means as compared to, if you had a sector -- bear in mind, Canada is the only country in the OCDE which prevents private access to hospital care and private health insurance. It is striking to us that the argument seems to be that we are unable to accommodate that and a generous public health care coverage whereas everyone else seems to be able to.

But to go back to your original question, if the State is incapable -- we submit to you that the evidence in this case has shown that the State is not providing it and it is a question of money and the funds of the State are limited and they will always be limited. So, therefore, it seems profoundly unfair to not allow people to go outside if it is not clear that they will be able to access the services inside.

And Mr. Justice Bastarache, I don't think I completed my answer to you. The issue of overbreadth is one of the issues in terms of principles of fundamental justice but there's an intimate link between overbreadth and the section 1. I don't believe that this Court has ever found legislation to be overbroad and then justified it under section 1. It's the same argument. And what I was submitting to you is that if you interpret section

7 as extending beyond cases in which it involves the administration of justice, then I think you have to go the next step and conclude that the principles of fundamental justice apply only when there's an individual confronted with the penal or criminal justice system in which case those principles are there to protect him, not to impose an additional burden on him, in order to access rights which should be protected under the *Charter*.

Bear in mind that this case involves also the *Quebec Charter* section 1 which --

MR. JUSTICE BASTARACHE: But I think the question I wanted to pose, I'm trying to understand why you're saying that if service were provided on a timely basis, either inside the province or outside the province, as suggested by Justice Major, wouldn't the overbreadth argument still be available? Because under your argument, I understood it to be that the only way you could prevent a person from buying private services is if the buying of services would jeopardize the public system.

MR. JOHNSTON: That's correct.

MR. JUSTICE BASTARACHE: So, basically, it becomes secondary that the Government can provide timely services under the overbreadth argument. That's what I was --

MR. JOHNSTON: Well, I think we probably wouldn't be here if the services were being provided and probably it would be easier for the Government to justify the freedom granted to society, people are not suffering. In this case, we have shown that people are suffering as a result of the problems in the system and, therefore, obviously, you're right, the argument is much easier, but in theory, no, it could be made without the proof of an actual damage.

So, the question of overbreadth ties into section 1. As well, we submit to you, it is manifestly unfair to prevent someone from taking measures to access medical care within the definition of manifestly unfair as this Court adopted in the *Morgentaler* 1988 case. In that case, it was also a question of access to timely medical care for a woman seeking abortion. We submit to you that the same principle applies here. If in a manner which is excessive and it ties into the overbreadth argument, if in a manner that is excessive, the Government creates an impediment to access to medical care which is needed, then, that is manifestly unfair.

It is also compounded by the fact that someone who is the object of a decision by a physician to say, well, you know, you will wait for this treatment, has no recourse against that decision. There are no standards existent against which the patient can gauge this decision and say, well, is this fair, is this normal, is it normal that I should have to wait to receive cancer treatment when I know that the cancer is going to be developing while I'm waiting? There are no standards against which to measure this and there is no review possible. That is manifestly unfair.

And thirdly, the issue of the sanctity of human life, I mean, this Court has decided in *United States versus Burns* that capital punishment was a port in Canada to the extent that it would be a violation of a principle of fundamental justice, namely, the sanctity of human life. In any measure, any measure, any government measure, which detracts or deprives people of the right to protect their own life, I submit to you, is a violation of that principle.

MR. JUSTICE BINNIE: Isn't your argument really more -- (communication failure) -- to arbitrariness than overbreadth? You're saying there's a legitimate State interest in the public health plan, that the measures taken to protect it are so

grossly disproportionate to what is required. Disproportionality is what threatens the security of the person.

MR. JOHNSTON: I think this Court in *Clay* equated the overbreadth argument which had been made in *Haywood* to the grossly disproportionate which is the new standard, but one comment though, we are not challenging the decision of the legislator which, in this case, is not to prohibit private healthcare. Private healthcare isn't prohibited in Quebec. It is not and, therefore, it can't be the object of these attack provisions to prohibit private healthcare. It is not prohibited. So therefore, the only object which can be valid is to protect the public healthcare system.

So, to the extent that these measures are designed to ensure that the public sector has the resources it needs, then it's a valid objective clearly, but is it necessary to go that far? No, and in that sense, we submit to you, as opposed to the *Malmo-Levine*, *Kane* and *Clay* cases where the Appellants were challenging the very decision by the Government to outlaw marihuana, and I think this Court was well founded to consider, well, this is really challenging a political decision. We're not challenging a political decision, we're challenging the fact that the impairment which is unnecessary, that's what we're challenging.

In terms of section-1 analysis, obviously, the minimal impairment is the operative standard against which we consider that these provisions fail. And I will end on the discussion of the *Quebec Charter* and this ties into what I discussed with respect to the possible interpretation of section-7 rights. It's interesting to note that none of the Courts below have really decided the issue on section 1 of the *Quebec Charter*, we submit to you that that was an error because they had to. This had been argued, and we don't see how the fact-based inclusion of the trial judge that there was an infraction to protected rights under

section 7 would not automatically be as well an infraction to rights protected under section 1 of the *Quebec Charter*.

The terms are richly identical, and yet, the *Quebec Charter* is not situated in a legal right section, it's situated in a fundamental right section so, therefore, the burden is incurred automatically by the Government, considering that infraction, to show that it satisfies the *Oakes* test which hasn't been done. There has been no evidence whatsoever adduced before the Court at first instance that there was no lesser infraction which would have met the objectives which were considered valid.

Now, we submit to you that there is no valid reason for considering that a right to life, liberty and security protected under the *Canadian Charter* should have any less content to it than the rights protected under section 1 of the *Quebec Charter*. So we would urge you to grant this appeal, we thank you very much.

MR. JUSTICE MAJOR: Thank you.

Mr. Pratte.

ARGUMENT OF THE INTERVENERS, THE CANADIAN MEDICAL ASSOCIATION AND THE CANADIAN ORTHOPAEDIC ASSOCIATION, Mr. Guy Pratte

MR. PRATTE: Madam Chief Justice, Justices, I have given this morning a very, very modest condensed book which I will use to address hopefully a number of the questions that have been raised with the Appellants so far, particularly in respect of section 7, and I will turn to it in a moment. It has three tabs reflecting the three main submissions that the Interveners I represent, the Canadian Medical Association and the Canadian Orthopaedic Association, wish to make.

MR. JUSTICE MAJOR: -- (Off microphone) -- these books to?

MR. PRATTE: To the clerk this morning, I believe that we were told it was circulated, I think some of your colleagues may have it, Justice Major. Yes, it's entitled Condensed Book of the CMA and COA. I'll turn to that in a couple of minutes, if I might, Justices, as I say, to try to engage some of the questions that have been raised particularly in respect of section 7, the rights protected therein, and whether the principles of fundamental justice are engaged on the facts of this appeal.

But might I start, since I don't intend to repeat the argument in our factum, to at least sum up the essence of the position of these interveners and then turn to some of the specific arguments in question that have been raised. Physicians are professionally bound to preserve lives, all lives equally. This professional obligation informs these interveners from commitment to the public single healthcare system founded on the principle of universal but real accessibility as the best means to discharge that obligation.

But life and the quality of life must be a physician's ultimate concern thus the prohibition inherent in a single-payer public health system to accessing alternative of methods of healthcare delivery can only -- and that's the essence of our position, can only be justified on the basis of a reciprocal and equally robust obligation to deliver timely access to required healthcare within the public system.

In other words, the promise of universal accessibility to healthcare is meaningless unless it means timely access. Healthcare delayed is healthcare denied. Indeed, the promise of accessibility should not be a mere political best efforts promise, it should be a legally enforceable promise since it is said to justify legally enforceable prohibitions against alternative sources of healthcare delivery.

An enforceable monopoly may well be in the public interest, and in the case of healthcare, these interveners strongly believe that it is. But any legislated public interest monopoly carries with it a concomitant obligation to deliver the monopolized service when required. If it's true in the case of electricity and public utilities, it ought to be, in our respectful submission, in the case of healthcare.

Now, the fix -- and here, we disagree with the Appellants, the fix here is not to legalize private healthcare. The fix is to tell the Governments that if they want to enforce their monopoly, they can but only to the extent that their monopoly delivers timely access. Recognizing timely access as a constitutional bright line will not, in any way, undermine the current legislative public healthcare system. Quite the contrary, it will legitimize it since the current system failure to ensure timely access is the biggest threat to its credibility.

Now, let me turn to my condensed book to, hopefully, address some of the questions that have been raised. It's divided into three tabs. The first tab is simply a set of excerpts dealing with the life, security of the person and liberty interest that I say are at stake, and if you look at page 2, we've excerpted a New Brunswick decision which clearly makes plain that physical and psychological integrity are values protected by section 7, I need not read them to you obviously. The liberty interest is covered by the *Rodriguez* case and the *Blencoe* case that are cited at pages 5 to 6 of my brief.

In my respectful submission, there can't be no doubt that the interests in this case are covered *prima facie* by section 7. I did want the address though very briefly the question of whether or not these appellants have standing or whether the question is moot and not right for adjudication, I simply wanted to point the Court, and that's the burden of pages 9 and 10, the last paragraph at page 132 of the trial judgment and 133 where the trial

judge disposed of that saying, there's at least an imminent threat to health. And I don't want to be fastidious about this but if we wait for the right case of a person narrowly defined to have standing, the person may not be standing at the time that she, or he, has to come to Court.

So I say, really, that's not the issue in this case. The real issue is section 7, the principles of fundamental justice, are they engaged? That's the heart of this case, and that is the burden of Tab 2 of my little book, and here, hopefully, I'll try to address some of the questions that have been raised in particular by you, Justice Bastarache and Justice LeBel and others.

The first point is, are principles of fundamental justice engaged outside the criminal context? I have excerpted the passage from *Gosselin* from the Chief Justice that defines circumstances outside the criminal process which this Court has agreed, for example, in *Blencoe* where the principles may be engaged. And here, I differ with the Appellants. I say the principles of justice or the judicial system are involved in this case for this reason: in the province of Quebec, for example, if a person is denied medical services, that person can appeal to the Tribunal administratif du Québec, and I'll take you to a case in a moment called *Stein* which is a horror story showing the arbitrariness of that system.

So my submission on that point is you don't have to decide whether completely absent an intervention of the justice system, section 7 or fundamental principles of justice would be triggered. In this case, they are. And indeed, in my respectful submission, that's the very defence offered by the Procureur général du Québec. They say, if we can't provide the services, there are sections which allow you to apply for it and then there's a revision mechanism, un Tribunal administratif, to assess your claim and that is, you will see at page 13 of my little brief, it's the sections of the *Health Insurance Act* and the

Regulations which show that the Government will pay if, for example, in 3(a), the services are medically required, and then, outside of Canada or the United States, is the *Regulation*, again, if they're not available in Quebec, that's 23.1(2) but if they are required and 23.2 deals with outside of Canada altogether.

Now, the problem with these sections is that they say nothing about timing, and if you think that's just a theoretical problem, I invite you now to turn to the decision of *Stein* which is the next page. I've excerpted the entire case, it's short, obviously, I won't read you all of it, I don't have the time, but I commend it to your reading because this shows the very arbitrariness of the system in the Province of Quebec. Let me sum up the facts very quickly.

Mr. Stein was a 41 year old person who had been diagnosed with colon cancer. He was operated on once and it was discovered that there was more cancer that needed to be taken out urgently. At paragraph 6, page 15, the Court says, 'it had to be done within four to eight weeks as of January 1996'. He applied to the Régie to get permission to go elsewhere after his operation, the second operation, had been cancelled twice, if not three times, for lack of space in Quebec hospitals. His doctors -- you'll see this at page 16 at the very last line prior to paragraph 14 of the decision, his doctors supported his application and said 'time is a critical factor in this case'. The Régie turned it down and they said, it's available in Canada, having no reference to time, but this kind of operation is performed in Canada, please contact a doctor in Calgary, Ottawa and Toronto. No reference to time.

Ultimately, he went to the United States to be operated on and, again, the Régie turned down his request, and at page 20, you'll see what the Régie and the

Tribunal administratif du Québec, on revision, said about timeliness. They said basically, we didn't take too long to deal with your complaint. That's paragraph 73 in brackets :

"Si le requérant invoque l'urgence de sa situation, l'Intimé, au contraire, se défend d'avoir tardé à traiter sa demande."

That has absolutely nothing to do with what he was asking. He asked to be treated promptly, timely, and the trial judge -- I've underlined paragraphs 31 and 32, but shows how ridiculous an assessment this was. Now, he got (inaudible) remedy in the end but in my respectful submission, had there been a timeliness requirement in the legislation, he would never have needed to.

So, two points. This legislation engages the principles of fundamental justice because it engages an administrative tribunal and it's arbitrary because it completely denies the important requirement of timeliness. Second point, and I'll lead that point on that, I've also excerpted -- because the Ontario Government also claims that it has a regime, and that's at page 24, again, in Ontario, if you ask to go elsewhere, you might if it's not available in Canada and it's reviewable by an Administrative Tribunal, I believe it's called the Ontario Hospital Services Appeal Board, but there in Ontario, again, there's no mention of delay as a criteria on the timeliness except in 28.4(ii), the last provisions, and there, you can go out of Canada to avoid delay that would result in death or medically significant irreversible to sue damage.

In other words, delay only counts if you're gonna die. That is such a narrow definition as to basically completely destroy the interest that was protected in life and security of the person, in my respectful submission, and such a denial, virtual complete denial, you give access to medicine on the one hand and you basically completely take it out on the other hand, that cannot be in conformity with the principles of fundamental justice.

It falls, in my respectful submission, and I've outlined in the last page under that tab 25, this Court's jurisprudence as to what happens if there's a failure under section 7, what the impact of that is on section 1, I won't address that other than to say that it's virtually impossible, in my respectful submission, to justify a breach of fundamental justice under section 1 and the Governments certainly haven't done that, it cannot be a proportionate response to deny the right that you've promised. The only proportionate response would be to guarantee timely access within the system or if you can't guarantee it within the system, allow the person and pay for the person's services out of the system. That's the only proportionate response.

I'll conclude on the issue of remedy. What I've said sounds too simple to be true but the complexity does not excuse a government from *Charter* scrutiny or compliance. It might though inform the remedy that we would grant. A declaration of constitutionality is always a serious matter *a fortiori* when it regards the public healthcare system, a cornerstone of our social political foundation. I've excerpted at Tab 3, and that's my last point, one of many decisions, the *Eldridge* decision, that speaks to the Court's discretion to grant declarations and give a delay or a suspension and allow the Government, given the complexity, to work out the exact remedy. I say that's the overall approach you should take to this case and stakeholders can work with the Government to come up with an enforceable in guidelines about what timeliness means. I'll conclude with these points, if I might.

Recognizing for the first time that accessibility means timeliness will remove the uncertainty that has plagued the healthcare system for years. Until now, accessibility has meant, when and where available. That makes accessibility, in my respectful submission, as the *Stein* case shows, meaningless. If you grant the declaration of

constitutionality, it will focus the mind on the real problem, figure out what timely access means and then provide it. If you can't provide it for all required services, then don't make the promise that you can't keep. Fundamentally, all these interveners are seeking is a declaration that if Governments legally promise accessible healthcare, they will be held constitutionally accountable for that promise by making it meaningful. Those are my submissions, Chief Justice, Justices.

MR. JUSTICE MAJOR: Thank you. The Court will take its morning recess.

--- (RECESS) ---

MR. JUSTICE MAJOR: Mr. Storrow.

ARGUMENT OF THE INTERVENERS, CAMBIE SURGERIES, ET AL.,

Mr. Marvin R.V. Storrow, Q.C.

MR. STORROW: Thank you, My Lord. My Ladies and My Lords, we filed and served last week a brief of our factum called 'Speaking Notes' and if it pleases you, it might be helpful if you could obtain a copy of them because I'm going to try to use those notes to articulate our position here and, hopefully, I can get to them all in a period of 15 minutes.

We're going to divide our argument into four areas: general remarks, section 7, section 1 and some brief conclusions. The people that we act for here are 14 clinics from British Columbia, two of which are diagnostic, the other 12 are surgeries. We act for the British Columbia Anaesthesiologists Society and the British Columbia Orthopaedic Association. Between them, they perform about 30,000 procedures a year in British Columbia. In British Columbia, we have about 80,000 people on our wait lists, likely, a very high percentage of the procedures performed by our clients would be added

to the wait lists in British Columbia if our clients weren't doing what they're doing so, in a sense, they're making the public system a bit easier.

We want to remind the Court of something that Dr. Chaoulli reminded you of, and that is that, in our opinion, it's of interest to note that only three provinces have intervened here; two others intervened and abandoned their interventions, that's British Columbia and Manitoba, one, a Liberal government and the other, a NDP government. We merely ask the question since medicare is a provincial matter, why aren't the provinces here to defend what went on in the Quebec Courts in this case?

In our view -- in our clients' view, I should say, the medicare system in Canada is in a very desperate condition at the present time. There isn't much time to fix it; it's unfortunate in the sense that the record in this case is six or seven years old because there's a lot that has happened since the record was developed in this particular appeal.

There is some evidence, and I wanted to bring to the attention of the Court some evidence that is contained in the authorities of Dr. Rawl(Ph), and at Tab 11, that is part of the OECD Report which was produced in 2003 and it demonstrates there that there are about seven or eight countries who have universal medicare coverage along with the private parallel system that don't have wait lists. These countries are Australia, Belgium, France, Germany, Japan, Luxemburg and Switzerland and the United States, and so, it seems that a parallel system can work and we suggest to you, and we will suggest this later, that it's overdue in Canada to get the assistance of someone other than the Government to attempt to fix this unfortunate condition that we see ourselves in.

So, if I could ask you to turn to paragraph 3 of our speaking notes, we say the specific provisions which are the subject of this appeal must be considered within their legislative and factual context as part of a public healthcare regime which: (a) limits or

rations medical care within the public healthcare regime itself; and (b) at the same time, imposes a number of statutory prohibitions and regulations aimed at preventing or deterring the development of alternative sources of funding for medical care, diagnosis and treatment.

The Respondents in effect admit that the healthcare system is broken in Canada but argue that the Appellants have not shown that the system would be fixed by allowing private funding of healthcare. Even if this is true, we suggest, it begs the question. The correct question is: if individual Canadians are not receiving adequate care under the public healthcare system, is the Government justified in preventing those individuals from using their own resources to obtain necessary or required medical treatment in order to protect their own health, alleviate pain, suffering, disability or disease, or perhaps even to save their own lives?

It is not a question of whether allowing individuals to do so will fix the system. Rather, it is a question of whether individuals can justifiably be prevented from securing necessary and adequate healthcare for themselves.

If we take the Government's position and extend it to its logical conclusion, the Government is essentially supporting the proposition that the one-payer system can justify any surgical waiting time no matter how long that wait is. That, I think is what the Government is driven to in terms of the position they have assumed. In essence, Canada has tried to turn our system of providing medical care into a State-controlled monopoly. We don't say that that's unprincipled, immoral or necessarily wrong even, but that's what they have tried to do and it might be a nice theory to try to do that, but if the theory isn't working, then something's got to give and we suggest, with respect, that this case will help that giving.

We have other choices in our system of justice. Here, a patient doesn't have a choice to receive surgery in a timely way but, for example, if a person is charged with a criminal offense, even a minor one, under section 11(b) of the *Charter*, that person has a right to a trial within a reasonable time and if the delay is pre-charged delay, then section 7, I suggest, should apply, but a sick patient doesn't have the same rights, but the importance of sickness and the importance of getting a trial within a reasonable time are two very important things, perhaps equally important. We've seen in Canada that a person has a right to counsel and perhaps a right to counsel of one's choice.

The medicare system seems to be depriving people of the right to a doctor in a timely way certainly and, in addition, we can imagine a situation where one's doctor has admitting privileges at one hospital and the wait there is 18 months, the person might be able to get into another hospital in 12 months, but the person's doctor doesn't have admitting privileges in the other hospital so that person might have to take another doctor who the person may not have confidence in. So the system itself, we suggest, is in a desperate condition.

So, I'd like to deal quickly with liberty and security of the person under section 7, we do adopt the arguments of my learned friends that went before us, in our submission, the right to take care of one's own body is an aspect of life in extreme cases and of liberty and security of the person within the meaning of section 7 of the *Charter*. Liberty includes physical health which is a matter of fundamental personal importance which falls within the sphere of personal autonomy protected by section 7 of the *Charter*. In our submission, the right to take reasonable measures to protect one's own health is an important aspect of liberty.

Security of the person. In addition, State interference with bodily integrity violates the security of the person which encompasses a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from State-imposed psychological and emotional stress and the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity. In our submission, the State infringes upon the right to security of the person if it prevents individuals from taking reasonable steps to protect their own life and health.

I'll deal with this briefly later, but I think it's relevant, I submit that it's relevant that Canada is the only OECD country with a one-payer system of medicare. Every other country has a parallel universal system. I don't think we can necessarily take that notion to the bank but it certainly does say something about us or about them. They have made it work. We have tried a system which, I suggest, on the evidence and in fact is not working and something's got to be fixed here, in our submission.

In our submission, it is the nature and the seriousness of the individual interest at stake which must be considered the most important factors in determining whether section 7 is applicable. It would be contrary to the spirit of section 7 to read it as protecting the individual from serious deprivations of life and liberty resulting from failures and imperfections in the administration of justice, and not protecting the individual in a context where there were no adjudicative or procedural protections in place whatsoever. Such an interpretation would fail to protect the individual at exactly the point when the risk of injustice and abuse of power was the greatest.

Certainly, in British Columbia, if a person has to wait two years to get a hip replacement or any other surgery, there's nothing the person can do about it. You just

have to wait until the hospital or the Government is ready to do the job. There's no appeal from that. You can't do anything about that and, with respect, we think that's --

MR. JUSTICE BASTARACHE: What principle of fundamental justice do you say is engaged here?

MR. STORROW: In this case, My Lord, I think life and the security of the person are the two perhaps main ones, I'm not sure about liberty, but certainly security of the person is engaged with respect --

MR. JUSTICE BASTARACHE: This is not my question. My question is, if they are engaged, then they would have to be jeopardized not according to a principle of fundamental justice, so what is that --

MR. STORROW: The principle of fundamental justice is the principle that lets us have bodily integrity, look after our own -- am I misunderstanding your question? That's the way we see it. The principles of fundamental justice also include question of, can a person do anything about this refusal to treat the person, and it's clear certainly in our jurisdiction that we don't have that right. We've dealt with that starting at page 8 of our brief, My Lord, and I wanted to bring your attention to some other facts at paragraph 14.

In British Columbia and elsewhere in Canada, and I'll just start with paragraph 14, we say, in fact, the Canadian healthcare regime is replete with arbitrary and irrational distinctions. In British Columbia, for example, a number of user groups are exempted by regulation from the strictures of the public healthcare legislation and are free to access care in Canada outside of the public system. These include injured workers who are covered by the Workers Compensation Board and that is a form of insurance, the Workers Compensation Plan is an insurance plan, workers can be insured by their employers for injuries at work but not for injuries not at work.

In addition to that, there are persons injured in motor vehicle accidents in British Columbia who are excluded, members of the RCMP, federal penitentiary inmates are excluded under the *Canada Health Act* and foreign visitors. We have an example at paragraph 15. We say, amazingly, persons from other jurisdictions are excluded from the legislation with the result that foreign visitors may access treatment within Canada outside of the public system. For example, if Canada's national women's soccer team is playing a team from Mexico in British Columbia and a player from each team receives a knee injury, the player from Mexico can get to the doctor and the hospital tomorrow and the Canadian woman might have to wait many, many months.

In short, the legislation, we suggest, fails to provide meaningful standards and procedures in order to safeguard the right of an individual to access adequate medical care.

Under section 1, I'll try to conclude with this, I've already stated that the OECD Report makes it very clear that Canada is unique. Canada is unique in that it has a one-payer system whereas the other countries have universal systems just like we intend to, but we do not permit others to pay for surgery in private facilities as the other countries do. Oddly enough, the Government of Canada forces Canadians to pay for their own healthcare in some areas and prohibits us from paying for healthcare in other areas. We can buy prescription drugs in Canada, we can get home care, genetic tests, medical equipment, and so on.

And recently, in Ontario, in the Ontario budget of this year, the Ontario Government announced that it intends to delist certain things, physiotherapy, chiropractic and optometry services. People now are going to have to pay themselves to get

those services. Why can't someone pay who isn't paying and can't get into a public hospital pay to have his knee or shoulder or whatever injury fixed.

In other developed countries, a broader spectrum of services is publicly provided and is provided in Canada but citizens have options outside of the public healthcare system in those countries. In fact, Canadians pay more from their own purses for medical services than do citizens of many of these countries. We don't have a system in Canada where the Government isn't paying very much per capita, it's paying a lot. The Canadian approach is no more obviously egalitarian and yet it violates fundamental rights of personal autonomy and security to an extent which is unparalleled in any other developed country.

There has been talk that a two-tier public system or a parallel system is a system for the rich and a system for the poor. A very high percentage of the work done by our clients is done for the Workers Compensation Board on persons who are members of unions, working people, and they get their difficulties fixed quickly.

MR. JUSTICE MAJOR: -- (Off microphone) --

MR. STORROW: Sorry. Thank you.

MR. JUSTICE MAJOR: Mr. Cherniak.

ARGUMENT OF THE INTERVENERS, SENATOR MICHAEL KIRBY, ET AL., Mr. Earl A. Cherniak, Q.C.

MR. CHERNIAK: May it please the Court. I would ask only that the Court have our factum before you and if you could turn to page 2, I am going to deal, in the time I have, with a brief review of our position on the section 7, and then turn to the healthcare option recommended by the Senate Report to rectify the constitutional defects in the legislation.

The position of these interveners can be simply stated as set forth in the Senate Report and our factum. If you look at paragraph 7 on page 2, the Senate Report clearly support the single-payer publicly funded system but they say that Governments can no longer have it both ways. They cannot fail to provide the service in the public system and prevent Canadians from obtaining them through private means.

While there is no constitutional right to healthcare, the constitutional issue in this case arises solely because Governments have legislated a monopoly on the funding of medically necessary health services but have not ensured that medically necessary healthcare will be available in a timely way. Waiting lists continue to grow and very greatly across the country, thereby, violating on a daily basis the *Charter of Rights* of thousands of Canadians who do not receive care until it's too late so that they suffer or die or must leave the country to obtain it at their own expense beyond the means of most Canadians.

The Senate Report demonstrated the sorry existence of this state of affairs beyond argument as did the Romanow Report. The Senators entirely adopt the argument of those who preceded me on section 7. In many cases, the failure to provide medically necessary services in a timely way involves the right to life and in all cases involves the security of the person. In our submission, there's nothing more fundamental to personal autonomy than the right to make decisions about one's health and treatment of illness and disease because the right to life and security of the person is negated without the ability to do so. To be constitutionally valid, in our submission, a single-payer publicly funded system must provide for timely delivery of medically necessary health services, it's part of the promise that is implicit within the legislation.

The Senators' position that we put before you is a much more nuance than narrow review of section 7 rights that are advanced by the Appellants who would end

the Government's monopoly. The Senators' submission focuses on the constitutional requirement that services be delivered, not on who delivers them. In other words, the focus is on the individual patient's right to access to treatment in a timely way and not on a particular delivery system or the right of any particular provider or the freedom of the medical profession to privately bill viewed, as the Senators argue, the issue is not economic, rather, it is about personal autonomy, the right to be treated in a timely way.

Now, there is, in effect, a prohibition here against the right to protect one's life and security of the person with no adequate process to challenge, and that is why section 7 is engaged.

MR. JUSTICE LeBEL: If we had no medicare system, would there be a constitutional right to public money to access medical care?

MR. CHERNIAK: If there was no medicare system?

MR. JUSTICE LeBEL: Yes.

MR. CHERNIAK: No, I say there is no constitutional right to healthcare but when the Government provides the publicly funded system and prevents access for all practical purposes, as Mr. Pratte demonstrated, outside the system, that is what engages section 7, and to answer Justice Bastarache's question, this is not an extension of section 7, this is engaged because there is no adequate process to challenge the prohibition. A healthcare system which we say -- a legislative healthcare system which does not deliver medically necessary healthcare in a timely way and prohibits the individual from doing it (inaudible) must be fundamentally flawed in contrary to the principles of the fundamental justice.

If one focuses on the purpose of the legislation under review, to deliver healthcare to Canadians which, in my submission, is the right focus, that purpose must mean

delivering that in a timely way and if this fails to do so, it cannot be meet the test of fundamental justice. The Attorney General of Canada says, well, satisfactory access is what it means. If it's not timely, it simply cannot be satisfactory.

MR. JUSTICE BINNIE: Just to clarify, the Appellants talk about the arbitrariness of the system, you're suggesting that built into section 7, once the rights upfront are engaged, the life and security of the person and so on, then, what section 7 means is there must be a procedure, a fair procedure, to deal with threats.

MR. CHERNIAK: There must be a way to deal with it and there's none here. For all practical purposes, there is none here and thus section 7 -- the fundamental justice aspect of section 7 is engaged, otherwise, Governments could always get around the premise of section 7 simply by not providing any way to deal with the violation of life, liberty and security of the person. That can't be right. That can't be a proper interpretation. In my submission, this is not an extension in any way of the interpretation that this Court has always put on section 7. So, we say that the failure to provide medically necessary healthcare in a timely way is a breach of the essential promise and the premise of the healthcare system.

Now, let me turn to the healthcare guarantee. The proposition that the Senators advance is that the choice for this Court and for Governments is not between a single-payer publicly funded model and a parallel private system which is what the Appellants appear to argue for. Rather, the work of the Senate Committee, very extensive work, six volume work that extended over many, many months, and the Report demonstrates that it is possible to provide medically necessary healthcare services in a timely way entirely through the single-payer publicly funded system.

That is in a way that will pass constitutional and *Charter* scrutiny such that section 7 rights are not violated, and that method recommended after careful study by the Senate Committee is outlined in considerable details in our factum, starting at paragraph 19 and going right through to paragraph 29, and I have not the time to review it in detail, but the premises is that this can be done entirely within the current structure and legislative framework governing the publicly funded healthcare, and that premise was supported by very substantial evidence before the Committee in the existence of two such guidelines in Canada that are detailed in paragraphs 25 to 29 of our factum, and I urge the Court to consider that out. The cardiac care network in Ontario and the western Canada waiting lists cogent and the existence, the ability to create guidelines such as this is supported by the Canadian Medical Association in their factum.

The important thing to note is that these guidelines are based on the existing ones and the ones that we propose can be developed. They will be based on objective clinical criteria that result in a URS, an urgency rating score, or its equivalent, for each individual depending on the circumstances of that patient, but the guidelines themselves will be clinically valid and objective. The healthcare guarantee, if it is implemented, will develop similar guidelines for all medically necessary services and rationalize waiting lists over the entire country.

MR. JUSTICE MAJOR: -- (Off microphone) -- interview process?

MR. CHERNIAK: -- (Communication failure) -- efficiencies?

MR. JUSTICE MAJOR: How will you bring the efficiencies?

MR. CHERNIAK: I say that the efficiencies will be inherent in that system because to the extent that a province cannot provide those services in a timely way in its own locale, it will be obligated under the healthcare guarantee to provide those services

to that individual in another province in Canada at its expense or, if necessary, if they're not available in Canada in a timely way, outside the country. Provinces will then have an incentive to so rationalize their services that that requirement will be minimize.

MR. JUSTICE MAJOR: I understand that, but what I'm curious about is how do you get before this board or tribunal, it sounds like another (inaudible) where there will be the usual lineups?

MR. CHERNIAK: Well, I say, one doesn't have to get before a tribunal at all. One has to have a medical person evaluate the individual and if the individual needs services in a particular time period based on those medically necessary guidelines, those medical guidelines, that person will be entitled to those services and if he can't, or she can't, get them in their own province, then, they go elsewhere. I'm not suggesting that the healthcare guarantee doesn't involve a board, it involves the rights based on objective clinically valid guidelines that will apply to each individual person and the province will simply have to provide those services there or elsewhere.

The healthcare guarantee, as I understand it, does not involve a bureaucracy. What it does envisage -- and this is expanded on in paragraph 20 in our factum and in more details in the report itself, it envisages delivery elsewhere in Canada or in another country, it's a self-defining system because it will be based on current clinical expertise and the individual's scores that each patient under the urgency rating scale is developed for that patient and it will preserve the principle of a single-payer public funding in Canada.

MR. JUSTICE BASTARACHE: But does that suppose that all provinces have to agree on those --

MR. CHERNIAK: Yes, I agree, because the provinces deliver the system, the provinces would have to agree and, of course, that's why -- and I'll get to this in a moment, that's why we say that if the Court accepts our submission and makes the declaration of invalidity, that the Court should suspend that declaration for up to three years in order that the Federal Government and the Provinces can come up with a scheme.

What's important is that Senator Kirby and his colleagues do not say that their delineation of the healthcare guarantee is the only way this can be done. What they say is -- and it's not the only way that the constitutional validity of the system can be saved, what they say is, it's the one they recommended after extensive study. There may be others. Governments may be able to devise that better method and they should be given this reasonable opportunity to do so by means of the suspension.

What we say is that a system that shifts the burden of Governments to meet their constitutional responsibilities on the backs of the most vulnerable of Canadians which is what is happening today on the ground in every part of this country, those people who are in need of medical services and cannot obtain them, that system cannot be maintained, in our submission.

So let me conclude where I started. Governments cannot have it both ways, at least not any longer. It can only constitutionally maintain the single-payer publicly funded system if that system delivers the corollary, the promise implied to Canadians that the single-payer system will provide for medically necessary services in a timely way.

MR. JUSTICE BINNIE: On the implied promises, it's difficult, all kinds of Government programs you could say imply a promise and what you're saying is that section 7 provides a guarantee that whatever promises you imply into the legislation, it has to be performed and, you know, in the case of the health guarantee, the costs would be,

according to the estimates, quite staggering. Where do we get the authority to say, well, you've got to have a guarantee and if you don't live up to it, then you have to pay somebody else for those services?

MR. CHERNIAK: I'm not suggesting this Court declare that there has to be a healthcare guarantee. My position is that the legislative system we have now is flawed and this is a different kind of Government program because it deals with the life and health of Canadians and it prevents them from doing anything about it except within that system, so we're dealing with a different kind of (inaudible). This Court does not have the right to make such a declaration that there be healthcare guarantee, I concede that, which is why our position is, there should be a suspension for three years to let the Governments come to grips with it.

But I say the system as it exist is constitutionally flawed because the premise of the system, any mandatory publicly funded system that we prevents you from going anywhere else must deliver those services in a timely way or it's no system worthy of the name. The question of budgets, the Government, who knows, may have to restrict the extent of those services. That will be for Governments to deal with but we say --

MR. JUSTICE BINNIE: But what you are saying is that the health guarantee by whatever name and whatever particular becomes a positive duty under the *Consitution* on the Government to fulfill in the way which you regard as satisfactory in terms of timeliness and --

MR. CHERNIAK: If the single-payer system is to be preserved such that one can't go outside the system, the Government could eliminate that. The Government could say, you can't go outside the system, but if the system is to be preserved, and the Senators say it should be, the Senators support the current single-payer publicly funded

system but if that's to be preserved, then it must be done in a constitutionally valid way and the healthcare guarantee is one way to do it. It is not the only way, and that's why Government should have three years to figure it out, so let me conclude in this way.

MR. JUSTICE LEBEL: Well, I would perhaps have just a short question as to the remedy and the possible response to a declaration of invalidity. If we assume, as you seem to assume, that there is no constitutional right to a public medicare system, then I take it that a possible, perhaps a theoretical response from Governments across Canada to a declaration of invalidity would perhaps be the repeal of the present system and, after that, letting people fend for themselves as well as they could.

MR. CHERNIAK: Well, I suppose that's a possible response, it's not a politically possible response. So if I can conclude in this way, this Court should not shrink from declaring the system as it stands constitutionally flawed but Government should be given the appropriate time frame to come up with a design of the system as this Court did in cases like *Eldridge versus B.C.*, a case like this one where the Government had options available to rectify the unconstitutionality. Thank you.

MR. JUSTICE MAJOR: Thank you.

Mr. Claude.

ARGUMENTATION DE L'INTIMÉ, *PROCUREUR GÉNÉRAL DU QUÉBEC*, maître Patrice Claude

....

RESPONDENT *ATTORNEY GENERAL OF QUEBEC*'S ARGUMENTS, Mr. Patrice Claude

MR. CLAUDE: Madam Chief Justice, Justices, the Attorney General of Quebec's oral arguments will deal with section 7 of the *Canadian Charter*. As concerns the other issues, we refer the Court to the relevant paragraphs of our factum without commenting any further while being, of course, ready to answer the Court's question if need be. I will be in charge of the first part of the Attorney General of Quebec's arguments and my colleague, Mr. Robert Monette, will be in charge of the second.

For my part I will examine the domain of application of section 7 and the absence of an infringement to the right to life, liberty and security of the appellants. Mr. Monette will, for his part, address more particularly the absence of causal link between the alleged infringement and sections 15 and 11 of the two Acts and the conformity of the alleged infringement with the principles of fundamental justice.

Does section 7 of the *Canadian Charter* guarantee to the appellants constitutional access to a free market for private insurance and private services covering medical and hospital services already covered by the Quebec health and hospital insurance regime? The appellants allege that it is the case and, to this end, allege that there exists a fundamental liberty to use their own financial resources to choose to buy health services which they consider appropriate.

In fact, what they are asking for is the possibility that a parallel private insurance regime be established which would enable those who have the means to provide this for themselves to obtain privileged access to health services. Indeed, during the hearing before the first instance judge, counsel for the appellant Zeliotis did not hide the true nature of his request by affirming 'I argue for wealthier people's right to access parallel health services'.

The appellants ask that this Court review the adequacy of measures aimed at preventing the development of a parallel private health care regime in the absence of an adequate factual context. None of the appellants has shown that his state of health required that he have access to health services which are required from the medical point of view, they have no specific request for particular services to put forward and they face no actual or imminent refusal of services, have not established any concrete difficulty of access to a medical service.

To the contrary, even in the case of appellant Zeliotis, the evidence on record shows that the medicare system has provided him with the emergency services, medical treatments and surgical care required by his state of health and the problems to which he alleges having been victim have not been caused by difficulties of access to health services, but rather by many personal factors. As for appellant Chaoulli, he has never pretended to have received inadequate care or that the Quebec health care system had not responded to his personal health needs.

In fact, what the appellants are doing is to put forward the hypothesis that if they eventually require health services, the Quebec medicare system will not be able to answer their demands, at least within an appropriate delay. They ask that the Court accept this hypothesis without anyone knowing, notably, the nature of health services which would be required, the availability of such services, the causes of an eventual delay in providing them and the delays after which there could be an impact on the health of persons.

The appellants therefore ask the Court to analyse the impact of the impugned provisions on the basis of an inadequate and highly hypothetical factual context, on the basis of a context that does not include the elements which would enable an evaluation of the nature of the infringement, its cause and the role of the State in this infringement.

MR. JUSTICE BASTARACHE: I think the case of Mr. Stein was not very hypothetical, there is much evidence here that there are important waiting lists, many experts have testified to the effect that their clients were put in danger by inaccessibility to services. You want us to ignore all of this evidence?

MR. CLAUDE: As concerns the case of Mr. Stein, the judge has heard Mr. Stein himself, has also heard Mr. Stein's doctor who was Dr. André Roy and has concluded at p. 44 of her decision... in fact at page 28 which is found at p. 44 of the appellants' joint file, and I quote:

> "On the other hand, Dr. Roy is the surgeon at St-Luc's Hospital. I assume that he has seen Mr. Stein and his testimony has not been to the same effect. I note that Dr. Roy has not been called as a witness at Mr. Stein's trial against the Régie de l'assurance-maladie du Québec. Dr. Roy has told before the court a different story from that told by Mr. Stein. According to him, Mr. Stein's surgery had to be postponed only once and he would perhaps have operated him the next week. Dr. Roy has testified in a strong and sincere manner and given many explanations as to what happened at St-Luc with Mr. Stein, his patient. What to think of all this, the court remains perplexed as to what really happened in that case, the story, at the very least, is not conclusive". (As read)

Evidently, Mr. Stein's case, like the case of Mr. Zeliotis, does not reveal the fact that a prejudice has been incurred through the delays caused in the present case.

MR. JUSTICE LeBEL: But, really, Mr. Claude, and on this, coming back a little to the problems raised by my colleague, Justice Bastarache, it seems that there are nonetheless in the record some pieces of evidence as to problems, let's say, systemic in the organization of services at present, and in such a case, can the appellants not raise, as to their standing, the reasonable hypothesis that if they have to have recourse to the available health services, that they could meet with some difficulties? And wouldn't that suffice then in order to establish, strictly at the constitutional level, their standing?

MR. CLAUDE: It is not as much a question of standing as it is a question of having before the Court the relevant and adequate factual context in order to proceed to an analysis under section 7, on the one hand. The appellants having shown no particular difficulty to access health services which concern them directly, base their argument on an allegation in fact of general infringement by pretending that the Quebec medicare system shows such grievous lapses that it does not respond on a vast scale to the needs of the population, that it globally jeopardizes the security of Quebeckers.

I respectfully submit that they have not proved this allegation. Faced with a law that guarantees to the population of Quebec free access to all, to the network of health establishments organized in conformity with the law, and to free access to almost all practicing doctors in Quebec.

Also a system whose performance considered in light of relevant social sanitary indicators can be favourably compared to access in other developed countries. Good results are obtained with respect to many elements, avoidable mortality, the number of potential years of lost life, the rate of infant mortality, life expectancy at birth, etc. The evidence in the record also shows that the medicare regime responds well to cases which constitute a danger for the life or physical integrity of users. This is what the experts came to say, there may be certain delays in the case of elective surgery, but emergency cases are treated promptly and efficiently.

In other situations, indeed like that where users are waiting for elective surgery, the professionals involved evaluate their situation and treat them in priority if their state of health presents certain signs which would justify a quicker intervention. Those are the testimonies of Doyle, of Dr. Doyle, of Dr. Fortin also who has said that urgent cases are seen, are prioritized, are treated first. Those who will wait are cases which do not present these characteristics of necessity of emergency and of a necessity of immediate care.

What is in the record, in fact, is that it is spoken of the phenomenon of waiting lists in order to bring you to conclude and to pass judgment on the general state of the Quebec medicare system based on this highly publicized topic, also, waiting lists. I submit to you that these waiting lists do not provide us with any reliable information because they are not based on uniform and normalized data. That's what the evidence in the record shows. It is generally estimated that more than a third of the patients who are found on these lists are counted outside, and this, for various reasons.

One example of this, Dr. Fortin, an ophthalmologist in Granby, testifies to the effect that of the patients who are waiting at Granby Hospital for a cataract operation, some, on their admission request, the mention «Florida» can be seen because they are in Florida for part of the winter, they are not available for the operation, but are nonetheless counted as being in

waiting and in waiting time. Thus, one must be very careful before relying on this highly publicized phenomenon.

Moreover, I respectfully submit that the existence of damage to someone's health cannot be established solely based on the fact that the person is put on a waiting list. Mr. Stein does not constitute a conclusive example. Mr. Zeliotis alleging he has waited, the Court examines his case and concludes that he has not suffered the damage he is alleging. Here are two people who could have been counted on a waiting list.

Also, the OECD in a study that is quoted at paragraph 125 of our factum, the study entitled «Tackling Excessive Waiting Times for Elective Surgery: A Comparison of Policies in Twelve OECD Countries». The OECD in that study, proceeds to a review of studies on the issues of waiting delays and reaches the conclusion that there is no evidence of a deterioration of one's state of health during the wait. No conclusive evidence in that regard, probably, it says, because waiting times are short when situations are serious and, on the other hand, because, indeed, doctors manage waiting lists and give priority to cases which require quicker intervention.

So one must be careful before concluding that the system is bankrupt on the basis of waiting times. In itself, a waiting list is not an undesirable element for a medicare system, the characteristics of countries which do not limit access to health services based on individuals' capacity to pay, they will swear that it is necessary in the distribution of services.

MR. JUSTICE LEBEL: However, in certain cases, even though there is not, say, a direct threat to life, to wait 12 months or two years as it has been said in certain cases for a hip replacement, can very much make life impossible for a person, render her incapable to undertake her normal activities, and there seems to be some indications that the system sometimes generates such problems.

MR. CLAUDE: Well, we do not pretend that the system is perfect. Indeed, there are situations in particular domains which can be identified where certain problems of waiting time exist but this situation cannot lead one to conclude to the generalized failure of the system and to the fact that on a vast scale the Quebec medicare system does not respond to the needs of the population.

And that is precisely the burden which is imposed on the appellants because they do not identify particular demands, proceed to a generalized attack of the system, well, they should demonstrate that it is in fact the case and it cannot be assumed in the present state of the record that the situation is such that the system is in such a state of failure that it does not respond to the needs of the population in a general manner. Indeed, no one seriously states that the health system is bankrupt. All the commissions and committees who have looked at the system believe in the need to preserve it, to maintain it on its present foundations.

So in this context, the appellant's demand amounts, I respectfully submit, essentially to dispose of financial resources in order to purchase medical and hospital services already insured by the law, and to give constitutional protection to such a right would have as a consequence to constitutionalise a right which, in truth, only wealthier individuals could exercise. I submit that section 7 does not enable a request for such a right, which is not protected under liberty or security of the person. To complete my arguments on this question, I refer the Court to paragraphs 132 to 139 among others.

Of course, all this is being examined in the context where section 7 of the *Charter* would be applicable, in the presence of a context which would present the relevant factual elements for an evaluation of all the elements which must lead to conclude to the protection of section 7, the nature of the infringement, its cause, because the causes of a delay can be multiple, and Mr. Monette will come back to that, it can be due to a group of elements which are not attributable to the State; it can be the professional himself, the professional doctor, who, for X or Y reasons, badly manages his lists; it can be the lack of professionals in a given sector, such lack being felt in all industrialized countries in certain sectors. Is the prohibition caused by ... the prohibition on purchasing private insurance caused by the law the cause of these delays? All the elements have not been demonstrated, in the present case

So, that being said, the present debate, I respectfully submit, does not come within the domain of application of section 7. According to the dominant judicial views on this section, this provision has the effect of preventing certain types of infringements on life, liberty and security of the person, namely those which happen through an interaction of individuals with the judicial system and the administration of justice.

The reasons which are invoked in order to limit the application of section 7 to the domain of the judicial system and of the administration of justice have been exposed by the Court in many decisions, and recently by Justice Bastarache in *Gosselin*. I have no intention of repeating them here and I refer to them without further comments. Recognizing however that the majority in *Gosselin* has not definitely closed the door on the application of section 7 outside of the administration of justice context, the Court has nevertheless not crossed that bridge and we submit that it is not appropriate to cross it here in the context of the present case.

In the present case, the alleged infringements to life, liberty and security of the person do not result from the interaction of individuals with the judicial system and the administration of justice, and this has been acknowledged by Mr. Trudel in oral argument. The words judicial system and administration of justice refer to the State's behaviour in applying the law and enforcing compliance with it. There must be, I respectfully submit, an initial act by the State through the administration of justice which directly infringes on life, liberty or security of the person. The infringement must emanate from the State through the application of the judicial system through the administration of justice, whereas in the present case, there is no State measure which would be analogous to a judicial or administrative instance and which would have legal consequences for the appellants.

MR. JUSTICE BASTARACHE: Isn't there a regime of penalties for a doctor who would perform a service contrary to the law?

MR. CLAUDE: There is a penal sanction which is the fine which would punish an infringement of sections 15 and 11, 15 of the *Health Insurance Act* and 11 of the *Hospital Insurance Act*. I submit that the mere possibility of a fine does not put under section 7 scrutiny the validity of a provision concerning the prohibition on private insurance itself. If the presence ...

MR. JUSTICE BASTARACHE: It is the justice system which is concerned.

MR. CLAUDE: Yes, but the impugned provisions, sections 11 and 15, do not impose any treatment through the intervention of the judicial system as was the case in *B.(R)* for instance. The State does not use any coercive means in order to restrain access to a service. The judicial

system cannot intervene, in such a manner that it would itself cause the alleged violation to life, liberty or to the security of the appellants, as opposed to *Morgentaler* or *Rodriguez*, for instance. The impugned provisions concern only a contractual right of an economic nature, concerning the financing mode of the public regime of health and hospital insurance. They aim at guaranteeing everyone's access to quality medical and hospital services, not at restricting such access.

And if the mere presence of a penal sanction providing for the payment of a fine sufficed in order to subject the regime to the application of section 7, well, this section would apply, I respectfully submit, to almost every legislative regime of a regulatory nature. The conduct which is covered by the penal provision must itself directly involve the rights guaranteed by section 7 in order to be subjected to the courts' scrutiny. This is not the case here.

One example of this, in *Re: Motor Vehicle Act*, it is not to prohibition on driving during the permit's suspension which involves section 7, but the fact that this conduct became through the provisions of the criminal code an absolute liability offence which could be punished by imprisonment. I also refer you to the *Rombault* case from which many extracts were quoted in our factum and which also establishes this principle. Hence, in our view, there is no application of the justice system in the present case.

Also, the great difficulty which the appellants and interveners have in identifying a principle of fundamental justice which would be applicable to the present debate illustrates perfectly that what is attempted is to apply section 7 in a context where the administration of justice is not in cause. My colleague, Mr. Monette will come back to the topic of principles of fundamental justice.

Let us simply note here that the way in which the appellants and interveners attempt to define the principles of fundamental justice illustrates the dangers and the consequences of recognizing the application of section 7 in order to protect rights or interests which have no relation to the administration of justice. The appellants and interveners raise section 7 and the principles of fundamental justice in order to bring the Court to specify how the medicare system should be organized and to reassess the very principles and foundations of this system. They raise them sometimes to open the possibility of a parallel private system, as do the

appellants, and sometimes to prevent it, as does the Charter Committee on Poverty, among others.

The aim is that the Court examine the financing mode of our system, that it reassess the relevance of the single payer medicare system, that it evaluates the impact of the introduction of a parallel private regime on the quality and accessibility of care, that it compare different systems among themselves, that it determine the appropriateness of having a guarantee of care or determine the delays within which care should be provided, and I submit to you that this is only the beginning. As most decisions in matters of health policy have an effect on the order of services, will decisions concerning the choice of insured services, privileged treatment, the management of hospitals, etc, be subjected to judicial review?

These issues of social and economic policy are very complex. This is particularly true in the health care sector as stated notably by many organisations and committees which have often looked at it. Now, tribunals do not have the necessary institutional resources to review decisions concerning the organization of the financing of health services when those are intimately related to other organizational parameters and to other budgetary parameters which are very technical.

Let us recall Donna Greschner's text, reproduced at paragraph 104 of our factum, the medicare system being extremely complex, there is a risk, by trying to reach simple solutions to difficulties, for instance, by authorizing private insurance in order to resolve waiting lists problems, considerable damage could be done to the system and the constitutional rights of a category of citizens could be infringed. The role of Courts would certainly be considerably widened if they were able to reassess the medicare system's organizing norms on the basis of section 7.

MADAM JUSTICE DESCHAMPS: How do you explain then that Mr. Castonguay, at the time of the parliamentary commission, could have made representations to the effect that the system could offer a guarantee of equality and that there would be no problem of resources migrating, because of section 24, or of section 30, because of the 3% which was there at the time and then the appearance of section (communication breakdown) private insurance?

MR. CLAUDE: These two measures, including that which was concerned with private insurance, were already in the first bills, including that which have been initially presented by the National Assembly, there was the Union Nationale, and these have always been two measures which have co-existed and which both aim at guaranteeing the same objectives, namely the principles and values of social equality as concerns accessibility to care and also at ensuring the system's capacity to respond adequately... as adequately as possible to the needs of all the population by taking all the resources, by establishing a single payer system which enables a better planning of the organization of the medicare and social services systems.

So there are these two sections, section 15 which aims at preventing the development of a parallel private insurance regime which would jeopardize these two objectives, and section 30 which has the same objective but in a slightly different context. Section 30 concerns the situation where there would be, for instance, in the context of negotiations, because the doctors negotiate fees with the government, massive disengagement from the doctors as a means of protest, but then, the government could, through section 30, the mechanisms which are provided for, the adoption of an order in council, etc, force the participation of doctors who would have left the system. Hence there is no incompatibility between these two objectives and both pursue the same ends.

MADAM JUSTICE DESCHAMPS: In his answers to the parliamentary commission, Mr. Castonguay was only referring to the 3% limit, so it can be thought that the prohibition was not present or important in his mind at this time.

MR. CLAUDE: The prohibition, he came back later, however and at a subsequent time ... unfortunately, I do not have the exact reference, but he came back to the reasons which explained why the government had abandoned the question of the 3%. He had abandoned it because, precisely, he saw in this 3%, the possibility of inequity and of privileged access being obtained on the basis of capacity to pay which was not in the interest of the system.

There is an answer to this question, unfortunately ... and it happened, I believe it is exhibit ... it is during a debate which concerned a subsequent motion by the Crédit social which asked that the 3% rule be reviewed and re-adopted and it was rejected by the Minister and, at this moment, he spoke of the issue of fairness and equality. Later, when my colleague Mr. Monette will be arguing, I will try to give you the exact reference if you will.

So it is exhibit R-30, the Journal des débats of the National Assembly of October 15 1970. I quote Minister Castonguay:

> "We have said, when the *Health Insurance Act* was presented in the month of July, that one of the goals of this law was that the patient's financial capacity not be one of the reasons which would enable him to have greater access to care as compared to another patient; that access to care had to be a condition only of the availability of services and not of capacity to pay. So this question was settled, in my view, at the time of the adoption of Bill 8.
>
> And he thus rejects the amendments submitted and proposed by...

MR. JUSTICE BASTARACHE: At that moment, the prohibition, did it not simply apply to overbilling and to private insurance contracts but it did not prevent a parallel network?

MR. CLAUDE: The prohibition the Minister is speaking of at that moment, it's the same prohibition than that found at section 15 concerning the prohibition on insurance contracts. Because there has been in the debates in the meantime, before the possibility of providing for a doctor to be ... while being disengaged, could be paid for part of his services through insurance, and it is that debate and it is that dilemma that has been rejected ... this proposition was withdrawn from the bill and this has lead to section 15.

MADAM JUSTICE DESCHAMPS: But for reasons of equality, which has been termed absolute, rather than for reasons of fear as to the integrity of the system.

MR. CLAUDE: There were these reasons of equality which you call absolute equality, I see that it is an attempt to put the principles of social equality at work, that was stated and verbalized by Minister Castonguay at the time, I think that what must be gleaned from all the provisions and debates which occurred before the National Assembly, notably from the Report of the Castonguay Commission, is that there was this necessity of taking all the resources, of not having a parallel private system on the side which would impede the organization of services, the capacity of the State to different measures to organize it and to distribute regionally, etc, the resources in question (sic).

So if we go back ... I come back to the idea which I was developing of the complexity of decisions to be taken with respect to the organization of a health care system, well, the present case is a good example. The complexity of the question of the effects of a parallel private health system on waiting times aptly illustrates that the evaluation of general policies in that domain is more at home in an interdisciplinary public debate than in a judicial debate. Section 7 cannot be used to go before the courts in order for them to manage the medicare system piecemeal as a function of the cases which those who are better organized in society will be able to launch, and I respectfully submit to you that that is nonetheless the suggestion made by the appellants and by many interveners in the case.

Finally, let me specify a rule of prudence and while the decisions which are made by the administrative arm of the State in the domain of health services organization are not only important but they must also be able to evolve in order to respond to the changing needs of the clientele and population. It is dangerous to crystallize the evolution of the medicare system through the imposition of mandatory financing rules which would come as a result of constitutional requirements. We find ourselves on very complex terrain, very complicated, and we must avoid fixing its evolution through the imposition of constitutional rules.

Hence, many elements militate against the application of section 7 to the present case, the absence of an adequate factual context is one, the absence of direct intervention by the State through the judicial system and the administration of justice, the difficulty of identifying a legal principle which would be applicable to the realm of health care and the complexity and nature of the socio-economic stakes raised by the case, the fact that the debate is generally more at home within a public network. All of this indicates, we respectfully submit, that this is a case which does not come under section 7.

I have already addressed the issue of infringement...

MR. JUSTICE LEBEL: Are you saying, in sum, that the issue is in a sense so political that it does not come within the domain of judicial intervention, or does our constitutional law accepts that there is such a category of questions defined as political which are not subject to judicial analysis at least in order to assess conformity with certain *Charter* values?

MR. CLAUDE: What I am telling you and submitting to you is that in the context in which the issues which are brought before the Court in this case are raised, we find ourselves having to debate issues which are of a political nature... I am not saying that the Court has never examined issues which are of a political nature, the *Charter* was an important evolution in that respect, but what I am telling you is that in the present case, in the absence of factual context, given the nature of the issues, the debate is essentially a political one which is not for the courts to settle.

So at this point I will let my colleague, Mr. Robert Monette, speak. I thank you.

ARGUMENTS OF THE RESPONDENT *ATTORNEY GENERAL OF QUEBEC*, Mr. Robert Monette

MR. MONETTE: May it please the Court. Madam Justice Deschamps, to complete one of the answers of my colleague, Mr. Claude, on the necessity of pooling resources, I would refer you to page 3307 of our compendium where the Castonguay Commission writes:

> Even if medicare solely aimed at eliminating the financial hurdle with respect to care, collective action with respect to the domain of application could hardly have a limited character. The rationalization of the financial effort thus agreed to by society requires the pooling of all individual resources related to the protection against illness.

Hence, it has always been the principle from the creation of the medicare regime that the sought after goal was to render all health resources available to the totality of the population of Quebec.

MADAM JUSTICE DESCHAMPS: Then why impose limits, time limits, limits on the number of acts?

MR. MONETTE: All over the world, the management of a health care system is the most difficult thing to so. In the OECD study on the attempt to study waiting lists solely in the realm of elective care, it has been said that half of OECD countries have waiting lists problems. There are considerations which occur where the State must judge in what specialties it must intervene, how it must intervene.

It is possible that at some point, of course, there will be periods of crises. We have witnessed it in Quebec as concerns the therapy network and the solution which was chosen by the government was to offer to its citizens care in the United States, and I know that this has also happened in British Columbia and I believe in Ontario. This solution, which is efficient for the population, only a public system could implement it. No system of private insurance could afford to do this.

So to answer your question, Madam Justice Deschamps, of course we try to do the best with the resources available, the management of waiting lists is part of this attempt to resolve all problems, the undertaking to provide care to all the population is there, but that it also is part of an inherent problem, we go by prioritization of cases and not by the fact that you could get such service because you have the means to pay for it. It is the prioritization of cases within the system which will lead to you getting the service, and thus, it is the individual's state of health which is examined first.

As concerns the causal link, it is related, I think, to the causal link on the record. The appellants have the burden to establish the link, not a conjectural link but a direct and immediate link between the alleged prejudice and the prohibition, that is in the present case, the difficulties of access if they exist and the State's intervention. We thus submit that the appellants had the burden ... the burden of proof has to be answered in the following way: are the problems of access to care directly related to the intervention, on the one hand; and on the other hand, would the presence of private insurance eliminate the problems of access or else guarantee the provision of health services to all the population?

MR JUSTICE BASTARACHE: I do not think that this is the question. At the constitutional level, I do not believe that the persons say that the private system is supposed to solve the problems of the public system. I think that the question, rather, is to know, does the public system need to completely prohibit private services in order to guarantee its own integrity?

MR. MONETTE: Absolutely, Mr. Justice. Absolutely, and the evidence is in the record, whatever may have been said, that the appellants or the interveners' factums say that there is no evidence on the record, it is false. The whole of the expert evidence which has been provided by both Attorney Generals' experts is related to that point, to the effect that ... when

we spoke earlier of the pooling of resources, one immediate effect of an interference by private insurance would be to take resources which are not available and to provide them to only one part of the population and not to all the population, this is the first negative effect.

MADAM JUSTICE DESCHAMPS: If the government limits surgery time, then doctors have more availability than the time which is allotted to them.

MR. MONETTE: The management of surgery time in a hospital means that the surgery room can be used by many specialists, not only by one specialist. So once again it must be managed, here again it is the micro-management of a system and this is what happens in practice. Indeed, you have evidence in the record, when Dr. Doyle, who is a heart surgeon, who complains that he makes ... that he works 12 hours a day and that he has reached his maximum of procedures, of surgeries. So that argument, I believe, once again, we are evaluating the management of the health care system, how it should be done, and as you have noticed, I think, and it is maybe this need for deference by the Court for the political choices of the legislature.

MR. JUSTICE LEBEL: It could lead us to tread on issues of limits on medical staff and of construction budgets for hospitals, of planning, et cetera.

MR. MONETTE: Mr. Justice LeBel, once again, that intention must be analysed ... that intervention must be analysed in the context where it could be performed. For instance, we know that hospitals will be built in Montreal, two hospital centres, one at McGill and one ... at Montreal too, so, it is difficult to constantly re-evaluate the decisions which are taken in these health-related domains and it must be avoided, I submit ... we must avoid making case by case analyses or becoming anecdotal and in that case, I do not want to repeat it but it must ... in the case of Mr. Stein, what is important to know, the surgery was postponed by a week and the reason why it has been postponed, and Dr. Roy has testified to that effect before judge Piché, is that there was either a liver emergency or a liver transplant and Dr. Roy is one of the only specialists East of Toronto who can perform such transplants.

So how can we evaluate or how can we attempt to fix bases which would enable us to evaluate, to proceed to a case by case analysis or to attempt to establish a guarantee of care? I submit to you that it is impossible because each case, what is asked of you, is the possibility

of re-evaluation each medical evaluation which would be made by a professional and this re-evaluation would be made case by case for every citizen who believed that he has been the victim of an undue delay.

So you have two cases in the file where, indeed, even if the citizen was complaining, it wasn't the case. You have the decision of Madam Justice Piché with respect to the case of Mr. Zeliotis and you also have the *Stein* case, but it remains that if this application is some kind of constitutional protection, we must take into account the bogging down of the medicare system then, if all the professionals were forced to defend their decisions, to participate to hearings, whereas their time would be put to much better use if they were exercising their profession in hospitals.

MR. JUSTICE LEBEL: What you are suggesting, then, if I understand you correctly, is that however the issue is legally wrapped, we would find ourselves at the limits of the courts' capacity of useful intervention and that this is a domain in which, as much as possible, the courts should not intervene.

MR. MONETTE: This is the argument that will be bolstered in the end, and it must not be forgotten that the values which are protected by the public medicare system are values of equality and integrity, it is important to emphasise that these are not contested by the population, and I will come back ... I will conclude with extracts from Romanow.

So with respect to the causal link, I was saying that the two elements that had to be proven have not been, namely, is there a direct link between the prohibition and the prejudice. We say no. In all cases, these are factors which are inherent to all health care systems. Take for instance the continuous evolution of new technologies which leads to less invasive procedures and to quicker cures. This evidently opens the door to a larger part of the population having a right to such care.

The consequence, what happens to access? Well, this is a consequence with which systems will have to deal with in the coming years because in the OECD Report on this topic, once again, and that report is very important, it is said that technological advances contribute to a permanent increase in demand. We are not alone facing this in Canada or Quebec. Every

country is faced with this problem. It is a health policy problem and a health management problem.

So that is only one of the factors. I mention only one to you, the factum mentions other factors which are inherent to a health care system and which are not related to the prohibition. What we are submitting is that, moreover, the appellants had to prove that the proposition which is put before you, is efficient, that private insurance will guarantee health care, we use the word 'guarantee' but private insurance must guarantee it to you, to all the population, and that is not as clear.

MR. JUSTICE BASTARACHE: No, but here nobody is arguing for the replacement of the public system by a private system, so the private system does not have to serve all the population but only those who want to use it because they do not want to use the public system. I do not understand at all your argument on this.

MR. MONETTE: Well, if it must be proven that the infringement ... that I am the target of an infringement, I must establish ... meet the burden of proof between the infringement and the provision. But the provision prohibits private insurance. We have established that it is not the prohibition which causes a problem of access.

MR. JUSTICE BASTARACHE: No, but that only means that if my life is threatened and you prevent me from purchasing private services, your restriction of my rights is not justified, this is all that it means. It does not mean that everyone who is in the same situation as mine must be able to purchase a private service for themselves.

MR. MONETTE: Yes, but it must at least be proven, Mr. Justice Bastarache, that even in such a case, you will have a right to health services through private insurance and this is where the difficulty is. There is no guarantee. When you look at Mr. Zeliotis who has undergone three surgeries within the health care system, heart surgery and two arthroplasties, could this person have received insurance when he complained of delays for the first time? This is what we want to put into evidence. You are complaining about delays, can you prove that private insurance would be an answer?

MR. JUSTICE BASTARACHE: I think that it has no relevance because what the government is blamed for here is the prohibition on someone to have access to private services if he is able to do so. For health reasons maybe he cannot, perhaps for reasons (communication breakdown) but how can you justify the prohibition if there is a threat to this person's life? That's the question.

MR. MONETTE: I agree with you Mr. Justice Bstarache, but once again, this is not the prohibition. The prohibition, this is not true, and judge Piché has said it, the goal of the prohibition is not prevent the obtaining of care. It is to prevent a private insurance market. The goal of public health care system is not to prevent you from getting care.

If at some point, in the medicare system, there are cases for which the limit between a damaging and a non-damaging delay is reached, the professionals must intervene and prioritize files. This is what the 'security blanket' is, if you wish, in such cases. So this is why we must insist to present to the population ... we must be honest towards the population. We cannot say that there is another exit door which would be that of private insurance without telling them that in the same situation where maybe you could not get the service through the public system, you would get it through private insurance, that's false. There is no guarantee in the realm of private insurance.

MR. JUSTICE BASTARACHE: That's another argument because I was talking about the argument concerning justification, and your answer is, there is no infringement to the right guaranteed by section 7. That's another issue.

MR. MONETTE: Exactly, Mr. Justice Bastarache. If you allow me to conclude on this as to the burden of proof concerning the causal link, so, as a consequence, the appellants... we submit that the appellants have not proven that there existed a direct causal link between the alleged prejudice and any State intervention whatsoever. This analysis also enables us to notice that Quebec and Canada are not faced with a special challenge. It is special in its context, but universal in its definition, namely, the management of a health care system with the available resources. One certainty remains, however, the establishment of a parallel private regime would not improve access to care for the whole of the population.

With respect to the principles of fundamental justice, I shall limit myself to one proposition which is that of a guarantee of care. Of course, and in the factums and oral arguments it has been very difficult for the appellants and interveners to define a principle of fundamental justice and the reason was that it must meet the three characteristics of a principle of fundamental justice. The first characteristic, it is a legal principle. The necessity of having a legal principle is precisely to avoid that the Court decide on political questions. This is why a legal principle cannot be established on such issues.

You had also established, as a second principle, the fundamental and basic character of this principle within the notion of justice which must be the object of a consensus. A point which is extremely important in the domain of health care is the third condition which is that of the identification and specificity of the identification of such principle in order to make it functional as a norm and to avoid controversy. In the domain of health care, this is what is the most difficult to attain. You only have to look at all the WHO and OECD reports on the quantity of recommendations, re-orientations of every system in the world to see that there is not only one solution. The third characteristic does not correspond to a requirement in the domain of health care.

I shall mainly deal with the notion of guarantee of care. This is not a legal principle. I think this goes without saying. There is no consensus in the legal community on this point. Even more important, let's look at the comments of Mr. Romanow and of the OECD on this choice. Mr. Romanow writes:

> "Right now there is no reliable method which enables to determine what would be appropriate guarantees. Guarantees cannot be arbitrarily defined and triumphantly offered to Canadians as a miracle solution. Medicare systems must remain flexible if we want to guarantee efficient management. This flexibility could be lost if guarantees of care were applied in a rigid fashion. This is what is happening in Canada, all over the world, what is thought of guarantees." (as read)

In the OECD article, at page 47, at paragraph 163, I read it to you:

> "In countries like Norway and Sweden, the guarantees have been abandoned or reformed. To solve the clinical prioritization issue, mentioned above, an alternative

formulation of the guarantee has also been proposed which provides the guarantee only to the patients with higher need. However this formulation has also proved to be unsuccessful as it is difficult to determine uniform criteria for need."

Impossible then to meet the third characteristic of a principle of fundamental justice.

As to the disproportionate character of the measure, Justices, we have... I believe that the factum is complete on this topic, we have mentioned the negative effects on the public system of an intervention by private insurance or if we think of the problem of resources, there is of course no evidence in the record showing that there is a surplus of resources. Canada would be the only OECD country to have a surplus of resources. This is almost mystical, it is impossible to find evidence to the effect that there is a surplus of resources in Canada and thus the appellants' premise does not hold up.

Of the negative effects, I mention one more, the problem of costs, the increase in costs generated by two systems, the administration of two systems which would lead to higher costs and there would be even less for the public, to give to the patient directly and also the desolidarization of people with respect to the system. It is important to know that society's most influential individuals are there to defend the system and force it to change. It would no longer be the case.

I conclude with an extract concerning the proposition, the appellants' claim. It is an extract from Mr. Romanow, from Commissioner Romanow, at page 248:

"Some think that not to be able to purchase faster service or care offered by the private market in order to help their loved ones is a perversion of Canadian values. In my view, it would be to pervert Canadian values even more to accept a system where money rather than need determines who has access to health care."

He goes even further by saying:

"To reject the principles and values which underpin our medicare system would amount to betraying the population's confidence."

And before that, he describes:

"Canadians consider the medicare regime to be a moral, not a commercial undertaking." (As read)

Thank you.

MR. JUSTICE MAJOR (off-mike)

(PAUSE)

MR. JUSTICE MAJOR: Mr. Aubry.

ARGUMENTS OF RESPONDENT, *ATTORNEY GENERAL OF CANADA*, Mr. Jean-Marc Aubry, Q.C.

MR. AUBRY: Madam Chief Justice, Justices, we have prepared a plan of arguments, if I understand correctly, which is before you and to which I may refer to from time to time. The appellants' action is wrapped up in section 7 in the name of wealthier people's right to use their financial resources in order to purchase, when it suits them better, health care services from a source other than the public regime.

Why should we care? The Attorney General of Canada's fundamental concern with this discourse is about the negative effects, in our view inevitable, of the emergence of a private system on universal accessibility, without regard for one's capacity to pay, to quality health services, which is one of the directing principles of the public medicare system in Canada.

More specifically, the Attorney General of Canada worries that we will see the emergence of two parallel health care regimes, one first class regime, accessible to those who can pay for it, and a second class regime, the public regime, for all the others constituting the majority which will not be able to access…

MR. JUSTICE MAJOR …

MR. AUBRY:

...

The expert Marmor who has been heard also summarizes this affirmation according to which to enable a parallel private system will have beneficial effects on both the public system and the ... for those who can subscribe to the private system, and here is how he summarizes this argument, and this is quoted at paragraph 11 of our factum:

...

Now, the evidence has indeed revealed that if we authorize the establishment of a parallel private system, the irremediable consequences will be, not to shorten the waiting lists in the public system, but rather to lengthen them, to degrade the quality of care for those who will continue to have access to the public system. Why? The experts have explained it, essentially, resources are limited...

MR. JUSTCE MAJOR:

...

MR. JUSTICE LEBEL: Must I understand that the evidence on which you rely or to which you refer on this issue of the impact of the emergence of a private regime is that which we find summarized at paragraphs 63 and following of your factum?

MR. AUBRY: Among others, yes. The Attorney General of Quebec has also addressed this question. The Attorney General of Ontario also refers to...

MR. JUSTICE BASTARACHE: But how do you explain the fact that it exists in other countries and that there aren't longer waiting lists than here? It also seems to me that it is very much a short term argument which you are submitting. Spaces in medical schools have been limited for years, access to the profession for people coming from other countries has been restricted and you say, ah yes, but it will necessarily push people from the public system

towards the private system, but this may be true for this year, but it seems to me that this is not an argument… I even ask myself, here in Gatineau, we have private MRI's, how come we can have competition from the private sector bit by bit, but we cannot have a more general one? Why does that not destroy your system?

MR. AUBRY: Because presently, existing private clinics do not cover medically required services, these insured services according to the private regime (sic).

MR. JUSTICE BASTARACHE: Magnetic resonance machines, MRI's, these are covered?

MR. AUBRY: Yes, but these are not services … these are diagnostic services, so I do not want to get into that … here I am talking about what are called CORE, ok, if you wish…

MR. JUSTICE BASTARACHE: It seems to me that they use that to discover if you have cancer or something, but this is not CORE?

MR. AUBRY: I am talking about the services which are medically covered by both private and public insurance, and I do not want to … I will not get into the administration or management of the Quebec medicare system, the Attorney General of Canada does not know how is organized …

MR. JUSTICE BASTARACHE: No, but your argument is still that access to limited private services will cause the deterioration of the public system.

MR. AUBRY: I'm not the one saying it.

MR. JUSTICE BASTARACHE: Well, what I'm simply telling you, in the evidence, we also have documents which say that there are in all kinds of other countries parallel systems which do not destroy the public system, so how can it be that it can work there and that here, it is undoable, it is totally impossible, and I am telling you that we are already partially doing it, at least with the example which I am giving you, and you say, ha, that doesn't count because it's a diagnostic service, but it is part of the system of services covered by medicare, isn't it?

MR. AUBRY: As concerns what is done elsewhere in the world one only has to read the OECD reports, the World Health Organization, the Romanow Report or the Committee Report, there are all kinds of possible combinations which are used but one thing is certain, it has not been demonstrated that in a regime where it is permitted ... because there are other social values in other countries, our system, and if we go back 40 years ago, it is based on certain fundamental values which are our own and which have lead to certain political choices which are ours to establish a public regime accessible to all on the basis of need and not of capacity to pay and to guarantee to all the greatest amount of quality care, and for that we have decided that we had to put all of the domain's limited resources at the disposition of the public regime in order for all these resources to enable everyone to have equal access, and these are the fundamental principles of our system: access to all for reasons of social fairness, of justice, of compassion. This is what makes... these are the values which underpin our system.

So we could choose another system because maybe they did not want to favour these fundamental values in the same way, that's all right, that's their choice, but our choice here is to have a system that is accessible to all with quality care for all through the pooling of available resources and as soon, and the evidence reveals that, as you are authorizing ... I am not alleging that, the evidence shows it, are authorizing the emergence of a parallel private system which will not only take part of the resources and use them to its own ends, they are going to make their choices as to how to administer the system, there is also a question of regulatory overlap, of additional costs, all this is in the evidence.

It is clear that if the solution to the problem of waiting lists was to withdraw the barriers and authorize the emergence of a private system, if it was proved, how then could we justify the maintenance of these barriers? It would avoid the spending of loads of money on financing. If that's the magical solution which has been tried elsewhere and which is the solution to all of our problems, well obviously we would not be here today because that would be the ideal solution and it would obviously be unreasonable to maintain these barriers. If we maintain them it is because, not only the experts here in this case have testified as to the negative effects, but those who have examined our system in the last ten years...

MR. JUSTICE BINNIE: Speaking of those who have examined our system, I note that in the factum of Senator Kirby and the others who have undertaken a great study on this, he says at paragraph 54:

> "If the legislation were declared unconstitutional, it is an option that would not destroy the publicly funded healthcare system, not inevitably lead to a parallel privately funded healthcare system..."

He's looking to preservation. So it is the exact opposite of the submissions, of the arguments of the Attorney General.

MR. AUBRY: Yes, but also ... that's his conclusion, but it is not in accordance with the evidence which has been filed in the present case and it is the evidence which must guide the Court here, but Senator, or the Kirby Committee, affirms from the outset that it wants the maintenance of a public service, with a strong single payer, and if it asks for the withdrawal of the said barriers, it is very honest in that respect, it is because it wants the Court to give an electric shock to the legislator, to force it to do something as concerns what it considers to be overly long waiting lists which could potentially, if nothing is done, imperil the life and security of the population.

This is why it ... and it says it candidly. The committee did not come to the conclusion that presently, these barriers should not be maintained, to the contrary it says that if we adopt the healthcare guarantees, for instance, or if we adopt another possible option which would bring the waiting lists to an acceptable level ... these barriers should be maintained, and the experience examined in other jurisdictions is not conclusive.

MR. JUSTICE BASTARACHE: But indeed, you seem to be saying that the OECD, its study is univocal, but this morning there was reference, at tab 21 of Mr. Chaoulli's condensed book:

> "Private health cover in Australia promotes health system responsiveness"

And it goes on, and they indeed say, and this is an OECD report. You're saying, not conclusive these things in other countries, and we have been told that in France where there is

a parallel system that there were no waiting lists comparable to those which we have in Canada, same in Sweden. So I do want to believe that they have other values, but here, the issue is rather to know, is it necessary to completely prohibit access to private services in order to maintain a public system. So, whatever the values, it is a question of ...

MR. AUBRY: I'm not saying that if we authorize the establishment of a private regime, that the public regime will die or disappear. That's not it. Two regimes could very well exist. What I am saying is that this will lead to the deterioration of the quality of care in the public regime for those who, 90%, cannot pay for care in the private regime, and I would add, the limits of the public regime must not be forgotten either, and I know that this has a lesser importance, but that regime has its own rationalizations, they're there to make profits, that's their first preoccupation, so they only cover certain risks which enable them to make profits, they only cover certain services, they only cover certain persons which are not at risk, precisely those who do not need the medicare system, the Zeliotis and others are never covered by insurance regimes, but they will use these resources to make profits in order to cover certain obvious cases, hip surgeries, et cetera, and in the meantime, these orthopaedic surgeons who are there will not be available for the rest of the population and they will only be available when they'll have to fulfill their obligations towards a clientele attached to an insurance company.

That's it. That's where a parallel system leads to, and all the experts who have come to testify have said it, that it is false to suggest that it will benefit everyone. Theoretically, and this is what Marmor, the expert to whom I have just referred, has said: "It's a key assumption, everybody thinks, oh yes, two systems and everybody is going to be better off, those who go ..." There is less people in the public queues because they will be dealt with in the private system, that's false. That's a false premise. It is false based on the evidence which we have, all five experts who have testified, and not the least, have said that.

The reports concerning what happened in other jurisdictions, let's think of England, for instance, examples from England have been referred to where we saw that the emergence of a private system has created even longer waiting lists.

MR. JUSTICE BASTARACHE: You know as well as I do that this is a system where doctors practice in both systems at the same time. You cannot compare the two.

MR. AUBRY: Well, we'll have to authorize doctors to participate in both regimes because, right now, there are that many doctors and they all practice in the public regime. So if we authorize them to take some of their time in order to go practice in another system, of course, they will be less available for the other system, that's as simple as this, and I am simplifying what the experts said, and there are other negative effects which have been identified...

MR. JUSTICE MAJOR ...

...

MR. AUBRY: Well, I guess, just two, if I may be permitted, on the issue of the right to security, on causation, these waiting lists, we should be frank, the prioritization of the clientele is done primarily by doctors. The State does not determine priority. Everybody agrees that emergency wards are managed in an exemplary fashion by the public system; as for prioritization, well, doctors determine what the needs are and to what extent, within which delays can care be given.

I also have rationalization and prioritization, it is inevitable in the present system where demand greatly exceeds, and more and more, the offer of services and in our view, we have here an attack on a political choice which was made about forty years ago when it was decided to establish the public regime, to guarantee fair access to all, and I would like you to remember that we will imperil, if you wish, the values which underpin the public regime, fairness, access based on need and not on capacity to pay, and at best, a private system will perhaps benefit a few people, but inevitably it will create bad consequences for the greater number. Thank you.

...

In your recent decision, in *Harper*, this Court has recognized that the right to vote found at section 3 of the *Canadian Charter* belongs to all Canadians. In this appeal, we hope and we ask you to find that in the context of health care, of the right to life, to liberty and to security of the person is a right which belongs to all, and not a right which belongs only and exclusively to those who are the most economically advantaged. That said, we ask that you reject the present appeal. Thank you.

MR. JUSTICE MAJOR: Thank you.

Miss Minor.

ARGUMENT OF THE INTERVENER, ATTORNEY GENERAL OF ONTARIO,

Miss Janet E. Minor

MISS MINOR: Thank you. Ontario agrees with the submission of counsel on behalf of Quebec and Canada. The Quebec's prohibition of the obtaining of private health insurance for publicly insured services does not infringe section 7 or 15 of the *Charter*. We submit that the facts of this case raise no issue of a denial of access to healthcare, rather, the interest asserted is an economic interest, assurgent by the Appellants to permit them to order their economic affairs to obtain healthcare in the manner they desire.

The effect of accepting their argument and imposing a constitutional requirement to permit persons to obtain private healthcare for publicly insured services would establish a parallel private healthcare system which would jeopardize the quality and viability of the public system. The reasons for this conclusion are detailed in the evidence below, before the lower Court, they have been summarized in the factums of Quebec, Canada, and also in our factum commencing at approximately paragraph 20, and counsel for Canada just dealt with many of those points.

Contrary to the assertion of the Appellants that a private healthcare system would either assist the public system generally or address the issue of waiting care lists, the evidence appears to be that a two-tier system does have the beneficial effect of reducing waiting lists in the public sector.

MR. JUSTICE MAJOR: -- (Off microphone) --

MISS MINOR: I would refer you to paragraph 23 of our factum and this is a study, the McDonald-Lewis Report of 1998, Health Canada, which studied waiting

lists in Canada, the UK, Sweden, Australia and New Zealand. The Report concluded there is no evidence to suggest the private sector healthcare will result in shorter waiting lists and waiting times in the public sector. Providing access to private care for those who can afford and choose to pay has, if anything, perverse effects on waiting lists and waiting times in the public sector. Greater access to private care appears to be generally associated with longer public sector queues.

MR. JUSTICE BINNIE: I'm not sure that that really meets the point though, what's being said is, well, even if it does have an adverse effect, you can't, at the same time, claim a monopoly on provision of medical services but, at the same time, under-fund it. So, whether it has a good or a bad effect on the public care system, Government intervention to cut people off from being able to pay for private care is the knob of the constitutional question. So, really, this is a kind of a sideshow, I suppose, part of the rationale is to say, well, it wouldn't hurt anybody, but even if it does hurt somebody, they're still saying, well, either fund it or let us buy our own care.

MISS MINOR: And that takes us to the submission of Ontario that there has been no infringement made out here, that government action has, in fact, infringed the rights of the Appellants in particular or anyone else in general.

MR. JUSTICE MAJOR: -- (Off microphone) -- that there are increasing wait lists in Ontario, that people are being sent to Sudbury and to Buffalo, or am I living in another world?

MISS MINOR: There are examples of remedies being taken by provinces to address the concern about waiting lists, and that concern is certainly acknowledged and responded to in the Romanow Commission Report. No one is arguing that the system is perfect. However, with respect, the Appellants have not made out any

infringement of a *Charter* right which would permit the Court in this case to grant some sort of remedy in an attempt to address this particular issue. And in fact, as Justice Binnie has just referred to, what the case has -- has given the opportunity to many to raise what we submit are essentially political issues and which are most properly or most helpfully dealt with by the Legislature who has the unique competence to deal with the multiplicity and myriad of concerns that must be taken into account when designing a healthcare system.

MR. JUSTICE MAJOR: You discount the possibility of any section 7 involvement in the healthcare system?

MISS MINOR: I don't discount any, with respect, certainly, this Court has already granted some remedy with respect to healthcare in *Morgentaler*. There may be issues raised in individual circumstances with compulsory treatment for instance, there are certainly issues where the *Charter* may come into play. However, with respect, we caution this Court in assuming that they too easily or too quickly in a case which doesn't really raise the issue directly as to what extent they would come into play when the issue involves the distribution of resources and the design of the public healthcare system.

We certainly have a number of questions which, we submit, should at least be in the background to our submission that the Court exercise some caution. That is, what is the Government action in waiting lists? Is it funding or anything more? Are there not other responsibilities of other groups who contribute to the issue of waiting lists? What are the impact of waiting lists on patients? And that is just the waiting lists question alone. How does the waiting lists fit in with the distribution of other scarce resources with respect to healthcare funding?

MR. JUSTICE MAJOR: Let me ask you a question, how do you respond to the patient who says, I need medical treatment and I can't get it, I can afford to

buy it, the Government has promised me reasonable care within a reasonable time, they're not delivering, it's an offence if I go and see a doctor privately, it seems to me that those are essential issues that are more than policy.

MISS MINOR: The answer of Ontario to that particular question lies in the regulation which provides for funding by Ontario if a service is required outside Canada, to avoid a delay in receiving services which would result in death or medically significant, irreversible tissue damage.

MR. JUSTICE MAJOR: What is it to get treatment for irreversible tissue damage?

MISS MINOR: It's to prevent it, with respect.

MR. JUSTICE MAJOR: It's irreversible, but isn't it already gone?

MISS MINOR: No, the situation arises where a medical practitioner would advise that, without this particular treatment, that would happen and that's when Ontario will fund the provision of services outside of Canada.

MR. JUSTICE MAJOR: It's the potential of being irreversible.

MISS MINOR: Yes. So, that is a safety valve so to speak in the Ontario system. But again, with respect to funding of healthcare, funding is forever being enlarged and being requested to be enlarged, it is currently approximately 40% of Ontario's budget. Costs ever increase through multiple reasons, from technology to increased services to problems of demographics and geography. Healthcare services in a public healthcare system must be rationed and the basis on which they are rationed involves a very complex weighing and evaluating of the effects and the effects on the rest of the system, and --

MR. JUSTICE MAJOR: -- (Off microphone) -- exercising privilege, so-called jumping the queue.

MISS MINOR: There may well be mechanisms which could be established to address that issue.

MR. JUSTICE MAJOR: Well, aren't they?

MISS MINOR: Well, I can't comment on the degree to which they are or aren't.

MR. JUSTICE MAJOR: But that is a fact in Ontario or elsewhere in Canada, isn't it, from what we're told constantly?

MISS MINOR: The Romanow Commission refers to some further steps that Ontario has taken to rationalize, for instance, the cardiac care in the Province, and certainly, the Romanow Commission recommends further steps to address those issues, and those rationalizing the provision of care do not necessarily involve huge new expenditures of resources. Some may, some don't.

But just in our authorities, we have included the comments of the Commission on the potential public policy remedies for waiting lists, and that's found at Tab 9 of our authorities and it starts at approximately page 138 going to 145 and, in fact, the Romanow Commission has some reservations about the care guaranteed proposed by the Kirby Report, so it's an illustration of the complexity, the problems in trying to formulate solutions which are both efficient and, with respect, equitable and which continue the greater accessibility to the healthcare system for all Canadians.

The request to the Court to impose some type of constitutional standard for the provision of medical services inevitably would involve the Court in assessing what that reasonable standard is and wing any standard which has been imposed

by the Provinces, and it is a very delicate and complex question indeed. We simply urge at this point the Court to exercise the same caution it displayed in the *Gosselin* case with respect to addressing novel, albeit important issues in cases where there is an insufficient factual background and, in this particular case, no infringement of section 7 whatsoever on the facts. Those are our submissions.

MR. JUSTICE MAJOR: Thank you.

Miss Jackman.

ARGUMENT OF THE INTERVENERS, THE CHARTER COMMITTEE ON POVERTY ISSUES AND THE CANADIAN HEALTH COALITION,

Miss Martha Jackman

MISS JACKMAN: At issue in this case is the social right that Canadians consider a defining feature of our society. As Health Commissioner Roy Romanow phrased it, the right to equal access to healthcare on the basis of need as a right of citizenship, not as a privilege, a status or wealth. What is the Court being asked to do in this case? The Court is being asked to strike down legislative provisions which the evidence shows ensure the integrity of the publicly funded system.

On what basis are you being asked to do this? You're being asked to do this based on evidence rejected by the Trial Court that no harm will befall the public system if the impugned provisions are struck down, and based on a right's claim, also rejected by the Courts below which relies on a discriminatory and under inclusive reading of section 7, one which we submit is incompatible with fundamental *Charter* equality rights principles and international human rights norms. One that says that there is no section right to healthcare per say, that only a right to buy healthcare if you have the means.

Based on the evidence at trial, Justice Piché found that striking down the impugned provisions would have serious negative consequences for the public system. This evidence was outlined by the Respondents, accepted by the trial judge, as we describe at paragraph 11 of our factum, confirmed by the Romanow Commission, as we describe at paragraph 13 of our factum, more recently confirmed by health economists from the University of Toronto in a report which is found at Tab 28 of our book of authorities, and at page 40 of that report in particular, Tuohy et al. conclude that allowing parallel private financing does not reduce pressures on the public system but rather makes things worst, and this based on a recent review of comparative evidence from OECD Nations including Britain, New Zealand, et cetera. And finally, this evidence was confirmed by experts that wrote for the Romanow Commission, in particular, by Canadian health economist Bob Evans whose evidence is at Tab 15 of our book of authorities.

This evidence which the trial judge accepted contradicts the Appellants' claim and contradicts Senator Kirby's claim that granting the remedy they seek would not adversely affect the publicly funded system or the healthcare rights of those who rely on frequent access to healthcare. While disputing the evidence, the Appellants and supporting Interveners also claim, as Justice Binnie has noted, that the evidence is to the harmful impact on the public system is striking down the impugned provisions is irrelevant from a *Charter* point of view, that this Court must not take into account such utilitarian considerations as the integrity of the public system or the interests of those who rely on it. Rather, the Appellants have claimed that this Court must focus on the interference with the Appellants' *Charter* rights.

The real issue in this case, the Appellants say, is that the State is depriving them of the right to choose the private healthcare they want, or may, when they

need, and that this deprivation amounts to a violation of the section 7 rights. In fact, however, as the Appellants all acknowledge, they are already and have always been free in Canada to choose private care. Canadians are absolutely free to use their own resources to purchase private healthcare for themselves or for their family members.

Neither the Quebec legislation challenged in this case or the *Canada Health Act* prohibits in any way the provision of private care, nor are Canadians statutorily precluded from choosing private healthcare. A person in the position of monsieur Zeliotis or actually Mr. Stein could obtain the treatment that they want through the private system including from the Intervener clinics in this case.

What the Appellants are in fact claiming in this case is not a right to choose private care which they already possess. Rather, the Appellants are confounding private care which is absolutely allowed in Canada and private insurance funding which is not. The Appellants are arguing that section 7 of the *Charter* prevents Governments from legislating in a way that makes the provision and sale a private healthcare economically unattractive for profit providers operating in a public market. In other words, the Appellants are proposing that section 7 guarantees the right of private healthcare providers to sell private health insurance in the most favourable possible market conditions, that is, with direct and hidden subsidies from the public system.

As the Attorney General of Quebec pointed out, the particular irony in this case is that, were the impugned provisions struck down, it's hardly unlikely that Mr. Zeliotis, elderly and self-employed, could in fact obtain what he's seeking, that is, private health insurance, either because it would be prohibitively expensive for him or because no private insurer would be willing to offer it to him. Is this what section 7 of the *Charter* guarantees, a right to healthcare not for everyone but only for those who can afford to buy

it or, in fact, a right to healthcare that primarily benefits private for profit healthcare insurers and providers? We say no.

CCPI and the Canadian Health Coalition submit that the section 7 right to life, liberty and security of the person, under section 7 of the *Charter*, guarantees an inclusive right to healthcare rather than a discriminatory and under inclusive one that is being argued by the Appellants and its supporting Interveners today. A right to healthcare based on need, not means, a right to healthcare which is consistent with fundamental equality and international human rights principles.

We submit that the section 7 rights to life, liberty and security guarantees an equal right to healthcare for those who can't afford to buy private insurance. A right to healthcare for those who, by the very fact of their illness, their disability or, in fact, their need for care would be considered a bad and uninsurable risk by the private market were the impugned provisions struck down.

In short, we submit that rather than violating the section 7 right to life, liberty and security of the person or section 15, equality guarantees, the impugned prohibitions on private health insurance are a positive measure required by section 7 of the *Charter* and consistent with the principles of fundamental justice. In particular, we submit that the impugned provisions are in accordance with the principles of fundamental justice because they ensure that access to healthcare is based on need rather than on the arbitrary and irrational criteria of ability to pay.

And here, I'd like to refer to the evidence, at Tab 34 of our book of authorities on the issue of queue jumping which was raised by the Justices today, and the evidence there suggests that within the public system, there is no systemic problem of queue jumping: poor people receive care in the same amount of time as the wealthy; rural residents

receive care in the same amount of time as urban residents; women receive care in the same amount of time as men, and this certainly is not the situation in a healthcare system like we see in the United States which allows private insurance funding where rationing occurs based on ability to pay and where poor people don't merely wait a little while for care but absolutely wait forever in many cases.

MR. JUSTICE MAJOR: What are you relying on -- (Off microphone) -- statements?

MISS JACKMAN: In relation to?

MR. JUSTICE MAJOR: Well, the queue jumping, rich people are served in the same time as poor people, country people get the same service as city people.

MISS JACKMAN: Absolutely. If I can refer to Federal Government --

MR. JUSTICE MAJOR: What you're saying in effect is that there's no problem in the health system --

MISS JACKMAN: I'm sorry, I'm not suggesting at all that the publicly funded healthcare system is perfect especially from the perspective of people living in poverty. What I'm suggesting is that the problem of queue jumping which has been -- is a legitimate concern is not a systemic problem within the publicly funded system and that, the evidence, as I said, at Tab 34 of our materials, has a Federal Government report to the UN Committee on economic rights.

MR. JUSTICE MAJOR: But you've got to catch queue jumpers, do they police it?

MISS JACKMAN: This conclusion was based on a careful study done in Manitoba that actually looked at waiting times and concluded that queue jumping was not occurring, and I'm sorry, I'm not a health economist, I'm relying, as many of my fellow counsel, on the evidence that has been provided by the health economists.

MR. JUSTICE MAJOR: -- (Off microphone) -- ask you whether you are aware of any queue jumping?

MISS JACKMAN: I actually have a very -- I do have a very real concern about queue jumping because even within the existing publicly funded system, if you're living in poverty, you're not the person jumping the queue, but I think the issue before the Court today, if we're talking merely about the right to healthcare as an issue of queue jumping, who gets it first, the publicly funded system is the one that I would -- the basket I'd put my eggs in rather than in a privately funded system simply on the issue of queue jumping.

On the issue of access period, access to care, there's absolutely no question and the evidence accepted by the trial judge makes clear that from the perspective of access, the right to access to healthcare generally and not simply the right to access for poor people, the public system is to be preferred because by definition, private healthcare doesn't work. It's not economic to provide insurance to somebody who might actually get sick.

The Appellants have submitted that the current publicly funded healthcare system suffers from a lack of fundamental justice. If their submission is that there must be greater guarantees of fundamental justice in healthcare decision-making which I readily and absolutely agree with, the remedy is hardly to strike down the publicly funded system and to introduce a new layer of irrationality based on ability to pay.

Rather, the remedy for any defectiveness in terms of principles of fundamental justice in access to healthcare is to enhance participation and accountability within the public system. The Romanow Commission, Senator Kirby's Committee and many other of the publicly commissioned healthcare reports in recent years have made numerous recommendations about how this can be done, how accountability and participation in healthcare decision-making can be enhanced and Governments across Canada are beginning to implement these recommendations.

We submit that a remedy is not to strike down the impugned provisions which would simply introduce greater arbitrariness in terms of ration of care based on ability to pay. As I said already, we agree with the Appellants that the publicly funded healthcare system is far from perfect including in its failure to adequately address the healthcare needs of aboriginal people and his disproportionate focus on acute healthcare relative to poverty and other broader determinants of health.

We also agree with Professor Colleen Flood's recent assessment that the remedy proposed by the Appellants and supporting Interveners is akin to euthanising a patient with the flue. The evidence accepted by Justice Piché at trial shows that healthcare waiting lists and delays that the Appellants are complaining of are not attributable to the sole and simple fact of public funding, nor does the evidence show that the problem of waiting lists and the problem of timely access be solved by the introduction of parallel private insurance funding. The evidence accepted at trial and confirmed by the Romanow Commission shows that the remedy called for by the Appellants will in fact make things worst.

We submit that, as the evidence at trial makes clear, the remedy proposed by the Appellants and supporting Interveners in the presence case represents bad

healthcare policy but more importantly, we submit that the proposed remedy represents bad constitutional law. In his decision in *Edwards Book*, Justice Dickson warned against this very case, that's to say, the use of the *Charter* to roll back legislative measures that have been introduced to protect the *Charter* interests of the disadvantaged.

In your recent decision -- dans votre décision récente dans l'affaire *Harper*, ce tribunal a bien reconnu que le droit de vote à l'article 3 de la *Charte canadienne* appartient à tous les Canadiens et Canadiennes. Dans ce pourvoi, nous espérons et nous vous demandons de trouver que dans le contexte des soins à la santé, le droit à la vie, la liberté et la sécurité de la personne est un droit qui appartient à tous et à chacun, non un droit qui appartient seulement et exclusivement à ceux et celles qui sont les plus économiquement favorisés. Sur ce, nous vous demandons de rejeter le présent pourvoi. Merci bien.

MR. JUSTICE MAJOR: Thank you.

Réplique.

RÉPLIQUE DE L'APPELANT, *JACQUES CHAOULLI*

MR. JUSTICE MAJOR: Thank you.

Reply.

APPELLANT *JACQUES CHAOULLI*'S REPLY:

MR. CHAOULLI: So what stands out, I submit, from all of my opponents' interventions, is the socially undesirable character which is over 40 years old, to use the words of Mr. Aubry. So we come back to square one in the division of powers argument which was the real reason for the prohibitions.

Mr. Claude has said that the possibility of overbilling was rejected in order to get to section 15, I submit that this is false. Section 15 *HEIA* has nothing to do with sections 17, 18, 19 and 24 of the 1970 Act, it was already included in Minister Cloutier's Bill 8, long before the specialists' contestation.

Mr. Monette has said that all the resources had to be put in common. Intervener Roy has aptly exposed at paragraph 6 of his factum that this refers to all the resources collected through taxation and nothing else. I submit that the *Gosselin* case was limited to a positive right only.

As to the principles of fundamental justice, for instance in *Godbout*, there was an infringement which was not in conformity with the principles of fundamental justice and it was outside an administration of justice context. The 'manifestly unfair', overbroad and arbitrary criteria respond, I submit, to the criterion established in the *Canadian Foundation for Children* case.

The Attorney General of Canada has raised the issue of additional costs. I submit respectfully that most OECD countries, and particularly all those that have a parallel private system, spend less of their GDP in percentage than Canada does and do better in all respects.

Mr. Monette has invoked the possibility of desolidarization and in this respect I refer you to the fact that no evidence has been provided by my opponents' experts, and you should

find that in my condensed book at tab 19, at pages 300 and 803. The reason invoked in favour of a 3-year suspension, I respectfully submit, is not relevant for the reason which I have raised in my factum at paragraphs 200 to 202.

I allow myself to remind you that there is here an imminent and potential infringement to the right to life, so what would a 3-year suspension do in this context, since, moreover, I have already submitted, and you have that in my factum, that all governments presently have the regulatory means to protect access to care, so I don't see here the relevance of a suspension.

Contrary to what has been submitted by the Attorney General of Quebec, I submit that Canada does not have a single payer system. Those who have been injured at work, as well as police officers, foreign residents and federal prisoners are exempted from the single payer system in our country and by allowing this appeal, you will give ordinary Canadians the same right that others have. I thank you.

REPLY OF THE APPELLANT, *GEORGE ZELIOTIS*, Mr. Bruce W. Johnston

MR. JOHNSTON: May it please the Court. The key assumption was hit on the nail by maître Aubry when he said, the resources are totally used, but that's not what the evidence demonstrates. They are not totally used and that's why we're here. That's our thesis. If you don't use all the resources, it's unfair to prevent us from using what you're not using. That's the key.

We happen to be in an election year, in fact, in an election campaign right now, and we've all heard many politicians promising more money for health, what are they gonna do with that money? What are they gonna do with it, if the resources are being completely used, what's this money gonna go for? If it's not going to provide more health, more buildings, more equipment or more medical services, what is it going to be used for? If you put more money into the system, it's absolutely incontrovertible, we submit to you, that you will provide more services and if the Government isn't willing to do it, then people should be allowed to do it individually.

The experts which were heard in the trial in this case all founded their expertise on one fundamental premise which was false and I submit to you with respect for Madam Justice Piché, she also relied on the same premise, that is that whatever would be put into a private sector would be taken out, as if it's a zero sum gain, there's nothing that

you can put into a private sector without taking it out of the public sector. That's just not the case.

In response to a question by Mr. Justice LeBel, maître Aubry said yes, the expert reports which we are relying upon are at paragraphs 63 and following of the factum, these facts are legal facts. I submit to you, there's little deference which must be paid to a finding based on expert reports hired by the Government to protect the status quo when, in fact, you should be looking at documents which are objective and which compare to what's going on in the rest of the world.

Now, one example -- I can give you many example of this, but if you look at the factums, you really have mostly references to these expert reports but I would encourage you to read what was actually said at trial because we asked those questions: do you have any evidence to show that, for instance, people would stop supporting the public sector? Well, no, there is no evidence. And how could there be any evidence because it happens everywhere else in the world. Do you think that in a country like Sweden that there's no support for a public sector? I mean, that's ludicrous assertion.

One of the experts, Dr. Wright, quoted and this is just an example to show you the danger of relying upon this kind of expertise to decide a case such as this one, he mentions in his report, and this is cited at paragraph 63 of the Attorney General of Canada's factum:

> "A recent in-depth investigative report in Britain reveals that the extent to which physicians progressively favour the private system and divert their commitment into it and away from the public system." (As read)

Well, in cross-examination, Dr. Wright -- because we had checked up on his sources, and in cross-examination, it turns out that this in-depth report was in fact a letter to the editor of the British Medical Journal talking about a TV show that the expert witness had not seen, so I think it's dangerous to this Court to rely solely on this, especially when the premise is false.

We submit to you that it's counterintuitive to suppose that adding resources would do anything but alleviate the stress on the public sector. However, it's not our burden to show, and many of the people who have spoken to you against our appeal have assumed that we haven't demonstrated that we would solve the problems of the public sector, it's not our burden to show that we would solve the problems of the public sector, we hope that it would, but the issue of this appeal is not that. There's a fundamental difference, we submit to you, between forcing someone to pay. When we refer to the battle days when someone could be bankrupted by illness, that's because they were forced to pay when they became ill.

There's a fundamental difference between forcing someone to pay and allowing him to pay, and the thought I would like to leave you on is, I think, tomorrow, you'll be hearing a case, *Auton*, in which parents of autistic children were paying for a service that the Government refused to provide. The Government, I'm sure, will tell you that they have limited resources, this is probably what they will tell you tomorrow, they have limited resources and, therefore, they cannot provide that, but imagine the following scenario.

Imagine the Government decides to cover the service but then affects so few resources to it that it won't be possible to -- you will have a three-year waiting list to get into the program, and then imagine that you prohibit those parents from paying

themselves if they want the service even though it's not available, and then, you have the facts of our case, and I urge you to grant our appeal. Thank you very much.

MR. JUSTICE MAJOR: The Court will take this case under reserve and the Court stands adjourned.

--- La Cour est ajournée à 15:08 heures

Transcription produite à partir des cassettes
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par : _____
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