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Message: Please find enclosed the Response of the Intervener, The Charter Committee on Poverty Issues and The Canadian Health Coalition, to the Motion by the AG of Quebec.

Marie-France Major
Marie-France Major

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File Ref. # 70575-1

S.C.C. No. 29272

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR QUÉBEC)

B E T W E E N :

JACQUES CHAOULLI and GEORGE ZELIOTIS

Appellants

- and -

ATTORNEY GENERAL OF QUÉBEC and
ATTORNEY GENERAL OF CANADA

Respondents

- and -

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF NEW
BRUNSWICK, ATTORNEY GENERAL OF SASKATCHEWAN, AUGUSTIN ROY,
SENATOR MICHAEL KIRBY, SENATOR MARJORY LEBRETON, SENATOR
CATHERINE CALLBECK, SENATOR JOAN COOK, SENATOR JANE CORDY,
SENATOR JOYCE FAIRBAIRN, SENATOR WILBERT KEON, SENATOR LUCIE
PÉPIN, SENATOR BRENDA ROBERTSON and SENATOR DOUGLAS ROCHE,
CANADIAN MEDICAL ASSOCIATION and THE CANADIAN ORTHOPAEDIC
ASSOCIATION, CANADIAN LABOUR CONGRESS, CHARTER COMMITTEE ON
POVERTY ISSUES and THE CANADIAN HEALTH COALITION, CAMBIE
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SPECIALTY MRI CLINICS INC., FRASER VALLEY MRI LTD., IMAGE ONE MRI
CLINIC INC., MCCALLUM SURGICAL CENTRE LIMITED, 4111044 CANADA INC.,
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ORTHOPAEDIC ASSOCIATION and THE BRITISH COLUMBIA
ANESTHESIOLOGISTS SOCIETY

Intervenors

RESPONSE OF THE INTERVENER
THE CHARTER COMMITTEE ON POVERTY ISSUES and
THE CANADIAN HEALTH COALITION
(Pursuant to Rules 54, 62, and 76 of the *Rules of the Supreme Court of Canada*)

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OVERVIEW

1. The Respondent Attorney General of Quebec has filed a motion for a partial re-hearing of the appeal granted by this Court in *Chaoulli v. Quebec (Attorney General)*¹ on the issue of remedy. In its application, the Attorney General describes an in-depth policy and legislative review process to be undertaken over the next 18 months, to implement this Court's decision, and it seeks a stay of the judgment to enable this to occur.
2. The Charter Committee on Poverty Issue (CCPI) and the Canadian Health Coalition (the Coalition) support the Attorney General's application. However, in our submission, a stay should not be granted without a full consideration of the remedial issues raised in this case. In our view, the Court's decision in *Chaoulli* does not sufficiently explain what government action is required to remedy the violation of the right to life and security for those who cannot access private health care and insurance.
3. We submit that the distinctive remedial issues raised by the case, and by the Attorney General's request for a suspended declaration, necessitate a re-hearing and separate remedial judgment by this Court, in order to clarify the constitutional and human rights requirements that must be met in any legislative or other response to the Court's decision.

PART I: FACTS

The Relevance of the Objectives of the Medicare System

4. All members of this Court agreed in their judgments that Medicare is a social program designed "to promote health care of the highest possible quality for all Quebecers regardless of their ability to pay"²; that its design was "motivated by considerations of equality and human dignity"³; that "universal health care was a response to a need for social justice"⁴; and that "The

¹ *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 [*Chaoulli*].

² *Chaoulli*, *per* Deschamps J. at para. 49.

³ *Chaoulli*, *per* Deschamps J. at para. 7.

⁴ *Chaoulli*, *per* Deschamps J. at para. 56.

policy is to provide health care based on need rather than on wealth or status.⁵ These legislative objectives identified by the Court are of critical importance when considering the appropriate remedy.

Public Interest Standing

5. Because the Court found that the Appellants' circumstances did not entitle them to a ruling that their personal interests were infringed, it based its *Quebec Charter* analysis on public interest standing. Framed this way, the Court must take into account the entire public's interest in the case, and not merely the interests of the Appellants, and it must grant a remedy that is effective and appropriate for all those whose rights were infringed.

The Nature of the Violation Found

6. No member of the Court found a constitutional right to private health insurance, or concluded that a prohibition on private insurance would be constitutionally objectionable in the absence of undue waiting times for care. All members of this Court agreed that excessive waiting lists were the factor triggering the application of section 1 of the *Quebec Charter*. It is based on this evidentiary finding alone that the majority found a *Quebec Charter* violation. The majority held that, in the context of a legislated single-payer system, excessive waiting lists violate the right to "life" guaranteed by article 1 of the *Quebec Charter* and, per McLachlin C.J., LeBel and Bastarache JJ., section 7 of the *Canadian Charter*. As the majority explained:

The appellants do not contend that they have a constitutional right to private insurance. Rather, they contend that the waiting times violate their rights to life and security.

By imposing exclusivity and then failing to provide public health care of a reasonable standard within a reasonable time, the government creates circumstances that trigger the application of s. 7 of the Charter....

-and-

[B]ecause patients may be denied timely health care for a condition that is clinically significant to their current and future health, s. 7 protection of

⁵ *Chaoulli*, per Binnie and LeBel JJ. at para. 164.

security of the person is engaged....Where lack of timely health care can result in death, s. 7 protection of life itself is engaged.⁶

7. The majority and dissenting judgments disagreed in their assessment of the evidence about the impact of the prohibition on private insurance on the public system. However, none of the parties or interveners in the case argued, and this Court did not find, that striking down the ban on private health insurance as a remedy for those who could afford or were eligible for it, would in any way vindicate the right to life and security of the poor or of others who continue to rely entirely on public health care.

The Remedial Order

8. The remedial order sought by the Appellants and granted by the Court was a declaration that, in view of excessive wait times, the prohibition on private insurance was inconsistent with section 1 of the *Quebec Charter*. In granting its declaratory order, the Court gave no guidance as to how the rights violation it found should be remedied for those who cannot access private health insurance. CCPI and the Coalition submit that such clarification is necessary to ensure a remedial response consistent with the right to equality under the Quebec and Canadian charters, and with Quebec's international human rights obligation to ensure equal enjoyment of the right to health care, regardless of economic or other circumstances.

PART II: ISSUES

- a. Should the Court grant a re-hearing of the appeal on the issue of the appropriate remedy?
- b. If the Court grants a re-hearing on the issue of remedy, what issues should be addressed and what type of Remedial Order would be appropriate?

PART III: ARGUMENT

9. CCPI and the Coalition support the Attorney General of Quebec's request for a partial re-hearing of the appeal for the reasons set out below.

⁶ *Chaoulli, per* Deschamps, J. at para. 14 and *per* McLachlin C.J. and LeBel J. at paras. 105 & 123.

The Issue of Remedy Was Not Dealt With by the Parties or the Court

10. On the issue of remedy, the Appellant Zeliotis asked for a declaration of invalidity or any other remedy considered appropriate by the Court. The Respondent Attorneys General of Quebec and Canada did not address what remedy should be ordered, and most of the interveners did not deal with the issue. Likewise, the Court did not engage in a substantive discussion of the appropriate remedy for the rights violation it found in this case.

The Remedial Issues are of Particular Importance in this Case

11. This Court has ruled on the question of a violation of the right to life under the *Quebec Charter*. CCPI and the Coalition do not seek to have the Court's ruling regarding a breach of the *Quebec Charter* re-heard.

12. Rather, the motion for a re-hearing to consider the merits of a suspended declaratory order provides a crucial opportunity for this Court to craft an appropriate remedy. Such a remedy must, we submit, ensure that the rights violation identified by the Court – one experienced by all residents of Quebec – is addressed in a way that is inclusive of the rights of all, consistent with the Quebec and Canadian charters' equality rights protections, unwritten constitutional principles, and international human rights norms.

13. CCPI and the Coalition submit that, where the Court has concluded that the current functioning of Quebec's public health care system violates the right to life of those who rely upon it, the remedy ordered by the Court and to be implemented by Quebec during an 18 month stay, must be one that responds to the rights of all. The remedy, in our submission, ought not to be restricted to those whose right to life may be safeguarded through access to private insurance and privately funded health care services.

14. The remedy ordered by the Court must not, in short, discriminate against disadvantaged groups by denying them the full protection of article 1 of the *Quebec Charter*, which the Court has interpreted as including timely access to health care necessary for personal security and life.

15. The remedial significance of the present case is compounded by the similarity between the Quebec and Canadian charters and the fact that three members of the Court also found a violation of section 7 of the *Canadian Charter*. It is clear that governments across Canada will be reviewing their legislation in light of the Court's decision. A clear statement regarding what action is required to remedy the violations the Court has identified is necessary and appropriate in light of the national implications of its ruling.

16. Without a full consideration of important remedial issues arising from its decision, there is a very real risk that the Court's declaratory judgment might be taken as judicial direction for governments to act to protect the right to life and security of those who can access private health insurance while neglecting the rights of those who cannot. For people who are poor, chronically ill, or disabled, the availability of private health care or health insurance is clearly not an adequate remedy for violations of the right to life and security that the Court has found within the public system.

The Unique Remedial Considerations in a Public Interest Case

17. Standing was granted in *Chaoulli* based on the public interest in ensuring the protection of fundamental rights in health care delivery. The judgment identified systemic and pervasive problems in a social program of enormous importance to all Canadians, but of particular significance to those with disabilities, chronic illness or living in poverty. Given its public interest character, this case requires a thorough remedial analysis taking into account the full dimension of the public interests at stake.

18. This is not a case in which a partial remedy, applicable only to individuals appearing before the Court, is appropriate. The Court heard and adjudicated the case as a public interest case, because all residents of Quebec have an interest in the issues raised by the Appellants. Remedial considerations must include all members of the public, and in particular, those who may not have any real prospect of accessing private insurance or care. A systemic problem that attracts public interest standing demands an effective and systemic remedy for all, not just for the more advantaged.

19. Human rights legislation in Canada has been crafted to be remedial in its focus, and to provide for broad remedies going beyond the particular circumstances of the individual complainants. This Court has recognized that a critical component of the public interest, particularly under human rights legislation such as the *Quebec Charter*, is protection from discrimination. A public interest remedy under the *Quebec Charter* must include full consideration of the unique circumstances of those who, for reasons of disability, illness or poverty, do not have access to private health insurance.

A Distinct Consideration of Remedial Issues is Necessary

20. In previous cases, this Court has considered the issue of remedy apart from the question of substantive rights violations. The Court's extensive use of suspended declarations of invalidity recognizes that remedial issues can raise considerations that are distinct from those which determine liability. This Court has also revisited matters relating to the operation of its judgments.⁷

21. The implementation of remedies in cases involving complex social programs will frequently involve consideration of the rights and interests of individuals and groups other than those who appeared before the Court. In the present case, there is a legitimate concern that a remedy implemented solely on the basis of the Court's finding on the issue of an infringement of section 1 of the *Quebec Charter*, may result in violations of the rights of other groups, by denying them the equal benefit and protection of the law.

22. We agree with the Attorney General of Quebec that this case is one in which a suspended declaration of invalidity is appropriate. However, we submit that the remedial issues that must be addressed by Quebec are broader than the issue of access to private insurance considered by the Court in *Chaoulli*.

⁷*Schachter v. Canada*, [1992] 2 S.C.R. 679; *Reference re Provincial Court Act*, [1997] 3 S.C.R. 3, supp. reasons [1998] 1 S.C.R. 3, supp. reasons [1998] 2 S.C.R. 443; *R. v. Feeney*, [1997] 2 S.C.R. 13, supp. reasons [1997] 3 S.C.R. 1008.

The Remedy Must be Equally Effective for Disadvantaged Groups

23. In its ruling, a majority of the Court found that the public's interest in the right to life under the *Quebec Charter* was violated by unreasonable waiting times where patients must rely exclusively on the public system. However, a significant proportion of the public are people whose poverty, illness or disability makes access to private insurance meaningless. This component of the public interest requires additional consideration at the remedial level, in light of the Court's finding of violations of rights in relation to the public system.

24. It is important to note that there is no allowance for private health insurance in Statistics Canada's Market Basket Measure of poverty, which is significantly above the level of social assistance rates anywhere in Canada. In the most recent report by the National Council of Welfare (a statutorily created advisory body to the Minister of Social Development), the Council concluded that:

Welfare incomes have never been adequate anywhere in Canada, but many of the provincial and territorial benefits reported in 2004 were modern-day lows. Even when federal benefits such as the GST Credit and the National Child Benefit are added to the equation, welfare incomes remained far below the poverty line and far below what most Canadians would consider reasonable.

Welfare incomes were further below the poverty line in most provinces in 2004 than they were in the late 1980s or early 1990s. The differences between the peak years and 2004 tended to be particularly harsh in the case of single employable persons. Losses of 25 percent or more were reported in seven provinces.⁸

25. Similarly, no one has contended that private health insurance would be an option for those with acute or chronic illnesses or disabilities who would be largely ineligible for private insurance.

⁸ National Council of Welfare, *Welfare Incomes 2004* (Ottawa: National Council of Welfare, Spring, 2005) at 87.

Equal Enjoyment of Rights Under the Quebec and Canadian Charters

26. A remedy for violations of the right to life that relies on a notion of formal equality of access to private health insurance is meaningless and ineffective for those who are poor, chronically ill, or disabled. Such a remedy, if implemented by governments in Canada, would be a clear example of 'equal treatment resulting in inequality' and would offend equality principles under both human rights legislation and the *Canadian Charter*.⁹

27. The *Quebec Charter* provides that everyone is entitled to the "full and equal recognition of his human rights and freedoms, without distinction, exclusion or preference based on...social condition, a handicap..."¹⁰ Moreover, the same provision states that "discrimination exists where an exclusion or preference has the effect of nullifying or impairing such rights."¹¹

28. The constitutional guarantee of equality under the *Canadian Charter* has been characterized by this Court as: "the broadest of all guarantees. It applies to and supports all other rights guaranteed by the Charter."¹² Three members of this Court have recognized that the right to life and personal security in section 7 of the *Canadian Charter*:

- a. ...must be interpreted through the lens of ss. 15 and 28, to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society.¹³

29. This Court has recognized that the poor are "one of the most disadvantaged groups in society"¹⁴ and that, when it comes to poverty-related barriers to equal enjoyment of *Charter*

⁹ In *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 76, the Court stated: "It has been repeatedly held that identical treatment will not always constitute equal treatment." In the more specific context of disability discrimination, the Court stated in *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 67 that: "Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access...." And in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 at para. 81 the Court stated: "The question, in each case, will not be whether the state has excluded all disabled persons or failed to respond to their needs in some general sense, but rather whether it has been sufficiently responsive to the needs and circumstances of each person with a disability."

¹⁰ *Charter of Human Rights and Freedoms*, R.S.Q. c.C-12 (*Quebec Charter*), s. 10 (emphasis added). Discrimination based on "social condition" under the *Quebec Charter* has been extensively considered. See, for example: *Québec (Comm. des droits de la personne) v. Whittom* (1993), 20 C.H.R.R. D/349 (Qué. Trib), affirmed on appeal (1997), 29 C.H.R.R. D/1 (Qué. C.A.).

¹¹ *Ibid* (emphasis added).

¹² *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 185.

¹³ *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 6 at para. 115 (emphasis added).

rights, the poor ought not, in the Chief Justice's words, to be treated as "constitutional castaways."¹⁵

30. Relying on the *Quebec Charter* to open the door to private health care is not a remedy that provides equal enjoyment of the right to life for the poor and for those who are medically ineligible for private insurance. It does not ensure that the poor will receive medical treatment that meets the requirements of section 1 of the *Quebec Charter* or the constitutional standard set out under section 7 of the *Canadian Charter*.

The Problem of Remedial Under-inclusion

31. In *Dunmore*, seven members of this Court brought a concrete contextual analysis to the workplace realities of non-unionized agricultural workers. The Court found that the exclusion of vulnerable agricultural workers from protective labour legislation was tantamount to a denial of their *Charter* right to association.

32. Here, a *de facto* socio-economic barrier confronts the poor and those with disabilities who cannot qualify for private insurance. This obstacle effectively serves to exclude the poor from the private-insurance alternative that the Appellants have sought for themselves as a remedy to the violation of their right to life caused by undue waiting times within the public system.

33. In *Dunmore*, the Court held that where the social realities of a vulnerable group "substantially impede" their ability to enjoy a fundamental *Charter* right, "in order to make a fundamental freedom meaningful, a positive governmental action might be required."¹⁶ We submit that this is equally true in the present case for those who by reason of poverty, illness or disability, have no meaningful access to private insurance.

34. In our submission, it would be inappropriate, given the nature of the rights at issue and the barriers such disadvantaged groups face in accessing the courts, to ignore or "leave to another

¹⁴ *R. v. Prosper*, [1994] 3 S.C.R. 236 at 288, per L'Heureux-Dubé, J.

¹⁵ *Ibid.* at 302, per McLachlin, J.

¹⁶ *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 at para 23, per Bastarache J., citing the judgment of L'Heureux-Dubé J. for the majority in *Haig v. Canada*, [1993] 2 S.C.R. 495 at p. 1039.

day" judicial consideration of the right to life of the poor, people with disabilities or those with chronic illnesses. The majority's finding in this case is unequivocal in its conclusion that the right to life is violated by waiting times where patients rely exclusively on the public health care system. Those who are forced to rely on the public system by reason of poverty, illness or disability will continue to see their rights violated, whether private health insurance is available to others or not.

35. We submit that it would be tantamount to judicially sanctioned discrimination if the remedial order, under which Quebec is to redesign its health care system, ignored the rights of those who cannot realistically access private health care or insurance.

Constitutional Principles Apply

36. This court has underscored that the unwritten principles of the Constitution infuse and inform all written constitutional texts. The Court has held that the: "rule of law is a constitutional principle which permits the courts to address the practical consequences of their actions, particularly in constitutional cases....[it attempts] to refashion the law to meet social reality."¹⁷

37. The Court has also explained that the principle of democracy includes far more than 'process protections' and includes substantive goals, such as a commitment to social justice and equality.¹⁸ In the present case, the Court must make clear, by way of precautionary guidance to governments, that their response to the Court's ruling in *Chaoulli* must take into account the equality interests of disadvantaged Canadians.

The Requirements of International Human Rights Law

38. This Court has also made clear that domestic human rights guarantees and remedies must be interpreted and applied consistently with Canada's international human rights obligations.¹⁹

¹⁷ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 145.

¹⁸ *Ibid.* at para. 64.

¹⁹ *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at 1056-1057, 1078-1081; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 70.

39. Thus, under the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*), governments must ensure that the right to health is guaranteed to all, to the maximum of available resources, and that it is implemented without discrimination and in particular, without discrimination based on “social origin, poverty, birth or other status.”²⁰ In the words of the U.N. Committee on Economic, Social and Cultural Rights, which monitors compliance with the *ICESCR*: “Health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds.”²¹

40. Under Article 6 (the ‘right to life’) of the *International Covenant on Civil and Political Rights* (*ICCPR*), States Parties are required to ensure that everyone enjoys the right to life regardless of “social origin, property, birth or other status” and the right to an “effective remedy” for violations thereof.²² Moreover, the *ICCPR* places special emphasis on the ‘right to life’ by explicitly prohibiting any derogation therefrom.²³

41. A remedial order based on an implicit assumption that violations of the right to life of those forced by circumstances, such as poverty or disability, to rely exclusively on the public system, can be justified, would be entirely inconsistent with the non-derogable status of the right to life under the *ICCPR*.

Canadian Charter Considerations

42. This Court’s *Charter* jurisprudence has always maintained that the remedy must respond to the full breadth of the rights violation:

Purposeful interpretation means that remedies provisions must be interpreted in a way that provides “a full, effective and meaningful remedy for Charter violations” since “a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach” (Dunedin, *supra*, at paras. 19-20). A purposeful approach to remedies in a Charter context gives modern

²⁰ *International Covenant on Economic, Social and Cultural Rights*, Can. T.S. 1976 No. 46, Article 2.

²¹ Committee on Economic, Social and Cultural Rights, *General Comment No. 14*, United Nations document number: E/C.12/2000/4 at para. 12(b).

²² *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, articles 6 and 2.

²³ *Ibid*, article, 4(2).

vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies.²⁴ (emphasis in original)

43. In *Schachter*, this Court adopted a general approach to determining the appropriate remedy for *Charter* violations: "the Court must be guided by the principles of respect for the purposes and values of the *Charter*, and respect for the role of the legislature."²⁵ As the Court further observed in *Osborne*:

In selecting an appropriate remedy under the *Charter*, the primary concern of the court must be to apply the measures that will best vindicate the values expressed in the *Charter* and to provide the form of remedy to those whose rights have been violated that best achieves that objective.²⁶

44. In the context of a public health care system that has been found to have unreasonable wait times, opening up access to private insurance as a mechanism for ensuring quicker treatment is an illusory *Charter* remedy for the poor and for those medically unable to qualify for it. For the poor, such a remedy is both discriminatory and contrary to section 7 'principles of fundamental justice'.

The Scope of the Court's Remedial Jurisdiction under the Quebec Charter

45. The Court recently discussed its remedial powers under section 52 of the *Quebec Charter*:

- a. ...the case law of this Court...stresses the need for flexibility and imagination in the crafting of remedies for infringements of fundamental human rights (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 2003 CSC 62, at paras. 24-25 and 94). We should also not lose sight of the fact that enactments such as the *Quebec Charter* occasionally require intervention that is in no way related to the law of civil liability. It is sometimes necessary to put an end to actions or change practices or procedures that are incompatible with the *Quebec Charter* even where there is no fault within the meaning of the law of civil

²⁴ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 at para. 25.

²⁵ *Schachter v. Canada*, [1992] 2 S.C.R. 679 at pp. 700-701 *et seq.*

²⁶ *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 at 104, *per* Sopinka J.

liability....Thus, in the context of seeking appropriate recourse before an administrative body or a court of competent jurisdiction, the enforcement of this law can lead to the imposition of affirmative or negative obligations designed to correct or bring an end to situations that are incompatible with the *Quebec Charter* (emphasis added).²⁷

46. The *Quebec Charter* also stipulates that remedies granted thereunder must be "consistent with the public interest."²⁸

The Need for Clear Judicial Guidance in this Case

47. Given the importance of the rights at issue in this case and the widespread reaction to the Court's judgment, described by the Attorney General of Quebec in its motion, it is respectfully submitted that this Court should provide clear remedial guidance to Quebec and other governments attempting to comply with the Court's decision. In particular, CCPI and the Coalition submit that this Court must make clear that any remedial action taken by governments must not neglect the rights of the poor or of those ineligible for private insurance.

48. A declaratory order of inconsistency with the *Quebec Charter*, based on the Court's findings in relation to unreasonable waiting times in the public system, provides no clear guidance as to how to remedy the violation. This Court has recognized that the legislative response, if any, to its judgments cannot be predicted, and that in some cases revised legislation may not be adopted in response to a judgment that strikes down an impugned provision.

49. In this case, however, as the Attorney General's motion indicates, positive action is required in response to the Court's decision, in order to ensure compliance with the *Quebec Charter* and to promote the legitimate purpose of the Medicare system. The combination of unreasonable waiting times and inaccessible private insurance would amount to the 'worst of both worlds' for the poor, and would undermine the social justice objectives this Court identified as animating Canadian and Quebec health care legislation.²⁹ This concern must, we submit, be

²⁷ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, [2004] 1 S.C.R. 789 at para. 26.

²⁸ *Quebec Charter*, s. 80.

²⁹ See, for example, paras. 49, 56 and 164 of *Choulli*.

explicitly addressed in the Court's partial re-hearing of the present case and in its ultimate remedial order.

50. The Court could provide additional clarity through other remedial options. For example, consideration could be given to an ongoing role for this Court, or the trial court, in reviewing governments' remedial actions. The Court might consider ordering the Attorney General of Quebec to report back with a plan as to how to make its health care system compliant with the *Quebec Charter* and constitutional principles, including reports on the situation of those who cannot afford or otherwise access private health insurance. Such reports could be subject to adversarial argument by the parties and interveners, and would help ensure that the remedial measures ultimately adopted by the Respondent were effective for all citizens, including those who cannot afford private health insurance.

51. Another option available to the Court, in circumstances where systemic remedies to rights violations must be crafted, is to provide a role for another institution, such as Quebec's *Commission des droits de la personne et des droits de la jeunesse* in supervising governments' remedial responses. Such an approach was adopted, for example, by the South African Constitutional Court in a case involving violations of the right to housing, in which the South African Human Rights Commission was assigned an ongoing monitoring and reporting role.³⁰

52. Given the policy and legislative review that will now take place in Quebec and, no doubt, in other provinces, it is entirely appropriate for this Court to correct any misunderstandings which legislators may have as to what implementation of the *Chaoulli* judgment requires. In the context of the broad health care system re-design process described by the Attorney General of Quebec in its application, it is more than appropriate for this Court to remind legislators that they must take into account, not only the rights of those in the position of the Appellants, but also the fundamental constitutional and quasi-constitutional rights of the poor and others who, by reason of illness or disability, lack any meaningful access to private insurance.

³⁰ *Government of the Republic of South Africa v. Grootboom* (2001), 1 South African Law Reports 46 (CC).

Conclusion

53. In her reasons for judgment in this case, Justice Deschamps emphasized the appropriate institutional role which the courts play, noting that: "it is through the combined action of legislatures and courts that democratic objectives can be achieved."³¹ She invoked recent scholarly writing, relating to the metaphorical legislative/judicial dialogue:

Judges can add value to societal debates about justice by listening to claims of injustice and by promoting values and perspectives that may not otherwise be taken seriously in the legislative process.

-and-

The image which emerges is one of "judicial and legislative cooperation in the molding of concrete standards through which elusive and complex constitutional norms . . . come to be applied."³²

54. Further to this approach, it is unsatisfactory for the courts to provide direction to legislators as to how to protect the rights of the advantaged while remaining silent about the rights of the poor and the disabled.

55. In the present case, given the political lethargy referred to in the majority judgments, there is a very real danger that governments will take the message that removing statutory prohibitions on private health care funding and insurance will, without more and absent any consideration of the rights of those who cannot access private insurance, represent adequate compliance with human rights laws and the *Canadian Charter*, in accordance with this Court's ruling.

56. The 'public interest' judgment in *Chaoulli* requires a thorough public interest hearing on the unique remedial issues raised in this case. It requires an in-depth remedial analysis and clear direction from this Court as to the constitutional and human rights requirements of statutory and regulatory responses to the Court's ruling – a ruling that directly and dramatically affects a social program at the heart of Canadian identity.

³¹ *Chaoulli*, *per* Deschamps J. at para. 90

³² *Chaoulli*, *per* Justice Deschamps, at paras. 89-80, citing: Kent Roach, "Dialogic Judicial Review and its Critics" (2004), 23 *Sup. Ct. L.R.* (2d) 49 at pp. 69-71 and Sujit Choudhry and Robert Howse, "Constitutional Theory and The Quebec Secession Reference" (2000) 13 *Can. J. L. & Jur.* 143 at 160-61. (emphasis added).

57. It would, in our respectful submission, be a distortion of the judicial role in Canada's constitutional democracy if the Court's remedial order sanctioned, much less called for, provincial "overhaul" of health care delivery in a manner that failed to address the situation of the poor, the disabled, or others for whom access to private health care and insurance is a meaningless option. This Court must, in our submission, make it clear in a separate remedial order that an under-inclusive remedial response, leaving problems in the public system unaddressed and thereby leaving the poor and the disabled without any remedy to the continued violation of the right to life would be unconstitutional, inconsistent with the *Quebec Charter*, and contrary to international human rights law.

58. It is respectfully submitted that this Court should grant the partial re-hearing and stay sought by the Attorney General of Quebec but, in so doing, provide clear guidance to all governments, to ensure that they respond to the Court's judgment in a way that recognizes and protects the rights of the poor and other disadvantaged groups.

59. We respectfully submit that consideration should also be given to an ongoing role for the Court in this matter, such as through a report-back mechanism to the Court or to another institution, such as the Quebec *Commission des droits de la personne et des droits de la jeunesse*.

Part IV: Order Sought

60. We submit that the request for a partial re-hearing should be granted and that parties should be permitted to make submissions on the nature of the appropriate remedial order in this case.

ALL OF WHICH IS RESPECTFULLY SUBMITTED dated the 11th of July, 2005

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