Chaoulli - AG BC Factum

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APPENDICES

## PART I
## FACTS

1. For the purpose of argument on the Constitutional Questions, the Intervenor, the Attorney General of British Columbia, adopts the facts set out in the Respondents' Facta and will also rely upon the facts found by the trial judge.

## PART II
## ISSUES ON APPEAL

2. The following Constitutional Questions were stated by the Honourable Mr. Justice Major on August 15, 2003:

1. Does s. 11 of the *Hospital Insurance Act*. R.S.Q., c. A-28, infringe the rights guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*?

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

3. Does s. 15 of the *Health Insurance Act*, R.S.Q., c. A-29, infringe the rights guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*?

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

5. Is s. 15 of the *Health Insurance Act*. R.S.Q., c. A-29, *ultra vires* the Quebec National Assembly, in light of s. 91(27) of the *Constitution Act, 1867*?

6. Is s. 11 of the *Hospital Insurance Act*, R.S.Q., c. A-28, *ultra vires* the Quebec National Assembly, in light of s. 91(27) of the *Constitution Act, 1867*?

7. Does s. 15 of the *Health Insurance Act*, R.S.Q., c. A-29, infringe the right to equality guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

8. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

9. Does s. 11 of the *Hospital Insurance Act*, R.S.Q., c. A-28, infringe the right to equality guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

10. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

11. Does s. 11 of the *Hospital Insurance Act*, R.S.Q., c. A-28, infringe s. 12 of the *Canadian Charter of Rights and Freedoms*?

12. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

3. The Intervenor submits that Constitutional Questions numbered 1, 3, 5, 6, 7, 9 and 11 should be answered in the negative. It is not necessary to answer the other Constitutional Questions relating to whether any alleged infringement of *Charter* rights are reasonable limits under s. 1 of the *Charter*.

4. The Intervenor will make submissions on Constitutional Questions 1, 3, 5 and 6 in support of our position that they should be answered in the negative. For the remaining Constitutional Questions, we adopt the submissions of the Respondents.

## PART III
## ARGUMENT

### A. DIVISION OF POWERS ISSUE – THE NATIONAL ASSEMBLY OF THE PROVINCE OF QUEBEC HAS PLENARY AND EXCLUSIVE JURISDICTION TO ENACT SECTION 11 OF THE *HOSPITAL INSURANCE ACT AND SECTION 15 OF THE HEALTH INSURANCE ACT*

5. Constitutional Questions 5 and 6 ask whether s. 15 of the *Health Insurance Act* (the "*Health IA*") and s. 11 of the *Hospital Insurance Act* (the "*Hospital IA*") enacted by the Quebec National Assembly are *ultra vires* the legislative authority of the provincial Legislature by reason of the exclusive federal jurisdiction over the criminal law (s. 91(27) of the *Constitution Act, 1867*). In effect, those legislative provisions establish the Province of Quebec as the single payer or provider of insurance for insured health services and insured hospital services. The relevant parts of those provisions are:

> "15. No person shall make or renew a contract of insurance or make a payment under a contract of insurance under which an insured service is furnished or under which all or part of the cost of such a service is paid to a resident or a temporary resident of Quebec or to another person on his behalf."

> "11(1) No one shall make or renew, or make a payment under a contract under which
> (a) a resident is to be provided with or to be reimbursed for the cost of any hospital service that is one of the insured services..."

6. It is well established that provincial governments can create compulsory insurance programs where the government is the sole insurer of whatever risk it chooses to insure:

> "The purpose of the legislation in question is to provide for the compulsory insurance of motor-vehicles registered in British Columbia and of automobile drivers licensed in British Columbia through a corporation incorporated in British Columbia, which is a government controlled monopoly. It controls the business of automobile insurance in British Columbia.
>
> ...
>
> ...The aim of the legislation relates to a matter of provincial concern within the Province and to property and civil rights within the Province."
>
> *Canadian Indemnity Co. v. British Columbia (Attorney General)*, [1977] 2 S.C.R. 504 at p. 512

7. Not only is s. 15 of the *Health IA* and s. 11 of the *Hospital IA intra* vires the province as a matter of property civil rights and things of a local and private nature within the province since it is concerned with insurance contracts, but also it is within the exclusive health jurisdiction of provincial Legislatures:

> "It is generally agreed, however, that the hospital insurance and medicare programs in force in this country come within the exclusive jurisdiction of the provinces under ss. 92(7) (hospitals), 92(13) (property and civil rights) and 92(16) (matters of a merely local or private nature); see Hogg, supra, at p. 6-16, and the Canadian Bar Association Task Force on Health Care, What's Law Got to Do with It? Health Care Reform in Canada (1994), at p. 15."
>
> *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, [1997] S.C.J. No. 86 at para. 24

8. The Attorney General of Canada at paragraphs 105 to 107 of his Factum agrees that s. 11 of the *Hospital IA* and s. 15 of the *Health IA* of Quebec are within the general authority of the province to legislate in respect to matters of health. The importance of the concurrence in the positions of the federal and provincial Attorneys General, as a matter of public policy, was noted in *Schneider*:

> "A factor which plays no part in the determination of the constitutional validity of the Act, but which, as a practical matter, is not negligible, is the support of both the provincial and federal authorities for the validity of the legislation. Although it does not resolve the constitutional issue it is interesting to observe that in these proceedings a provincial statute is being attacked on the ground that it falls within federal competence yet the Attorney General of Canada is not contesting the constitutionality of the provincial statute. He would like to see the provincial legislature (sic) remain in place."
>
> *Schneider v. British Columbia*, [1982] 2 S.C.R. 112 at p. 138

## B. RELEVANT ASPECTS OF THE HEALTH CARE CONTEXT IN BRITISH COLUMBIA AND QUEBEC

9. As in Quebec, the provincial Legislature in British Columbia decided as a matter of public policy to prohibit private contracts of insurance for the cost of health care services provided by the provincial Medical Services Plan. Section 45 of the *Medicare*

*Protection Act* provides:

> 45(1) A person must not provide, offer or enter into a contract of insurance with a resident for the payment, reimbursement or indemnification of all or part of the cost of services that would be benefits if performed by a practitioner.
>
> (2) Subsection (1) does not apply to
>
> (a) all or part of the cost of a service
>
> (i) for which a beneficiary cannot be reimbursed under the plan, and
>
> (ii) that is rendered by a health care practitioner who has made an election under section 14(1),
>
> (b) insurance obtained to cover health care costs outside of Canada, or
>
> (c) insurance obtained by a person who is not eligible to be a beneficiary.

*Medicare Protection Act,* RSBC 1996 c. 286, s. 45 (Appendix "A")

10. The prohibition on private insurance contracts for health care applies to insured services rendered by both medical practitioners and health care practitioners (chiropractors, dentists, optometrists, podiatrists and prescribed health care practitioners – see s. 1 of the *Medicare Protection Act*). These practitioners can opt out of the Medical Services Plan under s. 14 of the *Act* and elect to be paid for health care services by an insured patient who then is reimbursed by the Medical Services Commission, generally at its prevailing rate for such health services. Private health insurance is permitted for those services rendered by health care practitioners who have elected under s. 14(1) to bill patients directly where such services are not insured under the public system (i.e. not reimbursable).

11. Unlike s. 11 of the Quebec *Hospital IA,* the British Columbia *Hospital Insurance* Act does not specifically prohibit private insurance contracts for insured hospital services. Instead, it provides for payment by the government to hospitals (which may be publicly or privately owned and in the latter case the provincial government enters into an agreement requiring a hospital to provide general hospital services) of the cost

of hospital benefits provided to persons who are qualified for hospital insurance by reason of residency in the province. Section 12 of the *Hospital Insurance Act* provides:

> "12 If a hospital has been paid by the government for services rendered by it, the payment, subject to section 5(7) or 14, is deemed to be payment in full for the services, and the hospital must not seek to recover additional payment from any other person."
>
> *Hospital Insurance* Act of British Columbia , RSBC 1996, c. 204, ss. 1, 3, 9, 12 (Appendix "B")

12. Section 5(7) of the *Hospital Insurance* Act provides that the Lieutenant Governor in Council may approve imposition of user fees by hospitals to be paid by beneficiaries. Section 14 of that Act permits hospitals to charge a beneficiary directly for care in addition to public ward care, or if additional care is provided for a patient on the order of his physician.

13. Until 1992, medical insurance for the cost of physician services was provided under the *Medical Services Act* (enacted in 1967, (1967) S.B.C. c. 24 and repealed in 1992) which established the Medical Services Commission and provided that the Lieutenant Governor in Council could, by regulation, establish a "voluntary medical services plan for the Province" to be administered by the Commission. The Commission was also empowered under the *Act* and Regulations to licence private health insurance carriers to provide payment for insured services under the plan. Such private carriers were required to operate on a non-profit basis.

> *Medical Services Act* , RSBC 1979, c. 255, ss. 7 and 9 (Appendix "C")
> *Medical Services Act Regulation*, B.C. Reg. 144/68,s. 9.01 (Appendix "D")

14. While the plan was said to be "voluntary", there was a high degree of participation by the citizens of British Columbia as noted in this description of "liberty" by the Court of Appeal *Wilson*:

> "The liberty to participate in the medical plan (embraces "liberty") for it is conceded that denial of participation in the plan is a denial of the opportunity to practise medicine in British Columbia. That is so because

99% of the citizens of British Columbia subscribe to the plan. As a practical matter, no doctor can work outside it."

*Wilson v. British Columbia (Medical Services Commission)* (1988), 53 D.L.R. (4th) 171 (BCCA) at p. 183

15. On November 5, 1991, the British Columbia Royal Commission on Health Care and Costs issued its report entitled "Closer to Home" under the Chairmanship of the Honourable Mr. Justice Peter D. Seaton (the "Seaton Commission"). The Terms of Reference of the Seaton Commission, comprised of six members, were exceedingly broad and are set out in their entirety in Appendix "E" to this Factum. They included these terms:

1) "To examine the structure, organization, management and mandate of the current health care system to ensure continued high quality, access and affordability throughout the 1990s and into the twenty-first century.

2) To examine the utilization, appropriateness and efficacy of health care services, including hospital and continuing care services, medical services and prescription drug programs...

3) To examine the costs associated with each of the health care system's major elements and the current methods of funding and reimbursement and to identify possible options...

4) To examine the existing legislation to ensure an appropriate statutory framework consistent with the achievement of an economical, efficient and effective system of health care and health promotion."

Closer to Home, Vol. 2, p. III

16. Perhaps the most significant finding is contained in the Commission's letter of transmittal to the Lieutenant Governor dated November 5, 1991, where it was stated:

"We have talked to representatives from many different health care systems and we have not found a system that we would accept in exchange for the one currently in operation in British Columbia. But, there is room for improvement..." [emphasis added]

Closer to Home, Vol. 1, p. 5

17. The Seaton Commission fully endorsed the principles of the 1984 *Canada Health Act* which were: 1) "comprehensiveness, 2) universality, 3) portability; 4) accessibility, 5) public administration", and noted that at the time of their report no Canadian province had confirmed those five principles of Medicare by enacting them in legislation. They recommended that the B.C. government take the first step and make these principles an integral part of B.C. law. (Closer to Home Vol. 1, p. 6)

18. The first step towards implementing this recommendation, and many others of the Seaton Commission, came with the enactment of the *Medical and Health Care Services Act* which received royal assent on July 3, 1992. Under s. 4 of the *Act*, the Commission was given an extensive catalogue of powers but those powers were constrained:

> "4(2) The commission must not act under subsection (1) in a manner that does not satisfy the criteria described in section 7 of the *Canada Health Act (Canada)*."
>
> *Medical and Health Care Services Act*, 1992 SBC c. 76, s. 4

19. The recommendation of the Seaton Commission concerning the principles of Medicare was fully implemented with the enactment in 1995 with the *Medical and Health Care Services (Amendment) Act*, 1995 (an *Act* to protect Medicare), SBC 1995, c. 52 (Appendix "F"). This enactment renamed the *Medical and Health Care Services Act* to be the *Medicare Protection Act* and added a preamble in the following terms:

> **Preamble**
>
> "WHEREAS the people and government of British Columbia believe that medicare is one of defining features of Canadian nationhood and are committed to its preservation for future generations;
>
> WHEREAS the people and government of British Columbia wish to confirm and entrench universality, comprehensiveness, accessibility, portability and public administration as the guiding principles of the health care system of British Columbia and are committed to the preservation of these principles in perpetuity;
>
> WHEREAS the people and government of British Columbia recognize a responsibility for the judicious use of medical services in order to maintain a fiscally sustainable health care system for future generations;

AND WHEREAS the people and government of British Columbia believe it to be fundamental that an individual's access to necessary medical care be solely based on need and not on the individual's ability to pay."

20. As well the purpose section, s. 2, of the *Medicare Protection Act* emphasizes the fundamental principle of Medicare:

> "2 The purpose of this Act is to preserve a publicly managed and fiscally sustainable health care system for British Columbia in which access to necessary medical care is based on need and not an individual's ability to pay."

21. In 1992, the *Medical and Health Care Services Act* (now s. 45 of the *Medicare Protection Act*) imposed a prohibition against private health care and insurance contracts for the first time:

> "39(1) A person must not provide, offer or enter into a contract of insurance with a resident for the payment, reimbursement or indemnification of all or part of the costs of services that would be benefits if performed by a practitioner."

22. The Seaton Commission in its 1991 report also dealt with what it called "Waiting Time":

> "Public perceptions about waiting lists are shaped, in large part, by news media reports of backlogs for open heart surgery and certain cancer treatments, and by reports of staff shortage in hospitals. The accuracy of the reports, usually based on the anecdotal evidence of patients who find themselves having to queue for certain procedures, is questionable. Although there are backlogs for some procedures, there is no valid way to objectively determine the length of the current waiting lists – not for the government, and not for the news media."
>
> Closer to Home, Vol. 2, p. B-45

23. That Report identified major factors which contributed to waiting times:

1) some specialists have better reputations and as a consequence receive more referrals;

2) general practitioners are likely to continue to refer to the same specialist,;

3) unless they know the length of the specialist's waiting list, general practitioners may continue to refer to that specialist not realizing that their patients may be put at the end of a long line;

4) the systems for compiling waiting list information are incompatible;

5) most BC hospitals compile wait list information manually; only two use computers;

6) there are periodic shortages of highly trained technicians;

7) certain services, for example, prosthetic surgery, have been rationed by the hospitals to control part of their global budget.

Closer to Home, Vol. 2, p. B-45

24. Over a decade later, the Standing Senate Committee on Social Affairs, Science and Technology in their report entitled "The Health of Canadians – the Federal Role", chaired by the Honourable Michael J.L. Kirby, came to some similar conclusions with respect to the accuracy of the data regarding waiting times:

> "But the lack of disciplined, prioritized waiting lists based on standards, criteria and clinical, need-based data on the condition of patients substantially exacerbates this problem. The absence of data certainly makes it harder to determine what to do about it. In fact, in Canada's health care system it is impossible to distinguish effectively between genuine, clinically based patient needs on the one hand, and on the other, patient – and physician – generated demand for immediate service (when waiting would have no impact on the person's health)."
>
> Standing Senate Committee on Social Affairs, Science and Technology, Final Report on the state of the health care system in Canada, Volume Six: Recommendations for Reform, at p. 116

25. A solution to the problem of waiting times advocated by the Seaton Commission was to set up a surgical and diagnostic registry recommending:

> "Timely and adequate information should be used to match patients with the first appropriative available surgeon and facility. To do this, the Province needs a standardized computer system to compile and analyze data and make it accessible to facilities, physicians and patients."
>
> Closer to Home, Vol. 2, p. B-46

See also: Final Report on the state of the health care system in Canada, at pp. 111-113

See also: Tackling Excessive Waiting Times for Elective Surgery. A Comparison of Policies in Twelve OECD Countries, July 7, 2003; Recueil de Sources de L'Appellant Chaouili, Vol. III, Tab 47 ("OECD Report on Waiting Times") at paras. 21-28 and 91-92

See also: Surgical Wait Times Website of the Ministry of Health Service http://ww.healthservices.gov.bc.ca/waitlist/index.html, at pp. 1-2

26. In order to insure a "publicly managed and fiscally sustainable health care system for British Columbia", the Legislature and its delegates, the Lieutenant Governor in Council and the Medical Services Commission, must make a myriad of policy choices that results in a vast and intricate web of regulation that finds its realization in the form of legislation, regulations, minutes and directives of the Commission and other public policy choices, both legislative and administrative, which are just as important to the health care system as the decision to have a publicly administered system that incorporates a single payer, the government, through a compulsory government monopoly on the provision of medical health insurance.

See Appendix "G" for a list of British Columbia health related Statutes and Regulations

See also for background:
*Wilson v. British Columbia (Medical Services Commission), supra*
*Waldman v. British Columbia (Medical Services Commission)*, [1997] B.C.J. No. 1793, 150 D.L.R. (4th) 405
*Waldman v. British Columbia (Medical Services Commission)*, [1999] B.C.J. No: 2014, 1999 BCCA 508, 177 D.L.R. *4th) 321
*Yu v. Attorney General of British Columbia*, [2003] B.C.J. No. 2872, 2003 BCSC 1869

27. Determining the mix between public involvement and private involvement in the health care system is a matter uniquely for the Legislature and the executive government to decide. The limits of the government as insurer and single payer are determined by what is and what is not included as an insured service under the Medical Services Plan and a hospital service under the *Hospital Insurance Act*. There is a considerable private sector involvement in the provision of services by doctors who practice principally on a fee for service basis, medical laboratories which provide

diagnostic services and other health care practitioners whose services are insured services. On the other hand, there is also a significant public involvement in the delivery of services through doctors employed in hospitals and by public agencies, such as the British Columbia Cancer Agency and by medical diagnostic labs in publicly owned and administered hospitals. What is the right mix between public sector and private sector involvement both in the funding and delivery of health care in the Province of British Columbia is a matter for the Legislature and executive government of the province. It is, with respect, not a matter of constitutional entitlement.

## C. SECTION 7 OF THE *CHARTER*

### 1. Analytical Approach to Determination of whether Rights guaranteed by Section 7 have been infringed or denied

28. The analytical approach to determination of whether rights under s. 7 of the *Charter* have been violated was summarized by the British Columbia Court of Appeal quoting *R. v. Beare*:

> "The analysis of s. 7 of the *Charter* involves two steps. To trigger its operation there must first be a finding that there has been a deprivation of the right to "life, liberty and security of the person" and, secondly that that deprivation is contrary to the principles of fundamental justice."
>
> *Bennett v. British Columbia (Securities Commission)* (1992), 94 D.L.R. (4th) 339 at p. 355

29. There is a further necessary element of proof required in the s. 7 analysis beyond proving a deprivation of the triad of protected s. 7 *Charter* rights and proving that deprivation is contrary to the principles of fundamental justice. That further element of proof is causation. That is, not only must there be a deprivation of one or more of the protected triad of rights but also that deprivation must have been caused by the impugned state action. In *Blencoe* there was no question that Mr. Blencoe had suffered serious prejudice as a result of the allegations of sexual harassment brought against him which gave rise to the much delayed Human Rights Tribunal proceedings.

The issue as to whether s. 7 applied rested, however, on whether the state had caused this prejudice:

> "While it is incontrovertible that the respondent has suffered serious prejudice in connection with the allegations of sexual harassment against him, there must be a sufficient causal connection between the state-caused delay and the prejudice suffered by the respondent for s. 7 to be triggered. In Operation Dismantle Inc. v. Canada, (citation omitted) Dickson J. (as he then was) concluded that the causal link between the actions of government and the alleged Charter violation was too "uncertain, speculative and hypothetical to sustain a cause of action"."
>
> *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, [2000] S.C.J. No. 43 at para. 60

30. In *Bennett v. British Columbia (Securities Commission)*, the Court of Appeal used the language of prematurity (at p. 355) to reject the securities trader's attempt to invoke s. 7 of the *Charter*. In *Blencoe,* it was asserted (at para. 61 and accepted at paras. 68-71) that the nexus between the harm to Mr. Blencoe and the alleged delay by the Human Rights Commission in processing the complaint was too remote. Each of these approaches suggests that causation has not been proven even if it can be speculated, as in this case and in Mr. Bennett's case, that in the future there may be s. 7 deprivations.

31. In summary, for reasons developed later in the argument in this Factum, it is the position of the Intervenor that the Appellants, Dr. Chaouilli and Mr. Zeliotis, have not proven that they have been deprived of a right protected by s. 7 of the *Charter,* being life, liberty and security of the person, or that, even if there has been a deprivation, they have not proven that the deprivation has been caused by the state.

## 2. Life, Liberty and Security of the Person

### (a) The concept of constitutionally protected liberty does not include a right to enter into contracts or practice a profession

32. The Appellant, Dr. Chaouilli, submits at paragraphs 142 to 145 of his Factum, that the liberty interest guaranteed by s. 7 of the *Charter* includes a right to be enjoyed by medical practitioners to enter into contracts with patients to provide medical

services and he says that this is not an economic right. For instance, it is stated at paragraph 143:

> "Un droit économique pur est un droit qui ne'est pas incident au droit à las vie ou au droit à la sécuirité d'un individu. L'appelant soumet qu'au contrare, la liberté contracutelle d'une personne, qu'elle soit physique ou morale, lorsqu'elle est incidente aux droits à la vie et à la sécurité du'un individu, est protégée par l'article 7 de la Charte canadienne."

33. With the greatest of respect, the Intervenor submits that liberty does not embrace economic rights, including the freedom to contract, notwithstanding the *obiter dicta* of Dixon J. in *Irwin Toy* which may suggest a residual role for the concept of liberty for rights having an economic component where the situation is such as to involve the fundamental necessaries of life for the human person. Instead, Professor Hogg suggests a more cautious approach. Referring to the *Lochner* era in the United States, Professor Hogg said:

> "All this happened in the United States, but the *Lochner* era cast its shadow over Canada as well. The framers of Canada's Charter of Rights deliberately omitted any reference to property in s. 7, and they also omitted any guarantee of the obligation of contracts. These departures from the American model, as well as the replacement of "due process" with "fundamental justice" (of which more will be said later), were intended to banish *Lochner* from Canada. The product is a s. 7 in which liberty must be interpreted as not including property, as not including freedom of contract, and, in short, as not including economic liberty." [emphasis added]
>
> Hogg, Constitutional Law of Canada, Vol. 2, Loose-leaf Ed. at p. 44-9
> *Irwin Toy v. Quebec (Attorney General),* [1989] 1 S.C.R. 127 at p. 1003

34. Nor does security of person extend to the economic capacity to satisfy basic human needs, at least in Professor Hogg's view. He rejected such an expanded role for security of the person under s. 7 of the *Charter*:

> "...The suggested role also involves a massive expansion of judicial review, since it would bring under judicial scrutiny all of the elements of the modern welfare state, including the regulation of trades and professions, the adequacy of labour standards and bankruptcy laws and,

of course, the level of public expenditure on social programs."

Hogg, Constitutional Law of Canada, Vol. 2, Loose-leaf Ed. at p. 44-13

35. In *Waldman v. British Columbia (Medical Services Commission),* three doctors challenged the validity of billing restrictions imposed by the Medical Services Commission and argued that their liberty interest under s. 7 of the *Charter* included a right to practice their profession. Rejecting the previous authority of the British Columbia Court of Appeal in *Wilson v. British Columbia Medical Commission,* Her Ladyship held:

> "The comments of Lamer J. in the Soliciting Reference, the decisions of courts of appeal of other provinces and of the Federal Court of Appeal, the affirmation by the Supreme Court of Canada of the decision of the Prince Edward Island Court of Appeal in Walker and the decisions of our Court of Appeal and my colleague Mr. Justice Melnick all persuade me that the weight of authority, since Wilson, is that section 7 does not protect the right of a person to practise a profession."
>
> *Waldman v. British Columbia (Medical Services Commission), supra,* BCSC at para. 293
>
> See also: *Waldman v. British Columbia (Medical Services Commission), supra,* BCCA at para 52

36. Mr. Justice Bastarache in *Blencoe v. British Columbia (Human Rights Commission)* appears to support Professor Hogg's "more cautious approach" to the interpretation of s. 7 of the *Charter* as not including economic rights, including the freedom to contract. After quoting from Professor Hogg's comments concerning the deliberate omission of "property" from "life, liberty and security of the person" in s. 7, Mr. Justice Bastarache stated:

> "Although an individual has the right to make fundamental personal choices free from state interference, such personal autonomy is not synonymous with unconstrained freedom. In the circumstances of this case, the state has not prevented the respondent from making any 'fundamental personal choices'. The interests sought to be protected in

this case do not in my opinion fall within the 'liberty' interest protected by s. 7."

*Blencoe v. British Columbia (Human Rights Commission), supra,* at para. 54

37. That passage was persuasive for the British Columbia Court of Appeal to conclude that liberty under s. 7 of the *Charter* does not include a right to be free from summary dismissal as a teacher:

"My reading of the above passage and in particular the reference therein to the comments of Professor Hogg lead me to conclude that Bastarache J., at least by inference, was suggesting that economic matters such as a right to any specific employment would not be within the purview of s. 7."

British Columbia Teachers' Federation v. Vancouver School District No. 39, [2003] B.C.J. No. 366, 2003 BCCA 100 at para. 205

38. In the *Health Services and Support-Facilities Subsector Bargaining Assn.* case, Bill 29 was challenged, among other things, as violating s. 7 of the *Charter.* Bill 29 made extensive changes to the collective bargaining rights of members of unions representing employees in the health sector and significantly altered existing collective agreements. The plaintiff union argued that the fundamental importance of employment to individuals goes far beyond the economic importance of income, relying on *Gosselin* and *Irwin* Toy, and this latter aspect is clearly critical to an individual's capacity to survive and provide for his family. Madam Justice Garson rejected that argument. She said:

"...The implications of concluding that s. 7 encompasses the entitlement to maintain employment as asserted by the plaintiffs are profound and demonstrate the extent to which such application of s. 7 would overshoot its purpose. If s. 7 can be said to protect the right to maintain employment, then any state action that had a detrimental impact on an individual's ability to maintain a job would be open to challenge as violating the Charter... Such consequences would render government policy-making virtually impossible."

*Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia,* [2003] B.C.J. No. 2107, 2003 BCSC 1379 at paras. 125, 139, 147 (appeal set for hearing May 3, 5 and 5, 2004)

39. Freedom to contract, even though it has fundamental economic importance to the individual in the employment context, has been rejected by the British Columbia Courts as a protected interest under s. 7 of the *Charter*. Professor Hogg's observation is apt: (page 44-13)

> "...As Oliver Wendell Holmes would have pointed out, these are issues upon which elections are won and lost; the judges need a clear mandate to enter that arena, and section 7 does not provide that clear mandate."
>
> Hogg, Constitutional Law of Canada, Vol. 2, Loose-leaf Ed. at p. 44-13

**(b) Legislated Restrictions on the Identity of the Insurer of Health Services does not infringe or deny any constitutionally protected liberty rights**

40. In paragraphs 33 and 34 of his Factum, the Appellant, George Zeliotis, submits that ss. 11 of the *Hospital IA* and 15 of the *Health IA* encroach upon the sphere of personal autonomy possessed by each individual thereby depriving the individual of their liberty to make decisions that are of fundamental personal importance. He relies upon the Reasons for Judgment of Mr. Justice Bastarache in *Blencoe* and Mr. Justice La Forest in *B(.R). v. Children's Aid Society of Metropolitan Toronto* and *Godbout v. Longueuill (City)*.

41. After the decision of this Court in *Blencoe,* it is accepted that it can no longer be asserted that s. 7 of the *Charter* is restricted to mere freedom from physical restraint. Rather, "liberty" is engaged for state compulsions or prohibitions affecting important and fundamental life choices. But, as already noted (para. 36, *supra*), Mr. Justice Bastarache has cautioned that this aspect of s. 7 liberty interest is narrow in scope, encompassing only those decisions that are of "fundamental importance".

42. Section 15 of the *Health IA* simply prohibits entering into contracts of insurance or making payments under such contracts for the payment of insured health services for a person who is insured by the provincial medical health insurance system. Section 11 of the *IA* simply prohibits contracts for payment of hospital services that are insured services under the provincial government hospital insurance program. The impugned provisions restrict the choice of the identity of the provider of health

insurance such that for medically necessary services insured under the provincial health scheme, there is a single payer, a single insurer, which is the government.

43. With the greatest of respect, restricting the choice of the identity of the provider of medical health insurance and hospital insurance, does not affect any "fundamental personal choices". Fundamental personal choices could include such choices as choosing appropriate medical treatment in the circumstances of a particular illness or disease, consenting or not consenting to medical treatment, choosing which hospital to attend, choosing the identify of one's family physician, choosing the identity of the specialist treating a particular serious illness or disease, choosing to submit to a particular treatment regimen or drug therapy, or any and all other health care decisions that one might wish to make. Section 11 of the *Hospital IA* and s. 15 of the *Health IA* do not restrict any of these kinds of fundamental personal choices concerning one's own health care.

**(c) Section 15 of the *Health Insurance Act* and Section 11 of the *Hospital Insurance Act* do not violate the right to security of the person**

44. At paragraphs 40 and 41 of his Factum, the Appellant, George Zeliotis, suggests that based on *Morgentaler* "security of the person" must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction arising from the *Hospital IA* and the *Health IA*. The Appellant asserts (paragraphs 37 and 38 of his Factum) that delays to accessing medical treatment affecting his security of the person are the result of waiting times for specialist health services, such as ophthalmology, orthopaedic surgery, radial oncology, cardiac and vascular services and emergency room treatment.

45. Based on the adjudicative facts in this case, there is an "air of unreality" concerning this aspect of the challenge based on s. 7 of the *Charter*. The learned trial judge held that neither Mr. Zeliotis nor Dr. Chaouilli had suffered from the alleged systemic flaws in the public health care system arising from the waiting times which were the subject of the expert evidence regarding specialist health services which was

led by the Appellants. The learned trial judge stated in this respect:

> "On peut sympathiser avec Mr. Zeliotis, comprendre les douleurs et les angoisses ressenties, mai on ne peut conclure que les problèmes et les délais qu'il inoque ont iniquement été cuaseés par des problèmes d'acccès aux services de santé du Québec..."
>
> Judgment of Piché J., Case on Appeal, Vol. 1 at p. 30
>
> "Dr. Chaoulli n'a jamai témoigné non plus à l'effect qu'il avait reçu des soins inadéquats out que le système n'avait pas répondu à ses besoins peronnels de santé."
>
> Judgment of Piché J., Case on Appeal, Vol. 1 at p. 38

46. Notwithstanding that the Appellants do not suffer the sort of problems for which they require immediate medical care and are not affected by the waiting times of which they complain, the learned trial judge concluded that there was an imminent threat of deprivation in the case at bar. (Judgment of Piché J., Case on Appeal, Vol. 1 at pp. 132–133).

47. With the greatest of respect, even if the learned trial judge were able to predict a deprivation of the physical security of the person in the future, the requirement of causality is still absent. That is, as a matter of law there must be a proven causal link between that deprivation of security of the person and the impugned state action in order that s. 7 of the *Charter* should have application in these circumstances.

48. There is, it is submitted, an absence of proof of the necessary nexus between any alleged harm to the Appellants resulting from waiting times and the choice of identity of the insurer of insured health services under s. 11 of the *Hospital IA* and s. 15 of the *Health IA*.

49. Certainly, it cannot be said that those provisions directly caused any pain, suffering and mental anguish associated with serious illness and disease. In *Blencoe,*

the "but for" test of direct causality was rejected in favour of a more exacting test:

> "With respect, I cannot agree with McEachern C.J.B.C.'s speculation that the respondent would have been able to reconstruct his life **but for** the proceedings (or I should say, delay in the proceedings). A higher level of certainty is required than "might reasonably be expected" in order to find that government has caused a deprivation of an individual's Charter rights."
>
> *Blencoe v. British Columbia (Human Rights Commission), supra,* at para. 64

50. Even applying the "but for" test, it cannot be said that the impugned provisions would cause any pain, suffering and mental anguish associated with serious illness and disease. Rather, the direct cause which does satisfy the "but for" test of causality is the serious injury or illness itself.

51. However, the Appellants appear to argue the alternate ground of causation relied upon by Mr. Blencoe:

> "While I conclude that the delay in the human rights process was not the direct cause of the respondent's prejudice, another question which arises is whether it exacerbated his prejudice. According to McEachern C.J.B.C., the excessive delay in the human rights proceedings both created a stigma against Mr. Blencoe and exacerbated an existing prejudice...'
>
> *Blencoe v. British Columbia (Human Rights Commission), supra,* at para. 68

52. The Court in *Blencoe* rejected the idea that *Morgentaler* and *Rodriguez* lead to a conclusion that this kind of exacerbation argument can "obviate the need to establish a significant connection between the harm and impugned state action". Even granting the argument's validity, the Court said with respect to delay:

> "Moreover, even accepting this exacerbation argument, it is difficult to see how the respondent's prejudice was seriously exacerbated by the delays. In the absence of delays in the proceedings, the respondent would nevertheless have faced unproven allegations of sexual harassment and discrimination and suffered stigma as a result. It is thus clear that the respondent's reputation was harmed prior to the filing of the

> Complaints with the Commission. The delays in the proceedings could only have extended the time that rumours were circulating... It is thus difficult to see how procedural delay could have seriously increased the damage to the respondent's reputation that had already been done."
>
> *Blencoe v. British Columbia (Human Rights Commission), supra,* at para. 71

53. With the greatest of respect, that reasoning should be applied in the case at bar. Any pain, suffering and mental anguish caused by serious illness and disease would exist prior to any waiting times complained of by the Appellants, assuming the facts could be proven such to show that they would be subject to such waiting times in the future.

54. As well, it is impossible to prove causation in respect of the waiting times themselves. As noted by the Kirby Commission, the OECD Report on Waiting Time and the Seaton Commission, there are many reasons why there are waiting times that have nothing to do with the method of funding payment for insured health care services (see paras. 23-25 of this Factum). With respect to private health insurance ("PHI") the OECD Report specifically stated: "...a high percentage of PHI coverage is not a guarantee of success for reducing waiting times for public patients." (OECD Report on Waiting Times at para. 124; see also paras. 151 and 152 emphasizing the impossibility of proving causation). It is impossible to say in any one given case that waiting time for a particular treatment or therapy for a serious illness or disease is directly attributable to the operation of s. 11 of the *Hospital IA* and s. 15 of the *Health IA*, or to some other cause or combination of causes.

55. In a sense, the learned Trial Judge relied upon reasoning similar to the "reasonable hypothetical" case analysis that has been adopted by this Court for evaluation of whether legislation would impose cruel and unusual treatment or punishment contrary to s. 12 of the *Charter*. In effect, he rejected an argument to the effect that the claims of the Appellants were premature. He said, instead, that there was an imminent threat of deprivation of security of the person for the Appellants. However, he should at least have considered whether the legislation was

unconstitutional in its general effects, as opposed to its effects in a particular case:

> "The mere fact that it is not clear whether the respondent will in fact be denied access to records potentially necessary for full answer and defence does not make the claim premature. The respondent need not prove that the impugned legislation would probably violate his right to make full answer and defence. Establishing that the legislation is unconstitutional in its general effects would suffice..."
>
> *R. v. Mills*, [1999] 3 S.C.R. 668, [1999] S.C.J. No. 68 at para. 36
> *R. v. Goltz*, [1991] 3 S.C.R. 485 at p. 515
> *R. v. Morrisey*, [2000] 2 S.C.R. 90, [2000] S.C.J. No. 39 at para. 30

56. It is true as in *R. v. Mills* this Court has applied the "reasonable hypothetical" form of analysis to a case not involving s. 12 of the *Charter*. It is also true that this Court has cautioned against a too enthusiastic approach to the use of "reasonable hypothetical":

> "If the particular facts of the case do not warrant a finding of gross disproportionality, there may remain another aspect to be examined, namely a Charter challenge or constitutional question as to the validity of a statutory provision on grounds of gross disproportionality as evidenced in reasonable hypothetical circumstances, as opposed to far-fetched or marginally imaginable cases."
>
> *R. v. Goltz, supra*, at p. 506

57. The arguments must focus upon "imaginable circumstances" as opposed to the worst case pathological scenario. (*R. v. Mills, supra,* at para. 41)

58. It is certainly imaginable that pain, suffering and mental anguish caused by serious illness and disease would continue throughout a period of waiting for a specialist's treatment of the form dealt with in the evidence concerning waiting times in this case. It is also imaginable, given the Hippocratic oath and the general duty of members of the medical profession to alleviate pain and suffering, that persons suffering illness and disease would be treated during that waiting time either by the family physician or the specialist treating that illness or disease, or both, in order to alleviate any pain, suffering or mental anguish. Further, it is imaginable that if a person's health condition worsens, the family physician or specialist would treat that

as an emergency hastening appropriate treatment for that condition (see OECD Report on Waiting Times at para. 9). The facts in the case at bar in the situation of Mr. Zeliotis are an excellent example of these limits of imaginable circumstances. It is entirely appropriate to look at both Mr. Zeliotis' and Dr. Chaouilli's situations in order to determine what is "imaginable".

> "The particular facts of the instant appeal provide an important benchmark for what is a reasonable example... This is because they represent one real application of the challenged statutory provision."
>
> *R. v. Goltz, supra,* at p. 516

59. Thus, it is submitted that there has been no violation of the security of the person of the Appellants either caused by or contributed to by the impugned statutory provisions, s. 11 of the *Hospital IA* and s. 15 of the *Health IA*.

## D. PRINCIPLES OF FUNDAMENTAL JUSTICE

60. In the alternative, the Intervenor submits that if there has been a deprivation of life, liberty or security of the person in the circumstances of this case, that deprivation is in accordance with the principles of fundamental justice.

61. The *Motor Vehicle Act Reference* recognized two particular aspects to the principles of fundamental justice. First, principles of fundamental justice may be divided into procedural principles of fundamental justice which are essential for a fair process in adjudicating on whether or not the state can deprive a person of life, liberty and security of the person and substantive principles of fundamental justice which lie in a deeply rooted and common understanding of what is required for fairness in adjudication in our society. In the *Motor Vehicle Act Reference,* it was the principle that innocent persons should not suffer punishment, as a principle of substantive fundamental justice. Second, these principles must be legal principles associated with the system for administration of justice.

> *Reference re Motor Vehicle Act (British Columbia) S. 94(2),* [1985] 2 S.C.R. 486 at pp. 503, 512-513

*Gosselin v. Quebec (Attorney General),* [2002] 4 S.C.R. 429, [2002] S.C.J. No. 85 at paras. 75-84

*R. v. Malmo-Levine; R. v. Caine*, [2003] SCC 74, [2003] S.C.J. No. 79 at paras. 113-114

*Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General),* 2004 SCC 4, [2004] S.C.J. No. 6 at paras. 7-12

62. There are three criteria in order to determine whether any particular principle is a principle of fundamental justice:

(a) The principle must be a legal principle in order to avoid adjudication of policy matters;

(b) There must be a sufficient consensus that the alleged principle is "vital or fundamental to our societal notion of justice"; and

(c) The alleged principle must be capable of being identified with precision and apply to situations in a manner that yields predictable results.

*Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), supra,* at para. 8

63. The Appellant, George Zeliotis, suggests at paragraphs 72 and 73 of his Factum that s. 15 of the *Health IA* and s. 11 of the *Hospital IA* are overbroad in their application and thus do not conform to the principles of fundamental justice. They are, he submits, overbroad in their application because they are "manifestly unfair" in preventing the Appellant from obtaining health care outside of the public system if he does not deprive it of any resources.

64. With the greatest respect, "unfairness" or even "manifest unfairness" simpliciter is not sufficient to be a legal principle which is the first requirement for a principle to be a principle of fundamental justice. The Appellant questions the policy of a single payer, the provincial government, supporting a public health care system and so disagrees with the general public policy. This does not meet the requirement for being a legal principle:

"...A legal principle contrasts with what Lamer J. (as he then was) referred to as "the realm of general public policy" (Re B.C. Motor Vehicle Act,

> supra, per Lamer J., at p. 503), and Sopinka J. referred to as "broad" and "vague generalizations about what our society considers to be ethical or moral" (Rodriguez, supra, at p. 591), the use of which would transform s. 7 into a vehicle for policy adjudication."
>
> *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), supra,* at para. 9

65. "Manifest unfairness" does not meet the requirement that the alleged principle is vital or fundamental to our societal notion of justice. The impugned provisions are not a part of a system for the administration of justice at all and so the alleged principle can not qualify as a principle of fundamental justice. Moreover, insofar as there is any consensus in our society, it is in support of, not questioning the validity of, the public health care system. It is instructive in this respect to recall the preamble to the *Medicare Protection Act* which states, in part:

> "WHEREAS the people and government of British Columbia believe that medicare is one of defining features of Canadian nationhood and are committed to its preservation for future generations;
>
> ...
>
> AND WHEREAS the people and government of British Columbia believe it to be fundamental that an individual's access to necessary medical care be solely based on need and not on the individual's ability to pay."

66. Finally, the alleged principle of fundamental justice, "manifest unfairness" is not capable of being identified with any precision and providing a justicible standard. Consequently, it does not meet the third criterion for qualification as a principle of fundamental justice.

## E. POSITION ON THE OTHER CONSTITUTIONAL QUESTIONS

67. The Intervenor adopts the submissions of the Respondents on the other Constitutional Questions.

## PART IV
## ORDER REQUESTED

68. The Intervenor submits that Constitutional Questions number 1, 3, 5, 6, 7, 9 and 11 should be answered in the negative and it is not necessary to answer questions number 2, 4, 8, 10, and 12.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

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Dated this at Victoria, British Columbia, this 2nd day of March, 2004.