Court File No. 29272

IN THE SUPREME COURT OF CANADA
(On Appeal from the Quebec Court of Appeal)

BETWEEN:

JACQUES CHAOULLI AND GEORGE ZELIOTIS

Appellants
(Appellants)

- and -

ATTORNEY GENERAL OF QUÉBEC

Respondent
(Respondent)

- and -

ATTORNEY GENERAL OF CANADA

Respondent
(Mis en Cause)

- and -

Attorney General of British Columbia, Attorney General of Ontario, Attorney General of Manitoba, 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, The Canadian Medical Association and the Canadian Orthopaedic Association, Canadian Labour Congress, Charter Committee on Poverty Issues and The Canadian Health Coalition, Cambie Surgeries Corporation, False Creek Surgical Centre Inc., Delbrook Surgical Centre Inc., Okanagan Plastic Surgery Centre Inc., Specialty MRI Clinics Inc., Fraser Valley MRI Ltd., Image One MRI Clinic Inc., McCallum Surgical Centre Limited, 4111044 Canada Inc., South Fraser Surgical Centre Inc., Victoria Surgery Ltd., Kamloops Surgery Centre Ltd., Valley Cosmetic Surgery Associates Inc., Surgical Centres Inc., The British Columbia Orthopaedic Association and the British Columbia Anesthesiologists Society

Interveners

FACTUM OF THE INTERVENER
THE ATTORNEY GENERAL FOR SASKATCHEWAN

Counsel for the Intervener:

Deputy Attorney General for Saskatchewan
Saskatchewan Justice
8th Floor, 1874 Scarth Street
REGINA SK S4P 3V7

Graeme Mitchell, Q.C.
Telephone: (306) 787-8385
Facsimile: (306) 787-9111
E-mail: gmitchell@justice.gov.sk.ca

Ottawa Agents for the Intervener:

GOWLING LAFLEUR HENDERSON LLP
Suite 2600, 160 Elgin Street
OTTAWA ON K1P 1C3

Telephone: (613) 233-1781
Facsimile: (613) 563-9869
E-mail: henry.brown@gowlings.com

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PART I

FACTS

A. Overview of the Intervener's Position

1. The goal of achieving a universal publicly funded health care system has been central to Saskatchewan's history, almost from the time the province entered Confederation in 1905. Medical treatment for certain disadvantaged individuals funded through public monies began modestly in 1915. Initiatives like this continued throughout subsequent decades and culminated in *The Saskatchewan Medical Care Insurance Act* enacted by the Saskatchewan Legislature in 1961 following a difficult work stoppage by the province's doctors. This law, the first of its kind in North America, enumerated an extensive list of medical procedures and diagnostic services that in future would be underwritten by revenue generated through the provincial tax system.

See: C. Stuart Houston, "*A Medical Historian Looks at the Romanow Report*" (2003), 66 Sask. L. Rev. 539.

The Saskatchewan Medical Care Insurance Act, S.S. 1961 (Second Session) c. 1, s. 26.

2. Successive provincial governments of various political stripes did not waver in their commitment to securing a publicly funded medical care system accessible to all residents of Saskatchewan regardless of their ability to pay. One medical historian postulates that this partisan consensus was forged largely by the citizens of Saskatchewan "who showed a co-operative spirit, trust, and a willingness to help one another that was developed to a higher and more practical degree than in any other province".

Houston, op. cit., at p. 543.

3. It is Saskatchewan's history of a strong societal commitment to a universally accessible, publicly funded health care system which motivates the Attorney General for Saskatchewan (the "Attorney General") to intervene in this appeal. The Attorney General readily acknowledges the many challenges currently facing all governments as they strive to support a public health system which is both accessible and sustainable. These challenges are formidable and present highly complex and nuanced issues of social policy for which there are few obvious, let alone universally accepted, solutions.

4. This reality is starkly illustrated by two major public reports on Canada's health care system delivered within the past two years: (1) the Report of the Standing Senate Committee on Social Affairs, Science and Technology, *The Health of Canadians -- The Federal Role*, Final Report, October 2002 (the "Kirby Report"), and (2) the Report of the Romanow Commission, *Building on Values: The Future of Health Care in Canada*, November 2002 (the "Romanow Report"). These two exhaustive studies offer differing solutions for resolving the current problems with Canada's public health system. The fact these reports present divergent public policy options demonstrates that the reform of our publicly funded health care system will not admit of easy solutions.

Report of the Standing Senate Committee on Social Affairs, Science and Technology, *The Health of Canadians -- The Federal Role*, Final Report, October 2002 (the "Kirby Report").

The Report of the Romanow Commission, *Building on Values: The Future of Health Care in Canada*, November 2002 (the "Romanow Report").

5. The Attorney General submits that the *Canadian Charter of Rights and Freedoms* (the "*Charter*") does not prefer one approach to the delivery of medical services over another. The *Charter* does not require Canadian governments to implement the Health Care Guarantee, a primary recommendation contained in the *Kirby Report*, for example. Nor does the *Charter* require Canadian governments to tolerate a private health care system which operates parallel to and in competition with the public health care system. Rather, the *Charter* extends considerable latitude to governments when making significant and highly complicated social policy decisions.

6. When properly construed the constitutional issues raised in the case at bar are narrow. A general free-standing right to publicly funded health care is not at issue. As well, this Honourable Court should resist the invitation to decide the constitutional propriety of a parallel private health care system. Instead, the essence of the case at bar is whether it is contrary to the *Charter* to prohibit the purchase of a private contract of insurance for medical services which duplicate those offered by the publicly funded system.

7. The Attorney General submits that the Quebec laws impugned in this appeal fall within exclusive provincial legislative jurisdiction. Furthermore, these laws do not engage any interest or value protected under section 7 of the *Charter*. As a consequence, section 7 is not engaged in the case at bar.

B. Summary of Facts

8. The Attorney General accepts the findings of facts -- both adjudicative and legislative -- as found by the learned trial judge. In particular, the Attorney General adopts the summary of facts set out in the Respondents' facta and the Factum of the Intervener, the Attorney General of Ontario.

9. The Attorney General participates in this appeal by virtue of a Notice of Intention to Intervene dated October 6, 2003, and filed with this Honourable Court. The Attorney General will rely solely on the written arguments presented in this factum and will not seek leave of the Court to make an oral presentation at the hearing of this appeal.

Notice of Intention to Intervene dated October 6, 2003.

PART II

ISSUES ON APPEAL

10. The constitutional issues relevant to the instant appeal are found in the twelve (12) constitutional questions stated by this Honourable Court on August 15, 2003. Those questions read as follows:

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 *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-29, *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-29, 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-29, 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*?

Order of Major J. dated August 15, 2003.

11. The Attorney General respectfully submits that the constitutional questions stated by Major J. should be answered as follows:

(1) Questions 1, 3, 5, 6, 7, 9 and 11 should be answered "no";

(2) Questions 2, 4, 8, 10 and 12 do not require answers.

12. Accordingly, the Attorney General respectfully asks this Honourable Court to affirm the orders of the lower courts; to sustain the constitutionality of the impugned Quebec laws, and to dismiss the actions brought by the Appellants.

PART III

ARGUMENT

A. Introduction

13. The Attorney General endorses the written arguments of the Attorneys General of Canada, Quebec and Ontario respecting the constitutional questions posited by Major J. in this appeal. The submissions which follow as much as possible will attempt to augment rather than repeat those submissions. To begin, however, a brief review of relevant Saskatchewan legislation will be undertaken.

B. Relevant Saskatchewan Legislation

14. The Attorney General of Canada correctly states that Saskatchewan does not expressly prohibit "the use of private insurance and the purchase of medical and hospital services for services already covered by the public system". Instead of focussing on the patient, the Saskatchewan Legislature decided to concentrate on the individuals and institutions that deliver medical and diagnostic services, namely physicians and hospitals.

> Factum of the Respondent (Mis en Cause), Attorney General of Canada, at p. 24, paras. 74-77.

15. In particular, two provincial statutes are relevant. These statutes are: *The Saskatchewan Medical Care Insurance Act*, and *The Health Facilities Licensing Act*.

> *The Saskatchewan Medical Care Insurance Act*, R.S.S. 1978, c. S-29.1 (the "*SMCIA*").

The Health Facilities Licensing Act, S.S. 1996, c. H-0.02 (the "*HFLA*").

16. The *SMCIA* creates the statutory regime which regulates the payment to physicians and certain other health professionals for most medical services provided to residents of Saskatchewan. It prohibits these individuals from receiving remuneration for such services from sources other than the provincial medical care insurance plan, unless the particular health care professional has elected to work entirely outside this plan. This election is referred to as "opting out".

SMCIA, supra.

17. Subsections 14, 15 and 24 of the *SMCIA* define what medical services qualify as "insured services". Generally speaking, these include all "medically required services provided in Saskatchewan by a physician" as well as certain designated services performed by optometrists, dentists, and chiropractors amongst others.

SMCIA, ss. 14(1)(2), 15 and 24.

18. Section 18 of the *SMCIA* authorizes payment to doctors and other health care professionals from the provincial medical care insurance plan for providing an insured service as defined in the legislation. It also prohibits these individuals from "extra-billing", that is asking for monies which exceed the amount permitted by the tariff under the provincial medical care insurance plan. Subsection 52(1) creates an offence for breaching this prohibition and imposes a maximum fine of $5,000 upon conviction.

SMCIA, ss. 18(1), 18(1.1), 18.01, 18.02, 52(1).

19. The *SMCIA* does accommodate doctors who wish to carry on their medical practices wholly outside the medical care insurance plan. Doctors who elect to do so cannot receive any payment from public monies for any medical service provided to their patients. They cannot be selective about which aspects of their practice they will conduct under the plan and which aspects they will conduct outside the plan. They are either entirely in or entirely out. If a doctor elects to opt out, their patients are entirely responsible for funding their medical treatment.

SMCIA, s. 24.

20. The legislation also contains a corrective mechanism. The Lieutenant Governor in Council is authorized to require a doctor who originally opted out of the medical care insurance plan, to operate within its parameters in circumstances where "reasonable access to insured services is jeopardized because physicians . . . are providing uninsured services".

SMCIA, s. 24.1.

21. Although the *SMCIA* does permit doctors as well as other health care professionals to operate outside the publicly funded medical care insurance plan, in practice this is not feasible in Saskatchewan. None of the province's doctors have elected to opt out of the plan.

22. The *HFLA* is also relevant here. This statute requires insured health services to be delivered only in a licenced health facility. It creates a procedure whereby an applicant may obtain a licence from the Minister of Health to operate such a facility in which diagnostic or therapeutic medical procedures may lawfully be performed.

HFLA, ss. 3-17.

23. As well, the *HFLA* creates an offence for operating an unlicensed health facility and imposes a maximum fine of $5,000 and in the case of a continuing offence a maximum fine of $5,000 for each day.

HFLA, ss. 25(1).

C. Questions 5 and 6 - The Division of Powers Issue

24. Questions 5 and 6 ask whether section 11 of Quebec's *Hospital Insurance Act* and section 15 of Quebec's *Health Insurance Act* are *ultra vires* the Quebec National Assembly. The Attorney General agrees with the Attorney General of Quebec that these laws fall within exclusive provincial legislative jurisdiction and are *intra vires* the Quebec National Assembly.

Mémoire de l'Intimé, Le Procureur Général du Québec, at pp. 65-67, paras. 212-221.

25. As well, the Attorney General adopts the reasoning of Piché J., respecting the division of powers issue raised on this appeal.

Chaoulli v. Quebec (Procureure generale), [2000] J.Q. no 479 QuickLaw (S.C.), at paras. 123-190.

26. The Attorney General submits that the impugned laws are firmly rooted in provincial legislative jurisdiction. Previous jurisprudence from this Honourable Court has established that provincial laws pertaining to health care, health care insurance and contracts of insurance generally are valid exercises of the legislative jurisdiction found in sections 92(13) and (16) of the *Constitution Act, 1867*.

See especially: *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at pp. 646-647 per La Forest J.

Schneider v. British Columbia, [1982] 2 S.C.R. 112, at pp. 135-138 per Dickson J. (as he then was); and at pp. 141-142 per Estey J.

Canadian Indemnity Co. v. British Columbia, [1977] 2 S.C.R. 504, at p. 512.

27. Furthermore, section 92(15) of the *Constitution Act, 1867* empowers provincial legislatures to create offences and impose penalties for breaches of valid provincial enactments. The Attorney General submits this is precisely what the impugned laws in the instant appeal purport to do, namely they create offences and impose penalties for entering into contracts of insurance for medical services which are already underwritten by Quebec's public health insurance plan.

See generally: *Schneider, supra*, at pp. 143-144 per Estey J.

Nova Scotia Board of Censors v. McNeil, [1978] 2 S.C.R. 662, at p. 697 per Ritchie J.

28. Finally, although it is not determinative of the division of powers issues raised in this appeal, it is highly significant that the Attorney General of Canada supports the constitutionality of the two impugned Quebec laws. As this Honourable Court stated in *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, this inter-governmental consensus "does invite the Court to exercise caution before it finds that the impugned provisions . . . are *ultra vires* the province".

Factum of the Respondent (Mis en cause), Attorney General of Canada, at pp. 32-33, paras. 105-107.

Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture), [2002] 2 S.C.R. 146, at p. 180 per Le Bel J.

See also: *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at pp. 19-20 per Dickson C.J.

29. For the foregoing reasons, the Attorney General submits that Questions 5 and 6 should be answered "no".

D. Questions 1-4: The Section 7 Issue

1. Summary of the Attorney General's Position

30. Questions 1 and 3 ask whether section 11 of Quebec's *Hospital Insurance Act* and section 15 of Quebec's *Health Insurance Act* respectively impair the Appellants' rights guaranteed under section 7 of the *Charter*. In the event that the answer to these two questions is "yes", Questions 2 and 4 ask further if these two provisions qualify as reasonable limitations upon the Appellants' rights for the purposes of section 1 of the *Charter*.

31. The Attorney General submits that neither of the two impugned Quebec laws violates section 7 of the *Charter*. A proper characterization of the interests at stake in the case at bar reveals that no right to life, liberty or security of the person is engaged by the impugned provisions. Alternatively, if one or more of those rights are triggered, then the Attorney General submits that no constitutionally recognized principle of fundamental justice is engaged.

32. Accordingly for these reasons, it is respectfully submitted that Questions 1 and 3 should be answered "no". It is unnecessary then to answer Questions 2 and 4.

2. Proper Characterization of Interests at Stake

33. At the outset of every section 7 analysis, it is essential to characterize accurately the interests at stake. In the instant appeal, it is submitted that the Appellants and certain of the Interveners that support them have characterized those issues far too broadly. Neither perceived inadequacies in the current delivery of public health services in Quebec nor unfettered access to alternative privately funded medical care is truly at stake in this case. Rather, the essential complaint is that the Appellants are prohibited by law from purchasing private insurance to cover medical services already provided for under Quebec's publicly funded hospital insurance plan.

34. The adjudicative facts as found by the learned trial judge clearly demonstrate that the health of neither Appellant was jeopardized in any way by this prohibition. In the case of the Appellant, Zéliotis, for example, Piché J. questioned the veracity of his claim that his health had been impaired by delays occasioned "from lack of access to public health services and in fact even the complaints made by Mr. Zéliotis about delays may be questioned".

Chaoulli, supra, at para. 22.

35. In the case of the Appellant, Chaoulli, concerns about the effect these prohibitions had on his personal health or the health of his family members were unfounded. The learned trial judge found no evidence that Dr. Chaoulli "received inadequate health care or the [Quebec public health

care] system did not respond to his personal health needs". Indeed, Piché J. expressly questioned "the demands and realism of the applicant, whose statements occasionally took on shades of exaltation that can only leave one perplexed".

Chaoulli, supra, at para. 43 and para 44.

36. These particular findings of fact are important for two reasons. First, these are findings of adjudicative facts and on appeal great deference is to be accorded to them, unless there are express statutory powers authorizing appellate review.

See generally: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.

37. Second, this Honourable Court has earlier cautioned against applying the *Charter* in a manner which could seriously disrupt broadly based, publicly funded social programs or entitlements solely on the testimony of a few affected individuals. *Gosselin v. Quebec (Attorney General)* involved a constitutional challenge to welfare rates in Quebec which paid adults under 30 years one third of the amounts payable to those over 30 years. A majority speaking through the Chief Justice, found no violation of section 15(1) on the basis of the evidence offered by the applicant at trial. Indeed, McLachlin C.J. went so far as to assert:

> It is, in my respectful opinion, utterly implausible to ask this Court to find the Quebec government guilty of discrimination under the *Canadian Charter* and order it to pay hundreds of millions of taxpayers dollars to tens of thousands of unidentified people, based on the testimony of a single affected individual. (Emphasis added).

Gosselin v. Quebec (Attorney General), [2002] 4 S.C.R. 429, at p. 475.

38. Furthermore, the majority dismissed the section 7 argument advanced in *Gosselin*, again largely because of an inadequate and incomplete evidentiary record.

Gosselin, supra, at p. 492 per McLachlin C.J.

39. It is submitted that the caution displayed by this Honourable Court in *Gosselin* is equally applicable to the case at bar. Indeed, unlike *Gosselin*, not only did the Appellants fail to establish their claim that the *Charter* extends to them the right to purchase private medical insurance, the evidence at trial disproved it by demonstrating the Appellants' health care could be adequately provided for within the public system.

40. As well, a number of experts testified at first instance respecting Quebec's publicly funded health care system and possible options for its reform. Piché J. reviewed this evidence at length in her reasons for judgment. She made two findings which are highly significant to the section 7 analysis in the case at bar.

41. First, Piché J. held that the "Quebec public health system does not enjoy unlimited and inexhaustible resources". There are many other important social policy initiatives which demand the investment of public monies and numerous trade-offs have to be made. This uncontroversial proposition represented the unanimous opinion of all the experts who testified at trial.

Chaoulli, supra, at para. 262.

See generally: MacKinnon, "*Good Public Policy or a False Sense of Security? The Romanow Report: Sustainability and the Trade-Offs*" (2003), 66 Saskatchewan Law Review 613.

42. Second and perhaps more importantly, Piché J. concluded that allowing a parallel private health care system to flourish "would have repercussions on the rights of the entire population" as it would "threaten the integrity, sound operation and viability of the public system". This holding represented the consensus of the experts' opinions. Only one expert witness, Dr. J. Edwin Coffey, did not share this view.

Chaoulli, supra, at para. 263 and para. 120.

43. Evidence of this kind is characterized as social context or as it is more commonly referred to, legislative facts. Generally speaking, legislative facts describe complex social science evidence from which general conclusions concerning the effect of legal rules upon human behaviour may be made. As a consequence, a more relaxed standard of appellate review is warranted in relation to legislative facts. However, appellate courts should not interfere with findings respecting legislative facts made at trial, "absent demonstrated error".

Gosselin, supra, at p. 477.

See generally: *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099.

RJR-MacDonald Inc. v. Canada (A.G.), [1995] 3 S.C.R. 199, at p. 289 per La Forest J. dissenting but not on this point.

44. It is submitted that the learned trial judge committed no error in her findings of fact-both adjudicative and legislative. As a consequence, the facts as found by Piché J. are the ones upon which this Honourable Court must adjudicate the constitutional claims advanced in the case at bar. Therefore, attempts to question Piché J.'s factual findings ought to be rejected.

3. No Right to Life, Liberty or Security of the Person Engaged

45. It is well-established that there are two stages in any challenge brought under section 7 of the *Charter*. As La Forest J. for an unanimous Court stated in *R. v. Beare; R. v. Higgins:*

> 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.

There will be an infringement of section 7 only if both steps are met.

R. v. Beare; R. v. Higgins, [1988] 2 S.C.R. 387, at p. 401.

46. Very recently in *Gosselin*, McLachlin C.J. for the majority stated that there is also a threshold question to consider under section 7, namely does the impugned legislation "affect an interest protected by the right to life, liberty and security of the person within the meaning of section 7".

Gosselin, supra, at p. 489.

47. The Attorney General submits that in the case at bar where the claim advanced is for an unfettered right to purchase private medical insurance to underwrite medical services already provided by a publicly funded health care system, no such interest is affected. At bottom, the interest advanced here is purely economic in nature. An interest of this kind does not receive constitutional recognition under section 7 of the *Charter*.

48. For many years now, this Honourable Court has consistently rejected economic claims that masquerade as values deserving protection under section 7. For example, in *Reference re Sections 193 and 195.1(1) of the Criminal Code (Man.)*, this Court dismissed a challenge to the soliciting

offences in the *Criminal Code*. Lamer J. (as he then was) in his concurring opinion emphasized that the right to liberty does not encompass economic rights such as the right to contract. Similarly, in *Whitbread v. Walley*, this Court affirmed a lower court's holding that a statutory cap on damages for personal injury did not engage section 7. This Court agreed with McLachlin J.A. (as she then was) of the British Columbia Court of Appeal that the right to liberty and security of the person under section 7 did not extend to a right to economic compensation for personal injury, even one so severe as quadriplegia.

> *Reference re Sections 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at pp. 1162-1171 per Lamer J.
>
> *Whitbread v. Walley*, [1990] 3 S.C.R. 1273, at p. 1279 aff'g the decision of McLachlin J.A. (as she then was), 51 D.L.R. (4th) 509 (B.C.C.A.), at pp. 519-522.

49. As already noted in paragraph 37 above, this Honourable Court rejected a section 7 challenge to one aspect of Quebec's social assistance program. The majority dismissed the claim advanced under section 7, in part because of reservations about the evidentiary record at trial. In a concurring decision on this issue, Bastarache J. went further and found no infringement of section 7.

> *Gosselin, supra*, at p. 492 per McLachlin C.J. and at pp. 543-551 per Bastarache J.

50. Most recently, in *Siemens v. Manitoba (Attorney General)*, this Honourable Court unanimously dismissed a claim that section 7 protects the very important economic interest of an individual's livelihood. The Appellant had argued that a municipal prohibition on video lottery terminals impaired his ability to pursue a legitimate means of earning a living, an interest protected

by section 7 of the *Charter*. Justice Major for the full Court rejected this argument in this significant passage:

> The appellants also submitted that s. 16 of the *VLT Act* violates their right under s. 7 of the *Charter* to pursue a lawful occupation. Additionally, they submitted that it restricts their freedom of movement by preventing them from pursuing their chosen profession in a certain location, namely, the Town of Winkler. However, as a brief review of this Court's *Charter* jurisprudence makes clear, the rights asserted by the appellants do not fall within the meaning of s. 7. The right to life, liberty and security of the person encompasses fundamental life choices, not pure economic interests. As La Forest J. explained in *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 66:
>
> > . . . the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.
>
> More recently, *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, concluded that the stigma suffered by Mr. Blencoe while awaiting trial of a human rights complaint against him, which hindered him from pursuing his chosen profession as a politician, did not implicate the rights under s. 7.
>
> . . .
>
> In the present case, the appellants' alleged right to operate VLTs at their place of business cannot be characterized as a fundamental life choice. It is purely an economic interest. The ability to generate business revenue by one's chosen means is not a right that is protected under s. 7 of the *Charter*.
>
> *Siemens v. Manitoba (Attorney General)*, [2003] 1 S.C.R. 6, at pp. 30-31, paras. 45-46.

51. The Attorney General submits that these authorities, most especially *Siemens*, are dispositive of the section 7 claim advanced in the case at bar. Statutory limitations upon an individual's freedom to purchase medical insurance from services already available from the publicly funded and administered provincial health care system are analogous to statutory limitations upon an

individual's freedom to pursue a lawful occupation. Indeed, it is not difficult to imagine that preventing an individual from pursuing his or her livelihood may have adverse consequences on this person's health and general well-being. Nonetheless, this Honourable Court has consistently resisted attempts to extend constitutional protection to this interest.

52. Moreover, the section 7 claim advanced in this case resembles similar challenges made in the past to workers' compensation systems. Like publicly funded health insurance, workers' compensation systems involve significant policy choices about the best way to provide for compensation and health care for a target group. Canadian governments have decided that the best way to meet these goals for injured workers is by a no-fault system, coupled with a compensation fund provided by levies on employers, rather than a tort system coupled with private insurance. This policy choice by Canadian governments was challenged in the 1980s in a series of cases under both section 7 and section 15, but without success.

Budge v. Workers' Compensation Board (1991), 78 Alta. L.R. 193 (C.A.).

Whitbread v. Walley, supra.

Reference re Workers' Compensation Act, 1983 (Nfld.), [1989] 1 S.C.R. 922.

53. There are obvious parallels between the challenges to workers' compensation systems and the challenge in this case. In both cases, legislatures have made policy choices between individual, private insurance systems and publicly funded systems open to all. This Court's decision in

Whitbread and *Reference* support the Attorney General's argument that the provisions in issue in this case do not infringe section 7.

54. The Appellants and their supporting Interveners attempt to distinguish the section 7 claim advanced in the case at bar from these controlling authorities. They assert that because the contracts of insurance at issue here pertain to an individual's personal health care decisions, the statutory prohibition upon their purchase impairs "a fundamental life choice," and because of this the application of those precedents concerning purely economic interests is displaced.

55. The Attorney General submits that this line of argumentation is disingenuous. The Appellants seek to "dress up" an economic claim for section 7 purposes by over-emphasizing its connection to health care. It is submitted that the Quebec Court of Appeal correctly saw these arguments for what they are. As Delisle J.A. asserted in the court below:

> To begin with, the right to enter into a contract prohibited by ss. 11 *LAH* and 15 *LAM* is an economic right that is not fundamental to the person's life. The principles involved must not be inverted so as to turn an ancillary economic right -- a right to which financially disadvantaged persons would not have access, by the way -- into an essential one. The fundamental right in issue is the right to provide to all a public system of health protection, which the prohibitions laid down by the aforesaid sections are meant to safeguard. It has not been demonstrated in the case at bar that the infringement of the economic right was of a nature to endanger this fundamental one.
>
> *Chaoulli v. Québec (Procureur général)*, [2002] J.Q. no 759 QuickLaw (C.A.), at para. 25.

56. In a separate judgment concurring in the result, Brossard J.A. came to a similar conclusion as follows:

> Like Delisle J., I am of the opinion that the right to enter into a contract prohibited by ss. 11 *LAH* and 15 *LAM* is an economic right that, in itself and apart from its possible consequences, is not fundamental to the life of the person. Thus, insofar as, in the case at bar, it has not been proven that the violation of this right threatened the appellant's fundamental right to life and health, it does not appear to me to be necessary to consider it further.
>
> *Chaoulli, id.*, at para. 66.

57. The Attorney General submits that the lower court correctly recognized that the section 7 claim in the case at bar fails to trigger any interest which is protected by the right to life, liberty and security of the person. Accordingly, Question 1 and 3 should be answered "no".

4. No Principle of Fundamental Justice Impaired

58. Alternatively, should this Honourable Court determine that the Appellants' rights to life, liberty and security of the person are infringed in the case at bar, the Attorney General submits that any such infringement accords with the principles of fundamental justice.

59. It is submitted that this particular aspect of the constitutional analysis should be conducted following the guidelines enunciated by this Honourable Court very recently in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*.

> *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* (2004), 234 D.L.R. (4th) 257 (S.C.C.), at pp. 274-275 per McLachlin C.J.

60. Respecting the principles of fundamental justice, the Attorney General adopts the submissions of his colleague, the Attorney General of Ontario.

Factum of the Intervener, the Attorney General of Ontario, at pp. 13-18, paras. 28-38.

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E. The Remaining Constitutional Questions

61. Respecting the remaining constitutional questions stated by Major J. in his Order dated August 15, 2003, the Attorney General adopts the submissions of his colleague, the Attorney

20 General of Quebec.

Mémoire de l'Intimé, le Procureur Général du Québec.

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PART IV

NATURE OF ORDER SOUGHT

62. The Attorney General respectfully submits that the Constitutional Questions stated by Major J. in this appeal should be answered in the manner set out in paragraph 8 above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Regina, Saskatchewan, this 26th day of May, 2004.

Graeme G. Mitchell, Q.C.

Counsel for the Attorney General for Saskatchewan

PART V

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