Court File No. 29272

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

BETWEEN:

JACQUES CHAOULLI and GEORGE ZELIOTIS
Appellants (Appellants)

- and -

THE ATTORNEY GENERAL IN RIGHT OF QUÉBEC
Respondent (Respondent)

- and -

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Party Intervener

- and -

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PART I - STATEMENT OF FACTS

A. Overview

1. These interveners were individual members of the Standing Senate Committee on Social Affairs, Science, and Technology (the "Committee") that undertook a multi-phase study of Canada's health care system, which culminated in a report, released in six phases, the last volume being released in October 2002 (collectively, the "Report").

2. These interveners do not assert a free-standing constitutional right to health care. Nor do they support a parallel privately funded health care system. In their Report, these interveners strongly support the single payer publicly funded model for the delivery of health care services. However, these interveners also recognize that the *status quo* of long waiting times across the country for access to medically necessary health care is unacceptable, as in many cases it causes the health of the patient waiting for treatment to deteriorate further. The combination of (1) the currently existing delays in the delivery of publicly funded health care; and (2) the absence of any options in Canada for those persons requiring medically necessary health care who cannot obtain it in a timely way, caused by the effective prohibition of privately funded health care contained in the impugned legislation, results in a violation of s. 7 of the Canadian Charter of Rights and Freedoms (the "Charter").

3. The courts below justified any perceived infringement of s. 7 as being "in accordance with the principles of fundamental justice" because of a fear that permitting private funding for medical services would destroy the public health care system. That conclusion assumes that there are only two options available for structuring a nation's health care system and, hence, if the *status quo* is determined to be unconstitutional, private funding for medical services must be permitted.

4. These interveners assert, based on their work embodied in the Report, that while those may be the only options available to this Court as the judicial branch, governments have other viable alternatives available should the impugned legislation be declared unconstitutional - alternatives that preserve all the principal characteristics of the current publicly funded health care system in Canada. One of those alternatives, and in the submission of these interveners the most viable one that does not involve some aspect of private funding for medically necessary services, is the Committee's unanimously recommended "Health Care Guarantee". Briefly, pursuant to the Health Care Guarantee, if a patient could not obtain "timely access to medically necessary health care" in his or her own home province, then the provincial and/or federal government would be obligated

to pay for those services to be provided to the patient in another jurisdiction. Over time, the Health Care Guarantee would assist governments in re-prioritizing public health care resources and render the system more effective and efficient.

5. These interveners do not ask this Court to impose the specific remedy of the Health Care Guarantee in this case. Rather, these interveners seek to demonstrate to the Court that this option, possibly among others, is a policy option available to governments following any declaration of unconstitutionality. The decision on how exactly to proceed would be up to governments and legislatures. Moreover, this Court could suspend the declaration of unconstitutionality for a period of time to allow governments to address and rectify the situation.

6. To ease the burden on governments that a declaration of unconstitutionality would have, this Court could draw upon the Committee's work to define and circumscribe the scope of the s. 7 rights protected in a more moderate way than the parties to this appeal are advocating. These interveners assert that **if *timely access* to *medically necessary* health care is provided, there is no violation of s. 7 of the Charter.** The concept of timely access can be defined objectively using evidence-based clinical criteria. Service can then be provided consistent with clinical practice guidelines to ensure that a patient's health does not deteriorate while waiting for care.

7. The availability to governments of moderate options like the Health Care Guarantee, which would be publicly funded, should reassure this Court that a declaration that the impugned legislation is unconstitutional will not result in chaos in the health care system in Canada as the courts below have suggested. Governments have effective options, other than allowing private funding for medically necessary services that will, ultimately, result in improved service, and hence improved health care, for all Canadians. As the Committee said:

> "[G]overnments can no longer have it both ways – they cannot fail to provide timely access to medically necessary care in the publicly funded health care system and, at the same time, prevent Canadians from acquiring those services through private means. […] [The Committee] passionately hopes that it will not be necessary for […] a parallel system of private delivery, financed by private insurance, to emerge […]. The Committee has pointed to these potential consequences of not implementing the health care guarantee only because it categorically rejects the status quo: Canadians in need of medically necessary services must be given timely access to them."
>
> The Health of Canadians - The Federal Role, Interim Report of the Standing Senate Committee on Social Affairs, Science and Technology (the "Report"), Volume Six, Chapter Six, p. 120-121 (Book of Authorities, Tab 10)

B. The Report

i) The Work of the Committee

8. From December 1999 to October 2002, the Committee was engaged in the study of the Canadian health care system, gathering submissions from across Canada as well as drawing upon experience in other countries. The final Report of the Committee reflected the *unanimous* view of the eleven members of the Committee. Based on a careful consideration of both Canadian and international experience, the Committee recommended that governments implement a guaranteed maximum waiting time for all major procedures, within the framework of Canada's single-payer publicly funded health insurance program.

ii) The Problem of Waiting Times

9. The Committee quickly ascertained that Canadians were concerned about not receiving "timely access" to health care. This conclusion by the Committee was based in part on numerous anecdotal pieces of evidence given to the Committee, on many public opinion polls over the past decade, and on a Statistics Canada study that revealed the following troubling statistics:

a. "Almost one in five Canadians who accessed health care for themselves or a family member in 2001 encountered some form of difficulty, ranging from problems getting an appointment to lengthy waiting times";

b. Of the estimated 5 million people who visited a specialist, approximately 18% (900,000 people) reported that waiting for care affected their lives;

c. Out of this 18%, the majority (59%) reported worry, anxiety or stress; and

d. Out of this 18%, approximately 37% reported having experienced pain."

The Report, Volume Six, Chapter Six, p. 109, citing *Access to Health Care Services in Canada*, 2001, Claudia Sanmartin, Christian Houle, Jean-Marie Berthelot, and Kathleen White, *Statistics Canada*, June 2002; and *Statistics Canada, The Daily*, July 15, 2002

10. The Statistics Canada study concluded:

"Perhaps the most significant information regarding access to care was about waiting times. According to the results of the survey, Canadians reported that waiting for services care was clearly a barrier to care... Long waits were clearly not acceptable to Canadians, particularly when they experienced adverse affects such as worry and anxiety or pain while waiting for care."

Ibid

11. This statistical evidence strongly supported the anecdotal evidence before the Committee. The Committee concluded that the status quo of long waiting times for medically necessary services was "simply unacceptable".

The Report, Volume Six, Chapter Six, p. 109-110

iii) Consideration of the Constitutional Issues Raised

12. The Committee heard submissions on and reviewed precisely the issues raised on this appeal, i.e., the existence and scope of rights to health care under s. 7 of the Charter.

13. The Committee considered, in particular, an article on the subject written by Stanley H. Hartt Q.C. and Patrick J. Monahan. The thrust of their conclusion was that the delay in providing medically necessary health care in the public system, combined with prohibitions or impediments to accessing private health care, resulted or could result in a violation of s. 7:

> "Existing restrictions on the private purchase of medically necessary services are entirely justifiable in circumstances where such medical services are available on a timely basis through the public system.
>
> ... where the publicly funded health care system fails to deliver timely access to medically necessary care, governments act unlawfully in prohibiting Canadians from using their own resources to purchase those services privately in their own country. In these circumstances, the restrictions on private payment and private health insurance that are found in the laws of various provinces force Canadians into a system that, at a minimum compromises their health and potentially may endanger their lives".
>
> The Report, Volume Six, Chapter Five, p. 106, citing Stanley H. Hartt Q.C., Patrick J. Monahan, The Charter and Health Care: Guaranteeing Timely Access to Health Care for Canadians, C.D. Howe Institute, Commentary, No. 164, May 2002, p. 3 and 4. (Book of Authorities, Tab 9)

14. Hartt and Monahan concluded that the government could either finance and structure the publicly funded health care system to provide timely access to medically necessary care or, in the alternative, it could allow Canadians to purchase health care privately if timely access was not available in the publicly funded system.

The Report, Volume Six, Chapter Five, p. 106, citing Hartt and Mohanan, p. 4.

15. The Committee agreed with the analysis of Hartt and Monahan. The Committee strongly supported the single payer publicly funded model of health care delivery. However, based on the analysis done by Hartt and Monahan, the Committee strongly believed that Canadians' rights under

s. 7 would be violated if timely access to publicly funded medically necessary health care was denied while, simultaneously, Canadians were effectively prohibited from paying privately in Canada for the health care they need.

The Report, Volume Six, Chapter Five, p. 106 and 108

16. The Committee concluded:

> "[G]overnments can no longer have it both ways - they cannot fail to provide timely access to medically necessary care in the publicly funded health care system and, at the same time, prevent Canadians from acquiring those services through private means. Thus, one consequence of not implementing the health care guarantee would be to render it highly likely that the current legal prohibition on the creation of a parallel private health care insurance and delivery system would be challenged successfully in the courts."

The Report, Volume Six, Chapter Six, p. 120

iv) The Recommendation of the Committee: The "Health Care Guarantee"

17. Accordingly, the Committee concluded that the government should first increase health care spending by raising additional revenue through the imposition of a national health insurance premium. Secondly, the Committee unanimously recommended the establishment of a Health Care Guarantee - "a set of nationwide standards for timely access to key health services". Such a guarantee would improve the timeliness of health care delivery in Canada, yet does not require the implementation of a system of
private funding for medically necessary services. Implementation of the Health Care Guarantee would have the effect of re-allocating the finite resources of governments' health care budgets.

The Report, Volume Six, Chapter Five, p. 108

18. The Health Care Guarantee would guarantee every Canadian the right to timely access to medically necessary health care. The Committee defined "timely access to medically necessary health care" as follows:

> "The Committee feels it is important to stress that timely access to needed care does not necessarily mean immediate access. Nor is the issue of timely access limited to life-threatening situations. **Timely access means that service is being provided consistent with clinical practice guidelines to ensure that a patient's health is not negatively affected while waiting for care.**"

The Report, Volume Six, Chapter Five, p. 99

19. If a patient could not obtain "timely access to medically necessary health care" in his or her home province, then the provincial and/or federal government would be obligated to pay for those services to be provided to the patient in another jurisdiction, either within or without Canada.

v) Implementation of the Committee's Health Care Guarantee

20. The timelines for what constituted "timely access to medically necessary health care" would need to be developed and the Committee unanimously recommended the following concrete steps be taken to implement the Health Care Guarantee:

> "For each type of major procedure or treatment, a maximum needs-based waiting time be established and made public.
>
> When this maximum time is reached, the insurer (government) pay for the patient to seek the procedure or treatment immediately in another jurisdiction, including, if necessary, another country (e.g., the United States). This is called the Health Care Guarantee."...
>
> "The point at which the health care guarantee would apply for each procedure would be based on an assessment of when a patient's health or quality of life is at risk of deteriorating significantly as a result of further waiting. Waiting times would be established by scientific bodies using clinical, evidence-based criteria. In order to accomplish this, the Committee recommends that:
>
> > The process to establish standard definitions for waiting times must be national in scope.
> >
> > An independent body be created to consider the relevant scientific and clinical evidence.
> >
> > Standard definitions focus on four key waiting periods:
> >
> > > waiting time for primary health care consultation;
> > > waiting time for initial specialist consultation;
> > > waiting time for diagnostic tests; and
> > > waiting time for surgery."
>
> The Report, Volume Six, Chapter Six, p. 117-118

21. As the delivery of health care is a provincial responsibility, the provinces and territories would have to adopt the Health Care Guarantee. The federal government could also consider enacting its own legislation to enforce the Health Care Guarantee. It could set national maximum waiting times for various medically necessary procedures and treatments. Once those waiting times were exceeded, the federal government could then pay the cost of treating the patient in another jurisdiction, including the United States, and then deduct that amount from the Canada Health and Social Transfer (CHST) payment to the province in which the patient resides.

The Report, Volume Six, Chapter Six, p. 120

22. Debate over private involvement in health care is regularly marked by confusion over the difference between the funding and delivery of health care services. Publicly funded health care insurance in Canada covers medically necessary services that are delivered by doctors or in hospital. Since most physician practices are essentially small businesses, and the vast majority of hospitals are run by not-for-profit, non-governmental bodies, Canada has, in effect, a system in which the majority of publicly funded services are delivered by 'private' providers.

23. When the distinction between funding and delivery is not clearly drawn, it is possible to give the impression that the advantages associated with single payer public *funding* also apply to the public *delivery* of health care services. There thus occurs a form of insidious slippage in the public debate. An illicit inference is made that since single payer public funding is good, private delivery must be bad. This then allows opponents of any form of private involvement to claim that the private delivery of health care services threatens the integrity of the publicly funded system, which is manifestly false given the actual structure of Canadian Medicare.

24. The Health Care Guarantee, in and of itself, would neither encourage nor discourage greater private involvement in health care delivery. Its implementation could be accomplished entirely within the current structure and legislative framework governing publicly funded health care in Canada. Governments would be obliged to ensure that Canadians have timely access to needed services, and would have to supply the necessary *funding* to make this happen. However, the corporate structure of the entities that would *deliver* these services would no more be specified under the provisions of the Health Care Guarantee than they are currently for services mandated under the *Canada Health Act*.

vi) Needs-Based Clinical Guidelines Can Be Used to Develop Objective and Accurate Maximum Waiting Times

25. The Committee examined two objectively prioritized waiting lists in Canada: the Cardiac Care Network of Ontario and the Western Canada Waiting List Project. These prioritized waiting lists demonstrate that needs-based clinical guidelines can be developed and applied. Using this type of needs-based clinical guidelines, objective and accurate maximum waiting times can be

developed to be used to implement the Health Care Guarantee. Over time, the result should be that waiting times would be reduced and service to patients improved.

The Report, Volume Six, Chapter Six, pp. 110 - 111

26. The Cardiac Care Network of Ontario (CCN) was established in 1990, among other things, to coordinate, facilitate, and monitor access to advanced cardiac care. Using information about a patient and his or her medical condition, CCN calculates an urgency rating score ("URS") for the patient. The URS is then used to prioritize the patient's need for care. Patients in more serious condition, as determined by the URS, receive care sooner than patients in better condition, regardless of the particular service needed.

The Report, Volume Six, Chapter Six, p. 111

27. As the result of using these criteria and timelines to allocate resources, waiting times for bypass surgery, for example, in Ontario have dropped substantially since the mid-1990's.

The Report, Volume Six, Chapter Six, p. 111

28. The Western Canada Waiting List (WCWL) project was a collaborative undertaking involving a variety of organizations, including regional health agencies, provincial medical associations, provincial ministries of health, and health research centres. The goal of the WCWL project was to generate physician-scored point-count tools to assign priority to patients on waiting lists. Their work focussed on five areas: cataract surgery, general surgery, hip and knee replacement, MRI scanning and children's mental health. Through clinical input from panel members, criteria for setting priorities and a scoring system were developed. Clinicians then tested the validity and reliability of these criteria and the scoring system and concluded that they had the potential to be useful in clinical settings. While actually determining acceptable maximum waiting times for patients with varying degrees of need was beyond the scope of the mandate of the WCWL project, its results indicate that there is a strong possibility of developing some standardized and orderly method of establishing treatment priorities and access to medical care using criteria and a scoring system similar to that developed by the WCWL project.

The Report, Volume Six, Chapter Six, p. 112

29. In the view of the Committee, the CCN and WCWL experience demonstrated that "substantial improvement in both the reality and perception of the waiting list problem is possible through adopting an approach based on the clinical needs of patients on waiting lists".

The Report, Volume Six, Chapter Six, p. 113

PART II - QUESTION IN ISSUE

30. The position of these interveners on the issues on appeal is that the combination of (1) the currently-existing lengthy and growing delays in providing medically necessary health care in the publicly funded system; and (2) prohibitions or impediments to Canadians' accessing options to obtain medically necessary health care in Canada, including those contained in the impugned legislation, constitutes a violation of s. 7 that cannot be saved under s. 1 of the Charter.

31. The Report applies to the issues on appeal in three ways:

(a) the Report refutes the assumption and fear that, if the impugned legislation were declared unconstitutional, the Canadian health care system would disintegrate and the only option available to governments would be to permit private funding of medically necessary health care services;

(b) the Report can assist this Court in suggesting a definition of the rights to health care to be protected within s. 7 that is more moderate than the parties to this appeal are asserting. This more circumscribed definition would ease the financial burden on governments that any declaration of unconstitutionality would impose, while still preserving the fundamental values underlying the Charter and the values underlying the existing Canadian health care system; and

(c) the Report's study of two examples of objectively prioritized waiting lists demonstrates that "timely access to medically necessary health care" can be defined with some objective, evidence-based clinical precision. Through these lists and objective criteria, the finite resources of government could be re-allocated, resulting in better health care for all Canadians.

PART III - ARGUMENT

A. Defining the Scope of the Constitutional Right Under Section 7

32. These interveners are not asserting a free-standing constitutional right to health care. Rather, these interveners assert a constitutional right not to be prevented from obtaining "timely access to medically necessary health care" in Canada that is not currently available through the publicly-funded system.

> "Timely access to needed care does not necessarily mean immediate access. Nor is the issue of timely access limited to life-threatening situations. *Timely access means that service is being provided consistent with clinical practice guidelines to*

ensure that a patient's health is not negatively affected while waiting for care." [emphasis added][1]

The Report, Volume Six, Chapter Five, p. 99.

33. Governments cannot, constitutionally, fail to provide timely access to medically necessary health care in the publicly funded system and, at the same time, prevent individuals from utilizing their own resources to obtain it.

B. The Three Types of Rights Protected Within Section 7

34. Section 7 of the Charter protects a right to medically necessary health care potentially within all three of (1) the right to life, (2) the right to liberty, and (3) the right to security of the person.

(i) Right to Life

35. If the deprivation of health care puts an individual's life at risk, it would seem obvious that his or her s. 7 right to life is infringed. This Court has also recognized that the notion of a right to "life" can include the notion of the right to "quality of life".

Richard B. v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315 at para 88.

(ii) Right to Liberty

36. The right to "liberty" is broader than simply freedom from physical restraint. The right to "liberty" is engaged "where state compulsions or prohibitions affect important and fundamental life choices". The liberty interest must be interpreted broadly and in accordance with the principles and values underlying the Charter as a whole. The liberty interest protects an individual's personal autonomy to make decisions that are of fundamental personal importance. The section 7 liberty interest encompasses matters that are "fundamentally or inherently personal" and that "by their very nature... implicate basic choices going to the core of what it means to enjoy individual dignity and independence".

Blencoe v. ***British Columbia (Human Rights Commission)***, [2000] 2 S.C.R. 307 at para. 49, citing LaForest J. in ***Richard B. v. Children's Aid Society of Metropolitan Toronto***, [1995] 1 S.C.R. 315 at para. 80; and at para. 51, citing LaForest J. in ***Godbout*** v. ***Longueuil (City)***, [1997] 3 S.C.R. 844 at para. 66.

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[1] This definition of the right is consistent with the *Canada Health Act*, which stipulates that Canadians should have "reasonable access" to insured health services.

37. Of specific relevance to the issue on appeal, in *Richard B.*, four of the justices of this Court concluded that parental decisions respecting medical care for children fell within "this narrow class of inherently personal matters" and were part of the liberty interest of the parent. Three more justices declined to recognize a parental liberty interest in making decisions regarding their child's medical care only because the medical decision in that case endangered the life of the child. Those three justices, however, stated that the right to liberty in s. 7 "may very well permit parents to choose among equally effective types of medical treatment for their children".

> ***Blencoe* v. *British Columbia (Human Rights Commission)*, *supra*, at** para. 51, citing LaForest J. in ***Godbout* v. *Longueuil (City)*, *supra***, referring to ***Richard B.*, *supra*.**

38. If the right of a parent to make decisions about medical care for their children is protected within the sphere of the "liberty" interest, then surely personal decisions regarding medical care for oneself must also be protected.

(iii) Right to Security of the Person

39. The respondents assert that the appellants' case is "hypothetical" and speculative. However, the lengthy and growing waiting lists for medically necessary health care in Canada are real. In *Rodriguez v. British Columbia (AG)*, the issue before this Court was the stress caused to a person who knew that, at some point in the future, after her disease had progressed, she would want to be assisted in the act of suicide, and would be denied that assistance by law. It was her present distress about a future event that triggered s.7 protection:

> "That there is a right to choose how one's body will be dealt with, even in the context of beneficial medical treatment, has long been recognized by the common law. To impose medical treatment on one who refuses it constitutes battery, and our common law has recognized the right to demand that medical treatment which would extend life be withheld or withdrawn. In my view, these considerations lead to the conclusion that the prohibition in s. 241(b) deprives the appellant of autonomy over her person and causes her physical pain and psychological stress in a manner which impinges on the security of her person. The appellant's security interest (considered in the context of the life and liberty interest) is therefore engaged, and it is necessary to determine whether there has been any deprivation thereof that is not in accordance with the principles of fundamental justice."
>
> ***Rodriguez v. British Columbia (A.G.)***, [1993] 3 S.C.R. 519, 588-89.

40. The deprivation of timely access to necessary health care interferes with the right to make decisions about medical treatment and puts at risk a person's physical health or integrity. Even if that risk is anticipatory, the right to security of the person protects both the "physical and psychological integrity of the person":

"For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety."

New Brunswick (Minister of Health and Community Services) v. G.(J.), [1999] 3 S.C.R. 46 at para. 58 and 60, citing ***Rodriguez*** v. ***British Columbia (Attorney General)***, [1993] 3 S.C.R. 519 at p. 587; and see *R.* v. ***Morgentaler***, [1988] 1 S.C.R. 30 at p. 173.

41. The Committee had before it much anecdotal evidence as well as the report from Statistics Canada that Canadians' psychological integrity was being profoundly affected by delays in accessing medically necessary health care in Canada. Therefore, these interveners assert that the right to security of the person is also engaged.

The Report, Volume Six, Chapter Six, p. 109-110

C. The Impugned Legislation Cannot be Justified

42. The impugned legislation is not in accordance with the principles of fundamental justice. Nor can it be saved under s. 1 of the Charter.

43. A deprivation of timely access to necessary health care is not in accordance with at least two principles of fundamental justice: (1) the government's obligation not to prevent its citizens from protecting life and health by accessing medically necessary health care; and (2) the government's obligation to fulfil its contractual and quasi-contractual obligations to its citizens.

44. This Court has permitted state interference with parental decisions regarding health care for their children based on a finding that "necessary" protection by the state of a child's "right to life and to health" is a "basic tenet of our legal system":

"The protection of a child's right to life and to health, when it becomes necessary to do so, is a basic tenet of our legal system, and legislation to that end accords with the principles of fundamental justice..."

Richard B., supra, at para. 88.

45. Therefore, it must also be a basic tenet of our legal system that the government will not stand in the way of a citizen protecting his or her own life or health by accessing medically necessary services. The impugned legislation, which effectively prohibits access to privately funded health care for medically necessary health care, combined with the current situation of

lengthy waiting times for medically necessary publicly funded health care, is not in accordance with this principle of fundamental justice and therefore violates s. 7.

46. These interveners submit that it is also a basic tenet of our legal system that governments will honour quasi-contractual obligations to the Canadian people. The Committee's analysis in the Report is based upon the concept of a "contract" between governments in Canada and Canadians, as insurers and insures, respectively, within the public health care system:

> "Since government has the responsibility for funding an adequate supply of essential services provided by hospitals and doctors, it has an obligation to help them meet reasonable standards of patient service. This is the essence of a patient-oriented system and of the health care 'contract' between Canadians and their governments.
>
> A maximum waiting time guarantee gives concrete form to this obligation..."
>
> The Report, Volume Six, Chapter Six, p. 119

47. The impugned legislation, combined with the *status quo* of lengthy waiting times, results in a violation by governments of this quasi-contractual obligation and therefore is not in accordance with this principle of fundamental justice.

48. If a deprivation of the rights to life, liberty and security of the person is not in accordance with the principles of fundamental justice, it cannot be justified under s.1.

> ***Reference re Motor Vehicle Act (British Columbia) S94(2)***, [1985] 2 S.C.R. 486 at p. 517-518.

49. Even if the government could avail itself of s. 1, given the *status quo*, the impugned legislation cannot be justified as a reasonable limit within the meaning of s. 1. These interveners agree that preserving publicly funded health care in Canada is a pressing and substantial objective. Legislation, such as the impugned legislation, that effectively prohibits the rise of privately funded health care might be said to be rationally connected to that objective.

50. However, that prohibition does not impair the right as little as possible. As demonstrated in the Report, there is at least one other option available to government that would impair the right less, while still preserving publicly funded health care - the Health Care Guarantee recommended in the Report.

51. Nor is there acceptable proportionality between the effects of the prohibition on the rights of Canadians and the objective. Right now in Canada, many Canadians are having the state of their health, and consequently the quality of their lives, deteriorate while they are waiting for medically necessary health care. Such a situation cannot be reasonably and demonstrably justified in a free and democratic society:

> "Canadians in need of medically necessary services *must* be given *timely*-access to them."
>
> The Report, Volume Six, p. 121

D. The Respondents' Justification Using the Principles of Fundamental Justice Cannot be Supported, Given Options Including the Health Care Guarantee

52. The courts below adopted the framework asserted by the parties to this appeal that, if the impugned legislation is declared unconstitutional, then the only alternative available to governments is to permit private funding for medically necessary services . The trial judge and Justice Forget of the Court of Appeal justified infringements of rights to life, liberty, and security of the person as being in accordance with the principles of fundamental justice because the only alternative was a parallel privately funded health care system, which was seen as a threat to the general good as represented by the existing exclusively public funding of medical services:

> "Le regime public de santé québécois ne bénéficie pas de ressources illimitées et inépuisables ... Dans ce contexte, il est tout à fait justifiable qu'un gouvernement, ayant les meilleurs intérêts de sa population à coeur, adopte une solution en matière de santé qui vise à favoriser le plus grand nombre possible d'individus. Le gouvernement limite les droits de quelques-uns pour assurer que les droits de l'ensemble des citoyens de la société ne seront pas brimés.
>
> La preuve a montré que le droit d'avoir recours à un système parallèle privé de soins, invoqué par les requérants, aurait des répercussions sur les droits de l'ensemble de la population. Il ne faut pas jouer à l'autruche. L'établissement d'un système de santé parallèle privé aurait pour effet de menacer l'intégrité, le bon fonctionnement ainsi que la viabilité du système public ".
>
> Reasons of Piché J., p. 126-27, cited by Forget J. at para. 62

53. First, the status quo, involving the physical and psychological deterioration of Canadians affected by long and ever-increasing waiting times, hardly reflects a public policy solution that has

the "meilleurs intérêts de sa population à coeur". However laudatory the intention, the status quo is unacceptable.

54. Moreover, while the Health Care Guarantee is only one option that would be available to governments if the impugned legislation were declared unconstitutional, it is an option that would *not* destroy the publicly funded health care system, nor inevitably lead to a parallel privately funded health care system for medically necessary services. The Health Care Guarantee offers a solution that can be publicly funded, minimize the financial burden on governments, and thereby preserve public health care while still protecting the constitutional rights of Canadians and respecting the values on which the Canadian health care system is based. These interveners recognize that the ultimate decision as to how to ensure timely access to necessary health care is for governments and legislatures to make. The point, for the purposes of this appeal, is simply that governments have viable options if the impugned legislation is declared unconstitutional.

E. The Concept of a Health Care Guarantee Can Avoid Violations of Section 7 of the Charter

55. The Committee incorporated into the Health Care Guarantee a specific definition that can be used to circumscribe the scope of the protected rights, within either of the two parts of s. 7. The articulation of the right as one of "timely access to medically necessary health care" can be used either to circumscribe the "life, liberty and security of the person" interests protected within the first part of s. 7 or to limit a recognized right under "principles of fundamental justice" within the second part of s. 7.

(i) The Scope Can be Limited Within the "Liberty" and "Security of the Person" Interests Protected

56: It may be that recognition of a "liberty" interest to make any and all decisions relating to health care is too broad. However, once that decision relates to health care that could negatively impact on the health of the individual if not provided in a ***timely*** manner, and is therefore "***medically necessary***", the "liberty" interest is more obviously engaged.

57. Similarly, this Court may be reluctant to recognize a "security of the person" interest broad enough to encompass a right to ***any*** desired medical care. However, the potential of a negative impact upon the physical or psychological integrity of the individual, caused by undue delay in

access to medically necessary health care, may gives rise to a "security of the person" interest worthy of the protection of s. 7.

(ii) The Scope Can Be Limited as a "Principle of Fundamental Justice"

58. Alternatively, the concept of "timely access to medically necessary health care" can also be applied under the "principles of fundamental justice" to limit the scope of the constitutionally protected right. That is, assuming the "liberty" and "security of the person" interests **are** broad enough to encompass all decisions relating to or impacting upon an individual's health, some restriction on those decisions may be in accordance with the principles of fundamental justice if the health care is not "medically necessary". .

(iii) "Timely Access to Medically Necessary Health Care" Provides a "Purposive" Definition for the Right to Health Care Under Section 7

59. Whether the scope of the right is circumscribed in part one or two of s. 7, this more moderate definition is consistent with a "purposive" approach to the interpretation of the scope of s. 7. This definition ensures that the interests protected within s. 7 are not trivialized. It ensures that the liberty and security of the person interests recognized and protected are more closely linked to a person's dignity and autonomy and that the Charter is being used to protect choices tied to its underlying values.

> ***R. v. Big M Drug Mart Ltd.***, [1985] 1 S.C.R. 295 at p. 344.

F. Objectively Prioritized Waiting Lists Can Be Developed and Used to Re-Allocate Finite Resources

60. The Committee found that objectively prioritized waiting lists have been developed in particular instances and could be developed for other medical situations in order to assist governments in prioritizing the distribution of finite public resources:

> "Not all waiting lists are the result of shortages.. As already noted, evidence suggests it is possible to reduce these waiting times by tackling them head-on, as CCN...has done in Ontario. We strongly suggest that a major factor contributing to growing waiting times has been the slowness of the "players" in the system - hospitals and their specialist physicians and surgeons in particular - to apply systematic management to waiting lists for all major procedures, diagnostic tests and consultations. ... so that patients in the greatest need are tended to first and that, wherever possible, waiting times for everybody are kept to a minimum."
>
> The Report, Volume Six, Chapter Six, p. 116

61. Some waiting lists are the result of governments failing to increase funding at the same rate as growth in health care costs over the years. The concept of a "guarantee" would motivate governments to take steps to improve upon wait times.

> Were it to be implemented, such a health care guarantee would mean that government would have to shoulder the responsibility of needed care not being delivered in a timely fashion, provided, of course, the funded hospitals and physicians discharge their part of the bargain by developing and using clinical criteria to prioritize needs-based waiting lists and by employing their resources in an optimally cost-effective manner. **Allowing waiting times to increase would no longer represent a cost-free option for governments**, nor for hospitals and doctors, when under-funding is not the primary reason for prolonged waiting, since they would be required to pay to have patients obtain treatment in other jurisdictions.
>
> The Report, Volume Six, Chapter Six, p. 111, 116-117 and 119

G. Conclusion

62. A declaration that the impugned legislation is unconstitutional will not sound the death knell for the Canadian system of publicly funded health care for medically necessary services. A government commitment to a Health Care Guarantee, or its equivalent, can be accommodated within the publicly funded system. A fear that is unfounded cannot be used to justify a violation of Canadian's constitutional rights under either s. 7 or s. 1 of the Charter. The *status quo* is unacceptable. Indeed, declaring the legislation unconstitutional on the bases argued herein may provide the impetus for governments to implement a solution that will lead to an improved publicly funded health care system in Canada.

PART IV - COSTS

63. These interveners do not seek to claim costs in the intervention from any other party to this appeal.

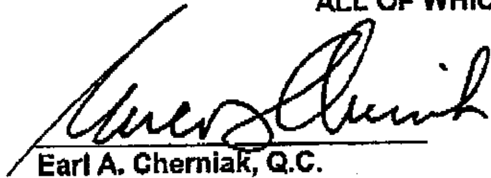
PART V - ORDER SOUGHT

64. These interveners submit that constitutional questions # 1 and 3 should be answered in the affirmative. Constitutional questions # 2 and 4 should be answered in the negative.

65. These interveners take no position on questions # 5 through 16.

66. These interveners also seek an order suspending any declaration of unconstitutionality for a period of thirty-six (36) months, or such other period of time as this court deems reasonable to allow governments time to address and rectify the constitutional infirmities of the impugned legislation.

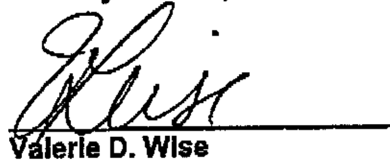
ALL OF WHICH IS RESPECTFULLY SUBMITTED



Earl A. Cherniak, Q.C.

Stanley H. Hartt, Q.C.

Patrick J. Monahan



Valerie D. Wise

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PART VI - STATUTES

None.