S.C.C. File No.: 29272

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

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 INTERVENERS CANADIAN MEDICAL ASSOCIATION AND THE CANADIAN ORTHOPAEDIC ASSOCIATION

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
1100 – 100 Queen St.
Ottawa, Ontario K1P 1J9

Guy Pratte/Freya Kristjanson
Tel: (613) 237-5160/(416) 367-6388
Fax: (613) 230-8842/(416) 361-7053
Net: gpratte/fkristjanson@blgcanada.com

Solicitors for the Interveners,
The Canadian Medical Association and The Canadian Orthopaedic Association

AND TO:

JACQUES CHAOULLI
21, Jasper Avenue
Ville Mont-Royal, Quebec
H3P 1J8

Tel.: (514) 738-2377
Fax: (514) 738-4062

Appellant, self-represented

AND TO:

BERGERON, GAUDREAU, LAPORTE
167, rue Notre Dame de l'Île
Gatineau, Quebec
J8X 3T3

Richard Gaudreau
Tel: (819) 770-7928
Fax: (819) 770-1424

Agent for the Appellant,
Jacques Chaoulli

AND TO:

TRUDEL & JOHNSTON
85, de la Commune Est, 3e étage
Montreal, Quebec
H2Y 1J1

Philippe H. Trudel
Bruce W. Johnston
Tel.: (514) 871-8385
Fax: (514) 871-8800

Counsel for the Appellant,
George Zéliotis

AND TO:

MCCARTHY TÉTRAULT LLP
1400 - 40 Elgin Street
Ottawa, Ontario
K1R 5K6

Colin S. Baxter
Tel.: (613) 238-2000
Fax: (613) 238-9836

Agent for the Appellant,
George Zéliotis

AND TO:

BERNARD, ROY ET ASSOCIÉS
8.01 - 1, rue Notre-Dame Est
Montreal, Québec H2Y 1B6

Robert Monette
Tel.: (514) 393-2336
Fax: (514) 873-7074

Counsel for the Respondent,
Attorney General of Québec

AND TO:

NOËL & ASSOCIÉS
111, rue Champlain
Hull, Quebec
J8X 3R1

Sylvie Roussel
Tel.: (819) 771-7393
Fax: (819) 771-5397

Agent for the Respondent,
Attorney General of Quebec

AND TO:

CÔTE, MARCOUX & JOYAL
Complexe Guy Favreau, Tour Est
200, boul. Rene-Levesque O.
5 etage
Montréal, Québec H2Z 1X4

André L'Espérance
Tel: (514) 283-3525
Fax: (514) 283-3856

Counsel for the Respondent,
Attorney General of Canada

AND TO:

D'AURAY, AUBRY, LEBLANC & ASSOCIÉS
275, rue Sparks
Ottawa, Ontario
K1A 0H8

Jean-Marc Aubry, Q.C.
Tel.: (613) 957-4663
Fax: (613) 952-6006

Agent for the Respondent,
Attorney General of Canada

AND TO:

MINISTRY OF ATTORNEY GENERAL
Legal Services Branch
6th Floor, Sussex Building
P.O. Box 9280 Stn Prov Govt
1001 Douglas Street
Victoria, B.C. V8W 9J7

George H. Copley, Q.C.
Tel: (250) 356-8875
Fax: (250) 356-9154

Counsel for the Intervener,
Attorney General of British Columbia

AND TO:

BURKE-ROBERTSON
Barristers and Solicitors
70 Gloucester Street
Ottawa, Ontario K2P 0A2

Robert E. Houston, Q.C.
Tel: (613) 236-9665
Fax: (613) 235-4430

Agent for the Intervener,
Attorney General of British Columbia

AND TO:

ATTORNEY GENERAL OF ONTARIO
720 Bay Street, 4th Floor
Toronto, Ontario M5G 2K1

Janet E. Minor
Shaun Nalatsuru
Tel: (416) 326-4137
Fax: (416) 326-4015

Counsel for the Intervener,
Attorney General of Ontario

AND TO:

BURKE-ROBERTSON
Barristers and Solicitors
70 Gloucester Street
Ottawa, Ontario K2P 0A2

Robert E. Houston, Q.C.
Tel: (613) 236-9665
Fax: (613) 235-4430

Agent for the Intervener,
Attorney General of Ontario

AND TO:

ATTORNEY GENERAL OF MANITOBA
Department of Justice
1205-405 Broadway
Winnipeg, Manitoba R3C 3L6

Tel: (204) 945-0679
Fax: (204) 945-0053

AND TO:

GOWLING LAFLEUR HENDERSON LLP
2600-160 Elgin Street
P.O. Box 466, Stn. "D"
Ottawa, Ontario K1P 1C3

Henry S. Brown, Q.C.
Tel: (613) 233-1781
Fax: (613) 563-9869

Agent for the Intervener,
Attorney General of Manitoba

AND TO: **ATTORNEY GENERAL OF NEW BRUNSWICK**
P.O. Box 6000, Room 444
670 King St., Centennial Building
Fredericton, N.B. E3B 5H1

Gabriel Bourgeois, Q.C.
Tel: (506) 453-3606
Fax: (506) 453-3275

Counsel for the Intervener,
Attorney General of New Brunswick

AND TO: **GOWLING LAFLEUR HENDERSON LLP**
2600-160 Elgin Street
P.O. Box 466, Stn. "D"
Ottawa, Ontario K1P 1C3

Henry S. Brown, Q.C.
Tel: (613) 233-1781
Fax: (613) 563-9869

Agent for the Intervener,
Attorney General of New Brunswick

AND TO: **ATTORNEY GENERAL OF SASKATCHEWAN**
Constitutional Law Branch
8th Floor – Scarth Street
Regina, Saskatchewan S4P 3V7

Tel: (306) 787-8385
Fax: (306) 787-9111

AND TO: **GOWLING LAFLEUR HENDERSON LLP**
2600-160 Elgin Street
P.O. Box 466, Stn. "D"
Ottawa, Ontario K1P 1C3

Henry S. Brown, Q.C.
Tel: (613) 233-1781
Fax: (613) 563-9869

Agent for the Intervener,
Attorney General of Saskatchewan

AND TO: **AUGUSTIN ROY**

AND TO: **BERGERON, GAUDREAU, LAPORTE**
167, rue Notre Dame de l'Île
Gatineau, Quebec
J8X 3T3

Richard Gaudreau
Tel: (819) 770-7928
Fax: (819) 770-1424

Agent for the Intervener,
Augustin Roy

AND TO: **LERNERS LLP**
2400 - 130 Adelaide Street West
Toronto , Ontario M5H 3P5

Earl A. Cherniak, Q.C.
Tel: (416) 867-3076
Fax: (416) 867-9192

Counsel for the Interveners,
Senator Michael Kirby, Senator Marjory Lebreton, Senator

AND TO: **GOWLING LAFLEUR HENDERSON LLP**
2600-160 Elgin Street
P.O. Box 466, Stn. "D"
Ottawa, Ontario K1P 1C3

Brian A. Crane, Q.C.
Tel: (613) 233-1781
Fax: (613) 563-9869

Agents for the Interveners,
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

Catherine Callbeck, Senator Joan Cook, Senator Jane Cordy, Senator Joyce Fairbairn, Senator Wilbert Keon, Senator Lucie Pépin, Senator Brenda Robertson and Senator Douglas Roche

AND TO: **SACK GOLDBLATT MITCHELL**
20 Dundas Street West
Suite 1130, P.O. Box 180
Toronto, Ontario M5G 2G8

Steven Shrybman
Tel: (416) 977-6070
Fax: (416) 591-7333

Counsel for the Intervener,
Canadian Labour Congress

AND TO: **BURKE-ROBERTSON**
Barristers and Solicitors
70 Gloucester Street
Ottawa, Ontario K2P 0A2

Robert E. Houston, Q.C.
Tel: (613) 236-9665
Fax: (613) 235-4430

Agent for the Intervener,
Canadian Labour Congress

AND TO: **UNIVERSITY OF VICTORIA**
P.O. Box 2400, Station CSC
Victoria , British Columbia
V8W 3H7

Martha Jackman
Tel: (250) 721-8181
Fax: (250) 721-8146

Counsel for the Interveners,
Charter Committee on Poverty Issues and the Canadian Health Coalition

AND TO: **LANG MICHENER**
300-50 O'Connor Street
Ottawa , Ontario K1P 6L2

Marie-France Major
Tel: (613) 232-7171
Fax: (613) 231-3196

Agent for the Interveners,
Charter Committee on Poverty Issues and the Canadian Health Coalition

AND TO: **BLAKE, CASSELS & GRAYDON LLP**
Suite 2600, Three Bentall Centre
595 Burrard Street,
P. O Box 49314
Vancouver, B. C. V7X 1L3

Marvin R.V. Storrow, Q.C.
Tel: (604) 631-3300
Fax: (604) 631-3309

Counsel for the Interveners,
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

AND TO: **BLAKE, CASSELS & GRAYDON LLP**
World Exchange Plaza
20th Floor, 45 O'Connor
Ottawa, Ontario K1P1A4

Gordon K. Cameron
Tel: (613) 788-2222
Fax: (613) 7882247

Agent for the Interveners,
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
and
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

Surgical Centre Limited
and
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

TABLE OF CONTENTS

PART I: FACTS 1

1. Overview 1

2. CMA/COA's Interest in the Appeal 2

3. CMA/COA's Position on the Facts 3

PART II: QUESTIONS IN ISSUE 8

PART III: ARGUMENT 8

1. Breach of Section 7 of the *Charter* 8
   - (a) Right to Life and Security of the Person 9
     - (i) Infringement of Life and Security of the Person 9
     - (ii) Real Apprehension of Charter Section 7 Violation 10
   - (b) Principles of Fundamental Justice 11
   - (c) Not an Economic Right 15

2. Not Saved Under *Charter* Section 1 17

PART IV: SUBMISSIONS CONCERNING COSTS 18

PART V: ORDER SOUGHT 19

PART VI: TABLE OF AUTHORITIES 20

PART VII: STATUTES AND REGULATIONS 22

PART I: FACTS

1. Overview

1. The Canadian Medical Association ("CMA") and the Canadian Orthopaedic Association ("COA") support the existing single payer (publicly funded) model of health care delivery, but are concerned that delays in access to medically necessary health care may put the life and health of patients in Canada at risk. The CMA/COA submit that governments must address the issue of timeliness of access to health care if they wish to maintain the viability and constitutionality of the social contract that is Medicare.

2. The CMA/COA put forward a position that they believe best protects the public health care system, while at the same time recognizing that failures in that system which threaten the life, liberty and security of the person of patients in Canada may constitute a *Charter* section 7 breach. The CMA/COA submit that so long as access to medically necessary care is provided in a timely manner, there is no *Charter* section 7 breach. In the absence of a clear commitment to timely access and where as a matter of fact the public system fails to provide timely access to medically necessary health care, legislative prohibitions that impede access or the means for access to medical treatment necessary to the life, liberty and security of the person do breach *Charter* section 7.

3. The fundamental issue in this case is whether it is constitutionally justifiable for governments to legislatively preclude a patient from seeking access or the means for access to medical treatment necessary to the life, liberty and security of the person, when such treatment is not available in a timely manner in the public system by reason of significant waiting times, under-funding, inadequate human and physical resources, or other impediments.

4. The purpose and effect of the matrix of federal and provincial statutes applicable to Medicare is to establish the public health care system as the sole payer of medically necessary ("insured") services. In Québec, for example, the government defines what constitute medically necessary services, pays for all insured service provided to residents of Québec, sets out the conditions under which the insured services may be funded outside the province, and otherwise

forbids by law the provision of private insurance for such insured services. While the Québec government has legislated to provide medically necessary care, the legislation does not extend to the provision of timely access to medically necessary care. It is this disjunction which has caused the CMA/COA to intervene in this case. Governments are not held accountable for the failure to provide medically necessary services in a timely manner in the public system.

5. This is not a case of economic rights because in the context of health care any clinically excessive delay can have profound consequences on both the physical and psychological aspects of a person's life and security of the person. The CMA/COA, as physicians, submit that it is the impact of the deterioration of the public health care system to the point that it cannot deliver timely access to Canadians that is the heart of the issue. In this context, "timely access" refers to the delivery of care within a medically appropriate timeframe. Medically necessary health care delayed is health care denied.

2. CMA/COA's Interest in the Appeal

6. The CMA is the national voice of Canadian physicians, with over 57,000 members in each of the ten provinces and the three territories. Its mission is to serve and unite the physicians of Canada, and to be the national advocate, in partnership with the people of Canada, for the highest standards of health and health care. An affiliate of the CMA, the COA is a voluntary medical speciality society of physicians with specialized training and certification in orthopaedic surgery. The COA's goals are to achieve excellence in orthopaedic care for Canadians, in part through ensuring that adequate and accessible health care resources are available for Canadians.

7. The CMA/COA are committed to the fundamental principles of the national system of Medicare – comprehensiveness, universality of coverage, portability of benefits, reasonable access and non-profit administration. Furthermore, the CMA *Code of Ethics*, article 31, states that physicians should "recognize the responsibility of physicians to promote fair access to health care resources". However, excessive waiting times in the public system threaten the viability of Medicare unless and until governments clearly commit to and factually do provide timely access. The decision of this Court will have a profound and lasting effect on the Canadian health care

system, of which physicians are an integral part. It will directly affect the conditions under which patients receive treatment from physicians and other providers.

Canadian Medical Association, *Code of Ethics of the Canadian Medical Association*, (Ottawa: The Association), October 1996, *CMA/COA Authorities*, Tab 17

3. CMA/COA's Position on the Facts

8. Madam Justice Piché found at trial that if access to the health system is not possible, it is illusory to think that rights to life and security are respected. She further found that the prohibition on the purchase of private insurance is an infringement of life and security of the person where there are excessive waiting times for essential medical services in the public system. The trial judge found that waiting lists are too long and that, even if the question is not always one of life or death, all individuals are entitled to receive the care they need in a clinically responsive manner. She held, however, that the infringement did not violate fundamental justice given the historical context and the social benefits to all of a publicly funded health care system.

Judgment of Piché J., *Joint Appellants' Record*, Vol. I, pp. 126-127, 129, 134-135, 143

9. More recently, the serious issue of waiting times for medically necessary health care has been considered by two major national studies – the Canadian Commission on the Future of Health Care in Canada (the "Romanow Commission") and the Report of the Standing Senate Committee on Social Affairs, Science and Technology ("the Senate Committee"). Each of these significant reports concluded that excessive waiting times exist across the country, that governments have available a number of tools to address such waiting times which are not being used to their fullest extent, and that delays in access to medically necessary services may cause the health of patients to deteriorate, as well as stress and anxiety.

Canada, Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada – Final Report*, (Ottawa, 2002) (Chair: Roy Romanow) at 137-150 [hereinafter Romanow, *Building on Values*], *CMA/COA Authorities*, Tab 15

Canada, The Standing Senate Committee on Social Affairs, Science and Technology, *The Health of Canadians – The Federal Role: Final Report on the State of the Health Care System in Canada*, Vol. 6 (Ottawa: 2002) (Chair: Michael Kirby) at 99-121 [hereinafter Kirby, *The Health of Canadians*, Vol. 6], *CMA/COA Authorities*, Tab 16

10. The CMA/COA recognize that wait times for diagnosis and treatment are intrinsic to a health care system. No country has sufficient resources at its disposal to build the excess capacity necessary to meet all health needs on an urgent basis. However, excessive wait times emerged as a major public policy issue starting in the mid- to late-1990s following several years of cuts in the financing of public health care. Moreover, public anxiety has been mounting over lengthening wait times for treatment. Public confidence in the system "being there" at the time and to the extent of need is gradually being lost.

> Kirby, *The Health of Canadians*, Vol. 6, *supra* at 109-111, *CMA/COA Authorities*, Tab 16

11. The Senate Committee cited with approval a recent *Statistics Canada* study, entitled *Access to Health Care Services in Canada, 2001,* that provides an indication of the extent to which Canadians are subject to waiting times and the associated stress and anxiety:

- Almost one in five Canadians who access 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.

- Of the estimated five million people who visited a specialist, roughly 18 %, or 900,000, reported that waiting for care affected their lives. The majority of these people (59 per cent) reported worry, anxiety or stress. About 37 % said they experienced pain.

- Canadians reported that waiting for services was clearly a barrier to care. Long waits were clearly not acceptable to Canadians, particularly when they experienced adverse effects such as worry and anxiety or pain while waiting for care.

> Statistics Canada, *Access to Health Care Services in Canada, 2001* by C. Sanmartin, C. Houle, J.-M. Berthelot and K. White, (Ottawa, Minister of Industry, 2002) [hereinafter Statistics Canada, *Access to Health Care*], cited in Kirby, *The Health of Canadians*, Vol. 6, *supra* at 109, *CMA/COA Authorities*, Tab 21

12. The Statistics Canada report concluded that:

> Perhaps the most significant information regarding access to care was about waiting times. ... 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.
>
> Statistics Canada, *Access to Health Care, supra* at 21, cited in Kirby, *The Health of Canadians*, Vol. 6, *supra* at 109, *CMA/COA Authorities*, Tab 21

13. Furthermore, the Romanow Report acknowledged the problem that Canadian patients and their physicians are faced with:

> Waiting for health care is a serious concern for Canadians and it has become a preoccupation for health care professionals, managers, and governments. Studies and public opinion polls have consistently shown that one of the top concerns of rural and urban Canadians is health care access... Long waiting times are the main, and in many cases, the only reason some Canadians say they would be willing to pay for treatment outside of the public health care system... As individual provinces and territories have struggled to deal with waiting times and wait lists within their own systems, progress is being made in some areas but more effort needs to be put into generalizing those efforts across the country... Clearly, the progress is not fast enough for Canadians. More can and must be done across the country to give Canadians what they want and deserve - timely access to health care services they need.
>
> Romanow, *Building on Values, supra* at 138-139, *CMA/COA Authorities*, Tab 15

14. Following its review of the Canadian health care system, the Senate Committee concluded on the issue of waiting time that:

> In Canada, patient prioritization is not standardized for any medical service (with the exception of [the Cardiac Care Network] in Ontario). This means that there is currently no provincially or nationally accepted method of measuring or defining waiting times for medical services, nor are there standards and criteria for "acceptable" waits for the vast majority of health services. It is impossible, therefore, to determine whether, from a clinical point of view, patients have waited a reasonable or unreasonable length of time to access care. The absence of standardized criteria and methods to prioritize patients waiting for care means that patients are placed and prioritized on waiting lists based on a range of clinical and non-clinical criteria that vary by individual referring physician across institutions, regional health authorities, and provinces.

Kirby, *The Health of Canadians,* Vol. 6, *supra* at 112, *CMA/COA Authorities*, Tab 16

15. The Romanow Commission concluded on the issue of current problems with wait lists:

> One of the most serious concerns is not only the length of time some people wait but the way in which wait lists are managed. In fact, to say wait lists are "managed" is almost a misnomer. There is no consistent way of dealing with wait lists in particular regions let alone on a provincial or national basis. This affects the health of people who wait and it seriously undermines Canadians' confidence in their health care system.
>
> When individual Canadians are told that they are on a wait list for a particular service, they probably assume that there is a master list that is managed and co-ordinated based on the urgency of their need. In reality, that is not what happens.

Romanow, *Building on Values, supra* at 141-143, *CMA/COA Authorities*, Tab 15

16. Recent international surveys also indicate that the waiting times and access to care for patients who make heavy use of the health care system are markedly poorer in Canada than in four other Western countries.

R.J. Blendon et al., "Common concerns Amid Diverse Systems: Health Care Experiences in Five Countries" (2003), 22 Health Affairs 106, *CMA/COA Authorities*, Tab 14

17. On the international scene, since at least the early 1990's, mechanisms to address excessive wait times including access standards and care guarantees have been the subject of study, debate and practice in several jurisdictions including the United Kingdom, Sweden and New Zealand. The Organisation for Economic Co-operation and Development (OECD) commissioned a comprehensive study of the international experience with access standards and care guarantees.

OECD, Labour and Social Affairs Committee, *Tackling Excessive Waiting Times for Elective Surgery: A Comparison of Policies in Twelve OECD Countries*, Doc. No. DELSA/ELSA/WD/HEA(2003)6 (2003), *CMA/COA Authorities*, Tab 19

OECD, Labour and Social Affairs Committee, *Explaining Waiting Times Variations for Elective Surgery Across OECD Countries*, Working Paper No. 7, Doc. No. DELSA/ELSA/WD/HEA(2003)7 (2003), *CMA/COA Authorities*, Tab 18

18. While the federal government has never taken the position that timeliness is a component of accessibility, such a position is certainly open to it. The *Canada Health Act* has established five criteria pursuant to which the federal government will cost-share provincial Medicare programs: portability, comprehensiveness, universality, public administration, and accessibility. "Accessibility" has been interpreted to require that there be no financial barriers to accessing hospital and physician services.

Canada Health Act, R.S.C. 1985, c. C-6, s. 7, 12

19. The CMA proposed to the Senate Committee that guidelines and standards around quality and waiting times be established for a clearly defined basket of core services, and argued that "if the publicly funded health care system fails to meet the specified agreed-upon standards for timely access to core services, then patients must have other options to allow them to obtain this required care through other means."

Kirby, *The Health of Canadians,* Vol. 6, *supra* at 119, *CMA/COA Authorities*, Tab 16

20. There are concrete Canadian examples of how timely access may be measured and provided such as the Cardiac Care Network of Ontario, and the Western Canada Waiting List Project, both of which are reviewed in the Senate Committee Report. These projects have demonstrated that a substantial improvement in the waiting list problem is possible through adopting an approach based on the clinical needs of patients on waiting lists. The Senate Committee suggested:

- A process to establish standard definitions for waiting times should be national in scope, and

- Standard definitions should focus on four key waiting periods – waiting for primary care consultation; for initial specialist consultation; for diagnostic tests; and for surgery.

Kirby, *The Health of Canadians*, Vol. 6, *supra* at 103-113, *CMA/COA Authorities*, Tab 16

Romanow, *Building on Values, supra* at 143-144, *CMA/COA Authorities*, Tab 15

PART II: QUESTIONS IN ISSUE

21. The CMA/COA take a position on the following constitutional questions as stated by this Court in its Order of 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*?

22. The CMA/COA submit that if there is a clear commitment from governments which provides timely access to medically necessary care, there is no constitutional breach. However, constitutional questions #1 and 3, should be answered affirmatively if a patient is denied timely access to health care in the public system with the result that the patient's life is threatened or the quality of his/her life substantially compromised, and that patient is legislatively precluded from seeking access or the means for access to medically necessary treatment. In this event, the corresponding questions #2 and 4 should be answered negatively.

PART III: ARGUMENT

1. Breach of Section 7 of the *Charter*

23. The analytical approach to be used under section 7 of the *Charter* has recently been described by this Honourable Court as a three-step process: 1) the identification of the individual interests said to be infringed and a determination of whether those interests fall within the meaning of the phrase "life, liberty and security of the person;" 2) the identification of the principles of fundamental justice engaged in the circumstances of the case; and, 3) whether the

threshold infringement found in the first stage of the analysis is inconsistent with the pertinent principle of fundamental justice.

> *R v. Malmo-Levine; R. v. Caine*, 2003 SCC 74 at para. 83 [hereinafter *Malmo-Levine*], *CMA/COA Authorities*, Tab 10

(a) Right to Life and Security of the Person

24. The CMA/COA submit that when a patient is denied timely access to health care in the publicly funded system with the result that the patient's life is threatened or the quality of her life substantially compromised, and that patient is legislatively precluded from seeking access or the means for access to medically necessary treatment, the infringement of the rights to life and/or security of the person is clear. However, where the health care service at issue is not essential to maintaining quality and quantity of life, and the delay in accessing that treatment is not clinically significant, then the values and principles reflected in *Charter* section 7 are not engaged.

25. "Timely access" to health care refers to the delivery of care within a medically appropriate time frame. As discussed in paragraph 20, there are existing Canadian and international initiatives to develop and refine medically appropriate time frames.

(i) Infringement of Life and Security of the Person

26. In the context of health care, any clinically excessive delay can have profound consequences on both the physical and psychological aspects of a patient's life and security of the person.

> OECD, Labour and Social Affairs Committee, *Tackling Excessive Waiting Times for Elective Surgery: A Comparison of Policies in Twelve OECD Countries Annex 1*, Doc. No. DELSA/ELSA/WD/HEA(2003)6/ANN1 (2003), *CMA/COA Authorities*, Tab 20

27. The CMA/COA submit that delay in the medical context, when caused by government laws and policies, may clearly threaten an individual's life and security of the person. The significance of government-caused delay in the criminal context was recognized in *R. v. Morgentaler*. Chief Justice Dickson, as he then was, in *R. v. Morgentaler* found that the

increased risk to a woman's health resulting from the delay caused by the government procedures in obtaining an abortion deprived her of her security of the person. Justice Beetz recognized the additional danger to a woman's health caused by the state's intervention which prevented "access to effective and timely medical treatment."

> *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 59, 101 [hereinafter *Morgentaler*], *CMA/COA Authorities*, Tab 11

28. The infringement of a person's security is not restricted to the physical aspect. State interference with bodily integrity and serious state-imposed psychological stress also constitute a breach of security of the person. There must be an objective assessment of state interference "on the psychological integrity of a person of reasonable sensibility." It requires more than ordinary stress and anxiety, but does not need to escalate to the level of nervous shock or psychiatric illness.

> *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 at para. 60 [hereinafter *New Brunswick*], *CMA/COA Authorities*, Tab 7
>
> *Morgentaler, supra* at 60, *CMA/COA Authorities*, Tab 11

29. The failure to obtain timely health care may have a serious and profound effect on an individual well beyond the normal stress and anxiety of life. Where there is an increased risk to both physical and mental health resulting from excessive delay in obtaining medically necessary health care, a deprivation of security of the person and significant diminution in the quality and quantity of life will ensue.

(ii) Real Apprehension of Charter Section 7 Violation

30. The evidence before the trial judge supports a finding that there is a real apprehension of a violation of *Charter* section 7 rights. At trial, Piché J. heard evidence from more than fifteen witnesses, including both expert physicians and professors, as well as patients who have been intimately involved with the public health care system. A large quantity of evidence was presented on the delays in access to health care, and its consequences in such fields as orthopaedics, ophthalmology, oncology, cardiology and emergency care. She concluded:

> De ces témoignages, le Tribunal retient d'abord la sincérité et l'honnêteté des médecins qui ont témoigné, de leur désir de changer les choses, de leur impuissance malheureuse devant des listes d'attente trop longues. Le Tribunal retient que les listes d'attente sont trop longues, que même si ce n'est pas toujours une question de vie ou de mort, tous les citoyens ont droit à recevoir les soins dont ils ont besoin, et ce, dans les meilleurs délais.

Judgment of Piché J., *Joint Appellants' Record*, Vol. I, pp. 42, 43

31. The CMA/COA submit that deference must be paid to the findings of fact of the trial judge. In the alternative, the CMA/COA submit that this Court has before it all the necessary evidentiary support in order to make the determination on reasonable hypothetical circumstances. The protection under the Charter embodies a preventative aspect when a violation is apprehended, as observed by the trial judge. As Justice Forget at the Court of Appeal held:

> Obliger une personne à attendre d'être gravement malade (ou d'avoir subi un grave accident) avant d'entreprendre des procédures pour obtenir des soins adéquats de santé aurait pour effet, dans la majorité des cas, de rendre illusoire le recours, compte tenu de l'imprévisibilité de la maladie et de son évolution.

Judgment of Court of Appeal, Forget J., *Joint Appellants' Record*, Vol. I, p. 187

New Brunswick, supra at paras. 56-68 and 91, *CMA/COA Authorities*, Tab 7

32. The CMA/COA submit that this Honourable Court should not be waiting for, in the words of the trial judge, "une question de vie ou de mort" before acting. Cases such as *Stein v. Québec (Régie de l'Assurance-maladie)* demonstrate that timely access to necessary medical care is a real concern. Failures of timely access pose a significant risk to s. 7 rights.

Stein v. Québec (Régie de l'Assurance-maladie), [1999] Q.J. No. 2724 (S.C.), *CMA/COA Authorities*, Tab 13

(b) Principles of Fundamental Justice

33. The section 7 analysis then turns to the principles of fundamental justice which are found in "the basic tenets of our legal system." The objective of the *Health Insurance Act* is to regulate the single payer (publicly funded) Medicare system in Québec. The CMA/COA are committed to a sustainable health care system which provides for timely and fair access to medically

necessary care. All aspects of health care are intrinsically linked to time – prevention, diagnosis, treatment, and follow up – yet there is no commitment from governments to timeliness as a core aspect of the provision of health care. As a result, the CMA/COA submit the legislation violates principles of fundamental justice due to arbitrariness and irrationality.

> *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 512, *CMA/COA Authorities*, Tab 8

34. This Honourable Court has identified the three criteria that must be fulfilled in order to establish a principle of fundamental justice:

> First, it must be a legal principle. This serves two purposes. First, it "provides meaningful content for the s. 7 guarantee"; second, it avoids the "adjudication of policy matters": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503. Second, there must be sufficient consensus that the alleged principle is "vital or fundamental to our societal notion of justice": *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 590. The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice. Third, the alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results. Examples of principles of fundamental justice that meet all three requirements include the need for a guilty mind and for reasonably clear laws.
>
> *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 at para. 8, *CMA/COA Authorities*, Tab 3

35. The CMA/COA respectfully submit that the trial judge erred in this case in balancing the harms to individuals with the greater good to society of Medicare, under the rubric of *Charter* section 7 rather than under *Charter* section 1. As this Court has recently held:

> The balancing of individual and societal interests within s. 7 is only relevant when elucidating a particular principle of fundamental justice... Once the principle of fundamental justice has been elucidated, however, it is not within the ambit of s. 7 to bring into account such "societal interests" as health care costs.
>
> *Malmo-Levine, supra* at para. 98, *CMA/COA Authorities*, Tab 10

36. This Honourable Court recently reiterated that the state has an interest in avoiding harm to those subject to its laws which may justify parliamentary action:

> In other words, avoidance of harm is a "state interest" within the rule against arbitrary or irrational state conduct mentioned in *Rodriguez*, at p. 594, previously cited, that
>
> > Where the deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be), it seems to me that a breach of fundamental justice will be made out, as the individuals' rights will have been deprived for no valid purpose.
>
> *Malmo-Levine, supra* at para. 131, *CMA/COA Authorities*, Tab 10

37. The state has a particular interest in acting to protect vulnerable persons. All patients, including those waiting to receive medical care, are vulnerable to the exercise of state power which limits access to health care. The CMA/COA submit that in the context of the single payer (publicly funded) model of health care delivery where access to alternate means for such care is prohibited by the state, patients are a vulnerable group. It is an arbitrary and irrational use of state power for the Québec Legislature, in section 15 of the *Health Insurance Act,* to prohibit alternative meaning of access to health care services without assuming a concomitant state obligation to guarantee timely access to necessary medical care, where the failure to afford timely access may lessen the quality and quantity of life.

> *Health Insurance Act,* R.S.Q., c. A-29, s. 15
>
> *New Brunswick, supra* at para. 70, *CMA/COA Authorities*, Tab 7
>
> *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at para. 88, *CMA/COA Authorities*, Tab 1
>
> *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at 595, *CMA/COA Authorities*, Tab 12

38. The CMA/COA submit that it is open to this Court to read the concept of timeliness into the existing legislative provisions so as to render them constitutionally compliant. However, in the context of health care, a commitment to timeliness must be demonstrated in fact. The evidence before the trial judge and the findings of the Romanow Commission and the Senate

Committee clearly indicate that access to medically necessary health care is not always provided in a timely manner.

39. In the absence of a commitment which provides timely access to publicly funded care, it is irrational for the state to prohibit access or the means of access to other forms of medically necessary care. The CMA/COA do not argue that governments must fund all medical services, but rather that having chosen to provide insured medical services under a single payer (publicly funded) model and prohibiting private insurance for these services, the government must provide the insured services in a timely manner. Failure to do so would be irrational, as it would constitute state action harming vulnerable persons.

> *Hitzig v. Canada*, [2003] O.J. No. 3873 (C.A.) at paras. 113-121, *CMA/COA Authorities*, Tab 6

40. Timeliness as a concept integral to many aspects of fundamental justice has been recognized by the common law and equity, through such concepts as laches, or the timeliness of trial rights. In particular, timeliness in the provision of medically necessary health care is essential to preserving human dignity, security of the person and promotion of human health.

> *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at paras. 121-133, *CMA/COA Authorities*, Tab 2

> *R. v. Askov*, [1990] 2 S.C.R. 1199 at 1219-1223, *CMA/COA Authorities*, Tab 9

41. This is not just a failure of the Québec provincial legislature: it is an issue which involves the constitutional obligations of the federal government as well. As discussed above, one of the five criteria established by the federal government for cost-sharing of provincial Medicare is the principle of "accessibility". The federal government, however, has not acknowledged timeliness as an aspect of accessibility.

42. Recognizing timeliness as intrinsic to accessibility and the requirements of fundamental justice is consistent with the constitutional commitments made by both the federal and provincial governments in section 36(1) of the *Constitution Act, 1982*, which provides:

> 36(1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to:
>
> (a) promoting equal opportunities for the well-being of Canadians;
>
> ...; and
>
> (c) providing essential public services of reasonable quality to all Canadians.

Constitution Act, 1982, s. 36(1), being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 [hereinafter *Constitution Act, 1982*]

43. Section 36(1) of the *Constitution Act, 1982* establishes a constitutional commitment to promoting opportunities for well-being, and providing essential public services of reasonable quality. However, where governments fail to provide access to necessary medical care in a timely fashion in the public system, it is irrational to use the legislative power of prohibition to forbid viable alternatives. This irrationality contravenes principles of fundamental justice. Where Medicare contains no method of measuring or achieving timely access, the promise that governments will provide medically necessary treatment becomes illusory.

Constitution Act, 1982, s. 36(1), *supra*

44. In the alternative, if this Honourable Court were to conclude that the prohibition is in accordance with the principles of fundamental justice because it promotes legitimate social interests, the CMA would respectfully submit that this conclusion should not be a "frozen" one. Any decision should not enshrine the status quo of excessive wait times as a perpetually viable constitutional state of affairs. This Court could establish threshold criteria for the life and health of Canadian citizens, below which the larger public good cannot be used to justify violations of individual rights. Recent studies such as the Romanow Commission and the Senate Committee found that the waiting time issue is dynamic, evolving and not static.

(c) Not an Economic Right

45. Some of the respondents and interveners argue that the issue is one of economic rights – the purchase of insurance – which is not protected by the *Charter*. The CMA/COA submit that

in the realm of access to health care, insurance can be a tool to secure that which is *Charter* protected – timely access to medically necessary health care. The economic aspect is incidental to securing the right.

46. The CMA/COA take the position that any economic and contract aspects are merely incidental to the real issue of the s. 7 right to life, liberty and security of the person. The trial judge concluded that economic barriers in the impugned legislation are ancillary to the principle of access to health care:

> Le Tribunal estime que les barrières économiques établies par les articles 15 LAM et 11 LAH sont intimement liées à la possibilité d'accès à des soins de santé. Sans ces droits, compte tenu des coûts impliqués, l'accès aux soins privés est illusoire. Dans ce sens, ces dispositions sont une entrave à l'accès à des services de santé et sont donc susceptibles de porter atteinte à la vie, à la liberté et à la sécurité de la personne.

Judgment of Piché J., *Joint Appellants' Record*, Vol. I, pp. 126-127

47. The CMA/COA submit that the trial judge was correct in concluding that excessive delay in the provision of necessary medical care violates the right to life, liberty and security of the person. Any economic rights to contract are incidental. This case is about patients in Canada having the right to quality health care in a timely manner.

Judgment of Piché J., *Joint Appellants' Record*, Vol. I, pp. 125-127, 133-134

48. To deny Canadians the right to timely access to health care on such conjectural grounds as the secondary aspect of this case, which touches economic or contractual aspects, would denude section 7 of its promise to life, liberty and security of the person. A legislative prohibition on the purchase of insurance when timely access is not provided is not the denial of an economic right, but the denial of a fundamental right to life, liberty and security.

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624 at paras. 91-93 [hereinafter *Eldridge*], *CMA/COA Authorities*, Tab 4

2. Not Saved Under *Charter* Section 1

49. It is clear that once an infringement of section 7 is established, the onus moves to the Government to justify the infringement under s. 1 pursuant to the *Oakes* test. The framework under section 1 was first established in *R v. Oakes* :

> A limitation to a constitutional guarantee will be sustained once two conditions are met. First. the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right.

New Brunswick, supra at para. 95 citing *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 182, *CMA/COA Authorities*, Tab 7

50. It has long been established that the rights protected under section 7 are of significant importance and cannot ordinarily be overridden by competing social interests. In addition, "rarely will a violation of the principles of fundamental justice...be upheld as a reasonable limit demonstrably justified in a free and democratic society".

Godbout v. Longueuil (City), [1997] 3 S.C.R. 844 at para. 91, *CMA/COA Authorities*, Tab 5

New Brunswick, supra at para. 99 citing *Re B.C. Motor Vehicle, supra* at 518, *CMA/COA Authorities*, Tab 7

51. The values in issue here are similar to those considered by this Honourable Court in *Eldridge*, where La Forest J. for the Court held:

> Given the central place of good health in the quality of life of all persons in our society, the provisions of substandard medical services to the deaf necessarily diminishes the overall quality of their lives. The government has simply not demonstrated that this unpropitious state of affairs must be tolerated in order to achieve the objective of limiting health care expenditures. Stated differently, the government has not made a "reasonable accommodation" of the appellants' disability.

Eldridge, supra at para. 94, *CMA/COA Authorities*, Tab 4

52. The Romanow Commission has advocated central management of waiting lists, with common indicators, benchmarks and public accounting. The Senate Committee has recommended care guarantees. These are strong indications that solutions exist in a public health care system that will extend a commitment to timely access to medically necessary health care.

Kirby, *The Health of Canadians*, Vol. 6, *supra* at 103-113, *CMA/COA Authorities*, Tab 16

Romanow, *Building on Values, supra* at 143-144, *CMA/COA Authorities*, Tab 15

53. The CMA/COA submit that if this Court holds that the legislation contravenes the *Charter*, governments have open to them a full range of options that could be implemented to address excessive waiting times for care. These include government commitments to assurances of timeliness as an essential element of the provision of medically necessary care where wait times are excessive, adopting timeliness as an element of "accessibility" under the *Canada Health Act*, and committing to clinically responsive access standards as envisioned by the Senate Committee. Other measures such as streamlining and improving the portability of out-of-province provisions in provincial Medicare statutes may also be considered by governments. In the absence of such assurances, however, a system which precludes alternative means to obtain medically necessary health care is unconstitutional where wait times are excessive.

54. Accordingly, it is submitted that a violation of *Charter* section 7 could be justified pursuant to section 1 if and only if the government were able to prove, on a balance of probabilities based on reliable and credible evidence rather than conjecture, that no alternative exists that could be implemented to ensure timeliness while at the same time maintaining the viability of the public single-payer.

PART IV: SUBMISSIONS CONCERNING COSTS

55. The CMA/COA seeks no costs and asks that none be awarded against it.

PART V: ORDER SOUGHT

56. The CMA/COA submit that when a person's life is threatened or the quality of his or her life is substantially compromised and that person is prohibited from obtaining the medically necessary treatment through other means, even though the publicly funded system is unable to provide the necessary care, then constitutional questions # 1 and 3 should be answered affirmatively and the corresponding questions # 2 and 4 should be answered in the negative. Any declaration of unconstitutionality should, however, be delayed by three years, or such other period of time as this Court shall determine, so that the government may during this period institute the systemic commitment to timely access to medically necessary care and ensure simultaneously that individual patients receive care in as timely a manner as possible.

57. The CMA/COA seek leave of this Court, pursuant to rule 59(2), to present oral argument at the hearing of this appeal.

Rules of the Supreme Court of Canada, SOR/2002-156, as amended, Rule 59(2)

ALL OF WHICH IS RESPECTFULLY SUBMITTED

March 15, 2004

Guy Pratte

for: Freya Kristjanson

C:\Documents and Settings\neffendi\Local Settings\Temp\Factum on appeal 1 (except part VII) v1.doc

PART VI: TABLE OF AUTHORITIES

Cases **Paragraph Nos.**

B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315....................37

Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307...................40

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004 SCC 4..34

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.........................48, 51

Godbout v. Longueuil (City), [1997] 3 S.C.R. 844..50

Hitzig v. Canada, [2003] O.J. No. 3873 (C.A.)..39

New Brunswick (Minister of Health and Community Services) v. G.(J.), [1999] 3 S.C.R. 46..28, 31, 37, 49, 50

Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486..33

R. v. Askov, [1990] 2 S.C.R. 1199...40

R v. Malmo-Levine; R. v. Caine, 2003 SCC 74..23, 35, 36

R. v. Morgentaler, [1988] 1 S.C.R. 30...27, 28

Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519...........................37

Stein v. Québec (Régie de l'Assurance-maladie), [1999] Q.J. No. 2724 (S.C.)....................32

Secondary Sources **Paragraph Nos.**

R.J. Blendon et al., "Common concerns Amid Diverse Systems: Health Care Experiences in Five Countries" (2003), 22 Health Affairs 106..16

Canada, Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada – Final Report*, (Ottawa, 2002) (Chair: Roy Romanow)..9, 13, 15, 20, 52

Canada, The Standing Senate Committee on Social Affairs, Science and Technology, *The Health of Canadians – The Federal Role: Final Report on the State of the Health Care System in Canada*, Vol. 6 (Ottawa: 2002) (Chair: Michael Kirby)..9, 10, 14, 19, 20, 52

Canadian Medical Association, *Code of Ethics of the Canadian Medical Association*, (Ottawa: The Association), October 1996 7

OECD, Labour and Social Affairs Committee, *Explaining Waiting Times Variations for Elective Surgery Across OECD Countries*, Working Paper No. 7, Doc. No. DELSA/ELSA/WD/HEA(2003)7 (2003) 17

OECD, Labour and Social Affairs Committee, *Tackling Excessive Waiting Times for Elective Surgery: A Comparison of Policies in Twelve OECD Countries*, Doc. No. DELSA/ELSA/WD/HEA(2003)6 (2003) 17

OECD, Labour and Social Affairs Committee, *Tackling Excessive Waiting Times for Elective Surgery: A Comparison of Policies in Twelve OECD Countries Annex 1*, Doc. No. DELSA/ELSA/WD/HEA(2003)6/ANN1 (2003) 26

Statistics Canada, *Access to Health Care Services in Canada, 2001* by C. Sanmartin, C. Houle, J.-M. Berthelot and K. White, (Ottawa, Minister of Industry, 2002) 11, 12

PART VII: STATUTES AND REGULATIONS

Loi canadienne sur la santé, L.R.C. 1985 c. C-6

7. Le versement à une province, pour un exercice, de la pleine contribution pécuniaire visée à l'article 5 est assujetti à l'obligation pour le régime d'assurance-santé de satisfaire, pendant tout cet exercice, aux conditions d'octroi énumérées aux articles 8 à 12 quant à :

a) a gestion publique;
b) l'intégralité;
c) l'universalité;
d) la transférabilité;
e) l'accessibilité.

12. (1) La condition d'accessibilité suppose que le régime provincial d'assurance-santé :

a) offre les services de santé assurés selon des modalités uniformes et ne fasse pas obstacle, directement ou indirectement, et notamment par facturation aux assurés, à un accès satisfaisant par eux à ces services;
b) prévoie la prise en charge des services de santé assurés selon un tarif ou autre mode de paiement autorisé par la loi de la province;
c) prévoie une rémunération raisonnable de tous les services de santé assurés fournis par les médecins ou les dentistes;
d) prévoie le versement de montants aux hôpitaux, y compris les hôpitaux que possède ou gère le Canada, à l'égard du coût des services de santé assurés.

Canada Health Act, R.S.C. 1985, c. C-6

7. In order that a province may qualify for a full cash contribution referred to in section 5 for a fiscal year, the health care insurance plan of the province must, throughout the fiscal year, satisfy the criteria described in sections 8 to 12 respecting the following matters:

(a) public administration;
(b) comprehensiveness;
(c) universality;
(d) portability; and
(e) accessibility.

12. (1) In order to satisfy the criterion respecting accessibility, the health care insurance plan of a province

(a) must provide for insured health services on uniform terms and conditions and on a basis that does not impede or preclude, either directly or indirectly whether by charges made to insured persons or otherwise, reasonable access to those services by insured persons;
(b) must provide for payment for insured health services in accordance with a tariff or system of payment authorized by the law of the province;
(c) must provide for reasonable compensation for all insured health services rendered by medical practitioners or dentists; and
(d) must provide for the payment of amounts to hospitals, including hospitals owned or operated by Canada, in respect of the cost of insured health services.

(2) Pour toute province où la surfacturation n'est pas permise, il est réputé être satisfait à l'alinéa (1)*c*) si la province a choisi de conclure un accord et a effectivement conclu un accord avec ses médecins et dentistes prévoyant :

a) la tenue de négociations sur la rémunération des services de santé assurés entre la province et les organisations provinciales représentant les médecins ou dentistes qui exercent dans la province;

b) le règlement des différends concernant la rémunération par, au choix des organisations provinciales compétentes visées à l'alinéa *a*), soit la conciliation soit l'arbitrage obligatoire par un groupe représentant également les organisations provinciales et la province et ayant un président indépendant;

c) l'impossibilité de modifier la décision du groupe visé à l'alinéa *b*), sauf par une loi de la province.

(2) In respect of any province in which extra-billing is not permitted, paragraph (1)(*c*) shall be deemed to be complied with if the province has chosen to enter into, and has entered into, an agreement with the medical practitioners and dentists of the province that provides

(a) for negotiations relating to compensation for insured health services between the province and provincial organizations that represent practising medical practitioners or dentists in the province;

(b) for the settlement of disputes relating to compensation through, at the option of the appropriate provincial organizations referred to in paragraph (*a*), conciliation or binding arbitration by a panel that is equally representative of the provincial organizations and the province and that has an independent chairman; and

(c) that a decision of a panel referred to in paragraph (*b*) may not be altered except by an Act of the legislature of the province.

Loi sur l'assurance-maladie, L.R.Q., c. A-29, article 15

CONTRATS D'ASSURANCE ET SUBROGATION

Contrats d'assurance prohibés.

15. Nul ne doit faire ou renouveler un contrat d'assurance ou effectuer un paiement en vertu d'un contrat d'assurance par lequel un service assuré est fourni ou le coût d'un tel service est payé à une personne qui réside ou qui séjourne au Québec ou à une autre personne pour son compte, en totalité ou en partie.

Contrats en vigueur pour d'autres services et biens.

Si un tel contrat a aussi pour objet d'autres services et biens, il demeure en vigueur quant à ces autres services et biens et la considération prévue à l'égard de ce contrat doit être ajustée en conséquence, à moins que le bénéficiaire de ces services et de ces biens n'accepte de recevoir en échange des avantages équivalents.

Délai de remboursement.

Si la considération a été payée à l'avance, le montant du remboursement ou de l'ajustement, selon le cas, doit être remis dans les trois mois à moins que la personne assurée n'accepte au cours de cette période de recevoir des avantages équivalents.

Montants inférieurs à 5 $.

Si le montant total des remboursements ou des ajustements qui doivent être effectués à l'égard d'une même personne en vertu d'un contrat conclu pour au plus une année est inférieur à 5 $, le montant n'est pas exigible mais il doit être remis au ministre pour être versé au Fonds de la recherche en santé du Québec visé dans l'article 96.

Exception.

Le premier alinéa ne s'applique pas à un contrat qui a pour objet l'excédent du coût des services assurés rendus hors du Québec ou l'excédent du coût des médicaments dont la Régie assume le paiement. Il ne s'applique pas non plus à un contrat qui a pour objet la contribution que doit payer une personne

Health Insurance Act, R.S.Q., c. A-29, section 15.

CONTRACT OF INSURANCE AND SUBROGATION

Coverage under contract of insurance prohibited.

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 temporary resident of Québec or to another person on his behalf.

Contract in force for other services and property.

If such a contract also covers other services and property it shall remain in force as regards such other services and property and the consideration provided with respect to such contract must be adjusted accordingly, unless the beneficiary of such services and of such property agrees to receive equivalent benefits in exchange.

Delay for reimbursement.

If the consideration was paid in advance, the amount of the reimbursement or adjustment, as the case may be, must be remitted within three months unless the insured person agrees, during such period, to receive equivalent benefits.

Amounts less than $5.

If the total amount of the reimbursements or adjustments to be made as regards one person under a contract made for not more than one year is less than $5, the amount shall not be exigible but it shall be remitted to the Minister to be paid to the Fonds de la recherche en santé du Québec contemplated in section 96.

Excess cost.

The first paragraph does not apply to a contract covering the excess cost of insured services rendered outside Québec or the excess cost of any medication of which the Board assumes payment nor does it apply to a contract covering the contribution payable by an insured person under the Act respecting prescription

assurée en vertu de la Loi sur l'assurance médicaments (chapitre A-29.01).

1970, c. 37, a. 12; 1970, c. 42, a. 17; 1971, c. 47, a. 8; 1974, c. 40, a. 6; 1981, c. 22, a. 3; 1983, c. 54, a. 9; 1989, c. 50, a. 21; 1992, c. 19, a. 3; 1996, c. 32, a. 93; 1999, c. 89, a. 42; 1999, c. 89, a. 21.

drug insurance (chapter A-29.01).

1970, c. 37, s. 12; 1970, c. 42, s. 17; 1971, c. 47, s. 8; 1974, c. 40, s. 6; 1981, c. 22, s. 3; 1983, c. 54, s. 9; 1989, c. 50, s. 21; 1992, c. 19, s. 3; 1996, c. 32, s. 93; 1999, c. 89, s. 42; 1999, c. 89, s. 21.

Constitution Act, 1982, s. 36, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11

36. 1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

(a) promoting equal opportunities for the well-being of Canadians;

(b) furthering economic development to reduce disparity in opportunities; and

(c) providing essential public services of reasonable quality to all Canadians.

36. 1) Sous réserve des compétences législatives du Parlement et des législatures et de leur droit de les exercer, le Parlement et les législatures, ainsi que les gouvernements fédéral et provinciaux, s'engagent à

a) promouvoir l'égalité des chances de tous les Canadiens dans la recherche de leur bien-être;

b) favoriser le développement économique pour réduire l'inégalité des chances;

c) fournir à tous les Canadiens, à un niveau de qualité acceptable, les services publics essentiels.

Règles de la Cour suprême du Canada, DORS/2002-156, tel qu'amendées, Règle 59(2)
Rules of the Supreme Court of Canada, SOR/2002-156, as amended, Rule 59(2)

59 (2) Le juge peut à sa discrétion, une fois les mémoires de demande d'autorisation d'appel, d'appel ou de renvoi déposés et signifiés, autoriser l'intervenant à présenter une plaidoirie orale à l'audition de la demande d'autorisation d'appel, le cas échéant, de l'appel ou du renvoi, et déterminer le temps alloué pour la plaidoirie orale.

59 (2) After all of the memoranda of argument on an application for leave to appeal or the facta on an appeal or reference have been filed and served, a judge may, in his or her discretion, authorize an intervener to present oral argument at the hearing of the application for leave to appeal, if any, the appeal or the reference, and determine the time allotted for oral argument.

S.C.C. File No. 29272

JACQUES CHAOUILLI et al.
Appellants (Appellants)

- and -

ATTORNEY GENERAL OF QUÉBEC et al.
Respondents (Respondents)

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

FACTUM OF THE CANADIAN MEDICAL ASSOCIATION AND THE CANADIAN ORTHOPAEDIC ASSOCIATION

BORDEN LADNER GERVAIS LLP
Barristers and Solicitors
World Exchange Plaza
100 Queen Street, Suite 1100
Ottawa, Ontario, Canada K1P 1J9

Guy Pratte
Tel: (613) 237-5160
Fax: (613) 230-8842

Freya Kristjanson
Tel: (416) 367-6388
Fax: (416) 361-7053

Solicitors for the Interveners,
The Canadian Medical Association
and The Canadian Orthopaedic Association