S.C.C. File No. 29272

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

BETWEEN:

JACQUES CHAOULLI and GEORGE ZÉLIOTIS

APPELLANTS

and

ATTORNEY GENERAL OF QUÉBEC and ATTORNEY GENERAL OF CANADA

RESPONDENTS

FACTUM OF THE INTERVENERS CAMBIE SURGERIES CORPORATION, FALSE CREEK SURGICAL CENTRE INC., AND OTHERS

Solicitors for the Interveners Cambie Surgeries et al.:

Blake, Cassels & Graydon LLP
Barristers & Solicitors
Suite 2600, Three Bentall Centre
595 Burrard Street, P.O. Box 49314
Vancouver, British Columbia, V7X 1L3
Tel: (604) 631-3300 Fax: (604) 631-3309
Marvin R.V. Storrow, Q.C.
Peter W. Hogg, Q.C.
Joanne R. Lysyk
Peter L. Rubin

Ottawa Agents for the Interveners Cambie Surgeries et al.:

Blake, Cassels & Graydon LLP
Barristers and Solicitors
World Exchange Tower
20th Floor, 45 O'Connor Street
Ottawa, Ontario, K1P 1A4
Tel: (613) 788-2200 Fax: (613) 788-2247
Attention: Gordon Cameron

PART I: STATEMENT OF FACTS

1. The proposed 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, 4111044 Canada Inc. (carrying on business as Ambulatory Surgical Centre Vancouver LP), South Fraser Surgical Centre Inc., Victoria Surgery Ltd., Kamloops Surgery Centre Ltd., Valley Cosmetic Surgery Ltd., Surgical Centres Inc., the British Columbia Orthopaedic Association ("BCOA") and the British Columbia Anaesthesiologists Society ("BCAS") (collectively, "these Interveners") adopt paragraphs 6-24 of the Statement of Facts set out in the Factum of the Appellant, George Zéliotis, and also adopt the statements of fact contained in paragraphs 36-38 and 70 of the Factum of the Appellant Zéliotis.

2. These Interveners also adopt paragraphs 3-4, 7-8 and 10 of the Statement of Facts set out in the Factum of the Appellant, Dr. Jacques Chaoulli and also the Statement of Facts contained in paragraph 149 to 152 of the Factum of the Appellant Chaoulli.

3. These Interveners are (with the exception of the BCOA and BCAS) private clinics providing surgical and diagnostic services in British Columbia, primarily to patients who are excluded from the prohibitions on privately funded medical services under the British Columbia *Medicare Protection Act*, R.S.B.C. 1996, c. 286. Specifically, these private clinics provide medical services to injured workers who are covered by the Workers Compensation Board ("WCB"), to persons injured in motor vehicle accidents who are insured by the Insurance Corporation of British Columbia ("ICBC"), to members of the Royal Canadian Mounted Police ("RCMP"), to First Nations individuals, to veterans, to Canadian Armed Forces personnel and to tourists. Some of these Interveners also provide uninsured services such as dental surgery.

PART II: POINTS IN ISSUE

4. The constitutional questions are as stated by the honourable Mr. Justice Major on August 15, 2003 and the points in issue on this appeal are stated in the Appellants' Factums. These interveners will limit their submissions to the following points:

(a) whether s. 11 of the *Hospital Insurance Act*, R.S.Q., c. A-28 and 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*; and

(b) if so, whether the infringement is 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*.

PART III: ARGUMENT

A. Introduction

5. The specific provisions which are the subject of this appeal must be considered within their legislative and factual context as part of a public health care regime which:

(a) limits or rations medical care within the public health care regime itself; and

(b) at the same time, imposes a number of statutory prohibitions and regulations aimed at preventing or deterring the development of alternative sources of medical care, diagnosis and treatment.

6. It is clear from evidence on the record in this case that in numerous instances the current public health care system in Canada is not providing Canadians with the medical care that they need, when they need it.

7. There have been numerous studies, reviews, debates and proposals for reform of the health care system over the last decade or more. As one writer has put it, "Health care reform proposals are akin to New Year's resolutions – they occur with predictable regularity

and enthusiastic commitment, only to be forgotten after a short passage of time". All the while, waiting lists continue to grow.

> D. Greschner, "Public Law in the Romanow Report" (2003), 66 Sask. L. Rev. 565-576 at para. 22
> Factum of the Respondent, the Attorney General of Canada, at para. 71
> Factum of the Respondent, the Attorney General of Quebec, at paras. 51-69

8. The Respondents in effect admit that the health care system is ailing, but argue that it has not been demonstrated that removing the barriers to private funding of health care would provide a panacea for the system's ills.

> Factum of the Respondent, the Attorney General of Canada, paras. 5, 44, 67, 70-72
> Factum of the Respondent, the Attorney General of Quebec, paras. 69, 144-147

9. Even if this is true, it begs the question, which is: if individual Canadians are not receiving adequate care under the public health care system, are the governments of Canada justified in preventing those individuals from using their own resources to obtain the medical treatment that is necessary for the protection of their health, for the prevention or amelioration of pain, suffering, disability or disease, and perhaps even to save their own lives? It is not a question of whether allowing individuals to do so will "fix" the system. Rather, it is a question of whether individuals can justifiably be prohibited from providing necessary and adequate health care for themselves, when the government is not providing it for them on a timely basis.

B. Liberty and Security of the Person

10. These Interveners adopt the submissions of the Appellant Zéliotis (at paragraphs 28-35 of his Factum) regarding the rights and interests which are at stake on this appeal.

11. In short, the right to life, liberty and security of the person includes a right to take care of one's own body, and to take reasonable steps to protect oneself from or ameliorate pain, suffering or risk to life or health, including procuring medical or other treatment. In essence, there is a broad right to preserve one's own life and health, which includes a right to seek medical treatment for one's injuries and illnesses. In effect, without this right, all of

the other rights and interests comprised within the term "life, liberty and security of the person" are rendered meaningless.

1. Applicability of Section 7

12. Some doubt has been expressed in past decisions of this Court as to whether s. 7 is intended to guard only against deprivations of life, liberty and security of the person which result from "an individual's interaction with the justice system", or occur in some similar adjudicative context. That question was left open by the majority of this Court in *Gosselin v. Quebec (A.G.)*.

> *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at para. 65
> *Gosselin v. Quebec*, [2002] 4 S.C.R. 429, 2002 SCC 84, at paras. 76-80

13. In these Interveners' submission, it would be contrary to both the plain language of s. 7 of the *Charter* and to the spirit of the section to hold that serious deprivations of life, liberty and security of the person might be rendered immune from constitutional scrutiny simply because the legislator, or the state, has chosen to remove these deprivations from an adjudicative context. Section 7 provides:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof *except* in accordance with the principles of fundamental justice.

14. In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 501, Lamer J. (as he then was) said:

> ...it is clear to me that the interests which are meant to be protected by the words "and the right not to be deprived thereof except in accordance with the principles of fundamental justice" of s. 7 are the life, liberty and security of the person. The principles of fundamental justice, on the other hand, are not a protected interest, but rather a qualifier of the right not to be deprived of life, liberty and security of the person.

15. It would be contrary to the spirit of s. 7 to read it as protecting the individual from serious deprivations of life and liberty resulting from failures and imperfections in the administration of justice, but as not protecting the individual in a context where there were

no adjudicative or procedural protections in place whatsoever. Such an interpretation would fail to protect the individual at exactly the point when the risk of injustice and abuse of power was greatest. For example, a death or disability that resulted from the rationing of emergency facilities or hospital procedures would be unreviewable while a far less serious deprivation would be reviewable if it followed an unfair trial or hearing.

16. In these Interveners' submission, it is the nature and seriousness of the individual interest at stake which must be considered the most important factors in determining whether s. 7 is applicable. There must be limits on the extent to which legislators can authorize serious or fundamental intrusions upon the liberty and security interests of their subjects, within the justice system or otherwise, without providing procedural and substantive protections which are in accordance with the principles of fundamental justice.

2. Right to take care of one's own body

17. In *Ciarlariello v. Schachter,* [1993] 2 S.C.R. 119, this Court recognized that, at common law, the right to make one's own decisions regarding one's own body is a fundamental right falling within the sphere of personal autonomy (at 135):

> *It should not be forgotten that every patient has a right to bodily integrity.* This encompasses the right to determine what medical procedures will be accepted and the extent to which they will be accepted. *Everyone has the right to decide what is to be done to one's own body.* This includes the right to be free from medical treatment to which the individual does not consent. *This concept of individual autonomy is fundamental to the common law* and is the basis for the requirement that disclosure be made to a patient.
>
> (emphasis added)

18. Similarly, in *Fleming v. Reid (Litigation Guardian)* (1991), 82 D.L.R.(4th) 298, the Ontario Court of Appeal stated (at pp. 309, 312, *per* Robins J.A.):

> The right to determine what shall, or shall not, be done with one's own body, and to be free from non-consensual medical treatment, is a right deeply rooted in our common law. This right underlies the doctrine of informed consent. With very limited exceptions, every person's body is considered inviolate....
>
> The common law right to bodily integrity and personal autonomy is so entrenched in the traditions of our law as to be ranked as fundamental and

> deserving of the highest order of protection. This right forms an essential part of an individual's security of the person and must be included in the liberty interest protected by s. 7. *Indeed, in my view, the common law right to determine what shall be done with one's own body and the constitutional right to security of the person, both of which are founded on the belief in the dignity and autonomy of each individual, can be treated as co-extensive.*
>
> (emphasis added)

19. In these Interveners' submission, the right to take care of one's own body is an aspect of life (in extreme cases) and liberty and security of the person, within the meaning of s. 7 of the *Charter*.

20. In this Court's recent judgment in *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74, Gonthier and Binnie JJ. summarized the jurisprudence defining "liberty" under s. 7 of the *Charter* (at para. 85):

> In *Morgentaler, supra*, Wilson J. suggested that liberty "grants the individual a degree of *autonomy in making decisions of fundamental personal importance*, without interference from the state" (p. 166). Liberty accordingly means more than freedom from physical restraint. It includes "the right to an *irreducible sphere of personal autonomy wherein individuals may make inherently private choices* free from state interference": *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 66; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 80. This is true only to the extent that such matters "can properly be characterized as *fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence*": *Godbout, supra*, at para. 66. See also *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, at para. 54; *Buhlers v. British Columbia (Superintendent of Motor Vehicles)* (1999), 170 D.L.R. (4th) 344 (B.C.C.A.), at para. 109; *Horsefield v. Ontario (Registrar of Motor Vehicles)* (1999), 44 O.R. (3d) 73 (C.A.)
>
> (emphasis added)

21. Physical health is a matter of fundamental personal importance which falls within the sphere of personal autonomy protected by s. 7 of the *Charter*. In these Interveners' submission, the right to seek take reasonable measures to protect one's own health is an important aspect of liberty.

> *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 83

22. In addition, security of the person includes a right to be free of state interference with bodily integrity as well as serious state-imposed psychological stress.

R. v. Morgentaler, [1988] 1 S.C.R. 30 at 56

23. In particular, security of the person encompasses:

> ...a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state-imposed psychological and emotional stress.... There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these.

Rodriguez v. British Columbia (A.G.), [1993] 3 S.C.R. 519 at 587-588 (*per* Sopinka J. for the majority)
See also:
Winnipeg Child and Family Services v. K.L.W., [2000] 2 S.C.R. 519 at para. 85

24. In these Interveners' submission, the state infringes upon the right to security of the person if it prevents individuals from taking reasonable steps to protect their own life and health.

25. The statutory scheme in the present case has the cumulative effect of depriving individuals of a right to choose. While this in itself might not constitute an infringement of liberty or security of the person, the evidence shows that, given the current state of the public health care system, the scheme has the effect of depriving individuals, in numerous cases, of their right to access health care on a timely basis – that is, of their right to access health care as required and when required in order to relieve pain, preserve quality of life or prevent permanent injury. In these Interveners' submission, when the government removes access to the means of treating one's own body, or restricts access to the extent that bodily harm or unreasonable pain and suffering are likely to result, it deprives individuals of their liberty and security of the person.

See: Factum of the Appellant Zéliotis, paras. 30, 38

26. These Interveners recognize the authority of government to allocate scarce public resources in the manner it sees fit. To the extent that individuals are given a reasonable opportunity to secure, in a timely manner, such medically necessary treatment as is not provided by the state, the failure of the state to provide such treatment does not result in a deprivation of s. 7 rights. Personal autonomy in that case would be protected. In other words, there is no constitutional right to have one's health care (or one's food or lodging) paid for by the government. However, these Interveners submit that the individual does have a right to be protected from government interference with his or her ability to take care of his or her own health.

27. Likewise, the current public health care provisions aimed at preventing the development of a parallel private health care system, including the bar on private health care insurance, would arguably not violate the liberty and security of individuals provided that unlimited, or at least adequate, health care resources were available from the state. In that case, individuals would be restrained in their choice of health care providers, but would not be prevented from accessing health care as needed.

28. These Interveners do not base their argument on freedom of contract, or even absolute freedom of choice in terms of health care providers. These Interveners recognize that the legislatures of the provinces may regulate the provision of health care within their jurisdictions. However, the cumulative effect of the public health care regime in Canada is that individuals are being prevented from protecting their own health and welfare, even when as a practical matter they have the means to do so. The evidence in this case demonstrates that the obstacles being placed in the way of timely medical care are so severe as to result, in many cases, in permanent physical injury or even death. The worst aspect is the degree of physical deterioration which often occurs during the waiting period, which in many cases is irreparable. At the very least, individuals are being subjected to prolonged pain and emotional distress. In these Intervener's submission, this degree of government interference in personal health care decisions is not constitutionally justifiable.

See: Factum of the Appellant Zéliotis, at para. 38

29. The evidence before this Court indicates that patients under the public health care system may face waits of up to two years for certain surgical procedures. During such a lengthy period of time, a young person may be prevented from taking advantage of a significant life or career opportunity, or an older person may die without ever having restored his or her quality of life. For example, a young person might lose the opportunity of a promising career in sports, or an elderly person awaiting cataract surgery or a hip replacement might die of old age while still waiting to have his or her eyesight restored.

Dossier Conjoint des Appellants, Vol. II, pp. 331, 346, 349; Vol. III, pp. 498-499, 518-520

30. The government, by restricting access to medical care outside of the public system, has taken onto itself the power to determine the health, physical mobility, quality of life and even life span of its citizens. It is the government that, under the current health care regime, takes into its own hands, on a daily basis, the health and lives of Canadians. In these Interveners' submission, the government if it is to assume such an authority must justify its actions to a very high level of scrutiny and must be subject to the strictest procedural protections in order to ensure a regime which is fair, rational and just.

C. Principles of fundamental justice

31. It is understood that delineating the boundaries of the principles of fundamental justice involves, to a certain degree, a balancing of the interests of the state and the individual. However, the question of whether a legislative or government measure accords with the principles of fundamental justice is not to be answered merely by asking whether the measure "'strikes the right balance' between individual and societal interests in general" (*R. v. Malmo-Levine, supra*, at para. 96). That is a question to be addressed under s. 1 of the *Charter*. At the s. 7 stage, the question is whether the procedural and substantive rules governing the deprivation of liberty and security of the person accord with the basic tenets of our legal system:

> 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. Those considerations will be looked at, if at all, under s. 1. As Lamer C.J. commented in *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 977:

> It is not appropriate for the state to thwart the exercise of the accused's rights by attempting to bring societal interests into the principles of fundamental justice and to thereby limit an accused's s. 7 rights. Societal interests are to be dealt with under s. 1 of the *Charter*, where the Crown has the burden of proving that the impugned law is demonstrably justified in a free and democratic society.

R. v. Malmo-Levine, supra, at paras. 95-99 (*per* Gonthier and Binnie JJ. for the majority)
See also:
B. (R..) v. Children's Aid Society, supra, at para. 115 (*per* La Forest J.); see also para. 233 (*per* Iacobucci and Major JJ.)

32. This Court has consistently held that, in order for a deprivation of life, liberty or security of the person to be in accordance with the principles of fundamental justice, the deprivation must be both procedurally and substantively fair.

R. v. Morgentaler, supra, at p. 63
Cunningham v. Canada, [1993] 2 S.C.R. 143 at 152
B.(R.) v. Children's Aid Society, supra, at para. 88
New Brunswick v. G. (J.), supra, at paras. 70-71

33. At the very least, fundamental justice requires that any deprivation of liberty or security be in accordance with standards and procedures which are fair, in the sense that they accord with the "basic tenets of our legal system".

Re B.C. Motor Vehicle Act, supra, at p. 503
B. (R.) v. Children's Aid Society, supra, at para. 88

34. In the present case, these Interveners submit that the deprivation cannot accord with the principles of fundamental justice, either substantively or procedurally, for the simple reason that there are neither standards nor procedures set out in the legislation which would ensure that access to medical services is being provided in a manner that is fair, rational or principled.

35. For the most part, the allocation of resources within the public system, is not prescribed by law but rather is left to the discretion of the many individuals and agencies involved in administering and delivering services within the public health care regime. In effect, it may be an individual doctor, civil servant, hospital or board that decides whether a

patient is entitled to medical care, and if so how quickly. In respect of this decision, which may be one of life and death, the patient has no procedural rights and no avenue of appeal.

See:
Factum of the Appellant Zéliotis, at para. 70
Factum of the Respondent, the Attorney General of Canada, at para. 32
Dossier Conjoint des Appellants, Vol. XIII, p. 2250

36. The legislative scheme in Quebec is unique among Canadian provinces in that it purports to recognize, to a limited and very general extent, the rights of patients to adequate medical care. However, the legislation does not provide a right of recourse to a patient who is denied access to timely medical treatment as a result of resource allocation decisions within the public system. Unlike the Health Care Guarantee proposed by the Interveners Senator Kirby et al., for example, the legislation in Quebec does not provide specific guarantees as to wait times and does not enable a patient to access care outside of the Canadian health care system if those specific guarantees are not met.

Health Services and Social Services Act, R.S.Q. c. S-4.2, s. 13
An Act respecting the Health and Social Services Ombudsman, R.S.Q., c. P-31.1
C.M. Flood, M. Stabile and C.H. Tuohy, "The Borders of Solidarity: How Countries Determine the Public/Private Mix in Spending and the Impact on Health Care", Case Western Reserve University Health Matrix: Journal of Law-Medicine, No. 297, 2002 (Record of the A.G. of Canada – Vol. X – p. 3442)
Greschner, "Public Law in the Romanow Report", *supra*, at paras. 7-10
See also:
Report of the Standing Senate Committee on Social Affairs, Science and Technology, "The Health of Canadians – The Federal Role", Final Report, October 2002 ("Kirby Committee, Final Report, October 2002"), Vol. 6, Ch. 5, 6 (pp. 99-121)

37. Moreover, the scope of the medical services which are provided by the Province and which, conversely, may not be privately insured or paid for, is left undefined by the legislation. Under both the *Canada Health Act* and Quebec's *Health Insurance Act*, the scope of insured services which the Province provides (and which a private insurer may not insure) is defined with reference to the terms "medically necessary" or "medically required". However, these terms are not defined and little or no guidance is given as to what is to be

included. This vests a great deal of discretion in the administration and leaves a great deal of room for decisions which are arbitrary or inconsistent with the professed purposes of the *Act*.

> *Canada Health Act*, R.S.C. 1985, c. C-6, ss. 2, 9
> *Health Insurance Act*, R.S.Q., c. A-298, ss. 3, 15, 69
> Flood et al, "The Borders of Solidarity", *supra*, (Record of the A.G. of Canada – Vol. X – p. 3440)

38. In fact, the Canadian health care regime is replete with arbitrary and irrational distinctions. In British Columbia, for example, a number of user groups are exempted by regulation from the strictures of the public health care legislation and are free to access care outside of the public system. These include injured workers who are covered by the WCB, persons injured in motor vehicle accidents who are insured by ICBC, members of the RCMP, First Nations individuals, veterans, Canadian Armed Forces personnel and tourists. The excluded groups are sufficiently large and sufficiently numerous to support the existence of the fourteen private medical clinics included among these Interveners, as well as other private service providers. As a result, for example, employees who are covered by the Workers' Compensation scheme are, in effect, insured by their employers in respect of any workplace injury, and may access private facilities for the treatment of such injuries. Yet, the same employees cannot be insured by their employers for injuries or illnesses that are not work-related.

> *Medicare Protection Act Prescribed Agency Regulation*, B.C. Reg. 381/97

39. Similarly, persons from other jurisdictions are excluded from the legislation, with the result that foreign visitors may access treatment within Canada outside of the public system. This might result in the anomaly that, if two persons, a Canadian and a visitor, receive the same injury at the same time (for example, in a skiing accident), the foreign visitor is likely to receive treatment much more quickly than the Canadian. Insurance against such an injury is also available, in Canada, to the foreign visitor.

40. In short, the legislation in Quebec (and elsewhere in Canada) fails to provide meaningful standards and procedures in order to safeguard the right of an individual to

access adequate medical care on a timely basis. In these Intervener's submission, the legislation fails to accord with the principles of fundamental justice.

D. Justification under Section 1 of the *Charter*

41. In order to justify interference with the fundamental rights of Canadian citizens to care for their own health, these Interveners submit that the Respondents must demonstrate that the interference is justified as a reasonable limit under s. 1 of the *Charter*. The onus in that regard lies with the Respondents.

R. v. Oakes, [1986] 1 S.C.R. 103 at pp. 136-137

42. While the Courts have generally distinguished between cases in which the legislation in issue is of a socio-economic nature requiring the legislature to balance competing interests and, on the other hand, instances in which the State is characterized as the "singular antagonist" of the individual, the Supreme Court of Canada has reaffirmed that such deference only goes so far and the Courts cannot abdicate their responsibility to carefully scrutinize impugned laws. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 129, McLachlin J. (as she then was) stated:

> The bottom line is this. While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the Courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the Courts to maintain this bottom line if the rights conferred by our Constitution are to have force and meaning. The task is not easily discharged, and may require the Courts to confront the tide of popular public opinion. But that has always been the price of maintaining constitutional rights. No matter how important Parliament's goal may seem, if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must therefore fail.

43. In the same case, McLachlin J. discussed the nature of the section 1 analysis and the degree of proof required to meet the test. She said (at para. 133):

> The s. 1 inquiry is by its very nature a fact-specific inquiry. In determining whether the objective of the law is sufficiently important to be capable of overriding a guaranteed right, the court must examine the actual objective of

> the law. In determining proportionality, it must determine the actual connection between the objective and what the law will in fact achieve; the actual degree to which it impairs the right; and whether the actual benefits which the law is calculated to achieve outweighs the actual seriousness of the limitation of the right. In short, s. 1 is an exercise based on the facts of the law at issue and the proof offered of its justification, not on abstractions.

44. Infringements of section 7 will not easily be saved by section 1. The rights that section 7 protects are fundamental and cannot ordinarily be overridden by competing social interests. Moreover, a violation of the principles of fundamental justice will rarely be upheld as a reasonable limit in a free and democratic society.

New Brunswick v. G. (J.), supra, at para. 99

45. The Respondents argue that the restrictions on private medical treatment are necessary to protect the integrity of the health care system and are necessary to ensure fair access of all citizens regardless of their ability to pay. These Interveners acknowledge that the health of all Canadian citizens is a pressing and substantial objective which would satisfy the first branch of the section 1 analysis. However, these Interveners submit that the prohibitions on privately funded health care fail to meet the requirement of proportionality. The Respondents have not shown that permitting private funding of health care would derogate from the benefits enjoyed by Canadians under the public health care system.

46. The Standing Senate Commitee on Social Affairs, Science and Technology chaired by Senator Kirby (the "Kirby Committee") has examined a number of other jurisdictions in which privately funded health care services exist alongside the public system. The committee has concluded:

> The evidence suggests that a contribution of direct payments by patients, allowing private insurance to cover some services, even in publicly funded hospitals, and an expanded role for the private sector in the delivery of health services are the factors which have enabled countries to achieve

> broader coverage of health services for all their citizens. Some countries like Australia and Singapore openly encourage private sector participation as a means to ensure affordable and sustainable health services.
>
> Standing Senate Committee on Social Affairs, Science and Technology, Interim Report on the state of the health care system in Canada: "The Health of Canadians – The Federal Role – Volume Three – Health Care Systems in Other Countries", January 2002 ("Kirby Committee, Interim Report, January 2002"), Vol. 3 - pp. 66

47. The Kirby Committee found that the most comprehensive publicly-funded health care systems are those in Germany, Sweden and the United Kingdom. Each of these countries permits private health care insurance to cover the same benefits that are provided by the public system. Despite the availability of such insurance, the public health care system in those countries covers a greater percentage of health care costs than does Canada. That is, individuals are required to pay less from their own pockets in order to obtain the full spectrum of health care services (including drugs, long term care and the like). Indeed, the evidence in the present case indicates that the percentage of <u>private</u> spending on health care in Quebec is (translation): "one of the highest in the OECD".

> Kirby Committee, Interim Report, January 2002, Vol. 3 - pp. 65-66 and Appendix B
> See also:
> Reasons for Judgment of Piché J., at pp. 43-44, 52 (Dossier Conjoint des Appellants, pp. 59-60, 68)

48. As one witness before the Kirby Committee commented:

> Differences also arise with respect to the extent to the two-tier system in different countries. In the U.K., everyone is locked into paying for the system. In Canada we pay through our taxes. However, unlike Canada, the U.K. has no restrictions on private purchase of publicly insured services. That is always portrayed as a great thing about the Canadian system, but one paradox is that *in the U.K. only 10 per cent to 15 per cent of expenditures comes from the private purse: in Canada that figure is 25 per cent.* Therefore, what you have here is a different form of two-tier system. It just covers a different set of services.
>
> (emphasis added)
>
> Prof. Cam Donaldson, Department of Economics, University of Calgary, quoted by Kirby Committee, Interim Report, January 2002, Vol. 3 - p. 66

49. The Attorney General of Canada in his Factum (at paragraph 57) recognizes that current world economic conditions are such that "no industrialized country has a fully public health care system". Canada already has a "two-tier" system in that certain health care sectors (for example, pharmaceuticals) are not universally covered by the public system. A choice has been made to provide publicly-funded services in certain health care sectors (physician and hospital services) and not in others (for example, prescription drugs, home care, genetic tests and medical equipment), and at the same time to prevent the development of privately funded health care in the sectors where the government provides services.

> Flood et al., "The Borders of Solidarity", *supra*, (Record of the A.G. of Canada – Vol. X – pp. 3440-3441)

50. In other developed countries, a broader spectrum of services is publicly provided than is provided in Canada, but citizens have options outside of the public health care systems in those countries. In these Interveners' submission, the Canadian approach is not more obviously desirable, or more inherently egalitarian, than the approach in these countries.

> Kirby Committee, Interim Report, January 2002, Vol. 3
> C.M. Flood, "Comparing Models of Health Care Reform: Internal Markets and Managed Competition" (University of Toronto, 1998), pp. 134-135

51. This Court has recognized, in the context of s. 15 of the *Charter*, that equality means more than simply identical treatment:

> It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality. This proposition has found frequent expression in the literature on the subject but, as I have noted on a previous occasion, nowhere more aptly than in the well-known words of Frankfurter J. in *Dennis v. United States*, 339 U.S. 162 (1950), at p. 184:
>
> > It was a wise man who said that there is no greater inequality than the equal treatment of unequals.
>
> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 164

52. The public health care system under the *Canada Health Act*, while superficially egalitarian, does not in fact ensure equal access to health care regardless of ability to pay.

Many important aspects of health care are excluded from the public system entirely, with the result that there are inherent inequities in terms of the services available to those without the means to pay.

> Flood et al., "The Borders of Solidarity", *supra*, (Record of the A.G. of Canada – Vol. X – pp. 3440-3441)

53. Moreover, the lack of express standards and the unregulated, broadly diffused exercise of administrative responsibilities within the system results in uneven allocation of resources, geographically and otherwise. For example, waiting times vary greatly from one hospital to another.

> Reasons for Judgment of Piche J., at p. 29 (Dossier Conjoint des Appellants, p. 45)

54. More importantly, the Canadian approach, in these Interveners' submission, is not one that minimally impairs the individual rights of Canadians to look after their own health. The Canadian approach violates fundamental rights of personal autonomy and security to an extent which is unparalleled in any other developed country, and certainly cannot be considered a minimal impairment of those rights. Many other options are available, as is apparent from the comparative survey undertaken by the Kirby Committee. Moreover, it is counterintuitive to suppose that the ability to access private health services could do anything other than reduce the pressures on the public system. That, no doubt, is why Canada is alone among developed countries in prohibiting private access.

> Kirby Committee, Interim Report, January 2002, Vol. 3
> Flood et al., "The Borders of Solidarity", *supra*, (Record of the A.G. of Canada – Vol. X – p. 3441)

55. In these Interveners' submission, the Canadian approach unjustifiably violates rights constitutionally guaranteed by section 7 of the *Charter*.

56. The Interveners respectfully submit that the evidence simply does not support the proposition that the public health care system in Canada will suffer significantly if private payment for insured services is permitted. There is simply no convincing evidence that

permitting private payment in respect of those areas which are currently monopolized by the public system would have any significant detrimental effect.

> Flood et al., "The Borders of Solidarity", *supra*
> See also: C. Tuohy, C. Flood and M. Stabile, "How Does Private Finance Affect Public Health Care Systems? Marshalling the Evidence from OECD Nations" (2003), 28: 4 Journal of Health Politics Policy and Law (Record of the A.G. of Canada – Vol. I – pp. 193-224)

57. It is significant that the Kirby Committee, having engaged in an exhaustive examination of the subject including an in depth review of public and private financing options, doubted that the prohibitions on private health care spending under the Canadian legislative regime could withstand constitutional scrutiny. The Committee's Final Report concludes:

> ...it is clear to the Committee that, when timely access to appropriate care is not available in the publicly funded health care system, the prohibition of private payment for health services becomes increasingly difficult, if not impossible, to justify. The rights to liberty and security of the person under section 7 of the Charter are likely to be violated when timely access to publicly funded health care is denied and, simultaneously, Canadians are effectively prevented from obtaining the required care elsewhere in Canada.
>
> Kirby Committee, Final Report, October 2002, Vol. 6 - p. 108

58. Specifically, in relation to the decision at first instance in the present case, the Kirby Committee said:

> It is also worth noting that [the conclusion of the Quebec Superior Court] was reached in spite of the fact that in European countries and Australia, which have universal and publicly funded health care systems, the purchase of private health care insurance is permitted and does not appear to have caused irreparable damage to the functioning and viability of their publicly funded health care systems.
>
> It must also be pointed out that the experience in these countries severely weakens the argument which some have made that even if the prohibition on purchasing health care insurance violates an individual's right to timely health care, this violation can be justified under section 1 of the Charter. In order for this argument to be valid, the violation must be a "reasonable limit" that can be "demonstrably justified in a free and democratic society". Since other free and democratic societies have universal health care systems and also allow individuals to purchase health care insurance which can be used to cover the cost of obtaining such services outside the publicly funded system, and since the health care systems in those countries appear to

> function effectively, the courts may be unwilling to accept the argument that the violation of an individual's right to timely health care (by prohibiting a parallel private system) is a "reasonable limit that can be demonstrably justified."
>
> Kirby Committee, Final Report, October 2002, Vol. 6 - p. 107

59. These Interveners agree with this conclusion. In summary, the right to take care of one's own body and one's own health is a fundamental aspect of liberty and lies at the core of security of the person. If the government is to deprive Canadians of this right, it must do so in accordance with the principles of fundamental justice, or justify the measures in question as a reasonable limit demonstrably justified in a free and democratic society under s. 1 of the Canadian Charter. Neither of these tests has been met.

60. Concerns that permitting private payment for medical care will imperil the publicly funded system are based primarily on speculation and surmise. As the Kirby Committee points out, the objective evidence does not bear out these concerns. Moreover, as these Interveners have already pointed out, the perception that the Canadian health care system as it presently exists is more comprehensive or universal than the equivalent systems in other developed countries, all of which permit parallel private care, is misconceived.

61. It is simply impermissible, these Interveners submit, for the government to deprive Canadians of fundamental liberty and security interests based upon myths and misconceptions about the comprehensiveness and universality of the public system as it exists or based upon speculation as to the potential dangers of permitting individual Canadians to exercise their fundamental rights. It is respectfully submitted that the appeal should be allowed, and the impugned legislation declared to be unconstitutional.

PART IV: SUBMISSIONS REGARDING COSTS

62. As a rule, apart from any additional disbursements associated with the intervention, costs are not awarded either for or against an intervener. These Interveners therefore do not seek an order for costs, and request that no order for costs be made against them.

Rules of the Supreme Court of Canada, Rule 59
Crane and Brown, *Supreme Court of Canada Practice*, 2002, pp. 310-311

PART V: NATURE OF ORDER SOUGHT

63. The Intervener respectfully submits that the appeal ought to be allowed and the first four Constitutional Questions answered as follows:

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

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*? Answer: No.

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*? Answer: Yes.

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*? Answer: No.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of March, 2004.

M.R.V. Storrow

Marvin R.V. Storrow, Q.C.

Peter Hogg

Peter W. Hogg, Q.C.

Joanne R. Lysyk

Peter L. Rubin

PART VI: LIST OF AUTHORITIES

1. **CASES** **Para.**

2. **STATUTES**

3. OTHER AUTHORITIES