FACTUM OF THE RESPONDENT
ATTORNEY GENERAL OF QUEBEC

PART I – FACTS

«The present debate concerning health and the current problems of accessibility sometimes leads us to forget the not so distant past when ill people would not get care because they simply did not have the means to afford it. Canadian society, in a fit of generosity and equality, has wished that this never happen again.»

- first instance decision, p. 5

1. Faced with the shortcomings of a health system essentially financed through private insurance or individuals' savings and of the inequalities thus generated, Quebec and Canadian societies have established a universal medicare regime financed through public money; in order to guarantee the viability of such a regime, measures were put in place in order to prevent the development of a parallel private regime.

2. This public regime of hospital and health insurance is based on values of equality and social solidarity, as well as on respect for human dignity, values which have been the object of a vast consensus within the population for many decades.

1. The Application

3. The Appellants launched an appeal against decisions from the Quebec Court of Appeal which have rejected with costs their appeals against a decision of the Quebec Superior Court rendered by Madam Justice Ginette Piché.

4. In first instance, the hearing was held over a period of 28 days. More than 250 exhibits were filed, including, among other things, expert reports and many reports from international organizations concerning various medicare systems around the world.

5. The parties have presented 20 witnesses, including 5 expert witnesses for the respondents and 1 for the Appellants. More than half of these witnesses were expert on health care.

6. The Appellants, by a motion for declaratory judgment, request that s. 15 of the *Health Insurance Act* (R.S.Q., c. A-29; hereinafter «*HEIA*») and s. 11 of the *Hospital Insurance Act* (R.S.Q. c. A-28; hereinafter «*HOIA*») be declared unconstitutional.

7. The articles read as follows:

LAM:

> *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.*

[…]

LAH:

11. 1.No one shall make or renew, or make a payment under a contract under which

a) a resident is to be provided with or to be reimbursed for the cost of any hospital service that is one of the insured services;

b) payment is conditional upon the hospitalization of a resident; or

c) payment is dependent upon the length of time the resident is a patient in a facility maintained by an institution contemplated in section 2.

[…]

8. Generally speaking, these provisions have the effect of forbidding that the cost of services insured by one or the other of these laws be reimbursed by private insurance companies.

9. The Appellants, in the conclusions of their re-amended application for declaratory judgment claim the right to «have recourse to non-participating doctors in order to obtain private health services which are medically required», «to enter into private insurance contracts for private medical services which are medically required and provided by non-participating doctors» and «to enter into contracts with non-participating doctors for private hospital services which are medically required» (Re-amended application for declaratory judgment, Appellants' joint file (hereinafter A.J.F.), vol. 2, p. 213).

10. In order to have these rights recognized, the Appellants mainly claim a constitutional right to the free use of their financial resources in order to get insurance which would reimburse the costs of medical or hospital services already covered by the *HEIA* and *HOIA.*

    - Appellant George Zeliotis' factum, par. 33
    - Appellant Jacques Chaoulli's factum, par. 141, 153 and 197

11. In fact, what the Appellants are looking for, is the possibility that a parallel private health care regime, outside of the public regime, be established, which would enable those who have the means to do so to obtain privileged access to health services.

12. Indeed, during the hearing before the first instance judge, counsel for the Appellant Zeliotis has clearly affirmed this when he said: «I argue for the right of people who have more money to have access to parallel health services» (first instance decision, p. 7, A.J.F., vol. 1, p. 23.

13. Now, one of the principles of the medicare system, which is backed by a large consensus within the Quebec and Canadian population, is based on access to health services as a function of the true needs of individuals and not as a function of their capacity to pay. This principle, as well as the values of equality and social solidarity

on which it is founded, are here put into question by the Appellants who allege that they do not have access to medical and hospital services according to conditions which are suitable to them. In fact, what the appellants are asking for is the establishment of a parallel private health care system which would jeopardize the viability of the public medicare system, as will be demonstrated later.

2. The Appellants' Situation

14. In the case of appellant Zeliotis, the medicare system has provided the emergency services, medical treatments and surgery care which were required by his health.

15. Based on his medical file and his testimony, it is impossible to infer that the alleged problems were caused by difficulties of access to health care services. The delays are in fact explained by many personal factors.[1]

16. As to the appellant Chaouilli, he has never claimed to have received inadequate care or that the Quebec health care system has not responded to his personal health needs.[2]

17. At the time when they launched their proceedings, none of the Appellants was in a situation where his health required care.

18. The Appellants have not faced any real difficulty to access medical or hospital services required by their health.

19. On August 15 2003, Mr. Justice Major, for the Court, drafted the following constitutional questions:

> 1. Does s. 11 of *Hospital Insurance Act*, R.S.Q., c. A-28, infringe the rights guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*?
>
> 2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?
>
> 3. Does s. 15 of the *Health Insurance Act*, R.S.Q., c. A-29, infringe the rights guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*?
>
> 4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?
>
> 5. Is s. 15 of the *Health Insurance Act*, R.S.Q., c. A-29, *ultra vires* the Quebec National Assembly, in light of s. 91(27) of the *Constitution Act, 1867*?
>
> 6. Is s. 11 of the *Hospital Insurance Act*, R.S.Q., c. A-28, *ultra vires* the Quebec National Assembly, in light of s. 91(27) of the *Constitution Act, 1867*?

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[1] First instance decision, p. 14, A.J.F., vol. I, p. 28 to 30
[2] First instance decision, p. 15 to 23, A.J.F., vol. I, p. 31 to 39

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

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

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

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

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

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

20. The Appellant Zeliotis adds four questions concerning the conformity of s. 15 *HEIA* and 11 *HOIA* with s. 1 of the Quebec Charter of Rights and Freedoms (R.S.Q., c. C-12; hereinafter the «*Quebec Charter*») (Appellant Zeliotis' factum, par. 26).

21. In response to these questions, the Attorney General of Quebec argues that the impugned provisions do not infringe the rights and freedoms invoked by the Appellants. It also argues that if there were an infringement, which it denies, it is justifiable pursuant to the criteria of section 1 of the *Canadian Charter of Rights and Freedoms* (hereinafter the «*Canadian Charter*») or pursuant to the preamble and section 9.1 of the *Quebec Charter*.

22. Moreover, the Attorney General argues that sections 15 *HEIA* and 11 *HOIA* were adopted in accordance with the exclusive legislative jurisdiction of the National Assembly and not that of the federal Parliament over the criminal law.

23. For the purpose of the present factum and for added convenience, the Attorney General will deal simultaneously with the validity of sections 15 *HEIA* and 11 *HOIA* with respect to every argument raised, save for the argument concerning section 12 of the *Canadian Charter*, which only concerns section 11 *HOIA*.

PART III – ARGUMENTS

1. LEGISLATIVE AND HISTORICAL CONTEXT

1.1 LEGISLATIVE FRAMEWORK

24. The *HOIA* and *HEIA*, in which are found the sections which are the object of the present action, as well as the *Act Respecting Health and Social Services* (S.R.Q., c. S-4.2; hereinafter the «*ARHSS*»), constitute, mostly, the legislative framework which regulates the financing, organization and distribution of health services provided to the population of Quebec.

25. These laws aim at ensuring access to quality medical and hospitals services, through the public financing of these services and the coordination of their distribution. It is in fact a «single payer» medicare system financed by the State.[3] The legislature's choice to establish such a system is, as we shall see, based on considerations of fairness and efficiency; it is based both on numerous studies and reports and on a vast popular consensus.

26. The *HEIA* and *HOIA* establish a complete and universal insurance regime by which residents of Quebec and individuals who are staying in the province, pursuant to the applicable regulations, receive the medical and hospital services required by their health free of charge.

- *HOIA*, s. 2 and 8 b); *Regulation respecting the application of the Hospital Insurance Act* (R.R.Q., c. A-28, r.1), s. 1 m) and 2.

- *HEIA*, s. 1 g. 1), 3, 5 to 8 and 69; *Regulation respecting Eligibility and registration of persons in respect of the Régie de l'assurance maladie du Québec*, (R.R.Q., c. A-29, r. 0.01), ss. 1 to 7.2.

27. Pursuant to what is provided by sections 1 c) and 8 *HOIA*, insured hospital services are defined at section 3 of the *Regulation respecting the application of the Hospital Insurance Act*. As to medical services insured by the *HEIA*, they are defined at section 3 of that Act.[4] Generally speaking, these provisions provide that medical and hospital services are insured to the extent that they are required from a medical point of view.

28. Any person who resides in Quebec or who stays there must register with the Régie de l'assurance maladie du Québec (hereinafter the «Régie»). The Régie then provides a health insurance card which attests that the person is entitled to get the services insured by the *HOIA* and *HEIA* (*HOIA*, s. 2.1 and *HEIA*, s. 9).

29. The cost of hospital services is, for its part, assumed by the institutions which manage a hospital centre, using the moneys which they receive from the Minister of Health and Social Services, via the «Régies régionales de la santé et des services sociaux» established pursuant to the *ARHSS*. (*HOIA*, s. 2).[5]

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[3] We specify at the outset that the HOIA and HEIA do not prohibit the presence of private providers of medical or hospital services within the Quebec medicare system. Indeed, most Quebec physicians are private providers of health services and are not employees of the State.

[4] Section 69 of the *HEIA* gives government the power to make, through regulations, specifications with respect to these insured services. This is what the government has done by adopting the *Regulation respecting the application of the Health Insurance Act* (R.R.Q., c. A-29, r.1).

[5] The régies régionales de la santé et des services sociaux will be replaced by local health and social services network development agencies following the approval, on December 18 2003, of the *Act respecting local health and social services network development agencies* (S.Q. 2003, c. 21).

30. Section 11 *HOIA* prohibits entering into (or renewing) a contract, or the making of a payment pursuant to a contract, by which a hospital service included in insured services must be provided to a resident or its cost reimbursed to him. It is thus forbidden to enter into a contract for private insurance in order to cover the cost of these services.

31. In addition, hospital services can also be insured when they are provided elsewhere in Canada or even, in certain circumstances, outside of Canada. (*Regulation respecting the application of the Hospital Insurance Act*, ss. 14, 15, 15.1 and 16).

32. Also, the costs of the services insured by the *HEIA* are covered by the Régie in conformity with the regime established by the *HEIA*. It is provided that the Minister of Health and Social Services, with the approbation of the Treasury Board, can enter into an agreement with the organizations representing any category of health professionals for the application of the *HEIA*, notably to establish their remuneration for the provision of the insured services (*HEIA*, ss. 19 and 21).

33. A health professional who is subject to the application of such an agreement is entitled to be remunerated by the Régie for an insured service which she has herself provided to an insured person who has presented his health insurance card or to be directly remunerated by a person to whom she has provided the insured service if he has not presented his card, as long as that health professional has complied with the provisions of the agreement (*HEIA*, ss. 13.1 and 22).

34. Any form of overbilling is prohibited. A health professional subjected to the application of an agreement can ask for or receive, for an insured service, only the remuneration provided for by the agreement and to which he is entitled; any agreement to the contrary is absolutely null (*HEIA*, s. 22).

35. However, the *HEIA* does not force health professionals to exercise their profession within the framework it establishes. A professional can choose to become a «disengaged professional» or a «non-participating professional» (*HEIA*, s. 26).

36. A disengaged professional is one who exercises his profession outside of the regime instituted by the *HEIA* but who accepts to be remunerated according to the tariff provided for by an agreement and the amount of whose fees are paid to his patients by the Régie (*HEIA*, s. 1d) and 31). A non-participating professional exercises his profession outside of the regime instituted by the *HEIA* but does not accept to be remunerated on the basis of the tariff provided for by an agreement and his patients alone assume payment of the fees (*HEIA*, s. 1 e) and 36).

37. The *HEIA*, while authorizing the status of non-participating professional, nonetheless creates, at section 15, a prohibition on entering or renewing an insurance contract in order to cover the health services already covered by the public regime. This provision aims at preventing the creation of a private insurance market which would cover the insured services, which would have the effect of inciting many doctors to become non-participating. [6]

[6] In 1998, in Quebec, there were 36 specialists and 11 general practitioners who were non-participating or disengaged from the health insurance regime. In 1998, this represented 0,27% of the total of participating doctors: Arpin Report, *La complémentarité du secteur privé dans la poursuite des objectifs fondamentaux du*

38. An insured person pursuant to the *HEIA* is also entitled to ask for reimbursement of the cost of insured services which were provided to her outside of Quebec by a health professional (*HEIA*, s. 10). The reimbursement will then amount to the lesser of the amount actually paid for the services and the amount established by the Board for such services paid in Quebec (*HEIA*, s. 10 par. 4)

39. Moreover, the legislature has also provided that in a case where specialized insured services would not be available in Quebec, the insured persons could nonetheless obtain medical or hospital services elsewhere in Canada or outside of Canada if these are not available. The Régie will assume or reimburse the cost of these services, as long as the conditions mentioned at ss. 23.1 and 23.2 of the *Regulation respecting the application of the Health Insurance Act* or those mentioned at ss. 14 to 16 of the *Regulation respecting the application of the Hospital Insurance Act* are respected.[7]

40. In order to ensure that Quebeckers receive the medical and hospital services which are required by their health condition, the legislator has also adopted the *ARHSS*. Through this Act, it has established a regime of health and social services which regulates the organization and distribution of these services (*ARHSS*, s. 1).

41. The mode or organization of human, material and financial resources allocated for health care established by the *ARHSS* is conceived in a way which gives users quality health care, distributed in accordance with principles of fairness, efficiency and efficacy. The powers and functions which the legislature gives to the Minister of Health and Social Services, to the Régies régionales de la santé et des services sociaux, to the institutions as well as to health professionals, are driven by these objectives (*ARHSS*, ss. 79, 81, 100 and ff. 132, 170 and ff., 213 and ff., 340 and ff., 405 and 431).

42. The *ARHSS* also gives users of the health care regime a series of rights. Among these rights, we mention those provided for at ss. 5, 6, 7 and 13:

> **5.** Every person is entitled to receive, with continuity and in a personalized and safe manner, health services and social services which are scientifically, humanly and socially appropriate.
>
> **6.** Every person is entitled to choose the professional or the institution from whom or which he wishes to receive health services or social services.
>
> Nothing in this Act shall restrict the freedom of a professional to accept or refuse to treat a person.
>
> **7.** Every person whose life or bodily integrity is endangered is entitled to receive the care required by his condition. Every institution shall, where requested, ensure that such care is provided.

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système de santé public au Québec, État détaillé de la situation (hereinafter «Arpin Report»), I-38, p. 35-36, Respondent Attorney General of Quebec's file (hereinafter R.F.), vol. 15, p. 2852-2853).

[7] If the person believes she has been wronged by a decision of the Régie taken in application of these provisions, the *HEIA* provides for mechanisms of review before the Régie and before the Tribunal administratif du Québec.

> **13.** The right to health services and social services and the right to choose a professional and an institution as provided in sections 5 and 6 shall be exercised within the framework of the legislative and regulatory provisions relating to the organizational and operational structure of the institution and within the limits of the human, material and financial resources at its disposal.

43. From all the provisions hitherto analyzed, it can be seen that the legislature of Quebec has established a medicare regime whose objective is to adequately meet the needs of the population.

1.2 CONCERNS WHICH PROMPTED THE ADOPTION OF THE HEIA AND HOIA

44. In order to understand the true stakes which underlie the present legal debate, it is important to generally explain the historical and legislative context surrounding the establishment of the medicare system in Canada and Quebec.

45. As noted by the first instance judge:

> *«It should be recalled, and we tend to forget this, that in Canada before the introduction of health insurance the situation was not a rosy one. There are those who will say that it is no better now, but this assertion can be seen to be clearly false when we really look back.»*

- first instance decision, p. 36, see also p. 5, A.J.F. vol. 1, p. 54 and 21

46. In that respect, Dr. Fernand Turcotte, a specialist in community medicine and expert-witness, reminded everyone that:

> *«From the beginning of the 20's, it was recognized that illness had become the main cause of impoverishment for Canadians through unemployment which almost always follows a serious illness and through the consumption of the family patrimony which was ineluctably caused by the need to pay for care»*

- Expert report of Dr Fernand Turcotte, I-32, p. 4, R.F., vol. 12, p. 2352.

see also:

- Report of the Commission of Inquiry on Health and Social Welfare: Health Insurance, 1967 (hereinafter the «Commission Castonguay-Nepveu 1967), I-39.3, p. 42-43, R.F., vol. 17, p. 3300-3301.

47. In order to fight this situation, the province of Saskatchewan had adopted, in 1947, the first provincial public and universal hospital insurance regime. The push towards a medicare regime financed by the State and based on values of fairness and social solidarity had just begun. Soon, the federal government and all the provinces would adhere to it (Royal Commission on Health Services (hereinafter the «Hall Commission», I-39.1, p. 394 and s., R.F., vol. 16, p. 3052 and ff.).

48. In 1957, the federal Parliament adopted the *Hospital Insurance and Diagnostic Services Act* (S.C. 1956-57, c. 28). That act authorized the federal government to cover around half of the costs of provincial hospital insurance regimes. In order to benefit from this money, however, the provinces had to provide all their residents hospital services insured according to uniform terms and conditions (ss. 3, 4 and 5). From then on, the federal authorities indicated their desire that a universal regime of hospital insurance be established from one end of Canada to the other.

49. Following the principles put forward by that act, in 1960, the legislative assembly of Quebec adopted the *HOIA*. As soon as 1961, all provinces had established a public regime of hospital insurance (Expert report of Dr Fernand Turcotte, I-32, p. 5, R.F., vol. 12, p. 2353).

50. In 1962, Saskatchewan once again innovated and widened the breadth of the public health insurance regime by covering medical services (Hall Commission, I-39.1, p. 398 and ff., R.F., vol. 16, p. 3056 and ff.).

51. In 1964, the Hall Commission, presided by the Honourable Emmett M. Hall and instituted by the federal government three years earlier, published its report. The Commission's mandate was to inquire on the state of health services and on the future needs of the Canadian population in that domain, as well as on the resources necessary in order to provide these services. It was also entrusted with recommending measures which would ensure that all Canadians receive the best health care possible (I-39, p. xix, R.F., vol. 16, p. 3021).

52. Having as its objective to make the discoveries of health sciences accessible to all of the country's inhabitants, the Hall Commission concluded that it was necessary to establish a universal and complete regime of health services, which covered medical services among other things, in every province or territory. After having carefully examined the situation of private insurance in Canada and seen its incapacity to create universal and complete coverage, the Hall Commission suggested that the regime be financed through health insurance funds managed by the provinces. Indeed, the Commission had noted that in 1961 more than 7.5 millions of Canadians did not benefit from any medical insurance. For those who had private insurance, the Commission had observed that the insurance coverage varied from one insurance company to the other and that many insurance contracts offered clearly insufficient protection. As for the hospital insurance regime established previously, the Commission observed that once that regime was put in place, all personal health services will have to be universally accessible according to uniform conditions for all Canadians (I-39.1, p. 11 to 13, 19, 20, 731 to 736, 746 to 748, R.F. vol. 16, p. 3033 to 3035, 3038, 3039, 3086 to 3091, 3101 to 3103).

53. In 1966, reacting to the Hall Commission's recommendations, Parliament adopted the *Medical Care Act* (S.C. 1966-67, c.64). The federal government shared with the provinces that put a health care insurance regime in place an amount of about 50% of the costs of medical services which they insured. In order to be entitled to federal funds, the provincial health insurance regimes had to meet the four conditions of public management, transferability, universality and completeness which, at that time, were the only ones expressly provided for by the Act (ss. 3 to 5). That Act complemented the *Hospital Insurance and Diagnostic Services Act* and confirmed the

federal government's objective of ensuring to all Canadians complete and universal access to both hospital and medical care.

54. In 1966, Quebec established its own Commission of inquiry on health and social welfare (hereinafter the «Castonguay-Nepveu Commission»). Its task was to inquire on the whole domain of health care and social welfare and, more particularly, to study the feasibility of a health care regime for Quebec (I-39.3, p. ix and x, R.F., vol. 17, p. 3258 and 3259).

55. In its 1967 report concerning health insurance, the Castonguay Nepveu Commission has made the following observations, among others:

- In Quebec, as elsewhere, illness is an important cause of poverty (I-39.3, p. 42-43, R.F., vol. 17, p. 3300-3301).

- Poverty itself makes people particularly vulnerable to illness. Poverty favours its occurrence (I-39.3, p. 42-43, 46, R.F., vol. 17, p. 3300-3301, 3304).

- Not only does illness have serious consequences on individuals, it also has important social consequences. It is in all of society's interest to raise everyone's level of security and welfare. The gains which accrue to society in terms of health care constitute multipliers of social and economic progress (I-39.3, p. 41 and 42,o R.F., vol. 17, p. 3299 and 3300) (see also Hall Commission, I-39.1, p. 6, R.F. vol. 16, p. 3028).

- The situation of private insurance regimes is even less good in Quebec than in other Canadian provinces: the regimes protect a lesser proportion of the population and the regimes' degree of protection varies greatly. Only a tiny percentage of the population benefits from more or less complete coverage (I-39.3, p. 45-46, R.F., vol. 17, p. 3303-3304).

- In order to efficiently protect the population against the individual and social consequences of illness, it is necessary to put in common all individual financial resources which are allocated to the protection against illness (I-39.3, p. 35 to 49, 54, R.F., vol. 17, p. 3293 to 3307, 3309).

56. The Castonguay-Nepveu Commission thus recommended the establishment of a complete and universal health insurance regime which, as an essential component of a widened system of social welfare, required the pooling of all individual financial resources allocated to the protection against illness.

57. In conformity with this recommendation, Quebec adopted the *HEIA* in 1970, thereby creating a complete and universal health insurance regime. The Régie de l'assurance-maladie du Québec, created by an *Act Respecting the Régie de l'Assurance-Maladie du Québec* (R.S.Q. c. R-5; hereinafter the *«ARAMQ»*), was then entrusted with the administration and application of the health insurance regime's programmes created by the *HEIA* (*ARAMQ*, ss. 1 and 2).

58. Like the *HOIA*, the *HEIA* was a very important law in the development of the social welfare system in Quebec (Journal des Débats (i.e. Quebec Hansard), I-39.5, p. 551-559, A.J.F., vol. 14, p. 2510-2518). Indeed, as specified by the first instance judge:

> *«The Health Insurance Act and the Hospital Insurance Act are legislation designed to create and maintain a public health system open to all residents of Quebec. They are legislation which seeks to encourage the overall health of all Quebeckers without discrimination on the basis of their economic situation. In short, it is a measure by the government intended to promote the well-being of its population as a whole.»*

- First instance decision, p. 119, A.J.F., vol. 1, p. 141.

59. As shown by the Journal des Débats, the adoption of the *HEIA* was part of a general health policy whose implementation required numerous reforms in the organization of the health care system (Journal des Débats, I-39.5, p. 551-559, A.J.F., vol. 14, p. 2510-2518).

60. This is why in 1971 the National Assembly of Quebec adopted the *Act respecting Health Services and Social Services* (S.Q. 1971 c. 48).[8] That law put in place a new mode of organization of health and social services aiming, among other things, at improving the population's health, distributing the financial and human resources in the most fair and rational way possible, and at making accessible to every person, in a continuous and non-discriminatory way, a complete set of health and social services, for the whole of a person's life (ss. 3 and 5).

61. Quebec thus acted in the context of the Canadian thinking which occurred at that time. After having heard many experts, social groups, health professionals and other actors, the legislator concluded that it was necessary to establish a regime which enabled every person to get the care which she needs, whatever her financial condition, age or physical or mental condition: all this in response, notably, to the failure of private insurance in the domain of health care (Castonguay-Nepveu Commission 1967, I-39.3, p. 53, R.F., vol. 17, p. 3308).

62. Following the implementation of the retained objectives in the domain of health care, the governments of Canada and of the provinces ordered various studies and put in place various committees and commissions.

63. Hence, in 1979, the Honourable Emmett M. Hall was once again appointed Commissioner. He was then asked to examine the state of health services in Canada. At the end of his analysis, Commissioner Hall did not put into question the fundamental principles of the health care system at all and noted that, on a world scale, Canada's medicare regime ranked among the best ones. He was however worried about additional fees being asked to the residents of some provinces as they were provided insured medical and hospital services. For Commissioner Hall, this constituted a menace to the principle of free and universal access to health care (I-39.7, p. III, 2, 3, 6, 7, 26, 39 to 47, R.F, vol. 19, p. 3746, 3752, 3753, 3756, 3757, 3776, 3789 to 3797).

[8] This law was replaced by the *ARHSS* in 1991.

64. In 1984, the *Hospital Insurance and Diagnostic Services Act* and the *Medical Care Act* were consolidated in order to give place to the *Canada Health Act* (S.C. 1984, c. 6). That law was a response to Commissioner Hall's worries and differed from both previous laws in that it provided for financial penalties for provinces that authorized doctors to overbill or that enabled the imposition of moderating fees at the time at which health services were being obtained. To the conditions of public management, completeness, universality and transferability, already provided for in both previous laws, was added that of accessibility. Pursuant to that law, each provincial health care system had to meet these five «national principles» in order to benefit from the federal government's financial help with respect to insured health services.

65. In 1985, the Quebec government created the Commission of Inquiry on Health and Social Services (hereinafter the «Rochon Commission». The Commission tabled its report in December 1987 and, among its conclusions, it rejected the option of using private financing in order to finance health services already insured by the State. According to the Rochon Commission, that option raised serious problems of fairness and did not at all guarantee the improvement of the profitability of resources invested in the domain of health and welfare. For the Commission, the financing of insured services had to remain fully public (I-39.8, p. 654, 657, 706 and 707, R.F., vol. 20, p. 4047, 4050, 4055 and 4056).

66. In 1991, following hearings which took place from 1989 onwards, the Standing Committee on Health, Social Welfare, Social Affairs, Old Age and the Status of Women (hereinafter the «Federal Porter Committee», tabled its report concerning the Canadian medicare regime and its financing. It affirmed that it was still convinced that Canada benefited from one of the best health care systems in the world and added that it was not only determined to preserve it, but also to improve it (I-39.9, p. 89, R.F., vol. 21, p. 4206).

67. In October 1994, the Prime Minister of Canada created the National Forum on Health and asked that it make recommendations to the federal government in order to improve the medicare system and the health of the Canadian population. In its final report published in 1997, the National Forum confirmed the continued attachment of Canadians to the fundamental principles of their medicare regime. It stated, moreover, that it was essential, in order to save that regime, to fully guarantee the public financing of medically required services and to respect the «single payer» model at the provincial and territorial levels (I-16, Final Report, p. 7, 11, 22, R.F. vol. 8, p. 1518. 1521, 1532; I-16, Final Report, Values Working Group, p. 6 to 12, R.F. vol. 8, p. 1560 to 1566).

68. In 1999, the Working Group established by the Quebec Minister of Health and Social Services in order to examine the issue of the private sector's complementarity within the pursuit of the fundamental objectives of the health care system in Quebec tabled its report (hereinafter the «Arpin Report»). It stated its opposition to the privatisation of insured services. It recommended, notably, that the provisions by which private insurers could not cover medical and hospital services already insured by the *HEIA* and *HOIA* be maintained (I-38, Working Group Report, p. 81, 103 to 107 and 115, R.F., vol. 15, p. 2967, 2987 to 2991 and 2997; I-38, Constats et Recommendations, p. 25, R.F., vol. 14, p. 2801).

69. Until very recently, this thinking process continued across Canada. Many Commissions and Committees analysed the state of the public health care system, the measures to be taken in order to ensure its long term viability, as well as its modes of functioning and financing. Although these have noticed that the health care system presently has certain difficulties, which indeed are common to all the health care systems of developed countries, they have all rejected recourse to the privatisation of health services already insured by the state in order to solve these difficulties. Of course, the Commissions and Committees have not all proposed the same solutions in order to quell these problems, although their recommendations are similar in many respects. This is not surprising when it is recalled that health care is, in every country, one of the most institutionally and politically complex sectors. Nonetheless, their reports show that the solutions to these problems are to be found within the public health care system and that the latter has the capacity to respond to them and to adapt to new realities.

- Commission d'étude sur les services de santé et les services sociaux: les solutions émergentes – Rapport et recommendations, 2000 (hereinafter the «Clair Commission», p. iii, 133 and ff., R.F., vol. 24, p. 4808, vol. 25, p. 4946 and ff.) ;

- Report of the Standing Senate Committee on Social Affairs, Science and Technology «The Health of Canadians – The Federal Role», Final Report, October 2002, vol. VI (hereinafter the «Kirby Report»), p. 9-10, 290, 322, Attorney General of Canada's compendium of sources, tab 17, p. 1885-1886, 2166, 2198;

- Commission on the Future of Health Care in Canada «Guided by our Values –The Future of Health Care in Canada», Final Report, 2002 (hereinafter the «Romanow Report»), p. xv to xxiii, Attorney General of Canada's compendium of sources, tab 15, p. 241 to 249;

- Rapport du conseil de la santé et du bien-être : Le financement privé des services médicaux et hospitaliers, 2003, (hereinafter «Rapport du conseil de la santé et du bien-être»), p. 54 to 58, R.F., vol. 27, p. 5305 to 5308.

70. An analysis of these reports shows that at no time the fundamental values and principles of the medicare system have been put into question. Every time, the option of privatisation of the financing of insured medical and hospital services has been rejected, not for dogmatic reasons, but because it showed major problems. In the opinion of our governments and of a vast majority of experts, that system still corresponds today to the best interests of the population of Quebec and Canada in the realm of health care.

2. THE PRESENT CASE DOES NOT MEET THE REQUIREMENTS FOR AN ADEQUATE FACTUAL CONTEXT

71. From the outset, the Attorney General wishes to emphasise the main parameters of the present case which show the absence of an adequate factual context for there to be a legal debate.

72. None of the Appellants has established that his health required that he have access to medically required care. They have not shown any difficulties of access, actual or imminent, to a medical or hospital service required by the state of their health. In fact, no concrete action from the State deprives them from any health service.

73. What the Appellants are really alleging is that, if they eventually were to require care, the Quebec health care system would not be able to answer their request, at least within reasonable time.

74. The parameters of such debate do not meet the requirements established by the Court since *Operation Dismantle.* Yet, it has been established that the preventive function of a declaratory judgment must be based on more than the merely hypothetical consequences of an act by the government whose imminence has not been established.

- *Operation Dismantle v. The Queen* [1985] 1 S.C.R. 441, p. 456-457 (Chief Justice Dickson for the majority); p. 490 (Madam Justice Wilson) (compendium of sources, **tab 30**);

  See also:

- *Borowski v. Canada (Attorney General)* [1989] 1 S.C.R. 342, p. 365 (Mr. Justice Sopinka for the Court) (**tab 6**).

75. In the present case, the Appellants cannot base their allegations on mere hypotheses according to which one day or another they may face some difficulty of access to the services provided by the Quebec health care system. If it has not yet materialised, the threat to their rights must still be individualised and show a high degree of probability that a violation of section 7 of the *Canadian Charter* will occur.

- *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46, par. 51 (Chief Justice Lamer, for the Court on this point) (**tab 27**);

- *R. c. Whyte* [1999] 2 S.C.R. 417, par. 38, 81-82 (Mr. Justice Iacobucci for the majority) (**tab 48)**;

- *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, p. 13, 16 (Sopinka and Iacobucci JJ. for the majority) (**tab 7**).

- *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, p. 158-159 (Justice Cory, with whom Iacobucci and Major JJ. concurred) (**tab 31**).

76. The factual context of the present case is completely different from that of the cases in which the Court has defined the extent of the right to liberty or of the right to security of a person in relation with a coercive State measure. Indeed, the cases of *R. v. Morgentaler* [1988] 1 S.C.R. 30 (**tab 42)** and *Rodriguez v. British Columbia (Attorney General)* [1993] 3 S.C.R. 519 (**tab 55**) concerned the effect of a criminal law prohibition on the obtaining of a service related to a person's health condition, namely a therapeutic abortion or the assistance of a third person in order to end a long illness. Similarly, the decisions reached in the cases of *B.(R.) v. Children's Aid Society of*

Metropolitan Toronto [1995] 1 S.C.R. 315 (**tab 3**), *New Brunswick (Minister of Health and Community Services) v. G.(J.), supra*, and *Children Aid Society of Winnipeg v. K.L.W. [2000] 2* S.C.R. 519 concerned the application of specific coercive measures imposed by the State on parents in the context of family relations, in the name of the interest of the child. Finally, the concrete effects of an action launched by the Human Rights Commission against a member of the British Columbia cabinet were examined in *Blencoe v. British Columbia* [2000] 2 S.C.R. 307 (**tab 5**).

77. Unlike the situation occurring in those cases, the Appellants do not face any actual or imminent refusal of services and cannot establish measurable difficulties of access to medical or hospital services which could be required by their health. Nor do they claim that an identifiable service is excluded from the health care system as was the case in *Eldridge v. British Columbia* [1997] 3. S.C.R. 624 (**tab 10**).

78. In fact, the Appellants circumvent the requirements applicable for a legal debate in order to invite the Court to review a general policy decision which consists in favouring the public financing of health and hospital insurance in order to provide the population with universal and free health care services.

79. The Attorney General submits that the theoretical context of the present case does not meet the minimum requirements of standing and evidence applicable to an action for declaratory judgment.

- *Operation Dismantle v. The Queen, supra*, p. 456-457 (Chief Justice Dickson, for the majority);

- *Trust général du Canada c. Dame Bouchard* [1971] C.A. 765, p. 768-769 (quoting the brothers Mazeaud, *Leçons de droit civil*, t.1 (1956), p. 350-351) (**tab 61**);

- *Lenscrafters International Inc. c. Ordre des opticiens d'ordonnances du Québec*, (1993) R.D.J. 607 (C.A. Qué.), p. 612-613 (**tab 23**).

3. CONSTITUTIONAL QUESTIONS 1 AND 3

3.1 SECTION 7 OF THE CANADIAN CHARTER DOES NOT APPLY IN THE PRESENT CASE

- **The present debate is one of general policy**

80. The Attorney General submits that the present case does not fit the domain of application of section 7 of the *Canadian Charter* since there does not exist any true link between the rights claimed by the Appellants and the justice system. Rather, this case concerns an essentially political claim aiming at putting into question the very principle of public financing of services insured by the Quebec medicare system.

81. Many statements by the Court express the importance which it attaches to distinguishing a domain of application for section 7 which is limited to the administration of justice, by contrast with the domain of general public policy which should be left to the appreciation of the representatives elected by the population.

- *Re: Motor Vehicle Act (B.C)* [1985] 2 S.C.R. 486, p. 499 (Justice Lamer for the majority) (**tab 53**);

- *United States of America v. Burns* [2001] 1 S.C.R. 283, par. 70-71 (The Court) (**tab 11**).

82. In *Morgentaler*, the Court has recognized the principle according to which it is not the courts' function to elaborate complex and controversial general policies. The courts' responsibility is rather to determine if the terms and contents of legislative initiatives conform to the *Charter*. As written by Justice McIntyre:

> *«(…) the task of the Court in this case is not to solve nor seek to solve what might be called the abortion issue, but simply to measure the content of s. 251 against the Charter.»*

- *R. v. Morgentaler*, *supra*, p. 138 (Mr. Justice McIntyre); p. 45-46 (reasons concurred with by Chief Justice Dickson).

83. Hence, apart from Justice Wilson, the Court refused to examine the correctness and opportunity of maintaining a criminal sanction against non-therapeutic abortions. It rather focused its analysis on the constitutionality of the conditions and of the administrative structure established by Parliament for authorizing a woman to legally have an abortion.

- *R. v. Morgentaler*, *supra*, p. 53, 63, 73 (Chief Justice Dickson); p. 106, 109, 121 (Mr. Justice Beetz); p. 148, 152 (Mr. Justice MacIntyre);

  See also:

- *Rodriguez v. British Columbia (Attorney General)*, *supra*, p. 628-629 (McLachlin and L'Heureux-Dubé JJ.).

84. In the recent trilogy on the criminalization of marihuana, the Court restated that an action based on section 7 should not be used to have the courts evaluate the opportunity of the State's general policy choices, but rather to evaluate the constitutionality of the means used to implement them:

> *«The task of the Court in relation to s. 7 of the Charter is not to micromanage Parliament's creation or continuance of prohibitions backed by penalties. It is to identify the outer boundaries of legislative jurisdiction set out in the Constitution. Within those boundaries, it is for Parliament to act or not to act. The appellant, together with the appellants in Malmo-Levine and Caine, has mounted an extensive attack on the wisdom of criminalizing the simple possession of marihuana. The Court's concern is not with the wisdom of the prohibition but solely with its constitutionality.»*

- *R. v. Clay*, 2003 SCC 75, par. 4 (Justices Gonthier and Binnie for the majority) (**tab 35**);

  See to the same effect:

- *R. v. Malmo-Levine; R. v. Caine*, 2003, SCC 74, par. 123 and 139-140 (Justices Gonthier and Binnie for the majority) (**tab 40**);

85. Similarly, the analysis of the reach of section 7 formulated by Professor Eric Colvin permits the drawing of a distinction between «public policy domain in general» and «the inherent powers of the judiciary»:[9]

> *«(…) Any claims which the judiciary can make to an inherent domain must be claims about means rather than ends. The judiciary should have some special expertise in matters of institutional process. The judiciary may also have certain limited powers to review governmental decisions of social policy. There is, however, no constitutional basis within the Western democratic tradition for the judiciary to claim any area of substantive policy-making as its exclusive preserve»*[10]

86. In the present case the Appellants wish to put into question the very wisdom of governmental policies concerning the public financing of medical and hospital services in Quebec and in Canada. This was also the opinion of Justice Delisle in the Court of Appeal when he wrote:

> *«Finally, section 7 of the Canadian Charter cannot be used to judicially second-guess the appropriateness of a societal choice, as observed by Justice Lamer in Reference Re. ss. 193 and 195.1 (1) c) Criminal Code Manitoba»*

- Court of Appeal decision, par. 30, A.J.F., vol. I, p. 182;

- See also the first instance decision, p. 147-148, A.J.F., vol. I, p. 163-164.

• The rights claimed have no link with the administration of justice

87. The present debate is essentially political and has no real link with the general domain of application of section 7, i.e. the interaction of individual rights to life, liberty and security with the judicial system or the administration of justice.

- *Reference re ss. 193 and 195.1(1)(C) of the criminal code (Man.), supra*, p. 1173-1174 and p. 1177-1178 (Mr. Justice Lamer);

- *Rodriguez v. British Columbia (Attorney General), supra*, p. 585 (Mr. Justice Sopinka for the majority)

- *B.(R.) v. Children's Aid Society of Metropolitan Toronto, supra*, par. 21 (Chief Justice Lamer);

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[9] *Re: Motor Vehicle Act (B.C), supra*, p. 503 (Mr. Justice Lamer for the majority);
[10] COLVIN, Eric, *Section 7 of the Canadian Charter of Rights and Freedoms*, (1989) 68 Can. Bar Rev., p. 575, quoted approvingly in *Reference re ss. 193 and 195.1(1)(C) of the criminal code (Man.),* [1990] 1 S.C.R. 1123, p. 1177 (Mr. Justice Lamer) (**tab 49**)

- *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, *supra*, par. 65-66 (Chief Justice Lamer, for the majority); par. 116 (Justice L'Heureux-Dubé);

- *Blencoe v. British Columbia (Human Rights Commission)*, *supra*, par. 46 (M. Justice Bastarache, for the majority);

- *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, *par. 210-217* (Mr. Justice Bastarache) (**tab 15**); see also *Gosselin v. Quebec (Attorney General)* [1999] R.J.Q. 1033 (C.A.Q.), p. 1062 and 1066-1069 (Robert J.); p. 1042-1043 (Baudouin H.); p. 1042 (Mailhot J.) (**tab 14).**

88. Unlike the situation in *Morgentaler*, the law does not limit access to a health service provided by any provider of care whatsoever under threat of penal sanction. The only sanction provided for by the law would be related to a contract for covering the costs of already insured health services (*HEIA*, s. 76, *HOIA*, s. 15).

89. Here the application of a penal provision aiming at guaranteeing obedience to the law does not suffice for the application of section 7. The Appellants should have shown that the violation of their rights results from the imposition of the fine *per se* and not from the regulated conduct which the sanction aims at guaranteeing. Only the constitutionality of the penal sanction could then be examined under section 7.

90. In the Attorney General's view, sections 15 *HEIA* and 11 *HOIA* should not themselves be examined under section 7 merely because their application is sanctioned by a penal provision, as is the case for almost all regulatory legislative regimes. If a constitutional problem was found with the sanction itself, the legislature could correct it without compromising the regulatory regime whose respect it guuarantees.

91. Hence, in *Re: Motor Vehicle Act (B.C)* (*supra*), it was not the prohibition on driving while the permit was suspended which triggered the application of section 7, but the fact that this action became, through the *Criminal Code's* provisions, an absolute liability offence punishable by jail.

- COLVIN, Eric, *Section 7 of the Canadian Charter of Rights and Freedoms*, *supra*, p. 566-567.

92. If there mere possibility of receiving a fine sufficed to trigger section 7, the legislature could decide to withdraw that type of sanction and replace it by a civil consequence, thereby avoiding the application of section 7 to its regulatory regime. Clearly, the criterion of the presence of a penal sanction cannot alone constitute a sufficient link with the administration of justice which would enable the contestation of the regulated conduct covered by the sanction.

93. The New Brunswick Court of Appal correctly noted that the conduct which is covered by the penal provision must itself directly involve the rights guaranteed by section 7 in order to be subjected to the court's analysis, even though the penal sanction is capable of depriving an individual from his or her liberty:

> *«Moving away from s. 7 of the Charter in the context of the Criminal Code, it is important to recognize that both federal and provincial legislation are*

invariably enforced through penal sanctions that frequently interfere with individual liberty because of the possibility of imprisonment. Yet the fact that regulatory legislation prescribes penal consequences for breaches, including imprisonment, is not by itself a sufficient basis on which to conclude that the regulated activity engages s. 7 of the Charter. Otherwise, courts would be consistently faced with the argument that the regulatory legislation is contrary to the principles of fundamental justice in its substantive sense. If s. 7 is engaged, it is because the regulated conduct itself is in conflict with a person's liberty interest. Alternatively, the penal provisions themselves may engage that interest. But it does not follow that because a penalty provision engages s. 7 so too does the regulated conduct. Correlatively, it does not follow that because the penalty is unconstitutional so too is the regulated conduct.»

- *Rombaut v. New Brunswick (Minister of Health and Community Services)*, [2001] N.B.C.A. 75 (N.B.C.A.), par. 107; see also par. 104 to 116 (**tab 56**).

94. In the present case, sections 15 *HEIA* and 11 *HOIA* are not directly the source of a coercive measure by the State over the individual which involves the judicial system. The interests claimed by the Appellants are thus excluded from the reach of section 7 because they do not have a sufficient link with the administration of justice:

> *«(…) it seems quite clear that the Charter concept of security of the person will come into play only in situations of "active deprivation" such as specific legislative barriers to a medical procedure, as in Morgentaler No. 2. All of the decisions discussed above contain a strong implication that restricting access to health care by reducing public funding or de-legislating health-care delivery will not constitute the type of deprivation which will give rise to an infringement of s. 7»*

- WINDWICK, Brent, *Health Care and Section 7 of the Canadian Charter of Rights and Freedoms*, (1994) 3 Health L. Rev. no 1, 20-23, par. 25 (**tab 73**);

See also:

- GRESCHNER, DONNA, How Will The Charter Of Rights And Freedoms And Evolving Jurisprudence Affect Health Care Costs? *Commission on the Future of Health Care in Canada*, 2002, Study No. 20, p. 11-12 (**tab 68**).

- **The legal nature of the principles of fundamental justice indicates the nature of the rights and freedoms protected by section 7**

95. The principles of fundamental justice are also a valuable tool for defining the reach of the rights which are included in section 7's domain of application. Included in the *Canadian Charter* in the section on «legal rights», the principles of fundamental justice, which modify the rights granted by section 7, «should not be generous to the point where they are reduced to vague generalizations concerning what our society considers to be just and moral» and thereby enable the Courts to review the wisdom of an enactment. Rather, they are seen as the «essential elements of a system for the administration of justice».

- *Re: Motor Vehicle Act (B.C), supra,* p. 503, 513 (Justice Lamer, for the majority);

- *Reference re ss. 193 and 195.1(1)(c) of the criminal code (Man.), supra,* p. 1173-1174 (Mr. Justice Lamer);

- *B.(R.) v. Children's Aid Society of Metropolitan Toronto, supra,* p. 339 (Chief Justice Lamer); p. 374 (Justice LaForest, for the majority);

- *New Brunswick (Minister of Health and Community Services) v. G.(J.), supra,* par. 65-66 (Chief Justice Lamer, for the Court);

- *United States of America v. Burns, supra,* par. 70-71 (The Court);

- *Gosselin v. Quebec (Attorney General), supra,* par. 215 (Mr. Justice Bastarache); par. 386 (Justice Arbour, dissenting);

- *R. v. Malmo-Levine; R. v. Caine, supra,* par. 112-113 (Justices Gonthier and Binnie for the majority).

96. The issue of the constitutionality of the legislative prohibitions on the freedom to enter into contracts for private insurance for health services already insured by the public regime does not involve any legal principle of fundamental justice. Also, the analysis of the mode of organization of the health care system fundamentally differs from cases involving two divergent interests with which courts are used to deal with. In those domains where the State does not limit individual rights through the judicial system and which, moreover, concern issues of general public policy, no principle of fundamental justice can be applied.

    Auton (Guardian ad litem of) v. British Columbia (Attorney General) [2002] 220 D.L.R. (4th) 411 (B.C.C.A.); par. 73; application for leave granted, 15 May 2003, no 29508 (**tab 2**).

97. It is the Attorney General's view that the attack on sections 15 *HEIA* and 11 *HOIA* attempts to apply to political decisions and to the legislative process itself principles of fundamental justice which are in essence related to the administration of justice, which amounts to the hijacking of the ends of section 7.

98. This is also the result which is looked for by some authors who claim that any general health policy or legislative or regulatory decision which could have an effect on the life, liberty or the security of individuals should meet «the same requirements of regular application of the law» than when the State directly infringes an individual's physical integrity. For those people, section 7 would require that the decisions concerning the distribution of health resources and services «be subjected to a public debate (public hearings or other forms of public consultation before their implementation», «that a larger individual and collective participation to decision-making» be assured (dissemination of information, efficient representation of the public, patients and interests groups before decision-making organizations in the health care realm) and that an obligation to account to the population be established.

- JACKMAN, Martha, The Implications of Section 7 of the Charter for Health Care Spending in Canada, *Commission on the Future of Health Care in Canada*, 2002, Discussion Paper no 31, p. 12 to 14 (**tab 70**).

99. The application of such requirements to the legislative process as well as to the government's political and budgetary decisions contravenes the very established principles according to which a Court cannot force the legislature to modify its legislative process or to reform its positions on issues which are part of the political domain.

- *Authorson v. Canada (Attorney General)*, 2003, SCC 39, par. 37-41 (Mr. Justice Major for the Court) (**tab 1**);

- *Reference Re: Canada Assistance Plan (B.C.)* [1991] 2 S.C.R. 525, p. 558-560 (Justice Sopinka for the Court) (**tab 52**);

- *Québec (Procureur général) c. R.C.* [2003] R.J.Q. 2027 (C.A.Q.), par. 145. 164-65 (**tab 33**);

- *Westmount (Ville de) c. Québec (Procureur général)* [2001] R.J.Q. 2520 (C.A.Q.), par. 249 ; demand for leave refused, [2001] 3 S.C.R. xi (**tab 64**);

- *Lachine General Hospital Corp. c. Québec (Procureur général)*, [1996] R.J.Q. 2804 (C.A.Q.), p. 2844 (**tab 21**) ;

- *Just v. British Columbia* [1989] 2 S.C.R. 1228, p. 1244-1245 (Justice Cory, for the majority) (**tab 18**);

- *Thorne's Hardware Ltd v. The Queen* [1983] 1 S.C.R. 106, p. 111-113 (Chief Justice Dickson for the Court) (**tab 60**).

100. Hence, the principles of fundamental justice cannot force the legislature to respect requirements of public hearings and procedural fairness before adopting a law. Similarly, the results of political decisions such as regulations and budgetary choices should not be reviewed by the Courts on the basis of correctness.

101. Moreover, the debates which preceded the adoption of section 7 show that the constituting authority chose to avoid using the expression «due process», preferring instead the terms «fundamental justice», in order to avoid risking importing into Canadian law the abuses of the American doctrine of «substantive due process» which had appeared with the case of *Lochner v. New York*, 198 U.S. 45 (1905).

- HOGG, Peter W., *Constitutional Law of Canada*, vol. 2., loose leaf edition, Carswell, p. 44-9, 44-14 (**tab 69**);

- STEPHENS K. Michael, Fidelity to Fundamental Justice: An Originalist Construction of Section 7 of the Canadian Charter of Rights and Freedoms, (2002) 13 N.J.C.L. 183, p. 217 and ff. (**tab 71**);

102. That deliberate choice made by the drafters of the *Charter* respects the constitutional tradition of Canada, which is founded on Parliament's legislative supremacy and on judicial deference in cases of general policy. Hence, the legitimacy of the political, social, or economic objectives of sections 15 *HEIA* and 11 *HOIA* cannot be reviewed under section 7.

- For an analysis of the differences between the American and Anglo-Saxon traditions as to the review of legislative choices and of the application of these differences in relation to section 7 of the *Canadian Charter*, see: TREMBLAY, Luc, *Section 7 of the Charter: Substantive Due Process?*, (1984) U.B.C.L.R., vol. 18:2, 201, p. 227-234 (**tab 72**); quoted approvingly in *Re: Motor Vehicle Act (B.C.), supra*, p. 513 (Justice Lamer, for the majority).

- **The relevant socioeconomic issues are not an appropriate object of legal debate because of their complex and political character**

103. Even if the Court were to conclude that section 7 may be invoked in order to protect rights or interests which have no real link with the administration of justice, the Attorney General submits that an examination of the financial terms of the health care system should be excluded from the domain of application of section 7.

104. Indeed, issues of political and economic policy are very complex. The courts do not have the institutional resources necessary to review decisions taken with respect to the organization and financing of health care services when these are closely related to other highly technical organizational and budgetary parameters (such as the mode and level of remuneration for doctors, policies surrounding the buying of medical technology, the organisation of labour within health institutions, etc.) and require the balancing of societal interests which are often opposed, thereby overlapping with the public debate:

> *«The debates about remedies for correcting wait times illustrate a major difficulty with Charter review of health care policies. The health care system is fiendishly complicated and simple answers to problems (such as allowing private insurance as a response to waiting lists) could wreak considerable damage to the system, and cause constitutional violations for other groups of people. Judges are not well equipped to deal with the enormous ramifications of changing elements of the health care system. They may not obtain much help from counsel, who may have neither the expertise or interest in assisting judges in understanding fully the variables and dynamics of health care policy.»* (the emphasis is ours)

- GRESCHNER, DONNA, How Will The Charter Of Rights And Freedoms And Evolving Jurisprudence Affect Health Care Costs?, *supra, p.* 13-14.

105. As stated by Professor Peter W. Hogg, the courts' role would be considerably widened if section 7 enabled them to rule on decisions of social policy and on the application and financing rules of these policies. In his view, these are questions that should be left to the judgment of voters.

- HOGG, Peter W., *Constitutional Law of Canada, supra*, p. 44-12.1;

See also:

- *Gosselin v. Quebec (Attorney General), supra*, par. 330-331 (Mr. Justice Bastarache).

106. In the same vein, in the *Rombaut* case, which concerned the management plan of medical resources, the New Brunswick Court of Appeal wrote:

> *«I recognize, as I must, the constitutional authority of the Province to legislate in matters relating to health care provided, of course, the legislation does not impinge on Charter rights. But I am also aware of the inherent difficulty, if not folly, of expressing an opinion on the effectiveness of the Province's physician resource plan. Frankly, the judiciary possesses no greater insight into matters that are best judged through human experience and the ballot box. Fortunately, this is not a case in which the Charter drives this Court into the complex arenas of social and political economy. On the facts of this case, and at most, the Province need only justify the decision to grandfather existing physicians, not the legislative decision to regulate physician supply and distribution in New Brunswick.»*

- *Rombaut v. New Brunswick (Minister of Health and Community Services), supra*, par. 12

107. In the present case, the complexity of the issue of the effects of a parallel private health care system on the waiting delays, as well as the search for solutions likely to improve access to health services, show that the evaluation of general policies in that domain can be done more appropriately in the context of an interdisciplinary public debate than in that of a legal debate.

108. Indeed, subs. 36(1)(c) of the *Constitution Act 1982* confirms that the undertakings of governments in the realm of essential public services are political and not legal in nature.

109. Finally, decisions taken by the administration in the domain of health services organization must also be able to evolve in order to respond to the changing needs of the population. In this respect, many expert committees and commissions regularly evaluate which changes should be made to the health care network. Courts should not crystallise the evolution of the health care system through the establishment of mandatory financing rules which would flow from constitutional requirements.

110. The Attorney General thus submits that the Appellants' constitutional submissions concern social issues which are essentially political and that do not show a sufficient link with the judicial system. Therefore, section 7 of the Canadian Charter is not applicable in the present case.

3.2 IN THE ALTERNATIVE, THE APPELLANTS HAVE NOT SHOWN THAT AN INFRINGEMENT OF SECTION 7 OF THE *CANADIAN CHARTER* FLOWS FROM SECTIONS 15 *HEIA* AND 11 *HOIA*

111. The Appellants have not met the burden of proof which they had to meet. They had to show:

- That the health care system does not adequately guarantee access to medically required health services;

- That there is a causal link between sections 15 *HEIA* and 11 *HOIA* and the alleged infringement of their rights;

- That a purported violation of their rights would contravene the principles of fundamental justice.

3.2.1 NO INFRINGEMENT OF SECTION 7 RIGHTS

• The Right to Security

112. As mentioned earlier, the Appellants have not shown that their health required that they have access to medically required services.

113. Nor have they shown that the Quebec health care system shows problems so generalized that it does not respond, on a vast scale, to the needs of the population and thus globally jeopardizes the security of Quebeckers. This is indeed the kind of proof which is required by their allegations of a generalized infringement which hypothetical users could suffer in relation to the medicare system considered as a whole.

114. Quite the contrary, the primary objective of the *HEIA* and *HOIA* is to guarantee to the Appellants and to all the population of Quebec the right to access to medically required medical and hospital services for free, whatever their financial situation. They benefit from access to a network of health institutions organized in conformity with the *ARHSS* in order to render available quality health services all over Quebec's territory, in accordance with notions of fairness, accessibility, efficiency and efficacy. On this issue, the Attorney General refers to its previous analysis of the legislative framework.

115. The insured medical services are provided by almost all doctors practicing in Quebec. It is indeed these doctors who determine what is required from a medical point of view in each particular case, thereby benefiting from a vast professional autonomy.

116. The Quebec medicare system receives an important part of the State's financial resources.

- In 2000, 39.8% of the government of Quebec's program expenses were used for health and social services (Clair Commission, p. 147, R.F., vol. 25, p. 4960).

- Based on total health spending per inhabitant (based on the Purchasing Power Parity index of the OECD) Quebec ranked 6th in 1997 among OECD countries (Arpin Report, Working Group Report, I-38, p. 51-52, R.F., vol. 15, p. 2868-2869).

- Based only on public spending for health, in 1998 Quebec spent about 7,2% of its GDP; here again, such rate can be favourably compared to that of other OECD countries (Clair Commission, p. 142, R.F., vol. 25, p. 4955).

117. When considered in light of the relevant sociosanitary indicators, the Quebec health system's performance, as that of health care systems in the rest of Canada, can be favourably compared to that of other developed countries. Good results are notably obtained as concerns the rate of avoidable mortality, the number of potential years of lost life, the rate of infant mortality, and living expectancy at birth or living expectancy corrected by incapacity.

- Sociosanitary indicators –international comparisons- evolution 1980-1994 – Germany, Canada, United States, France, Quebec, United Kingdom, R-60, p. 84-85, 90-91, 92, 126-127 and 129, R.F. vol. 7, p. 1290-1291, 1296-1297, 1298, 1331-1332 and 1334;

- Romanow Report, p. 11 to 14, Attorney General of Canada's compendium of sources, tab 15, p. 275 to 278;

- World Health Report 2000, «Health Systems: Improving Performance», World Health Organization (hereinafter «WHO Report 2000»), statistical annex, tables 1, 5, 9 and 10, R.F., vol. 27, p. 5319, 5323 to 5329, 5331, 5335, 5375 and 5379.

118. The Quebec health care system and health care systems in the rest of Canada thus get good results. Indeed, Canada ranked 7th within WHO member countries when the latter evaluated the global results of health care systems for 1997.

- WHO Report 2000, p. 218, R.F., vol. 27, p. 5375.

119. The Régie's annual statistics also reveal the number of medical acts provided to users by the health care system as well as their increase over the years.

- I-39.11, R.F., vol. 23, p. 4472.

120. The evidence in the file establishes that the Quebec health care regime appropriately responds to cases which present a danger for the life or physical integrity of users. If a user's health requires urgent care, he or she will have access to such care quickly and in priority.

- Testimony of Dr Côme Fortin, A.J.F., vol. 3, p. 497 and 507, R.F., vol. 1, p. 72 to 75, 81, 87-94;

- Testimony of Dr Daniel Doyle, A.J.F., vol. 3, p. 425 to 429;

- Testimony of Dr André Roy, R.F., vol. 2, p. 397-399;

- Expert report of Dr Charles J. Wright, I-34, p. 19, R.F., vol. 12, p. 2403;

- Expert report of Dr Fernand Turcotte, I-32, p. 12, R.F., vol. 12, p. 2360;

- Testimony of Dr Michael Churchill Smith, R.F. vol. 1, p. 136.

121. In the other situations, for instance in cases where users are waiting for elective surgery, the professionals involved evaluate their situation and treat them in priority if their health shows signs which would justify a faster intervention.

- Testimony of Dr Daniel Doyle, A.J.F., vol. 3, p. 425 to 429;

- Testimony of Dr Côme Fortin, A.J.F., vol. 3, p. 495, 497 and R.F., vol. 1, p. 81, 83.

122. The Attorney General submits that one cannot, as the Appellants do, judge the general state of the Quebec health care system based on the mere (and much hyped) existence of waiting lists.

123. In fact, these waiting lists do not provide reliable information because they are not based on uniform and normalized data. It is generally believed that a third of the patients which are included on these waiting lists are wrongly counted, for various reasons (for instance because they are put on various lists at the same time, because they are not available for surgery, because they have already had surgery or do not want it anymore). Many witnesses have indeed confirmed this situation:

- Expert report of Dr Fernand Turcotte, I-32, p. 13-14, R.F., vol. 12, p. 2361-2362;

- Expert report of Dr Charles J. Wright, I-34, p. 7 to 9, R.F., vol. 12, p. 2391 to 2393;

- Waiting lists and Waiting times for Health Care in Canada: More Management!! More Money? June 1998 (Lewis Report), I-34, p. 3 and R.F., vol. 13, p. 2438 and 2431;

- Testimony of Dr Côme Fortin, R.F., vol. 1, p. 75, 77 to 80;

- Testimony of Dr Daniel Doyle, R.F., vol. 1 p. 38 to 40.

124. Let us note that these problems of maintenance and management of waiting lists are not particular to Quebec and that many OECD countries are faced with the same problems.

- *Tackling Excessive Waiting Times for Elective Surgery: A Comparison of Policies in Twelve OECD Countries*, O.E.C.D., Health Working Papers no 6, July 7 2003, Paris, par. 10, 11 and 29 to 34, Appellant Chaoulli's compendium of sources, tab 47, p. 11 and 16.

125. Moreover, damage to the health of a person cannot be established merely by showing that he or she is put on a waiting list.

- *Tackling Excessive Waiting Times for Elective Surgery: A Comparison of Policies in Twelve OECD Countries*, *supra*, par. 9, Appellant Chaoulli's compendium of sources, tab 47, p. 10-11:

«Annex 1 contains a review of some of the main literature on the costs of waiting. Various tentative conclusions may be drawn. First, there is surprisingly little evidence of deterioration in health during wanting in most of the studies reviewed, which cover a variety of procedures, a variety of waiting times, and a variety of countries. That may have been because waiting times are typically shorter for the more acute conditions, such as coronary artery disease. Also, surgeons may be quite good at triage – that is at re-prioritising patients whose condition became unstable or deteriorate.»

See also:

- First instance decision, p. 14, A.J.F., vol. 1, p. 30;

- Testimony of Dr André Roy concerning Mr. Barry Stein, R.F., vol. 2, p. 367 and ff. and the conclusion of the first instance judge on this topic, p. 28, A.J.F., vol. 1, p. 44.

126. We also note that a waiting list is not *per se* an undesirable element within a health care system. It is typical of countries that do not limit access to health care based on individuals' capacity to pay and it plays a necessary role in the fair distribution of health services.

- Arpin Report, Constats and Recommendations, I-38, p. 37, R.F., vol. 14, p. 2812;

- *Tackling Excessive Waiting Times for Elective Surgery: A Comparison of Policies in Twelve OECD Countries*, *supra*, par. 21, Appellant Chaoulli's compendium of sources, tab 47, p. 13;

- Expert report of Dr Fernand Turcotte, I-32, p. 11-13, R.F., vol. 12, p. 2359-2361;

- Expert report of Dr Charles J. Wright, I-34, p. 6-7, R.F., vol. 12, p. 2390 to 2391;

127. Finally, it is revealing to see that the rate of satisfaction of users of medical and hospital services remains, with remarkable consistency, very high and much higher than that of the public in general.

- Arpin Report, Working Group Report, I-38, p. 1, R.F., vol. 15, p. 2891;

- Clair Commission, p. 206, R.F., vol. 25, p. 5018.

128. Therefore, it cannot be concluded, based on the mere existence of waiting lists, that the Quebec health system is generally incapable of providing the insured services within a medically acceptable delay.

- Expert report of Dr Fernand Turcotte, I-32, p. 14, R.F., vol. 12, p. 2362.

129. All health care systems are under pressure and none can claim that it is perfect. They all have, one day or another, to face occasional problems. It cannot be presumed that the Quebec health care system will not be able to respond to these occasional

problems and to ensure adequate access to medically required services to the population.

- *Tackling Excessive Waiting Times for Elective Surgery: A Comparison of Policies in Twelve OECD Countries*, *supra*, par. 1, Appellant Chaoulli's compendium of sources, tab 47, p. 9;

- Testimony of Dr Côme Fortin, R.F., vol. 1, p. 70;

- Testimony of Dr Daniel Doyle, A.J.F., vol. 3, p. 469.

130. In that context, the Appellants have not shown that the Quebec health care system showed such generalized lapses that it does not respond on a vast scale to the needs of the population and thereby globally jeopardizes the security of Quebeckers.

131. This is why the Attorney General believes that the right that is claimed by the Appellants is essentially a right to freely use their financial resources in order to get medical or hospital services already insured by the *HEIA* or the *HOIA*. But section 7 does not permit such a claim; the right to pay for access to a health service is not protected under liberty and security of the person.

- First instance decision, p. 111 A.J.F., vol. I, p. 127.

132. Hence, many courts in Canada have concluded that section 7 cannot guarantee the right to additional economic benefits, even though these have a positive impact on the quality of life and security of individuals.

- *Lacey v. British Columbia* [1999] B.C.J. no 3168, par. 3 to 6 (**tab 20**);

- *Fernandes v. Manitoba (Director of Social Services (Winnipeg Central)* (1992) 93 D.L.R. (4th) 402 (Man. C.A.), p. 412 to 414 (**tab 12**);

- *Wittman v. Emmot* [1991] W.W.R. 175 (B.C.C.A.), p. 185 and ff.;

- *Whitebread v. Walley* (1989) 51 D.L.R. (4th) 509 (B.C.C.A.), p. 521-522 (**tab 66**);

- *Belhumeur c. Savard* [1988] R.J.Q. 1526 (C.A.Q.), p. 1533 (**tab 4**) ;

- *Masse v. Ontario (Ministry of Community and Social Services)*, (1996) 134 D.L.R. (4th) 20 (Ont. S.C.), p. 41 to 43; request for leave refused, [1996] O.J. 1526; request for leave refused, [1996] 3 S.C.R. xi (**tab 25**).

133. This principle is also applicable in the context of access to certain conditions of medical care.

- *Brown v. British Columbia (Minister of Health)*, (1990) 66 D.L.R. (4th) 444 (B.C.S.C.) p. 466-467 (**tab 8**);

- *Ontario Nursing Hime Assn v. Ontario* (1990) 72 D.L.R. (4th) 166 (Ont. H.C.), p. 177 (**tab 29**);

- *Auton (Guardian ad Litem of) v. British Columbia, supra*, (B.C.C.A.), par. 73.

• The Right to Liberty

134. Under the right to liberty protected by section 7 only «intrinsically private decisions» are constitutionally protected. This limited sphere of personal autonomy includes only an individual's decisions which concern his or her «fundamental being» and protects only interests «truly essential to individual dignity».

- *Blencoe v. British Columbia (Human Rights Commission), supra*, par. 49-54 and par. 86 (Mr. Justice Bastarache, for the majority).

135. The liberty claimed by the Appellants is that of using their financial resources as they wish in order to get private insurance. The essentially economic nature of this claim cannot be overshadowed by the mere fact that this free use of their property is for the purchase of insured medical and hospital services.

136. Clearly, no fundamental personal choice is affected by the provisions impugned in this case. If it were to be concluded otherwise, the autonomy of individuals risks being assimilated to the right to live on the margin of society, since a mere regulatory constraint, such as the financing mode of the health care system, could be contested through section 7 of the *Canadian Charter*.

137. To give such a wide interpretation to the right to liberty is incompatible with the organization of life in society and the search for the common good.

- *Re: Motor Vehicle Act (B.C.), supra*, p. 524 (Justice Wilson);

- *R. v. Edwards Books and Art Ltd*, [1986] 2 S.C.R. 713, p. 785-786 (Chief Justice Dickson, Chouinard and LeDain JJ. concurring (**tab 36**);

- *R. v. Morgentaler*, *supra*, p. 164 (Justice Wilson);

- *R v. Jones* [1986] 2 S.C.R. 284, p. 318-319 (Justice Wilson) (**tab 39**);

- *Operation Dismantle v. The Queen*, *supra*, p. 489-490 (Justice Wilson);

- *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, *supra*, p. 368 (Justice LaForest, for the majority).

138. As the Court said concerning arguments suggesting that a choice relating to an aspect of the lifestyle of an individual would be protected by the right to freedom guaranteed by section 7 because the person considers it important:

> *«A society that extended constitutional protection to any and all such lifestyles would be ungovernable. Lifestyle choices of this order are not, we think, "basic choices going to the core of what it means to enjoy individual dignity and independence" (Godbout, supra, at para. 66).»*

- *R. v. Malmo-Levine ; R. v. Caine*, *supra*, par. 86 (Gonthier and Binnie JJ., for the majority).

139. In sum, the Attorney General submits that the Appellants have not shown any infringement of a right protected by section 7, which constitutes the first element of their burden.

3.2.2 ABSENCE OF CAUSAL LINK BETWEEN THE ALLEGED INFRINGEMENT AND SECTIONS 15 HEIA AND 11 HOIA

140. According to the criteria developed by the Court, the Appellants should also have shown the existence of a causal link between the effects of the impugned sections and the alleged infringement of their rights.

- *Blencoe v. British Columbia (Human Rights Commission)*, *supra*, par. 60 and particularly par. 69-70 (Justice Bastarache for the majority);

- *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, par. 53-54 (The Court) (**tab 59**);

- *R. v. Morgentaler*, *supra*, p. 60-61 (Chief Justice Dickson); p. 90 (Justice Beetz);

- *Operation Dismantle v. The Queen*, *supra*, p. 447, 456 (Chief Justice Dickson for the majority).

141. Yet the Appellants have completely omitted to show the existence of this causal link.

142. There is no piece of evidence in the file which demonstrates that the alleged problems of access to medical and hospital services are caused by the prohibitions found in sections 15 *HEIA* and 11 *HOIA*.

143. Quite the opposite, the evidence reveals that factors which are unrelated to the legislative prohibitions on private insurance (such as the rapid evolution of technologies, the lack of certain specialists, their distribution over the territory, or the lack of nurses or technicians) are the true origin of the problems suffered by the Quebec health care system. These problems are in fact common to all Western health care regimes, whatever their modes of financing.

- Expert report of Dr Howard Bergman, I-25, p. 4 R.F., vol. 10, p. 1852;

- Testimony of Dr Abdenour Nabid, A.J.F., vol. 3, p. 550-551, R.F., vol. 1, p. 114-115, 126-127;

- Testimony of Dr Côme Fortin, A.J.F., vol. 3, p. 496, R.F., vol. 1, p. 62, 63, 70;

- Testimony of Dr Daniel Doyle, A.J.F., vol. 3 p. 443 to 444 and 469;

- *Tackling Excessive Waiting Times for Elective Surgery: A Comparison of Policies in Twelve OECD Countries*, *supra*, par. 1, Appellant Chaoulli's compendium of sources, **tab 47**, p. 9.

144. Nor is there evidence in the file showing that the possibility to get private insurance in order to pay for the services insured by the public regime would solve the problems of access alleged by the Appellants and would have the effect of giving them access to services which they say they fear not receiving.

- First instance decision, p. 14 and 27, A.J.F., vol. 1, p. 30 and 43.

145. Rather, the Attorney General believes it has shown that a private regime would likely offer a restricted package of services, would limit access to its benefits to a clientele which meets selective criteria of insurability (based notably on age, health, medical history, etc.), would administer in a strict manner the coverage and access procedure to the care offered and would control the costs of the regime (by raising the amount of the premium and of co-insurance, by restricting coverage, by limiting the choice of doctor or by controlling her decisions, etc.)

- Testimony of Dr Howard Bergman, R.F., vol. 2, p. 232 to 236, 241 and 242, and Expert report, I-25, p. 7 and 10, R.F., vol. 10, p. 1855 and 1858;

- Testimony of Dr Daniel Doyle on HMO's, A.J.F., vol. 1, p. 50 to 54;

- Expert Report of Dr Jean-Louis Denis, I-27, p. 11-12, 16-17, R.F., vol. 11, p. 2076-2079, 2081-2082;

- Expert Report of Dr Charles J. Wright, I-34, p. 17-18, R.F., vol. 11, p. 2401-2402;

- World Health Report -1999- Toward a Real Change, World Health Organization, Respondent Attorney General of Canada's file, vol. 10, p. 1674.

146. Let us add that Appellant Zeliotis' position seems unrealistic because it does not take into account the difficulty for older persons to get private insurance covering medical and hospital needs.

- Castonguay-Nepveu Commission 1967, I-39.3, p. 54 and 46, R.F., vol. 17, p. 3303 and 3304;

- National Advisory Council on Aging on the Privatisation of Health Care, IA-54, p. 5, R.F., vol. 24, p. 4761.

147. Even assuming that the Quebec health care system shows generalized flaws, which is denied, the Appellants have not at all established that sections 15 *HEIA* and 11 *HOIA* are the effective cause of these problems and that the establishment of a parallel private regime would improve access to health services in a significant way for the whole of the population.

3.2.3 CONFORMITY OF ALLEGED INFRINGEMENT WITH THE PRINCIPLES OF FUNDAMENTAL JUSTICE

148. If it is concluded that a real or imminent infringement of one of the rights protected by section 7 of the *Canadian Charter* occurred, the Appellants must also show that it is contrary to the principles of fundamental justice. As specified by the Court, this stage of the analysis consists first in identifying and qualifying a relevant principle of fundamental justice, before establishing whether the infringement of the right is in conformity with it.

- *R. v. White*, *supra*, par. 38 (Justice Iacobucci for the majority) ;

- *R. v. Malmo-Levine ; R. v. Caine*, *supra*, par. 83 (Gonthier and Binnie JJ., for the majority); par. 219 (Justice Arbour).

149. In the present case, the Appellants' claim in that regard is limited to putting into question the correctness of the legislator's policy choices (Appellant Chaoulli's factum, par. 186-190) or the legitimacy of the objectives sought through the establishment of public health and hospital insurance regimes (Appellant Zeliotis' factum, par. 62-64).

150. However, these considerations of a political, non-legal, nature, do not amount to principles of fundamental justice which can be opposed to sections 15 *HEIA* and 11 *HOIA*.

151. As has been established in the recent trilogy concerning the criminalization of marihuana, section 7 of the *Canadian Charter* limits legislatures' power to protect legitimate State interests only if they adopt measures which are *arbitrary, irrational or overly disproportionate.* In sum, a violation of fundamental justice will be established if the infringement of a right protected by section 7 does more or less nothing to promote a State interest or serves no valuable goal.

- *R. v. Malmo-Levine ; R. v. Caine*, *supra*, par. 129-140 (Gonthier and Binnie JJ., for the majority);

- *Rodriguez v. British Columbia (Attorney General)*, *supra*, p. 594-595 (Justice Sopinka for the majority).

152. In opposition to the Appellants' claims, that principle does not consist in evaluating the importance of the collective interests sought by the law or the seriousness of the prejudice to which the State wants to remedy.

- *R. v. Malmo-Levine ; R. v. Caine*, *supra*, par. 133 (Gonthier and Binnie JJ., for the majority); see also par. 179-82.

153. Moreover, following *Heywood*, in order to show that a law is overinclusive it is not sufficient to state that other legislative solutions could have been imagined; it must be shown that the law is arbitrary or that it generates overly disproportionate effects as compared with the general interests which the law tries to protect. This strict legal principle is similar to that applicable to a sanction with respect to section 12 of the *Canadian Charter* and requires the demonstration of the odious or intolerable

character of the impugned measure, in order to preserve the principle of judicial restraint in relation to the means chosen by the legislator to further a State interest.

- *R. v. Malmo-Levine ; R. v. Caine*, *supra*, par. 143, 169, 175, 179-182 (Gonthier and Binnie JJ., for the majority);

- *R. v. Clay*, *supra*, par. 37-40 (Gonthier and Binnie JJ. for the majority).

> *«In analyzing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature. While the courts have a constitutional duty to ensure that legislation conforms with the Charter, legislatures must have the power to make policy choices. A court should not interfere with legislation merely because a judge might have chosen a different means of accomplishing the objective if he or she had been the legislator.»*

- *R. v. Heywood* [1994] 3 S.C.R. 761, p. 793 (Justice Cory for the majority) (**tab 38**); quoted approvingly in *R. v. Clay*, *supra*, par. 38-39 (Gonthier and Binnie JJ. for the majority).

154. In the present case, it was for the Appellants' to prove that the impugned legislative measures are arbitrary, irrational or that they are in themselves overly disproportionate in relation to any legitimate State interest. Evidently, such a demonstration has not been made.

• The Objectives of the HEIA and HOIA

155. An analysis of the historical and legislative contexts leads to the identification of two main legislative objectives.

156. The first objective is related to the improvement of the health and welfare of the population. In order to reach that objective, the legislator more specifically wanted to:

- Eliminate the uncertainty and economic risk inherent to illness, notably through the elimination of financial obstacles to access to care;

- Render care accessible to all the population for it to consume it optimally;

- Obtain maximum efficacy for the system of care distribution through the planning, coordination and streamlining of activities in the health domain.

- Maximize the social efficiency in relation to health care, as an investment in human resources and as a preventative social measure.

  - Castonguay-Nepveu Commission 1967, I-39.3, p. 35 to 47, 53, R.F., vol. 17, p. 3293 to 3305, 3308.

  - Journal des débats, I-39.5, p. 551 to 558, A.J.F. vol. 14, p. 2510 to 2517.

157. The second objective concerns the promotion of the values of equality and social solidarity by giving the population equal access to quality medical and hospital services, through the pooling of resources, so that services are distributed according to the users' true needs and not according to their capacity to pay.

158. These values of equality and social solidarity are fundamental to the health care system:

> *«Most people fully accept that different income levels lead to different standards of living. However, most would not tolerate a situation in which one person does not receive the same treatment for a physical ailment as another on the basis of income. This form of inequality was unacceptable. Equality of access is also seen to be essential to opportunity. Variances in income could be the end result of the market economy, but being physically healthy is seen as a precondition for having a fair chance at success. If there is to be equality of opportunity, then as far as possible everyone should start from a position of good health. Equality of access is also seen to be essential to opportunity. Variances in income could be the end result of the market economy, but being physically healthy is seen as a precondition for having a fair chance at success. If there is to be equality of opportunity, then as far as possible everyone should start from a position of good health.»*

- National Forum, Values Working Group Synthesis Report, I-16, p. 10-11, R.F., vol. 8, p. 1565-1566.

> *«**Citizenship and Equality of Opportunity** – Through health and hospital insurance, medical and hospital services are the only ones which society gives itself for the benefit of all of its members, without being conditional on the financial situation, in a truly universal manner. This situation is almost unique: it comes from society's choice to undertake a common project which brings together all citizens and the various communities. It thus has a symbolic character which is essential for its understanding. It is based on the principle according to which **equality of opportunity** is inherent to the status of citizen and on the conviction that health services are a necessary condition of such equality»*

- Arpin Report, Working Group Report, I-38, p. 34, R.F., vol. 15, p. 2921.

  See also:

- Castonguay Nepveu Commission: Health (hereinafter «Castonguay Nepveu Commission 1970»), I-39.4, p. 245, R.F., vol. 19, p. 3690;

- Journal des débats, I-39.5, p. 551 to 554, A.J.F., vol. 14, p. 2510 to 2513 ;

- Journal des débats, R-30, p. 1411-1412, A.J.F., vol. 8, p. 1357 to 1358 ;

- Canada's National-Provincial Health Program for the 1980's: A Commitment for Renewal, I-39.7, p. 6-7, 26-28, R.F., vol. 19, p. 3756-3757, 3776-3778;

- Rochon Commission, I-39.8, p. 487 to 490, 651-652, 654, R.F., vol. 20, p. 4027 to 4030, 4044-4045, 4047;

- Porter Federal Committee, I-39.9, p. 51, R.F., vol. 21, p. 4169;

- Report of the Conseil de la santé et du bien-être, p. 14, R.F., vol. 27, p. 5266;

- Romanow Report, p. xvi, xxii, 31-32, 47, Attorney General of Canada's compendium of sources, tab 15, p. 342, 248, 295-296, 311.

159. The importance of these main legislative objectives has been acknowledged by the first instance judge when she stated that sections 15 *HEIA* and 11 *HOIA* aim at improving the health and welfare of the population, as well as promoting the values of equality and human dignity affirmed by the *Canadian Charter* and the *Quebec Charter*.

- First instance decision, p. 126, A.J.F., vol. 1 p. 142;

- *R v. Oakes* [1986] 1 S.C.R. 103, p. 136 (Chief Justice Dickson for the majority) (**tab 44**).

- **The means chosen are not arbitrary or overly disproportionate as compared with the legislative objectives.**

160. Sections 15 *HEIA* and 11 *HOIA* help attain the objectives of the laws within which they are found.

161. In the present case the Appellants, through the abolition of the prohibitions contained in the impugned provisions, ask for the establishment of a parallel private health care system, access to which would be primarily a condition of individuals' capacity to pay.

162. On the one hand, this request goes against the values of equality and social solidarity which the legislature wants to promote in the realm of health care.

163. On the other hand, as concluded to by the first instance judge, this request interferes with the objective of improving the health and well-being of the population.

> ***«It is clear that the Quebec government intended to promote the health of its population by establishing a public health service system open to everyone.*** *This implies that the public system should be able to offer quality services. To achieve this end, the government had to provide a system that would prevent the loss of a significant part of health resources to the private sector. The viability of the public system depended on the availability of health resources personnel, equipment and so on) to the population as a whole. The purpose of s. 15 HIA is to guarantee this availability by significantly limiting the availability and profitability of the private system in Quebec.»*

- First instance decision, p. 74; see also p. 125 to 127, A.J.F, vol. 1 p. 92, 141 to 143.

164. The objectives indeed require the pooling of all individual financial resources which are provided for the protection against illness. Hence, the presence of a private regime overlapping with the public regime would interfere with the latter achieving its objectives. This is why it was decided to eliminate individual insurance regimes which covered the same services as those covered by the health and hospital insurance regimes, so that the State could have some liberty with respect to the financing of these regimes and with respect to the coordination, planning and pooling of all the resources then available in Quebec.

- First instance decision, p. 126, A.J.F., vol. 1, p. 142;

- Castonguay-Nepveu Commission 1967, I-39.3, p. 54, R.F., vol. 1, p. 3309;

- Journal des débats, I-39.5, p. 554, 646, A.J.F., vol. 14, p. 2513, 2525.

165. A single payer regime is better able to ensure that all get access to the best care which society's collective wealth can afford for the population. It also has the capacity to adapt and transform in order to tackle the pressures which presently affect all the health care systems of OECD countries. It enables collective responsibility for the problems which may occur.

- Expert report of Dr Howard Bergman, I-25, p. 8-9, R.F., vol. 10, p. 1856-1857;

- Expert report of Dr Jean-Louis Denis, I-27, p. 17 to 21, vol. 11, p. 2082 to 2086;

- Testimony of Dr Michael Churchill Smith, R.F., vol. 1, p. 180 to 182.

166. Moreover, a single payer regime provides the government with a financial lever which enables it to dispatch medical staff by adopting incentive measures which, for instance, encourage doctors to go practice outside of large urban centres or in certain domains which are to be filled in priority.

- Journal des débats, I-39.5, p. 553, vol. 14, p. 2512;

- Clair Commission, p. 159-160, R.F., vol. 25, p. 4972-4973.

167. Moreover, there is no doubt that the possibility of getting private insurance in the context of the Appellants' request would cause many deleterious effects for Quebec's medicare system and would interfere with the attainment of the legislature's objectives.

> *«The evidence showed that the right to have recourse to a parallel private health care system, advocated by the applicants, would have repercussions on the rights of the public as a whole. We cannot act like ostriches. The result of creating a parallel private health care system would be to threaten the integrity, sound operation and viability of the public system. Sections 15 HIA and 11 HIA prevent this from happening and guarantee the existence of a quality public health system in Quebec.»*

- First instance decision, p. 127, A.J.F., vol. 1, p. 143.

168. The evidence shows that the existing resources, in the case of doctors and in that of other health professionals (nurses and technicians, among others), would migrate from the public regime to the private one, thereby increasing the number of people on waiting lists in the public system.

- First instance decision, p. 126, A.J.F., vol. 1 p. 142;

- Expert report of Dr Howard Bergman, I-25, p. 8, R.F., vol. 10, p. 1856;

- Expert report of Dr. Charles J. Wright, I-34, p. 15 to 17, R.F., vol. 12, p. 2399 to 2401;

- Expert report of Dr Jean-Louis Denis, I-27, p. 14, vol. 11, p. 2079;

- Expert Report of Dr Theodore R. Marmor, I-29, p. 2 to 13, R.F., vol. 11, p. 2214 to 2225;

- Porter Federal Committee, I-39.9, p. 34, R.F., vol. 21, p. 4153;

- Romanow Report, p. 154, Attorney General of Canada's compendium of sources, tab 15, p. 418;

- Report of the Conseil de la santé et du bien-être, p. 30, R.F., vol. 27, p. 5281.

169. It must be noted that Mr. Zeliotis's submissions are all based on an erroneous premise, according to which the State would have medical and hospital resources which it does not need in order to meet the needs of the Quebec population. This thesis concerning a surplus of resources is a myth and is not bolstered by the evidence.

- Arpin Report, Working Group Report, I-38, p. 6 and 86, R.F., vol. 15, p. 2896 and 2972;

- Testimony of Dr Abdenour Nabid, A.J.F., vol. 3, p. 550-551, R.F., vol. 1, p. 97, 114-115, 126-127;

- Testimony of Dr Daniel Doyle, A.J.F., vol. 3, p. 443 to 444 and 467.

170. The loss of resources, both in terms of numbers and expertise, would also have consequences for the quality of services provided in the public regime, all the more since the latter would be stuck with the heaviest cases, since the private insurance regime would lead to «skimming» practices.

- Expert report of Dr Howard Bergman, I-25, p. 8, 10, R.F., vol. 10, p. 1856, 1858;

- Expert report of Dr. Charles J. Wright, I-34, p. 21, 24, R.F., vol. 12, p. 2405, 2408;

- National Forum, I-16, vol. 1, p. 12, R.F., vol. 8, p. 1522;

- Report of the Conseil de la santé et du bien-être, p. 56, R.F., vol. 27, p. 5306.

171. Moreover, the establishment of a parallel private regime would lead to increased complexity, notably in terms of coordination and planning, because of the need to manage two distinct regimes side-by-side. The general efficiency of the health care system would be affected by this overlap, particularly at the levels of distribution of resources on the basis of regional needs and of management of problems which could occur.

- Expert Report of Dr Theodore R. Marmor, I-29, p. 10, R.F., vol. 11, p. 2222;

- Expert report of Dr. Charles J. Wright, I-34, p. 22, R.F., vol. 12, p. 2406;

- Expert report of Dr Jean-Louis Denis, I-27, p. 23, vol. 11, p. 2088;

- Expert report of Dr Howard Bergman, I-25, p. 10, R.F., vol. 10, p. 1858;

- Report of the Conseil de la santé et du bien-être, p. 39 to 45, R.F., vol. 27, p. 5290 to 5296.

172. The presence of a parallel private system would lead to a global increase in the costs of health services. Moreover, it would lead to an increase in costs due to the need to manage two health care systems with, in the end, less resources being directly committed to care.

- Expert Report of Dr Theodore R. Marmor, I-29, p. 3, 6 10, R.F., vol. 11, p. 2215, 2218, 2222;

- Expert report of Dr Howard Bergman, I-25, p. 5 to 10, R.F., vol. 10, p. 1853 to 1858;

- Expert report of Dr Jean-Louis Denis, I-27, R.F. p. 6, vol. 11, p. 2071;

- National Forum, Striking a Balance Working Group, I-16, p. 15, R.F., vol. 9, p. 1612;
- Porter Federal Committee, I-39.9, p. 35, R.F., vol. 21, p. 4154;
- Report of the Conseil de la santé et du bien-être, p. 24, 35 and 55, R.F., vol. 27, p. 5275, 5286 and 5305.

173. This global increase in costs would also deprive the Quebec state apparatus from resources necessary in order to efficiently intervene on other socio-economic factors which have an important influence on the health of individuals and of the population, such as the fight against poverty, education, child care and the environment, only to name a few.

- Castonguay-Nepveu Commission 1970, I-39.4, p. 20-21, 121, 248, R.F., vol. 18, p. 3665-3666, 3674, 3693;

- National Forum, Striking a Balance Working Group Report, I-16, p. 12, 14 to 17, R.F., vol. 9, p. 1609, 1611 to 1614;

- Expert report of Dr Jean-Louis Denis, I-27, p. 1, 15, R.F., vol. 11, p. 2064, 2080.

174. Finally, it appears that, as time goes by, the most influential members of society, i.e. those who have the financial means to use the private regime, would dissociate themselves from the public regime, which would make obtaining the resources necessary for its functioning and for the collective management of health problems more and more difficult.

- Expert Report of Dr Theodore R. Marmor, I-29, p. 3 to 8, R.F., vol. 11, p. 2215 to 2220;

- Expert report of Dr Howard Bergman, I-25, p. 6, R.F., vol. 10, p. 1854;

- Expert report of Dr Jean-Louis Denis, I-27, p. 5, R.F. vol. 11, p. 2070;

175. All these factors would lead to the deterioration of accessibility to, and quality of, care provided by the public regime.

176. But mainly, it would lead to an unfair system, which would give privileged access to health care services to some because it is primarily based on their capacity to pay, which would go directly against the objectives of equality and social solidarity of the *HEIA* and *HOIA*.

- Expert report of Dr Howard Bergman, I-25, p. 6, R.F., vol. 10, p. 1854;

- Expert report of Dr Charles J. Wright, I-34, p. 9-10, R.F., vol. 12, p. 2393-2394;

- Expert report of Dr Theodore R. Marmor, I-29, p. 5-6, R.F., vol. 11, p. 2217-2218.

177. However, sections 15 *HEIA* and 11 *HOIA* precisely aim at preventing the creation of a parallel market for private insurance which would cover the same services as those insured by the public regime, and which would have the effect of inciting many doctors to become non-participants in the public regime.

178. The Attorney General thus concludes that the impugned provisions are rationally connected to the objectives sought by the legislature. They are neither arbitrary nor irrational; nor are they overly disproportionate as compared to any legitimate State interest. For these reasons, it has not been demonstrated that section 7 of the *Canadian Charter* has been infringed.

4. CONSTITUTIONAL QUESTIONS 7 AND 9

SECTIONS 15 HEIA AND 11 HOIA DO NOT INFRINGE THE RIGHT TO EQUALITY GUARANTEED BY PARAGRAPH 15(1) OF THE CANADIAN CHARTER

179. Appellant Chaoulli's claim according to which all Quebec residents who are entitled to free health services would be discriminated against as compared with

foreign residents who have to pay for the same services is not founded on any factual or legal basis.

- Testimony of René Carignan, A.J.F., vol. 3, pp. 483-484;

- Testimony of Dr Eric Lenczner, A.J.F., vol. 2, p. 343.

180. In *Law*, this Court has developed a three pronged test in order to rule on an alleged infringement of paragraph 15(1) of the *Canadian Charter*.

- *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497, par. 88 (Justice Iacobucci for the Court) (**tab 22**).

181. This Court has clearly indicated that it was not sufficient to show that a differential, even a detrimental treatment flows from the law in order to conclude to the presence of discrimination. It is for the person alleging the presence of discrimination under section 15 of the *Canadian Charter* to establish, on a balance of probabilities standard, each of the following elements:

> (1) the law imposes differential treatment between the claimant and others;
>
> (2) one or more enumerated or analogous grounds are the basis for the differential treatment;
>
> (3) the law in question has a purpose or effect that is discriminatory in the sense that it denies human dignity or treats people as less worthy on one of the enumerated or analogous grounds.

- *Gosselin v. Québec (Attorney General)*, *supra*, par. 17 (Chief Justice McLachlin for the majority).

182. The Attorney General first submits that the Appellant cannot compare his situation to that of persons who, because they do not reside in Quebec, are not covered by the public medicare regime established by the *HEIA* and *HOIA*.

183. In fact, the differential treatment the Appellant complains from should truly flow from the law itself or from its effects on a clientele who is potentially admissible to its benefits in order to give way to an analysis of the right to equality.

- *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, p. 276 (Justice LaForest, for the majority) (**tab 26**);

- *Stoffman v. Vancouver General Hospital* [1990] 3 S.C.R. 483, p. 517 (Justice Laforest, for the majority on this point) (**tab 58**);

- *R. v. S.(S.)* [1990] 2 S.C.R. 254, p. 284-285 (Chief Justice Dickson for the Court).

184. Moreover, sections 15 *HEIA* and 11 *HOIA* draw no distinction based on a characteristic personal to the beneficiaries of the regime. These provisions, by prohibiting that services covered by the public regime be covered by private

insurance, indeed make no distinction; all those who are subjected to these laws are entitled to free insured services and are treated in the same way. These provisions apply uniformly to all Quebec's population, based on the sole criteria of existence of services already insured by the public regime.

185. The Attorney General also submits that the distinction from which the appellant Chaoulli complains is not founded on a ground analogous to those enumerated at paragraph 15(1) of the *Canadian Charter*. Indeed, it is clear that a person's place of residence does not constitute a protected ground of discrimination. No special element of the present case suggests the refutation of the case law on this point.

- *R. v. Turpin*, [1989] 1 S.C.R. 1296, p. 1332-1333 (Justice Wilson for the Court) (**tab 47**);

- *R. v. S.(S.)*, *supra*, p. 285, 288 and 289, and 292 (Chief Justice Dickson for the Court);

- *Haig v. Canada*, [1993] 2 S.C.R. 995, p. 1043-1044 (Justice L'Heureux-Dubé for the majority);

- *R v. Finta*, [1994] 1 S.C.R. 701, p. 875-876 (Justice Cory for the majority) (**tab 37**);

- *Corbière v. Canada (Minister of Indian Affairs and Northern Affairs)* [1999] 2 S.C.R. 203, par. 13-15 (MacLachlin and Bastarache JJ.); par. 60-62 (Justice L'Heureux-Dubé, with whom Gonthier, Iacobucci and Binnie JJ. agreed) (**tab 9**);

- *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, par. 48-49 (Justice Major for the Court) (**tab 57**);

- *Westmount (Ville) v. Quebec (Procureur Général)*, *supra*, par. 161 to 169.

186. Finally, the Attorney General submits that the Appellant has not shown how the impugned provisions could have a purpose or effects which are discriminatory for him, or could be assimilated to the stereotypical application of personal characteristics which would affect the dignity of the person, when these provisions aim at ensuring access to free health care for everyone.

187. Indeed, the Court of Appeal has confirmed the first instance judge's conclusion to the effect that there is no conflict between the impugned provisions and the purpose of section 15 of the *Canadian Charter*, since these provisions do not demean Quebec's population at all. Quite the contrary, they aim at promoting legitimate social interests and at strengthening the equality and dignity of Quebeckers by guaranteeing them medical and hospital care, whatever their financial capacities.

- Court of Appeal decision, par. 40 to 48, A.J.F., vol. 1, p. 184-185;

- First instance decision, p. 144, A.J.F., vol. 1, p. 160.

5. CONSTITUTIONAL QUESTION 11

SECTION 11 HOIA DOES NOT INFRINGE SECTION 12 OF THE CANADIAN CHARTER

188. Appellant Chaoulli submits that section 11 *HOIA* infringes section 12 of the *Canadian Charter*.

189. However, the protection afforded by this provision primarily concerns sanctions imposed by a Court in the context of criminal law. Although the issue of whether section 12 can be applied outside of this context is not completely settled, it remains that «a mere prohibition by the state on certain action, without more, cannot constitute "treatment" under s. 12».

- *Rodriguez v. British Columbia (Attorney General), supra*, p. 608-612 (Justice Sopinka for the majority);

- First instance decision, p. 133-134, A.J.F., vol. 1, p. 149-150.

190. In the context of a regulated activity, as is the case here, the treatment to which section 12 applies concerns the sanction itself and not the general conduct which is mandated. Otherwise, any person who is subject to the application of a law, due to the mere possibility of having a fine imposed on him or her, could claim that it is subject to treatment because it is obliged to respect a prohibition or to fulfill an obligation.

191. For there to be treatment under section 12 of the *Canadian Charter*, the State must actively intervene in relation to an individual by imposing a coercive measure similar to a sanction. Also, the fact that due to the particular situation of an individual a given prohibition affects him or her in a way that causes more inconveniences does not mean that he or she is subject to a «treatment» imposed by the State.

- *Rodriguez v. British Columbia (Attorney General), supra*, p. 612 (Justice Sopinka for the majority).

192. Hence, the Court of Appeal rightly concluded that «the simple fact that all persons who reside in Quebec, including the appellant, are subject to sections 11 HOIA and 15 HEIA does not lead to the conclusion that the State has control over their lives», and, thus, cannot be assimilated to treatment or punishment under s. 12 of the *Canadian Charter*.

- Court of Appeal decision, par. 35, A.J.F., vol. 1, p. 183.

193. Finally, let us note that section 12 can only be applied in the case of a sanction or punishment which is excessive to the point of being incompatible with human dignity. This is a very demanding test which asks for judicial intervention only in the exceptional circumstances where a sanction is considered manifestly disproportionate. However, such circumstances are not present here.

- *R. v. Smith (Edward Dewey)* [1987] 1 S.C.R. 1045, p. 1072-1074 (Justice Lamer with whom Chief Justice Dickson agreed); p. 1109 (Justice Wilson); p. 1089-1090 (Justice MacIntyre) (**tab 46**);

- *R. v. Morrisey* [2000] 2 S.C.R. 90, par. 26 (Justice Gonthier for the majority) (**tab 43**);

- *Suresh v. Canada (Minister of Citizenship and Immigration), supra*, par. 51 (The Court).

194. As was rightly noted by the first instance judge in reasons confirmed by the Court of Appeal:

> *« As mentioned above, s. 11 HIA is a measure designed to ensure that the public health system is viable. This provision cannot be so constraining as to outrage standards of decency as it is a measure taken to preserve the dignity of all Quebeckers by guaranteeing them adequate health care.»*

- First instance decision, p. 135, A.J.F., vol. 1, p. 129;

- Court of Appeal decision, par. 38, A.J.F., vol. 1, p. 183.

195. The Attorney General thus submits that section 11 *HOIA* does not infringe section 12 of the *Canadian Charter*.

6. CONSTITUTIONAL QUESTIONS 2, 4, 8, 10 AND 12

IF IT IS CONCLUDED THAT ONE OF THE RIGHTS PROTECTED BY THE CANADIAN CHARTER HAS BEEN INFRINGED, WHICH IS DENIED, SUCH INFRINGEMENT CONSTITUTES A REASONABLE AND JUSTIFIED LIMIT PURSUANT TO SECTION 1 OF THE CANADIAN CHARTER

196. If the Court were to decide that sections 15 *HEIA* and 11 *HOIA* infringe any constitutional right invoked by the Appellants, the Attorney General submits that these provisions are justified pursuant to section 1 of the *Canadian Charter*.

• The importance of the legislative objectives

197. The objective of promoting equality and social solidarity, as well as the various objectives concerning the improvement of the health and well-being of the population, are related to real and urgent concerns in a free and democratic society, as demonstrated by the analysis of the historical context and the analysis of these objectives in the context of our section 7 argument.

198. No one is contesting the State's interest in the improvement of the health and well-being of the population. It is a major preoccupation for any society.

199. On the other hand, the values of equality and social solidarity which are at the basis of the principle of public financing of insured services are fundamental to Quebec and Canadian societies. In the realm of health care, these values guarantee the

respect of each person's right to human dignity by providing for equal access to quality medical and hospital services, through the pooling of resources, so that these services can be distributed in accordance with the true needs of individuals and not in accordance with their capacity to pay.

- *R. v. Oakes*, *supra*, p. 136 (Chief Justice Dickson for the majority);

- *R. v. Edwards Books and Art Ltd.*, *supra*, p. 779 (Chief Justice Dickson, with whom Chouinard and LeDain JJ. agreed);

- **Proportionality of sections 15 HEIA and 11 HOIA in relation to legislative objectives**

200. The Court has stated that, in the realms of social and economic policy, some deference must be afforded to the choices made by legislatures, as the latter are better placed to make decisions in relation to these complex and often controversial matters. Moreover, the test of justification must be applied flexibly when the State has to adjudicate between divergent interests:

- *Re: Reference Public Services Employees Relations Act (Alb.)* [1987] 1 S.C.R. 313, p. 416, 419-420 (Justice MacIntyre, with whom the majority agreed on this point) (**tab 51**);

- *RJR MacDonald Inc. v. Canada (Attorney General)* [1995] 3 S.C.R. 199, p. 277, 279 (Justice LaForest, with whom Justices L'Heureux-Dubé, Gonthier and Cory agreed); p. 331-333 (Justice McLachlin for the majority) (**tab 54**);

- *Libman v. Quebec (Attorney General)* [1997] 3 S.C.R. 927, p. 993-994 (The Court) (**tab 24**);

- *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] 1 S.C.R. 927, p. 993-994;

- *Eldridge v. British Columbia (Attorney General)*, *supra*, p. 685 (Justice LaForest for the Court).

201. Moreover, it is clear that the justification of a legislative measure does not require a demonstration that the legislature has chosen the least impairing means in order to achieve its objectives. It can choose a solution among a series of possible ones, as long as this solution is reasonably adapted to the objectives to be achieved.

- *Irwin Toy v. Quebec (Attorney General)*, *supra*, p. 999-1000 (Chief Justice Dickson for the majority);

- *Reference Re. ss. 193 and 195.1 (1) c) Criminal Code (Man.)*, *supra*, p. 1137-1138 (Chief Justice Dickson for the majority);

- *McKinney v. University of Guelph*, *supra*, p. 304-305 (Justice LaForest for the majority);

- *R. c. Butler* [1992] 1 S.C.R., p. 504-505 (Justice Sopinka, for the majority) (**tab 34**);

- *R. v. Mills* [1999] 3 S.C.R. 668, p. 710, 712 (Justice McLachlin and Justice Iacobucci for the majority) (**tab 41**).

202. Here, the prohibitions imposed by section 15 *HEIA* and 11 *HOIA* are rationally connected to the objectives and are proportionate in relation to their achievement. They contribute to preventing the development of a parallel private system which, according to the experts heard in evidence, would have the effect of damaging the values of equality and social solidarity which are at the basis of the Quebec and Canadian health care systems, of decreasing the quality of care, and of jeopardizing the State's capacity to maintain a health care system which has the means to guarantee a fair access to quality medical and hospital services to all.

203. In order to counter these deleterious effects, it is necessary to prevent the development of a parallel private system which would lead to the decreasing of the public regime's fairness. The prohibition on private insurance covering the insured medical and hospital services is a means for attaining the objective of promoting the values of equality and social solidarity which does not go further than necessary to attain this objective.

204. The objective of improving the health and well-being of the population would also be damaged by the deleterious effects of introducing private insurance covering insured services, as has been demonstrated earlier.

205. On this topic, the Attorney General relies on the study of the Canadian legislation done by the Attorney General of Canada in its factum. That study demonstrates that many other Canadian provinces have adopted provisions similar to those of the Quebec legislation to prohibit private insurance from covering insured medical and hospital services. Moreover, all provinces, in one way or another, have erected barriers against the emergence of a parallel health care system (Attorney General of Canada's factum, par. 73 to 85).

206. The Appellants suggest that the State, through some form of regulation, including recourse to section 30 *HEIA*, can make sure that there is always a sufficient number of doctors who participate in the public health care regime in order to meet the needs of the population. However, this solution presents major problems and does not enable the achievement of the results hoped for.

207. Indeed, in countries where, for historic reasons, there exist parallel public and private health care regimes, attempts to force doctors to practice both in the public and private regimes have lead to an increase in waiting times in the public regime. Moreover, the regulation of such double practice has been very difficult to implement.

- *Tackling Excessive Waiting Times for Elective Surgery: A Comparison of Policies in Twelve OECD Countries*, *supra*, par. 26, 44, 74 to 75, Appellant Chaoulli's compendium of sources, tab 47, p. 15, 20 and 28;

- See also references at par. 168 of this factum.

208. Such regulation, whose efficiency has not been demonstrated, only leads to an increase in the system's administrative costs, which at the same time affects the human and financial resources which are directly affected to care. It also leads to increased complexity, notably in terms of coordination and planning, in order to have two distinct regimes functioning side by side.

209. Finally, we note that section 30 *HEIA* targets the situation of a collective disengagement which could occur during negotiation of the agreements provided for by the law between health professionals and the Minister of Health and Social Services. Thus, it complements section 15 *HEIA* by aiming at a situation for which the latter would be useless.

- Castonguay-Nepveu Commission 1967, I-39.3, p. 150-151, R.F., vol. 17, p. 3404-3405.

210. Also, the deleterious effects of the measures, if there are some, are minimal when compared to their beneficial effects, to the extent that the latter contribute to ensuring to the Appellants and to the rest of the Quebec population access to quality medical and hospital services.

211. All this shows that the legislature has chosen a solution that is proportionate to the achievement of its objectives and which meets the criteria of reasonableness of section 1 of the *Canadian Charter*.

- First instance decision, p. 129, A.J.F., vol. 1 p. 145.

7. CONSTITUTIONAL QUESTIONS 5 AND 6

SECTIONS 15 HEIA AND 11 HOIA ARE WITHIN QUEBEC'S EXCLUSIVE JURISDICTION

212. Contrary to the submissions of Appellant Chaoulli, the Attorney General submits that the Quebec provisions prohibiting entering into a private insurance contract for health services already covered by the public regime are within the National Assembly's exclusive jurisdiction.

213. In order to determine whether sections 15 *HEIA* and 11 *HOIA* are within Quebec's exclusive jurisdiction, their true nature must first be evaluated by examining their purpose and effect. Here, this analysis shows that these provisions do not encroach on Parliament's exclusive jurisdiction over the criminal law. Indeed, the primary purpose of the *HEIA* and *HOIA* is to ensure free medical and hospital services for the population of Quebec.

- Court of Appeal decision, par. 17, A.J.F., vol. 1 p. 180.

214. The effect of the prohibitions found at sections 15 *HEIA* and 11 *HOIA* is to discourage the development of a parallel private insurance system which, as exposed earlier, would interfere with the quality, accessibility and efficiency of the Quebec health care system.

- First instance decision, p. 76, 78, A.J.F., vol. 1, p. 92, 94.

215. These provisions are part of a valid provincial legislative regime.

- *Siemens v. Manitoba (Attorney General)*, *supra*, par. 19 (Justice Major for the Court);

- *Krieger v. Law Society of Alberta* [2002] S.C.R. 372, par. 34 and 35 (Iacobucci and Major JJ. for the Court) (**tab 19**).

216. In fact, the *HEIA* and *HOIA*, along with the *ARHSS*, regulate the financing, organization and distribution of health services which are provided to all Quebeckers. These purposes are within the jurisdiction given to provincial legislatures by paragraphs 92(7), 92(13) and 92(16) of the *Constitutional Act 1867*.

- Court of Appeal decision, par. 16 and 17, A.J.F., vol. 1, p. 180 and 181;

- *Eldridge v. British Columbia (Attorney General)*, *supra*, par. 24 (Justice LaForest for the Court).

217. It is the Attorney General's view that the prohibition on getting private insurance in order to cover health services fees which are already covered by the *HEIA* and *HOIA* is merely the logical conclusion of the government's thinking in relation to the means which would enable the adequate functioning of the public health care regime. Being purely accessory to the purposes of the *HEIA* and *HOIA*, such a limit has thus nothing to do with a colourable attempt to legislate on criminal law matters.

218. Hence, the true nature of the impugned provisions is to ensure the realization of a purpose which is within a field of provincial jurisdiction.

219. Moreover, it is well known that the mere existence of a prohibition and sanction does not amount to an attempt to legislate on criminal law matters, since the provinces have, pursuant to paragraph 92(15) of the *Constitutional Act 1867*, the power to create offences to which are appended sanctions aiming at ensuring respect for the laws which are within provincial jurisdiction.

220. Also, even though the values of equality and social solidarity which are at the basis of the public regime can be assimilated to moral considerations, this is insufficient to make the impugned provisions part of the criminal law.

- *Siemens v. Manitoba (Attorney General)*, *supra*, par. 30, 31 and 32 (Justice Major for the Court);

- *Nova Scotia Board of Censors v. McNeil* [1978] 2 S.C.R. 662, p. 691-692 (Justice Ritchie for the majority) (**tab 28**);

- *Val d'Or (Ville de) c. 2550-9613 Québec inc.*, [1997] R.J.Q. 2090 (C.A.Q.), p. 2095-2096; request for leave refused, [1998] 1 S.C.R. v (**tab 62**).

221. Finally, the Attorney General wishes to specify that the allegations of Appellant Chaoulli questioning the rationality and efficacy of the prohibitions found at sections 15 *HEIA* and 11 *HOIA* are of no relevance whatsoever in the context of the analysis of their true nature. Indeed, the Court has already decided that the purpose of a legislative measure cannot validly be contested by suggesting an alternative solution which would supposedly be better able to attain this purpose. This is the legislature's prerogative.

- *Ward v. Canada (Attorney General)* [2002] 1 S.C.R. 569, par. 22 and 26 (Chief Justice McLachlin for the Court) (**tab 63**);

- *Reference Re: Firearms Act (Can.)* [2000] 1 S.C.R. 783, par. 18 (The Court) (**tab 50**).

- *R. v. Malmo-Levine; R. v. Caine*, *supra*, par. 5, 23, 173, 177 (Gonthier and Binnie JJ. for the majority) ; par. 211 (Arbour J.).

8. SECTIONS 15 HEIA AND 11 HOIA DO NOT INFRINGE THE RIGHTS GUARANTEED BY SECTION 1 OF THE QUEBEC CHARTER

222. The Appellant Zeliotis submits that sections 15 *HEIA* and 11 *HOIA* violate section 1 of the *Quebec Charter*, essentially invoking the same arguments invoked in relation to section 7 of the *Canadian Charter*, which «apply *mutatis mutandis* to the rights to life, security and liberty guaranteed by the *Quebec Charter*» (Appellant Zeliotis's factum, par. 94).

223. The Attorney General on the other hand is of the view that even if there exist many similarities and differences between section 7 of the *Canadian Charter* and section 1 of the *Quebec Charter*, the issues raised in the present case should ultimately be answered in the same way. In that regard, the reasons invoked earlier with respect to section 7 of the *Canadian Charter* are generally relevant for the analysis of the rights protected by the *Quebec Charter*. Notably, it seems that the allegations of infringement to the rights to security and integrity which are made by the Appellant Zeliotis are not founded on any evidence of actual or imminent damage, but rather on hypotheses which have not been demonstrated.

224. Now, the Court has established that the notion of integrity which is protected through section 1 of the *Quebec Charter* and article 10 of the *Civil Code of Quebec* essentially includes a guarantee of inviolability for the human person which cannot be affected by a passing or hypothetical infringement to a person's equilibrium. In this regard, the Appellant had the burden to establish a truly serious and permanent infringement of his physical or psychological integrity, which he has not done.

- *Quebec (Curateur Public) v. Syndicat National des Employés de l'Hôpital St-Ferdinand* [1996] 3 S.C.R. 211, par. 97-98 (Justice L'Heureux-Dubé for the Court) (**tab 32**);

- *Gauthier v. Beaumont* [1998] 2 S.C.R. 3, par. 89 (Justice Gonthier for the majority) (**tab 13**).

225. Moreover, as has been argued earlier in relation to section 7 of the *Canadian Charter*, no infringement to the Appellant's integrity can have been caused by the State's intervention in the present case, since the very purpose of the public health and hospital insurance regime is to give the entire population access to a full array of health services.

226. This is why the Attorney General is of the view that the impugned legislative provisions respect the rights protected by section 1 of the *Quebec Charter*. In the alternative, and for the same reasons as those exposed in relation to the *Canadian Charter*, it adds that these measures would be justified pursuant to the preamble and to section 9.1 of the *Quebec Charter*.

PART IV – COSTS

227. The Attorney General of Quebec asks the Court to allow costs in accordance with the outcome of the appeal.

PART V – REQUESTED ORDERS

228. The Attorney General of Quebec submits that the constitutional questions formulated by the Court should be answered in the following way:

Question number 1 - Answer: No

Question number 2 - Answer: Yes

Question number 3 - Answer: No

Question number 4 - Answer: Yes

Question number 5 - Answer: No

Question number 6 - Answer: No

Question number 7 - Answer: No

Question number 8 - Answer: Yes

Question number 9 - Answer: No

Question number 10 - Answer: Yes

Question number 11 - Answer: No

Question number 12 - Answer: Yes

229. The Attorney General of Quebec submits that the other questions formulated by Appellant Zeliotis should receive the following answers:

Section 11 of the *Hospital Insurance Act* and section 15 of the *Health Insurance Act* do not infringe the rights guaranteed by section 1 of the *Quebec Charter*.

If an infringement to one of the rights protected by section 1 of the *Quebec Charter* has occurred, it constitutes a reasonable limit in accordance with democratic values, public order and the general well-being of the citizens of Quebec pursuant to section 9.1 of the *Quebec Charter*.

230. For all these reasons, the Attorney General of Quebec requests that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Montreal, January 28 2004