



Form 41 (Rule 12-2 (3) and (3.1))

No. S-090663
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CAMBIE SURGERIES CORPORATION, CHRIS CHIAVATTI, MANDY MARTENS,
KRYSTIANA CORRADO, WALID KHALFALLAH by his litigation guardian DEBBIE
WAITKUS, and SPECIALIST REFERRAL CLINIC (VANCOUVER) INC.

PLAINTIFFS

AND:

MEDICAL SERVICES COMMISSION OF BRITISH COLUMBIA,
MINISTER OF HEALTH OF BRITISH COLUMBIA,
and ATTORNEY GENERAL OF BRITISH COLUMBIA

DEFENDANTS

AND:

DR. DUNCAN ETCHES, DR. ROBERT WOOLLARD, GLYN TOWNSON,
THOMAS McGREGOR, BRITISH COLUMBIA FRIENDS OF MEDICARE
SOCIETY, CANADIAN DOCTORS FOR MEDICARE, MARIËL SCHOOFF,
DAPHNE LANG, JOYCE HAMER, MYRNA ALLISON,
and the BRITISH COLUMBIA ANESTHESIOLOGISTS' SOCIETY

INTERVENORS

AND:

ATTORNEY GENERAL OF CANADA

PURSUANT TO THE
CONSTITUTIONAL QUESTION ACT

THIRD REVISED TRIAL BRIEF

Filed by: The Defendants Medical Services Commission of British Columbia, Minister of Health
of British Columbia and Attorney General of British Columbia

The trial of this action is scheduled for 24 weeks, plus an additional 3 weeks for oral submissions,
and is scheduled to begin on 6 September 2016.

The total time needed respecting items 2, 4, 5, 9 and 11, as applicable, is 136 hours.

[X] The filing party expects the trial to complete within the scheduled time.

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Appendix A - The Defendants Position with respect to *Chaoulli*

1. Summary of Issues and Positions

The following are the issues in dispute and the Defendants' position on each:

(Items 8 through 12 may not need to be dealt with at the trial, as per the discussion under heading 14 below.)

Issue in dispute	Filing party's position
1. Does s. 7 of the <i>Canadian Charter of Rights and Freedoms</i> apply to the Plaintiffs' claim?	1. No, it does not. Section 7 is not engaged unless what is in issue involves the administration of justice.
2. If s. 7 does apply, have the Plaintiffs established that they experienced a deprivation of their life, liberty, or security of the person?	2. No, they have not. In particular: (a) the Plaintiffs have not experienced deprivation of life, liberty, or security of the person; and (b) alternatively, if the Plaintiffs have suffered any deprivation of life, liberty, or security of the person, that deprivation could have been avoided within the existing public health care system within the restrictions imposed by the Impugned Provisions.
3. If the Plaintiffs have established such a deprivation, have they established that it was caused by ss. 14, 17, 18, and/or 45 (the "Impugned Provisions") of the <i>Medicare Protection Act</i> , R.S.B.C. 1996, c. 286 (the "Act")?	3. No, they have not. In particular: (a) the Plaintiffs cannot establish that striking down the Impugned Provisions would address the causes of wait times in the public health care system; (b) the evidence will establish that in the absence of the Impugned Provisions, wait times in the public system would not improve, and would likely become longer; (c) the evidence will establish that wait times arise for a multitude of reasons, including ineffective management of wait lists by individual physicians, and can be addressed most effectively within the public system by collective and cooperative efforts among government, health authorities, and

Issue in dispute	Filing party's position
	<p>the health care professions as a whole; and (d) the Plaintiffs cannot establish that they would have been able to access a parallel private health care system if the Impugned Provisions had not been in place.</p>
<p>4. If the Plaintiffs have established the necessary causation, have they established that the deprivation in question was not in accordance with the principles of fundamental justice?</p> <p>Specifically, have the Plaintiffs established that the Impugned Provisions are:</p>	<p>4. No, they have not.</p>
(a) Arbitrary?	<p>(a) They cannot establish on the evidence that there is no connection between the Impugned Provisions and the purpose of the Act, which is to preserve a publicly managed and fiscally sustainable health care system in which access to necessary medical care is based on need and not ability to pay.</p>
(b) Overbroad?	<p>(b) They cannot establish on the evidence that there is no connection between the purpose of the Act and its effects on particular individuals.</p>
(c) Grossly disproportionate?	<p>(c) They cannot establish on the evidence that the Impugned Provisions are so extreme that they are <i>per se</i> disproportionate to any legitimate governmental interest.</p>
(d) Vague?	<p>(d) They cannot establish on the evidence that the Impugned Provisions do not provide an adequate basis for legal debate and analysis, do not sufficiently delineate any area of risk, or are not intelligible.</p>

Issue in dispute	Filing party's position
<p>5. If the Plaintiffs have established a breach of their rights under s. 7, are the Impugned Provisions saved by s. 1 of the <i>Charter</i>?</p>	<p>5. Yes, the Impugned Provisions are saved by s. 1 of the <i>Charter</i> as:</p> <ul style="list-style-type: none"> (a) they were enacted in furtherance of a pressing and substantial objective, ensuring that medical care is provided on the basis of need and not ability to pay; (b) there is a rational connection between the Impugned Provisions and the objective; (c) the rights impaired are minimally impaired; and (d) the effect of the Impugned Provisions is proportionate to their objective.
<p>6. Have the Plaintiffs established that the Impugned Provisions violate s. 15 of the <i>Charter</i>?</p>	<p>6. No, the Plaintiffs have not established that the Impugned Provisions violate s. 15 of the <i>Charter</i> as:</p> <ul style="list-style-type: none"> (a) the s. 15 claim is unrelated to the Impugned Provisions, but relates instead to subordinate regulations that are not challenged in this litigation; (b) they have not established an adverse distinction based on an enumerated or analogous ground; (c) they have not established a disadvantage from perpetuation of prejudice or stereotypes; and (d) the relevant constitutional and statutory context prevents them from succeeding.
<p>7. If the Plaintiffs have established a breach of their rights under s. 15, are the Impugned Provisions saved by s. 1 of the <i>Charter</i>?</p>	<p>7. Yes, the Impugned Provisions are saved by s. 1 of the <i>Charter</i> as:</p> <ul style="list-style-type: none"> (a) they were enacted in furtherance of a pressing and substantial objective, ensuring that medical care is provided solely on the basis of need and not ability to pay; (b) there is a rational connection between the Impugned Provisions and the

Issue in dispute	Filing party's position
	<p>objective;</p> <p>(c) the rights impaired are minimally impaired; and</p> <p>(d) the effect of the Impugned Provisions is proportionate to their objective.</p>
<p>8. Is the Defendant Medical Services Commission (the "Commission") entitled to a declaration that the Plaintiffs Cambie Surgeries Corporation ("Cambie") and Specialist Referral Clinic (Vancouver) Inc. ("SRC") have violated ss. 17(1)(a), 17(1)(b), and 18(1) of the Act?</p>	<p>8. Yes, it is. Cambie and SRC have both admitted to violating ss. 17(1)(b) and 18 by charging beneficiaries for matters relating to the rendering of benefits. Each of Cambie and SRC have also admitted that they are violating s. 17(1)(a) by charging beneficiaries for benefits.</p>
<p>9. Is the Commission entitled to an injunction restraining Cambie and SRC from violating ss. 17(1)(a), 17(1)(b), and 18 of the Act?</p>	<p>9. Yes, it is. The evidence will establish the statutory precondition to the issuance of an injunction under s. 45.1 of the Act.</p>
<p>10. Is the Defendant Minister of Health entitled to an award of damages against Cambie and SRC for losses suffered as a result of their unlawful activities?</p>	<p>10. Yes, he is entitled to an award in the amount of at least \$700,000 plus interest, based on the amounts deducted by the federal government from the Canada Health Transfer as a result of the violations of the Act by Cambie and SRC.</p>
<p>11. Is the Defendant Attorney General entitled to a declaration that the Acknowledgment Forms that Cambie and SRC require beneficiaries to execute are void and unenforceable as being unconscionable, oppressive, unlawful, and inconsistent with public policy?</p>	<p>11. Yes, she is. The evidence will establish that Cambie and SRC have misled beneficiaries about their statutory rights and attempted to prevent them from exercising those rights.</p>
<p>12. Is the Defendant Attorney General entitled to an injunction restraining Cambie and SRC from continuing to require beneficiaries to execute Acknowledgment Forms?</p>	<p>12. Yes, she is.</p>

2. Witnesses To Be Called

The following are the names and addresses of the witnesses the Defendants presently intend to call at trial, the issue(s) each will address, an estimate of the time each witness will need for giving direct evidence, and the Defendants' opinion on whether, if the Court so orders or the parties all consent, the witness's direct evidence could conveniently be given by affidavit.

This list is subject to change.

Name	Address	Issue	Time in hours needed	Direct evidence by affidavit (Y/N)
Mr. Stephen Abercrombie, Audit Manager	Audit and Investigations Branch, Ministry of Health Victoria, BC	Violations of the Act by the corporate Plaintiffs.	2	Y
Mr. Dave Brar, Director, Data Quality and Production	Priority Projects Branch, PID Ministry of Health Victoria, BC	Various reports generated from data in Ministry databases.	1	Y
Ms. Sandra Feltham	Senior Economist, Performance, Modeling, Analysis & Reporting Branch, Planning & Innovation Division, Ministry of Health	Various reports generated from data in Ministry databases.	1	Y
Ms. Joanne Fox, Retired	Vancouver, BC	Patient who was offered faster care in a private facility.	0.5	Y
Dr. Michael Gilbert, Clinical Associate Professor	Division of Orthopaedic Surgery, University of British Columbia Vancouver, BC	Physician working in public system and at Cambie.	2	N
Ms. Rosalia Guthrie,	Salmon Arm, BC	Patient who was	2	N

Name	Address	Issue	Time in hours needed	Direct evidence by affidavit (Y/N)
Business Owner		offered faster care in a private facility.		
Dr. Andrew Hamilton, Program Medical Director, Surgical Services	Interior Health Authority, Summerland, BC	Efforts to improve performance of public health care system.	4	N
Dr. Khati Hendry, Retired General Practitioner	Rosedale Medical Associates Summerland, BC	Functioning of public health care system.	3	Y
Dr. Wayne Hildahl, Chief Executive Officer	Pan Am Clinic, Winnipeg Regional Health Authority Winnipeg, Manitoba	Risks associated with for-profit delivery of health care.	0.5	Y
Dr. Richard Kendall	Orthopedic Surgery, Richmond, BC	Physician working in public system and at Cambie.	2	N
Dr. Jordan Leith	Orthopedic Surgery, Burnaby, BC	Physician working in public system and at Cambie.	2	N
Dr. Margaret McGregor, Clinical Associate Professor and Director of Community Geriatrics	Department of Family Practice, University of British Columbia Vancouver, BC	Functioning of public health care system.	0.5	Y
Mr. Andrew Montgomerie, Director of Financial Services and Health Care Programs	WorkSafeBC Richmond, BC	Operation of workers' compensation system health care benefits	1	Y

Name	Address	Issue	Time in hours needed	Direct evidence by affidavit (Y/N)
Dr. Farhad Moola	Fraser Orthopedic Institute, New Westminster, BC	Physician working in public system and at Cambie.	2	N
Dr. Danyaal Raza	Assistant Professor of Family Medicine, University of Toronto	Functioning of public health care system; risks associated with for-profit delivery of health care.	2	N
Dr. John Reid, Head of Surgery	St. Paul's Hospital, Vancouver, BC	Functioning of public health care system.	2	N
Dr. Trevor Stone, Clinical Assistant Professor	Department of Orthopaedics, University of British Columbia New Westminster, BC	Physician working in public system and at Cambie.	2	N
Ms. Carly Van Soest, Human Resources Administrative Assistant	Williams Lake, BC	Patient who was offered faster care in a private facility.	2	N
Tom Vincent, Retired	Former Chair, Medical Services Commission, Victoria, BC	Functioning of Medical Services Commission.	2	N
Dr. James Waddell, Orthopedic Surgeon	Director, Holland Orthopaedic & Arthritic Centre, Toronto, ON	Functioning of public health care system.	2	N
Dr. Brenda Wagner	Department Head of OB/GYN; Richmond Hospital,	Functioning of public health care system.	2	N

Name	Address	Issue	Time in hours needed	Direct evidence by affidavit (Y/N)
	Richmond, BC			
Fanny Wong, Senior Economist	Workforce Research and Analysis Branch, Health Sector Workforce Division, Ministry of Health	Various reports generated from data in Ministry databases.	1	Y
Dr. Robert Woollard, Professor	Faculty of Medicine, University of British Columbia	Functioning of public health care system.	2	N
TOTAL TIME FOR DIRECT			31.5	

3. Expert Reports

The following are the expert reports that will be offered as evidence at trial:

Name of expert	Area of expertise	Date of report
Dr. Eric Bohm	Access, appropriateness, effectiveness, and safety of healthcare delivery.	21 February 2016
		21 February 2016
Prof. Ivy Bourgeault	Health human resource policy.	16 December 2013
Dr. Edmond D. Charleton	Family physician practice.	14 June 2016
Prof. Jacqueline Cumming	Health policy and management, and health services research.	27 April 2015
Prof. Carolyn DeCoster	Health policy and health services research.	7 August 2013

Name of expert	Area of expertise	Date of report
Dr. P.J. Devereaux	Health policy research.	9 October 2013
Dr. Cyril Frank	Health service improvements.	10 March 2014
		1 August 2014
Prof. James Gillespie	Health policy research.	17 July 2014
		May 2016
Prof. Jeremiah Hurley	Health care economics.	17 September 2013
		15 July 2014
Prof. Eike-Henner Kluge	Medical ethics.	22 August 2013
Prof. Sara Kreindler	Health services and policy research.	5 March 2014
Prof. Greg Marchildon	History of the Canadian health care system.	3 March 2014
		30 July 2015
Prof. Theodore Marmor	International health care policy.	28 October 2013
		16 July 2014
Dr. Robert McMurtry	Health care management and policy.	28 February 2014
Prof. Charles Normand	Health care economics, policy, and management.	16 October 2013
Prof. Adam Oliver	Health policy, health economics, and behavioural economics.	27 February 2014
		20 June 2014
Dr. Allyson Pollock	Public health research and policy.	13 August 2014
Dr. Michael Rachlis	Public health policy.	16 July 2014
Mr. Scott Sinclair	International trade policy.	10 July 2014
		28 April 2016

Name of expert	Area of expertise	Date of report
Prof. Jason Sutherland	Health services research.	16 July 2014
		14 June 2016
		4 July 2016
Dr. Jeffrey Turnbull	Health care policy and management.	6 March 2014

4. Witnesses To Be Cross-Examined

The following are the names of the witnesses the Defendants anticipate cross-examining at trial, and an estimate of the time the Defendants will need for each:

Name	Time in hours needed
Anokh Adami	1
Dr. Mark Adrian	1
Dr. Lawrence Barzelai	1
Elaine Baxter	1
Chris Chiavatti	1
Barb Collin	1
Kristiana Corrado	1
Dr. Brian Day	8
Gordon Denford	1
Buzz (David) Denroche	1
Dr. Victor Dirnfeld	1
Dr. Jim Douglas	0.5
Dr. Marcel Dvorak	1
Dr. Mark Godley	1

Name	Time in hours needed
Dr. Steven Hansen	1
Jill Hummerstone	1
Dr. David Jones	1
Vadim Korkh	1
Dr. Jean Lauzon	2
Dr. James Longstaffe	0.5
Dennis Mahoney	1
Mandy Martens	1
Dr. Bassam Masri	2
Dr. Patrick McGeer	1
Kenneth Morrison	1
Dr. Reza Nouri	1
Dr. John O'Brien-Bell	1
Dr. John O'Brien	1
Dr. Robert Ouellet	1
Grant Pearson	1
Dr. Allon Reddoch	1
Dr. William Regan	1
Dr. Chris Reilly	2.5
Dr. Ramesh Sahjpaul	1
Dr. Leslie Samaroo	1
Dr. Arno Smit	2
Dr. Derryck Smith	1

Name	Time in hours needed
Thomas Sobkowich	1
Dr. Fadi Tarazi	1
Dr. Jack Taunton	1
Dr. G. Frank O. Tyers	1
Dr. Kevin Wade	1
Debbie Waitkus	2
Janet Walker	1
Dr. Larry Warshawski	1
Dr. Tom Warshawski	1
Dr. Mary Weckworth	1
Dr. Kevin Wing	1
Karl Woll	1
Dr. Alastair Younger	1
Åke Blomqvist	1
Michael Bliss	2
Dr. Ross Davidson	1
Nadeem Esmail	1
Peter Holle	1
Dr. Robert Hollinshead	1
Daniel Kessler	2
Yannick Labrie	1
Alistair McGuire	2
John McGurran	2

Name	Time in hours needed
Dr. Antoni Otto	1
Dr. Albert Schumacher	1
Dr. Stephen Tredwell	1
Dr. Leslie Vertesi	2
TOTAL TIME FOR CROSS-EXAMINATION	80.5

5. Objections to Admissibility

The Plaintiffs and Defendants have agreed that there will not be any objections on the basis of admissibility of any of their respective expert reports. There will be arguments as to weight.

6. Documents and Exhibits

1. The parties [X] have agreed on a common book of documents.
2. The parties [X] have reached an agreement governing the use and admissibility of documents.

7. Admissions

The parties have exchanged and continue to exchange notices to admit.

8. Authorities

The Defendants expect that there will be a joint book of authorities.

9. Time required for submissions

The Defendants estimate that three days will be required for their opening statement and five days will be required for their final submissions.

10. Orders that may affect the conduct of the trial

The following orders contain provisions that may affect the conduct of the trial:

Date of order	Nature of order
Order of Chief Justice Bauman of 10 January 2013	Granting intervenor status and participatory rights to the intervenors
Order of Associate Chief Justice Cullen of 9 June 2014	Granting right to Coalition Intervenors to adduce specific expert evidence, and granting right to Schooff Intervenors to adduce specific affidavit evidence
Order of Associate Chief Justice Cullen of 30 July 2014	Granting right to intervenor BCAS to adduce specific affidavit evidence
Order of Justice Steeves of 6 May 2016	Setting 6 September 2016 as trial start date.
Order of Associate Chief Justice Cullen of 26 February 2016 and Order of Justice Steeves of 12 July 2016	Granting public interest standing to the Plaintiffs Cambie Surgeries Corporation and Specialist Referral Clinic (Vancouver) Inc.
Order of Justice Steeves of 27 July 2016	Striking certain affidavit material filed by intervenor BCAS.

11. Orders or Directions to be Applied for at the Trial Management Conference

The following orders or directions will be applied for at the Trial Management Conference:

Nature of order or direction	Time in hours needed for application
1. Notice of Application of Patient Intervenors re Document Production	1 hour

12. Settlement

- 1 Settlement discussions or mediation sessions [X] have taken place.
- 2 A mediation [X] is not scheduled before the date set for trial.
- 3 The Court at the trial management conference [X] will not be asked to assist the parties' efforts to settle.

13. Trial to be Heard With or Without Jury

The trial of this action is to be heard by the Court

[X] without a jury.

14. Other matters

There are a number of matters regarding the trial process that need to be settled prior to the beginning of the trial, including the following:

Issue	Position of Defendants
Sitting schedule	The Court has proposed that we sit three weeks on and one week off, beginning on 6 September. The Defendants are agreeable to that schedule. The Defendants are not agreeable to the revised schedule proposed by the Plaintiffs in their Trial Brief.
Defendants and Counterclaims	The Defendants are currently discussing with the Plaintiffs the possibility that the claims as against the Medical Services Commission and the Minister of Health, and the counterclaims by those parties will be discontinued in their present form. . It is anticipated that the current counterclaims would be replaced by a single counterclaim to be brought by the AGBC seeking a declaration that the corporate Plaintiffs are in breach of the Impugned Provisions.
Patient Medical Records	The parties have agreed that if any of their witnesses will be testifying regarding the medical condition of any particular patients, the medical records of those

	<p>patients will be provided to the other side at least one month prior to the start of trial.</p> <p>The parties have not yet reached agreement regarding admissibility of the Patient Plaintiffs' MSP records. The Defendants are seeking to have admitted the MSP records 5 years before the injury/treatment in issue and 5 years after. As the Defendants understand it, the Plaintiffs' position is that only MSP records pertaining directly to the injury/treatment in issue in this action are relevant.</p>
Opening statements	<p>In accordance with the existing trial plan, the Defendants will make an opening statement at the outset of the trial, following the Plaintiffs' opening statement. It is expected that AG Canada and the intervenors will wish to make opening statements as well.</p>
<i>Prima Facie</i> Facts Documents	<p>The Defendants have prepared four comprehensive documents which outline in detail the operation of the health care system in British Columbia, which are referred to as the <i>Prima Facie</i> Facts Documents ("PFF Documents").</p> <p>The Plaintiffs and Defendants have agreed in principle that:</p> <ul style="list-style-type: none">(a) the PFF Documents may be entered as exhibits at trial as <i>prima facie</i> proof of their contents.(b) if the Plaintiffs wish to challenge any of the evidence in those documents they will advise the Defendants which specific facts they intend to challenge; and(c) the Defendants will call appropriate witness(es) for cross-examination. <p>The Plaintiffs and Defendants have agreed that the PFF Documents will be entered</p>

	<p>into evidence and presented to the Court by the Defendants following the conclusion of opening statements, and prior to the Plaintiffs calling their first witness. The Defendants estimate this will require 2 days.</p> <p>The parties have also jointly drafted several agreed statements of facts relating to the experiences of the Patient Plaintiffs, which will be tendered as exhibits at trial.</p>
Agreed book of documents	<p>The parties are preparing a common book of documents, and have agreed that certain of the documents in the common book can go in as <i>prima facie</i> proof of their contents.</p> <p>It is anticipated that additional volumes of the common book may be prepared as the trial progresses, by all parties.</p>
Submissions	<p>In accordance with the existing trial plan, closing submissions will be exchanged as follows:</p> <ul style="list-style-type: none">(a) two weeks after the completion of the evidentiary portion of the trial the Plaintiffs will provide written submissions to the Defendants, AG Canada, and intervenors, and the Defendants will provide written submissions on their counterclaims.(b) Two weeks later, the parties will exchange responsive submissions with each other and with the intervenors.(c) One week later, the intervenors will provide the parties (and each other) with their written submissions.(d) One week later, the parties will exchange reply submissions to each others' submissions and the intervenors' submissions. <p>It is expected that approximately three weeks will be required for oral submissions once the exchange of written submissions is</p>

	complete.
Videoconferencing	The Plaintiffs have indicated that they may wish to have some of their witnesses testify by way of videoconference. The Defendants are not opposed to this proposal.
Affidavit evidence	Rule 12-5(60) requires that affidavit evidence must be tendered 28 days prior to trial, or such lesser period as the Court may order. The Defendants have already provided the Plaintiffs with most of the affidavit evidence on which they intend to rely; the balance will be provided by no later than 30 September. The Plaintiffs' affidavit evidence is due to be provided on 5 August 2016.
Objections to other evidence	The Plaintiffs have provided witness outlines for several of their witnesses which suggest that the evidence they will be asked to provide is in truth expert opinion evidence, argument, and/or hearsay. The Defendants will be objecting to the admissibility of any such evidence.

Date: 5 August 2016

Jonathan Penner / ewh

Signature of

☐ filing party ☒ lawyer for filing party

Jonathan Penner

This **THIRD REVISED TRIAL BRIEF** is prepared by Jonathan Penner, Barrister & Solicitor, of the Ministry of Justice, whose place of business and address for service is P.O. Box 9270, Stn Prov Govt, 1405 Douglas Street, Victoria, British Columbia, V8W 9J5; Telephone: (250) 952-0122; Facsimile: (250) 387-0343; Email Address: Jonathan.Penner@gov.bc.ca.

APPENDIX "A"

Chaoulli v. Quebec (A.G.), 2005 SCC 35: Defendants' Position

There is no legal principle from *Chaoulli* that is binding on this Court.

In *Chaoulli*, the plaintiffs challenged Quebec's prohibitions against private health insurance for health care services available in the publicly funded system ("duplicate private health insurance").¹ The plaintiffs sought coverage for health care services provided by physicians who were not participating in Quebec's public health system. The plaintiffs did not challenge the prohibition as it applied to participating physicians.²

There was no challenge in *Chaoulli* to a provision prohibiting extra-billing, such as the Plaintiffs here challenge.

A 4-3 majority held that Québec's provisions were contrary to Article 1 of the Quebec Charter, with the following reasons:

Deschamps, J. considered only the Quebec Charter and expressly confined her ruling to the Quebec Charter;³

McLachlin, C.J. and Major, J. (concurrent with Bastarache, J.) concurred with Deschamps, J. that the provisions were contrary to the Quebec Charter and also went on to consider section 7 of the Canadian Charter,⁴ finding that the legislation violated section 7 as well; and

Binnie, J. and Lebel, J. (concurrent with Fish J.) dissented and held that the provision was not contrary to either the Quebec Charter or section 7 of the Canadian Charter.⁵

The Quebec Charter

Deschamps, J. set out the differences between the Quebec Charter and the Canadian Charter. The differences, which are fundamental, mean that the majority's reasoning with respect to the Quebec Charter is not binding on this Court in its application of section 7 of the Canadian Charter.

Article 1 of the Quebec Charter provides:

1. Every human being has a right to life, and to personal security, inviolability and freedom. He also possesses juridical personality.⁶

¹ Health Insurance Act, R.S.Q., c. A-29, s. 15 and the Hospital Insurance Act, R.S.Q., c. A-28, s. 11.

² *Chaoulli*, paras. 2,3 (Deschamps, J.), *Chaoulli c. Quebec (Procureur general)*, [2000] R.J.Q. 786, para. 7.

³ Paras. 15, 36, 101.

⁴ Para. 102.

⁵ Paras. 265, 279.

Article 1 of the Quebec *Charter* does not refer to the principles of fundamental justice, as does section 7 of the Canadian *Charter*. It is thus unqualified. In contrast, section 7 is a conjunctive right, in that it requires that a plaintiff prove both:

- a) that he has been deprived of life liberty and security of the person; and
- b) that the deprivation was not in accordance with principles of fundamental justice.

Because section 7 is a conjunctive right, a plaintiff's burden of proof is greater. Under Article 1 of the Quebec *Charter*, a plaintiff need only prove the equivalent of a deprivation.

Article 1 is broader than section 7. Article 1 protects not only fundamental rights and freedoms but also certain civil, political, economic, and social rights.⁷ In addition, Article 1 of the Quebec *Charter* includes the right to inviolability and freedom and does not refer to liberty. "Inviolability" is broader than "security" used in section 7 of the Canadian *Charter*.⁸

Article 9.1 of the Quebec *Charter* has a "functional analogy" to section 1 of the Canadian *Charter*, although it differs.

9.1 In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Quebec.

In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.⁹

Madam Justice Deschamps found that Quebec's ban on private insurance as it applied to non-participating physicians was not saved under Article 9.1.

The Canadian Charter

The 6 Justices who decided the case based on the Canadian *Charter* were evenly divided on whether Quebec's prohibition was "arbitrary", so there is no legal principle arising from their reasons that is applicable here.¹⁰

⁶ Quoted in *Chaoulli*, para. 266.

⁷ Para. 25.

⁸ Para. 41.

⁹ *Chaoulli*, para. 269 (per Binnie, LeBel, and Fish, JJ).

¹⁰ As there is no *ratio decidendi* of the SCC on the application of s. 7 of the Canadian *Charter* to Quebec's prohibition of duplicate private insurance, the *ratio* of the Quebec Court of Appeal decision stands. That Court found that the prohibition did not violate a principle of fundamental justice: [2002] R.J.Q. 1205, paras. 24, 60, 65-68.

A. Section 7 Violation

Chief Justice McLachlin, along with Justices Major and Bastarache, found that while “[t]he *Charter* did not confer a freestanding constitutional right to health care”, section 7 applied because:¹¹

a) The Quebec government had created a “virtual monopoly for the public health scheme”.¹²

b) By imposing exclusivity and then failing to provide public health care of a reasonable standard within a reasonable time”, the government had “created[ed] the circumstances that trigger the application of s. 7 of the *Charter*”.¹³

The Justices then considered whether Quebec’s legislation was arbitrary. The Justices defined “arbitrary” as bearing no relation to, being inconsistent with, being manifestly unfair, or unnecessary to assure the law’s objectives.¹⁴ They found that Quebec’s prohibition against private health insurance was arbitrary because other developed countries with publicly-financed health care systems allowed duplicate private insurance to varying degrees.¹⁵ There was “no real connection” between the prohibitions on private health insurance and the legislative goal of a quality public health system.¹⁶ The prohibitions were thus “arbitrary” and not in accordance with the principles of fundamental justice.¹⁷

In finding that the prohibitions were arbitrary, the Justices rejected the evidence of experts called by the government at trial, which the Trial Judge had accepted.¹⁸ Instead, the Justices relied heavily on the report of a Standing Senate Committee, *The Health of Canadians—the Federal Role*, vol. 3, Health Care Systems in Other Countries, Interim Report (2002) (the “Interim Kirby Report”) for their findings about health care in other jurisdictions.

B. No Section 7 Violation

Justices Binnie, LeBel, and Fish said that they “cannot find in the constitutional law of Canada a ‘principle of fundamental justice’ dispositive of the problems of waiting lists in the Quebec health care system”.¹⁹ They found that “[t]he aim of ‘health care of a

¹¹ Para. 104.

¹² Para. 106.

¹³ Para. 105.

¹⁴ Paras. 130, 132, 133.

¹⁵ Paras. 139-149.

¹⁶ Para. 139.

¹⁷ Para. 153.

¹⁸ Paras. 128, 136-38, 235.

¹⁹ Para. 167.

reasonable standard within a reasonable time' is not a legal principle".²⁰ A principle of fundamental justice,

- a) "must be a legal principle";
- b) "the reasonable person must regard it as vital to our societal notion of justice, which implies a significant *societal consensus*"; and
- c) "must be capable of being identified with precision and applied in a manner that yields predictable results".²¹

The plaintiffs could not satisfy these requirements with respect to wait times. The "aim of health care to a reasonable standard within reasonable time" is not a legal principle. There is no "societal consensus" about what it means or how it can be achieved. It cannot be identified with precision: there is no way to distinguish "reasonable" from "unreasonable".²²

Justices Binnie, LeBel, and Fish agreed that while in theory an arbitrary law violates the principles of fundamental justice, Quebec's legislation was not arbitrary. They agreed with the conclusion of the Trial Judge and the Quebec Court of Appeal that in light of the legislative objectives of the *Canada Health Act*, it was not "arbitrary" for Quebec to discourage the growth of the private sector of health care. The prohibition on private health insurance was directly related to Quebec's legislative objective of a health system where access is governed by need rather than wealth or status.²³ Quebec's prohibition on private health insurance was not arbitrary because it was not "inconsistent" with the state interest and not "unrelated" to it.²⁴

With respect to the evidence, Justices Binnie, LeBel, and Fish found that the Interim Kirby Report did not "displace the conclusion of the trial judge, let alone the conclusion of the [Final] Kirby Report", which recommended the continuation of a single-tier health system.²⁵ The Justices accepted the findings below—disputed by the Chief Justice and Justice Major—that a two-tier system would "likely have a negative impact on the integrity, functioning and viability of the public system".²⁶ Justices Binnie, LeBel, and Fish found that the appellants' argument was "based largely on generalizations about the public system drawn from fragmentary experience, an overly optimistic view of the benefits offered by private health insurance, an oversimplified view of the adverse effects on the public system of permitting private sector health services to flourish" and an "overly interventionist" view

²⁰ Para. 209, emphasis in original.

²¹ *Chaoulli*, para. 209 (applying *R. v. Marmo-Levine*, 2003 SCC 74, para. 113) (emphasis in original)

²² *Chaoulli*, para. 209.

²³ Para. 236.

²⁴ Paras 242, 256, 257, 263.

²⁵ Para. 230.

²⁶ Para. 181.

of the courts role in try to find a 'fix' for "failings, real or perceived, of major social programs".²⁷

Since Chaoulli

The Supreme Court of Canada has clarified that in order for legislation to be "arbitrary" it must bear no connection to its objective,²⁸ and in fact be incapable of fulfilling its objective.²⁹

Finally, the record before the Supreme Court of Canada related to Quebec's health care system in 1999. The evidence before this Court will not be the same.

²⁷ Para. 169.

²⁸ *Bedford v. Canada*, 2013 SCC 72, para. 111.

²⁹ *Carter v. Canada (Attorney General)*, 2015 SCC 5, para. 83.