Association for access to abortion v Québec (Attorney General QCCS 4694)

JB2762

SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC

DISTRICT OF MONTRÉAL

No: 500-06-000158-028

DATE: AUGUST 17, 2006

UNDER THE PRESIDENCY OF: THE HONORABLE NICOLE BÉNARD, J.C.S.

ASSOCIATION FOR ACCESS TO ABORTION, Petitioner

v

ATTORNEY GENERAL OF QUÉBEC, Respondent

JUDGMENT ON THE COLLECTIVE REQUEST CONCERNING VOLUNTARY INTERRUPTIONS OF PREGNANCY

[1] Are women who, since 1999, had to pay sums to have access to an abortion in Québec entitled to a reimbursement?

I 1. Chronology of the event

[2] One must recall that in the 1980s, in order to have the right to an abortion, Canadian women had to submit their request to the abortion committee of accredited hospitals.

[3] However, in Québec, women can obtain an abortion in CLSC facilities subsidized by the government and even in women's health facilities and in certain medical clinics, such as the one belonging to Dr Morgentaler; the latter was then sued for having violated the *Criminal Code*. On January 28, 1988, the Supreme Court of Canada decided in its order *R. vs. Morgentaler **[1]***, that article 251 of the Criminal Code harms the rights and the safety of persons for a

large number of pregnant women. The procedure and the administrative structures established by the article to obtain therapeutic abortions are not in compliance with the fundamental principles of justice. There is a violation of article 7 of the *Canadian Charter of Rights and Freedoms (Canadian Charter)**[2]***, a harm which article 1 would not allow; the Supreme Court therefore annuls article 251 of the *Criminal Code*.

[4] Following this order by the Supreme Court, other clinics located in Montreal decide to offer elective abortion services, including the Medical Clinic of Alternatives and the Fémina Clinic.

[5] In 1992, in the framework of its reform of the health system, the Government of Québec files its policy on health and well-being, adopts the *Law on Health Services and Social Services* (LSSSS)***[3]*** and modifies various legislative provisions putting in place regional governing bodies.

[6] The government wants to improve family planning services and elective abortion and to ensure access to women in all of the regions of Québec.

[7] On February 22, 1996 (D-18), Jean Rochon, Minister of Health and Social Services, sends to all the presidents of the regional governing bodies the document entitled *Ministerial directives in matters of family planning* and asks them to send him a plan for implementing those directives, in concert with all of the partners implicated in the provision of services in their territory, and as needed, with other governing bodies, on the questions that required it. This plan of action should state the regional priorities for family planning, the range of services which will available on local, regional, and supraregional levels, the mechanisms for collaboration as well as the sharing of roles among the various partners; the minister asked for these plans to be sent back to him on July 31, 1996.

[8] In June 1998, a ministerial working plan is approved by Lise Denis, the under-minister.

[9] On March 8, 1999, Dr. Morgentaler informs Minister Pauline Marois that at least a third of women are required to pay to receive an abortion in Québec, because the public system does not have the resources to provide the service free of charge to all the women of Québec.

[10] A progress report (P-7) was then prepared by Nicole Gravel of planning management which mentions that the ministerial plan approved in June 1998 by under-minister Denis provides for a partnership with private clinics and that a mandate should be given to Dr. Guimond to negotiate the transformation of private clinics into non-profit organizations, because all of the regional governing bodies experience difficulties to ensure free access for women; it adds that the evaluation of action plans in terms of family planning is dependent on their being filed and that certain regions had not yet filed this.

[11] On May 6, 1999 (P-8), Minister Marois informed Dr. Morgentaler that the ministerial directives that were filed in 1996 deal with, among other things, universal access, the provision of services free of charge, and their adaptation to the needs and characteristics of each regional sub-population. She added that the Ministry is aware that despite all of these adjustments certain regions will not be able to repond to all of the demands through the CLSCs, women's centers, and hospital centers, and then even if it favors the organization of these services in the public network,

an agreement with private partners could be necessary, in particular regarding the costs stemming from these services. It is too early to make decisions, as all the regional governing bodies had not submitted their plan.

[12] In December 1999, the information required by the minister in February, 1996, was finally sent by the regional governing bodies. The Tribunal can not help but point out that it took them nearly four year, from February, 1996, to December, 1999, to submit a plan for the implementation of ministerial guidance on family planning, while this question was considered to be a priority for the Ministry, as it was presented in the letter by Minister Rochon and admitted by the two ministers who succeeded him and who were charged with the project, that is Ministers Agnès Maltais, in charge of the family planning file, and Pauline Marois, Minister of Health and Social Services; it took four years to inform the minister of the necessary resources requested for July 31, 1996. The Tribunal can not help but wonder about the time that the governing bodies would have taken to respond to this request if it had not been a priority.

[13] The Ministry then decided to grant the regional governing bodies a total recurring budget of $3,773,370, and $2,158,170, non-recurring, to allow them to ensure the organization and dispensation of elective abortion services for the women of their region;; the decision taken would not be implemented until August, 2001, that is more than five years after Minister Rochon had affirmed that family planning services were to be defined as essential services for women's health.

II 2. The parties

[14] Several persons or establishments are implicated in the file on elective abortion services (IVG) in Quebec.

2.1 The Minister of Health and Social Service

[15] The article 431 of the LSSSS determines:

431. In compliance with a policy of health and well-being, the minister determines the priorities, objectives, and guidelines in the area of health and social services and monitors their application.

More specifically:

1◦ the minister establishes health and social services policies and sees to their implementation and to their application by regional governing bodies, and their evaluation;

[16] The article 463 of the LSSSS specifies that it is up to the minister to see to the allocation of necessary resources among the regions for the financing of the health and social services system according to the populations to be served and their sociological and health characteristics.

2.2 Regional governing bodies now called health and social services agencies

[17] The LSSSS provides in article 339 for the government to institute, for each region it demarkates, a regional health and social services governing body.

[18] Article 340 of the LSSSS specifies that the regional governing body has as its main purpose in the region the planning, organization, implementation, and evaluation of guidance and policies articulated by the minister. The regional governing bodies are now called health and social services agencies.

[19] Its purpose is also to establish health and well-being priorities depending on the needs of the population of its region, while taking into account the objectives set by the minister.

[20] The regional governing bodies should therefore develop action plans that enable the application of ministerial guidelines, by identifying the needs in their territory or, as is said in article 346 of the LSSSS:

> 346 The regional governing body monitors compliance with the health and well-being priorities and the attainment of health and well-being objectives.
>
> To this end, it:
>
> (…)
>
> 2◦ identifies the needs of the population with a view to elaborating the regional plans for organization of services;

2.3 Health and social services establishments

[21] Article 79 of the LSSSS indicates which establishments offer health services:

> Local community service centers (CLSC)
>
> Hospital centers (CH);
>
> Centers for the protection of children and youth;
>
> Centers for long term housing and treatment (CHSLD);
>
> Rehabilitation Centers.

[22] For the needs of this cause, it is useful to recall the missions of the CLSCs and the CHs.

[23] The LSSSS specifies the mission of each of the centers and the services provided in their establishments.

[24] Article 80 of the LSSSS establishes that:

> 80. The mission of a local community service center is to offer a first line of health services and current social services, and, to the population of the territory it serves, health services and social services of a preventive or curative nature, for rehabilitation or retraining.

[25] Article 81 of the LSSSS indicates:

> 81. The mission of a hospital center is to offer diagnostic services and general and specialized medical treatments. To this end, the establishment that operates such a center receives, generally through referrals, persons who require such services or such treatments, ensures that their needs are evaluated and that the services required, including nursing treatments and specialized psychosocial services, both preventive and rehabilitative, are offered to them within its facilities, or if necessary, to ensure they are directed as early as possible toward the centers, organizations, or persons most capable to assist them.

[26] Article 100 of the LSSSS determines that:

100. The function of the establishments is to ensure the provision of quality health services or social services that are continuous, accessible, secure, and respectful of persons' rights and their spiritual needs and which aim to reduce or resolve health problems (…).

[27] Article 101 of the LSSSS adds that:

101. The establishment should in particular:

1◦ receive any person who requires its services and evaluate that person's needs;

2◦ dispense the health services or social services required itself or to have them dispensed by an establishment, an organization, or a person with which or with whom a service agreement was reached as addressed in article 108;

3◦ monitor to determine that the services it provides are done so in continuity and with complementarity with those dispensed by the other establishments and the other resources of the region and that the organization of these services takes into accounts the needs of the population to be served;

4◦ direct persons for whom it can not dispense certain services toward another establishment or organization or another person who dispenses these services.

[28] The establishment determines the health services and the social services that it dispenses as well as the various activities that it organizes, taking into account the mission of any center that it operates and the resources available and in compliance with the regional plans for the organization of services prepared by the regional governing body (article 105 of the LSSSS).

[29] An establishment can conclude with another establishment, organization, or any other person the dispensation on behalf of this establishment of certain health services or social services required by a user (article 108 of the LSSSS).

2.4 Community organizations

[30] Article 336 of the LSSSS allows the regional governing body to subsidize a community organization according to the admissability and assignment criteria that it determines:

1◦ if it offers prevention, assistance, and support services to the persons of the region, including temporary housing services that are part of the regional plan for the organization of services of the governing body;

2◦ if it performs activities, on the regional level, for promotion, awareness, and defense of rights and interests of the users of its services or the users of health services and social services of the region.

[31] *Community organization* (art. 334 LSSSS) means a moral person constituted as a non-profit by virtue of a law of Québec with affairs administered by a board whose majority consists of users of the services of the organization or members of the community it serves and whose activities are linked to the fields of healthcare and social services.

[32] Women's centers are community organizations which receive subsidies to offer abortion services, but the interpretation of *articles 336* and *337* of the LSSSS raises questions since it does not provide that non-profit organizations can, as is mentioned in article 80 of the aforementioned law for CLSCs and article 81 for CHs, offer diagnostic services and general and specialized medical treatments.

2.5 Physician private practices

[33] According to article 95 of the LSSSS, only persons or companies which operate in professional private practices are considered to be establishments for the purposes of this law.

[34] These practices are created by physicians who decide upon their method of operation.

[35] They do not receive any operations budget except for the amount provided for in the *Health Insurance Law* (LAM) ***[4]***, and they are not subsidized as community organizations.

III 3. Organization of Elective Abortion services in Québec

[36] The parties admit that abortions are classified in three categories which are defined as follows:

1. First trimester abortions, meaning those practiced within the 13 weeks following the patient's last menstruations;

2. Second trimester abortions, meaning those practiced in the 14 to 24 or 26 weeks following the patient's last menstruations;

3. Third trimester abortions, meaning those practiced after 26 weeks, in exceptional cases.

The claims only concern abortions in the first trimester.

[37] In order to really understand the stakes of this collective request, it is important to know the organization of the elective abortion services in Québec.

3.1 Outaouais Region

[38] As soon as it is an issue of making abortion accessible to the women of this region, there are obstacles in their way; the Hospital in Hull refuses to organize abortion services since the physicians are resistant to this surgery and refuse to practice it.

[39] Women therefore have to go to Montreal or to Ottawa.

[40] The women's clinic of Outaouais then organizes the dispensation of the service; as of 1993, 71% of women who require an elective abortion service obtain the service in their region at this clinic.

[41] Besides, on July 7, 1995, a letter of agreement was reached between Minister Rochon and the Federation of General Practitioners of Québec (P-35) which provides that physicians who practice abortions at this clinic are not subject to a reduction in their fees when the quarterly ceiling is reached. The Tribunal will explain this question in further detail in another chapter.

[42] Currently 95% of elective abortion services in the first trimester in the Outaouais region are performed by physicians operating in this clinic; several physicians come from the Montreal region.

3.2 Mauricie Region

[43] In Mauricie, elective abortion services are offered in large part by the women's health center of Mauricie.

[44] In December 1999, the regional governing body favored the dispensation of services in five places, which were two hospital centers, two CLSCs, and the women's health center.

[45] Hence budgets are allocated.

3.3 Other regions

[46] The same policy applies; CLSCs offer elective abortion services in the first trimester.

[47] Thus, there are two service locations in the Lanaudière region, which are the Joliette CLSC and the Lamater CLSC.

[48] The Montérégie region offers these services in a CLSC.

3.4 Central Montreal region

[49] Although the name of this region is Central Montreal, it includes all of the municipalities located on Montreal Island and, since its fusion, is part of the City of Montreal.

[50] Because of its geographic and demographic situation, this region presents particular problems which are at the basis of the present request.

[51] Indeed, in this region, elective abortion services in the first trimester are provided at the same time by certain CLSCs, by the Lasalle Hospital Center, and the Women's Health Center, as well as by private clinics.

[52] These locations can not absorb all of the demand which is why private abortion clinics are used; these clinics perform nearly one third of the elective abortion services in the first trimester in Montreal.

[53] As for elective abortion services in the second trimester, until they are performed by the CLSC of Les Faubourgs, they are performed entirely by private clinics.

[54] Indeed, in 1999, the CLSC of Les Faubourgs and the CLSCs of Montreal North and Rivière-des-Prairies receive a mandate by the regional governing body to organize first trimester elective abortion services and to create a coordination center for second trimester elective abortion services.

[55] During this reorganization, the regional governing body refers the vast majority of patients needing a second trimester elective abortion service to private clinics, provided the governing body had already authorized them.

[56] The governmental policy is to maintain its retention rate while favoring an increase in service to the public; the goal of keeping retention rates is to see that women don't have to leave their region to receive services.

[57] In 2000 and 2001, the ministry allocated additional credits in order to consolidate first trimester elective abortion services in the three CLSCs and in the hospital center which already offer services as well as the Women's Health Center.

[58] The CLSC of Les Faubourgs also saw an increase in its financing as a result of its mandate for the regional coordination of second trimester elective abortion services.

[59] The position of the Attorney General is that the courts can not get involved in policy guidelines, and these guidelines can not be the subject of legal sanction.

IV 4. Elective abortion services and health insurance

[60] It is admitted that the public sector can not dispense all elective abortion services.

[61] It is admitted that physicians practicing in private clinics see their fees reduced after a certain number of abortions in the same semester, such as is foreseen in the LAM; however, in certain circumstances, when there is a shortage of physicians in public establishments, the regional governing body authorizes them to practice abortions without being penalized, meaning without those abortions being accounted for in their quarterly revenues.

[62] By virtue of appendix 9 of the agreement reached with general practitioners and entitled *Conditions of application of rates*, article 5[5] declares that:

> 5.1 A physician is compensated according to applicable rates in so much as his or her revenue obtained from the system is less than the amount of the applicable quarterly ceiling in a given quarter.
>
> (…)

and article 5.4 adds:

> 5.4 As soon as the gross revenue of a physician for medical services provided in a given quarter reaches the ceiling set for this quarter, the honoraria that are payable to him or her for the medical services provided until the end of this quarter, are automatically reduced by 75%.
>
> (…)

[63] It is not being denied either that private clinics can not subsist without requiring the women who come for consultations there to pay additional fees which vary, depending on the year, from $200 to $300 for first trimester elective abortion services, but the question that is being raised by the collective request is the following:

> If elective abortion is a service covered by the LAM, when should women have to pay out of pocket to obtain this service?

[64] Article 1 of the LAM defines the services that are covered by insurance, the categories of physicians practicing in Québec, the persons insured, and creates the governing body of health insurance of Québec:

> 1. The services covered by insurance:

"insured services": the services, medications, devices or other equipment that compensate for a physical deficiency, visual aides, hearing aides, and aides for communication addressed in article 3;

2. the professionals who dispense them:

"health professional" or "professional": any physician, dentist, optometrist, or pharmacist who is legally authorized to provide the services insured;

"professional subject to the application of an agreement": a professional who exercises his or profession in the framework of a system instituted by the present law, which is compensated according to the rate provided for in the agreement and for which the amount of fees, which includes the price of medications in the case of pharmacists, is paid directly to him or her by the Governing Body when an insured person has presented his or her health insurance card or his or her claim form, depending on the case, or directly by an insured person when the latter has not presented his or her health insurance card or his or her claim form, depending on the case;

"unengaged professional": a professional other than a pharmacist who exercises his or her profession outside the framework of the system instituted by the present law but who accepts to be compensated according to the rate provided for in an agreement and whose fee amount is paid to his or her patients by the Governing Body;

"non-participating professional": a professional who exercises his or her profession outside of the framework of the system instituted by the present law but who does not accept to be compensated according to the rate provided for in an agreement and who is the subject of an order issued by virtue of article 77, 77.0.1, or 77.1.1 and of whom all the patients fully assume payment of the fees which include the price of medications, in the case of a pharmacist;

3. The persons insured:

"insured person": a person who resides in or who is staying in Québec and who is duly registered with the Governing Body;

4. The Health Insurance Governing body of Québec:

"Governing Body": the Health Insurance Governing Body of Québec instituted by the *Law on the Health Insurance Governing Body of Québec* (chapter R-5) [6].

[65] The request claims a reimbursement for women who received elective abortion services in private clinics by participating professionals.

[66] Article 3 of the LAM specifies that the cost of the services provided by the physicians and required from a medical point of view, is assured by the Governing Body on behalf of any insured person.

[67] Article 19 of the LAM allows the minister, with the approval of the Treasury Council, to conclude all agreements needed for the application of this law with organizations that represent all categories of health professionals.

[68] In the general practitioners' manual [7], which reprints all of the agreements reached with the government, the general preamble provides that the physician is compensated for the medical service that he or she provides to the patient.

[69] The agreement reached with the General Practitioners Federation provides in the section P-Gynecology, for payment for a series of acts that are related to abortion, whether this takes place in the first trimester or in the second trimester:

P – GYNECOLOGY		General Practitioners R = 1	R = 2
	(…)		
	Abortion incomplete (spontaneous)		
6900	by menstrual extraction……..24.00		
6906	by curettage……90,00	3	
	Therapeutic abortion		
6908	by menstrual extraction (including paracervical block, dilation of the cervix, insertion of laminar rods) (P.G. 2.4.7.7A)……24.00		
6938	in the office, supplemental fee……..13.00		
6909	by curettage (including paracervical block, dilation of the cervix, insertion of laminar rods) (P.G. 2.4.7.7 A)	3	
	… 85.00		
6939	…in the office, supplemental fee……28.00		
	Therapeutic abortion from 14 weeks:		
	One time: (including paracervical block, dilation of the cervix, insertion of laminar rods)		
6941	aspiration, curettge, and evacuation of the fetus (P.G. 2.4.7.7 A)….200.00	3	
6947	in the office, supplemental fee……28.00		
	Two times:		
6948	1st time: induction, including all methods, if the case arises, evacuation of the fetus (P.G. 2.4.7.7 A)	3	
	…… 120.00		
6949	2nd time: curettage, if the case arises (P.G. 2.4.7.7 A)……90.00	3	
6951	in the office, supplemental fee……..28.00		

6924 Cervical cerclage of the parturient……75.00 3

6952 Repeat of dilation and curettage (or recurettage) during the 6 weeks following a therapeutic or incomplete abortion 3

……..90.00

6953 in the office, supplemental fee……..28.00

(…)

[70] Article 69 of the LAM allows the government to adopt regulations to prescribe the cases, conditions, or circumstances in which the services addressed in article 3 of the LAM are not considered as insured services for the persons insured or for those among them that it indicates.

[71] Article 22 of the *Regulation for application of the law on health insurance* (Regulation for application of the LAM) [8] lists the services that are not considered as insured and in which circumstances they are not insured.

[72] Elective abortion services, which are not part of the exceptions provided in article 22 of the Regulation for application of the LAM, are insured when they are provided by a health professional who has not withdrawn himself or herself from the application of the law.

[73] It is also necessary to recall certain paragraphs of article 22 of the LAM, which provide that a health professional who is subject to the application of an agreement may only demand or receive, for a service that is insured, the compensation provided for in the agreement and for which he or she is entitled by virtue of the present law; any agreement to any other effect is null and absolutely void.

4.1 Nature of the costs required of women and the principle of services provided free of charge

[74] This is not a new question: in December, 1995, Dr. Morgentaler denounced this situation to Minister Rochon; he asked him to correct the injustice done to women who are required to pay private clinics the sums that should be ensured by the Health Insurance Governing Body.

[75] In 1999, Morgentaler made a new request of Minister Marois. Nicole Gravel, in charge of planning at the Ministry of Health and Social Services (MSSS), called upon to prepare the response to Dr. Morgentaler, denounced the fact that women who have abortions in private clinics have to pay money out of pocket for a service that is insured; nearly 30% of elective abortion services in Montreal are performed in private practices and it has been proven that the public sector can not absorb these services. It refers to another study prepared by Lise Dunnigan in October, 1995.

[76] The Tribunal is conscious that the opinion of an employee of the Ministry is not a commitment of its responsibility, but the fact remains that asking its employee to prepare a document on the state of affairs shows that the Ministry knows of the problem and is tolerating it or does not intervene to change it; since 1995, the minister knows that private clinics, if they are to continue

functioning, are required to get additional fees from the women who receive elective abortion services.

[77] On August 23, 1995 (P-45), the under-minister of the Federal Ministry of Health, Michèle S. Jean, learns of the position of Québec concerning the fees required by private clinics for performing medically insured services.

[78] On October 6, 1995 (P-44), the under-minister Luc M. Malo assured the federal under-minister that the legislative framework in force in Québec formally forbids the requirement of in-house fees in all the private clinics of Québec, for medically necessary insured services, and he adds:

> Therapeutic abortion is an insured service for which fees of $85 are associated. What's more, a supplement of $40 is paid to the general practitioner if the abortion is performed in a private clinic. This supplement of $40 is intended to expressly cover the administrative costs related to the provision of such a service in a private clinic (rent, equipment, supplies, etc.). What's more, the agreement reached with the Federation of General Practitioners of Québec does not include any particular provision which would allow a general practitioner to require anything from a patient seeking an abortion. In consequence, it is clear that the in-house fees are forbidden, and are therefore illegal, for any therapeutic abortion performed in a private clinic in Québec.

[79] On February 26, 1996 (P-4), the federal under-minister reaffirms her worry with respect to the fact physicians report cases where a supplemental payment is required by private clinics:

> As you know, if the services for which fees are required are medically necessary and offered free of charge in a hospital facility, they are subject to the policy on private clinics, which requires that these direct costs charged to the patients are eliminated. Although I do recognize that certain fees may be requested for services that the Governing Body does not reimburse, even if the abortion is practiced in a hospital, we would like to better understand the situation such as it presents itself in certain abortion clinics in Québec in order to be able to conclude that there truly is no problem with respect to the Canadian Law on Health.
>
> To do this, it may be useful for our representatives to meet in order to exchange the necessary information. Health Canada officials in fact went to other provinces and to the territories to explain federal policy concerning private clinics.

[80] Despite this exchange of letters, the situation remains unchanged; Québec decided not to intervene and to allow private clinics to charge women additional amounts because, otherwise they would have to stop operating, which could not happen without creating even greater problems; the additional amount spent would be spent either for *counseling*, echography, or anesthesia.

4.2 Echography

[81] Despite the position taken by the under-minister Malo in 1995, the Tribunal should investigate and determine if the LAM and its regulations have been modified in such a way as to allow private clinics to require additional payments in order to provide the service.

[82] It seems that no, only the rate was changed.

[83] The Tribunal does not share the opinion of the Attorney General who maintainis that the additional costs cover services that are not covered, such as echography and *counseling*.

[84] The Attorney General's position is based on article 22 q) of the Regulation of Application of the LAM which affirms that the ultrasonography (echography) is not covered unless this service is provided in a facility maintained by an establishment that operates a hospital center or unless this service is provided, for obstetric purposes, in a facility maintained by an establishment that operates a local center for the community services mentioned in appendix D.

[85] Now, if one refers to the directives adopted by the College of Physicians of Québec concerning the voluntary interruption of pregnancy (P-92), it is specified there that the professional, prior to proceeding to the performance of this surgery, should know the exact number of weeks of pregnancy (gestation) since this determines the surgical method used and the method of anesthesia.

[86] If one carefully analyzes article 22 of the Regulation of Application of the LAM, one notes that the exclusions refer to very specific acts; hence paragraphs:

> 22a) excludes the exam or the service that is not linked to a cure and the "iii." address specific cases;
>
> 22b) excludes psychoanalysis unless this service is provided in a designated establishment;
>
> 22c) excludes services for purely esthetic purposes;
>
> 22d) excludes consultations by telecommunications or by correspondence;
>
> 22e) excludes services rendered by a professional to his or her spouse or to his or her children;
>
> 22f) excludes examination, expertise, or testimony required for purposes of justice;
>
> 22g) excludes any visit whose goal is to obtain renewal of a prescription;
>
> 22h) excludes vaccinations;
>
> 22j) i excludes eyesight examinations;
>
> 22k) excludes adjustment of eyeglasses;
>
> 22l) excludes certain dental treatments;
>
> 22m) excludes all acupuncture procedures;
>
> 22n) excludes injections of sclerosing agents;
>
> 22o) i. excludes thermography, unless this service is performed in a facility maintained by an establishment which operates a hospital center;
>
> 22o) ii. Excludes mammography used for purposes of detection, unless this service is provided upon the orders of a doctor, in a location designated by the minister, to an insured person aged 35 or older and provided that such an exam has not been performed on this person for a year;
>
> 22p) excludes the use of radionuclides *in vivo* in humans, unless this service is performed in a facility maintained by an establishment which operates a hospital center.

22q) excludes ultrasonography, unless this service is provided in a facility maintained by an establishment which operates a hospital center or unless it is performed, for obstetric purposes, in a facility maintained by an establishment which operates a local center for the community services mentioned in appendix D;

22s) excludes any required anesthesia service used to provide a service that is not insured;

22t) excludes any surgical service performed for gender reassignment.

[87] Thus, if 22s) excludes any anesthesia service required in order to provide a service that is not insured, because elective abortion services are insured, the anesthesia necessary to practice this service should be covered;

[88] No exclusion addresses an accessory act supporting an insured act and 22q) addresses acts that are indispensable for achieving a valuable diagnosis. The Tribunal can not conclude that the State is supporting, for economic reasons, that the physicians practicing these interventions do so without employing all of the possible means recognized and recommended by their professional order, with this to be done in the interest of their patients.

[89] The echography that is an accessory to an elective abortion service is not necessary to reach a diagnosis (22q)), but to ensure that the intervention will be performed with all the existing precautions in order to limit the possible and inherent complications to any medical procedure; the directives adopted by the College of Physicians specifies that the physician should, in performing a medical elective abortion service, do so with echography.

[90] For these reasons, the Tribunal can only conclude that the government wanted elective abortion services provided in private practices to be done without regard to the rules recognized by the medical corps; the government can not favor methods that may increase the danger of resorting to these interventions.

4.3 Medications

[91] According to article 1.1.4 of the general preamble of the agreement made with general practitioners [9] (D-31):

> The physician may not ask the patient for any payment corresponding to the provision of a medical service, unless there is provision to the contrary to the present rate.
>
> The physician may however obtain compensation from the patient for the cost of medications and the anesthetic products used.

[92] Now, there is no proof that the additional costs claimed were claimed for the cost of medications or the anesthetic agents used, and all the more so because the only medication supplied is a pill (Ativan) which can obviously not be valued at $200 to $300, and there is no proof on the cost of anesthetic agents.

4.4 Agreement between general practitioners and the minister

[93] The Federation of General Practitioners of Québec (FMOQ) brings together 19 associations, of which 17 are regional and 2 are composed of physicians working in CLSCs and physicians in psychiatric establishments, and it negotiates the applicable rate for the procedures listed.

[94] The steps for negotiation are as follows:

> Acceptance by the parties of a percentage in the increase of the global allocation;
>
> Agreement on how the proposed allocation is split between the associations;
>
> Presentation of each of the parties' specific requests;
>
> Rates proposal submitted to the FMOQ.

[95] The Attorney General affirms that in the framework of negotiation, the minister takes into account repercussions of the rates on health services in Québec and negotiates compensation for physicians at the best possible cost.

[96] The Attorney General adds that the minister negotiates in the interests of citizens and then, when an agreement is reached, this agreement links all of the members of the representative organizations as well as all professions who work in the same fields of professional activity.

[97] The Tribunal does not doubt that the minister negotiates by taking the state of public finances into account, but, in the absence of proof, it can not pronounce and affirm that the agreement always takes the interests of citizens into account.

[98] The parties admit that the elective abortion service is provided for in the rate; the request is attempting to achieve recognition that the government, knowing that physicians practicing in private clinics can not maintain their operation without requiring women to pay an additional cost for elective abortion servicces, and knowing too that the public system can not accommodate all of the demand, particularly during certain times of the year when a number of physicians are on vacation, allows them to circumvent the LAM and its regulations.

[99] To this effect, it is clear than when private clinics have patients referred to them by the regional governing body, the latter pays the additional costs required of patients; the same is true for second trimester elective abortion procedures. If the elective abortion service is a covered service, why does the regional governing body, duly mandated by the MSSS to act in such a way, agree to pay a supplemental cost? Therefore, the argument that would have the request be directed against the clinics or against the health insurance governing body, which it would return against the clinics, does not hold. The State knows that since the set up of this system, the system does not respect its laws.

[100] The request seeks to indemnify women for the amounts that they were required to pay to obtain a service that is insured; in other terms, the request is attempting to achieve recognition that the government, in full knowledge of the cause, allowed for a system to be put in place that contravenes its laws, with full knowledge, but allowing it to happen for financial reasons.

V 5. Civil responsibility of the government

[101] The Tribunal shares the opinion of the Attorney General when it affirms that the MSSS may decide on its policy guidelines, that the power to develop these guidelines is of a policy nature which can not constitute a legal source for a third party and can not be the subject of a legal sanction.

[102] The fifth book of the *Civil Code of Québec*, entitled *Obligations*, contains in its general provisions article 1376 C.c.Q., which declares that the rules of the present book apply to the State as well as to its organizations and any other moral person governed by public law.

[103] The entry into force of this article in 1994 brought the Supreme Court in the cause of *Prud'homme vs. Prud'homme* ***[10]***, to make a distinction with what had already been decided in the order *Laurentide Motels* [11], which is that the measure of dependency of public authorities to the rules of civil law in matters of responsibility is determined by the common law rule established by the Chamber of Lords in the order *Anns vs. Merton London Borough Council* ***[12]***:

27 The entry into force of the *Civil Code of Québec* in 1994, places in a new context responsibility actions brought against another public authority. Although art. 356 *C.c.B.-C.* has its equivalent in art. 300 of the new Code, the art. 1376 *C.c.Q.* henceforth provides that the rules of the Book of Obligations "apply to the State, as well as to its organizations and to any other moral peron governed by public law, subject to other rules of law that are applicable to them." This rule is derived from public law. It exempts the justiciable party who sues a public authority from the obligation to identify a rule of common public law that makes civil law applicable to his or her action.

(see P.-A. Côté, "The determination of the domain of Civil law in terms of civil responsibility of the Québec Government – Comment on the order *Laurentide Motels*", in *Mélanges Jean Beetz* (1995), p. 397). The application of art. 1376 *C.c.Q.* also extends to the persons who compose the public administration or an arm of the public administration to the degree that the acts done are part of public functions (…)

31 All in all, the entry into force of the new provisions of the Civil Code of Québec and art. 1376 in particular, no longer permit the use of the method pescribed in the Laurentide Motels order mentioned above, to the degree that the method in particular imposed the obligation to identify a common law rule making private law applicable in its liability action against the public administration. Henceforth, the civilian liability system applies in principle to the wrongful act of the administration. It is therefore up to the party which intends to rely on public law to avoid or restrict the application of the general system for civil liability to demonstrate, if the case arises, that the relevant public law principles take precedence over the rules of civil law.

[104] The Government of Québec, still retaining the right to amend or to extend laws, can not make policy decisions that have as a consequence the effect that they are not respected or that they are circumvented, whether by the State or by its citizens.

[105] The State can not, for policy or economic reasons, take measures that lead the organizations that it has created and for which it dictates the conduct, to be able to circumvent laws or to allow the creation of systems which contravene theme.

[106] Citizens can not indirectly do what the law forbids them from doing; the same is true for the State. Allowing private clinics to require additional fees for insured services, and doing so while knowing that their survival depends on it, creates a system for what the law forbids.

[107] What's more, the State knows full well that women do not pay to receive counsel, an echography, or for medications. The State knows full well that women pay a supplement for insured services but closes its eyes and tolerates this. It is not enough to allow the use of different words that do not reflect reality to resolve this problem.

[108] Article 1457 C.c.Q. affirms:

> 1457. Every person has the duty to respect rules of conduct which, depending on the circumstances, usage, or the law, imposes upon him or her, in such a way as to cause no harm to another.
>
> Such person is, when endowed with the ability to reason and when one has failed in this duty, responsible for the harm that he or she causes by this error toward others and is required to repair this damage, whether it be bodily, moral, or material damage.
>
> Such person is also responsible, in some cases, to repair the damage caused to another by the fact or by the fault of another person or by the fact of the property he or she has under his care.

[109] The State is therefore liable for the damage caused to another by requiring the creation of structures which contravene its laws; the State is obligated to make policy decisions in compliance with its laws.

[110] The subject of the LAM and its regulations is to ensure than the citizens of Québec can receive healthcare treatments without having to defray the costs when such service is insured; the law determines what is insured and what is excluded, and abortion is a service that is included.

[111] By the reasons explained in the judgement rendered by the undersigned, on October 21, 2005, on the motion in declinatory exception of the Attorney General in the present file [13], the Tribunal does not share the opinion of the Attorney General to the effect that women have to address the Health Insurance Governing Body to recuperate the sums paid out of pocket, since the decision to allow private clinics to require additional costs comes from the MSSS and that the regional governing body acts according to the decisions made by this ministry; the regional governing body receives the budgets that need to be used according to the policy decisions taken by the ministry.

[112] The State can not plead immunity since it can not make policy or administrative decisions which do not comply with the laws that it has adopted; immunity's purpose is not to allow the State to circumvent its own laws or to allow third parties to act in this way.

5.1 Do the faults identified constitute bad faith?

[113] The Tribunal does not share the opinion of the petitioner, the Association for access to abortion, on this question; as Judge LeBel recalls in the Finney order [14], bad faith can have an element that exceeds intentional fault, but Judge Deschamps in the *Entreprises Sibeca inc. vs. Frelighsburg* order [15] recommends that this notion is however flexible and that its content varies according to the legal domains:

> 26 This interpretation of the concept of bad faith allows encompassing not only the acts which are deliberately done with intention to harm, which corresponds to a classic definition of bad faith, but also those which demarkate themelves so much from the legislative context in which

they are done that a tribunal can not reasonably conclude that they were done in good faith. What appears to be an extension of bad faith is in some sense only the admission in proof of facts that correspond to a circumstantial proof of bad faith, because the victim is unable to present direct proof of this.

27 One may conclude from this analysis that the immunity from public law that is associated with the exercise of legislative and regulatory power can be integrated into the system of responsibility applicable to public organizations. The formulation of art. 1457 of the Civil Code of Québec enables incorporation of the obligation made of the petitioner to show that the body public has acted in bad faith or in circumstances which lead one to reach the conclusion of bad faith.

[114] The Tribunal can not therefore conclude that the MSSS is in bad faith when it allows private clinics to require additional sums for the services insured, since this way of making use of the erroneous interpretation of certains articles of the LAM and the rate of general practitioners; the refusal or the failure to act does not always constitute bad faith.

Comment [SS1]: An error in the original text? The original is a sentence fragment.

5.2 Remedy

[115] Article 1028 C.p.c. provides for the final judgement that finds against:

1028. The final judgement, which awards damages-interest or reimbursement of a sum of money, orders that member claims be recovered collectively or that they be the subject of individual claims.

[116] Article 1031 C.p.c. adds:

> 1031. The tribunal orders class action recovery if there is proof to establish in a sufficiently exact fashion the total amount of member claims; it then determines the amount due by the debtor even if the identity of each of the members or the exact amount of their claim has not been established.

[117] Now, in this cause, the proof will allow for the precise determination of the claim of each members, as private clinics are in a position to show the amount spent out of pocket by each woman in order to receive elective abortion services, with this sum varying between $200 and $300.

[118] The table below lists the sums paid out of pocket by the women who had a health insurance card to obtain an elective abortion service, and this information is listed by clinic, and also for the Montreal Women's Health Center where the amount is smaller, because it is subsidized to a large extent:

CSFM: Montreal Women's Health Center

Cmorgen.: Morgentaler Clinic

L'Alter: Alternative Clinic

	CSFM (P-27)	Fémina (P-76-77)	Cmorgen. (P-80)	L'Alter. (P-54)	L'Envolée (P-85)	Lalitude (P-87)	TOTAL

1999	$146 520 814 elective abortion services	$625 100 3 009 elective abortion services	$339 700 1 646 elective abortion services	$296 640 1 648 elective abortion services	$77 000 440 elective abortion services	$61 000 348 elective abortion services	
1999 adjusted*	$97 670 543 elective abortion services	$416 692 2006 elective abortion services	$226 444 1097 elective abortion services	$197 740 1099 elective abortion services	$51 328 293 elective abortion services	$40 663 232 elective abortion services	$1 030 537 5270 elective abortion services
2000	$189 400 947 elective abortion services	$612 864 2883 elective abortion services	$383 600 1781 elective abortion services	$301 680 1676 elective abortion services	$77 350 442 elective abortion services	$70 000 400 elective abortion services	$1 634 894 8129 elective abortion services
2001	$183 200 916 elective abortion services	$652 550 2582 elective abortion services	$474 350 1865 elective abortion services	$349 140 1587 elective abortion services	$73 800 369 elective abortion services	$56 000 320 elective abortion services	$1 789 040 7639 elective abortion services
2002	$195 800 979 elective abortion services	$676 904 2632 elective abortion services	$421 500 1673 elective abortion services	$334 523 1545 elective abortion services	$64 000 320 elective abortion services		$1 692 727 7 149 elective abortion services
2003	$50 000 250 elective abortion services	$699 552 2472 elective abortion services	$467 800 1652 elective abortion services	$321 500 1286 elective abortion services	$57 600 288 elective abortion services		$1 596 452 5948 elective abortion services
2004		$718 300 2380 elective abortion services	$489 450 1610 elective abortion services	$321 956 1097 elective abortion services	$72 500 290 elective abortion services		$1 602 206 5377 elective abortion services
2005	$11 200 280 elective abortion services	$667 300 2 210 elective abortion services	$469 350 1541 elective abortion services	$294 600 982 elective abortion services	$72 250 289 elective abortion services	$	$1 514 700 5302 elective abortion services

2006							
TOTAL	$776 120	$4 652 570	$3 045 750	$2 220 039	$494 500	$187 000	$10 860 556 44 814 elective abortion services

*Wth the prescription suspended by the notification on May 2, 2002, of the petition for authorization to issue a collective request (art. 2908 C.c.Q.), and with the prescription applicable to a civil responsibility action set at three years, the period covered by the claims of the members of the group extends from May 2, 1999, to the date of the judgment to be rendered. For the year 1999, women who paid to obtain elective abortion services before May 2 are therefore excluded. As a result, we removed 4/12 or 33.33% of the total for 1999, rounded to the next number. This proportional weighting is justified by the proof that demonstrated that the number of elective abortion services performed was stable throughout the year (testimony of Catherine Cartier).

[119] Therefore these sums should be reimbursed to the women.

[120] Given that these are medical procedures covered by professional confidentiality clauses, and for the reasons listed by the Court of Appeals on anonymous requests [16] in the present file, the Tribunal will hear the attorneys regarding the measures to be taken to allow the women to exercise their right of recovery, while preserving their right to professional privacy, and by ensuring them of the greatest possible measure of confidentiality.

[121] It is premature to discuss other measures to be taken.

[122] Also, these sums should be deposited in a financial institution in Québec and the Tribunal leaves it to the lawyers to decide on which financial institution; if there is no agreement, it will specify which one.

VI 6. Violation of *Charters*

[123] The petitioner affirms that two *Charters* were not respected and that women are entitled to punitive damages-interest.

6.1 The *Québécois Charter* [17]

[124] Was there a violation of articles 1, 6 and 10?

> 1. Each human being has the right to life, as well as safety, integrity and liberty in his or her person.
>
> 6. Each person has the right to peaceful enjoyment and free use of his or her belongings, except in measures provided for by law.
>
> 10. Each person has the right to the recognition and exercise, in fully equality, of the rights and liberties of his or her person, without distinction, exclusion, or preference based on race, color, sex, pregnancy, sexual orientation, civil status, age except in measures provided for by law, religion, political conviction, language, ethnic or national origin, social condition, handicap or use of any means to mitigate this handicap.

There is discrimination when such a distinction, exclusion, or preference has the effect of destroying or compromising this right.

6.2 The *Canadian Charter* [18]

7. Each person has the right to life, liberty, and security in his or her person; no harm may be made against this right except in compliance with the principles of fundamental justice.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[125] Judge Deschamps in the Chaouli order [19] explains the fundamental differences between the two *Charters* and the method to be followed to decide on their application:

28 The similarities between these two provisions probably explains in part the fact that the file had been examined exclusively with respect to the *Canadian Charter* by the Superior Court and the Court of Appeals. With respect to certain aspects of the two charters, the right is the same. For example, the formulation of the protection of the right to life and to liberty is identical. Bringing them together is therefore indicated. There are however distinctions and I deem that it is important to first examine the particular protection offered by the *Québécois Charter* because it is not identical to that which is offered by the *Canadian Charter*.

29 The most obvious distinction is the absence in art. 1 of the *Québécois Charter* of any mention of the principles of fundamental justice. There is a double analysis required in the terms of art. 7 of the *Canadian Charter*. According to the approach that is generally followed for this provision, the petitioner should, at the outset, prove that there is harm to the right to life, liberty, and security of the person, and in a second phase, that the harm was not in compliance with the principles of fundamental justice *(Gosselin vs. Québec (Attorney General)*, [2002] 4 R.C.S. 429, 2002 CSC 84, par. 205, Judge Bastarache). If this proof is made, the State should then demonstrate, in compliance with art. 1 of the *Canadian Charter*, that the harm is justified in the framework of a free and democratic society.

30 In compliance with the recognized principles, it is the responsibility of the petitioner to prove that there was harm caused against his or her constitutional rights: *R. vs. Collins*, [1987] 1 R.C.S. 265 and *Rio Hotel Ltd. Vs. New Brunswick (Commission of licences and alcohol permits)*, [1987] 2 R.C.S. 59; see also Hogg, p. 44-3. By virtue of *art. 7* of the *Canadian Charter*, the burden of the petitioner would then be double. The imposition of this burden of proof upon the petitioner has the effect of making his or her task a heavier one. The double burden of proof is not present in the case of the *Québécois Charter*, due to the absence of incorporation of the principles of fundamental justice in art. 1 of the *Québécois Charter*. The latter has therefore a reach that is potentially wider and this characteristic should not be eluded.

31 Deciding on questions being litigated by resorting to the *Québécois Charter* allows one to give strength to an instrument that is proper to Québec in addition to use of the rules of Canadian constitutional law as justification.

[126] She concludes then that the *Québécois Charter* has a wider reach and that one mustn't restrict its reach to the problems of the administration of justice.

[127] She adds nevertheless:

> 35 It is clear that a dispute founded on a charter, whether the *Canadian Charter* or the *Québécois Charter*, should rest on a concrete factual basis: *Operation Dismantle Inc. vs. The Queen*, [1985] 1 R.C.S. 441. The question is not to determine if the appelants can invoke a harm that is their own. The questions raised pertain to the public interest, and the test established in the *Minister of Justice of Canada v. Borowski* order, [1981] 2 R.C.S. 575, applies. The question must be serious, the petitioners should be affected directly or have a veritable interest as citizens and there should be no other effective argument at their disposal (…)

[128] This justifies the position of the Attorney General with the effect that pretentions of a constitutional order should not be examined by the tribunals in a theoretical manner. The proof of sufficient factual foundation is essential before examining whether a law violates the *Charter*, particularly if the litigation deals with the effects of the contested law.

[129] Contrary to the principles listed in the Morgentaler order [20] where what was attacked was the right of women to have access to an abortion, given the obstacles imposed by the heavy process put in place to obtain it, and what was sought was the annulment of certain articles of the *Criminal Code of Canada*, in the present file, there is no proof that the women suffered an emotional and psychological trauma imposed by the application of the law; in other terms, the Tribunal has no proof that the fact of having paid a supplement caused such a trauma.

[130] As the Attorney General affirms [21]:

> 226. In the absence of sufficient factual context to demonstrate the existence of unreasonable waiting times in the public netowrk, the gravity of the consequences of this delay on the physical and psychological health of the women concerned and the causal link between the delays in the public network and the choice of women to turn to private practices, claims of harm to the rights of women protected by article 7 of the Canadian Charter or article 1 of the Québécois Charter should be rejected.
>
> Jane Doe 1 v. Manitoba, [2005] M.J. no. 335, par. 27.

[131] What's more, the Tribunal concludes that it is not the LAM which is causing problems but rather it is non-compliance with it, which is not only tolerated but encouraged by the government, and this is for economic reasons.

[132] **BY THESE REASONS, THE TRIBUNAL:**

[133] **ORDERS** the respondent to pay the designated member, Ms. A.B., an amount of $200 with interest calculated at the legal rate, starting from May 2, 2002, date of the notification of the petition for authorization to file a collective request, as well as the additional indemnity;

[134] **RECEIVES** the action of the petitioner as class action for the benefit of the members of the group;

[135] **ORDERS** the respondent to deposit the sum of ten million eight hundred sixty thousand five hundred fifty-six dollars ($10 860 556), for the benefit of the members of the group, in a financial institution exercising its activities in Québec to be determined by the attorneys of the file, or by the Tribunal if the attorneys can not reach an agreement.

[136] **ORDERS** the respondent to deposit in a financial institution exercising its activities in Québec, to be determined by the attorneys of the file, or if the attorneys are unable to reach an agreement, by the Tribunal, the interests calculated at the legal rate on the sum of four million four hundred fifty-four thousand four hundred seventy-one dollars ($4 454 471), from May 2, 2002, date of the notification of the request for authorization to file a class action suit, as well as the additional indemnity.

[137] **ORDERS** the respondent to deposit in a financial institution exercising its activities in Québec to be determined by the attoneys of the file, or if the attorneys can not reach an agreement, by the Tribunal, the interests calculated at the legal rate on the amount of one million six hundred ninety-two thousand seven hundred twenty-seven dollars ($1 692 727), from January 1, 2003, as well as the additional indemnity;

[138] **ORDERS** the respondent to deposit in a financial institution exercising its activity in Québec to be determined by the attorneys of the file or, if they are unable to reach an agreement, by the Tribunal, the interest calculated at the legal rate on the sum of one million five hundred ninety-six thousand four hundred fifty-two dollars ($1 596 452), from January 1, 2004, as well as the additional indemnity.

[139] **ORDERS** the respondent to deposit in a financial institution exercising its activity in Québec to be determined by the attorneys of the file, or if they are unable to reach an agreement, by the Tribunal, the interest calculated at the legal rate on the sum of one million six hundred two thousand two hundred six dollars ($1 602 206), from January 1, 2005, as well as the additional indemnity.

[140] **ORDERS** the respondent to deposit in a financial institution exercising its activity in Québec to be determined by the attorneys of the file, or if they are unable to reach an agreement, by the Tribunal, the interest calculated at the legal rate on the sum of one million five hundred fourteen thousand seven hundred dollars ($1 514 700), from January 1, 2006, as well as the additional indemnity.

[141] **ORDERS** the liquidation of the individual claims of the members according to the methods to be determined by the attorneys and the Tribunal;

[142] **REFUSES** exemplary damages;

[143] **WITH** costs including legal fees.

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NICOLE BÉNARD, J.C.S.

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Hon. Philippe H. Trudel, Esq.

Hon. Danielle Parizeau, Esq.

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Hearing dates: January 16, 17, 18, 19, 23, 24, and 26, February 6, 7, 8, 20, 21, and 22, 2006

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

[2] *Canadian charter of rights and freedoms*, part I of the Constitutional Law of 1982, constituting appendix B of the Law dated 1982 on Canada (R.-U.), 1982, c. 11.

[3] *Law on health services and social services*, L.R.Q., c. S-4.2.
[4] *Law on health insurance*, L.R.Q., c. A-29.
[5] Brochure no 1 – Agreement between the Federation of General Practitioners of Québec and the Minister of Health and Social Services, prepared by the Governing Body of Health Insurance of Québec, (document D-30).
[6] *Law on the Governance of health insurance of Québec*, L.R.Q., c. R-5.
[7] General Practitioners' Manual, issued by the Governing Body of Health Insurance of Québec, (document D-31).
[8] *Regulation of the application of the Law on Health Insurance*, R.Q. c. A-29, r.1.
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[16] *Association for access to abortion*, C.A. Montréal, no 500-09-011914-025, April 19, 2002, jj. Deschamps, Chamberland, Pelletier, p. 3.
[17] *Charter on rights and freedoms*, L.R.Q. c. C-12.
[18] Op.cit., note 2.
[19] *Chaoulli* v. *Québec (P.G.)*, [2005] 1 R.C.S. 791; EYB 2005-91328 (C.S.C.).
[20] Op.cit., note 1.
[21] Plan of the argumentation of the Attorney General of Québec, p. 35, par. 226.