

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR QUÉBEC)**

B E T W E E N:

JACQUES CHAOULLI and GEORGE ZELIOTIS

Appellants

- and -

**ATTORNEY GENERAL OF QUÉBEC and
ATTORNEY GENERAL OF CANADA**

Respondents

- and -

**ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF NEW
BRUNSWICK, ATTORNEY GENERAL OF SASKATCHEWAN, AUGUSTIN ROY,
SENATOR MICHAEL KIRBY, SENATOR MARJORY LEBRETON, SENATOR
CATHERINE CALLBECK, SENATOR JOAN COOK, SENATOR JANE CORDY,
SENATOR JOYCE FAIRBAIRN, SENATOR WILBERT KEON, SENATOR LUCIE
PÉPIN, SENATOR BRENDA ROBERTSON and SENATOR DOUGLAS ROCHE,
CANADIAN MEDICAL ASSOCIATION and THE CANADIAN ORTHOPAEDIC
ASSOCIATION, CANADIAN LABOUR CONGRESS, CHARTER COMMITTEE ON
POVERTY ISSUES and THE CANADIAN HEALTH COALITION, CAMBIE
SURGERIES CORPORATION, FALSE CREEK SURGICAL CENTRE INC.,
SPECIALTY MRI CLINICS INC., FRASER VALLEY MRI LTD., IMAGE ONE MRI
CLINIC INC., MCCALLUM SURGICAL CENTRE LIMITED, 4111044 CANADA INC.,
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ASSOCIATES INC., SURGICAL CENTRES INC., THE BRITISH COLUMBIA
ORTHOPAEDIC ASSOCIATION and THE BRITISH COLUMBIA
ANESTHESIOLOGISTS SOCIETY**

Interveners

**FACTUM OF THE INTERVENER
THE CHARTER COMMITTEE ON POVERTY ISSUES and
THE CANADIAN HEALTH COALITION
(Pursuant to Rules 37 of the *Rules of the Supreme Court of Canada*)**

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PARTS I and II - STATEMENT OF FACTS AND QUESTIONS IN ISSUE

1. The Charter Committee on Poverty Issues (CCPI) and the Canadian Health Coalition (the Coalition) adopt the Statement of Facts and Questions in Issue in the Respondent's Factum.

PART III – ARGUMENT

What is at Stake in this Case?

2. This case raises the question of how sections 7 and 15 of the *Canadian Charter* should be applied to protect and guarantee the right to health care in Canada. The Court's decision will be of critical importance to Canadians generally, and to disadvantaged groups such as poor people in particular, who rely on access to publicly funded health care as an essential component of their rights to life, liberty, security of the person, and equality.
3. Since the Second World War, and with the advent of publicly funded health insurance across Canada in the late 1960s and early seventies, Canadians and their governments alike have come to perceive free and universal health care as a basic right of social citizenship. CCPI and the Coalition submit that the *Charter* must be interpreted in a way that gives clear constitutional expression to this "keystone tenet of governmental policy."¹ As the Romanow Commission on the Future of Health Care in Canada asserts in its *Final Report*: "Canadians consider equal and timely access to medically necessary services on the basis of need as a right of citizenship, not a privilege of status or wealth."²
4. Notwithstanding increasing pressures placed upon it, and unrelenting criticism from its opponents, Canadians have remained constant in their view that equality of access to health care must be preserved as a core and defining feature of our publicly funded health care system:

¹*Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 50 [Eldridge].

²Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada – Final Report* (Saskatoon: Commission on the Future of Health Care in

The Canadian approach to the provision of health care services continues to receive strong and passionate support. The public does not want to see any significant changes which would alter the fundamental principles of our publicly administered health care system. They have an abiding sense of the values of fairness and equality and do not want to see a health system in which the rich are treated differently from the poor.³

5. Recognizing a positive obligation under the *Charter* to ensure equal access to health care is consistent not only with Canadians' understanding of health care as a basic right, but with governments' commitment under section 36 of the *Constitution Act, 1982* to "promoting equal opportunities for the well-being of Canadians" and "providing essential public services of reasonable quality to all Canadians." The National Forum on Health explains:

Canadian underpinnings of the health care system include the premise that it ought to be government run and not for profit, that money is not the primary consideration and that all are entitled – as a matter of citizenship – to equal access to quality care. This typically Canadian approach is, for many people, emblematic of a commitment to compassion, to equality of opportunity, to a sense of community and to a common purpose.⁴

6. Giving *Charter* effect to this domestic conception of health care is also consistent with the evolving international recognition of health as a fundamental human right, reflected in the *Universal Declaration* and subsequent human rights treaties ratified by Canada.⁵ As Justice Wilson expresses it: "government has recognized for some time that access to basic health care is something no sophisticated society can legitimately deny to any of its members."⁶

Canada, 2002) at xvi (Chair: Roy Romanow) [Romanow Commission].

³National Forum on Health, "Values Working Group Synthesis Report" in *Canada Health Action: Building on the Legacy, Volume II* (Ottawa: Minister of Public Works and Government Services, 1997) at 11 [National Forum on Health].

⁴*Ibid.*

⁵B. von Tigerstrom, "Human Rights and Health Care Reform: A Canadian Perspective" in T.A. Caulfield & B. von Tigerstrom, eds, *Health Care Reform and the Law in Canada – Meeting the Challenge* (Edmonton: University of Alberta Press, 2002)157 at 158-60.

7. Poverty is, beyond doubt, one of the most significant determinants of health in Canada.⁷ While poor people's access to social welfare programs and services has been steadily eroded over the past decade,⁸ publicly funded health care remains one social program to which they enjoy equal entitlement with other Canadians and for which the level of public support remains high. In *R. v. Edwards Books and Art Ltd.*, former Chief Justice Dickson warned that:

In interpreting and applying the Charter ... the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the conditions of less advantaged persons.⁹

8. The Appellants have put forward an interpretation of the *Charter* that would subvert the equal enjoyment of the right to health for disadvantaged groups such as seniors, people with disabilities, women and the poor in order to entrench a right of more advantaged individuals to contract for private health insurance and private health care funding. As found by the Courts below, evidence from Canada and other countries is clear that granting the Appellants' *Charter* claim would lead to a two-tiered health care system which would deny disadvantaged Canadians an equal standard of care.¹⁰

9. The Appellants' argument, if upheld, would allow the *Charter* to become a vehicle for knocking down a critical pillar of legislative protection for social rights in Canada. CCPI and the

⁶*Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 at 544.

⁷National Forum on Health, "Determinants of Health Working Group Synthesis Report" in National Forum on Health at 5-6; National Anti-Poverty Organization, *Government Expenditure Cuts and Other Changes to Health and Post-Secondary Education: Impacts on Low-Income Canadians* (Ottawa: National Anti-Poverty Organization, 1998) Chapter 3.

⁸B. Porter, "ReWriting the *Charter* at 20 or Reading it Right: The Challenge of Poverty and Homelessness in Canada" in W. Cragg & C. Koggel, eds, *Contemporary Moral Issues* (Toronto: McGraw-Hill Ryerson, 2004) at 374-86.

⁹[1986] 2 S.C.R. 713 at 779.

¹⁰*Chaoulli c. Québec (Procureur général)*, [2000] J.Q. no. 479 (C.S.), Joint Appeal Docket, Vol.I pp.17-172 at para. 263 ["*Chaoulli* (C.S.)"].

Coalition submit that such an outcome would be profoundly at odds with international human rights law, domestic *Charter* principles, and deeply held Canadian values.

The Evidence in Relation to Public and Private Insurance Funding

10. Justice Piché found that the health and hospital insurance legislation provisions at issue¹¹ are a key element of the framework established by Québec, in accordance with the principles of the *Canada Health Act*, to ensure a single-payer, publicly funded health care system, accessible to all without barriers based on ability to pay.

11. Justice Piché further found that striking down the impugned provisions would have serious negative consequences for the public system, including decreased support from more affluent and thus politically influential groups; advantaging of those able to afford private insurance; diversion of financial and human resources away from, and lengthening of waiting lists in, the public system; increased administrative costs required to regulate private insurance; and increased overall spending with no clear improvement in health outcomes.¹²

12. This evidence of the regressive effects of allowing private insurance funding is reinforced by the conclusions of the Romanow Commission.¹³ As health economist Robert Evans puts it: “The real motive underlying proposals for more private financing is very simple. The more private funding we have, the more those with high incomes can assure themselves of first class care without having to pay taxes to help support a similar standard of care for everyone else.”¹⁴

¹¹*Health Insurance Act*, R.S.Q. c.A-29, s.15; *Hospital Insurance Act*, R.S.Q. c.A-28, s.11.

¹²*Chaoulli (C.S.)*, *supra* at paras 91-93 (Dr. C. Wright); paras 103-115 (Dr. T. Marmor).

¹³Romanow Commission, *supra* at xx; National Coordinating Group on Health Care Reform and Women, *Reading Romanow: The Implications of the Final Report of the Commission on the Future of Health Care in Canada for Women* (Winnipeg: Canadian Women’s Health Network, 2003) at 9 [*Reading Romanow*].

¹⁴R. Evans, *Raising the Money: Options, Consequences, and Objectives for Financing*

13. In coming to her decision, Justice Piché recognized that all health care systems include some form of rationing:

Le régime public de santé québécois ne bénéficie pas de ressources illimitées et inépuisables, tous les experts l'ont dit. Nous pouvons même en dire autant de tous les systèmes de santé existant dans le monde. Dans ce contexte, il est tout à fait justifiable qu'un gouvernement, ayant les meilleurs intérêts de sa population à coeur, adopte une solution en matière de santé qui vise à favoriser le plus grand nombre possible d'individus. Le gouvernement limite les droits de quelques-uns pour assurer que les droits de l'ensemble des citoyens de la société ne seront pas brimés.¹⁵

CCPI and the Coalition agree that the single-payer system, which creates some waiting period for all, is preferable to the multi-payer system advocated by the Appellants, in which large numbers of people (primarily the poor) never receive care at all. CCPI and the Coalition submit, as Justice Piché concluded, that the publicly funded system is to be preferred, not only as a matter of sound health policy, but of constitutional and international human rights law.

Health Care and the Section 7 Right to Life, Liberty and Security of the Person

14. CCPI and the Coalition submit that section 7 of the *Charter* guarantees a right to health, including to health care necessary for physical and mental well-being. In the most basic terms, a right to life, liberty, and security of the person is meaningless without access to health care and other services to protect health and treat illness. As Justice Piché held: "S'il n'y a pas accès possible au système de santé, c'est illusoire de croire que les droits à la vie et à la sécurité sont respectés."¹⁶

15. Access to health care is clearly necessary to maintain human life. It is directly connected to physical and psychological security and autonomy. As the Preamble to the *Canada Health*

Health Care in Canada (Saskatoon: Commission on the Future of Health Care in Canada, 2002) at 42 [Evans, "Financing Health Care"].

¹⁵*Chaoulli* (C.S.), *supra* at para. 262; para. 79 (Dr. F. Turcotte); para. 95 (Dr. J.L. Denis).

¹⁶*Chaoulli* (C.S.), *ibid.* at para. 223.

Act states: “continued access to quality health care without financial or other barriers [is] critical to maintaining and improving the health and well-being of Canadians.”¹⁷ In this sense access to health care “touch[es] the core of what it means to be an autonomous human being blessed with dignity and independence in ‘matters that can properly be characterized as fundamentally or inherently personal’.”¹⁸ Access to health care necessary to maintain health and treat illness is essential to the exercise of other basic *Charter* rights, including expression, association, political and other rights that enable each individual to participate as full and equal members of Canadian society.¹⁹

16. While this Court has yet to consider the full scope of health related *Charter* rights, it has underscored the importance of health and health care decision-making to life, liberty and security of the person.²⁰ In *Rodriguez v. British Columbia (Attorney General)*, Justice Sopinka recognized that “security of the person is intrinsically concerned with the well-being of the living person.”²¹ In *Singh v. Canada*, Justice Wilson cited the Law Reform Commission of Canada’s conclusion that: “the right to security of the person means not only protection of one’s physical integrity, but the provision of necessities for its support.”²²

17. In *Irwin Toy v. Québec (Attorney General)*, this Court drew a distinction between social

¹⁷ *Canada Health Act*, R.S.C. 1985 c. C-6, Preamble.

¹⁸ *R. v. Clay*, 2003 SCC 75 at para. 31.

¹⁹ Committee on Economic, Social and Cultural Rights, *General Comment No.14: The Right to the Highest Attainable Standard of Health*, UN Doc. E/C.12/2000/4 (11 August 2000) para 3 [*General Comment No.14*].

²⁰ *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at paras 83, 217.

²¹ [1993] 3 S.C.R. 519 at 585 [“*Rodriguez*”].

²² [1985] 1 S.C.R. 177 at 206-07, citing Law Reform Commission of Canada, *Medical Treatment and the Criminal Law – Working Paper No. 26* (Ottawa: Supply and Services Canada, 1980) at 6.

