

COUR SUPRÊME DU CANADA
(EN APPEL DE LA COUR D'APPEL DE LA PROVINCE DE QUÉBEC)

ENTRE:

JACQUES CHAOULLI et GEORGE ZELIOTIS

APPELANTS
(Appellants)

- et-

PROCUREUR GÉNÉRAL DU QUÉBEC

INTIMÉ
(Intimé)

- et-

PROCUREUR GÉNÉRAL DU CANADA

INTIMÉ
(Mis en cause)

- et-

PROCUREUR GÉNÉRAL DE LA COLOMBIE-BRITANNIQUE, PROCUREUR GÉNÉRAL DE L'ONTARIO, PROCUREUR GÉNÉRAL DU MANITOBA, PROCUREUR GÉNÉRAL DU NOUVEAU-BRUNSWICK, PROCUREUR GÉNÉRAL DE LA 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., DELBROOK SURGICAL CENTRE INC., OKANAGAN PLASTIC SURGERY CENTRE INC., SPECIALTY MRI CLINICS INC., FRASER VALLEY MRI LTD., IMAGE ONE MRI CLINIC INC., MCCALLUM SURGICAL CENTRE LIMITED, 4111044 CANADA INC., SOUTH FRASER SURGICAL CENTRE INC., VICTORIA SURGERY LTD., KAMLOOPS SURGERY CENTRE LTD., VALLEY COSMETIC SURGERY ASSOCIATES INC., SURGICAL CENTRES INC., THE BRITISH COLUMBIA ORTHOPAEDIC ASSOCIATION AND THE BRITISH COLUMBIA ANESTHESIOLOGISTS SOCIETY

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PART I
INTERVENER'S STATEMENT AS TO THE FACTS

A. OVERVIEW OF THE INTERVENER'S POSITION

1. The Attorney General of Ontario's submissions relate to s. 7 of the *Charter*. In the case at bar, the Appellants do not seek access to health care *per se*. Publicly funded health care is available to them. Nor do the Appellants contend that they are in ill health and are being denied necessary medical treatment. They seek from this Honourable Court a determination that they have a constitutional right to purchase insurance to fund private health care. The essence of their complaint is that the impugned provisions are impediments to their obtaining health care in the fashion they desire; the treatment they want, from the physician they want, and at a time they want. They assert economic freedom for their individual health needs without due regard for the general welfare of others in the community, at the sacrifice of shared values and to the detriment of the common good.

2. The context of this constitutional challenge is highly significant and prudence should be exercised not to overshoot the purpose of the interests protected by the *Charter*. The impugned provisions deny the right to purchase private insurance or establish private hospitals; both are economic rights. It has not been proven that the provisions in question cause any denial of necessary medical treatments. Thus, no deprivation of life, liberty, or security of the person has been demonstrated.

3. This case does not raise the issue of whether s. 7 protects a general positive right to health care. The constitutional questions can be answered without addressing this complicated constitutional issue. The Court should follow its well-established practice of refusing to address constitutional issues that are not necessary to the determination of this appeal, especially when the record is incomplete on this issue.

B. SUMMARY OF THE FACTS

4. The Attorney General of Ontario, accepts the facts as set out in the Respondents' facts. In addition, the following facts found by the trial judge are relied upon.

5. Neither of the Appellants' health is presently under threat. They do not suffer from any illness that requires medical care. Mr. Zeliotis' medical problems were properly treated and he did not experience all the problems and delays he has claimed:

The truth is that, bearing in mind his personal medical obstacles, the fact that he was already suffering from depression, his indecision and his complaints which in many respects were unwarranted, it is hard to conclude that the delays incurred resulted from lack of access to public health services, and in fact even the complaints made by Mr. Zeliotis about the delays may be questioned... It is possible to sympathize with Mr. Zeliotis and understand the pain and anguish he felt, but it is difficult to conclude that the problems and delays he speaks of were caused solely by problems of access to Quebec health services... He believes that he would have had better access had there been a private system. We cannot say this is true, but that is his opinion and he is entitled to it.

Judgment of Piché J., Case on Appeal, Vol. I, at p.14.

6. Dr. Chaoulli, a 47 year old physician, had difficulties establishing his medical practice. When he was unable to start up an emergency service in Montreal, he became a non-participant in the public health care system for 3 months. Due to the reduction in his medical activities, he returned to the public system to work at a drop-in clinic:

Also, Dr. Chaoulli never testified that he received inadequate health care or the system did not respond to his personal health needs. He is still subject to significant penalties with the *Regie de l'assurance-maladie du Quebec*. He became a non-participating physician, returned to the public system, still not satisfied. All of this leads the Court to question Dr. Chaoulli's real motives in this proceeding. One cannot help being struck by the contradictions in the testimony and with the impression that Dr. Chaoulli embarked on a crusade which is now more than he can handle.

Judgment of Piché J., Case on Appeal Vol. I, at p. 21.

7. The Quebec public health care system, like every other Canadian health system, does not have unlimited resources. The trial judge remarked on the specialist physicians who testified about the waiting lists in their field:

Further, the Court notes that despite the fact that some of the specialists indicated a desire to be free to obtain private insurance, none of them completely and squarely endorsed the applicants' proposals, explaining that it was neither certain nor obvious that a rearrangement of the health system to accommodate a parallel private system would solve all the existing problems of delays and access. On the contrary, the specialists heard remained very cautious about an issue which is complex and difficult.

Judgment of Piché J., Case on Appeal Vol. I, at p. 27.

8. The six expert witnesses supported a publicly funded health care system. Except for Dr. Coffey, a Montreal gynecologist/obstetrician called by the Appellants, all the experts who were medical academics, epidemiologist, and a health policy expert, agreed that to permit a parallel private system would adversely affect the universal health care system:

The evidence has shown that the right to have access to a parallel private health care system, advocated by the applicants, would have repercussions on the rights of the entire population. We cannot bury our heads in the sand. The consequence of the establishment of a parallel private health care system would be to threaten the integrity, sound operation and viability of the public system. Sections 15 Health IA and 11 Hospital IA prevent that from happening and guarantee the existence of a quality public health care system.

Judgment of Piché J., Case on Appeal Vol. I, at pp. 125-26.

PART II ISSUES ON APPEAL

9. The constitutional questions stated are:
1. Does s. 11 of the *Hospital Insurance Act* R.S.Q. c. A-28, infringe the rights guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*?
 2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?
 3. Does s. 15 of the *Health Insurance Act* R.S.Q., c. A-29, infringe the rights guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*?

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?
5. Is s. 15 of the *Health Insurance Act* R.S.Q., c. A-29, *ultra vires* the Québec National Assembly, in light of s. 91(27) of the *Constitution Act, 1867*?
6. Is s. 11 of the *Hospital Insurance Act* R.S.Q., c. A-29, *ultra vires* the Québec National Assembly, in light of s. 91(27) of the *Constitution Act, 1867*?
7. Does s. 15 of the *Health Insurance Act* R.S.Q., c. A-29, infringe the right to equality guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?
8. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?
9. Does s. 11 of the *Hospital Insurance Act* R.S.Q., c. A-29, infringe the right to equality guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?
10. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?
11. Does s. 11 of the *Hospital Insurance Act* R.S.Q., c. A-29, infringe s. 12 of the *Canadian Charter of Rights and Freedoms*?
12. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

10. The Intervener submits that constitutional questions #1, 3, 5, 6, 7, 9, 11, should be answered in the negative. It is not necessary to answer constitutional questions #2, 4, 8, 10, 12. In the alternative, if any of questions # 1, 3, 7, 9, or 11 is answered in positively, then the corresponding questions #2, 4, 8, 10 or 12 should be answered affirmatively.

**PART III
BRIEF OF ARGUMENT**

A. THE CONTEXT OF THIS *CHARTER* CHALLENGE

11. The delivery of health care is highly complex with multi-faceted and polycentric relationships. Any change can have far-reaching, often unforeseeable consequences. Solutions to problems in the health system in general and to the problem of waiting lists in particular are not simple. Relatively recently, the comprehensive report of the Romanow Royal Commission on the Future of Health Care considered the very issue of health care coverage by private insurance. The Romanow Commission found that the publicly funded health system has delivered “affordable, timely, accessible and high quality care” on the basis of need and not income and recommended that solutions to problems should be found in the public system and not the private sector. The impugned provisions cannot be viewed in isolation from the comprehensive remedial scheme established for the benefit of all Canadians.

R. Romanow, Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada*, November 2002, p. xvi, 8, 48 – 63

12. The impugned provisions on their face deal with the regulation of economic contractual relationships in operation of the health system. They do not expressly speak to access to health care. Section 15 of the *Health Insurance Act* states:

15. No person shall make or renew a contract of insurance or make a payment under a contract of insurance under which an insured service is furnished or under which all or part of the cost of such a service is paid to a resident of temporary resident of Quebec or to another person on his behalf.

Section 11(1) of the *Hospital Insurance Act* states:

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

- (a) a resident is to be provided with or to be reimbursed for the cost of any hospital service that is one of the insured services;
- (b) payment is conditional upon the hospitalization of a resident; or
- (c) payment is dependent upon the length of time the resident is a patient in a facility maintained by an institution contemplated in section 2.

For breach of either provision, the penalty is a fine.

ss. 15, 76, *Health Insurance Act*, R.S.Q. c. A-29

ss. 11(1), 15, *Hospital Insurance Act*, R.S.Q. c. A-28

13. Ontario prohibits hospitals from charging insured patients for insured services and physicians from charging patients more than the amount payable by the Ontario Health Insurance Plan (OHIP). Subsection 14(1) of the *Health Insurance Act* prohibits private health insurance for any part of the cost insured services rendered in Ontario that is paid by OHIP. This subsection states:

14(1). Every contract of insurance, other than insurance provided under section 268 of the *Insurance Act*¹, for the payment of or reimbursement or indemnification for all or any part of the cost of any insured services other than,

- (a) any part of the cost of hospital, ambulance and nursing home services that is not paid by the Plan;
- (b) compensation for loss of time from usual or normal activities because of disability requiring insured services;
- (c) any part of the cost that is not paid by the Plan for such other services as may be prescribed when they are performed by such classes of persons or in such classes of facilities as may be prescribed,

performed in Ontario for any person eligible to become an insured person under this Act, is void and of no effect in so far as it makes provision for insuring against the costs payable by the Plan and no person shall enter into or renew such a contract.

s. 14, 15, *Health Insurance Act*, R.S.O. 1990, c. H. 6

s. 2, *Health Care Accessibility Act*, R.S.O., 1990, c. H. 3

14. It is noteworthy that Ontario provides for full payment for services rendered out of country if the service is required (a) to avoid a delay in receiving service in Ontario that would result in death or medically significant irreversible tissue damage, or (b) if the service is not performed in Ontario by an identical or equivalent procedure.

ss. 28.4 –28.6, Regulation 552, *Health Insurance Act*, R.S.O. 1990, c. H. 6

B. STEP 1: IS THERE A DEPRIVATION OF LIFE, LIBERTY, AND SECURITY OF THE PERSON?

(i). This Case is About an Assertion of Liberty

15. It is the position of the Attorney General of Ontario that this case is essentially about the assertion of a right to liberty. For example, the Appellant Zeliotis argues “the appellant and all Quebecers should be able to freely exercise the choice to devote their

¹ This provision deals with contractual terms for accident benefits arising out of a motor vehicle liability policy.

