

**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 (Appellants)

- and -

**THE ATTORNEY GENERAL IN RIGHT OF QUEBEC**  
Respondent (Respondent)

- and -

**THE ATTORNEY GENERAL IN RIGHT OF CANADA**  
Party Intervener

- and -

**THE ATTORNEY GENERAL OF BRITISH COLUMBIA, THE ATTORNEY GENERAL OF ONTARIO, THE ATTORNEY GENERAL OF MANITOBA, THE ATTORNEY GENERAL OF NEW BRUNSWICK, THE 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., 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**

Interveners

**FACTUM OF THE INTERVENER CANADIAN LABOUR CONGRESS**

**SACK GOLDBLATT MITCHELL**  
Barristers & Solicitors  
20 Dundas Street West, Suite 1130  
Toronto, Ontario M5G 2G8

**Steven Barrett**  
**Steven Shrybman**  
Tel: (416) 977-6070  
Fax: (416) 591-7333  
Net: [stevenbarrett@sgmlaw.com](mailto:stevenbarrett@sgmlaw.com)  
Counsel for the Intervener CLC

**BURKE-ROBERTSON**  
Barristers & Solicitors  
70 Gloucester Street  
Ottawa, Ontario K2P 0A2

**Robert E. Houston, Q.C.**  
Tel: (613) 566-2058  
Fax (613) 235-4430  
Net: [rhouston@burkerobertson.com](mailto:rhouston@burkerobertson.com)  
Ottawa Agent for the Intervener CLC

5           **“Canadians have been clear that they still strongly support the core values on which our health care system is premised – equity, fairness and solidarity. These values are tied to their understanding of citizenship. Canadians consider equal and timely access to medically necessary health care services on the basis of need as a right of citizenship, not a privilege of status or wealth. Building from these values, Canadians have come to view their health care system as a national program, delivered locally but structured on intergovernmental collaboration and a mutual understanding of values”.**<sup>1</sup>

10           **PART I           -           OVERVIEW**

1.       This appeal raises the constitutionality of a fundamental and essential feature of the Canadian medicare system -- our collective commitment to a publicly funded health care system based on need, rather than ability to pay. It raises the question of the scope and nature of a right to health care under s. 7 of the *Canadian Charter of Rights and Freedoms*. Given its historical and ongoing commitment to a single-tier publicly funded and administered health care system, the Canadian Labour Congress (the “CLC”) views the consequences of this appeal for the future of medicare as profound.

20       2.       The CLC will focus its submissions on the following areas:

- 25           a)       the contextual factors which should be considered in addressing the merits of the Appellants’ claim that our single-tier, publicly funded medicare system is unconstitutional;
- b)       the scope and content of s. 7 in the health care context;
- 30           c)       the extent to which the Appellants’ claim is, in substance, economic in nature and therefore outside the scope of s. 7;
- d)       the absence of any causal nexus between the alleged deprivation of the Appellants’ life liberty or security of the person and the statutory provisions they have challenged;
- 35           e)       the extent to which the legislation promotes rather than offends the principles of fundamental justice; and

---

<sup>1</sup> Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada*, November 2002 (Romanow Commission), p. xvi

- f) the extent to which any interference with the appellants s. 7 rights is justified under s. 1 of the Charter.

5 **PART II - SUBMISSIONS**

**A. Contextual Factors Supporting the Constitutionality of Medicare**

**(i) The Legislative and Policy Framework for Health Care**

10 3. In considering this challenge to the Quebec legislation which preclude individuals from gaining preferential access to health care through privately purchasing health care or private insurance, this Court must consider the impugned provisions of the *Hospital Insurance Act*, R.S.Q., c. A-29, and the *Health Insurance Act*, R.S.Q., c. A-28 in their overall statutory context and the broader public policy framework in which they operate.

15

4. Section 11 of the *Hospital Insurance Act* and section 15 of the *Health Insurance Act* are statutory elements of an integrated framework of policy, law and programs that establishes and provides public funding to Quebec's provincial health care insurance plan. That plan reflects the national consensus, embodied in the five criteria of the *Canada Health Act*: public administration, comprehensiveness, universality, accessibility and portability. Provincial health care insurance plans operate in accordance with these criteria and ensure that all insured persons have reasonable access to necessary medical and hospital services on uniform terms and conditions. Because these plans create a publicly administered, single payer insurance scheme, providing public services on universal terms,  
20 they are commonly described as creating a "single-tier" model for the delivery of insured services across Canada. The impugned provisions of the Quebec legislation operate as an integral part of this scheme.

25

*Canada Health Act*, R.S. 1985, c. C-6, s. 7-12

30

5. These characteristics of the health care system enjoy widespread public support, precisely because, as the historical record before this Court unequivocally demonstrates, our single-tier publicly funded health care system has immeasurably improved the ability

of all Canadians to access necessary medical and hospital services.<sup>2</sup> Indeed, it is precisely because of the demonstrated adverse health effects of a parallel private market for health care that elected legislatures across Canada collectively established our public system. It would be ironic indeed if this public system were to be dismantled as a result of the Charter, when the Charter itself is premised on the same fundamental values of human dignity and equal concern and respect, which also form the foundation of medicare.<sup>3</sup>

6. It must also be noted that the Appellants do not propose to give up all of the benefits provided by the publicly funded single-tiered health care system. Rather, they are content to continue to take advantage of all of the benefits the system provides but with a super-added right to obtain preferential access to health care at their own option. However, the Appellants could never really “opt out” of the public system. Even in the private market they wish to establish, they would continue to benefit from society’s investment in health care professionals and from public funding of the entire health care infrastructure, while seeking to avoid the single-tier foundation of the system.<sup>4</sup>

---

<sup>2</sup> See the factum of the Attorney General of Quebec, paras. 44 to 70.

<sup>3</sup> The Appellant Zeliotis seeks to avoid this conflict by arguing that the public system would suffer no detrimental effect if he were allowed to purchase health care services or insurance privately. However, the evidence before this Court is manifestly to the contrary: see para. 27 below and the factum of the Attorney General of Quebec, paragraphs 163 to 177.

<sup>4</sup> Evans, R. et al., *Private Highway, One-Way Street: The Deklein and Fall of Canadian Medicare?*, March 2000, at p. 49:

A truly *private* private tier of health care within Canada is thus impracticable and probably impossible in reality, and in any case is not what proponents are advocating. Rather they contemplate a private tier interwoven with the public - in effect a “public-private partnership” supported by various forms of more or less invisible public subsidies. Providers, working in both systems, could influence both access and productivity in the public system, steering patients as they saw fit. Meanwhile “those who can afford it” would have ready access to (actual or perceived) higher quality care, without necessarily having to pay its full cost, and without having to pay the taxes that would provide a similar standard for the rest of the population...

(ii) **Prohibition Against Two-Tiered Health Care Protects All Canadians, Including the Vulnerable and Disadvantaged**

7. On the record before this Court, there can be no dispute that for most Canadians, including the most disadvantaged and vulnerable, access to necessary health care depends upon extensive governmental legislation, regulation and funding, all of which makes up our medicare system. This important social and economic context should inform this Court's approach to the s. 7 claim in this case. As Justice Cory noted:

This Court has on several occasions observed that **the Charter is not an instrument to be used by the well positioned to roll back legislative protections enacted on behalf of the vulnerable.** This principle was first enunciated by Dickson C.J. for the majority in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. He wrote, at p. 779:

**In interpreting and applying the Charter** I believe that 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 condition of less advantaged persons.

...It would be unfortunate indeed if the Charter were used as **a weapon to attack measures intended to protect** the disadvantaged and comparatively powerless members of society. It is interesting to observe that in the United States, courts struck down important components of the program of regulatory legislation known as "the New Deal". This so-called "Lochner era" is now almost universally regarded by academic writers as a dark age in the history of the American Constitution.

... **The importance of the vulnerability concept as a component of the contextual approach ... should apply whenever regulatory legislation is subject to Charter challenge.** [emphases added]

*R. v. Wholesale Travel Group*, [1991] 3 S.C.R. 154 at 233-34  
*Slaight Communications Incorporated v. Davidson*, [1989] 1 S.C.R. 1030 at 1051  
*Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927 at 993

8. This Court should reject the Appellants' invitation to engage in a *Lochner*-type review of the wisdom of fundamental legislative protections in the realm of health care social and economic policy.<sup>5</sup> These are matters that are properly the subject of ongoing

---

<sup>5</sup> The 1905 U.S. Supreme Court decision in *Lochner v. New York*, 198 U.S. 45 (1905) was subsequently applied to invalidate over 200 state and federal statutes including progressive income tax laws, minimum wage laws, health and safety protections and the right of workers to organize.

parliamentary and extra-parliamentary public debate, a debate which is currently taking place.<sup>6</sup> Under the Appellants' proposed approach, there would be a constitutionally protected right for those with the ability to pay to a private market for health care, but this at the detriment of a public system enacted to protect all Canadians, particularly the most vulnerable and disadvantaged, from the deficiencies of the private market. Indeed, implicit in the Appellants' approach is the *Lochner* view of government action as antagonistic to freedom and liberty. This approach is inconsistent with the contemporary recognition that in various areas of social and economic policy, including health care, state intervention to regulate and control the private market is both necessary and appropriate.

#### **B. Scope of Section 7 Rights in the Health Care Context**

9. Courts have recognized that, due to the intentional omission of a right to property in the Charter, rights and interests which are primarily of a contractual, commercial or economic nature are not encompassed by s. 7. However, the majority of this Court has expressly reserved on the question of whether s. 7 can apply to protect rights and interests wholly unconnected to the administration of justice, and on the question of whether s. 7

---

The *Lochner* era ended only late into the New Deal when a majority of the U.S. Supreme Court upheld the *National Labour Relations Act*, ruled that social and economic regulatory laws and protective measures were constitutional, and affirmed the government's constitutional role in protecting societal health and welfare, which justified restrictions on the private marketplace. In short, the Supreme Court came to recognize what is the starting point under the Canadian Charter of Rights, namely that public needs come before individual property and economic rights.

<sup>6</sup>In the Court of Appeal, Justice Delise noted that s. 7 should not be used to challenge the correctness of a social policy option in the courts, adopting the then-Chief Justice Lamer comment in *Reference re; 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 S.C.R. 1123 at 1176:

... [I]n the area of public policy what is at issue are political interests, pressures and values that no doubt are of social significance, but which are not 'essential elements of a system for the administration of justice....The courts must not, because of the nature of the institution, be involved in the realm of pure public policy; that is the exclusive role of the properly elected representatives, the legislators. To expand the scope of Section 7 too widely would be to infringe upon that role.

imposes a positive obligation on government to protect interests which may have an economic component but which also are fundamental to human life or survival.<sup>7</sup>

*Irwin Toy, supra*

5 10. This appeal requires the Court to consider the extent to which s. 7 comprehends a right to health or health care, and the scope and nature of any such right. In applying s. 7 of the Charter to a claim to receive health care, it is necessary to afford both a contextual and purposive interpretation. It is the CLC's position, for the reasons set out below, that to the extent s. 7 provides a right to health care, it should be interpreted as extending an  
10 equal right for all Canadians to access medically essential health care services, not as a right of the advantaged to obtain preferential access.

11. This approach is supported by fundamental Charter values which have informed constitutional interpretation in other contexts, including advancing human dignity and ensuring equal concern and respect. It is also reinforced by the text and purpose of s. 36  
15 of the *Constitution Act, 1982*, which commits governments to certain objectives in the delivery of essential public services, particularly where the well-being of Canadians is concerned. Section 36(1) provides as follows:

- 20 36 (1) ... Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to
- (a) **promoting equal opportunities for the well-being of Canadians;**
  - 25 (b) furthering the economic development to reduce disparity in opportunities; and
  - (c) **providing essential public services of reasonable quality to all Canadians.**  
[emphasis added]

30 *Constitution Act, 1982, s. 36(1)*

---

<sup>7</sup> This case does not necessarily require the Court to determine whether there is a positive obligation on the state to ensure that individuals receive a guaranteed level of health care consistent with their s. 7 rights. To be clear, the CLC would support the view that such a positive state obligation exists. Indeed, as set out below, in the CLC's view, the publicly funded, single-tier medicare system, far from being a threat to s. 7 interests, protects and advances those interests.

12. In this respect, the medicare system is one of, if not the most, fundamental "essential public service" provided to Canadians; its very essence is to improve the "well-being" of Canadians. Thus, in the specific context of any right to health care under s. 7, the emphasis in s. 36 on promoting equal opportunities for all Canadians should inform the scope and boundaries of the right. Any right to health care should be understood as a right to equal access to essential health care for all Canadians, and not as a right to preferential access to health care for some based on their ability to pay.

13. This approach is also consistent with the treatment of a right to health and health care under international treaties and obligations to which Canada is party. These treaties and obligations uniformly recognize the importance of equality and non-discrimination in access to health care and health services as the fundamental component of the right to health. Article 25.1 of the Universal Declaration of Human Rights affirms: "Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services". The equality component of the right to health is also recognized, *inter alia*, in article 5 (e) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination (establishing "a right to public health"); article 12 of the Convention on the Elimination of All Forms of Discrimination against Women (non-discriminatory access to health care); and in article 24 of the Convention on the Rights of the Child (establishing a right to health for all children). Furthermore, the International Covenant on Economic, Social and Cultural Rights provides in section 12 as follows:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

...  
(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

As the Commentary to Article 12 makes clear, health facility, goods and services must be accessible to everyone without discrimination, including the most vulnerable or marginalized sections of the population.

5           General Comment No. 14 (2000), The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)

          See also World Health Organization, *World Health Report 1999: Making A Difference*, (Geneva, WHO, 1999) [relied upon by the trial judge at paragraphs 61-70]

10       14.    Thus, to the extent that the interests protected by s. 7 extend to a right to health or to health care, this right should be interpreted and applied in a manner which recognizes these underlying equal access and non-discrimination values. In this context, far from interfering with the right to health under s. 7, the impugned provisions have both the purpose and effect of safeguarding equal access to health care for all Canadians, and  
15       ensuring that all available resources are marshalled within the public system for the overall benefit of all Canadians. A right to health care, as asserted by the Appellants, which privileges or advantages those with the means to purchase health services, is antithetical to these constitutional and international legal norms embodied in a right to health care.

20       15.    This Court's decision in *R. v. Morgentaler* is consistent with this understanding of the right to health care under s. 7. At issue in *Morgentaler* was a criminal prohibition preventing women from obtaining access to necessary health care services even where their life or health was in danger. In substance, the interest protected by this Court involved a woman's right to access the public health care system in order to obtain  
25       necessary medical care; this Court held that the *Criminal Code* provisions at issue operated in a manner which impeded or blocked equal access to medically necessary abortion services. However, there was no suggestion that the Court was extending protection to an indirect economic interest in privately purchasing health services.<sup>8</sup>

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

---

<sup>8</sup> Indeed, the interests of all women in safe and timely abortions can only be meaningful in the context of a public health care system. To the extent the Appellants' claim weakens or undermines the public system, the rights recognized in *Morgentaler* would be correspondingly diminished.

16. Indeed, interpreting s. 7 as extending to the Appellants a right to purchase health care privately or through private insurance would, as the evidence demonstrates, have an adverse and destructive effect on the s. 7 rights of all other Canadians who depend on the publicly funded medicare system. As found by the trial judge there would be significant adverse effects on the Quebec health care system if private insurance or private payment for medical and hospital care were allowed. An interpretation of s. 7 which would undermine the essential equal access core of the s. 7 guarantee in the health care context should be avoided, particularly where such an interpretation is neither compelled by the language of s. 7, nor is it consistent with its underlying purpose and with the larger purposes of the Charter itself.<sup>9</sup>

**C. Appellants' Interests Are Economic In Nature**

17. Section 7 does not protect economic, contractual or commercial interests. However, the impugned provisions in this case relate specifically to the entering into, or payment under, a contract of insurance for publicly insured medical services and the making of, or payment under, a contract, by insurance or otherwise, for publicly insured hospital services. They are key provisions in a broad statutory scheme that is intended to regulate the economic market for health insurance and health care.

18. With respect to publicly insured medical and hospital services, the legislation establishes a single public payer and insurer. The objective of this publicly administered health insurance system is to ensure that all persons have access to publicly insured, comprehensive, and accessible medical and hospital services on uniform terms and conditions. Thus, the legislation regulates the operation of the private and insurance markets for health services, precluding a market for publicly insured medical and hospital services, while permitting the private and insurance markets to provide certain other health services not covered by the public system.

---

<sup>9</sup>As former Chief Justice Dickson observed in relation to freedom of religion, "protection of one religion and the concomitant non-protection of others.... imports disparate impact destructive of the religious freedom of the collectivity": *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 337.

