

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Quebec)

BETWEEN:

JACQUES CHAOULLI and GEORGE ZELIOTIS

APPELLANTS
(Appellants)

- and -

ATTORNEY GENERAL OF QUEBEC

RESPONDENT
(Respondent)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

- and -

**ATTORNEY GENERAL OF BRITISH COLUMBIA,
ATTORNEY GENERAL OF ONTARIO
ATTORNEY GENERAL OF MANITOBA
ATTORNEY GENERAL OF NEW BRUNSWICK
ATTORNEY GENERAL OF SASKATCHEWAN**

INTERVENERS

AFFIDAVIT OF BARB BYERS

I, **BARB BYERS**, of the City of Ottawa in the Province of Ontario, **AFFIRM THAT:**

1. I am a Vice-President of the Canadian Labour Congress (the "CLC") and as such have knowledge of the matters to which I hereinafter depose.

2. The CLC seeks leave to intervene in these appeals pursuant to Rules 55 and 56 of the *Rules of the Supreme Court of Canada*.

The Canadian Labour Congress

3. The CLC is the principal labour centre for the labour movement and the senior trade union organization in Canada. The CLC's affiliates include some 60 trade union organizations which represent approximately 2.5 million members in both the private and public sectors, including the health care sector where affiliates represent nurses, technicians, paramedics, health support workers, maintenance and clerical staff and public health personnel. These workers are employed in hospitals, clinics, nursing homes, long term care facilities, private homes, and public health departments. The CLC's affiliates also include the Fédération des travailleurs et travailleuses du Québec (the Quebec Federation of Labour), which is the largest union federation in the province of Quebec, representing approximately half a million members in all sectors of the economy and all regions throughout the province.

4. The CLC plays a central role in researching, debating and deciding important questions of policy affecting the objectives and the direction of the trade union movement in Canada. The CLC has its head offices in the City of Ottawa, in the Province of Ontario, where it maintains extensive administrative and research facilities, and where its senior administrative officers are based.

5. The purpose of the CLC is to advance the economic and social welfare of Canadian workers and to advance the interests of affiliated trade unions by, among other things, promoting the unionization of the workforce, advocating legislation which will safeguard the rights of workers, promoting the principles of free collective bargaining, and protecting and strengthening our democratic institutions. The CLC is committed to protecting and furthering the rights of all workers in Canada.

6. As set out below, the CLC and its affiliates have a well-established and demonstrable interest in and commitment to the preservation and further development of Canadian social programs, of which publicly funded health care is the most important. Indeed, protecting the future of Medicare is one of the most important priorities for the trade union movement in Canada. Because it represents the interests of hundreds of thousands of workers in the health care sector, the CLC also has specialized knowledge and expertise concerning the delivery of publicly funded health care services, including the impacts of privatization on the availability and allocation of those services. As well, the CLC has special knowledge and expertise about the impact of privatizing the payment for health care services on workers' interests in reasonable and fair compensation and safe working conditions, on collective bargaining, and on the competitiveness of the Canadian economy.

The CLC's Contribution to Charter and Human Rights Appeals

7. This Court has consistently recognized the value of the CLC's contributions in appeals involving *Charter* and human rights issues, having granted the CLC leave to intervene in numerous cases, including:

Reference re Workers' Compensation Act 1983 (Newfoundland) ss. 32 & 34, [1989] 1 S.C.R. 922;

Lavigne v. Ontario Public Service Employees Union et al., [1991] 2 S.C.R. 211;

Central Okanagan School District No. 23 v. Renaud, [1992] 2 S.C.R. 970;

Egan v. Canada, [1995] 2 S.C.R. 513;

Vriend v. Alberta, [1998] 1 S.C.R. 493;

Delisle v. Canada (Deputy Attorney General), [1999] 2 S.C.R. 989;

United Food and Commercial Workers, Local 1518 v. K-Mart Canada Ltd., [1999] 2 S.C.R. 1083;

Allsco Building Products Ltd. v. United Food and Commercial Workers International Union, Local 1288P, [1999] 2 S.C.R. 1136;

British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union, [1999] 3 S.C.R. 3;

Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016;

Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd., [2002] 1 S.C.R. 156;

Bell Canada v. Canadian Telephone Employees Assn., 2003 SCC 36; and

Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur, 2003 SCC 54.

The CLC's Unique Health Care Knowledge and Expertise

8. With respect to its particular expertise in relation to the public health care system, the CLC has long regarded universal and publicly funded health care to be Canada's most important social program and it is one that is of immediate and vital interest to our members. For several decades, the CLC and many of its affiliates have been actively engaged in the public policy concerning the establishment and future of Medicare. Both the CLC and many of its affiliates have committed substantial resources to campaigns to preserve and strengthen Canada's public health care system

9. Over forty years ago, in May 1962, the CLC made submissions to the Royal Commission on Health Services chaired by the Honourable Justice Emmett M. Hall, which led to Canada's system of Medicare. In its submissions, the CLC expressed its support for a system of public health care that:

- would be universal in application and comprehensive in coverage;
- would present no economic barriers between the service and those who need it; and
- would be regarded as public.

10. Forty years later, the CLC reiterated this position before the Royal Commission on the Future of Health Care in Canada, chaired by the Honourable Roy Romanow (the "Romanow Commission"). Attached as Exhibit A is the CLC's statement to the Romanow Commission.

11. In the late 1960s, following the establishment of Medicare, physicians began to "extra-bill" for services. In 1979, the CLC convened the SOS Medicare conference to fight extra-billing and user fees. It joined with community groups to form the Canadian Health Coalition, which has become Canada's leading public interest non-governmental organization dedicated to dealing with questions of health care policy and law. As a result of the efforts of the CLC, the Canadian Health Coalition and many others, Parliament unanimously passed the *Canada Health Act* in 1984, which not only banned extra-billing and user fees, but which enshrined Canada's commitment to a single-tier, publicly funded, universal, accessible, and comprehensive public health care system.

12. Since then, the CLC and its affiliates have been actively engaged in the public policy debate concerning the future of Medicare and have committed substantial resources to preserve and strengthen Canada's public health care system. Some of our activities in this regard include:

- a. organizing hundreds of public meetings, seminars, rallies and other events that have taken place in every region of Canada to raise awareness and stimulate public discussion and debate about the future of Medicare. One of the most recent of such events was a "People's Summit on Health Care" which was organized by the CLC and took place February 7 to 10, 2003;
- b. actively engaging with the Romanow Commission, including meeting with the Commission's research staff, attending several of the public meetings and other events organized by the Commission, and preparing detailed written submissions. The submissions made by the CLC and its affiliates often

stressed the need not only to strengthen but also to expand the Medicare system, notably in the form of home-care and pharmacare programs, to establish the same publicly funded program delivery for these areas of the health care service as is now being challenged in this litigation in relation to essential medical and hospital services; and

- c. active involvement in the development and review of Canadian health care policy that has been taking place throughout the country. The CLC's affiliates have made submissions to numerous legislative and parliamentary committees, public inquiries and Commissions, the trustees of public sector pension funds, municipal governments and committees and Ministers of Health regarding the health care system and health policy.

13. In addition, the Quebec Federation of Labour is part of a broad based coalition of Quebec labour and community groups dedicated to promoting and protecting the principles of the *Canada Health Act* and Medicare system. The Coalition Solidarite Sante was formed approximately fifteen years ago and has been extremely active since its inception, making submissions to both provincial and federal committees and Commissions, working with the Canadian Health Coalition, and regularly engaging in public debate and discussion respecting the health care system.

14. In June 2002, delegates to the CLC convention passed a resolution on Medicare calling on the CLC to mobilize and organize members on health care. The resolution provided, among other things, for the establishment of a national campaign to save and build a public Medicare system that is universal and accessible to all Canadians from coast-to-coast. A copy of the resolution is attached hereto as Exhibit B.

15. In addition to these activities, the research staff of the CLC, as well as that of many of its affiliates who specialize in health care issues, have carried out research and analytical work concerning health care services. These health research experts have

formed an informal network that also includes independent health policy and research experts, for the purpose of facilitating the exchange of information and analysis concerning the health care system. These researchers have produced hundreds of research reports, information bulletins, fact sheets, and briefs on a diversity of issues concerning the delivery of health care services in Canada. Attached hereto as Exhibit C are several such documents outlining the importance of the public medicare system to disadvantaged groups such as the disabled, lesbians and gay men, people of colour, Aboriginal people and women, which are of particular relevance to some of the issues raised in this appeal. Further, a survey of the web sites maintained by the CLC and many of its affiliates reveals a wealth of information about health care issues, and the activities of the unions in working to strengthen the medicare system.

16. In addition to its research and analysis in the health care sector, the CLC and several of its affiliates conduct carry out research on economic and fiscal policy matters that create the context within which the availability of public funding for health care services is determined. Working in collaboration with experts and academics, and under the auspices of the Canadian Centre for Policy Alternatives, trade union research staff prepare an "alternative federal budget" each year to stimulate public debate about such matters are health care and social program spending. Thus, in addition to having considerable expertise about the public health care system itself, the CLC and many of its affiliates have knowledge and expertise about the fiscal and budgetary policies that determine the availability of resources to the publicly funded system.

17. In addition to relying upon their own internal expertise and resources, the CLC and its affiliates often retain consultants, public opinion research firms and others to carry out research on a diversity of issues effecting the delivery of health care services, from the casualization of the health care work force, and the effects of privatization of the quality of health care services, to the effects of international trade law on domestic health care policy and law.

18. Yet another area of specialized interest and expertise relevant to the issues raised in this appeal concerns the impact of international trade disciplines on health care policy and law. The CLC and its affiliates have commissioned several studies and reports that have examined the implications of Canada's commitments under international agreements concerning the trade in services in foreign investment which underscore the risks of privatization and foreign investment in the health care sector. The CLC's position on Medicare and Global Trade Deals is attached hereto as Exhibit D.

The CLC's Perspective on the Fundamental Issues Raised in this Appeal

19. This case raises, for the first time in this Court, the constitutionality of essential elements of our Medicare system. Given the historical and ongoing commitment of the CLC, its affiliates and its members to a publicly funded health care system, as detailed above, the consequences of this appeal for the future of Medicare, recently recognized by the Romanow Commission as a defining value we share as Canadians, are profound.

20. As representatives of health care workers and professionals, the CLC and its affiliates have direct knowledge and expertise concerning the impacts on patient care as a result of efforts to privatize the delivery of certain health care services. In particular, we are vitally concerned that the creation of a parallel or second tier of health care service would seriously and adversely affect the allocation and availability of resources within the publicly funded system. This would happen because privately funded health care does not exist in isolation from the public system, but invariably relies upon staff and facilities that are also engaged in providing publicly funded care. Privatization results in the diversion of scarce resources from the public system to serve paying clientele. In addition, there is a tendency of for-profit providers to "cream skim" (i.e., to concentrate their businesses on the most profitable procedures and least challenging cases), leaving the most difficult cases to be cared for by the public system, and thereby disproportionately and further

increasing demand on the public system.

21. The privatization of the delivery of health care services also creates both an impetus and opportunity to promote the sale of health care services, thereby creating a second tier of health care for those willing to pay. For example, by introducing the profit motive into the hospital environment, the privatization of health care service delivery creates a platform on which two-tiered delivery can flourish. The lack of transparency that attends such privatization initiatives undermines efforts to monitor and enforce the requirements of the *Canada Health Act* in private clinics and hospitals. Unions representing workers and professionals in the health care sector are confronting an unprecedented onslaught of initiatives to contract out or privatize the work their members perform. This experience with privatization also accords the CLC specialized knowledge and expertise concerning the impact of privatization on the delivery of publicly funded health care services.

22. The CLC's interest in this appeal also stems from its knowledge regarding the impacts of abandoning the principles of universal care on labour management relations and on the competitiveness of Canadian businesses. The United States experience¹ suggests that privatized health care would be of lower quality and more expensive, ultimately leading to increased costs for employers and reduced competitiveness for the Canadian economy generally. In this respect, increased reliance on private financing and private health care insurance is certain to exert new pressures on collective bargaining as workers seek through their collective agreements to ensure that they and their families are insured for the all necessary health services.

23. Indeed, in the United States, collective bargaining for adequate health care coverage is a major and often contentious aspect of labour management relations. For example, this year General Electric faced its first strike in 20 years over health insurance.

¹ Several CLC affiliates are international unions headquartered in the United States, while others have close working relationships with trade unions based in the United States.

This was also was the make-or-break issue that led workers to go on strike at Domtar's plant in Michigan. Thus, based on our knowledge of the workings of the health care system in the United States, we believe that privatized healthcare is no more in the interests of our employers than it is in the interests of our members. By contrast, Canadian trade unions and employers (including Abitibi-Consolidated, Bell Canada, NorskeCanada, General Motors, Ford Motor Company of Canada and DaimlerChrysler) have strongly expressed the view that Canada's national health care system must be preserved and renewed on the existing principles of universality, accessibility, portability, comprehensiveness, and public administration, and that the erosion of publicly funded healthcare will impose significant costs on employers and undermine the attractiveness of Canada as a site for new investment.

24. In terms of the submissions that the CLC would make, if granted intervener status, I am advised by counsel and believe that our submissions would, *inter alia*, touch upon the following:

- a) the scope of interest protected by the *Charter*, including life, liberty and security of the person, in the context of a challenge brought against the fundamental values of our medicare system which themselves are intended to promote life, liberty and security of the person;
- b) the absence of a logical, clear and empirically based causal connection between the impugned provisions and the alleged adverse effects on health care about which the Appellants complain;
- c) the need to take into account collective and individual interests in assessing the beneficial consequences of our publicly funded, single-tier medicare system and in determining whether there has been any infringement of *Charter* rights and freedoms, including the significant advantages of Canada's Medicare system and its effectiveness in providing comprehensive

and high quality health services, and its beneficial contribution to the Canadian economy as a whole. In this respect, the CLC will submit that the privatization of funding for health care services is likely to further deplete the public system of essential resources, and ultimately undermine public confidence in and support for Canada's Medicare model for providing all Canadians with the health care they require;

- d) the need to take into account the extent to which the medicare system advances fundamental Canadian values, including the section 15 *Charter* interest in promoting equal access of disadvantaged groups to quality health care, for women, people of colour, Aboriginal people, the disabled, and gays and lesbians;
- e) the extent to which the Appellants' challenge implicates the values enshrined in the *Canada Health Act*, and is inconsistent with its terms;
- f) the need to take into account, under section 1 of the *Charter*, of the effect of removing the publicly funded model on the viability and sustainability of the existing system, as well as the adverse impact on collective bargaining and on productivity and competitiveness generally;
- g) the appropriate degree of deference to be applied under section 1 of the *Charter* to the social and economic judgments and values inherent in the Canadian commitment to Medicare;
- h) the need to consider, under section 1 of the *Charter*, the serious risk that allowing private payment for necessary health care services poses to the preservation of Canadian claims that public health care is exempt from international trade obligations, and the attendant serious risk of exposing the government of Canada to the risk of trade complaints and foreign investor claims; and

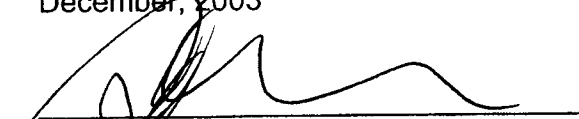
- i) the appropriate remedial response should this Court determine that the impugned provisions violate *Charter* rights and freedoms and, in particular, the extent to which such relief should be consistent with preserving and enhancing Canada's collective commitment to a publicly funded, universal health care system. In this regard, the CLC will submit that any remedial response should be addressed within the framework of the publicly funded system and not by introducing opportunities for wealthier Canadians to jump the queue or otherwise access health care services on preferential terms to those available to less privileged Canadian residents.

25. In order to ensure that its participation in this appeal will contribute to the Court's consideration of these issues, and not delay the proceedings or prejudice the parties to this appeal, the CLC would propose the following terms for its intervention, as well as any such other such terms as this Court may deem appropriate:

- a. the CLC's factum would be served and filed in accordance with the *Rules of the Supreme Court of Canada*, or on such other date as the Court may determine appropriate;
- b. the CLC's factum will be no greater than 30 pages in length;
- c. the CLC's oral submissions, if permitted, would not exceed 30 minutes in duration; and
- d. neither the CLC's factum nor its oral submissions would duplicate the factum filed by the Respondent or its oral submissions before this Court.

26. I make this Affidavit in support of a Motion by the Canadian Labour Congress for leave to intervene in this proceeding and for no other or improper purpose.

AFFIRMED BEFORE ME in the City of Ottawa)
in the Province of Ontario, this 10th day of)
December, 2003)



Commissioner for Taking Affidavits, etc.



BARB BYERS