

COUR SUPRÊME DU CANADA

(En appel d'un jugement de la Cour d'appel du Québec)

ENTRE :

JACQUES CHAOULLI

et

GEORGE ZELIOTIS

Appelants
(Appelants)

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

Intervenants

RESPONSE OF THE RESPONDENT
ATTORNEY GENERAL OF CANADA
TO THE MOTION FOR LEAVE TO INTERVENE OF SENATOR KIRBY ET AL.
(Rule 49 of the *Rules of the Supreme Court of Canada*)

The Respondent Attorney General of Canada opposes the motion of Senator 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 in their capacity as members of the Standing Senate Committee on Social Affairs, Science and Technology for leave to intervene in the appeal and to serve and file further evidence, on the following grounds:

A) LEAVE TO INTERVENE

A.1 Status of the proposed interveners

1. The applicants seek to intervene not in any personal capacity but in their official capacity as Senators and members of a standing committee of the Senate, to file and explain a report submitted by the committee to the government of Canada in the normal course of Senate operations and to discuss the recommendations contained in the said report.
2. The Attorney General of Canada does not consider it appropriate that the Senate or one its committees as an institution, being an element of the Parliament of Canada pursuant to s.17 of the *Constitution Act, 1867* and therefore of the legislative process should obtain intervener status on that basis.
3. Senators have unique privileges and roles to play in the legislative process.
4. These roles and privileges are defined in our Constitution and relevant legislation, in particular the *Constitution Act, 1867* and the *Parliament of Canada Act, S.C., ch. P-1*; together these instruments provide the specific ways

by which Senators can act in their official or formal capacity as parliamentarians.

5. In the same way that individual judges, when acting in their judicial capacity may only do so through established avenues such as rendering decisions our legal system provides for specific avenues for parliamentary action that serve to distinguish the parliamentary process from the judicial process.
6. The courts have now allowed the introduction of Hansard debates and committee reports of the Senate and the House of Commons which permit the courts to better understand the thinking of the legislature and the spectrum of views before Parliament at the time an Act or report was adopted; to now allow Senators or members of the House of Commons and its committees to appear and participate in an appeal would, it is respectfully submitted, go too far and result in a furtherance of legislative discussion and debate before the Court.
7. If the motion is granted this would create a whole new forum for political discussion incongruent with the proper functioning and role of Parliament by allowing a particular group of parliamentarians holding a particular point of view a second forum to make their case, without the balance of divergent legislators' views; it would also open the door to Senators or members of the House of Commons opposed to the views of their colleagues to also seek to intervene in order to put forward discuss their own point of view.
8. It would also allow the interveners to address a point after events have evolved since the time of the legislative debate.

A.2 No Real and Substantial interest

9. The applicants describe their real and substantial interest in the outcome of this appeal as their interest as a Committee which dedicated close to three

years studying Canada's health care system and their interest in explaining their work, as embodied in their Report to the government and more particularly the recommendations contained therein.

10. It is submitted that the Report contained in six volumes speaks for itself.
11. Extracts of the final Report are reproduced by the Appellant Jacques Chaoulli at tab 44 in his Books of Authorities and referred to in paragraphs 186.5, 196, 202 and 205 of his factum.
12. The Attorney General of Canada will also refer to the Report in his factum and will include it in its entirety (six volumes) in his own Books of Authorities.
13. Appellant Chaoulli has also included in its entirety at tab 40 in his Books of Authorities the article written by Stanley Hart and Patrick Monahan who also act as counsel for the applicant Senators, which was considered and found compelling by the Committee and to which Senator Kirby refers in paragraphs 37, 38 and 39 of his affidavit and to which the applicants refer in paragraphs 14, 15 and 16 in their Draft Proposed Memorandum of Argument.
14. The Appellant Chaoulli has also reproduced extracts at tab 54 in his Books of Authorities of the Final Report dated November 2002 of the Commission on the Future of Health Care in Canada presided by Roy S. Romanow which also undertook a major study of Canada's health care system and has referred to the said report in paragraph 39 of his factum.
15. The Attorney General of Canada will also refer to the Romanow Report in his factum and will include it in its entirety in his Books of Authorities.

A.3 Useful and Different Perspective to Offer

16. The Applicants submit that they have a useful and different perspective to offer by introducing and explaining the Report and in particular its recommendations.
17. There is no need to introduce the Report as it is already before the Court and referred to by the Appellant Chaoulli and will be referred to by the Attorney General of Canada.
18. The Report speaks for itself and the intervention of the applicants would serve no useful purpose in the appeal.
19. This court is not the proper forum for the applicants to discuss their Report and its recommendations.
20. The study conducted by the Standing Committee and the ensuing report were in the normal course of Senate operations as an element of the legislative process of Parliament.

B) FURTHER EVIDENCE

21. If the applicants obtain intervener status they seek leave to file and serve further evidence in the form of:
 - (1) the six-volume final Report of the Standing Senate Committee on Social Affairs, Science and Technology;
 - (2) an affidavit of Senator Kirby in the way of background or explanation of the mandate and work of Committee;

(3) a Statistic Canada Study attached as Exhibit B to the Affidavit of Senator Kirby.

22. As stated above the six-volume final Report will be included in the Books of Authorities of the Attorney General of Canada and extracts of the Report are already in the Books of Authorities filed by Appellant Chaoulli.

23. As for the affidavit of Senator Kirby and the Statistic Canada Study attached as an Exhibit to the affidavit, the Attorney General of Canada refers to the long and well established rule that interveners must take the case as they find it and cannot introduce new evidence.

Brian A. Crane, Henry S. Brown, *Supreme Court of Canada Practice 2002*,
Carswell, at p. 311.

24. Statistical data was filed as evidence by the parties and will be part of the record before the Court.

25. The applicants submit that this new evidence is comprised of "legislative", as opposed to "adjudicative facts".

26. The respondent submits that this is clearly not the case for the statistics found in Exhibit B of the affidavit of Senator Kirby.

27. With respect to the affidavit itself it adds nothing to the Report and supports the position of the Attorney General of Canada that the mandate and the work of the Committee and the ensuing Report were part of the normal operations of the Senate as an element of the legislative process of Parliament and as a result the applicants should be denied intervener status.

C) ORDERS SOUGHT

The Attorney General of Canada respectfully prays that:

- (1) the motion for leave to intervene be dismissed;
- (2) if the leave to intervene is granted the further motion to serve and file further evidence be dismissed.

Ottawa, December 22, 2003

Mr. Jean-Marc Aubry, Q.C.

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AFFIDAVIT

Je, soussigné, Jean-Marc Aubry, avocat, exerçant ma profession au Ministère de la Justice, 284, rue Wellington. Bureau SAT-6045, à Ottawa, province de l'Ontario, déclare solennellement ce qui suit:

1. Je suis l'un des procureurs de l'intimé Procureur général du Canada;
2. L'appelant Jacques Chaoulli a inclus des extraits du Rapport final du Comité sénatorial permanent des Affaires sociales, de la science et de la technologie à l'onglet 44 de ses Recueils de sources et y a référé aux paragraphes 186.5, 196, 202 et 205 de son mémoire;
3. Le Procureur général du Canada va également référer audit Rapport dans son mémoire et va l'inclure en son entier (six volumes) dans ses Cahiers de sources;
4. L'appelant Jacques Chaouli a aussi reproduit en son entier à l'onglet 40 de ses Recueils de sources l'article de Stanley Hart et Patrick Monahan intitulé "*The Charter and Health Care, Guaranteeing Timely Access to Health Care for Canadians*" auquel réfère le requérant Kirby aux paragraphes 37, 38 et 39 de son affidavit et auquel réfèrent les requérants aux paragraphes 14, 15 et 16 de leur projet de mémoire;
5. L'appelant Jacques Chaoulli a également inclus des extraits du Rapport final de la Commission sur l'avenir des soins de santé au Canada présidée par Roy S. Romanow datée de novembre 2002 à l'onglet 54 de ses Cahiers de sources et y a référé au paragraphe 39 de son mémoire;

6. Le Procureur général du Canada va également référer au Rapport final de la Commission Romanow dans son mémoire et va l'inclure en son entier dans ses Cahiers de sources;
7. Les parties ont déposé en preuve de nombreuses statistiques qui feront partie du dossier devant la Cour.

EN FOI DE QUOI, J'AI SIGNÉ.

JEAN-MARC AUBRY

Déclaré solennellement devant moi
À Ottawa, le 22 décembre 2003

Commissaire à l'assermentation
pour tous les districts judiciaires du Québec
et pour l'extérieur du Québec

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