In the Court of Appeal of Alberta

Citation: Allen v Alberta, 2015 ABCA 277

Date: 20150909
Docket: 1401-0150-AC
Registry: Calgary

Between:

Darcy Allen

Appellant
(Applicant)

- and -

Her Majesty the Queen in Right of Alberta

Respondent
(Respondent)

The Court:

The Honourable Mr. Justice Peter Martin
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter

Reasons for Judgment Reserved of the Honourable Mr. Justice Slatter

Reasons for Judgment Reserved of the Honourable Mr. Justice Martin
Concurring in the Result

Reasons for Judgment Reserved of the Honourable Mr. Justice Watson
Concurring in the Result

Appeal from the Judgment by
The Honourable Mr. Justice P.R. Jeffrey
Dated the 31st day of March, 2014
Filed on the 13th day of June, 2014

(2014 ABQB 184, Docket: 1101-17169)

Reasons for Judgment Reserved of the Honourable Mr. Justice Slatter

[1] The issue on this appeal is whether the appellant created the proper procedural and evidentiary platform to decide the constitutionality of s. 26(2) of the *Alberta Health Care Insurance Act*, RSA 2000, c. A-20. That section prevents the issuance in Alberta of private insurance for basic health services covered under the Alberta Health Care Insurance Plan. In effect, it gives the public Plan a monopoly on health care insurance for basic services. The appellant argues that the procedural and evidentiary platform is adequate for constitutional review, because this Court need only apply the binding precedent of ***Chaoulli v Quebec (Attorney General)***, 2005 SCC 35, [2005] 1 SCR 791.

Background Information

[2] In December of 2007, the appellant, Dr. Allen, then a 36 year old dentist, injured his knee and lower back playing hockey. His knee recovered; his back did not. Notwithstanding numerous treatments from medication to physiotherapy to acupuncture, nothing could alleviate his back pain. In September of 2008, a MRI, which he had done at a private clinic at his own expense, disclosed a bulging and degeneration of two of his lumbar discs.

[3] His doctor recommended "facet injections". When they too failed, surgery was the only remaining option. The decision to operate was made in May of 2009, but the operation itself could not be scheduled within the Alberta Health Care system until June of 2011, more than two years off.

[4] In June of 2009, Dr. Allen underwent another MRI, (again at his own expense), which showed a further degradation and herniation of his lumbar discs. The pain became so disabling Dr. Allen was no longer able to work, and after first hiring an associate to assist, he was forced to sell his practice in July of 2009.

[5] Faced with the prospect of a deteriorating back and increasing pain, Dr. Allen looked to Montana for more timely relief. A specialist there recommended surgery to replace two discs. Dr. Allen agreed to have that surgery performed in Montana at his own expense, rather than wait an additional 18 months when he could have the same surgery done in Alberta. The surgery was performed in Montana in December of 2009

[6] The chambers judge concluded that surgery was not considered until May of 2009 and that the clock for wait time purposes "started to run" at that time. He further concluded that:

> Dr. Allen waited from May, 2009 until December 18, 2009 for his back surgery. He underwent that surgery as early as he did only because he took the initiative to arrange it outside the jurisdiction and at his own expense. He would have waited

> until at least June, 2011 had he been without the means or initiative to access it in Montana …" (para. 21)

These findings are not disputed.

[7] Dr. Allen complains that s. 26(2) of the *Alberta Health Care Insurance Act* stopped him from obtaining private health care insurance that would have allowed more timely access to the surgery he required and covered the cost of that operation, which in his case exceeded $77,000. That section provides:

> 26(2) An insurer shall not enter into, issue, maintain in force or renew a contract or initiate or renew a self-insurance plan under which any resident or group of residents is provided with any prepaid basic health services or extended health services or indemnification for all or part of the cost of any basic health services or extended health services.

In 2011 Dr. Allen brought an application, commenced by Originating Application, seeking declarations; a) that s. 26(2) was unconstitutional, because it violated his s. 7 *Charter* rights, and b) that he was "entitled, in a different and separate court action, to seek damages" as a result of his experience. The Application was based on Dr. Allen's affidavit, to which he exhibited a number of medical reports and proof of expenses he had incurred. The Government of Alberta responded with affidavits of civil servants, to which were appended a number of background documents on the health care system generally, and wait times specifically. No expert evidence was filed, and there was no *viva voce* evidence before the chambers judge.

[8] The chambers judge agreed that s. 7 of the *Charter* could potentially be engaged by a provision like s. 26(2) of the *Act*. Next, he examined whether the prohibition of private health care insurance had actually compromised the appellant's right to life, liberty and security of the person. The appellant had not presented any evidence on that subject, but relied instead on a number of precedential decisions: ***Chaoulli v Quebec (Attorney General)*** and ***Canada (A.G.) v PHS Community Services Society***, 2011 SCC 44, [2011] 3 SCR 134. The appellant argued that these two decisions established that any restriction on private health insurance *per se* violates the right to security of the person.

[9] The chambers judge was of the view that a violation of the appellant's security of the person was, at least in part, a question of fact. Just because restrictions on private health care insurance had been held in other litigation to violate the rights of other plaintiffs, did not mean that the appellant's rights had necessarily been violated (reasons, para. 41). The appellant was required to demonstrate that this particular restriction on private health insurance, in the specific context in which it operated, offended s. 7.

[10] The chambers judge was not satisfied with the evidence presented by the appellant. He held (reasons, para. 42) that there was nothing on the record showing a breach other than the appellant's

personal opinion. He reasoned (reasons, para. 48) that he was bound by conclusions of law from the Supreme Court of Canada, but not conclusions about fact in prior decisions.

[11] The chambers judge accepted that the appellant's injury and experience were "most unfortunate", but there was no evidence that the prohibition on private insurance had any causative effect (reasons, paras. 49-50, 53). The chambers judge also noted an absence of evidence as to whether private health care insurance would have been available (at a reasonable cost) for this type of back surgery, absent the prohibition. In short, the chambers judge was not satisfied that the appellant had proven any infringement of his right to life, liberty or security of the person.

[12] In the result, the chambers judge concluded that Dr. Allen had failed to establish on a balance of probabilities a sufficient causal connection between the state-caused effect and the harm suffered by him to engage s. 7 of the *Charter*.

Grounds of Appeal

[13] Dr. Allen no longer seeks a declaration that he has a right to sue for damages in a separate action. However, he challenges the chambers judge's refusal to declare s. 26(2) of the *Act* invalid on the following grounds.

i) The chambers judge committed an error of law by failing to follow and apply the Supreme Court of Canada precedent in ***Chaoulli v Quebec***.

ii) The chambers judge committed a palpable and overriding error by misapprehending the evidence which proved the existence of significant medical wait times in Alberta, and which proved that they cause physical and psychological pain and suffering.

iii) The chambers judge committed a palpable and overriding error by narrowly considering only Allen's individual situation, and failing to recognize the *Charter* s. 52 challenge to the law, based on all the evidence before the court.

These are such closely related arguments that they can be addressed as one. All three question the chambers judge's conclusion that the evidentiary record was not sufficient to rule on the constitutional issue raised. In essence, the issue is whether the appellant provided a proper procedural platform and evidentiary record to decide the constitutionality of s 26(2) of the *Act*.

The Health Care System

[14] Canada's system of universal health care is perceived by many as the crowning achievement of Canadian social policy. The majority of Canadians support the public funding of health care and oppose attempts to shrink or compromise the system. At the same time, many

Canadians criticize the system; they would like it to be even better than it is. Health care costs dominate public finances, and now consume about 40% of the budgets of the provinces.

[15] The Canadian health care system involves both the federal and provincial levels of government; it is an example of co-operative federalism in action. The challenge to the constitutionality of the system is of interest not only to the present applicant and the Government of Alberta, but engages all Canadian governments. The system operates based on some basic principles set out in the *Canada Health Act*, RSC 1985, c. C-6. Section 3 of the *Canada Health Act* states that the "primary objective" of the Canadian health care system is "reasonable access to health services without financial or other barriers". Section 5 lists five program criteria: (a) public administration; (b) comprehensiveness; (c) universality; (d) portability; and (e) accessibility.

[16] A key aspect of the Canadian health care system is its universality, which has two main components:

a) Economic Universality. Because basic health care is publicly funded, all Canadians have equal access to it. There are no distinctions to access based on means, wealth or social status.

b) Risk Universality. All Canadians are entitled to access the public health system without proving "insurability". Even those who are frail, elderly, or sick, or who have genetic or other vulnerabilities to particular illnesses, are covered. No Canadian is denied coverage, or expected to contribute more to health care costs, based on his or her medical profile.

These features of the system undoubtedly account, in large measure, for the public support of the system, and the willingness of Canadians to devote the substantial public resources necessary to operate it.

[17] The Alberta Health Care Insurance Plan is complex, and is regulated by a number of statutes and regulations. The majority relate directly to its operation, but some are primarily designed to protect the integrity of the public system. For example, s. 3 of the *Health Care Protection Act*, RSA 2000, c. H-1 protects the universality of the system by preventing "queue jumping". Section 9 of the *Alberta Health Care Insurance Act* prevents "extra billing" for basic health services provided by the public Plan. Sections 6 and 8 of that statute effectively require physicians to either opt in or opt out of the public Plan, and preclude a physician from providing basic health services both within and outside the Plan.

[18] As noted, s. 26(2) of the *Act* gives the public Plan a monopoly on health care insurance by preventing the issuance in Alberta of private insurance covering basic health services covered under the Alberta Health Care Insurance Plan. It too is designed to preserve the integrity of the public Plan. The appellant argues that this provision violates his right to security of the person under s. 7 of the *Charter*.

Procedure in Constitutional Cases

[19] This appeal brings into focus the importance of using appropriate procedures, and having a proper evidentiary record, when reviewing statutes for constitutionality.

[20] Cases in which the appointed judiciary override the will of the democratically elected legislatures fall into a special category. Our constitution and the parliamentary system of government recognize the "supremacy of Parliament". The presence, however, of an entrenched constitution now provides an important exception to that principle; statutes that are clearly inconsistent with the constitution are of no force or effect: *Constitution Act, 1982*, s. 52. Canada's constitution requires that the courts determine whether a statute is constitutional or not: ***Reference Re: Appointment to the Supreme Court of Canada***, 2014 SCC 21 at para. 89, [2014] 1 SCR 433; ***Marbury v Madison*** (1803), 1 Cranch 137 at p. 177 (USSC). The elected legislatures then retain the option of declaring the statute to be effective, notwithstanding the ruling: *Charter*, s. 33.

[21] The unavoidable mandate of the judiciary to override statutes is not a task to be exercised casually. It is always a serious matter whenever an appointed judiciary overrides a democratically elected legislature and such decisions should not be made unless the proper procedural safeguards have been observed. The selected procedure must be:

> (a) fair to the citizens challenging the statute, in the sense that they are given a reasonable opportunity to make the case for unconstitutionality: ***Canada (A.G.) v Downtown Eastside Sex Workers United Against Violence Society***, 2012 SCC 45 at paras. 31-2, [2012] 2 SCR 524.
>
> (b) fair to the legislature, in the sense that the government has a reasonable opportunity to defend the statute;
>
> (c) fair to the court, in the sense that the court has a reasonable record on which to exercise this important component of its jurisdiction; and
>
> (d) fair to other governments and interested groups who are affected by and may want to intervene in the process.

The ultimate problem underlying this appeal is that the appellant attempted to shortcut the normal procedures followed in constitutional challenges, undoubtedly in an effort to preserve resources and time. Summary dispositions of legal disputes are available, but only if on the existing record that alternative method for adjudication is fair and just to all interested parties, and appropriate to the issue being raised: ***Hryniak v Mauldin***, 2014 SCC 7 at paras. 4, 29, [2014] 1 SCR 87. This litigation raises evidentiary and legal issues about health care policy choices that raise genuine issues requiring a trial.

[22] The courts have always been reluctant to decide constitutional questions in a factual vacuum: ***Reference re Same-Sex Marriage***, 2004 SCC 79 at para. 51, [2004] 3 SCR 698; ***Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)***, 2002 SCC 31 at para. 46, [2002] 2 SCR 146. ***Chaoulli***, for example, was only decided after a full trial, at which numerous expert witnesses testified. That is as it must be.

[23] The presumption is that constitutional cases will be decided on a full evidentiary record, including, where appropriate, the evidence of expert witnesses: ***Canada (A.G.) v Bedford***, 2013 SCC 72 at paras. 53-4, [2013] 3 SCR 1101. The expectation is that the parties will prove the facts on which the constitutional challenge lies, and that resort to judicial notice will be kept on a "short leash", the more so the closer one comes to the ultimate issue: ***R. v Spence***, 2005 SCC 71 at paras. 58, 64, [2005] 3 SCR 458. As a general rule, evidence from unrelated cases cannot be transported into the record: ***R. v Daley***, 2007 SCC 53 at para. 86, [2007] 3 SCR 523.

[24] All of the leading section 7 cases, like ***Bedford***, ***Carter v Canada***, 2015 SCC 5, [2015] 1 SCR 331, and ***R. v Smith***, 2015 SCC 34 were decided on full evidentiary records. Each had a substantial record of evidence demonstrating (a) how the claimant was deprived of the right to security of the person by specific actions of the state, (b) the relevant principles of fundamental justice, (c) whether any of those applied and to what effect and (d) whether section 1 of the *Charter* was potentially applicable.

[25] A careful reading of the reasons under appeal discloses that the chambers judge was not comfortable with the record before him. In the absence of a full trial record, he perceived significant gaps which prevented a proper consideration of the issues. While he may have set too high an evidentiary burden on the appellant, the chambers judge reasonably concluded that the record is not adequate to decide the constitutional issue presented.

[26] It is not *per se* objectionable that the appellant is seeking a bare declaration of rights, without any collateral relief. The courts can exercise their discretion to provide free-standing declarations, but only on a proper evidentiary record. As noted in ***Blood Tribe v Canada***, 2012 ABCA 206 at para. 41, 533 AR 230, leave denied [2013] 1 SCR vi, declaratory relief should only be granted where ". . . the pleadings and the evidence establish [a] proper basis upon which a court could exercise its discretion to grant a declaration". That is particularly the case in constitutional litigation, because the supremacy clause in s. 52 of the *Constitution Act, 1982* states that inoperability of any law is only to "the extent" that it is inconsistent with the Constitution. The only way to know what is that "extent", is to have a full evidentiary record with complete factual conclusions about it. The appellant's quest for a declaration should have been pursued at trial.

[27] The applicant argues that a truncated procedure is appropriate, because there is binding authority on the point: ***Chaoulli v Quebec (Attorney General)***. He argues that there is no need to re-prove the constitutional point each time it comes up, and when there is binding authority a summary process is adequate. There are undoubtedly cases where the binding authority is so clearly on point and definitive that a full trial is not required. Whether that is so depends on a

number of factors, including (a) the scope, (b) the pedigree, (c) the clarity of the precedent, and (d) the precise constitutional provision that is engaged.

A. *The Scope of Binding Precedents*

[28] First is the basic premise of the doctrine of *stare decisis*: prior decisions are at best binding on points of law, not questions of fact. Where the constitutionality of the statute presently under examination depends on fact findings, such as those underlying a s. 1 analysis, the existence of a precedent of high authority may not be enough.

B. *Pedigree of the Precedent*

[29] A second factor is the applicability of the precedent. The age of the precedent is one consideration. ***Chaoulli*** was decided in 2005, based on a record established in 2000. Circumstances may have changed: ***Carter*** at paras. 44-5.

[30] A related issue is the jurisdiction in which the precedent originated. ***Chaoulli*** arose in Québec (as noted, based on the Québec health care system as it stood in 2000). About 20 witnesses testified at the trial. It does not necessarily follow that the health care system in Alberta in 2015 has the same constitutional features.

C. *The Constitutional Provision and Issue Engaged*

[31] A third factor is the constitutional provision involved. In this case, the challenge is under s. 7 of the *Charter*:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

This provision is notoriously open-ended, and its application to the constitutional review of social and economic policies is controversial and unsettled. A full factual record is therefore particularly important in a s. 7 and s. 1 analysis.

[32] Part of the problem is the breadth of terms used in constitutional documents. They speak of "peace, order and good government", "life, liberty and the pursuit of happiness", and "life, liberty, and security of the person". They say nothing about the difficult social issues that come before the courts: capital punishment, euthanasia, abortion, prostitution, drug treatment, etc. Controlling this vague language falls to the courts, and an absence of institutional self-restraint by the judiciary makes the problem worse, not better. The Supreme Court has recast the phrase "principles of fundamental justice" with even less precise terms like overbreadth, disproportionality and arbitrariness, none of which have been comprehensively defined. It is, unfortunately, sometimes

difficult to discern the difference between these concepts and a simple disagreement by the judiciary with the public policy decisions of democratically elected officials.

[33] The text of s. 7 signals that the drafters of the *Charter* never intended it to be applied to the review of social and economic policies. It certainly was not drafted with that in mind. In addition to its wording being open-ended, there is no obvious link between 1) the concept of a social or economic policy impinging on security of the person, and 2) the exception "in accordance with the principles of fundamental justice". As Prof. Hogg has pointed out, the intention of the framers of the *Charter* to restrict judicial review to procedural matters has been "totally disregarded by the Supreme Court of Canada" with dramatic consequences: P. Hogg, *The Brilliant Career of Section 7 of the Charter* (2012), SCL Rev (2d) 195 at p. 198.

[34] The Ontario Court of Appeal highlighted the problem of attempting to constitutionalize social policies in ***Tanudjaja v Canada (A.G.)***, 2014 ONCA 852, 123 OR (3d) 161, leave to appeal denied, June 25, 2015, SCC #36283. That case involved an assertion of a free-standing constitutional right to "adequate housing", and amounted to an open invitation to the courts to take charge of housing policy in Ontario. In holding that the issue was not even justiciable, the majority noted:

> 33 Finally, there is no judicially discoverable and manageable standard for assessing in general whether housing policy is adequate or whether insufficient priority has been given in general to the needs of the homeless. This is not a question that can be resolved by application of law, but rather it engages the accountability of the legislatures. Issues of broad economic policy and priorities are unsuited to judicial review. Here the court is not asked to engage in a "court-like" function but rather to embark on a course more resembling a public inquiry into the adequacy of housing policy.

While ***Tanudjaja*** was premised on allegations of unconstitutional inaction, the analytical issues are no less acute when an existing social policy is challenged.

[35] The *Charter* does not confer a freestanding right to health care: ***Chaoulli*** at para. 104. The Canadian governments could abolish the universal health care system at any time. They can remove services from the system, or add new services. These social policy choices do not engage the constitution; neither the *Charter* nor the judiciary have much to contribute to the debate. In ***PHS Community*** the Court confirmed at para. 105:

> The issue of illegal drug use and addiction is a complex one which attracts a variety of social, political, scientific and moral reactions. There is room for disagreement between reasonable people concerning how addiction should be treated. <u>It is for the relevant governments, not the Court, to make criminal and health policy</u>. (emphasis added).

The courts obviously retain a residual jurisdiction to consider the constitutionality of government action. In this litigation the applicant seeks to isolate out one small portion of the entire complicated, intertwined health care system, and subject it to constitutional scrutiny in isolation. Whether that can or should be done requires a proper evidentiary record.

[36] As Prof. Hogg points out, ". . . many of the Charter rights are expressed in exceedingly vague terms, and all of the rights come into conflict with other values respected in Canadian society": P. Hogg, Constitutional Law of Canada (5th ed) (Toronto: Carswell, looseleaf) at para. 36.4(a). A social policy choice that reflects such "other values", such as equality of access to health care, is an important component in assessing whether the policy is justifiable in a free and democratic society. A proper record is required to make the analysis.

[37] Having established a universal health care system, governments are *prima facie* entitled to put in place provisions that protect that system, and prevent its abuse. They are entitled to ensure that the system remains truly "universal", in the sense that there is not a parallel system for the wealthy, and another for ordinary Canadians. The concept of equality of access is consistent with the core values of Canadian democracy. Provisions designed to safeguard these aspects of the health care system are *prima facie* demonstrably justified in a free and democratic society. If an applicant wants to engage in a constitutional vivisection of the health care system, a full trial is required to allow the Government of Alberta to justify its policy choices and spending priorities, and to allow other interested governments and parties an opportunity to be heard.

D. *The Clarity of the Precedent*

[38] A fourth factor is the degree of certainty provided by the precedent. The 7 judge panel in ***Chaoulli*** split 3-3-1; there is no clear *ratio decidendi*. A key issue was whether the provision in question interfered with security of the person "in accordance with the principles of fundamental justice".

[39] Three judges (McLaughlin CJC, Major, Bastarache JJ) held at para. 105 that failing to provide health care "of a reasonable standard within a reasonable time" engaged s. 7 because the public health care system imposed a practical monopoly on insurance coverage. The "principles of fundamental justice" were re-defined to include a concept of "arbitrariness". Because some European countries operate health care systems that allow parallel private insurance, these three judges found that the Canadian regime was "arbitrary". Reports on the experience of these other jurisdictions were found to be the "best guide" to the best policy, and the import of any reports that came to a different conclusion were a "matter of some debate" (at paras. 150-1). Notwithstanding that the democratically elected legislatures of Canada had collectively decided otherwise, the conclusion appears to be have been incontrovertible in the minds of these judges. In other words, not only was it clear that allowing private insurance would not undermine the public health care system, it was so clear that the court should reduce it to a constitutional norm. It was not just a questionable policy "of some debate" but "arbitrary", and no other policy choice could be demonstrably justified.

[40] Three judges (Binnie, LeBel, Fish JJ) persuasively reasoned that health care policy choices were not within the legitimate mandate of the courts. It was impossible to set a constitutional standard as to what was "a reasonable time" within which to make health services available. While not everyone would agree on the policy choice made by the legislatures, it could not be said that prohibiting private insurance had no rational connection to maintaining the objects of the Canadian health care system. Further, they noted at para. 168 that the trial judge, who had heard all of the evidence, concluded that "the general availability of health insurance will lead to a significant expansion of the private health sector to the detriment of the public health sector". Even if the trial judge committed a palpable and overriding error of fact in so concluding, it is quite something else to say that there was no rational connection between the policy involved and the intended objective. As these three judges noted at para. 169: "A legislative policy is not 'arbitrary' just because we may disagree with it."

[41] The seventh judge in ***Chaoulli*** (Deschamps J) found that there was a violation of the right to life and personal security under the *Québec Charter*. She disagreed with the experts who opined that private insurance would undermine the public system, essentially re-weighing all the evidence. She was particularly impressed by the experience of jurisdictions that did not restrict private insurance, and concluded that their experience could be applied in the Québec context. While suggesting at para. 89 that the courts have a duty to rise above political debate, and must "leave it to the legislatures to develop social policy", she concluded that deference should not lead the judicial branch to abdicate its role in favour of the legislative branch. Since waiting lists had been a factor for many years, and the government had not met its burden of proving the effectiveness of the public monopoly on health care insurance, judicial intervention was warranted. Thus, by a majority of 4 to 3 the Québec statute was found to be unconstitutional.

[42] The result in ***Chaoulli*** is dependent on the factual findings. Notwithstanding the Supreme Court's usual insistence on deference to fact findings of trial judges, the majority of the court came to the opposite conclusion on the fundamental issue of the potential impact of private insurance on the public system. The existence, length and reasonableness of wait times in Québec were also a key to the decision. It cannot be said that the same factors are so obviously present in Alberta in 2015 that ***Chaoulli*** can be applied in a summary fashion.

[43] There is another interesting aspect of the ***Chaoulli*** decision. It appears that the constitutionality of the public health care monopoly depends on the resources dedicated to the system, and how those resources are allocated within the system. The prohibition was said to be unconstitutional because the waiting lists were too "long", and because the government was "doing nothing" (at paras. 97, 108, 124). Presumably, if more resources were dedicated to health care, the government would no longer be "doing nothing", and there would come a point in time when the waiting lists would be "just right". Rather than reflecting a fundamental constitutional norm, the validity of the prohibition on private health insurance would vary from time to time, and from province to province. Only Goldilocks would know when the statute was constitutional. This

supports the argument that ***Chaoulli*** involved disagreements with specific health care policy decisions, not the application of foundational constitutional principles.

[44] In ***Chaoulli*** the standard was said to be the provision of health care to a "reasonable standard within a reasonable time". As noted, this looks more like a policy objective than a constitutional norm. The Supreme Court decision in ***Chaoulli*** was not based on any particular finding of fact about the delay experienced by the plaintiff Zéliotis. (The plaintiff Chaoulli was a doctor who was interested in private health care insurance for economic reasons.) One of the expert witnesses had suggested that there were 12 month delays for one particular procedure: ***Chaoulli*** at para. 42. Does that mean that a 12 month delay is unconstitutional? How about 11 months? Another expert testified that for certain conditions: ". . . the risk of mortality rises by 0.45 percent per month": ***Chaoulli*** at para. 40. Does that mean that anything short of "health care on demand" makes the public system's monopoly unconstitutional? Would a two month delay (i.e., less than 1% increase in risk) be in accordance with the principles of fundamental justice? Is the constitutionality of the length of the waiting lists as variable as the length of the Chancellor's foot? Is the test of a "reasonable standard within a reasonable time" impermissibly vague because there is no adequate basis for legal debate or it is impossible for the government to delineate its area of risk: ***Harper v Canada (Attorney General)***, 2004 SCC 33 at para. 90, [2004] 1 SCR 827?

[45] The applicability of ***Chaoulli*** must also be assessed in light of subsequent judicial decisions, particularly ***R. v Smith***. ***Smith*** confirmed that a law which is "arbitrary" is not in accordance with the principles of fundamental justice, but at para 23 held "a law is only arbitrary if it imposes limits on liberty or security of the person that have no connection to its purpose" (emphasis added). ***Smith*** followed the observation in ***Canada (Attorney General) v Bedford***, 2013 SCC 72 at para 98, [2013] 3 SCR 1101 that: "Arbitrariness was used to describe the situation where there is no connection between the effect and the object of the law." This confirms the principle that disagreement with policy choices does not equate to "arbitrariness", and that any connection to the stated policy objective negates "arbitrariness".

[46] Furthermore, even if the impact of the challenged statute might end up being arbitrary with respect to a particular individual, that does not necessarily invalidate the law itself: ***Centre for Addiction and Mental Health v Ontario and Conception***, 2014 SCC 60, at paras. 41-3, [2014] 3 SCR 82. As Lord Bingham wrote in ***R. (Animal Defenders International) v Secretary of State for Culture, Media and Sport*** [2008] UKHL 15 at para. 33, [2008] 1 AC 1312, ". . . hard cases will arise falling on the wrong side of [a general rule], but that should not be held to invalidate the rule if, judged in the round, it is beneficial."

[47] At a trial, the respondent might raise a number of arguments in support of the statute. The prohibition on private health care insurance arguably has a rational connection to both of the key objectives of the Canadian public health care system. It may be shown to promote economic universality by ensuring that all Canadians have equal access to health care regardless of means, albeit within public budgetary restraints, and that wealthy citizens do not enjoy a higher standard.

It may also promote risk universality, because it ensures that Canadians who are privately uninsurable due to health challenges do not receive a lower tier of health care. The prohibition on private health care insurance arguably helps to protect the monopoly that the public system has, which is a key to true universality. It promotes the "public administration" of health care as mandated in sections 7 and 8 of the *Canada Health Act*. Universality, in turn, is a key reason why public support for the Canadian health care system is so high. Some may disagree with the inherent policy choices, but they may not be plainly "arbitrary".

[48] The respondent might also show that it is not determinative that some European democracies allow private health care insurance. That line of analysis assumes that the *Charter* prevents Canadian legislatures from adopting their own policy choices if those choices are inconsistent with the consensus position of the other democratic legislatures. These European democracies have obviously chosen to have a mixed public and private health care system; while Canada has chosen to have an exclusively public system, choosing one legitimate policy option over another may not be constitutionally "arbitrary". This could be shown to be a valid choice which is demonstrably justified in a free and democratic society. "A legislative policy is not 'arbitrary' just because we may disagree with it."

[49] It is inappropriate to focus on only a small portion of the overall Canadian health care system, and then subject that part to *Charter* scrutiny. At a trial, the Canadian health care regime could be examined to determine if, as a whole, there was a breach of s. 7, whether the system overall provides a "fundamental justice" rationale for the challenged limit, and whether it is demonstrably justified in a free and democratic society.

[50] The decision in ***Chaoulli*** examined the ban on private health care insurance in a particular context. The issue is not whether the delivery of health care could or should be accelerated, because those are questions of how the government spends public resources. Permitting private health care insurance is incompatible with fundamental values underlying the Canadian system, notably economic universality and risk universality, but also public administration, and accessibility. It must be obvious that private health care insurance is only available to the wealthy and the healthy. The result in ***Chaoulli*** is arguably inconsistent with these core Canadian values which, to use the words of Prof. Hogg, are ". . . other values respected in Canadian society". It is arguably constitutionally "justifiable" for the Canadian governments to craft a system in a Canadian context, as they have done, that is consistent with those values as expressed in the *Canada Health Act*, notwithstanding the policy choices that have been made by other democratic societies which reflect their different social circumstances.

[51] It also follows that there might be arguments open to the Alberta government in 2015 that were not available to the Québec government in 2000 when ***Chaoulli*** was decided. It is not possible to take judicial notice of the fact that waiting times in Alberta in 2015 are the same as they were in Québec in 2000, or that the context is even comparable. The Alberta government could try to prove, for example, that there were waiting times for the type of surgery the appellant had

because resources were being devoted to other higher priority areas. Perhaps funds are being dedicated to life threatening conditions like cancer treatment and cardiovascular surgery. Not everyone would agree on the policy choices being made, but that does not mean that the health care system, as a whole, is "constitutionally arbitrary".

[52] Since there is no freestanding constitutional right to health care, there cannot be any constitutional requirement that the health care system be given a blank cheque. There will always have to be decisions about spending priorities, which are outside the purview of the constitution. Systemic arrangements that reflect policy choices, even those of broad application which do not directly involve government spending, may well be designed in a manner that they meet the principles of fundamental justice for those who are affected. The challenge to the prohibition on private health care insurance should not be allowed to become an indirect way of subjecting spending policies and priorities to constitutional review. A full trial would disclose whether s. 26(2) crosses the constitutional line.

E. *Summary*

[53] In summary, while there might be situations where a binding precedent makes the outcome of a constitutional challenge inevitable, ***Chaoulli*** is not such a precedent. The constitutionality of prohibitions on private health care insurance depend heavily on the factual context. This is not a situation in which procedural and evidentiary shortcuts in deciding the constitutionality of legislation can be taken with any confidence. The constitutionality of s. 26(2) must be pursued at a full trial.

Conclusion

[54] In conclusion, the appellant's attempt to adjudicate the constitutionality of the Alberta statute in a summary fashion was inappropriate. The issues are complex, nuanced, factually sensitive, and raise genuine issues requiring a trial. The precedent relied on is not sufficiently clear or compelling. The application was properly dismissed.

Appeal heard on April 10, 2015

Reasons filed at Calgary, Alberta
this 9th day of September, 2015

Slatter J.A.

Reasons for Judgment Reserved
of the Honourable Mr. Justice Martin
Concurring in the Result

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[55] I have read the reasons for judgment of my colleagues. In my respectful opinion, the issue before us is answered by paras 1-26 and 54 of the reasons of Slatter JA, with which I concur.

Appeal heard on April 10, 2015

Reasons filed at Calgary, Alberta
this 9th day of September, 2015

Martin J.A.

Reasons for Judgment Reserved
of the Honourable Mr. Justice Watson
Concurring in the Result

[56] I concur in the conclusion reached by my colleague, Slatter JA, in relation to the appeal. His analysis is well stated and clear. A crucial difficulty in this case, it seems to me, is that the appellant has drawn from the decision in ***Chaoulli*** what he essentially contends is a binding proposition of law. In his submission, ***Chaoulli*** commands a generalized declaration that the restrictive provision respecting the availability of health insurance contained in s. 26(2) of the *Act* inevitably infringes upon an individual Albertan's right to security of the person. That is because, so the argument goes, it impedes that individual from making private choices respecting health insurance the individual might be able to afford to pay for (yet presumably less than the cost of health tourism to another nation). The flow of thinking in this is that an individual's ability to address health concerns as to 'insured' services under the health care law should not be impeded by mere government policy arising from public administration of the health care system. To raise this argument from a mere *ipse dixit* into a syllogism sufficiently compelling as to substantiate a summary decision in favour of a declaration – which is what the appellant sought -- required the appellant to establish a compelling evidential foundation (e.g. circumstances, causation, alternatives) and a persuasive legal analysis at multiple stages. The appellant failed to do so on this record at more than one level of consideration.

[57] The broad declaration sought by the appellant would create an environment which would allow the existing health care system to be surrounded by either myriad private arrangements between individuals and service providers or insurers, or would establish a right to larger health management operations of a private nature for those who might wish to participate in them. It cannot be doubted that such a declaration would involve a fundamental policy decision about health care and health management affecting every person living in Canada. This would arguably be at least as large as the policy decisions about Canadian health care made in the 1960s. Such a declaration would also directly strike at the ability of Parliament and the Legislatures, operating democratically on behalf of those persons, to make such important policy decisions, particularly in an area of acute controversy. Ancillary to this declaration would be the implicit stipulation that the courts might further be empowered, and perhaps even expected, to micro-manage the initiation or development of any sequelae arising from such a declaration.

[58] My colleague carefully analyzes the decision in ***Chaoulli*** (and the later Supreme Court decisions) and concludes that nothing in that line of authority supports such an enormous and categorical change of policy.

[59] The matter can also be addressed in another way. The Canadian approach is one of co-operative federalism, represented by law-defined architectures of health care services in every legal subdivision of our federation. In all those places, there does co-exist either the capacity or the reality of a mixed model of health care and health management services available to all qualified residents. The statute recognizes the publicly administered component for the vast majority of topics, characterized as covered services whether "basic" or "extended", as well as a structure for "optional" services. Nevertheless, judicial notice can be taken of areas of specialized services left to the private sector. In other words, the government of Alberta has struck a balance between public and private health care services and health management. The government can alter this balance at any time in light of social changes, technological improvements, economic circumstances and so forth. Doubtless the government does so regularly, as where new treatments are added, or efficiencies in delivery are found. Decisions can also be made in this respect at the policy level or operational level.

[60] This does not mean that the policy decisions of government or the exercises of discretion by government agencies are necessarily in compliance with s. 7 of the *Charter* merely because the government generally, or any individual officials, may have capacity or *prima facie* authority to regulate or influence that balancing. To assert absolute immunity from *Charter* scrutiny for those situations is also an *ipse dixit*. Just as there was not a record here that justified the declaration sought by the appellant, there is equally not a record that justifies an absolute declaration to the contrary. There is no record for the establishment of a 'No Go' zone for reviewing either individual exercises of authority or broader regulatory discretions or actions of governments in this respect. As Cromwell J said in a different context in ***Strickland v Canada (Attorney General)***, 2015 SCC 37 at para. 63, the court must "keep an open mind" to the possibilities. Dismissal of a declaration on the grounds that it was not made out in the pleadings and evidence is not the same thing as saying that an action properly pleaded, fairly proceeded with, and backed by sufficient evidence would be impossible, either for an individual regarding the government's interpretation and application of s. 26(2) to his specific situation or for some broader contention.

[61] Since health management and health care services are important to everyone, Canadians rely on their governments to make wise decisions and to respond to needed changes with agility. Governments learn of problems or developments, engage experts, consult the public, and allocate scarce public resources accordingly. The courts are not there to second guess the policy choices of governments, and they lack the governments' ability to acquire information and expert advice. There are probably many mixed models, options for exemptions, alliances between public and private institutions and so forth that have or could be considered. Some might actually improve the existing health care system, but a current defect in the provision of services by government is not *per se* a constitutional wrong. Imperfect as it might be, a result may still be what our society would characterize as consistent with fundamental justice under our current social realities. Where the rule of law is engaged, the courts are required to act. Where an individual can establish not merely adverse consequences, but that those arose due to a breach of s. 7 rights by the state, the court is

required to give a remedy. But mere imperfections in or disagreements about social polices do not rise to that level.

Appeal heard on April 10, 2015

Reasons filed at Calgary, Alberta
this 9th day of September, 2015

Watson J.A.

Appearances:

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