COURT FILE NUMBER	1101-17169
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	DARCY ALLEN
RESPONDENTS	HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA
DOCUMENT	BRIEF

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

June 25, 2013 @ 10:00 AM

John V. Carpay
Justice Centre for Constitutional Freedoms
#253, 7620 Elbow Drive SW
Calgary, Alberta, T2V 1K2
Phone: (403) 619-8014
Email: jcarpay@jccf.ca

APPLICANT'S REPLY BRIEF

Responding to the Brief of Minister of Justice and Solicitor General and Attorney General

---

FIAT: Let this Brief and attached Authorities be filed in Court file number 1101-17169

"HALL J"

The Honourable Justice ROBERT J. HALL

June 19, 2013 Calgary, Alberta

Table of Contents

1. ISSUES

The Applicant, Darcy Allen, submits that the following issues were raised by Alberta in its Brief:

A. Has the Pan-Canadian Wait Times Initiative reduced wait times for patients?

B. Have the Alberta Wait Times Initiatives reduced wait times for patients?

C. Does section 7 of the Charter apply to health care legislation?

D. Does the prohibition on private health insurance deprive the Applicant of his right to life, liberty, or security of the person?

E. What is the Applicant's burden of proof?

F. Was the Court in *Chaoulli* split evenly in regards to the prohibition?

G. What is the test for arbitrariness in this Application?

H. Is a government program different from a government monopoly?

I. Are wait times taken seriously by the Out-of-Country Health Services Committee?

J. Were the Ombudsman's recommendations implemented?

K. Does the Out-of-Country Health Services Regulation provide an effective "safety valve"?

L. Is Darcy Allen's decision not to apply for out-of-country funding relevant?

M. Does the government's health care system have more than one tier?

II. ARGUMENT

A. Pan-Canadian Wait Times Initiative – no evidence of shorter wait times for patients.....3

B. Alberta Wait Times Initiatives – no evidence of shorter wait times for patients.....4

C. Section 7 of the *Charter* applies to health care legislation.....5

D. The prohibition on private health insurance causes deprivation of the right to life and security of the person.....6

E. The Applicant's burden of proof in *Charter* litigation.....8

F. The Court in *Chaoulli* was not split evenly regarding the prohibition on private health insurance.....9

G. The test for arbitrariness.....10

H. A government program is not the same as a government monopoly.....12
I. Wait times not taken seriously by the Out-of-Country Health Services Committee.....14
J. Ombudsman's recommendations for OOCHS program not implemented.....15
K. The OOCHS regime is not an effective "safety valve".....16
L. Darcy Allen's decision not to apply for out-of-country funding.....17
M. Private payment for medically necessary MRIs reveals more than one tier of health care...19

II. ARGUMENT

A. Pan-Canadian Wait Times Initiative – no evidence of shorter wait times for patients

1. When *Chaoulli* was decided in 2005, the government had already "had plenty of time to act" (*Chaoulli*, paragraph 96) and had "not given reasons for its failure to act" (*Chaoulli*, paragraph 97). From the Alberta government's own evidence in this Application, it is apparent that the problems with wait lists has not been fixed or improved in any measurable way in Alberta.

2. At paragraphs 29-39 of its Brief, Alberta discussed the recommendations set out in Dr. Brian Postl's 2006 "Final Report of the Federal Advisor on Wait Times" (Exhibit "A", Affidavit of Marie Lyle, filed).

3. While some of these recommendations could arguably reduce wait times if implemented, Alberta has not adduced evidence to show that *wait times have actually been shortened* since Dr. Postl's report was released in 2006. According to the transcript of questioning of Marie Lyle, the Alberta government has no idea as to:

- how many Albertans are currently waiting for surgery (5:12-16; 11:11-15); or
- what percentage of Albertans on wait lists are prevented (either partially or entirely) from working because of their medical condition (11:16-21); or
- what percentage of Albertans on wait lists are experiencing severe pain versus moderate pain versus no pain (11:22-12:1); or

- how many Albertans on wait lists are prevented by their medical condition from performing daily tasks (like tying your shoelaces or going shopping or taking out the trash) or from carrying on with their daily lives (12:10-19); or
- how many Albertans on waiting lists choose to leave Alberta each year to obtain surgery elsewhere (50:11-15); or
- how long some patients actually wait for surgery (or for MRIs) in Alberta, if they belong to the unlucky tenth of patients whose wait times are not tracked at all (transcript of questioning of Marie Lyle, filed, 24:19-27; 37:13-16)

4. The Alberta government has no idea how many patients are like Darcy Allen and Richard Cross, waiting for surgery in a state of severe pain, unable to enjoy life, unable to perform daily tasks, and with a reduced capacity to earn money to support themselves and their families. In spite of Alberta Health's current annual budget exceeding seventeen billion dollars (transcript of questioning of Marie Lyle, filed, Exhibit 1, *Alberta Health Budget 2013*), Alberta has failed to collect or obtain this vitally important information.

B. Alberta Wait Times Initiatives – no evidence of shorter wait times for patients

5. At paragraphs 40-54 of its Brief, Alberta asserts that it has implemented a number of the recommendations of the Postl Report. Again, Alberta has not adduced evidence that shows that its Wait Times Initiatives have actually *reduced wait times for patients*.

6. In addition to not knowing how many Albertans are currently suffering in pain on waiting lists, the Alberta government also admits that it has no idea how many Albertans die on waiting lists:

> Question: … for patients who are waiting for heart valve surgery or waiting for an implantation of a pacemaker, do some patients die while waiting for that surgery?
>
> Answer: I don't know.

Question: Has Alberta health made any efforts to determine how many Albertans die each year waiting for surgery?

Answer: Not to my knowledge. (transcript of questioning of Marie Lyle, filed, 16:1-9)

7. At paragraph 54 in its Brief, Alberta asserts that the proportion of patients in Alberta receiving care within benchmarks from April 1 to September 30, 2011 are 82% for hip replacement, 70% for knee replacement, 79% for hip fracture repair, 82% for cataract, 99% for bypass and 87% for radiation therapy. This is not correct. Alberta has quoted the Canada-wide numbers, not the Alberta numbers, and Alberta's performance in relation to most of these surgeries is poorer than the Canadian average (page 5 of the C.I.H.I. report, Exhibit "B", affidavit of Marie Lyle, filed).

8. However, even if the numbers quoted by Alberta at paragraph 54 were correct, that is cold comfort to patients who are among the 18% not receiving their hip replacement surgery, or among the 30% not receiving their knee replacement surgery, or among the 21% not receiving their hip fracture repair, or among the 18% not receiving their cataract surgery, or among the 13% not receiving their radiation therapy, in a timely fashion. Alberta has not adduced evidence indicating how far beyond the benchmark these patients must wait, how many patients are waiting, or whether fewer Albertans are dying on waiting lists than was the case when *Chaoulli* was decided in 2005.

C. Section 7 of the *Charter* applies to health care legislation

9. The Minister of Justice, Solicitor General, and Attorney General of Alberta (hereafter "Alberta") argue at paragraphs 1 and 4 of its Brief that the *Charter* section 7 right to "life, liberty and security of the person" is limited to "the adjudicative context or one involved in the administration of justice" and excludes a publicly funded health care system. At paragraph 4(ii) of its Brief, Alberta argues that public health care is a social program and therefore does not fall within the three formal requirements of "fundamental justice," such that no principle of fundamental justice is engaged.

10. The Applicant submits that all legislation and all regulations must comply with the *Charter*, including the *Out-of-Country Health Services Regulation*, and section 26(2) of the *Alberta Health Care Insurance Act*. The fact that legislation (or a regulation) governs public health care – or any other social program – does not immunize it from needing to comply with the *Charter*. Darcy Allen and Richard Cross are not challenging "public health care" or a "social program". Rather, they are challenging the constitutional validity of specific legislation which violates the Applicants' rights by confining them (and all citizens) to suffer on wait lists within the government's "virtual monopoly" over health care.

11. In *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 (hereafter "*PHS*"), at paragraph 10, McLachlin C.J. wrote for a unanimous Court as follows:

> … It is for the relevant governments, not the Court, to make criminal and health policy. However, when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the *Charter*: *Chaoulli*, at para. 89, per Deschamps J., at para. 107, per McLachlin C.J. and Major J., and at para. 183, per Binnie and LeBel JJ.; *Rodriguez*, at pp. 589-90, per Sopinka J. The issue before the Court at this point is not whether harm reduction or abstinence-based programmes are the best approach to resolving illegal drug use. It is simply whether Canada has limited the rights of the claimants in a manner that does not comply with the *Charter*.

D. The prohibition on private health insurance causes deprivation of the right to life and security of the person

12. At paragraph 4(ii) and paragraph 95 of its Brief, Alberta argues that Darcy Allen has not proved that the prohibition on private insurance caused the breach of his *Charter* section 7 right to life, liberty and security of the person.

13. This argument was rejected in *Chaoulli v. Quebec* by all seven Justices, who were unanimous in recognizing that the prohibition on private health insurance and the waiting lists in the government's health care system violate the *Charter* section 7 right to life. This recognition is found in the judgment of McLachlin C.J. and Major J. (Bastarache J. concurring) at paragraphs 103, 123, and 124; in the judgment of Deschamps J. at paragraphs 28, 37, 38, 45 and 100; and in the dissenting judgment of Binnie and LeBell JJ. (Fish J. concurring) at paragraphs 191, 200, 203, 204, 206, 207, 225, and 265.

14. In two concurring judgments (that of Deschamps J. and that of McLachlin C.J. and Major J., with which Bastarache J. concurred), the majority of the Court in *Chaoulli* held that the violation of rights by the prohibition on private insurance was not justified. The dissent disagreed with the majority only on the question as to *whether this violation was justified.*

15. As a consequence, neither Darcy Allen nor Richard Cross has a burden of proving that the ban on private health insurance creates a "virtual monopoly" for the government over "insured" health care services, or that this monopoly rations resources through waiting lists, or that waiting lists violate the section 7 *Charter* rights of citizens.

16. Further, apart from their own experiences with the government's health care system, Darcy Allen and Richard Cross would have standing as public interest litigants to bring their applications, just as Dr. Jacques Chaoulli and George Zeliotis had standing to do so in *Chaoulli*. The majority of the Court in *Chaoulli* (per Deschamps J. at paragraph 35, and per the dissent's judgment at paragraphs 188-189 and 204) held that Dr. Chaoulli and Mr. Zeliotis had standing as public interest litigants. The judgment of McLachlin C.J. and Major J. expressed no disagreement on this point. Darcy Allen relies on the same grounds and reasoning to qualify as a public interest litigant, should his own experiences within the government's health care system be deemed inadequate.

17. The deprivation of section 7 rights in the context of health care was confirmed again by the Supreme Court of Canada in *PHS, supra*, at paragraph 93, where McLachlin C.J. held for a unanimous Court as follows:

> The trial judge made crucial findings of fact that support the conclusion that denial of access to the health services provided at Insite violates its clients' s. 7 rights to life, liberty and security of the person. He found that many of the health risks of injection drug use are caused by unsanitary practices and equipment, and not by the drugs themselves. He also found that "[t]he risk of morbidity and mortality associated with addiction and injection is ameliorated by injection in the presence of qualified health professionals" (para. 87). Where a law creates a risk to health by preventing access to health care, a deprivation of the right to security of the person is made out: *Morgentaler* (1988), at p. 59, per Dickson C.J., and pp. 105-6, per Beetz J.; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519,

at p. 589, per Sopinka J.; *Chaoulli*, at para. 43, per Deschamps J., and, at paras. 118-19, per McLachlin C.J. and Major J.; *R. v. Parker* (2000), 188 D.L.R. (4th) 385 (Ont. C.A.). Where the law creates a risk not just to the health but also to the lives of the claimants, the deprivation is even clearer. [emphasis added]

E. The Applicant's burden of proof in *Charter* litigation

18. At paragraphs 4(ii), 90 and 99 of its Brief, Alberta asserts that this Court is being asked to assume that private health care insurance would eliminate wait times in the government's health care system. At paragraphs 101 and 102, Alberta argues that Darcy Allen has failed to prove that granting his Application would reduce wait times in the government's health care system.

19. These assertions by Alberta mischaracterize Darcy Allen's Application, and misconstrue the test for determining a violation of section 7 of the *Charter*.

20. Citizens who allege that their *Charter* rights have been violated by legislation (or other forms of government action) do not bear a burden of providing solutions to moral, social, economic, or other problems. The citizen's only burden is to prove that her or his *Charter* right was violated. Once this is established, the onus is on the government to justify the violation under section 1 of the *Charter*.

21. In regard to section 7 of the *Charter*, the Applicant's only burden is to prove that (1) the prohibition on private health insurance and resulting waiting lists within the government's health care system deprive him of his right to life, liberty, or security of the person, and that (2) this deprivation is not in accordance with the principles of fundamental justice. The Applicant has no burden of solving wait times, or solving any other moral, social or economic problem.

22. The Applicant's burden of proving that he has been deprived of his *Charter* section 7 right to life has been met, because the Court in *Chaoulli* held unanimously that the prohibition on private health insurance and resulting waiting lists deprive patients of their *Charter* section 7 right to life, and six Justices further held that the prohibition also violates the section 7 right to security of the person.

23. Darcy Allen and Richard Cross seek the right to access health services outside of the government's system. They make no claim that granting their Applications would eliminate wait times in the government's health care system, nor are they required to do so. While granting their Applications would likely result in shorter wait lists within the government's system, this issue is not before this Court, and is irrelevant to the Applications. In short, this Court is not being asked to assume that private health care insurance would eliminate wait times, because that question is irrelevant.

24. In *PHS*, there was no onus on the claimants to prove what programs were the best approach to resolve illegal drug use. In similar fashion in the case at bar, there is no onus on the Applicants to propose or provide a solution to the problem of wait lists in the government's health care system. Alberta has not provided any authorities for its contention that this is a test which the Applicants must meet.

F. The Court in *Chaoulli* was not split evenly regarding the prohibition on private health insurance

25. At paragraph 90 of its Brief, Alberta argues that the Court in *Chaoulli* split evenly on how it characterized Quebec's prohibition on private health insurance. This is not correct. Deschamps J. joined McLachlin C.J. and Major and Bastarache JJ. in holding that (1) the prohibition on private health insurance creates a virtual monopoly over health care, (2) the government's virtual monopoly and the rationing of resources impose waiting lists which violate the right to life, and (3) the prohibition on private health insurance is not necessary to preserving or sustaining a public system.

26. Deschamps J. arrived at the same conclusion as McLachlin C.J. and Major and Bastarache JJ., holding that:

- "the effectiveness of the measure in protecting the integrity of the system has not been proved" (paragraph 74);

- "the evidence shows that a wide variety of measures are available to governments, as can be seen from the plans of other provinces and other countries" (paragraph 98);
- "the state can establish a framework of practice for physicians who offer private services" (paragraph 66);
- neither "the evidence relating to the Quebec plan or the plans of the other provinces of Canada" nor "the evolution of the systems in place in various OECD countries" justifies "the choice of prohibiting private insurance contracts" (paragraph 84);
- "a measure as drastic as prohibiting private insurance contracts appears to be neither essential nor determinative" (paragraph 83); and
- "the effectiveness of the prohibition has by no means been established" (paragraph 98)

27. The Court was split evenly only in regard to its section 7 analysis, in which Deschamps J. did not participate (although Deschamps J. did acknowledge expressly that the prohibition and resulting waiting lists violate the *Charter* section 7 right to life). The Court's majority invalidated the prohibition on private health insurance because this prohibition causes people to suffer and die on waiting lists, and this prohibition is not necessary for preserving the public health care system.

G. The test for arbitrariness

28. At paragraph 101 of its Brief, Alberta argues that the government's efforts and attempts at reducing wait times in its health care system are not arbitrary. This misconstrues the test for arbitrariness, which must be applied to the legislation being challenged, in this case the prohibition on private health insurance.

29. The objective of the *Canada Heath Act*, 1984, c. 6, s. 3, (hereafter "*CHA*") is as follows:

> Primary objective of Canadian health care policy
>
> **3.** It is hereby declared that the primary objective of Canadian health care policy is to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers. [emphasis added]

30. The majority and dissent in *Chaoulli* each proposes a test for arbitrariness, applied to determine whether or not the prohibition on private health insurance is arbitrary in relation to the CHA objective set out here above.

31. In *Chaoulli*, when addressing arbitrariness as a principle of fundamental justice, McLachlin C.J. and Major J. (Bastarache J. concurring) posed the "necessity test" and found that the prohibitions on the purchase of private insurance were not necessary to further reasonable access to care and to provide mental and physical well-being, holding at paragraph 138:

> To this point, we are confronted with competing but unproven "common sense" arguments, amounting to little more than assertions of belief. We are in the realm of theory. But as discussed above, a theoretically defensible limitation may be arbitrary if in fact the limit lacks a connection to the goal".

32. More than eight years have passed since *Chaoulli* was decided in June of 2005. Further, the Alberta government has had ample time to gather and adduce evidence since being served with the *Cross* and *Allen* applications in 2011. There has been plenty of time for these theories to be proven, yet the government's evidence does not demonstrate that the prohibition on private health insurance is *necessary* to fulfill the objectives of the *CHA*, which prohibits not only financial barriers to reasonable access, but also *other barriers* to reasonable access. In any event, the majority of the Court in *Chaoulli* (McLachlin C.J. and Major, Bastarache and Deschamps JJ.) held that the prohibition on private health insurance is not necessary to preserve the government's health care system.

33. The dissent in *Chaoulli* states at paragraph 232 that arbitrariness exists when "[a] deprivation of a right . . . bears no relation to, or is inconsistent with, the state interest that lies behind the legislation". The judgment of Deschamps J. and the judgment of McLachlin C.J. and Major J. both held that the evidence of health systems in other countries – *none of which prohibit private health insurance* – demonstrates that there is a chasm between theory and reality on the alleged necessity of prohibiting the purchase of private insurance to maintain the public system. While the dissent accepted the government's theories in 2005, the Alberta government has not adduced any evidence that would bolster these theories or their connection to reality. Even on the dissent's approach, the prohibition on the purchase of private insurance is not consistent with

the state's interest, which the *CHA* describes as facilitating reasonable access to health services without financial or other barriers.

34. The government's own evidence indicates that wait times result from limited and unused resources within the government's health care system, such as the limited operating room time available to surgeons (transcript of questioning of Marie Lyle, filed, 12:24 – 13:6). It remains unclear how the government's health care system would be undermined or eroded if surgeons who are currently denied access to operating room time were to operate on patients outside of the government's system. This would enable people like Darcy Allen and Richard Cross to receive treatment in Canada rather than needing to travel abroad. Further, Alberta does not allege that the existence of a parallel health care system for Workers' Compensation Board patients has undermined the government's health care system or caused a loss of physicians (transcript of questioning of Marie Lyle, filed, 32:3-35:27).

35. On both the majority's and dissent's definitions of the fundamental justice principle of arbitrariness, the evidence concerning Dr. Allen supports a finding that the impugned provisions are arbitrary, and that the deprivation of life and security of the person that flows from them cannot therefore be said to accord with the principles of fundamental justice.

H. A government program is not the same as a government monopoly

36. At paragraph 100 of its Brief, Alberta argues for a health system where access is governed by need rather than wealth or status. The Applicant agrees that this should be the goal of every government program, including health care, education, affordable housing, public transit, services and support for the disabled, etc.

37. The government provides public transit without banning private car ownership so as to create a government monopoly over transportation. The government provides affordable housing without banning private home ownership so as to create a government monopoly over housing. The government provides social services to needy people without prohibiting the existence and benevolence of hundreds of different private charities so as to create a government

monopoly over social services. The government provides public education without banning private schools so as to create a government monopoly over education.

38. The government's education, housing, public transit and social service programs enjoy strong popular support, without the government having a legislated monopoly over any of these sectors. In each of these sectors, the government program is not "eroded" or otherwise threatened by the existence of a "parallel private sector" in education, housing, transportation, and charities.

39. The majority in *Chaoulli*, in concluding that prohibiting private health insurance is not necessary to preserving a public health system, relied on evidence that other countries with public health care systems have parallel private systems which do not erode or undermine public health care.

40. The questions posed by the dissenting Justices in *Chaoulli*, and reprinted in Alberta's Brief at paragraph 103, are worth attempting to answer.

41. Q. What are constitutionally required "reasonable health services"?

42. A. The Constitution does not require the government to provide any health services (reasonable or unreasonable) or other government programs in areas such as education, public transportation, and social services. The Constitution requires that government either (1) refrain from imposing a monopoly over health care or (2) ensure that the government's health care monopoly does not inflict suffering or death on people on waiting lists.

43. Q. What is treatment "within a reasonable time"? What are the benchmarks? How long a waiting list is short enough? How many MRIs does the *Constitution* require?

44. A. The Constitution sheds no light on what waiting times for medical services might be reasonable, or what benchmarks should exist, or how many MRIs should be purchased. The Constitution merely requires that the government refrain from forcing people like Darcy Allen

and Richard Cross to suffer in pain on waiting lists for years by denying them the legal right to access health care outside of the government's monopoly system.

45. All government programs, including health care, will continually grapple with the establishment and maintenance of reasonable standards and appropriate goals. But whatever goals are set, and whatever standards are established, the government cannot inflict suffering or death on citizens by way of a monopoly over health care, housing, education, transportation, or any other sector.

I. Wait times not taken seriously by the Out-of-Country Health Services Committee

46. At paragraph 24 of its Brief, Alberta states that a resident may receive out-of-country benefits when the time they would have to wait to receive the treatment in Canada would not be considered reasonable by the medical community for that resident's medical condition.

47. Alberta's assertion at paragraph 24 is not supported by the evidence. When the Chair of the OOCHS Committee is asked how many out-of-country funding applications were received where the wait time was the primary reason for the application, she responds by saying "We don't track wait times as a specific criteria." The Committee Chair is not able to say which applications are made exclusively or primarily on grounds that the patient was waiting too long for surgery (transcript of the questioning of Stella Hoeksema, filed, 5:25-6:15). The Alberta government is not able to provide (and has not provided) any examples or other evidence in support of its assertion that some patients receive out-of-country funding because their waits are too long.

48. Further, according to the Committee Chair, there is no such thing as a wait time considered "reasonable" by the "medical community", notwithstanding the use of these terms in the legislation. The Chair states that she has no knowledge of any list or chart by which the medical community sets out its approval of reasonable wait times, and that there are no surgeries in respect of which the medical community has determined reasonable wait times (transcript of questioning of Stella Hoeksema, filed, 13:23-27, and 15:15-23). The expression "medical

community" refers only to the doctors or other health practitioners involved with a particular patient (transcript of questioning of Stella Hoeksema, filed, 5:1-7).

49. Applications for funding are considered individually on a case-by-case basis. Since the OOCHS Committee does not track wait times as a criterion, and since there are no wait times which the "medical community" deems to be "reasonable", there is no credible evidence that would suggest that any Alberta patient has ever been approved for out-of-country surgery on grounds that she or he is waiting for years for medically necessary surgery, as Darcy Allen did.

50. Further, the *Out-of-Country Health Services Committee Information Sheet* (Affidavit of Stella Hoeksema, filed, paragraph 15, Exhibit "H") contains all of the important information that the public needs to know; it is limited just to the most important matters (transcript of questioning of Stella Hoeksema, filed, page 16, lines 8-17). Containing all the important information that the public needs to know, this *Information Sheet* does not mention waiting times as a reason or ground in respect of which out-of-country funding could potentially be obtained. The government's *Information Sheet* says that the requested medical service must not be "available in Canada" but says nothing about receiving medical services *in a timely manner*, or being able to apply for out-of-country funding on that basis. This silence is deafening.

J. Ombudsman's recommendations for OOCHS program not implemented

51. In December 2008, the Alberta Ombudsman, on his own motion, commenced a review of Alberta's OOCHS scheme. In May 2009, he released "Prescription for Fairness", a report containing 53 recommendations to address shortcomings in the program.

52. At paragraph 28 in its Brief, Alberta asserts that the Minister of Health and Wellness "accepted" all but one of these 53 recommendations. However, the Health Minister's letter to the Ombudsman and the chart included therewith (Exhibit "K", Affidavit of Stella Hoeksema, filed) indicate that only 44 recommendations were accepted or "agreed to in principle", with nine recommendations characterized as "declined in part," "will actively consider" or "under review."

53. The evidence before this Court does not support the assertion that Alberta Health has actually *implemented* all of the recommendations that were "accepted." "Acceptance" of a recommendation is not the same thing as implementing a recommendation.

54. The Certified Record of Proceedings filed with this Court in respect of Richard Cross (Court File Number 1101-17315) suggests that at least eight of the Ombudsman's recommendations (Exhibit "J", Affidavit of Stella Hoeksema, filed, pages 53-57) have not been implemented. Specifically, the Certified Record of Proceedings suggests that the Ombudsman's recommendations 16, 17, 18, 19, 32, 33, 34 and 35 were not implemented when the OOCHS Committee and the OOCHS Appeal Panel handled the out-of-country funding application of Richard Cross. This is explained at paragraph 14 of the Reply Brief of Richard Cross, filed in response to the written submissions of the Out-of-Country Health Services Appeal Panel.

K. The OOCHS regime is not an effective "safety valve"

55. In *Chaoulli*, the dissenting Justices described out-of-country health services as a "safety valve" for individuals forced to wait too long for surgery (*Chaoulli*, paragraphs 224 and 264). The existence of a well-functioning "safety valve" was central to the dissent's willingness to justify the violation of the section 7 right to life and security of the person, under the second part of the section 7 test.

56. However, the experiences of Darcy Allen and Richard Cross, along with the government's evidence provided by Stella Hoeksema in her Affidavit and in the transcripts of the questioning on her Affidavit, demonstrate that the OOCHS Committee does not function as a useful or effective "safety valve" for Albertans who are in a great deal of pain, and who must wait for *years* to receive medically necessary surgery.

57. In and of itself, the *OOCHS Regulation* does not violate the Applicant's section 7 right to life, liberty and security of the person, because the government has no obligation to ensure that citizens enjoy or benefit from their section 7 rights. The government's only obligation is to

refrain from violating section 7 rights. The government has no obligation to provide any and all health services that patients may desire.

L. Darcy Allen's decision not to apply for out-of-country funding

58. Alberta argues (at paragraph 4 and elsewhere) that because Darcy Allen did not apply for out-of-country funding for the surgery he obtained and paid for in Montana, there is no causal connection between the *Out-of-Country Health Services Regulation* and the breach of security of the person under Section 7. Alberta's argument ignores the fact that the Alberta government told Darcy Allen (and also tells other patients) that "the time a person has been waiting for a medical procedure is not a factor considered by the OOCHS Committee." (Affidavit of Wendy Stiver, filed, paragraph 10; Affidavit of Lisa Thompson, filed, paragraph 10). [emphasis added]

59. It is disingenuous on the government's part to deliberately inform Albertans that "the time a person has been waiting for a medical procedure is not a factor considered by the OOCHS Committee," and to omit any reference to wait times from the public *Information Sheet*, and then fault Darcy Allen for failing to make an application to the OOCHS Committee. The government's own evidence makes it abundantly clear that Albertans waiting for surgery are actively dissuaded from attempting to apply for out-of-country funding on grounds that their painful waiting times are too long.

60. In relation to Darcy Allen's medically necessary orthopaedic surgery, the Chair of the OOCHS Committee, who oversees all applications made by patients for out-of-country funding, avers that she has no knowledge of her Committee ever looking at the expert opinion of the Canadian Orthopedic Association that patients should wait no more than six months to undergo surgery (transcript of the questioning of Stella Hoeksema, May 30, filed, 17:8-18:26).

61. Darcy Allen was advised to obtain surgery by Dr. Bouchard in May of 2009, after having already lived in a state of significant pain for a year or longer. Darcy Allen was told that he would need to wait twelve months to receive a discogram, and that he could not get onto a surgery waiting list until after receiving the discogram (Affidavit of Darcy Allen, filed,

paragraph 18). Upon receipt of the discogram, no surgery was available to Darcy Allen for a further twelve months (Affidavit of Darcy Allen, filed, paragraphs 25-27).

62. The failure of the OOCHS Committee to consider the six-month maximum wait for surgery that is recommended by the Canadian Orthopedic Association further confirms that an application by Darcy Allen for out-of-country funding to obtain his orthopaedic surgery in a timely fashion would very likely have failed. If Darcy Allen had contacted the OOCHS Committee about having to wait twelve months to obtain a discogram followed by a further twelve-month wait for surgery, the OOCHS Committee would not have considered – or applied – the six-month maximum wait time stipulated by the Canadian Orthopedic Association.

63. At paragraph 87 of its Brief, Alberta states that the OOCHS Committee has approved applications for out-of-country funding in relation to the musculoskeletal system, which includes the spine. Alberta appears to suggest that Darcy Allen's application may have been approved if he had applied. Yet the OOCHS Chair was not able to explain what kinds of surgeries the musculoskeletal system might refer to (transcript of questioning of Stella Hoeksema, filed, 6:16-7:3), or why the approval rate for musculoskeletal applications was less than half of the approval rate for other applications (transcript of questioning of Stella Hoekesema, filed, 12:8-13:1).

64. While it will never be known *with absolute certainty* whether Darcy Allen's application would have been approved or denied, the evidence before this Court strongly suggests that his application would have been denied, for the following reasons:

- Alberta Health employees told Darcy Allen (and other callers) that wait times are not considered as a factor by the OOCHS Committee;
- The *Out-of-Country Health Services Committee Information Sheet*, which contains all of the important information that the public needs to know, makes no mention of excessive waits as a possible ground or reason for making an application for out-of-country funding;
- The OOCHS Committee does not track wait times as a criterion in applications;

- There is no such thing as a wait time considered "reasonable" by the "medical community";
- The OOCHS Committee has not considered (and therefore has not applied) the expert opinion of the Canadian Orthopedic Association that patients should not wait longer than six months for surgery; and
- The rate of approval for applications related to the musculoskeletal system is less than half of the rate of approval for other kinds of treatments.

65. The evidence suggests that the OOCHS scheme is not functioning effectively as a "safety valve," thereby undermining one of the factors which influenced the dissenting Justices in *Chaoulli* to uphold the prohibition on private health insurance.

M. Private payment for medically necessary MRIs reveals more than one tier of health care

66. At paragraph 76 of its Brief, Alberta argues that Darcy Allen "was not deprived of his MRIs and accordingly his right to security of the person was not breached."

67. Here Alberta raises a proverbial "straw dummy", because Darcy Allen does not allege that (1) he was "deprived of MRIs" or that (2) this alleged deprivation breached his section 7 right to security of the person. Rather, Darcy Allen was deprived of his section 7 right to security of the person by being forced to wait in a state of severe pain for *years* for necessary orthopaedic surgery within the government's "virtual monopoly". Darcy Allen was legally prohibited from buying private health insurance to access health services (i.e. orthopaedic surgery) outside of the government's system with its lengthy waiting lists.

68. Darcy Allen paid approximately $750 in January 2008 to receive a medically necessary MRI which his physician Dr. Flayne Byam said was needed (Affidavit of Darcy Allen, filed, paragraph 5). Darcy Allen did so in order to avoid a wait of six to eight months within the government's "virtual monopoly" for that same doctor-mandated MRI. Lengthy wait times for medically necessary MRIs (see Exhibit "I", Affidavit of Marie Lyle, filed) delay access to

treatment, and thereby inflict significant suffering on those who are unable to afford $750 for *timely access* to a medically necessary MRI. While paying out-of-pocket for a timely MRI might not violate a person's section 7 right to life, liberty and security of the person, it does demonstrate that the government's health care system already has more than one tier.

All of which is respectfully submitted.

DATED this 19th of June, 2013.

John V. Carpay
Counsel for the Applicant Darcy Allen