COURT OF APPEAL OF ALBERTA

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COURT OF APPEAL FILE NUMBER:	1401-0150AC
TRIAL COURT FILE NUMBER:	1101-17169
REGISTRY OFFICE:	Calgary
PLAINTIFF/APPLICANT:	DARCY ALLEN
STATUS ON APPEAL:	Appellant
DEFENDANT/RESPONDENT:	HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA
STATUS ON APPEAL:	Respondent

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COURT OF APPEAL
CALGARY

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

FACTUM OF THE RESPONDENT
HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

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For the Appellant

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I. Statement of Facts

1. The Appellant brought an application alleging that Alberta's prohibition on private insurance, s. 26(2) (Prohibition) of *Alberta Health Care Insurance Act*[1] (AHICA) violated his s.7 *Charter* rights. He sought as relief a declaration entitling him to sue for damages resulting from this breach. He relied heavily on *Chaoulli* v. *Quebec (Attorney General)*[2] for evidence.

2. The Chambers Judge ruled that the Appellant failed to establish a breach of his right to life, liberty or security of the person, the first of two hurdles facing the Appellant. Therefore, there was no reason to address the second hurdle, whether or not the breach was in accordance with principles of fundamental justice.

3. The Chambers Judge found there was no evidence:

   a. causally connecting the Appellant's wait time experience in the Alberta health care system with the Prohibition by showing his wait time to be longer than it otherwise would because of the Prohibition, or shorter absent the Prohibition;[3]

   b. allowing a conclusion that the absence of a Prohibition in Montana precipitated greater efficiency in the Montana health care system;[4] and

   c. demonstrating that the surgery was not available at all in Alberta within a comparable time, or that he made reasonable efforts to that end from which an inference favourable to him might be drawn.[5]

   The Chambers Judge ruled that the Appellant advanced two theories, both unsupported by evidence. First, the Prohibition creates or exacerbates wait times thereby preventing access to health care.[6] Second, absent the Prohibition,

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[1] *Alberta Health Care Insurance Act* , R.S.A. 2000, c. A-20
[2] *Chaoulli* v. *Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791 (Appellant's Authorities, Tab 1]
[3] *Allen* v. *Her Majesty the Queen*, 2014 ABQB 184, paragraph 49, 50, AR F1 – F11
[4] *Allen, supra*, paragraph 51, AR F1 – F11
[5] *Allen, supra*, paragraph 52, AR F1 – F11
[6] *Allen, supra*, paragraph 53, AR F1 – F11

private health insurance would have offered coverage for the risk of needing lumbar disc replacement surgery, that he would have been eligible for such coverage and that he would have opted to pay for such coverage.[7]

II. Grounds of Appeal

4. Ground No 1: The Chambers Judge was correct in law in not applying the Supreme Court of Canada's decision in *Chaoulli v. Quebec*.

5. Ground Nos. 2 & 3: The Trial Judge reasonably considered all the evidence in finding there was no s. 7 *Charter* violation.

III. Standard of Review

6. Ground No. 1 alleges *Chaoulli* is binding on the principle of *stare decisis*. This is a question of law and reviewable on the standard of correctness.

7. Grounds Nos. 2 and 3 allege errors of fact and errors of mixed fact and law. The standard of review for the findings of fact, whether adjudicative, social, or legislative, including inferences, is palpable and overriding error. The standard of review for mixed fact and law is palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law.

Bedford, paragraphs 53 to 56
Housen v. Nikolaison, paragraph 26, 27, 37

IV. Argument

Ground 1:

A. *Chaoulli v. Quebec*: A *Quebec Charter* Case Not Binding on *Allen*

8. The Chambers Judge was correct in declining to consider the evidence in *Chaoulli* as binding on him. As he correctly observed the Court went out of its way in ruling that its decision was based on the record before it.[8]

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[7] *Allen, supra*, paragraph 53, AR F1 – F11

9. Beyond the issue of evidence the legal outcome is not binding for three additional reasons. First, *Chaoulli* was decided by a four-three majority on the *Quebec Charter*, not the *Canadian Charter*. Second, the six justices addressing the *Canadian Charter* were evenly divided on the meaning of "arbitrary" when applied in the context of principles of fundamental justice. The result was that they divided evenly on whether or not the Quebec prohibition on private insurance was arbitrary. Third, these six justices were evenly divided on whether the wait times engaged a principle of fundamental justice.

10. *Quebec, not Canadian Charter*: Deschamps J.ruled, based on the witnesses at trial, that the Quebec legislative prohibition on private insurance, when health care was not accessible due to wait lists, violated the Applicant's right to life and security of the person under s.1 of the *Quebec Charter*. Deschamps J. cautioned that while similarities between the *Quebec* and *Canadian Charters* exist they are not identical.[9]

11. The distinctions outlined by Deschamps J. preclude an identical outcome for *Allen* under the *Canadian Charter*:

    a. The *Canadian Charter* is neither an ordinary statute nor an extraordinary statute like the *Canadian Bill of Rights*, R.S.C.1985, App. 111. It is part of the *Constitution*. In contrast the *Quebec Charter* is a legislative product of Quebec's National Assembly. It has a broad scope, applying to relationships between individuals, and between individuals and the state. It protects not only the fundamental rights and freedoms, but also certain civil, political, economic and social rights[10].

    b. The most obvious distinction is the absence of any reference to the principles of fundamental justice in s.1 of the *Quebec Charter*. The question of whether or not the protection afforded by s. 7 of the *Canadian Charter* is limited to

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[8] *Allen, supra*, paragraphs 43, 44, 46, 47, 48, AR F1 – F11
[9] *Chaoulli, supra*, paragraph 28, Appellant's Authorities Tab 1
[10] *Chaoulli, supra*, paragraphs 33, 25, Appellant's Authorities Tab 1

situations involving the administration of justice does not arise in the context of the *Quebec Charter.*[11]

c. Under s. 7 the claimant bears a dual burden of proving first, that a deprivation of the right to life, liberty and security of the person has occurred and, second, that the deprivation is not in accordance with the principles of fundamental justice.[12]

d. The effect of placing this burden on the claimant is that it makes his or her task more onerous. There is no such dual burden of proof under the *Quebec Charter* because the principles of fundamental justice are not incorporated into s.1 of the *Quebec Charter.* For this reason, the *Quebec Charter* has a scope that is potentially broader.[13]

e. The scope of s. 1 is broad, applying to relationships between individuals, and between individuals and the state.[14]

f. Section 1 of the *Quebec Charter* includes the right to inviolability and freedom, and makes no mention of the right to liberty. The protection of the right to personal inviolability is a very broad right. The meaning of "inviolability" is broader than the meaning of the word "security" used in s.7 of the *Canadian Charter.*[15]

g. Justices Binnie, LeBel and Fish also noted the differences between s.9.1 of the *Quebec Charter* and s.1 of the *Canadian Charter*, the former requiring "proper" regard to "democratic values, public order and general well-being of the citizens of Quebec".[16]

12. Dechamps J. was clear in confining her ruling to the *Quebec Charter:*

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[11] *Chaoulli, supra*, paragraphs 29, 33, Appellant's Authorities Tab 1
[12] *Chaoulli, supra*, paragraph 29, Appellant's Authorities Tab 1
[13] *Chaoulli, supra*, paragraph 30, Appellant's Authorities Tab 1
[14] *Chaoulli, supra*, paragraph 33, Appellant's Authorities Tab 1
[15] *Chaoulli, supra*, paragraph 41, Appellant's Authorities Tab 1
[16] *Chaoulli, supra*, paragraph 269, Appellant's Authorities Tab 1

> Because I conclude that the *Quebec Charter* has been violated, it will not be necessary for me to consider the arguments based on the *Canadian Charter*.[17]
>
> The three preliminary objections are therefore dismissed. I will now turn to the analysis of the infringement of the rights protected by s.1 of the *Quebec Charter*.[18]
>
> For these reasons, I would allow the appeal with costs throughout and would answer the
>
> Question 1: Does s.11 of the Hospital Insurance Act, R.S.Q., c. A-28, infringe the rights guaranteed by s.1 of the *Quebec Charter*?
>
> Answer: Yes.
>
> Question 2: If so, is the infringement a reasonable limit prescribed by law as can demonstrably justified in a free and democratic society under s.9.1 of the *Quebec Charter*?
>
> Answer: No.
>
> Question 3: Does s.15 of the Health Insurance Act, R.S.Q., c. A-29, infringe the rights guaranteed by s.1 of the *Quebec Charter*?
>
> Answer: Yes.
>
> Question 4: If so, is the infringement a reasonable limit prescribed by law as can demonstrably justified in a free and democratic society under s.9.1 of the *Quebec Charter*?
>
> Answer: No

13. *Definition of Arbitrary*: Chief Justice McLachlin, along with Justices Major and Bastarache, defined "arbitrary" as, bearing no relation to, being inconsistent with, being manifestly unfair, or unnecessary to assure the law's objectives.[19]

14. They found, based on the evidence at trial, that the Quebec prohibition on private insurance was arbitrary because other developed countries with public health care systems permit access to private health care. In other words, it was

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[17] *Chaoulli, supra*, paragraph 15, Appellant's Authorities Tab 1
[18] *Chaoulli, supra*, paragraph 36, Appellant's Authorities Tab 1
[19] *Chaoulli, supra*, paragraphs 130, 132, 133, Appellant's Authorities Tab 1

unnecessary. Accordingly the prohibition was not in accordance with the principles of fundamental justice.

15. In contrast, Justices Binnie, LeBel, and Fish found that Quebec's prohibition against private health insurance was not arbitrary but rather a rational consequence of Quebec's commitment to the goals and objectives of the *Canada Health Act.*[20]

16. Justices Binnie, LeBel, and Fish approached the issue of "arbitrariness" in three steps: (i) what is the "state interest" to be protected; (ii) what is the relationship between the "state interest" and the prohibition against private health insurance; and, (iii) have the applicants established that the prohibition bears no relation to, or is inconsistent with, the state interest.[21]

17. They found that Quebec (along with the other provinces and territories) subscribes to the policy objectives of the *Canada Health Act.* This includes (i) the equal provision of medical services to all residents, regardless of status, wealth or personal insurability, and (ii) fiscal responsibility.[22]

18. As for relationship, in principle, Quebec wants a health system where access is governed by need rather than wealth or status. Quebec does not want people who are uninsurable to be left behind. To accomplish this objective endorsed by the *Canada Health Act*, Quebec seeks to discourage the growth of private-sector delivery of "insured" services based on wealth and insurability. The prohibition is rationally connected to Quebec's objective and is not inconsistent with it.[23]

19. After reviewing all of the evidence they agreed with the conclusion of the trial judge and the Quebec Court of Appeal that in light of the legislative objectives of the *Canada Health Act* it is not "arbitrary" for Quebec to discourage the growth of private sector health care. Prohibition of private health insurance is directly related to Quebec's interest in promoting a need-based system and in ensuring

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[20] *Chaoulli, supra*, paragraph 233, Appellant's Authorities Tab 1
[21] Chaoulli, supra, paragraph 235, Appellant's Authorities Tab 1
[22] *Chaoulli, supra*, paragraph 236, Appellant's Authorities Tab 1
[23] *Chaoulli, supra*, paragraphs 239 - 241, Appellant's Authorities Tab 1

its viability and efficiency. Prohibition of private insurance is not "inconsistent" with the state interest; still less is it "unrelated" to it.[24]

20. *Wait Lists – No Principle of Fundamental Justice*: Beyond this Justices Binnie, LeBel, and Fish found no principle of fundamental justice was dispositive of the problems of waiting lists in the Quebec health system.[25]

21. They reviewed the three formal requirements of a principle of fundamental justice:[26]

(i) It must be a legal principle;

(ii) The reasonable person must regard it as vital to our societal notion of justice, implying a significant societal consensus; and

(iii) It must be capable of being identified with precision and applied in a manner that yields predictable results.

22. They found these requirements were insurmountable hurdles to the appellants. The "aim of health care to a reasonable standard within reasonable time" is not a legal principle. There is no "societal consensus" about what it means or how to achieve it. It cannot be "identified with precision" and it would be very difficult to predict when its provisions cross the line form what is "reasonable" into the forbidden territory of what is "unreasonable" and how one is to be distinguished from the other. [27]

23. The evidence in *Chaoulli* showed that there was no consensus about what constitutes "reasonable" wait times.[28] The evidence was not clear or obvious that a reorganization of the health system with a parallel private system would solve all the existing problems of delays or access.[29] There was a lack of accurate data

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[24] *Chaoulli, supra*, paragraphs 242, 256, 257, 263, Appellant's Authorities Tab 1
[25] *Chaoulli, supra*, paragraphs 164, 167, 168, 201, Appellant's Authorities Tab 1
[26] *Chaoulli, supra*, paragraph 208, Appellant's Authorities Tab 1
[27] *Chaoulli, supra*, paragraph 209, Appellant's Authorities Tab 1
[28] *Chaoulli, supra*, paragraph 212, Appellant's Authorities Tab 1
[29] *Chaoulli, supra*, paragraph 215, Appellant's Authorities Tab 1

regarding the wait list problem.[30] It was difficult to generalize about the potential impact of a waiting list on a particular patient.[31] As wait times are not only found in public systems, they are found in all health care systems, whether single-tier private, single-tier public, or the various forms of two-tier public/private. The consequences of a quasi-unlimited demand for health care coupled with limited resources, whether public or private, is to ration services.[32] The Justices agreed with the trial judge that based on the evidence and the expansion of private health care would undoubtedly have a negative impact on the public health system.[33]

24. The Justices raised the question of who should be allowed to "jump the queue". In a public system founded on the values of equity, solidarity and collective responsibility, rationing occurs on the basis of clinical need rather than wealth and social status. The evidence also showed that persons who are in greater need are prioritized and treated before those with a lesser need. Where there are exceptions, they can and should be addressed on a case-by-case basis.[34] Section 10 of Quebec's *Health Insurance Act* provided for public funding for Out-of-Province medical care. If administered properly, this "safety valve" provided for an individual remedy and an important element of flexibility.[35]

25. From the above it is clear that, in addition to the Chambers Judge's finding that the *Chaoulli* evidence was not binding on him, there is no binding legal principle arising from *Chaoulli* based on the *Canadian Charter*.

B. *Morgentaler, Bedford, PHS Community* do Not Advance the Appellant's Case

26. The three cases relied on by the Appellant to argue *Chaoulli* is binding are in fact not helpful to him.

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[30] *Chaoulli, supra*, paragraph 215, Appellant's Authorities Tab 1
[31] *Chaoulli, supra*, paragraph 220, Appellant's Authorities Tab 1
[32] *Chaoulli, supra*, paragraph 221, Appellant's Authorities Tab 1
[33] *Chaoulli, supra,* paragraph 242, Appellant's Authorities Tab 1
[34] *Chaoulli, supra*, paragraph 232, Appellant's Authorities Tab 1
[35] *Chaoulli, supra*, paragraph 224, Appellant's Authorities Tab 1

27. *Morgentaler:*[36] The six justices in *Chaoulli* considering s. 7 of the *Canadian Charter* were evenly split on the relevance and applicability of *Morgentaler*.

28. Chief Justice McLachlin and Justices Major and Bastarache relied on *Morgentaler* to find in *Chaoulli* both a violation of security of the person and a breach of fundamental principles of justice. In *Chaoulli* the delays in treatment giving rise to psychological and physical suffering engaged the s. 7 protection of security of the person. In both cases care outside the legislatively provided system was effectively prohibited.[37] They also looked to *Morgentaler* for the meaning of "arbitrary" when applying the principle of fundamental justice that laws should not be arbitrary. In *Morgentaler*, "arbitrary" included laws that were "manifestly unfair", unconnected to Parliament's objectives, or unnecessary to assure those objectives were met.[38]

29. In contrast, Justices Binnie, LeBel, and Fish found *Morgentaler*, a case involving criminal liability, inapplicable to *Chaoulli*, a case involving public health policy. They saw no connection between the factual and legal issues in the criminal law at stake in *Morgentaler* and the debate in *Chaoulli* over a two-tiered health system. In addition, they found the "manifestly unfair" test applied in *Morgentaler* to find a breach of a principle of fundamental justice had never been adopted outside the criminal law context. Further, the judgment in *Morgentaler* turned on internal inconsistencies in s. 251 of the *Criminal Code*, which had no counterpart in the *Chaoulli* case. In the latter, no principle of fundamental justice was engaged by the problems of waiting lists.[39]

30. While they agreed with McLachlin C.J., Major J. and Bastarache J., that a law is arbitrary if "it bears no relation to, or is inconsistent with, the objective that lies behind [the legislation]", they did not agree that the prohibition on private health insurance was caught by this definition. In addition, they disagreed with

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[36] *R.* v. *Morgentaler*, 1988 CarswellOnt 45, [1988] 1 S.C.R. 30, Appellant's Authorities Tab 3
[37] *Chaoulli*, *supra*, paragraph 118, Appellant's Authorities Tab 1
[38] *Chaoulli*, *supra*, paragraph 232, Appellant's Authorities Tab 1
[39] *Chaoulli*, *supra*, paragraphs 167, 180, Appellant's Authorities Tab 1

expanding the *Morgentaler* principle to invalidate a prohibition because a court believes it to be "unnecessary" for government's purpose.[40]

31. To substitute the term "unnecessary" for "inconsistent" is to substantively alter the meaning of the term "arbitrary". "Inconsistent" means that the law logically contradicts its objectives, whereas "unnecessary" simply means that the objective could be met by other means. It is quite apparent that the latter is a much broader term that involves a policy choice. If a court were to declare unconstitutional every law impacting "security of the person" that the court considers unnecessary, there would be much greater scope for intervention under s. 7 than has previously been considered by this Court to be acceptable.[41]

32. *Morgentaler* invoked a principle of "manifest unfairness", not "arbitrary" or "arbitrariness".[42] *Morgentaler* triggered a criminal sanction not found in the context of *Chaoulli*.[43] The *Morgentaler* case turned on a statutory analysis, rather than re-weighing of expert evidence in *Chaoulli*. [44]

33. *PHS Community* Services: The Court in *PHS Community* Services acknowledged the unsettled jurisprudence regarding the definition of "arbitrary". It did not have to settle this dispute as the government action being challenged qualified as arbitrary under both definitions of "arbitrary". [45]

34. *Bedford*:[46]: The common law principle of *stare decisis* was live in the *Bedford* case because two of the three *Criminal Code* provisions being challenged had previously been considered and upheld in 1990 by the Supreme Court in the *Prostitution Reference*. In the *Prostitution Reference* a s. 7 *Charter* challenge to two *Criminal Code* provisions resulted in the Court upholding those provisions. (The *Prostitution Reference* also considered s. 2(b) of the *Charter*.) The

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[40] *Chaoulli*, *supra*, paragraph 233, Appellant's Authorities Tab 1
[41] *Chaoulli*, *supra*, paragraph 234, Appellant's Authorities Tab 1
[42] *Chaoulli*, *supra*, paragraph 269, Appellant's Authorities Tab 1
[43] *Chaoulli*, *supra*, paragraph 260, Appellant's Authorities Tab 1
[44] *Chaoulli*, *supra*, paragraph 262, Appellant's Authorities Tab 1
[45] *PHS Community Services v. Canada (A.G.)*, 2011 CarswellBC 2443, [2011] 3 S.C.R. 134, paragraph 132, Appellant's Authorities Tab 4
[46] *Bedford* v. *Canada*, 2013 CarswellOnt 17681, [2013] S.C.R. 1101, Appellant's Authorities Tab 2

challenge in *Bedford* to the same two *Criminal Code* provisions was also based on s. 7 of the *Charter*, triggering the issue of whether or not the *stare decisis* principle precluded judicial review. The Court allowed the challenge in *Bedford* because it raised the issue of whether or not the *Criminal Code* provisions violated the security of the person interests under s. 7 whereas the *Prostitution Reference* was based on the s. 7 physical liberty interest. In addition, the principles of fundamental justice had evolved since the *Prostitution Reference*.[47]

35. The *Allen* case does not trigger the *stare decisis* principle because *Chaoulli* was decided on the *Quebec Charter* and the *Allen* case is based on the *Canadian Charter*. These *Charters*, while sharing some similarities, have significant differences, particularly between s. 7 of the *Canadian Charter* and s. 1 of the *Quebec Charter*.

36. The Chambers Judge was correct in not applying *Chaoulli* as binding precedent.

Ground 2

37. The Chambers Judge found the Appellant had not demonstrated, on a balance of probabilities, a sufficient causal connection between to support an alleged violation of his s. 7 *Charter* rights.[48] There is no basis to overturn this decision as a palpable and overriding error.

A. Required Causal Connection

38. The Court in *Bedford* established "sufficient causal connection" as the standard for proving breach of s. 7 *Charter* claims, as opposed to a higher standard of "foreseeable and necessary" cause of prejudice. The sufficient causal connection is (i) flexible, allowing the circumstances of each particular case to be taken into account; and, (ii) *requires a* real, *as opposed to speculative, link.*[49]

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[47] *Bedford*, *supra*, paragraphs 42, 44, 45, Appellant's Authorities Tab 2
[48] *Allen*, *supra*, paragraph 55, AR F1 – F11
[49] *Bedford*, *supra*, paragraphs 75, 78, citing *Blencoe* and other cases, Appellant's Authorities Tab 2

39. The *Khadr* decision was held out as an example of what "sufficient causal connection"[50] In *Khadr*, the Court found a sufficient causal connection between the Canadian Government's participation in the interviews of Mr. Khadr and his deprivation of life and security of the person. This finding was based on a number of interconnected factors:

a. During repeated questioning of Mr. Khadr by CSIS officials about central events at issue in his prosecution interviews, statements were extracted that could potentially prove inculpatory in the U.S. proceedings against him;

b. The report of the Security Intelligence Review Committee indicated that CSIS assessed the interrogations of Mr. Khadr as being "highly successful, as evidenced by the quality of intelligence information" elicited from him;

c. These statements were shared with U.S. authorities and summarized in U.S. Investigatory reports;

d. Mr. Khadr's statements to Canadian officials were potentially admissible against him in the U.S. proceedings due to U.S. legislation;

e. The CSIS interrogations provided the context for the DFAIT interrogation; and

f. In addition, the Court noted that at the time of Canada's active participation, the U.S. regime was illegal.

40. Based on these factors it was reasonable for the Court to infer that the statements taken by Canadian officials contributed to the continued detention of Mr. Khadr thereby impacting his liberty and security interests.

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[50] *Bedford*, *supra*, paragraph 76, Appellant's Authorities Tab 2

41. In contrast, the applicant in *Blencoe* failed to demonstrate the necessary causal link between the delays in processing a complaint filed with the B.C. Human Rights Commission and the psychological stress suffered. His life was terribly affected by the allegations of sexual harassment and it could not be said with sufficient certainty that the petitioner would have been able to successfully reconstruct his life if the proceedings had not been delayed.

42. In this appeal there is no evidence meeting the standard of "sufficient causal connection". The theories presented by the Appellant are speculative.

B. Insufficient Evidence

43. As found by the Chambers Judge, the applicant must demonstrate that the prohibition on private insurance prevents access to health care. He found nothing on this record to satisfy that burden. Rather what the record provided was at most speculative inference.

44. The Appellant's evidence is that he heard a comment that the lengthy delay prior to surgery may have caused permanent nerve damage. As found by the Chambers Judge, "[t]hat effect was not proven, only that he heard the comment."[51]

45. Dr. Allen offers only the personal opinion that the availability of private health insurance prior to his events would have provided him with timely health care.[52]

46. The Appellant failed to demonstrate that his surgery was not available at all in Alberta within a comparable time, or that he made reasonable efforts to that end from which an inference favorable to him might be drawn.[53]

47. The Chambers Judge correctly found that reliance by the Appellant on Deschamps J.'s reference to Alberta policy did not bridge the evidentiary gap.[54] Furthermore, the Chambers Judge found that, if anything, the divided court in

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[51] *Allen*, *supra*, paragraph 16, AR F1 – F11
[52] *Allen*, *supra*, paragraphs 41, 42, AR F1 – F11
[53] *Allen*, *supra*, paragraph 52, AR F1 – F11
[54] *Allen*, *supra*, paragraphs 43, 44, AR F1 – F11

Chaoulli was very careful to not have its collective decision be taken as precedent for anything beyond its immediate Quebec context.[55]

48. Reliance by the Appellant on Alberta's evidence also fails to bridge the evidentiary gap. Alberta's evidence consists of wait time initiatives taken in Alberta since the *Chaoulli* decision. It does not show evidence of serious adverse physical and psychological consequences, whether caused by the Prohibition or from wait times *per se.*

49. Even considering the *Chaoulli* case, as noted by Justices Binnie, LeBel, and Fish, wait times are experienced in all health care systems, whether single-tier private, single-tier public, or the various forms of two-tier public/private.[56]

50. The Court expects evidence to be presented through an expert witness and assessed by the trial judge.[57]

51. No expert evidence was introduced in support of his alleged violation of s. 7 Charter rights. This stands in stark contrast to the considerable evidence lead at trial in *Chaoulli.*[58]

C. Proper Analytic Approach

52. The Chambers Judge was correct in acknowledging the broader context when considering a challenge to a specific legislative provision.[59]

53. In *PHS Community Services* the Court confirmed that challenges to legislative provisions based on s. 7 *Charter* rights must not be considered in isolation. They must be considered in the context of the scheme as a whole. In *PHS Community Services* the context included a Ministerial exemption if it was necessary for a medical or scientific purpose or was otherwise in the public interest. The Court

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[55] *Allen, supra*, paragraph 47, AR F1 – F11
[56] *Chaoulli, supra*, paragraphs 165, 221, Appellant's Authorities Tab 1
[57] *Bedford, supra*, paragraph 53, Appellant's Authorities Tab 2
[58] *Chaoulli, supra*, paragraphs 111-177, 37, 45, Appellant's Authorities Tab 1
[59] *Allen, supra*, paragraph 45, AR F1 – F11

considered the availability of the exemption to act as a safety valve that prevented the CDSA from applying where such application would be arbitrary.[60]

54. In *Chaoulli* Justices Binnie, Lebel, and Fish considered the Quebec reimbursement scheme for out-of-province services a form of safety valve for situations in which Quebec facilities are unable to respond.[61]

55. Alberta has a similar safety valve, the *Out-of-Country Health Services Regulation*, A.R.78/2006[62]. The Appellant never applied for out-of-country coverage. As a result, we are deprived of the benefit of the Chambers Judge's decision concerning the OOCHS Regulation.

56. The findings of the Chambers Judge that the Appellant has failed to prove a breach of his s.7 *Charter* rights on a balance of probabilities is reviewable on a standard of palpable and overriding error.[63]

57. No palpable and overriding error exists.

Ground 3

Evidence Properly Applied

58. The Appellant's complaint, while seeking in the alternative a declaration of invalidity under s. 52 of the *Constitution Act, 1982*, was very much an individual complaint. His primary remedy sought was the right to commence an action to prove damages:

> A declaration, under Section 24 of the *Canadian Charter of Rights and Freedoms*, that Dr. Allen is entitled, in a different and separate court action, to seek damages for reimbursement of the expenses he incurred to obtain medically necessary services in a timely fashion out-of-country, and to seek damages for irreparable harm to his health that have been caused by the delays in obtaining necessary surgery.[64]

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[60] *PHS Community Services, supra* paragraphs 109, 112, 113, Appellant's Authorities Tab 4
[61] *Chaoulli, supra*, paragraph 224, Appellant's Authorities Tab 1
[62] *Out-of-Country Health Services Regulation*, A.R.78/2006, Appellant's Authorities Tab 7
[63] *Bedford, supra*, paragraph 53, Appellant's Authorities Tab 2, *Carter* v. *Canada (AG),* 2015 SCC 5, paragraph 109, Appendix to Alberta's factum
[64] *Allen, supra*, paragraph 1, Appellant's Authorities, Originating Application, Remedy Sought, AR P3

59. The Appellant never sought public interest standing nor advanced evidence of systemic *Charter* violations of the broader public interest. Had he been granted public interest standing his application would fail for lack of evidence as discussed under Ground 2 above.

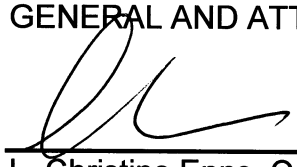
60. The Chambers Judge made no palpable and overriding error.

V. RELIEF SOUGHT

61. For all of the reasons above, Alberta respectfully requests that this appeal be dismissed.

All of which is respectfully submitted this 23rd day of February, 2015.

ALBERTA JUSTICE AND SOLICITOR
GENERAL AND ATTORNEY GENERAL



L. Christine Enns, Q.C.
Counsel for Her Majesty the Queen
in right of Alberta

Estimated time of argument: 45 minutes

Table of Authorities

Alberta relies solely on the Cases and Statutes cited by the Appellant in their Book of Authorities: