Court of Queen's Bench of Alberta

Citation: Allen v Her Majesty the Queen, 2014 ABQB 184

Date:
Docket: 1101 17169
Registry: Calgary

Between:

Darcy Allen

Applicant

- and -

Her Majesty the Queen in Right of Alberta

Respondent

Memorandum of Decision
of the
Honourable Mr. Justice P.R. Jeffrey

Introduction

[1] Dr. Allen applied for a declaration that the prohibition on private health insurance in Alberta is unconstitutional, because he said it infringed his right to life, liberty and security of his person protected by s. 7 of the *Charter of Rights and Freedoms*. He also asked for a declaration that he is entitled to sue for damages resulting from those infringing delays.

Facts: Dr. Allen's Medical Condition, Wait Times and Treatment

[2] Dr. Allen was 36 years old and a dentist in Alberta when, on December 23, 2007, he injured his right knee and lower back. He experienced pain in his right knee immediately. Pain developed over time in his lower back, ultimately becoming severe.

[3] After a number of months of physiotherapy and pain medication during 2008, Dr. Allen was told that it would take another six to eight months to receive an MRI of his back because of the waitlist in Alberta for access to that procedure.

[4] He paid for the MRI himself in order to avoid the wait. In September 2008 the MRI revealed bulging and degeneration of lumbar discs.

[5] Dr. Allen began seeing a physiotherapist for his back pain in October 2008 and tried acupuncture treatments.

[6] His family doctor referred Dr. Allen to a specialist in December 2008. He met with the specialist in April 2009 who prescribed Lyrica for nerve pain. It did not alleviate his pain, but its side effects affected his ability to work at his dental practice and function generally. He gradually decreased his workload.

[7] Dr. Allen underwent "facet injections" in February and April 2009. These injections helped alleviate Dr. Allen's pain to a degree but only for a short period, less than a few weeks.

[8] In May 2009 his specialist recommended back surgery. He would have to wait a year for a pre-requisite "discogram" and then another year for the surgery. He would be able to receive the surgery in June 2011.

[9] Dr. Allen hired an associate to offload some of his dental work.

[10] In June 2009 Dr. Allen went to the hospital for severe back spasms. Another MRI was performed which revealed further degradation and herniation of his lumbar discs.

[11] A few days later, on June 22, 2009, Dr. Allen met with a specialist in Montana. A new MRI was taken. Surgery was recommended, specifically a two-level disc replacement at L4/5 and L5/S1.

[12] Dr. Allen ceased working at his dental practice entirely in July 2009 due to his back pain. It was severe, debilitating and constant.

[13] Dr. Allen contacted the Alberta Health Minister's office and managed to obtain a discogram appointment in September 2009, not the year he was otherwise facing. The discogram occurred September 10, 2009. It also confirmed the abnormalities in the L4/L5 and L5/S1 discs.

[14] Rather than wait the year following his discogram for his surgery, Dr. Allen arranged to have surgery in December 2009 with the specialist in Montana. He later cancelled it because the surgery in Alberta also became available in December 2009. However as the date approached, it was cancelled and re-set for June 2011.

[15] Dr. Allen was able to revive his booking in Montana. He paid for the surgery himself and underwent the surgery in Montana in December 2009.

[16] Following surgery Dr. Allen's pain gradually decreased. On February 17, 2010 he was informed that the length of time transpiring between his injury and the surgery may have left him with permanent nerve damage. That effect was not proven, only that he heard the comment.

[17] Dr. Allen sold his dental practice between March and June, 2010, and is still unable to practice dentistry due to the negative side effects of his pain medication.

[18] Dr. Allen was not able to purchase private health insurance prior to these events that, he testified, "would have provided me with timely medical care."

[19] I am unable to conclude on this record whether Dr. Allen needed his back surgery before it was recommended to him in May 2009. His back condition did not reveal itself immediately after the injury and the diagnosis along the way was of a degenerative condition. For wait time purposes, therefore, the clock started to run May 2009, at the time of that prescription by his Alberta specialist. His counsel agreed for purposes of this application.

[20] Further, on this record I am unable to conclude that Dr. Allen was delayed in receiving any other medical service beyond a time either convenient to him or that was first medically advisable (for example in receiving an MRI or in seeing a specialist).

[21] In sum, 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 means or initiative to access it in Montana and instead acquiesced to receiving the surgery in Alberta from his specialist when scheduled.

Facts: Alberta Wait Times & Initiatives

[22] Alberta implemented recommendations in the *Final Report of the Federal Advisor on Wait Times* (Health Canada, (Ottawa: Health Canada, 2006) (the "**Postl Report**")) by undertaking several wait times initiatives, including a tracking website, and primary care networks. The purpose of the Postl Report was to look into what contributed to long wait times and provide recommendations that would help to reduce wait times in Canada.

[23] Dr. Postl was also involved in the Canadian Institute for Health Information's report: *Health Care in Canada, 2012: A Focus on Wait Times* (online: CIHI <http://www.cihi.ca>). The report was an update on a similar report released in 2006, taking advantage of the improved data available regarding wait times since the 2006 report. The report noted, at page 4, that wait times improved most significantly towards the beginning of their tracking, but that improvements slowed in more recent years:

> With improvements in measuring and reporting wait times, progress can now be tracked for many priority procedures. Certainly the largest gains in wait time reductions were observed in the first years following the start of the 10-Year Plan; in most recent years, the gains have levelled off for the majority of procedures. Overall, by 2011, about 80% of Canadians were receiving priority procedures within the benchmark time frames; across the provinces, however, variation remains… [Citations omitted]

[24] The report found that Canada continued to "fare poorly compared with other countries on access to primary care. Similarly, access to a specialist remains a challenge, with more Canadians waiting longer than three months for an appointment in 2009 than in 2003."

[25] In regards to patients who required acute care the report found that Canada had relatively long wait times, but that progress was being made in terms of patients receiving the necessary care within allotted benchmarks.

[26] From 2008 to 2012 Alberta tracked specific medical conditions to ascertain whether treatments were delivered within benchmark times and to identify any trends in those results over time. Disc replacement surgery was not one of the procedures specifically tracked.

[27] The results suggested some gradual improvement. That is, a greater proportion of the hip replacements, knee replacements and radiation therapies had been performed within the benchmark wait time by the end of that period than at the beginning. Proportionately fewer of the cataract surgeries were delivered within the benchmark wait time at the end of the period than the beginning and about the same proportion of hip fracture repairs were performed within the benchmark wait time at the end of the review period as at the beginning.

[28] Alberta's affiant acknowledged that it does not collect information regarding the number of patients on wait lists who are suffering through severe pain or who are unable to carry out their day-to-day activities because of their conditions. It does not know how many Albertans are waiting for various surgeries or what percentage of Albertans on wait lists are prevented, either partially or entirely, from working because of their medical condition.

Statutory Provisions

[29] The *Canada Health Act*, RSC 1985, c C-6 ("***CHA***"), provides the framework under which the health regimes of the provinces operate. Section 3 of *CHA* provides the objective of Canada's health care system:

> 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.

[30] The Alberta prohibition on private health care insurance (the "**Prohibition**") is set out in s. 26(2) of *Alberta Health Care Insurance Act*, RSA 2000, c A-20 ("***AHCIA***"):

> (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.

Charter Provisions

[31] The relevant provisions of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, are as follows:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable time limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> ...

> 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.
>
> ...
>
> 24(1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> ...
>
> 52(1) The *Constitution* of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the constitution is, to the extent of the inconsistency, of no force or effect.

Analysis

[32] Section 7 of the Charter protects against governmental action that deprives an individual of their right to life, liberty or security of the person other than in accordance with a principle of fundamental justice. A two-step process is therefore followed, as set out by La Forest J in ***R v Beare***, [1988] 2 SCR 387 at 401:

> To trigger its operation there must first be a finding that there has been a deprivation of the right to "life, liberty and security of the person" and, secondly, that the deprivation is contrary to the principles of fundamental justice.

[33] The questions before the court therefore become, first, whether the Prohibition has deprived Dr. Allen of life, liberty or security of his person and, if so, second, whether the Prohibition causing that deprivation accorded with a principle of fundamental justice. However Alberta raised as a threshold issue that s. 7 of the Charter does not even apply at all in situations such as these.

1. Is s. 7 of the *Charter* engaged on this issue?

[34] Alberta argued that s. 7 of the *Charter* is not applicable in these circumstances. It said s. 7 applies to the adjudicative context and the administration of justice, but the Prohibition does neither. Therefore, it maintains, a s. 7 analysis is inappropriate.

[35] I disagree. Dr. Allen challenges the constitutionality of the Prohibition, that is, of s. 26(2) of the AHCIA. All legislation must be constitutional. Section 52(1) of the *Charter* states:

> The *Constitution* of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the constitution is, to the extent of the inconsistency, of no force or effect.

[36] In ***Canada (Attorney General) v PHS Community Services Society***, 2011 SCC 44 at para 105, [2011] 3 SCR 134 ("***PHS***"), the Supreme Court of Canada concluded:

> 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.

[37] The Prohibition, s. 26(2) of the *AHCIA*, is therefore subject to *Charter* review.

2. Did the Prohibition deprive Dr. Allen of his right to life, liberty or security of his person?

[38] The "right to life, liberty and security of the person" is not a single right but three separate and distinct rights: ***Singh v Canada (Minister of Employment & Immigration)***, [1985] 1 SCR 177 at 204-5, ***Reference re s 94(2) of the Motor Vehicle Act (British Columbia)***, [1985] 2 SCR 486 at 500, ***Blencoe v British Columbia (Human Rights Commission)***, 2000 SCC 44 at para 48, [200] 2 SCR 307.

[39] Dr. Allen said it was the security of his person in particular that was violated. He did not point to any evidence but relied upon the Supreme Court of Canada decisions in ***Chaoulli v Quebec (Attorney General)***, 2005 SCC 35, [2005] 1 SCR 791 ("***Chaoulli***"), and *PHS*. He believed that *Chaoulli* determined, and PHS made it clear that *Chaoulli* determined, that any statutory prohibition on private health insurance violates the right to security of the person. Therefore, he argued, the only real issue before this court is step two in the section 7 analysis. His counsel put it this way during the hearing:

> But on the first point of whether a prohibition on private health insurance violates the *Charter* section 7 right, the Court in *Chaoulli* was unanimous. We have Justice McLachlin and Major with Bastarache concurring, saying that the prohibition creates a "virtual monopoly" over health care by the government, that people are subjected to painful waiting lists, which threaten their – psychological integrity, which cause physical suffering, that the monopoly rations services and the people who are on waiting lists suffer physically, suffer psychologically and that this constitutes a depravation of the section 7 right to security of the person, Justices McLachlin and Major also held that because people do die on waiting lists, the prohibition on private health insurance violates the right to life.
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> Justice Deschamps concurs expressly, and this is in regards to the *Canadian Charter of Rights and Freedoms*, section 7 right to life. ... Deschamps concurred with the majority's conclusion, holding that the trial judge was correct in finding that the ban on private health insurance violates the right to life, liberty and security of the person guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*. Now, I propose to not go through paragraphs 38, 45, 28, 40 and 100, but those, My Lord, are the references at which Deschamps expressly agreed, not just on the Quebec Charter but the *Canadian Charter of Rights and Freedoms* section 7 right has been violated.
>
> So, we have the court's majority saying that the section 7 -- the prohibition violates the section 7 rights. But, further, it -- it's not just the court's majority, but the dissenting justices, and this is at paragraphs 200 to -- in the *Chaoulli* decision, the dissenting justices at paragraphs 200 through 206 and again at 265 hold that the prohibition violates the *Charter* section 7 right to life and to security of person does not violate --
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> THE COURT: Okay, 200 to 206 and ...

MR. CARPAY: And 265.

THE COURT: 265. Thank you.

MR CARPAY: Those are the paragraphs where the dissent also agrees. So we have a unanimous court saying that prohibition on private health insurance violates the section 7 right, and the only division in the court is on this question of the principles of fundamental justice.

The last point I will raise on this -- on my first argument about the violation, this – there's a case, *PHS Community Services Society v. Canada*. ... I draw My Lord's attention to paragraph 93 --

THE COURT: I have it.

MR. CARPAY: -- at page 36. And this is significant because this is the Supreme Court of Canada's own interpretation of the *Chaoulli* decision. The last sentence on the page -- the last sentence on page 36 states: (as read)

> 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.

And the Court cites there *Morgentaler* and *Rodriguez*, and on the next page cites *Chaoulli* and then goes on to cite the specific references of where Deschamps said that and where McLachlin and Major said that.

And then the last sentence at paragraph 93 I think is pertinent: (as read)

> Where the law creates a risk not just to the health but also to the lives of the claimants, the deprivation is even clearer.

Now, on that point I am not arguing that Darcy Allen's very life was threatened, but that is, in my submission, a reference that ties in with the -- *Chaoulli's* findings that the section 7 right to security of the person is violated, and also the section 7 right to life is violated.

... And in *PHS*, the -- the deciding issue was whether the Minister's refusal to renew the permit for the Insite safe injection site. ... So a very different fact scenario, but I -- I mentioned paragraph 93 because it -- it's the Court's own consideration of *Chaoulli*, saying that where a law denies access to health care, that section 7 -- a deprivation of section 7 security of the person is made out. And so that's further corro -- I mean, a -- apart from the *PHS* case, and my -- my argument's already clear, that the *Chaoulli* court was unanimous on this point, but this is further corroboration that the Supreme Court of Canada itself ... that *Chaoulli* says that a section 7 violation is made out.

THE COURT: And it's your client's position, is it, that specifically section 26(2) interferes with access to medical attention?

MR. CARPAY: Yes, My Lord.

THE COURT: Sorry. By virtue -- that's determined at law by virtue of the Supreme Court of Canada decision in *Chaoulli*, is it?

MR. CARPAY: Yes, My Lord.

...

THE COURT: Okay. And -- and you're saying that finding, that conclusion, unanimously by the Supreme Court of Canada is binding on me in this case? That's --

MR. CARPAY: Yes. Yes, My Lord.

THE COURT: -- part 1 of your argument. Okay. And -- and --

MR. CARPAY: In my submission, it does not need to be --... re-litigated, that -- that particular point. [Transcript page 42, l. 20 - p. 46, l. 8]

[40] I disagree with Dr. Allen's reasoning. Breaches of s. 7 are demonstrated with evidence: *PHS*, *Chaoulli*, ***Blencoe v British Columbia (Human Rights Commission)***, 2000 SCC 44, [2000] 2 SCR 307, ***Canada (Attorney General) v Bedford***, 2013 SCC 72, 366 DLR (4th) 237. Dr. Allen has not satisfied that burden here.

[41] The statement in *PHS* he relied upon ("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.") does not say that all prohibitions of private health insurance infringe the right to security of the person, such that an applicant like Dr. Allen automatically moves to step two in the section 7 analysis. Rather, it says that any law (shown to) prevent access to health care creates a risk to health, which constitutes a deprivation of the right to security of the person. However, an applicant must still demonstrate that a law prevents access to health care. The words at the end of that sentence, "is made out", entail no less. It means that in this case Dr. Allen must demonstrate that the Prohibition prevents access to health care (or in some other way creates a risk to health). He has not done so.

[42] Nothing on this record satisfies that burden. Dr. Allen offers only the personal opinion that the availability of private health insurance prior to his events would have provided him with timely medical care

[43] His counsel also argued, in effect, that the conclusion of Justice Deschamps in *Chaoulli*, at paragraph 72, bridges the evidentiary gap. There Justice Deschamps said that Alberta's policy and Quebec's policy were the same. In describing the policy in Alberta she wrote:

> ... non-participating physicians are free to set the amount of their fees, but the cost of the services is not refunded and contracts for insurance to cover services offered by the public plan are prohibited. This is the same policy as has been adopted by Quebec.

[44] But that was the conclusion of one Justice, not a majority of the seven. That was a conclusion about Alberta's policy as it was then; it may not remain so now. That was a conclusion about Alberta's policy based upon the evidence that was before the trial judge in *Chaoulli*; that record is not before this court. That addressed one policy choice of the Alberta

legislators; it may be the only point of similarity between the policy and legislative choices of two different jurisdictions. That was a statement made by Deschamps, J in the midst of summarizing the expert evidence accepted by the Trial Judge, not a determination about the Alberta Prohibition for the purposes of determining whether a section 7 right had been violated.

[45] The correct interpretation of a statutory provision requires consideration of its fuller statutory context – its scheme, its object and the intention of the legislators: ***Rizzo & Rizzo Shoes Ltd. (Re)***, [1998] 1 SCR 27, at para 21. The similarity of a policy between two jurisdictions does not necessarily mean that their entire statutory regimes, within which those similar policies might be embodied, are also sufficiently similar.

[46] Dr. Allen's evidentiary omission is placed in sharp relief by contrasting it to the following conclusions of McLachlin, CJC and Major J in *Chaoulli*:

> 124 We conclude, based on the evidence, that prohibiting health insurance that would permit ordinary Canadians to access health care, in circumstances where the government is failing to deliver health care in a reasonable manner, thereby increasing the risk of complications and death, interferes with life and security of the person as protected by s. 7 of the *Charter*.
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> ...
>
> 140 The evidence adduced at trial establishes that many western democracies that do not impose a monopoly on the delivery of health care have successfully delivered to their citizens medical services that are superior to and more affordable than the services that are presently available in Canada. This demonstrates that a monopoly is not necessary or even related to the provision of quality public health care.
>
> ...
>
> 152 The evidence before us establishes that where the public system fails to deliver adequate care, the denial of private insurance subjects people to long waiting lists and negatively affects their health and security of the person.
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> ...
>
> 153 We conclude that on the evidence adduced in this case, the appellants have established that in the face of delays in treatment that cause psychological and physical suffering, the prohibition on private insurance jeopardizes the right to life, liberty and security of the person of Canadians in an arbitrary manner, ...
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> [Emphases added]

[47] Each of the other two judgments in *Chaoulli* contain similar statements of conclusions reached based upon the specific record before the court. If anything, the divided court in *Chaoulli* was very careful to *not* have its collective decision be taken as precedent for anything beyond its immediate Quebec context.

[48] I am bound by the Supreme Court of Canada's majority decision legal pronouncements. I am bound to apply its *ratio decidendi* to similar causes of action arising from similar fact

situations. But I am not bound to apply a conclusion of mixed fact and law from a Supreme Court of Canada case to another case that merely shares a similar allegation but offers no evidence to establish the allegation in fact.

[49] Dr. Allen's injury and its ensuing effects were most unfortunate, but no evidence causally connected his wait time experience in the Alberta health care system with the Prohibition. Nothing was presented showing, for example, his wait time to be longer than it otherwise would have been *because of the Prohibition* or to show that absent the Prohibition his wait time would have been shorter.

[50] Dr. Allen demonstrated that he could receive his needed treatment in another jurisdiction, Montana, sooner than he would receive it in Alberta. I am satisfied that Dr. Allen would have suffered more over the period he would have to have waited for the surgery in Alberta. By procuring the surgery in Montana, Dr. Allen avoided a deprivation to the security of his person, but I have nothing on the record to show that the deprivation he faced in Alberta, for example if he had not the means to pay for it himself in Montana, was a result of the Prohibition. A vast array of alternate possibilities come to mind for the added wait times in Alberta that may have nothing to do with the Prohibition: under-funding, mis-management, shortage of qualified practitioners, disproportionate incidence of this particular condition at the relevant times, unexpected population increases or merely differences in population concentrations and distributions, to name a few.

[51] Dr. Allen has also demonstrated that in his case the health care system in Montana was able to provide him the treatment he required sooner. In the absence of any evidence, I am unable to conclude that the absence of the Prohibition precipitated that greater efficiency. I have no way of knowing, absent evidence, what were the relevant differences between the Alberta and Montana health systems.

[52] Dr. Allen has also demonstrated that in his case the health care system in Montana was able to provide him the treatment he required sooner than could the specialist that he selected in Alberta. He did not demonstrate 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.

[53] Dr. Allen is asking the court to accept his theory that the Prohibition creates or exacerbates wait times thereby preventing access to health care. His application requires evidence proving his theory but offers none. The added time Dr. Allen would have to have waited for his surgery in Alberta may have been no different in the absence of the Prohibition. That competing theory has just as much support on this record.

[54] Dr. Allen's theory also requires me to assume that, absent the Prohibition, 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.

[55] As the Supreme court of Canada stated in *Blencoe*, at para 60, and in *Bedford,* at para 75, a sufficient causal connection between the state-caused effect and the harm suffered by the claimant must be shown for s. 7 to be engaged. Dr. Allen has not demonstrated, on a balance of probabilities, a sufficient causal connection. He has not shown that the Prohibition deprived him

of life, liberty or security of his person. His application fails at the first step in the section 7 analysis.

[56] I therefore need not address step two in the section 7 analysis. The remaining step assesses whether the deprivation is in accordance with the principles of fundamental justice. Here a deprivation caused by the Prohibition has not been demonstrated.

[57] I therefore deny the application for the declarations. The parties may speak to me regarding costs if within 30 days they take steps to do so.

Heard on the 17th day of October, 2013, and the 7th and 21st days of February, 2014.
Dated at the City of Calgary, Alberta this 31st day of March, 2014.

P.R. Jeffrey
J.C.Q.B.A.

Appearances:

J. V. Carpay
C. M. W. Crosson
for the Applicant

L. C. Enns, Q.C.
for the Respondent