COURT OF APPEAL OF ALBERTA

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PLAINTIFF/APPLICANT:	DARCY ALLEN	
STATUS ON APPEAL:	Appellant	
DEFENDANT/RESPONDENT:	HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA	
STATUS ON APPEAL:	Respondent	
DOCUMENT:	**FACTUM**	

Appeal from the Judgment of
The Honourable Mr. Justice P. R. Jeffrey
Dated the 31st day of March, 2014
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FACTUM OF THE APPELLANT

JOHN V. CARPAY
Justice Centre for Constitutional Freedoms
#253, 7620 Elbow Drive S.W.
Calgary, Alberta T2V 1K2
Telephone: (403) 619-8014
Fax: (403) 475-3622
FOR THE APPELLANT

L. CHRISTINE ENNS, Q.C.
Alberta Justice and Solicitor General
4th Floor, 9833 – 109
Edmonton, Alberta T5J 3S8
Telephone: (780) 422-9703
Fax: (780) 475-0307
FOR THE RESPONDENT

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PART 1
STATEMENT OF FACTS

(i) Evidence of Allen's Suffering and Hardship

1. The Appellant Dr. Darcy Allen ("Allen") practised dentistry in Okotoks, Alberta, from 2004 until he was forced to stop working in July of 2009 due to severe, debilitating and constant back pain. This pain was the result of an injury Allen sustained while playing hockey in December 2007, which caused bulging and deterioration of his lumbar discs.

(Extracts of Key Evidence, Vol. I, Tab 1, p. A1, paras. 2-3;
p. A2, para. 9; p. A3, para. 19; p. A4, para. 23)
(Appeal Record, p. F2, paras. 2, 4, 12)

2. Although Allen received some medical treatment for these problems, his physical condition deteriorated. He suffered increasing pain and numbness in his back and legs, making it difficult for Allen to walk, stand, sit and perform many other basic daily functions.

(Extracts of Key Evidence, Vol. I, Tab 1, p. A2, paras. 8, 12;
p. A3, paras. 14, 16-17, 20; p. A4, para. A23; Tab 2, pp. A8-9;
Tab 3, p. A10; Tab 4, pp. A11-12, A14-15; Tab 5, p. A16;
Tab 7, p. A19; Tab 8, p. A20; Tab 9, p. A21)
(Appeal Record, p. F2, paras. 3, 5, 6, 12)

3. In May 2009, Allen's treating physician recommended surgery, but was not able to schedule surgery or place Allen on the surgery waiting list until after Allen received a discogram (a diagnostic tool) to further verify abnormal discs. Allen was placed on the year-long waiting list for a discogram, with the actual surgery to take place one more year thereafter.

(Extracts of Key Evidence, Vol. I, Tab 1, p. A3, para. 18)
(Appeal Record, p. F2, para. 8)

4. By July of 2009 Allen's severe and painful condition compelled him to cease working. Allen was forced to stay home, lying either on the floor or his bed for the entire day. The pain was of such severity that it was difficult for Allen to even carry on a simple conversation. This condition persisted until Allen had surgery.

(Extracts of Key Evidence, Vol. I, Tab 1, p. A4, para. 23)

(Appeal Record, p. F2, para. 12)

5. Allen managed to obtain an early discogram in September 2009, due to the direct intervention of the Alberta Health Minister's Office. He was subsequently referred for surgery. However, no surgery appointment was available until September 2010. In December 2009, Allen was informed by the surgeon's office that his surgery would be delayed for 18 months or more, to take place in the summer of 2011.

(Extracts of Key Evidence, Vol. I, Tab 1, p. A4, paras. 24-27;
p. A5, paras. 34-35)
(Appeal Record, p. F2, paras. 13, 14)

6. Enduring severe, debilitating and constant pain, and facing many months of further delay, Allen inquired of the Alberta Health Minister's Office about getting out-of-country treatment. Allen was told that Alberta Health Services would only cover out-of-country treatments not provided in Canada, and that wait times were not a factor taken into consideration in determining eligibility. Further, the *Out-of-Country Health Services Regulation* characterized Allen's surgery as "elective," meaning "non-emergency," such that no reimbursement would be provided to Allen for receiving a timely private surgery to alleviate his severe and continuous pain.

(Extracts of Key Evidence, Vol. I, Tab 1, pp. A4-5, paras. 28-29;
(Vol. II, Tab 25, pp. 379-80, paras. 10, 13)
Out-of-Country Health Services Regulation (Alberta Regulation 78/2006)
[*Appendix* and BOA Tab #7].

(ii) Constructively Driven Abroad by Monopoly System to Obtain Healthcare

7. Having already experienced two years of pain, ineffective medical treatments and various waiting list delays (and facing another 18 months of extreme and increasingly debilitating pain), Allen arranged for a private medical procedure at an American hospital in Montana in December of 2009. Allen underwent the required surgery that addressed his condition and improved his health. The procedure cost him $77,502.57 CAD.

(Extracts of Key Evidence, Vol. I, Tab 1, pp. A5-6, paras. 36-38;
Tab 10, pp. A22-23; Tab 11, p. A24; Tab 12, p. A25; Tab 13, pp. A26-27)
(Appeal Record, p. F2, paras. 14-15)

8. Allen was forced to increase the mortgage on his house in order to pay for his surgery. Further, the delays in treatment while attempting to obtain health care in Alberta, and the resultant uncertainty as to Allen's recovery, made it necessary for Allen to sell his successful dentistry practice. These consequences of Alberta's waiting lists placed Allen and his family under considerable financial stress.

(Extracts of Key Evidence, Vol. I, Tab 1, pp. A6-7, paras. 41, 44)
(Appeal Record, pp. F2-F3, paras.14-15, 17)

(iii) Private Insurance Permissible ('But-For' Healthcare?)

9. In areas outside health care, Albertans are otherwise free to purchase insurance to cover financial risks related to unfortunate life events. Insurance provides peace of mind and allows individuals an opportunity to insulate themselves from risks associated with the hardships of life and move forward with their lives when such hardships occur.

10. Alberta, however, prohibits its citizens from insuring against the serious and sometimes catastrophic misfortune of disease or injury to one's self or family. This prohibition creates a virtual monopoly for government over health care which all patients must rely on.

Alberta Health Care Insurance Act, R.S.A. 2000, c. A-20, s. 26(2)
["*AHCI Act"*] [*Appendix* and Appellant's Book of Authorities, Tab #6].

11. As a result, Albertans are forced to either languish on painful waiting lists inside Alberta's monopoly health care system or, if they have the financial ability, spend their own money (often at a tremendous personal hardship) to obtain necessary medical services in another jurisdiction, and paying the full cost in the absence of insurance.

12. This problem of wait times in Alberta is real, as is the physical and psychological suffering which wait times inflict on patients. According to a 2011 Alberta Health Services report, "[a]ccess to health services and wait times" are serious issues in health care delivery. Waiting lists can be "harmful to a patient's health and well-being" and can undermine the benefits of therapy. Those stuck on waiting lists are often forced to endure "increased worry,

anxiety, stress and pain," "problems carrying out activities of daily living," "deterioration in overall health," "increased prevalence of disability," "psychological affects" and "deterioration in the patient's condition." As in Allen's case, these effects can have a drastic impact on the life, health, and well-being of Albertans and their families.

(Extracts of Key Evidence, Vol. II, Tab 19, p. A226, para. 1;
p. A230, paras. 1-2; Vol. I, Tab 16, p. A52, para. 1; p. A66, para. 2;
p. A92, para. 1; p. A107, para. 2; p. A109, para 2; Vol. I, Tab 17, p. A157,
para. 3; p. A171, para. 3; p. A195, para 3; Tab 1, p. A2, para. 11; p. A3,
paras. 16-17, 20; p. A4, para. 23, p. A5, para. 31)

13. Since the Supreme Court of Canada's landmark decision in *Chaoulli v. Quebec* in 2005, the Alberta Government has not solved the serious problems related to its own medical waiting lists. The 2011 Alberta Health Services report confirms: "With current shortage of resources and growing demand for services in Canada, the problem of waiting for care remains a major concern." *Health Care in Canada, 2012, A Focus on Wait Times,* further notes that Canada has some of the worst wait times in the developed world.

(Extracts of Key Evidence, Vol. II, Tab 19, p. A230, para. 1;
Vol. I, Tab 16, p. A49, paras. 2-3; p. A53, para. 1; p. A66, para. 1)
Chaoulli v Quebec, 2005 SCC 35, [2005] 1 SCR 791 [*Chaoulli*]
[Appellant's Book of Authorities, Tab #1].

PART 2
GROUNDS OF APPEAL

Ground No. 1: The chambers judge committed an error of law by failing to follow and apply the Supreme Court of Canada precedent in *Chaoulli v. Quebec.*

Ground No. 2: The chambers judge committed a palpable and overriding error by misapprehending the evidence which proved the existence of significant medical wait times in Alberta, and which proved that they cause physical and psychological pain and suffering.

Ground No. 3: The chambers judge committed a palpable and overriding error by narrowly considering only Allen's individual situation, and failing to recognize the *Charter* s. 52 challenge to the law, based on all the evidence before the Court.

PART 3
STANDARD OF REVIEW

14. The application of *Chaoulli* to the facts in this case (the first ground of appeal) is a question of law and reviewable on the standard of correctness.

Housen v. Nikolaisen, 2002 SCC 33 at paras. 8-9,
[2002] 2 S.C.R. 235 [*Housen*][not reproduced].

15. The misapprehension of the evidence under the second ground is a factual error and is reviewable on a standard of a palpable and overriding error.

Housen, *supra*, at paras. 5, 10-11.

16. The failure of the chambers judge to consider all the evidence before him, and to recognize, consider, and address the broader *Charter* challenge (outside of Allen's individual fact situation) is an issue of mixed fact and law, and reviewable on a standard of a palpable and overriding error. Although there is a measure of discretion granted to judges in this regard, Supreme Court of Canada decisions such as *Bedford* and *Chaoulli* show that alleged violations of section 7 (and particularly violations of patients' section 7 rights) should generally be considered in light of the broader evidentiary basis.

Housen, *supra*, at para. 37.
Canada (Attorney General) v. Bedford,2013 SCC 72,
[2013] 3 S.C.R. 1101 [*Bedford*] [Appellant's Book of Authorities Tab #2].

PART 4
ARGUMENT

I. THE CHAMBERS JUDGE COMMITTED AN ERROR OF LAW BY FAILING TO FOLLOW AND APPLY THE SUPREME COURT OF CANADA PRECEDENT IN *CHAOULLI V. QUEBEC*

(i) *Chaoulli v. Quebec* and Allen's Case are Nearly Identical

(a) *Legal Question, Legislation, and Issues Virtually Identical*

17. The question resolved by the Supreme Court of Canada in *Chaoulli* is the same question at issue in Allen's case. The facts in *Chaoulli* revealed:

(a) the general failure of a province (Quebec) to deliver timely healthcare in a reasonable manner to its citizens; and

(b) the existence of medical waiting lists that caused physical and psychological suffering for waiting patients.

Chaoulli, *supra*, at paras. 105, 124, 153.

18. The law challenged by Allen is the Alberta equivalent of the law struck down by the Supreme Court in *Chaoulli*: the legal prohibition of private health insurance, which creates a "virtual monopoly" over health care by government.

19. The legal issue before the Supreme Court of Canada in *Chaoulli* was:

(a) whether a law prohibiting the provision of private health care insurance;

i. given circumstances of unreasonable health care service delivery; and

ii. the resultant increased risk to patients' physical and psychological health;

(b) breached s. 7 *Charter* rights in a manner not justified under s. 1 of the *Charter*.

Chaoulli, *supra*, at paras. 14, 103, 108, 124, 153.

20. Like the prohibition set out in s. 26(2) of the *AHCI Act*, the law struck down in *Chaoulli* had the purpose and effect of prohibiting individuals from purchasing private insurance for healthcare services already covered by the government's (monopolistic) health care system. The

impugned Quebec prohibitions in *Chaoulli* included both s. 11 of the *Hospital Insurance Act*, R.S.Q., c. A28 and s. 15 of the *Health Insurance Act*, R.S.Q., c. A29 ("*HEIA*"). The impugned provisions in *Chaoulli* stated:

> **11.** (1) No one shall make or renew, or make a payment under a contract under which
>
> (a) a resident is to be provided with or to be reimbursed for the cost of any hospital service that is one of the insured services;
>
> (b) payment is conditional upon the hospitalization of a resident; or
>
> (c) payment is dependent upon the length of time the resident is a patient in a facility maintained by an institution contemplated in section 2.
>
> **…**
>
> **15.** No person shall make or renew a contract of insurance or make a payment under a contract of insurance under which an insured service is furnished or under which all or part of the cost of such a service is paid to a resident or a deemed resident of Québec or to another person on his behalf.
>
> *Chaoulli*, *supra*, at para. 3.

21. In an almost identical fashion, s 26(2) of the *AHCI Act* states:

> **26(2)** An insurer shall not enter into, issue, maintain in force or renew a contract or initiate or renew a self-insurance plan under which any resident or group of residents is provided with any prepaid basic health services or extended health services or indemnification for all or part of the cost of any basic health services or extended health services.[1]

22. The substantive similarity between the Quebec and Alberta provisions speaks for itself. It was also noted in obiter in *Chaoulli* by Deschamps J. The chambers judge, however, ignored this similarity. The chambers judge erroneously held that Allen was challenging a "policy" or an entire statutory regime, when Allen in fact challenged one, specific, statutory provision.

> *Chaoulli*, *supra*, at para. 72.
> (Appeal Record, pp. F8-9, paras. 44-45)

[1] Additional relevant portions of the *AHCI Act* are included in the *Appendix* to this Factum.

23. The Quebec and Alberta provisions, in both purpose and effect, prohibit private health care insurance for "insured services" such as orthopedic surgery, cancer diagnosis, cancer treatment, and numerous other essential health services. The specific medical services Allen required were "insured" under the *AHCI Act*, and therefore subject to the private health insurance prohibition.

24. In *Chaoulli*, the Applicants did not argue for a positive *Charter* right to any kind or level of government-provided health care. Instead they argued that, given the undue delays in receiving medical treatment, s. 7 of the *Charter* was violated by a law that prevented individual citizens from purchasing private insurance to meet their own needs. The Court agreed that the provincial closing of all other healthcare doors by legislation violated the rights of individuals to help themselves by other reasonable means (i.e. private health care insurance).

Chaoulli, supra, at paras. 14, 103, 45, 124, 153.

25. Like the Applicants in *Chaoulli*, Allen asks that he (and all Albertans subject to painful and harmful medical delays) not be prevented by provincial law from accessing timely medical services. In his Application, Allen is not asking the Alberta Government to create a better health care system. Instead, the evidence before the chambers judge has demonstrated that Allen (and other Alberta patients) endure physical and psychological suffering on waiting lists. Allen therefore asks that s. 26(2) of the *AHCI Act* be struck down, so that Albertans can access health care outside of the Alberta Government's monopoly.

26. The argument in form is like that presented in *R. v. Morgentaler*, where the Supreme Court of Canada held a law violated individual s. 7 *Charter* rights because it was a state-imposed interference which carried with it an indirect threat of resultant harm to the bodily integrity of a woman. In *Morgentaler*, an independent breach of s. 7 of the *Charter* was found to exist as a result of medical delays to obtaining therapeutic abortions.

R. v. Morgentaler, [1988] 1 S.C.R. 30 at 58-60,
[*Morgentaler*] [Appellant's Book of Authorities, Tab #3].
Chaoulli, supra, at paras. 43, 118-121.

27. Therefore, in Allen's case, the impugned legislation, the legal question, and the issue to be resolved are the same as in *Chaoulli*: whether the prohibition of private health insurance under the *AHCI Act* (which causes delays resulting in physical and psychological harm to patients) violates s. 7 of the *Charter* in a manner not demonstrably justified under s. 1 of the *Charter*.

(b) *Relevant Facts and Evidence in Allen's Case same as Chaoulli*

28. Like Allen, the Applicants in *Chaoulli* argued that the prohibition against private health care insurance deprived them of access to timely health care services, resulting in pain and suffering and risks to patients' health. In *Chaoulli*, the fact that health care was subject to wait times was based on "common knowledge," evidence from witnesses, as well as various studies and reports.

Chaoulli, supra, at paras. 14, 103, 106, 39, 116-117.

29. In *Chaoulli*, the Supreme Court of Canada found the existence of waiting lists in Quebec and the resultant pain and suffering to patients to be a sufficient basis for concluding that the prohibition of private health insurance violated s. 7 of the *Charter*. The Court did not require, or rely on, any specific number of patients waiting for various identified surgeries. The evidence brought forth by the Applicants in *Chaoulli* revealed medical waiting list that resulted in physical and psychological suffering. That reality is no different today. The evidence before the chambers judge in this case has demonstrated that Albertans continue to suffer as a direct consequence of being forced to wait on lists, unable to obtain private healthcare insurance due to the *AHCI Act* prohibition. Evidence adduced by Allen and by the Alberta Government as to wait lists and their impact on patients was unchallenged and uncontradicted.

Chaoulli, supra, at paras. 124, 153, 42, 45, and 111-119.
(Extracts of Key Evidence, Vol. I, Tab 1, p. A2, para. 11; p. A3, paras. 16-17, 20; p. A4, para. 23, p. A5, para. 31; Tab 16, p. A52, para. 1; p. A66, para. 2; p. A92, para. 1; p. A107, para. 2; p. A109, para 2; Tab 17, p. A157, para. 3; p. A171, para. 3; p. A195, para 3; Vol. II, Tab 19, p. A226, para. 1; p. A230, paras. 1-2)

30. In both Allen's case and *Chaoulli*, the Applicants demonstrated the existence of medical waiting lists in their respective jurisdictions. Since *Chaoulli,* waiting lists (and their adverse effects) continue in Alberta and elsewhere in Canada. In Allen's case the chambers judge, based on the evidence before him, 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" and that "[i]n regards to patients who required acute care the report found that Canada had relatively long wait times".

Chaoulli, *supra*, at paras. 39-42, 45, 103-08, 111-17.
(Appeal Record, p. F3-F4, paras. 24, 25)
(Extracts of Key Evidence, Vol. II, Tab 18, pp. A215-19; Tab 19, p. A226, para. 1; p. A230, paras. 1-2; A240, A244-46, A248;Tab 20, p. A293-295; Vol. I, Tab 16, pp. A49-50, paras. 2-4; p. A53, para. 1; p. A64, paras. 1-2; p. A65, para. 3; p. A66, para. 1)

31. Therefore, in Allen's case (as in *Chaoulli*) evidence on record reveals that many patients in Alberta still fail to receive timely medical care capable of alleviating physical and psychological suffering. The Alberta Government's monopolistic system provides access to waiting lists (and suffering), rather than access to health care.

32. Allen and other Albertans, denied by law of their choice to affordably access health care outside of the government's system, are subjected to long medical waiting lists. They are not allowed (by virtue of s. 26(2) of the *AHCI Act*) to resort to self-help by purchasing private healthcare insurance. The Applicants in *Chaoulli* faced precisely the same situation, and successfully argued "that because delays in the public system place their health and security at risk, they should be allowed to take out insurance to permit them to access private services."

Chaoulli, *supra*, at para. 103.

33. With the relevant facts, relevant evidence, and statutory prohibition being so similar in both *Chaoulli* and Allen's case, the chambers judge was bound to follow the binding precedent (*ratio decidendi*) in *Chaoulli* and find a violation of s. 7 of the *Charter*. Failing to do so amounts

to an error in law.

(c) *Ratio Decidendi in Chaoulli: Prohibiting Private Healthcare Insurance in the Face of Medical Wait Times Violates s. 7 of the Charter*

34. In *Chaoulli,* the Supreme Court of Canada was asked to determine whether it was a violation of s. 7 of the *Charter* to prohibit private insurance for health care where Canadians were otherwise subjected to long medical delays with resultant risk of physical and psychological harm.

Chaoulli, supra, at paras. 14, 102-103, 108.

35. The seven sitting Justices in *Chaoulli* (across three sets of written reasons) were unanimous in finding that subjecting patients to waiting lists in the government's monopolistic health care system, by banning private health insurance, was a violation of the s. 7 *Charter* rights to life and security of the person. Three dissenting Justices held that the violation was consistent with the principles of fundamental justice. The Court's majority concluded the violation was not justified.

Chaoulli, supra, at paras. 38, 45, 117-18, 123-24, 199-200, 265.

36. In *Chaoulli,* McLachlin C.J. and Major J. (Bastarache J. concurring) held:

> (a) "where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*";
>
> (b) "the prohibition on medical insurance in [provincial legislation] violates s. 7 of the *Charter* because it impinges on the right to life, liberty and security of the person in an arbitrary fashion that fails to conform to the principles of fundamental justice"; and
>
> (c) "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*."

Chaoulli, supra, at paras. 104, 124.

37. Deschamps J. agreed that "the prohibition on insurance for health care already insured by the state constitutes an infringement of the right to life and security. This finding is no less true in the context of s. 1 of the *Quebec Charter*." She noted "Quebeckers are denied a solution that would permit them to avoid waiting lists, which are used as a tool to manage the public plan."

Chaoulli, supra, at para. 45.

38. Therefore, the *ratio decidendi* in *Chaoulli* established that a violation of s. 7 *Charter* rights will be made out if there exists:

- a law prohibiting private health care insurance, that would permit and enable ordinary Canadians access to health care outside of the government's system; and
- treatment delays (i.e. waiting lists) in the government's delivery of healthcare which cause physical and psychological suffering to patients.

39. In regard to the *Canada Health Act*, McLachlin C.J. and Major J. noted that its primary purpose, set out in s. 3, is "to protect, promote and restore the physical and mental well-being of residents of Canada and <u>to facilitate reasonable access</u> to health services without financial or other barriers" [emphasis in *Chaoulli*]. The application of section 7 of the *Charter* is triggered "[b]y imposing exclusivity and then failing to provide public health care of a reasonable standard within a reasonable time".

Chaoulli, supra, at para. 105.
Canada Health Act, R.S.C., 1985, c. C-6
[*Appendix* and Appellant's Book of Authorities, Tab #8].

40. For the *Canada Health Act* principle of "accessibility" to have any real meaning, it must be more than a mere opportunity for people to receive care eventually, after a lengthy wait that frequently involves severe pain, the inability to work, the inability to provide for one's self and loved ones, and the inability to enjoy life. All of these negative effects were experienced by Allen, and are experienced by other Albertans. Rather than an opportunity for eventual access, accessibility must entail a decent standard of care within a reasonable time, because the Supreme Court has held that "access to a waiting list is not access to health care."

Chaoulli, supra, at para. 123.

41. In *Chaoulli*, the Court held that the state cannot require the Applicant to withstand physical and psychological suffering, in violation of his *Charter* s. 7 right to life and security, in the name of supporting an unfounded assertion that the government's health care system will crumble if its residents are afforded the choice of accessing care outside of it.

42. The suffering and excessive wait times experienced by Allen show that s. 26(2) of the *AHCI Act* runs counter to the objective of "accessibility" required by the *Canada Health Act*. While opening the door for all to access care, Alberta's current health system fails to provide care to many people after they step through this door. At the same time, Alberta prohibits people from using any other doors to access care. Simply, the s. 7 *Charter* rights of Allen and other Albertans in similar situations are violated by provincial legislation that restricts their ability and choice to provide care for their medical needs, and then confines them to a system which does not provide the promised access.

43. McLachlin C.J. and Major J. held that the *Charter* "does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*." In similar fashion, Deschamps J. noted that the *Canada Health Act* does not prohibit private health care services, does not provide benchmarks for wait times, and acts as a "general framework that leaves considerable latitude to the provinces." There are many ways to meet the objectives of the *Canada Health Act* without prohibiting the purchase of private insurance. The Alberta Government must therefore adhere to the *Canada Health Act* principle of accessibility. It must do so – and can do so – without violating the *Charter* rights to life, liberty and security of Albertans.

Chaoulli, *supra*, paras. 104 and 16-17.

(ii) Conclusion: The Chambers Judge Mischaracterized and Failed to Follow the *Ratio Decidendi* in *Chaoulli*

44. The Court of Queen's Bench may only depart from (or refuse to apply) Supreme Court of Canada precedent when different legal issues are raised, or when a change in circumstances fundamentally shifts the parameters of the debate.

Bedford, *supra* para. 16 at para. 42.
(Appeal Record, p. F9-10, para. 48).

45. For Allen to succeed, he must establish that:

- a law exists prohibiting private health care insurance that would permit and enable Albertans to access health care outside of the government's system; and
- delays in treatment in the government's monopolistic delivery of its healthcare system cause physical and psychological suffering in patients.

46. Allen's argument was (and is) that s. 26(2) of Alberta's *AHCI Act* is the same as the prohibition struck down by the Court in *Chaoulli*, and that, in the context of the same relevant facts and evidence, Alberta's prohibition should also be struck down. The chambers judge ignored Allen's narrow and specific legal argument in regard to s. 26(2). The chambers judge ignored the similarity between the Quebec and Alberta statutes, asserting incorrectly that Allen had argued "that <u>any</u> statutory prohibition on private health insurance violates the right to security of the person" and "that <u>all</u> prohibitions of private health insurance infringe the right to security of the person". No such argument was made by Allen.

(Appeal Record, p. F6, para. 39; p. F8, para. 41)

47. The chambers judge wrongly interpreted the preparative phrasing, "we conclude that on the evidence adduced," used by the Court in *Chaoulli*. The chambers judge interpreted such phrasing as creating a requirement for future litigants like Allen to prove anew, by evidence, that a prohibition on the provision of private health care insurance prevents access to health care.

(Appeal Record, p. F8, paras. 41-42; p. F9, para. 46; p. F10, para. 54)

48. The burden the chambers judge placed on Allen was impossible to meet. For instance, the chambers judge required Allen to prove with evidence that "the availability of private health insurance prior to his events would have provided him with timely medical care." Since private health insurance is prohibited in Alberta and therefore does not exist, it would be impossible to prove its hypothetical coverage.

(Appeal Record, p. F8, para. 42; p. F10, para. 49)

49. The chambers judge's requirement of Allen to prove how the prohibition on private health insurance prevents access to health care was not part of the Court's *ratio decidendi* in *Chaoulli*. The successful Applicants in *Chaoulli* were not required to demonstrate from specific fact situations that the prohibition caused wait times, or prevented access to timely health care. Instead, the Court in *Chaoulli* held, as a matter of statutory interpretation, that the prohibition creates a "virtual monopoly" for government over health care, which confines patients to suffer on waiting lists. McLachlin C.J. and Major J. stated at paragraph 106 of *Chaoulli*:

> The *Canada Health Act*, the *Health Insurance Act*, and the *Hospital Insurance Act* do not expressly prohibit private health services. However, they limit access to private health services by removing the ability to contract for private health care insurance to cover the same services covered by public insurance. The result is a virtual monopoly for the public health scheme [Emphasis added].

Chaoulli, *supra*, at paras. 105-108, 106, 123, 45, 52-56, 153, 191.

50. The Court in *Chaoulli* held that the prohibition on private health insurance violates *Charter* rights by denying patients the opportunity to access health care outside of the government's monopoly system. As a matter of statutory interpretation, the Court in *Chaoulli* held that the prohibition creates a "virtual monopoly," which results in delays in treatment. *Charter* rights are violated by this law, which confines patients to suffer in this "virtual monopoly" by prohibiting them from accessing health care outside of the government's system.

Chaoulli, supra, at paras. 45, 105-106, 124, 153.

51. The chamber judge mischaracterized the *Chaoulli* ratio by demanding that Allen prove that "the prohibition causes wait times," and by assuming that wait times, in and of themselves, violate *Charter* rights. But the Court in *Chaoulli* did not hold that the prohibition causes wait times *per se*, or that wait times *in and of themselves* violate *Charter* rights. Rather, the prohibition prevents people from escaping or avoiding the wait times inside the government's monopoly system. This statutory effect (not the wait times in and of themselves) is what violates the *Charter*. The chambers judge erred by ignoring the Court's statutory interpretation, and by

demanding evidence to support what the Court in *Chaoulli* had already decided as a matter of law.

(Appeal Record, p. F10, paras. 49-51)

52. The misinterpretation of the *Chaoulli ratio decidendi* by the chambers judge improperly placed a burden on Allen to prove through evidence what the Court in *Chaoulli* has already determined as a matter of statutory interpretation. Allen therefore should not be required to now prove something the Supreme Court of Canada did not require of the Applicants in *Chaoulli*.

53. A proper adherence to the *ratio* in *Chaoulli* does not require a Court to consider factors such as underfunding or mismanagement of resources, referred to by the chambers judge as possible causes of wait times. The various possible causes of wait times were not relevant to the Court's majority in *Chaoulli*, nor are they relevant to Allen's case.

(Appeal Record, p. F10, para. 50)

54. Due to the Court in *Chaoulli* holding (as a matter of law, through statutory interpretation) that the prohibition of private health insurance prevents access to health care, Allen is not required to prove that the same prohibition in Alberta prevents access to health care. Alberta's law creates a virtual monopoly like Quebec's law did in *Chaoulli*, by removing the ability of citizens to access health care outside of the government's system. The *ratio decidendi* in *Chaoulli* requires Allen to prove only that waiting lists exist in Alberta, such that health care is not being delivered in a reasonable and timely manner, and that waiting patients endure physical and psychological suffering.

Chaoulli, supra, at paras. 105, 123-24, 153, 45, 52-56, 191.

55. The chambers judge incorrectly held that *Chaoulli* was not be "taken as precedent for anything beyond its immediate Quebec context." But the Supreme Court of Canada itself has not limited the *Chaoulli* precedent to its immediate Quebec context. In *Canada v. PHS Community Services Society*, the unanimous Court through McLachlin C.J. applied *Chaoulli*'s holding concerning a violation of s. 7 of the *Charter* to a B.C. case, citing the judgments of Deschamps J. and McLachlin C.J. and Major J.: "[w]here 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." In *Bedford*, the unanimous Court relied on *Chaoulli* as an example of an appropriate finding of arbitrariness, citing both the decisions of Deschamps J. and McLachlin C.J. and Major J. Limiting *Chaoulli*'s holding to "its immediate Quebec context" is an error of law.

(Appeal Record, p. F9, para. 47)
Canada (Attorney General) v. PHS Community Services Society, 2011 SCC 44 at paras. 93, 84, 105, 132, 137, [2011] 3 S.C.R. 134 [*PHS*] [Appellant's Book of Authorities, Tab #4].
Bedford, *supra*, at paras. 98-99, 111.

56. In conclusion, a violation of s. 7 of the *Charter* is properly made out in Allen's case by virtue of the ruling in *Chaoulli* because Allen has demonstrated:

(a) the relevant facts, and law challenged, are substantially identical in both cases;
(b) circumstances continue to exist in Alberta such that healthcare is not being delivered in a timely or reasonable manner; and
(c) waiting lists continue to cause physical and psychological suffering to patients.

II. THE CHAMBERS JUDGE ERRED BY MISAPPREHENDING THE EVIDENCE

57. The chambers judge committed a reversible error by failing to consider the evidence in the record before him. This evidence proved the existence of significant medical wait times in Alberta, and that waiting lists cause physical and psychological pain and suffering.

58. The chambers judge misapprehended (or in the alternative, ignored) the evidence in Allen's case when he found there was no basis in the record:

- to support Allen's assertion that his right to security of the person had been violated; or
- that established common relevant and material facts between Allen's case and those presented in *Chaoulli*.

(Appeal Record, p. F6, para. 39; pp. F9-10, paras. 48-49)

59. Evidence presented by Allen and by the Alberta Government demonstrates a failure of the Alberta Government's healthcare system to provide Alberta patients with timely healthcare, which in turn caused significant physical and psychological suffering (Allen's own experience being one example of this). The evidence before the chambers judge, and facts based on it, are the same as the evidence and facts in *Chaoulli*.

60. The chambers judge asserted that there was "no evidence" to establish that relevant facts in Allen's case were the same as the relevant facts established in *Chaoulli*. Evidence submitted by Allen, however, demonstrates that Alberta's failure to provide timely health care resulted in severe physical and psychological suffering, no different from the physical and psychological suffering identified in *Chaoulli*, which supported the conclusion of all seven Justices in *Chaoulli* as to the violation of s. 7 rights.

(Extracts of Key Evidence, Vol. I, Tab 1, p. A3, paras. 18-19;
p. A4, para. 23; p. A4-5, para. 28, p. A5, para. 30-31; p. A6, para. 39)
(Appeal Record, p. F6, para. 39, pp. F9-10, paras. 48-49)
Chaoulli, supra para. 13 at paras 39-40, 111-17, 191, 200, 265.

61. The chambers judge's misapprehension of the evidence led him to assert that Allen "did not demonstrate that the surgery he required was not available at all in Alberta within a comparable time, or that he made reasonable efforts" to obtain such a surgery in Alberta. This conclusion is directly contradicted by the chambers judge's own finding that Allen did in fact make reasonable efforts:

> "[Allen] 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."

(Appeal Record, p. F10, para. 52; p. F3, para. 21)

62. The chambers judge also noted other medical visits and attempts made by Allen, including his contact with the office of the Alberta Minister of Health in an attempt to speed up the otherwise year-long wait for a discogram. Ample evidence was before the chambers

regarding efforts Allen made to obtain medical care as soon as was possible. Despite Allen's efforts, when a physician or surgeon recommended a diagnostic test (e.g. MRI) or treatment (e.g. surgery), Allen faced delays ranging anywhere from 6 months for an MRI to 18 months for surgery.

(Appeal Record, p. F3, para. 21; p. F2, para. 13)
(Extracts of Key Evidence, Vol. I, Tab 1, p. A2, paras. 5, 9, 13;
p. A3, paras.15, 18; p. A4, paras. 24, 25, 27; p. A5, para. 35)

63. Thus, the chambers judge's unsupported conclusion that Allen "did not demonstrate the surgery was unavailable 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" is a palpable and overriding error and must be disregarded.

(Appeal Record, p. F10, para. 52)

64. The evidence before the chambers judge, and the evidence before the Court in *Chaoulli*, in both cases established that waiting lists inflict physical and psychological suffering on patients. The evidence before the chambers judge, from both Allen and the Alberta Government, showed not only the existence of waiting lists, but also the consequences of waits lists. Those consequences included psychological stress, increased pain, problems carrying out daily living, deterioration in overall health, increased prevalence of disability, and even death.

(Extracts of Key Evidence, Vol. I, Tab 1, p. A2, para. 11; p. A3,
paras. 16-17, 20; p. A4, para. 23, p. A5, para. 31;
Tab 16, p. A52, para. 1; p. A66, para. 2; p. A92, para. 1;
p. A96, para. 2; p. A97, para. 3; p. A107, para. 2; p. A109, para 2;
Tab 17, p. A157, para. 3; p. A171, para. 3; p. A195, para 3;
Vol. II, Tab 19, p. A226, para. 1; p. A230, paras. 1-2)

III. THE CHAMBERS JUDGE ERRED BY NARROWLY CONSIDERING ONLY ALLEN'S INDIVIDUAL SITUATION AND FAILING TO RECOGNIZE THE *CHARTER* S. 52 CHALLENGE TO THE LAW BASED ON ALL THE EVIDENCE.

65. Allen did not limit his application to seeking individual redress of the violation of his own rights, but sought also the remedy of having Alberta's prohibition on private health insurance under the *AHCI Act* declared of no force or effect. In his Originating Application as well as in his Brief, Allen requested a declaration under s. 52 of the *Constitution Act*, arguing that s. 26(2) of the *AHCI Act* is "inconsistent" with s. 7 of the *Charter*.[2]

(Appeal Record, P3, Remedy Sought)

66. In addition to Allen's own physical and psychological suffering on a wait list inside the government's "virtual monopoly," Allen also has standing as a public interest litigant, like the Applicants in *Chaoulli*.

Chaoulli, *supra*, at paras. 35, 189.

67. In the context of a *Charter* challenge and particularly arguments based on s. 7 of the *Charter*, evidence of broader context is often critical in determining whether the impugned law is unconstitutional. For example, in *R v. Swain*, the Supreme Court did not limit itself to a consideration of the situation of the individual claimant, but also considered the broader effect on persons generally, interpreting the challenged law by way of hypothetical situations and noting historical evidence.

R v. Swain, [1991] 1 S.C.R. 933 at 969, 972, 973-74
[Appellant's Book of Authorities, Tab #5].

[2] During oral argument before the chambers judge, counsel for Allen abandoned his challenge to the *Out-of-Country Health Services Regulation* (Alberta Regulation 78/2006). There is ample evidence showing that this *Regulation* is ineffective in assisting Albertans who are suffering on lengthy waiting lists (Extracts of Key Evidence, Vol. I, Tab 1, pp. A4-5, paras. 28-29; Vol. II, Tab 25, pp. A379-80, paras. 10-13; also the transcripts of the cross-examination of Stella Hoeksema on her affidavit [not produced]). However, Allen now challenges only the prohibition on private health insurance established by s. 26(2) of the *AHCI Act*, as violating s. 7 of the *Charter*.

68. The Court's decision in *Bedford* also demonstrates the propriety and importance of an examination of the broader evidence in a *Charter* case. In *Bedford*, a challenge to *Criminal Code* provisions in relation to prostitution was brought by three individuals, yet the evidence accepted and considered by the Court included "studies, reports, newspaper articles, legislation, *Hansard* and many other documents". The analysis in *Bedford* was not solely dependent on the specific situations of the three Applicants, despite the fact that each Applicant was granted private interest standing.

Bedford, *supra*, at paras. 15, 17.

69. Likewise in *Chaoulli*, the Court looked beyond the individual circumstances of the two Applicants, and examined the broader context. All seven Justices in *Chaoulli* examined and considered the problem of waiting lists in Canada, including the resulting physical and psychological suffering of patients.

Chaoulli, *supra*, at paras. 37-45, 110-117, 200, 203-04, 220, 225.

70. Deschamps J. noted the propriety of addressing the broader public concerns at issue:

> [T]he question is not whether the appellants are able to show that they are personally affected by an infringement. The issues in the instant case are of public interest and the test from *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575, applies. The issue must be serious, the claimants must be directly affected or have a genuine interest as citizens and there must be no other effective means available to them. These conditions have been met. The issue of the validity of the prohibition is serious. Chaoulli is a physician and Zeliotis is a patient who has suffered as a result of waiting lists. They have a genuine interest in the legal proceedings. Finally, there is no effective way to challenge the validity of the provisions other than by recourse to the courts (Emphasis added).

Chaoulli, *supra*, at para. 35.

71. The dissent in Chaoulli agreed that the Applicants were public interest litigants.

Chaoulli, *supra*, at para. 189.

72. McLachlin C.J., Major, and Bastarache JJ. did not disagree with the majority of Justices in *Chaoulli* (Deschamps, Binnie, LeBel and Fish JJ.) who specifically held that the Applicants were public interest litigants. McLachlin C.J. and Major J. relied on the broad evidence before them of waiting times in the government's medical system and the adverse physical and psychological consequences of those delays.

73. In *Chaoulli,* neither Applicant was found to have had his *Charter* s. 7 rights violated personally or individually. The Court struck down *Quebec*'s prohibition because it violated citizens' rights generally, apart from the Applicants' own situations. In Allen's case, the chambers judge failed to consider the impact of Alberta's prohibition on patients generally. Even if the chambers judge was correct in holding Allen's personal s. 7 *Charter* rights were not violated, Allen nevertheless meets the requirements for public interest standing, as did the Applicants in *Chaoulli,* because:

- the existence of wait times in Alberta is a serious issue of concern for all residents of Alberta (as amply demonstrated by the evidence placed before the Court of Queen's Bench);

- Allen has a genuine interest in this legal action, having been directly affected by wait times in Alberta, to the point of being compelled to seek treatment outside Canada at his own personal expense to alleviate pain he was suffering while waiting for years for the necessary medical treatment in Alberta; and

- there is no other effective means of challenging the prohibition on private insurance.

74. Rejecting the *Chaoulli* precedent, the chambers judge failed to consider the broader public interest *Charter* arguments raised by Allen with respect to the *AHCI Act*. Whether Allen's own *Charter* rights had been violated or not, the chambers judge, like the Court in *Chaoulli*, should have considered the evidence in the record showing that the prohibition on private health insurance, in combination with waiting lists in the Alberta Government's "virtual monopoly," violates other Alberta citizens' rights under s. 7 of the *Charter*.

(Appeal Record, p. F1, para. 1; p. F8, para. 42; p. F10, paras. 49, 51-52, 54)

75. The broader public interest challenge to Alberta's prohibition on private health insurance was squarely before the chambers judge in this case. As Allen argued in his Reply Brief:

> Further, apart from their own experiences with the government's health care system, Darcy Allen and Richard Cross[3] would have standing as public interest litigants to bring their applications, just as Dr. Jacques Choulli 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 judgement 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.
>
> (Applicant's Reply Brief, filed June 19, 2013, at para. 26 [not reproduced])

76. Unlike all seven Justices in *Chaoulli*, the chambers judge failed to consider whether the broader evidence in the record of physical and psychological suffering caused by wait times (and the circumstances of a failure to reasonably deliver health care services) demonstrated a violation of s. 7 of the *Charter*. Contrary to reports filed in evidence before the chambers judge demonstrating the continued existence of wait times in Alberta, the chambers judge instead fixated exclusively on Allen's individual situation. This failure to consider the broader public interest caused the chambers judge to misapprehend the relevance of this evidence to the argument placed before him.

(i) The Misapprehended Evidence Establishes a Violation of s. 7 *Charter* Rights

77. As noted above, in *Chaoulli* McLachlin C.J. and Major J. held that when a government fails to deliver health care in a reasonable manner, thereby increasing the risk of complications and death, a legislated prohibition on private health care insurance violates s. 7 *Charter* rights. In making its findings, the Court in *Chaoulli* relied on evidence that:

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[3] Richard Cross, the Applicant in a case heard together with Allen's case and raising the same constitutional issues, withdrew his application following oral argument before the chambers judge. With the consent of all counsel, the application of Mr. Cross was dismissed without costs.

- "Quebec residents face delays in treatment that adversely affect their security of the person and that they would not sustain but for the prohibition on medical insurance" (at para. 111);

- "Delays in the public system are widespread and have serious, sometimes grave, consequences" specifically noting an existing "waiting list for cardiovascular surgery for life-threatening problems" causing some patients death due to undue delay (at para. 112);

- Pre-operative delay before hip surgery increased risk of death (at para. 113);

- Delaying ligament reconstruction surgery increases the risk that the injury will become irreparable (at para. 114);

- "over one in five Canadians who needed health care for themselves…encountered some form of difficulty, from getting an appointment to experiencing lengthy waiting times…Thirty-seven percent of those patients reported pain" (at para. 115); and

- "Studies confirm that patients with serious illnesses often experience significant anxiety and depression while on waiting lists" (at para. 117).

Chaoulli, *supra*, at paras. 111-117.

78. Deschamps J. relied on the same evidence to conclude that the trial judge in *Chaoulli* was correct in finding "that the prohibition on insurance for health care already insured by the state constitutes an infringement of the right to life and security. This finding is no less true in the context of s. 1 of the *Quebec Charter*."

Chaoulli, *supra*, at paras. 37-45.

79. The evidence before the chambers judge in Allen's case, like the evidence in *Chaoulli*, merits the conclusion that Alberta's prohibition on private health insurance violates the s. 7 *Charter* rights of Allen and other Alberta patients.

80. There was ample evidence before the chambers judge, some general and some very specific, supporting this conclusion including, *inter alia*, that:

(a) Albertans face widespread delays in treatment[4];

(b) Delays in treatment have serious, sometimes grave consequences[5];

(c) There are delays in Alberta even for those with cardiovascular problems who are in need of surgery[6];

(d) Nine out of ten Albertans waited up to 35 weeks for hip replacement surgery and 49 weeks for knee replacement surgery[7] and those waiting for such surgical procedures suffer from increased morbidity, pain and increasing disability[8]; and

(e) One in three Canadians report waiting six or more days to see a doctor when sick or in need of medical attention, and Canadians report increased worry, anxiety, stress and pain while on waiting lists.[9]

81. This evidence on the record is unquestionably relevant, material, and probative to the *Charter* Application brought by Allen. The chambers judge ignored this evidence, which shows that waiting lists in Alberta inflict suffering, and even death, or patients, who are prohibited by law from purchasing medical insurance that could provide them with timely treatment outside of the government's legislated monopoly. The chambers judge failed to recognize the similarity and relevance of this evidence in comparison with the evidence presented in *Chaoulli*.

(ii) The Misapprehended Evidence Proves the Violation is Arbitrary

82. A law is arbitrary and thus in violation of the principles of fundamental justice if "there is no connection between the effect and the object of the law."

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[4] Extracts of Key Evidence, Vol. I, Tab 15, p. A31, para. 9; Tab 16, p. A69; Tab 17, p. A148, paras. 1, 3-4; Vol. II, Tab 18, p. A215-19; Tab 19, p. A226, para. 1; p. 230, paras. 1-2; p. A244-46; A248; Tab 21, p. A305-07; Tab 22, p. A308-10; Tab 23, p. A313-18.
[5] Extracts of Key Evidence, Vol. I, Tab 16, p. A52, para. 1; p. A66, para. 2; p. A96, para 2; p. A97, para. 3; p. A107, para. 2; p. A109, para. 2; Vol. II, Tab 19, p. A230, para. 2.
[6] Extracts of Key Evidence, Vol. II, Tab 19, p. A240; Tab 20, p. A293.
[7] Extracts of Key Evidence, Vol. II, Tab 20, p. A293.
[8] Extracts of Key Evidence, Vol. I, Tab, 16, p. A92, para. 1;Tab 17, p. A157, para. 3; p. A171, para. 3; The remaining 10% wait even longer: Extracts of Key Evidence: Vol. II, Tab 24, pp. A343, line 19 – A344, line 5.
[9] Extracts of Key Evidence, Vol. I, Tab 16, p. A64, para. 2; p. A52, para. 1.

Bedford, *supra*, at paras. 98-99.
Chaoulli, *supra*, at paras. 130-31.

83. A court thus must consider "whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose."

Bedford, *supra*, at para. 111.

84. Providing an example of a finding of arbitrariness, the Court in *Bedford* referred to *Chaoulli* and stated: "A law that imposes limits on these interests in a way that bears *no connection* to its objective arbitrarily impinges on those interests. Thus, in *Chaoulli*, the law was arbitrary because the prohibition of private health insurance was held to be unrelated to the objective of protecting the public health system."

Bedford, *supra*, at para. 111.

85. In *Chaoulli,* McLachlin C.J. and Major J. (Bastarache J. concurring) expressly found the Quebec prohibition on private health insurance to be "arbitrary" because there was no real connection on the facts between the effect and the objective of the law. The prohibition does not "protect the public health care system and prevent the diversion of resources from the public system."

Bedford, *supra*, at para. 99.
Chaoulli, *supra*, at paras. 128-53.

86. In *Bedford*, the Court interpreted *Chaoulli* as follows: "in *Chaoulli*, the law was arbitrary because the prohibition of private health insurance was held to be unrelated to the objective of protecting the public health system." The Court noted that in *Chaoulli* "[t]he majority found, on the basis of international evidence, that private health insurance and a public health system could co-exist." As part of this *Chaoulli* majority, Deschamps J. also concluded that "[t]he choice of prohibiting private insurance contracts is not justified by the evidence." Since private health insurance and a public health system can coexist, prohibiting private health insurance to protect the public health system is arbitrary.

Bedford, *supra*, at paras. 111, 99.

Chaoulli, *supra*, at paras. 84, 74, 128-53.

87. The judgment of McLachlin C.J. and Major J. and the judgment of Deschamps J. both considered and relied on the evidence of other jurisdictions and countries in rejecting the government's theoretical argument that banning private health insurance is somehow necessary to preserving a public health system. McLachlin C.J. and Major J. specifically noted the experiences of Sweden, Germany, and the United Kingdom, ultimately concluding that "far from undermining public health care, private contributions and insurance improve the breadth and quality of health care for all citizens."

Chaoulli, *supra*, at paras. 46-48, 70-84, 153, and 141-147.

88. Similarly, the chambers judge in Allen's case had unchallenged evidence before him, including a report titled *Health Care in Canada, 2012, A Focus on Wait Times*. This report repeatedly referenced a 2010 study of 11 countries showing Canada's relative performance in health care has not improved. In fact, among the 11 countries studied, Canada had the worst wait times for seeing a doctor or nurse when sick, seeing a specialist, and having elective surgery. One example given was the fact that 41% of Canadians wait 2 or more months for a specialist appointment, while only 9% of Germans do, and Germany does not ban private health insurance. Like Quebec's prohibition, Alberta's prohibition bears no relation to improving health care delivery in the public system. Alberta's prohibition on private health insurance is therefore arbitrary, just like Quebec's prohibition was.

(Extracts of Key Evidence Vol. I, Tab 16, pp. A49, paras. 2-4;
p. A66, para 1)
Chaoulli, *supra*, at paras 78, 144.

(iii) The Misapprehended Evidence Shows the Violation is not Justified Under s. 1 of the *Charter*

89. Alberta's prohibition on private health insurance under the *AHCI Act* cannot be "demonstrably justified in a free and democratic society" under s. 1 of the *Charter*.

90. In *Chaoulli*, the government argued unsuccessfully that the prohibition on private

insurance was required to preserve the integrity of the public system, and provide adequate universal health care for all Canadians. The goal of providing Canadians with adequate universal health care is admittedly pressing and substantial. However, in order for the prohibition at issue to be justified under s. 1, the Alberta Government must demonstrate that the law preventing Albertans from purchasing private health insurance is rationally connected to that objective, minimally impairs Albertans' rights, and that its benefits (if any) outweigh the harm it causes.

Chaoulli, *supra* at paras. 84, 55, 108, 141-147.

91. The Alberta Government has not met any of the components of the s. 1 test for proportionality. Instead, the Alberta Government relies on the reasoning of the dissent in *Chaoulli*, arguing that the prohibition is necessary for preserving public health care. But the Alberta Government's own evidence shows that Canada, in relation to countries which do not prohibit private health insurance, has worse wait times for seeing a doctor or nurse when sick, seeing a specialist, and having elective surgery.

(Extracts of Key Evidence Vol. I, Tab 16, pp. A53, para. 1)

92. McLachlin C.J. and Major J. doubted "whether an arbitrary provision, which by reason of its arbitrariness cannot further its stated objective, will ever meet the rational connection test under *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.)" The government of Alberta has not presented any evidence showing that the prohibition on private health insurance is necessary to protect the public health care system. Absent such evidence, there is no rational connection between the prohibition on private insurance and the objective of providing adequate healthcare and protecting the public health care system.

Chaoulli, *supra*, at para 155.

93. Likewise, a prohibition under the *AHCI Act* on private insurance is not minimally impairing.

Chaoulli, *supra*, at paras. 59-85, 156.

94. The words of McLachlin C.J. and Major J. in *Chaoulli* at para 157 are *à propos* here:

Finally, the benefits of the prohibition do not outweigh the

> deleterious effects. Prohibiting citizens from obtaining private health care insurance may, as discussed, leave people no choice but to accept excessive delays in the public health system. The physical and psychological suffering and risk of death that may result outweigh whatever benefit (and none has been demonstrated to us here) there may be to the system as a whole.

PART 5
RELIEF SOUGHT

95. It is respectfully submitted that the appeal be allowed, with a declaration that Alberta's prohibition on private health insurance under s. 26(2) of the *ACHI Act* is inconsistent with section 7 of the *Canadian Charter of Rights and Freedoms*, cannot be saved under section 1 of the *Charter*, and therefore is of no force or effect.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of November, 2014.

_____

John Carpay
Counsel for the Appellant
Justice Centre for Constitutional Freedoms

Estimated time of argument: 45 minutes

TABLE OF AUTHORITIES

Cases

Statutes/Regulation

APPENDIX

ALBERTA HEALTH CARE INSURANCE ACT

Revised Statutes of Alberta 2000

Chapter A-20

Part 1 – Health Care Insurance

1. Definitions

In this *Act*,

…

(b) **"basic health services"** means

(i) insured services,

(ii) those services that are provided by a dentist in the field of oral and maxillofacial surgery and are specified in the regulations but are not within the definition of insured services,

(iii) optometric services,

(iv) chiropractic services,

(v) services and appliances provided by a podiatrist,

(vi) services classified as basic health services by the regulations;

…

(k) **"extended health services"** means those goods and services or classes of goods and services that are specified in the regulations and provided to a resident or the resident's dependants under section 3(2);

…

(n) **"insured services"** means

(i) all services provided by physicians that are medically required,

(ii) those services that are provided by a dentist in the field of oral and maxillofacial surgery and are specified in the regulations, and

(iii) any other services that are declared to be insured services pursuant to section 2,

but does not include any services that a person is eligible for and entitled to under any Act of the Parliament of Canada or under the *Workers' Compensation Act* or any law of any jurisdiction outside Alberta relating to workers' compensation;

…

2. Insured services

The Lieutenant Governor in Council may by regulation declare any basic health services referred to in section 1(b)(ii), (iii), (iv), (v) or (vi) to be insured services for the purposes of the Plan.

26. Prohibitions

26(1) In this section,

(a) **"carrier"** means

(i) an insurer licensed under the *Insurance Act*, or

(ii) the Provincial Health Authorities of Alberta;

(b) **"insurer"** means

(i) a carrier, or

(ii) an employer, corporation or unincorporated group of persons that administers a self-insurance plan;

(c) **"self-insurance plan"** means a contract, plan or arrangement entered into, established, maintained in force or renewed under which coverage is provided

(i) by an employer for all or some of the employer's employees who are residents of Alberta,

(ii) by a corporation for all or some of its members who are residents of Alberta, or

(iii) by an unincorporated group of persons for all or some of its members who are residents of Alberta.

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

26(3) An insurer that contravenes subsection (2) is guilty of an offence.

(Consolidated up to 170/2012)

ALBERTA REGULATION 78/2006

Alberta Health Care Insurance Act

OUT-OF-COUNTRY HEALTH SERVICES REGULATION

****

1(1)(d) "elective services" means insured services and insured hospital services that are not provided in an emergency or in other circumstances in which medical care is required without delay;

2(1) Subject to subsections (2) and (3), an application may be made to the OOCHSC for approval of the payment of expenses with respect to insured services or insured hospital services received outside of Canada, where the resident or the resident's dependant has endeavoured to receive the services in Canada and the services are not available in Canada.

(2) An application may only be made under subsection (1) with respect to

(a) elective services, if the application is made prior to receiving the services, or

(b) insured services or insured hospital services that are not elective services, if the application is made

(i) prior to receiving the services, or

(ii) not later than 365 days after the services were received.

(3) An application under subsection (1) must

(a) be in writing in a form established by the OOCHSC,

(b) contain the information required under section 7(1)(b), and

(c) be made on the resident's behalf by

(i) a physician registered under the Health Professions Act, if the services are insured medical services referred to in the Medical Benefits Regulation (AR 84/2006) or insured hospital services, or

(ii) a dentist registered under the Health Professions Act, if the insured services are oral and maxillofacial surgery services referred to in the Oral and Maxillofacial Surgery Benefits Regulation (AR 86/2006).

CANADA HEALTH ACT

R.S.C., 1985, c. C-6

CANADIAN HEALTH CARE POLICY

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.

1984, c. 6, s. 3.

***

PROGRAM CRITERIA

Program criteria

7. In order that a province may qualify for a full cash contribution referred to in section 5 for a fiscal year, the health care insurance plan of the province must, throughout the fiscal year, satisfy the criteria described in sections 8 to 12 respecting the following matters:

- (*a*) public administration;
- (*b*) comprehensiveness;
- (*c*) universality;
- (*d*) portability; and
- (*e*) accessibility.

1984, c. 6, s. 7.