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Health care, and justice, denied

Patients suffering in pain on wait lists for surgery have once again been denied their Charter right to access health care outside of the government's cruel, inefficient, and unaccountable monopoly. In 2005, the Supreme Court of Canada famously declared in *Chaoulli vs. Quebec* that "access to a waiting list is not access to health care." But last week, the Alberta Court of Appeal refused to apply and follow the *Chaoulli* precedent, citing a lack of evidence in the case of *Darcy Allen vs. Alberta*.

A dentist in Okotoks, Alberta, Dr. Allen was forced out of his profession while waiting for years for surgery to address his severe and debilitating back pain. What began in 2007 as a seemingly minor hockey injury gradually turned his life into a nightmare of around-the-clock pain. Normal tasks, like shovelling snow or tying shoelaces, became impossible. On one occasion, Dr. Allen watched helplessly as his one-year-old daughter, while crawling on a bed, lost her balance and fell off, and he could not move to catch her.

Dr. Allen finally received a referral for surgery in early 2009, but no surgery could be performed until September 2010 — a date later pushed back to June 2011. No longer able to work to support himself and his family, unable to perform ordinary day-to-day tasks, and experiencing pain so severe that not even the strongest drugs were effective, he spent \$77,000 of his own money on surgery in Montana. Dr. Allen's surgery immediately and significantly reduced his pain, and started his slow journey back to better health. Apart from paying out of pocket, Dr. Allen's only other option

was to suffer two years of extreme pain, waiting for the Alberta government's monopoly system to provide necessary surgery.

Dr. Allen's experience with medical wait times is, unfortunately, not unique. While patients in France, Germany, Japan and dozens of other developed democracies count their medical wait times in days and weeks, the government health monopolies in Canadian provinces subject patients to wait times that are counted in months and years. The international evidence demonstrates that there is simply no need for government to impose a monopoly over health care in order to ensure that health services are available to all members of the public. In *Chaoulli*, the Supreme Court held that while government has every right to create health-care programs, it does not have the right to create a monopoly that prevents patients from accessing health care outside of that government monopoly.

Last week's Court of Appeal decision, as well as the trial decision under appeal, declared that Dr. Allen had not brought forward enough evidence to support his claim. Curiously, neither decision refers to the extensive evidence put before the court about Alberta's long wait lists, and how wait times hurt patients, even killing them in some cases. While refusing to consider — or even mention — this abundant evidence, the court declared that Darcy Allen should have introduced expert reports and expert witnesses to testify about the fact that wait lists exist, and the fact that wait lists inflict suffering — and sometimes death — on patients.

The Alberta government has not disputed either of these two facts. They are the same facts on which the Supreme Court relied in *Chaoulli*.

Following the court's logic, Darcy Allen should have spent \$77,000 out-of-pocket on his medically necessary surgery, and then an additional \$200,000 to \$400,000 to assert his Charter rights, by paying a panoply of experts to "prove" basic facts that have already been admitted by the Alberta government. So much for access to justice.

To respect Charter rights, governments have only two options: ensure that a monopoly system provides real access to health care (not just access to a waiting list), or allow Canadians the freedom to access health care outside of the government's system. A law that creates a government monopoly over health care, by banning private health insurance, complies with the Charter only if that monopoly does not inflict pain and suffering — and a real risk of death — on waiting patients.

Ignoring the evidence before them about Alberta's long and painful waiting lists, Alberta's courts have refused to deal with the violation of Darcy Allen's Charter rights. Hopefully the Supreme Court of Canada will not refuse to do so.

Calgary lawyer John Carpay is president of the Justice Centre for Constitutional Freedoms (JCCF.ca), and acts for Darcy Allen