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Private Health Insurance and Charter Section 7

Written by: Linda McKay-Panos

Case discussed: *Allen v Alberta*, 2014 ABQB 184

Over the past few years, various courts across Canada have addressed the ambit of the *Charter* right to life, liberty and security of the person in the context of access to private health insurance. *Allen v Alberta*, 2014 ABQB 184 ("*Allen*") is Alberta's recent case on this issue.

Dr. Allen, a dentist, experienced a back and knee injury in 2007, and required a Magnetic Resonance Imaging ("MRI") test. He was told it would take six to eight months for the MRI because of Alberta's waiting list. Dr. Allen paid for the MRI himself in order to avoid the wait. The MRI revealed bulging and degeneration of his lumbar spinal discs (paras 2 to 5).

Dr. Allen was treated for the pain by medication and injections, but his work as a dentist was affected. In 2009, a specialist recommended back surgery (para 8). He was told he would have to wait one year for a special test ("discogram") and a further year for surgery (to June 2011). In June 2009, a new MRI test revealed further degeneration and herniation of the lumbar discs (para 10).

A specialist in Montana took a further MRI and recommended surgery (para 11). Dr. Allen ceased his dental practice due to the pain.

Dr. Allen contacted the Alberta Health Minister's office and was able to expedite the discogram to September 2009. He arranged to have surgery in Montana in December 2009, but later cancelled this because surgery became available in Alberta in December 2009 (para 15). However, the Alberta date was later cancelled and re-set for June 2011 (para 14). Dr. Allen contacted the surgeon in Montana and was able to revive the December 2009 date in Montana and paid for the surgery himself.

Following surgery the pain decreased gradually but Dr. Allen claimed (without proof) that the delay in obtaining surgery left him with permanent nerve damage. He sold his dental practice in 2010 (para 17). Dr. Allen had not been able to purchase private health insurance.
Justice P. Jeffrey was 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" (para 20).

Justice Jeffrey discussed Alberta's implementation of the recommendations in the *Final Report of the Federal Advisor Wait Times* (Ottawa: Health Canada, 2006) ("Postl Report" available here) , including wait times initiatives and primary care networks (para 22). While Alberta had tracked specific medical conditions in order to ascertain whether their treatment was delivered within target timeframes, it did not specifically track disc replacement surgery (para 26). Alberta testified that it did not know how many Albertans were on waiting lists for surgeries and suffering through severe pain or unable to function on a daily basis because of their conditions (para 28).

Section 3 of the *Canada Health Act,* RSC 1985 c C-6 provides:

> **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.

The relevant subsection of the *Alberta Health Care Insurance Act*, RSA 2000, c A-20 ("AHCIA") provides:

> 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.

Dr. Allen applied to the court for a declaration that AHCIA subsection 26(2) violated his rights under section 7 of the *Canadian Charter of Rights and Freedoms* (the *Charter*), which provides:

> **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.

As a preliminary issue, Alberta argued that *Charter* section 7 did not apply here because AHCIA subsection 26(2) was neither part of the adjudicative context nor the administration of justice (para 34). Justice Jeffrey relied on *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 ("*PHS*"), which provides that "when a policy is translated into law or state actions, those laws and actions are subject to scrutiny under the *Charter*." He concluded that AHCIA section 26(2) ("the Prohibition") was therefore subject to *Charter* review (paras 34, 36).

Justice Jeffrey noted that in determining whether section 7 of the *Charter* is violated, *R v Beare,* [1988] 2 SCR 317, provides for a two-step inquiry. First, the court looks at whether there has been a deprivation of the right to life, liberty and security of the person, and, second, whether the law (AHCIA, section 26(2)) is contrary to the principles of fundamental justice (para 32).

Dr. Allen argued that his security of the person was violated in this case. He relied on *Chaouilli v Quebec (Attorney) General*, 2005 SCC 35 ("*Chaouilli*") for the proposition that "any statutory prohibition on private health care violates the right to security of the person" (para 39). Justice Jeffrey disagreed with this position. He noted that breaches of section 7 must be demonstrated with evidence: *PHS, Chaouilli, 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" (para 40). Justice Jeffrey held that the authorities require an applicant to demonstrate that the law in question prevents access to health care. Dr. Allen had not so demonstrated (para 41).

Dr. Allen also argued that the conclusion of Justice Deschamps in *Chaouilli*— that the policies with respect to private health insurance in Quebec and Alberta are the same—supported his lack of evidence (para 43). Justice Jeffrey said that that was the decision of one Justice, not the majority of seven. Further, Alberta's policy may have changed since *Chaouilli* was heard. Justice Deschamps' statement was made when summarizing expert evidence that was accepted by the Trial Judge in *Chaouilli,* not when determining that AHCIA section 26(2) violated *Charter* section 7 (para 44).

Justice Jeffrey noted that the majority judgment of the Supreme Court in *Chaouilli* relied on conclusions based on the specific record that was before the court. He held:

> [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.
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> [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.

Justice Jeffrey also noted that there are a number of alternate possibilities for the added wait times in Alberta that may have nothing to do with AHCIA section 26(2), such as underfunding, mismanagement, shortage of qualified practitioners, increased incidence of the particular condition, and unexpected population increases, among others (para 50).

Because Dr. Allen had failed to show that AHCIA section 26(2) deprived him of life, liberty or security of the person, his application failed at the first step in the section 7 analysis; the court therefore did not need to address the second, fundamental justice, step (paras 55-56).

Commentary

Chaouilli involved a patient who had to wait several months for hip replacement surgery. The patient and his physician (Dr. Chaouilli) challenged the Quebec law that prohibited private health care insurance for publicly insured health services. They argued that this provision offended both the *Canadian Charter of Rights and Freedoms* and the *Quebec Charter of Human Rights and Freedoms*. On June 9, 2005, a 4-3 majority of the Supreme Court ruled that Quebec's ban on private insurance violated the *Quebec Charter of Human Rights and Freedoms*. Three of the majority concluded that the ban also violated the *Canadian Charter of Rights and Freedoms*, while three judges held that it did not, and the seventh judge was silent on the matter. The majority therefore only ruled that there was a violation of the *Quebec Charter*.

This decision has been interpreted in different ways, depending on whom you ask. Advocates of privatization and two-tiered healthcare see this case as a victory. However, advocates for Medicare indicate that the direct consequences of the ruling are limited to the application of the *Quebec Charter* and the province of Quebec (See the Canadian Doctors for Medicare, The *Chaouilli* Decision here). These advocates note that the majority decision concluded that the *Quebec Charter* guarantees a right to private insurance where the public system is inadequate.

They note that the case did not rule that a parallel private insurance system is guaranteed by the *Constitution*, or that a single-tier publicly insured system is unlawful. Advocates of Medicare also point out that the *Chaouilli* case arose from circumstances that existed in 1997 in Quebec, before that government and others across Canada had initiated strategies to address waiting times. Finally, the Supreme Court's reliance on comparisons to European health care systems has been widely criticized because the court failed to recognize that wait times are actually longer in those countries that have parallel private insurance. Further, the majority of European countries that permit private insurance do not allow people who can afford it to obtain preferential treatment by queue jumping (see the Canadian Doctors for Medicare, The Chaouilli Decision, above).

The *Allen* case seems to be an attempt to distinguish *Chaouilli*, or at least the interpretation it has been given by some two-tiered healthcare advocates. Dr. Allen was not arguing that he had a right to parallel private insurance, merely that the inadequacies of the public system had violated his *Charter* section 7 rights. Justice Jeffrey focused on the lack of evidence that the Prohibition was to blame for Dr. Allen's increased wait time. Arguably, it would be almost impossible for a person to demonstrate the causes of wait times without data; the Alberta government acknowledged that it did not collect information about 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 medical conditions (*Allen*, para 28). Thus, any individual would have a great deal of difficulty providing the required evidence. Justice Jeffrey's mixed findings of fact and law will also make the case difficult to appeal, as the appeal courts will defer to his findings of fact.

Perhaps this case also demonstrates the reluctance of courts to enter into the sphere of government policy, especially in an area that is very dear to many Canadians—our public health care system.