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Is There a Right to Private Health Care in Alberta? A "Constitutional Vivisection"

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Case Commented On: *Allen v Alberta*, 2015 ABCA 277

To what extent do precedents in constitutional cases allow litigants to take short cuts on evidence and procedure in subsequent claims? According to the Alberta Court of Appeal in *Allen v Alberta*, 2015 ABCA 277, it depends on a number of considerations. Many of the criteria that Justice Slatter enumerates in his opinion in *Allen* are sensible ones. However, he uses this case – involving a section 7 *Charter* challenge to the ban on private insurance in the health care context – to mount a critique of previous section 7 decisions, the Supreme Court of Canada, and even the framers of the *Charter*. Justice Slatter's critique is arguably inconsistent with the role of the courts as guardians of the constitution, and Justices Martin and Watson, although concurring in the result, distance themselves from his critique. Ironically, Justice Slatter's reasons for judgment are often devoid of precedential support even as he is writing on that very subject.

Darcy Allen was a dentist who sustained injuries playing hockey and required back surgery, which he was told could not be scheduled for two years due to backlogs in the Alberta health care system. He was subjected to increasing back pain as a result of the deterioration of his lumbar discs and reached a point where he was no longer able to practice dentistry. Allen eventually had surgery in Montana at a cost of over $77,000, when he was still facing an 18 month wait time in Alberta.

Allen brought a claim under section 7 of the *Charter*, which provides that "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." He sought a declaration that his right to security of the person was violated by the prohibition on private health insurance in section 26(2) of the *Alberta Health Care Insurance Act*, RSA 2000, c A-20. He brought this *Charter* challenge by way of an Originating Application, supported by an affidavit which included a number of medical reports and proof of expenses. The government's response was also by affidavit, including background documents on the health care system and wait times. As noted by Justice Slatter, "No expert evidence was filed, and there was no *viva voce* evidence before the chambers judge" (at para 7).

If this seems a somewhat truncated way to bring a *Charter* claim, that is because Allen was relying on a Supreme Court of Canada decision where a similar ban on private health care insurance in Quebec was struck down – *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791.

At the Court of Queen's Bench level, 2014 ABQB 184, Justice Paul Jeffrey found that the question of whether the prohibition on private health insurance violated Allen's right to security of the person was in part a question of fact. And on that question of fact, Allen had led

insufficient evidence to demonstrate that Alberta's restriction on private health insurance caused the harms he suffered – for example, there was no evidence of whether, absent the prohibition, private insurance would have been available for the kind of back surgery Allen required. Allen's argument that the precedent in *Chaoulli* was *per se* sufficient to ground his claim was rejected.

Justice Slatter framed the overarching issue for the Court of Appeal as "whether the appellant provided a proper procedural platform and evidentiary record to decide the constitutionality of s 26(2) of the *Act*" (at para 13). The Court unanimously decided that he had not done so.

Justice Slatter's reasons for decision begin with a discussion of Canada's universal health care system, which he describes as "an example of co-operative federalism in action" (at para 15). He notes the primary objective of the Canadian health care system, which is set out in section 3 of the *Canada Health Act*, RSC 1985, c C-6: "reasonable access to health services without financial or other barriers". Key components of the system are economic universality and risk universality, which protect equal access to publicly funded health care regardless of one's income or medical profile. According to Justice Slatter, "These features … undoubtedly account, in large measure, for the public support of the system, and the willingness of Canadians to devote the substantial public resources necessary to operate it" (at para 16). No authority is cited for this proposition, but perhaps Justice Slatter was taking judicial notice of it.

As for the Alberta health care system, Justice Slatter notes (at paras 17-18) that it promotes universality through prohibitions on queue jumping, extra billing, and private insurance for services covered under the Alberta Health Care Insurance Plan – the prohibition challenged by Allen.

Justice Slatter then turns to a discussion of the role of courts in constitutional litigation. He indicates that "Cases in which the appointed judiciary override the will of the democratically elected legislatures fall into a special category", since constitutional supremacy provides an exception to the supremacy of Parliament (at para 20). He calls this an "unavoidable mandate of the judiciary" and notes that it "is not a task to be exercised casually" (at para 21). In particular, constitutional litigation must observe proper procedural safeguards, which must be:

> (a) fair to the citizens challenging the statute, in the sense that they are given a reasonable opportunity to make the case for unconstitutionality: ***Canada (A.G.) v Downtown Eastside Sex Workers United Against Violence Society***, 2012 SCC 45 (CanLII) at paras 31-2, [2012] 2 SCR 524.
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> (b) fair to the legislature, in the sense that the government has a reasonable opportunity to defend the statute;
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> (c) fair to the court, in the sense that the court has a reasonable record on which to exercise this important component of its jurisdiction; and
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> (d) fair to other governments and interested groups who are affected by and may want to intervene in the process (at para 21).

Apart from the first consideration, Justice Slatter does not provide authority for this list of procedural safeguards. He later cites *Hryniak v Mauldin*, 2014 SCC 7 at paras 4 and 29, but this was a case concerning the fairness of summary judgment in a civil claim between private parties, and in any event it does not contain any list of criteria akin to that set out by Justice Slatter. He

could have cited a Supreme Court decision in the constitutional context, *Doucet-Boudreau v Nova Scotia (Minister of Education)*, [2003] 3 SCR 3, 2003 SCC 62, in which the majority listed a number of considerations for courts deciding on "appropriate and just" remedies under section 24(1) of the *Charter*. These include both fairness to *Charter* claimants and fairness to the party(s) against whom a remedy is made (typically the government), as well as consideration of the different functions performed by the legislature, the executive and the judiciary (at paras 55-58). Although *Doucet-Boudreau* concerns constitutional remedies rather than procedural and evidentiary issues in constitutional claims, it still could have provided some support for Justice Slatter's list of considerations.

Interestingly, Justice Slatter does not apply his considerations for fair procedure to the facts, but cites a number of cases which establish the norm that constitutional cases must be decided on the basis of a full evidentiary record, often including expert evidence. He notes that this was the case in *Chaoulli*, as well as in other section 7 decisions such as *Canada (A.G.) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 (a successful challenge to the criminal prohibitions on prostitution) and *Carter v Canada*, 2015 SCC 5, [2015] 1 SCR 331 (a successful challenge to the criminal prohibition against assisted suicide). Some of these cases proceeded by way of application rather than trial, but they nevertheless included evidence of specific state actions state that deprived the claimant of security of the person, the relevant principles of fundamental justice and how they applied to the facts, and evidence related to any section 1 justification by government (at paras 22-24). Based on these authorities, Justice Slatter found that the chambers judge "reasonably concluded that the record [was] not adequate to decide the constitutional issue presented" (at para 25).

As for Allen's argument that the precedent in *Chaoulli* allowed for a truncated procedure in his case, Justice Slatter again enumerated a list of criteria to be considered: (a) the scope of the precedent, (b) the pedigree of the precedent, (c) the constitutional provision that is engaged, and (d) the clarity of the precedent (at para 27). Once again, no authority is provided for this list.

The application of the first two criteria seem relatively straightforward for Justice Slatter. On the question of scope, he notes that "prior decisions are at best binding on points of law, not questions of fact" (at para 28). On the pedigree of the precedent, he notes that *Chaoulli* was decided in 2005 based on evidence led in 2000, and concerned the Quebec health care system. Circumstances may have changed since then, and may be different in Alberta (at paras 29-30).

It is in relation to the third criterion – the constitutional provision and issue engaged – that Justice Slatter begins his critique. After citing the text of section 7 of the *Charter*, Justice Slatter suggests that it is "notoriously open-ended, and its application to the constitutional review of social and economic policies is controversial and unsettled" (at para 31). No authority is provided for this statement, but perhaps the notoriety of the point brings it into the realm of judicial notice. Justice Slatter calls the wording of section 7 "vague" and "imprecise", and critiques the courts' interpretation of section 7 by saying that "an absence of institutional self-restraint by the judiciary makes the problem worse, not better." The Supreme Court is seen as part of the problem, as it has "recast the phrase "principles of fundamental justice" with even less precise terms like overbreadth, disproportionality and arbitrariness, none of which have been comprehensively defined" (at para 32). Furthermore, this interpretation takes section 7 beyond the intent of the framers of the *Charter*, which was to limit judicial review to procedural principles of fundamental justice, a point that Justice Slatter says the Supreme Court has "totally disregarded… with dramatic consequences" (at para 33). He cites Peter Hogg for this last point (see "The Brilliant Career of Section 7 of the *Charter*" (2012) SCL Rev (2d) 195 at 198), but

fails to note that the Supreme Court grappled with the question of substantive versus procedural review under section 7 in one of its first *Charter* cases, *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486, 1985 CanLII 81. He also fails to note that the Supreme Court recently provided comprehensive definitions of overbreadth, gross disproportionality and arbitrariness in *Bedford, supra* at paras 96 to 123.

All of this leads Justice Slatter to state that "It is, unfortunately, sometimes difficult to discern the difference between these concepts and a simple disagreement by the judiciary with the public policy decisions of democratically elected officials" (at para 32). On the more specific issue of health care policy, he correctly notes that "The *Charter* does not confer a freestanding right to health care" (at para 35, citing *Chaoulli* at para 104), but then goes on to suggest that the government could remove services from the system without these "social policy choices" engaging the constitution. This is not correct; if for example the government were to remove coverage for abortion services or medically necessary services for people with disabilities, there would be a strong argument that this government action violated the *Charter* guarantee of equality. It is well accepted that although the government may not be obliged to provide a particular social program, once it does so it must comply with the *Charter* (see e.g. *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 1997 CanLII 327).

Justice Slatter also makes the point that where an applicant such as Allen "seeks to isolate out one small portion of the entire complicated, intertwined health care system, and subject it to constitutional scrutiny in isolation" this kind of "constitutional vivisection" mandates a proper evidentiary record (at paras 35, 37). The record would need to include evidence allowing assessment of the government's social policy choices based on protection of equality of access to health care (at para 36). These are fair points, as the burden is on the claimant in litigation under section 7 of the *Charter* to prove both a violation of life, liberty or security of the person and a violation of the principles of fundamental justice. At the latter stage, if arbitrariness, overbreadth, or gross disproportionality are alleged, this requires consideration of the interplay between the government's objectives (such as equal access to health care) and the actual effects of its laws. Moreover, Justice Slatter's point that "It is inappropriate to focus on only a small portion of the overall Canadian health care system, and then subject that part to *Charter* scrutiny" (at para 49) is supported by Supreme Court jurisprudence, although he does not cite it (see *Withler v Canada (Attorney General)*, [2011] 1 SCR 396, 2011 SCC 12 (an unsuccessful challenge to federal spousal survivor benefits under section 15 of the *Charter*)).

Justice Slatter is also critical in his application of the fourth criterion, the clarity of the precedent. He notes (at paras 38-41) that *Chaoulli* involved a 3:3:1 split, with 3 judges (McLachlin CJ, Major and Bastarache, JJ) finding that the prohibition on private health care violated section 7 of the *Charter*, another 3 judges (Binnie, LeBel and Fish JJ) finding that there was no violation of section 7, and the swing judge, Deschamps J, finding that the prohibition violated the Quebec Charter. He accuses Justices McLachlin, Major and Bastarache of "re-defin[ing]" the principles of fundamental justice "to include a concept of "arbitrariness"" (at para 39). However, arbitrariness was explicitly recognized as a principle of fundamental justice much earlier, in *Rodriguez v British Columbia (Attorney General)*, 1993 CanLII 75, [1993] 3 SCR 519. He also levels the critique that "Notwithstanding that the democratically elected legislatures of Canada had collectively decided" that the policy of banning private insurance was justified, "the conclusion [that it was arbitrary] appears to be have been incontrovertible in the minds of these judges" (at para 39). Similarly, he critiques Justice Deschamps for "disagree[ing] with the

experts who opined that private insurance would undermine the public system, essentially re-weighing all the evidence" (at para 41). Justice Slatter says that these decisions, to the extent they require governments to put more resources into the health care system or allow private insurance, suggest that "Only Goldilocks would know when the statute was constitutional" (at para 43) and that "the constitutionality of the length of the waiting lists [is] as variable as the length of the Chancellor's foot" (at para 44). These are harsh (and, in respect of Goldilocks, gendered) criticisms of some members of the Supreme Court. And once again, Justice Slatter does not cite any authority for his criticisms, even though plenty of critical commentary on *Chaoulli* is available in the academic literature (see e.g. Colleen Flood, Kent Roach & Lorne Sossin, eds, *Access to Care, Access to Justice: The Legal Debate over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005); Martha Jackman, "The Last Line of Defence for [Which?] Citizens: Accountability, Equality and the Right to Health in *Chaoulli*" (2006) 44 Osgoode Hall LJ 349; Mel Cousins, "Health care and human rights after Auton and *Chaoulli*" (2009) 54 McGill LJ 717).

In contrast, the three judges who dissented in *Chaoulli* and would have upheld the prohibition on private health care are said by Justice Slatter to have "persuasively reasoned that health care policy choices were not within the legitimate mandate of the courts" (at para 40).

My sympathies also lie with the dissenting justices in *Chaoulli* and their attempt to shield the public health care system. And I tend to agree with Justice Slatter that *Chaoulli* did not provide the answer in and of itself to Allen's constitutional claim, and (although I have been critical elsewhere of the evidentiary burden sometimes imposed on *Charter* litigants) that more evidence was required to support this challenge. However, it must be noted that Justice Slatter is doing exactly what he accuses the Supreme Court majority of doing in *Chaoulli* and other cases – rendering an opinion that seems to flow from personal preferences rather than precedential authority. His use of colourful language to mount his critique enhances the impression that he is relying on rhetoric rather than precedent and reason.

Perhaps this is why Justices Martin and Watson declined to fully sign on to Justice Slatter's judgment. Justice Martin indicates (at para 55) that he concurs only with Justice Slatter's reasons on the insufficiency of the evidence (paras 1-26 and 54). Justice Watson concurs with Justice Slatter's conclusion (at para 56), and provides short reasons indicating he is more open to acknowledging that sometimes courts must assess the constitutionality of government decisions and policy choices (at para 60). That approach is the correct one; it is dictated by section 52 of the *Constitution Act 1982*, which provides that "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." To take a position to the contrary is, as I argued above, inconsistent with the role of the courts as guardians of the constitution.

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