SCC File No.

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

B E T W E E N

DARCY ALLEN

APPLICANT
(Appellant)

– and –

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

APPLICATION FOR LEAVE TO APPEAL
(DARCY ALLEN, APPLICANT)
(Pursuant to Section 40 of the *Supreme Court Act*, R.S.C., 1985, c. S-26)

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PART I – OVERVIEW & STATEMENT OF FACTS

A. Overview: Private Health Care Bans in Canadian Jurisdictions Despite *Chaoulli*

1. This case is about clarifying and extending the principles of s. 7 of the *Charter* in the context of the continued ban on private health insurance in Alberta.[1] The decisions below fail to apply a modern s. 7 analysis to address the constitutionality of Canadian health insurance legislation. This legislation prevents patients from obtaining private health care insurance and denies them reasonable medical alternatives where timely access to needed care is not available. As a consequence, this case necessarily deals with the Supreme Court of Canada's ruling in the similar case of *Chaoulli v. Quebec (Attorney General).*[2]

2. The decisions below call into question the proper procedure and amount of evidence required of an individual litigant to demonstrate a breach of s. 7 of the *Charter*. The approach adopted below runs counter to this Court's decision in *Bedford* [3] (which proceeded by way of application in the Superior Court of Ontario).

3. The Alberta Court of Queen's Bench and the Alberta Court of Appeal dismissed Darcy Allen's application, holding that he had failed to bring his legislative challenge by way of action and thereby failed to establish a proper evidentiary foundation. The evidence put forward by the parties included Dr. Allen's detailed personal affidavit, Government of Alberta affidavits, and background documents on both the healthcare system and wait times.[4]

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[1] See s. 26(2) of the *Alberta Health Care Insurance Act*, RSA 2000, c. A-20. For similar legislation across Canada see s. 45 of the *Medicare Protection Act*, RSBC 1996, c 286; s.18(10.1),(10.2), 24, 24.1 of the *Saskatchewan Medical Care Insurance Act*, RSS 1978, c S-29; s. 14(1) of the *Health Insurance Act*, RSO 1990, c H.6; s. 96(1) of *The Health Services Insurance Act*, CCSM c H35; s.15 of the *Health Insurance Act*, CQLR c A-29; s. 11 of the *Hospital Insurance Act*, CQLR c A-28; s. 14(1) of the *Health Care Insurance Plan Act*, RSY 2002, c 107; s. 3 of the *Medical Services Payment Act*, RSNB 1973, c M-7; s. 7, 10 of the *Medical Care Insurance Act*, 1999, SNL 1999, c M-5.1; s. 27(2) of the *Health Services and Insurance Act*, RSNS 1989, c 197; s. 21 of the *Health Services Payment Act*, RSPEI 1988, c H-2; s. 14 *Hospital Insurance Regulations*, RRNWT 1990, c T-12. For a comparison of this legislation see Colleen Flood & Tom Archibald, "The Illegality of Private Health Care in Canada" (2001) 164:6 Can Med Assoc Jnl 825.

[2] *Chaoulli v. Quebec (Attorney General)*, [2005] 1 SCR 791 [*Chaoulli*].

[3] *Canada (Attorney General) v. Bedford*, [2013] 3 SCR 1101 [*Bedford*].

[4] See also *Bedford* at para 54 to compare the evidentiary record established in that application.

4. The undisputed evidence, acknowledged by the Courts below, demonstrates that there were significant wait times in Dr. Allen's case, that these caused debilitating pain, that Dr. Allen eventually lost his livelihood as a result, and that many other patients suffer on waiting lists. There was ample evidence on the record to support a detailed s. 7 analysis.[5]

5. There is a pressing and substantial need for oversight and guidance from the Supreme Court as a result of the following:

- Courts in Canada need guidance to address the implementation and impact of *Chaoulli* – especially in light of the need to ensure consistency across Canada when identifying s. 7 infringements (applying the principles discussed in *Smith*[6], *PHS*[7], *Carter*[8] and *Bedford*[9]); and
- The rulings of the Alberta Courts in the instant case have created an access to justice barrier by imposing an onerous, and unconstitutional burden on ordinary litigants seeking *Charter* remedies.

B. The Undisputed Facts Accepted by all Parties and the Courts Below

6. In December 2007, Dr. Darcy Allen, then a 36 year old dentist from Okotoks, Alberta, injured his back and knee playing hockey. He began to experience increasing back pain, which could not be alleviated by medications, physiotherapy, acupuncture or facet injections.

7. Dr. Allen was forced to lay on his back due to pervasive and constant pain from his injuries. It became impossible for him to continue working in order to support himself and his family. He was not able to perform ordinary daily tasks, or even play with his infant daughter. The level of his debilitation was severe, yet surgery was not recommended until May of 2009.

8. Dr. Allen was informed by his physicians that he could not receive the surgery until the summer of 2011 – a wait of two years.[10] Dr. Allen could no longer practice dentistry due to the debilitating pain. He was forced to sell his dental practice in July 2009.[11]

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[5] Decision of the Court of Appeal below, at para 3 [Tab 2C].
[6] *R. v. Smith*, 2015 SCC 34 [*Smith*].
[7] *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 SCR 134 [*PHS*].
[8] *Carter v. Canada (Attorney General)*, [2015] 1 SCR 331 [*Carter*].
[9] *Bedford*, *supra.*
[10] Decision of the Application Judge below, at para 21 [Tab 2A].
[11] Decision of the Court of Appeal below at para 4 [Tab 2C].

9. As a last resort, and as a direct result of the projected two year waiting time, Dr. Allen paid $77,502.57 out of pocket for surgery in Montana in December of 2009. Dr. Allen paid for and obtained the same medically necessary surgery in Montana as had been recommended in Canada. Dr. Allen's pain reduced and his physical condition, as expected, gradually improved following surgery.

10. Dr. Allen filed an application and supporting affidavit for a declaration that s. 26(2) of the *Alberta Health Care Insurance Act* (*"AHCIA"*) was unconstitutional, as it violated s. 7 of the *Charter*.

C. Evidentiary Record Establishing the State of Alberta Healthcare

11. In addition to Dr. Allen's specific evidence regarding his personal circumstances, the record established conditions in the Alberta Healthcare system similar to the problems identified in the Quebec system (and discussed by this Honourable Court in *Chaoulli*).

12. The report of Dr. Postl (the "Postl Report") cited by Justice Jeffrey at the hearing found that Canada continues 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."[12] In *Health Care in Canada*, 2012: A Focus on Wait Times, the Canadian Institute for Health Information confirmed that Canadians experience longer wait times relative to other countries.[13]

13. In the Postl Report, Dr. Postl wrote, "…nobody wants to wait, or should wait, months for an artificial joint while suffering pain or disability."[14] The Canadian Institute for Health Information likewise reported that wait times can have negative consequences for patients: "Research has shown that long waits for care can contribute to declines in health status and poorer outcomes of care, and can impact the health care system overall. When asked, Canadians report that such waits lead to increased worry, anxiety, stress and pain."[15]

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[12] Decision of the Application Judge below at para 24 [Tab 2A].
[13] *Extracts of Key Evidence*, pages A-53, A-66, A-91, A-101 [Tab 4A].
[14] *Extracts of Key Evidence*, page A-171 [Tab 4A].
[15] *Extracts of Key Evidence*, page A-52 [Tab 4A].

14. Ample evidence was before the Alberta courts to show that wait times are a serious problem in Alberta, and across the rest of Canada.[16] As in *Chaoulli*, the evidence proves both the existence of lengthy wait times within the government health monopoly imposed by the Province of Alberta, and that these wait times result in physical and psychological suffering.

15. In an environment where timely access to medical care is frustrated by lengthy waiting times, the government's prohibition of reasonable medical alternatives violates Dr. Allen's s. 7 rights to liberty and security of the person.

16. Dr. Allen's experience demonstrates the real effect and consequence of structural issues identified in the Postl Report and endemic throughout Canada.

D. Trial Judgment

17. Justice P. R. Jeffrey applied the two-part test for finding a s. 7 *Charter* breach outlined by La Forest J. in *R v. Beare*,[17] namely that:

- There has to have been a deprivation to "life, liberty and security of the person"; and
- The deprivation must be contrary to the principles of fundamental justice.

18. Jeffrey J. found that Dr. Allen had failed to meet the first requirement under the two-part test in *Beare*, and had failed to establish that his right to security of the person had been infringed by s. 26(2) of the *Alberta Health Care Insurance Act.* Specifically, Justice Jeffrey found that:

- "Dr. Allen must demonstrate that the Prohibition[18] prevents access to health care (or in some other way creates a risk to health). He has not done so";[19]
- "Dr. Allen offers only the personal opinion that the availability of private health insurance prior to his events would have provided him with timely medical care";[20]
- 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

[16] Decision of the Court of Appeal below at para. 7 [Tab 2C].
[17] *R v. Beare*, [1988] 2 SCR 387 at 401; note: *Beare* is not referred to by recent decisions of the Supreme Court of Canada including *Bedford, Carter*, and *Smith.*
[18] "Prohibition" refers to the restriction in s. 26(2) of the *Alberta Health Care Insurance Act*.
[19] Decision of the Application Judge below at para 41.
[20] Decision of the Application Judge below at para 41 [emphasis added].

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"[21]; and

- "Dr. Allen is asking the court to accept his theory that the Prohibition creates or exacerbates wait times thereby preventing access to health care. His application requires evidence proving his theory but offers none. The added time Dr. Allen would have to have waited for his surgery in Alberta may have been no different in the absence of the Prohibition. That competing theory has just as much support on this record."[22]

E. Court of Appeal

19. The Alberta Court of Appeal also ignored the abundant evidence before it, which established both the existence of wait times in Alberta and their infliction of physical and psychological pain on patients. The Court upheld the decision of the chambers judge in deciding that Dr. Allen had failed to provide evidence that the s. 26(2) prohibition caused him to suffer a two-year wait time for surgery in Alberta.

20. The Court of Appeal also held the following:

a. *Stare decisis* only applies to questions of law, not facts, and the question of whether the s. 26(2) prohibition infringes s. 7 by depriving Albertans (including Dr. Allen) of timely health care is a question of fact (and thus that *Chaoulli* was inapplicable to the instant case, as *Chaoulli* had separate facts);[23] and

b. *Chaoulli* was decided in 2005 and may no longer be good law, or alternatively, that the constitutionality of the Alberta health care system may have evolved (i.e. improved) since 2005;[24] and

c. A full trial is required to challenge s.26(2) of the *Alberta Health Care Insurance Act* (and required for any other *Charter* challenges of legislation).[25]

21. The Courts below refused to properly consider Mr. Allen's s. 7 rights as an individual, by requiring that he provide a compelling argument for societal change writ large.

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[21] Decision of the Application Judge below at para 49 [emphasis added].
[22] Decision of the Application Judge below at para 53 [Tab 2A].
[23] Decision of the Court of Appeal below at para 37 [Tab 2C].
[24] Decision of the Court of Appeal below at para 29 [Tab 2C].
[25] Decision of the Court of Appeal below at para 37 [Tab 2C].

PART II – QUESTIONS IN ISSUE

22. This Application for leave to appeal raises the following issues of public importance:

Issue 1: How does the Court reconcile *Chaoulli* and the Court of Appeal decision herein with the recent decisions in *Smith, PHS, Bedford* and *Carter?* Does *Chaoulli* create a right without a remedy in Alberta? Does a healthcare system that prohibits private health insurance and that is plagued by waiting lists harmful to patients unjustifiably violate the *Charter* s. 7 guarantee of life, liberty and security of the person?

Issue 2: Given the time and great expense associated, does a requirement that *Charter* challenges to legislation require the parties to proceed by way of a trial with experts (where an inexpensive alternative exists) *per se* deviate from the Court's approach in *Bedford* by foreclosing the possibility of proceeding by way of application?

PART III – STATEMENT OF ARGUMENT

Issue 1: Reconciling Dr. Allen's Case with *Chaoulli* and Recent s. 7 Jurisprudence

23. This case is about clarifying the parameters of s. 7 of the *Charter* following this Honourable Court's decisions in *PHS, Smith*, *Bedford*, and *Carter* and the constitutionality of Canadian health insurance legislation preventing patients from obtaining private health care insurance and timely access to needed care.

24. In *Chaoulli*, this Court also relied upon the *Quebec Charter of Human Rights and Freedoms* and did not confidently express the issues only in terms of s. 7 of the *Canadian Charter of Rights and Freedoms*. The test in s. 7 had not yet been developed or received judicial treatment to the extent it enjoys today (in light of *Carter*, *PHS*, and *Smith* for example).

25. The Court's guidance is required to decide whether protections under s. 7 of the *Canadian Charter of Rights and Freedoms* remain insufficient to offer the same protections made available in Quebec by *Chaoulli*.

26. The Alberta Court of Appeal, in interpreting s. 26(2) of the *Alberta Health Care Insurance Act* (similar provisions exist in public health insurance legislation across Canada), failed to apply modern s. 7 analysis as recently articulated by this Honourable Court in *Smith, PHS*, and *Carter*. These cases support Dr. Allen's contention that security of the person is

engaged by any state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering.

A. Reconciling *Smith* and Dr. Allen's case: A Right Without a Remedy?

27. In *Smith*, the Supreme Court determined the prohibition on possession of non-dried forms of marihuana limits the liberty of medical users by foreclosing *reasonable medical choices* through criminal sanction.[26] By forcing a person to choose between legal but inadequate treatment and more effective treatment that is outside the scope of Canadian law, this Court found the law had infringed the s. 7 security of the person guarantee.

28. For Dr. Allen, s. 26(2) literally prohibits an alternative medical choice. Regardless of the efficacy of the alternative, denying it is of itself a restriction on Dr. Allen's right to liberty and security of the person.

29. In light of this Court's reasoning in *Smith*, a person suffering from chronic pain and seeking the use of medical marihuana, would not see their s. 7 claim dismissed because they can pursue pain medication *other than* medical marihuana (including topical application cannabinoids).

30. Likewise, the fact of potential access to the appropriate treatments within the public healthcare insurance scheme should not preclude the Court from redressing the impact of s. 26(2) on Dr. Allen's right to liberty and security of the person. His right to pursue reasonable, alternative medical choices is equally frustrated by the prohibition on private health insurance.

31. The s. 7 rights of Dr. Allen are violated because, while he enjoys the protection of an act which ostensibly is designed to protect, promote and restore his physical and mental well-being, it restricts his option to pursue medical choices aside from those not subject to s. 26(2) of the *Alberta Health Insurance Act*.

32. This Court has found that restrictions on *reasonable medical choice* are contrary to fundamental justice, especially where the infringement of a patient's s. 7 right (security of the

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[26] *Smith, supra,* at para 18.

person) is created by an arbitrary limit and the effect is contrary to the objective of protecting health.[27]

B. Contextualizing Dr. Allen's Claim: Section 7 in *Chaoulli, PHS and Carter*

33. The experience of *Chaoulli* demonstrates that, under certain conditions (such as where a lack of timely health care can result in death or where it can result in serious psychological and physical suffering), the s. 7 protection of security of the person is triggered.

34. In *Chaoulli*, the government prohibited private health insurance that would permit ordinary Quebeckers to access private health care while failing to deliver health care in a reasonable manner. In so doing, this Honourable Court found the government had interfered with the interests protected by s. 7 of the *Charter*.[28]

35. In *Carter, PHS*, and *Smith*, government action, in the form of legislation or an arbitrary ministerial decision, was held to infringe s. 7 of the *Charter*. In *Carter* and *Bedford*, the Court found that impugned provisions were not rationally connected to the broad objectives of their respective legislation. In the healthcare context, it is necessary to refer to the *Canada Health Act* for a statement of such objectives.

36. Section 3 of the *Canada Health Act* provides as follows:

> 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.

37. The broad principles of the *Canada Health Act* and s. 7 of the *Charter* (as applied in *Smith*, *PHS*, and *Carter*) are consistent with providing patients like Dr. Allen with access to reasonable medical alternatives – including those currently prohibited by s. 26(2) of the *Alberta Heath Insurance Act*.

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[27] *Smith, supra*, at paras 8, 23, 25-29.
[28] *Chaoulli, supra*, at paras 123-124.

38. In *Carter*, this Honourable Court stated the right to life is invoked wherever evidence shows a lack of timely healthcare could result in death[29] – in other words, the s. 7 rights of patients are engaged where a particular law or state action imposes death or an increased risk of death on a person directly or indirectly.

39. Underlying s. 7 rights is a concern for the protection of individual autonomy and dignity. The right to liberty and security of the person are engaged when autonomy and quality of life are at issue. [30] Liberty protects "the right to make fundamental personal choices free from state interference".[31] It follows that where state action imposes an increased risk of prolonged suffering and denies an alternative means to alleviate the suffering, that s. 7 is engaged.

40. In light of *Chaoulli* (and this Court's reference to *Chaoulli* in *Carter*), it is difficult to envision how Dr. Allen's circumstances would be insufficient to warrant a thorough s. 7 analysis.

41. In *PHS*, the government failed to grant an exemption under the *Controlled Drugs and Substances Act*, thereby limiting the s. 7 rights of citizens and breaching the principles of fundamental justice. The Supreme Court confirmed that there could be no conflict between saying that a law is validly adopted under the *Constitution Act, 1867*, and that it deprives individuals of their s. 7 guarantee.[32]

C. *Chaoulli* and the Present Case

42. In *Chaoulli*, two separate decisions were written by the Supreme Court's majority striking down Quebec's version of the Alberta s. 26(2) prohibition. The question was framed by Deschamps J as follows:

> …the question is whether Quebeckers who are prepared to spend money to get access to health care that is, in practice, not accessible in the public sector because of waiting lists may be validly prevented from doing so by the state [33]

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[29] *Carter, supra,* at para 62.
[30] *Carter, supra,* at para 62.
[31] *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44 at para. 54.
[32] *PHS, surpa,* at para 82.
[33] *Chaoulli, supra,* at para 4.

43. Deschamps J.'s framing of the question in *Chaoulli* has application to the case at bar, as the s. 26(2) prohibition in Alberta operates analogously to the prohibition on private health insurance in Quebec pre-*Chaoulli.*

44. Vis-à-vis the *Charter*, the majority decision was written by McLachlin C.J. and Major (Bastarache J. concurring). McLachlin C.J. and Major stated the question to be determined thus:

> The issue at this stage is whether the prohibition on insurance for private medical care deprives individuals of their life, liberty or security of the person protected by s. 7 of the *Charter*. [34]

45. The findings of the Court in *Chaoulli* are directly applicable to the case at bar. Abundant evidence before the courts in this case established that lengthy wait times exist in Alberta's health care system, causing suffering and pain, and sometimes death. They deprive Albertans of autonomy over their own bodies. *Chaoulli* applies to Alberta generally, and in the instant case specifically.

46. The Alberta Court of Appeal, ostensibly for policy reasons[35] as opposed to legal reasons, refused to apply the general findings in *Chaoulli*. The Court of Appeal distinguished *Chaoulli* by failing to analyze, or even consider, the evidence before it that established that painful wait times exist in Alberta.[36]

47. The Court of Appeal ignored the *Charter* and *Chaoulli* in favour of a thorough obeisance to Alberta's existing health care policies and the Court's own policy preference for a government monopoly over health care. The Court of Appeal went so far as to state, **"**Permitting private health care insurance is incompatible with fundamental values underlying the Canadian system, notably economic universality and risk universality, but also public administration, and accessibility." [37] This excerpt makes sufficiently clear that the Court of Appeal was more concerned about defending its own public policy preferences than it was in applying *Charter* rights or in following the precedent of the Supreme Court in *Chaoulli*.

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[34] *Chaoulli*, *supra*, at para 110.
[35] Decision of the Court of Appeal below at para 14 [Tab 2C].
[36] Decision of the Court of Appeal below at para 50 [Tab 2C].
[37] Decision of the Court of Appeal below at para 50 [emphasis added] [Tab 2C].

<u>Issue 2</u>: Process and Evidence – What's Enough for the Court and will an Application (not) do?

48. The Alberta Court of Appeal erred in law in its requirement that Dr. Allen proceed by way of statement of claim (an action), as opposed to originating application.[38] The Court cited no authority for the proposition that a full trial is *required* to bring a *Charter* challenge to legislation, yet it imposed this onerous restriction on the Applicant. The Court created a significant access to justice barrier in Canada.

49. This decision sets a dangerous precedent for future legislative constitutional challenges in Canada and is out of step with recent jurisprudence – notably, the Court's decision in *Bedford* (which proceeded by way of application).

50. This Honourable Court in *Bedford* endorsed the "sufficient causal connection" standard for causation and rejected the higher standard argued for by the Attorney General of Canada.[39] That decision emphasized that the causation standard was to be flexible and to take into account the circumstances of each particular case.[40] With respect to the standard, the Court in *Bedford* concluded with the following practical observation:

> Finally, from a practical perspective, a sufficient causal connection represents a fair and workable threshold for engaging s. 7 of the *Charter*. This is the port of entry for s. 7 claims. The claimant bears the burden of establishing this connection. Even if established, it does not end the inquiry, since the claimant must go on to show that the deprivation of her security of the person is not in accordance with the principles of fundamental justice. Although mere speculation will not suffice to establish causation, to set the bar too high risks barring meritorious claims. What is required is a sufficient connection, having regard to the context of the case.[41]

51. While the application judge below named the correct standard, in applying that standard the bar is set too high. Dr. Allen provided a connection between his s. 7 rights and the prohibition on health insurance. In the context of the case, it was well beyond speculation given the concrete evidence he presented.

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[38] Decision of the Court of Appeal below at paras 21, 26, 37, 52, 53 [Tab 2C].
[39] *Bedford, supra*, at paras 75, 77.
[40] *Bedford, supra*, at para 75.
[41] *Bedford, supra*, at para 78.

52. In considering the applicability of *Chaoulli*, the doctrine of *stare decisis* must not be adopted narrowly. The trial judge is limited to making findings of fact and credibility to create the necessary evidentiary record which the Supreme Court of Canada can then consider. [42]

53. The Court's guidance is required to harmonize the expectations of litigants pursuing rights under s. 7 of the *Charter*. In *Bedford*, the litigants proceeded by way of application and were ultimately successful. By precluding Dr. Allen by virtue of his not having proceeded by way of action, the Court of Appeal deviates from the legal parameters established in *Bedford*, creating uncertainty in the law.

A. Comparing the Evidentiary Record in *Bedford* and *Allen*

54. In *Bedford*, the Court found that when social and legislative evidence is put before a judge of first instance, the judge has a duty to evaluate and weigh the evidence in order to arrive at a conclusion.

55. The application judge in *Bedford* arrived at her conclusions on the impact of the impugned laws on s. 7 security interests on the basis of the personal evidence of the applicants, evidence of affiants and experts, documentary evidence in the form of studies, reports of expert panels and Parliamentary records. [43]

56. The Court of Appeal described the evidentiary record in *Allen* as follows: "The Application was based on Dr. Allen's affidavit, to which he exhibited a number of medical reports and proof of expenses he had incurred. The Government of Alberta responded with affidavits of civil servants, to which were appended a number of background documents on the health care system general, and wait times specifically."

57. Although, admittedly, no expert evidence was filed in this matter, the evidence before the court, while not as voluminous as that in *Bedford*, is nonetheless analogous and worthy of consideration in terms of whether Dr. Allen has suffered a breach of his s. 7 rights.

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[42] *Bedford, supra,* at para 31.
[43] *Bedford, supra,* at para 54.

58. Ample evidence was before the Courts to conduct a thorough analysis of the s. 7 violation in the context of the specific legislation and its effect on Dr. Allen himself.

59. Modern s. 7 analyses as demonstrated by *Smith* and *Carter* are conducted with a view to protecting the right of the individual – and not to establish or consider broader societal facts, as these have no direct bearing on the narrow question of s. 7 being violated or not.

60. Similarly, there is no precedent for the proposition that Dr. Allen was required to obtain expert evidence to support his application, or provide an evidentiary foundation in addition to what Dr. Allen and the Alberta Government provided in their Affidavits and other filed materials, including cross-examination transcripts.

61. The Court of Appeal properly noted that the chambers judge appears to have imposed too stringent an evidentiary test on the Applicant, [44] and yet summarily committed the same error in its insistence of a more substantial evidentiary record requiring the proof of certain unprovable propositions, as set out below.

62. The Court's finding that the Applicant failed to provide a sufficient evidentiary foundation to establish that the lengthy wait time he experienced for surgery in Alberta was a result of the government's monopoly on health care is an impossible (and counterintuitive) requirement.

63. It would be impossible to establish that private service providers *could have* provided more timely assistance to the Applicant had they not been illegal and prohibited. This is simply because private health insurance is illegal in Alberta.

B. What the Court Below Missed

64. By improperly focusing on Dr. Allen's "failure" to prove the impossible, the chambers judge and the Court of Appeal appear to have ignored the evidence of the deposed officers of the

[44] Decision of the Court of Appeal below, at paras 21, 26, 37, 52, 53 [Tab 2C].

province of Alberta who gave testimony regarding wait times in the province of Alberta, including the following: [45]

- Wait lists exist in Alberta;
- Patients on wait lists in Alberta suffer physical and psychological pain, and they presently have no alternative but to suffer due to limited resources;
- There is no tracking of applications for extra-country reimbursement for surgery where the reason for the application was long wait times;
- Alberta Health does not know how many Albertans are waiting for various surgeries;
- Alberta Health does not collect data on what percentage of Albertans on waiting lists are prevented from working because of their medical condition;
- Alberta Health does not collect information regarding how many people on wait lists are experiencing severe pain;
- Alberta Health does not track how many people on waiting lists cannot perform daily tasks due to their medical condition;
- Wait times exist because the province does not have infinite resources;
- Alberta Health appears not to have made any effort to determine how many people die yearly waiting for surgery;
- That there are no statistics specifically regarding wait times for the type of surgery Dr. Allen required; and
- That in regards to hip replacement surgery, for example, in 2009 and 2010, 9 out of 10 people waited 35 months to have this surgery, with the tenth statistical "person" waiting even longer than 35 months.

65. Even though the province of Alberta, with its vast resources and virtually unlimited access to information, has failed to answer questions that might be relevant to the question at bar, the Court of Appeal of Alberta *required* Dr. Allen, an injured citizen who has been forced to stop practicing his profession, and who has infinitely fewer resources than any government, to produce a super-abundance of evidence as a "requirement" to his legislative challenge.

66. The rationale of the Court of Appeal could be utilized to dismiss many a legitimate *Charter* claim on the basis that the claimant had failed to amass "sufficient" information well beyond that which goes to support their own circumstances.

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[45] *Extracts of Key Evidence* [Tab 4B].

67. By the precedent-setting nature of the Alberta court's decision, both the Applicant and Canadians generally are discouraged from commencing challenges to legislation by way of application.

68. They must, according to the Alberta Court of Appeal, proceed through the expensive venue of a full trial, preferably with experts, and moreover may be required to produce information which even a Provincial government has not succeeded in assembling.

69. These requirements, which are not supported at law, nullify the protections of the *Charter* by creating an insurmountable obstacle to legislative challenges.

Conclusions

Issue 1

70. The argument advanced here is not that public healthcare violates s. 7 of the *Charter*. Rather, the point is that where healthcare conditions resemble those faced by the Court in *Chaoulli*, the legislated denial of access to pursue alternative means of healthcare infringes a person's s. 7 rights. This occurs in a manner that is analogous to the situation faced by the Court in *Smith* – that a denial of reasonable medical choice results in a breach.

71. Public healthcare (insofar as it is consistent with the values articulated at s.3 of the *Canada Health Act*) is a valid legislative initiative. The recognition that provisions such as s. 26(2) of the *Alberta Health Care Insurance Act* breach the *Charter* rights of Canadians is in no way an indictment of healthcare services generally.

72. However, where an individual such as Dr. Allen has experienced significant wait times in the healthcare system that resulted in the prolonging of debilitating pain and loss of livelihood, recent s.7 jurisprudence would suggest that his rights are infringed. For a court to ignore this clear evidence and ignore the similarities to *Chaoulli* and principles in *Carter*, *PHS*, and *Smith*, creates a gap in the application of otherwise certain principles.

73. In the present case, Dr. Allen was told by doctors he required surgery following an injury to his lower back. A decision to operate was made in May of 2009, but the operations could not be scheduled until June, 2011 (more than two years later).

74. The pain associated with the degradation and herniation of Dr. Allen's lumbar discs became "so disabling Dr. Allen was no longer able to work…" and so, rather than wait an additional 18 months for the surgery to be performed in Alberta, he agreed to have it performed in Montana at great personal cost.[46] Dr. Allen was seeking to live free from debilitating pain within a reasonable period of time (a feat he achieved only by paying for surgery at his own expense).

Issue 2

75. Dr. Allen proceeded by way of application, a means that is freely available to pursue one's s.7 *Charter* rights in Canada. The Court's guidance is necessary to clarify the means by which citizens are entitled to address situations that call their liberty and security of the person into question.

76. In the alternative, if it is truly necessary to proceed by way of action, the Court must provide clear direction that this is the case. Moreover, the Court's assistance is required to clearly determine the evidentiary threshold required to attract a proper assessment of one's matter as it relates to s.7 of the *Charter*.

77. In the Courts below, Dr. Allen and the Government of Alberta furnished an evidentiary record that is at least analogous to what was provided in *Bedford* (a s.7 case which proceeded by application).

PART IV – SUBMISSIONS CONCERNING COSTS

78. The Applicant requests costs in the cause.

[46] Decision of the Court of Appeal below, at para 4 [Tab 2C].

PART V – ORDER SOUGHT

79. That leave to appeal be granted, with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of November, 2015

John Carpay
Justice Centre for Constitutional Freedoms
Counsel for the Applicant, Dr. Darcy Allen

PART VI – TABLE OF AUTHORITIES

PARA.

Cases

Other

PART VII – STATUTORY PROVISIONS

Alberta Health Care Insurance Act, RSA 2000, c. A-20, s. 26(2)

Canada Health Act, R.S.C., 1985, c. C-6, s. 3

Health Care Insurance Plan Act, RSY 2002, c 107, s. 14(1)

Health Insurance Act, CQLR c A-29, s. 15

Health Insurance Act, RSO 1990, c H.6, s. 14(1)

Health Services and Insurance Act, RSNS 1989, c 197, s. 27(2)

Health Services Payment Act, RSPEI 1988, c H-2, s. 21

Hospital Insurance Act, CQLR c A-28, s. 11

Hospital Insurance Regulations, RRNWT 1990, c T-12, s. 14

Medical Care Insurance Act, 1999, SNL 1999, c M-5.1, s. 7, 10

Medical Services Payment Act, RSNB 1973, c M-7, s. 3

Medicare Protection Act, RSBC 1996, c 286, s. 45

Saskatchewan Medical Care Insurance Act, RSS 1978, c S-29, ss.18(10.1),(10.2), 24, 24.1

The Health Services Insurance Act, CCSM c H35, s. 96(1)

***Alberta Health Care Insurance Act*, RSA 2000, c. A-20, s. 26(2)**

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.

***Canada Health Act*, R.S.C., 1985, c. C-6, s. 3**

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.	**3.** La politique canadienne de la santé a pour premier objectif de protéger, de favoriser et d'améliorer le bien-être physique et mental des habitants du Canada et de faciliter un accès satisfaisant aux services de santé, sans obstacles d'ordre financier ou autre.

***Health Care Insurance Plan Act*, RSY 2002, c 107, s. 14(1)**

14(1) No person shall make, renew, or make payment under a contract, under which an insured person is to be provided with or to be reimbursed or indemnified either wholly or partly for the cost of insured health services.	14(1) Il est interdit de conclure ou de renouveler un contrat, ou d'effectuer un paiement sous son régime, qui prévoit qu'un assuré sera remboursé ou indemnisé en tout ou en partie des coûts de services de santé assurés.

***Health Insurance Act*, CQLR c A-29, s. 15**

15. An insurer or a person administering an employee benefit plan may enter into or maintain an insurance contract, or establish or maintain an employee benefit plan, as the case may be, that includes coverage for the cost of an insured service furnished to a resident or temporary resident of Québec, only if

(1) the insurance contract or employee benefit plan does not cover any insured service other than the insured services required for a total hip or knee replacement, a cataract extraction and intraocular lens implantation or any other specialized medical treatment determined under section 15.1, and those required for the provision of the preoperative, postoperative, rehabilitation and home care support services described in section 333.6 of the Act respecting health services and social services (chapter S-4.2);

(2) the insurance contract or employee benefit plan includes coverage for the cost of all insured services and all preoperative, postoperative, rehabilitation and home care support services referred to in subparagraph 1, subject to any applicable deductible amount; and

(3) the coverage applies only to surgery performed or any other specialized medical treatment provided in a specialized medical centre described in subparagraph 2 of the first paragraph of section 333.3 of the Act respecting health services and social services.

An insurance contract or employee benefit plan inconsistent with subparagraph 1 of the first paragraph that also covers other goods and services remains valid as regards those other goods and services, and the consideration provided for the contract or plan must be adjusted accordingly unless the beneficiary of the goods and services agrees

15. Un assureur ou une personne qui administre un régime d'avantages sociaux peut conclure ou maintenir un contrat d'assurance ou établir ou maintenir un régime d'avantages sociaux, selon le cas, comportant une garantie de paiement à l'égard du coût d'un service assuré fourni à une personne qui réside ou séjourne au Québec uniquement si:

1° le contrat d'assurance ou le régime d'avantages sociaux ne couvre aucun autre service assuré que ceux qui sont requis pour effectuer une arthroplastie-prothèse totale de la hanche ou du genou, une extraction de la cataracte avec implantation d'une lentille intra-oculaire ou un autre traitement médical spécialisé déterminé conformément à l'article 15.1 ainsi que ceux qui sont requis, le cas échéant, pour dispenser les services préopératoires, postopératoires, de réadaptation et de soutien à domicile visés à l'article 333.6 de la Loi sur les services de santé et les services sociaux (chapitre S-4.2);

2° le contrat d'assurance ou le régime d'avantages sociaux comporte, sous réserve de toute franchise applicable, une garantie de paiement à l'égard du coût de tous les services assurés et de tous les services préopératoires, postopératoires, de réadaptation et de soutien à domicile visés au paragraphe 1°;

3° la garantie de paiement ne s'applique qu'à l'égard d'une chirurgie ou d'un autre traitement médical spécialisé dispensé dans un centre médical spécialisé visé au paragraphe 2° du premier alinéa de l'article 333.3 de la Loi sur les services de santé et les services sociaux.

Un contrat d'assurance ou un régime d'avantages sociaux qui va à l'encontre du paragraphe 1° du premier alinéa mais qui a également pour objet d'autres services et biens demeure valide quant à ces autres services et biens et la considération prévue à l'égard de ce

to receive equivalent benefits in exchange.

Nothing in this section prevents an insurance contract or an employee benefit plan that covers the excess cost of insured services rendered outside Québec or the excess cost of any medication of which the Board assumes payment from being entered into or established. Nor does anything in this section prevent an insurance contract or an employee benefit plan that covers the contribution payable by an insured person under the Act respecting prescription drug insurance (chapter A-29.01) from being entered into or established.

"Insurer" means a legal person holding a licence issued by the Autorité des marchés financiers that authorizes it to transact insurance of persons in Québec.

"Employee benefit plan" means a funded or unfunded uninsured employee benefit plan that provides coverage which may otherwise be obtained under a contract of insurance of persons.

An insurer or a person administering an employee benefit plan that contravenes the first paragraph is guilty of an offence and is liable to a fine of $50,000 to $100,000 and, for a subsequent offence, to a fine of $100,000 to $200,000.

contrat ou de ce régime doit être ajustée en conséquence, à moins que le bénéficiaire de ces services et de ces biens n'accepte de recevoir en échange des avantages équivalents.

Rien dans le présent article n'empêche la conclusion d'un contrat d'assurance ou l'établissement d'un régime d'avantages sociaux qui a pour objet l'excédent du coût des services assurés rendus hors du Québec ou l'excédent du coût des médicaments dont la Régie assume le paiement. Il n'empêche pas non plus un contrat d'assurance ou un régime d'avantages sociaux qui a pour objet la contribution que doit payer une personne assurée en vertu de la Loi sur l'assurance médicaments (chapitre A-29.01).

On entend par «assureur», une personne morale titulaire d'un permis délivré par l'Autorité des marchés financiers qui l'autorise à pratiquer l'assurance de personnes au Québec.

On entend par «régime d'avantages sociaux», un régime d'avantages sociaux non assurés, doté ou non d'un fonds, et qui accorde à l'égard d'un risque une protection qui pourrait être autrement obtenue en souscrivant une assurance de personnes.

En cas de contravention au premier alinéa, l'assureur ou la personne qui administre un régime d'avantages sociaux commet une infraction et est passible d'une amende de 50 000 $ à 100 000 $ et, en cas de récidive, d'une amende de 100 000 $ à 200 000 $.

***Health Insurance Act*, RSO 1990, c H.6, s. 14(1)**

14.(1) Every contract of insurance, other than insurance provided under section 268 of the *Insurance Act*, for the payment of or reimbursement or indemnification for all or any part of the cost of any insured services other than,

(a) any part of the cost of hospital, ambulance and long-term care home services that is not paid by the Plan;

(b) compensation for loss of time from usual or normal activities because of disability requiring insured services;

(c) any part of the cost that is not paid by the Plan for such other services as may be prescribed when they are performed by such classes of persons or in such classes of facilities as may be prescribed,

performed in Ontario for any person eligible to become an insured person under this Act, is void and of no effect in so far as it makes provision for insuring against the costs payable by the Plan and no person shall enter into or renew such a contract.

14.(1) Tout contrat d'assurance, à l'exception d'une assurance prévue aux termes de l'article 268 de la *Loi sur les assurances*, en vue du paiement, du remboursement ou de l'indemnisation de la totalité ou d'une partie du coût de services assurés, à l'exclusion :

a) de toute partie du coût des services hospitaliers et des services d'ambulance ou de foyers de soins de longue durée qui n'est pas remboursée par le Régime;

b) de l'indemnisation accordée pour la perte de temps survenue dans les activités habituelles ou normales en raison d'une invalidité nécessitant des services assurés;

c) de toute partie du coût qui n'est pas remboursée par le Régime et qui porte sur les autres services prescrits, lorsqu'ils sont fournis par des catégories de personnes prescrites ou dans des catégories d'établissements prescrites,

fournis en Ontario à une personne admissible à devenir un assuré aux termes de la présente loi, est nul et sans effet dans la mesure où il contient des dispositions visant à assurer contre des coûts remboursables par le Régime. Nul ne doit souscrire ou renouveler un tel contrat.

***Health Services and Insurance Act*, RSNS 1989, c 197, s. 27(2)**

27(2) A provider may, at any time in writing, notify the Department of the provider's election to collect fees in respect of insured professional services otherwise than under the M.S.I. Plan.

***Health Services Payment Act*, RSPEI 1988, c H-2, s. 21**

21. (1) Subject to subsection (3)

(a) every contract under which an insured person is to be provided with, or to be reimbursed or indemnified for, the costs of basic health services that are benefits under this Act, has no force or effect and no payments shall be made thereunder to reimburse or indemnify any person for those costs in whole or in part; and
(b) no person shall make or renew a contract under which a resident is to be provided with, or to be reimbursed or indemnified for, any part of the cost of basic health services that are benefits.

***Hospital Insurance Act*, CQLR c A-28, s. 11**

11. No insurer may enter into or maintain an insurance contract that includes coverage for the cost of an insured service furnished to a resident.

No person may establish or maintain an employee benefit plan that includes coverage for the cost of an insured service furnished to a resident.

An insurance contract or employee benefit plan inconsistent with the first or the second paragraph, as the case may be, that also covers other goods and services remains valid as regards those other goods and services, and the consideration provided for the contract must be adjusted accordingly unless the beneficiary of the goods and services agrees to receive equivalent benefits in exchange.

Nothing in this section prevents an insurance contract or an employee benefit plan that covers the excess cost of insured services rendered outside Québec from being entered into or established.

"Insurer" means a legal person holding a licence issued by the Autorité des marchés financiers that authorizes it to transact insurance of persons in Québec.

"Employee benefit plan" means a funded or unfunded uninsured employee benefit plan

11. Un assureur ne peut conclure ni maintenir un contrat d'assurance comportant une garantie de paiement à l'égard du coût d'un service assuré fourni à un résident.

Nul ne peut par ailleurs établir ou maintenir un régime d'avantages sociaux comportant une garantie de paiement à l'égard du coût d'un service assuré fourni à un résident.

Un contrat d'assurance ou un régime d'avantages sociaux qui va à l'encontre du premier ou du deuxième alinéa, selon le cas, mais qui a également pour objet d'autres services et biens demeure valide quant à ces autres services et biens et la considération prévue à l'égard de ce contrat ou de ce régime doit être ajustée en conséquence, à moins que le bénéficiaire de ces services et de ces biens n'accepte de recevoir en échange des avantages équivalents.

Rien dans le présent article n'empêche la conclusion d'un contrat d'assurance ou l'établissement d'un régime d'avantages sociaux qui a pour objet l'excédent du coût des services assurés rendus hors du Québec.

On entend par «assureur», une personne morale titulaire d'un permis délivré par l'Autorité des marchés financiers qui l'autorise à pratiquer l'assurance de personnes au Québec.

that provides coverage which may otherwise be obtained under a contract of insurance of persons.

An insurer or a person administering an employee benefit plan that contravenes the first or second paragraph is guilty of an offence and is liable to a fine of $50,000 to $100,000 and, for a subsequent offence, to a fine of $100,000 to $200,000.

On entend par «régime d'avantages sociaux», un régime d'avantages sociaux non assurés, doté ou non d'un fonds, et qui accorde à l'égard d'un risque une protection qui pourrait être autrement obtenue en souscrivant une assurance de personnes.

En cas de contravention au premier ou au deuxième alinéa, l'assureur ou la personne qui administre un régime d'avantages sociaux, selon le cas, commet une infraction et est passible d'une amende de 50 000 $ à 100 000 $ et, en cas de récidive, d'une amende de 100 000 $ à 200 000 $.

***Hospital Insurance Regulations*, RRNWT 1990, c T-12, s. 14**

14. No person shall make or renew, or make payment under, a contract under which an insured person is to be provided with, or to be reimbursed or indemnified for the cost of, in-patient and out-patient insured services.

14. Il est interdit de conclure ou de renouveler un contrat qui prévoit la fourniture, à un assuré, de services assurés aux malades hospitalisés et aux maladies externes, ou le remboursement ou l’indemnisation d’un assuré pour le coût de tels services; il est aussi interdit de faire des versements aux termes d’un tel contrat.

***Medical Care Insurance Act*, 1999, SNL 1999, c M-5.1, s. 7, 10**

7. (1) Where a participating physician renders an insured service to a beneficiary, the physician shall submit his or her account for the service to the minister, together with the information that is required to substantiate the claim upon the forms that are prescribed by the minister for that purpose.

(2) The physician shall supply further patient information where the minister requires it to clarify or substantiate the physician's claim.

(3) A physician may, in writing, notify the minister of his or her election to collect payments in respect of insured services rendered by the physician to residents otherwise than from the minister.

(4) Where a physician makes an election under subsection (3) within one month from the date on which he or she first becomes entitled to practise medicine in the province, the election shall have effect on and from the date when the physician becomes entitled to practise medicine in the province.

(5) An election under subsection (3) shall have effect on and from the first day of the first month beginning after the expiration of 60 days after the date on which the minister receives the notice of election.

(6) A physician who has made an election under subsection (3) may revoke the election by written notice to the minister.

(7) A revocation of election under subsection (6) shall have effect on and from the first day of the first month beginning after the expiration of 60 days after the date on which the minister receives the notice of revocation.

10. (1) The minister shall, under this Act and the regulations, make payment for the providing of insured services to beneficiaries.

(2) Where a participating physician as an individual or through a professional medical corporation provides insured services to a beneficiary, the minister shall make payment to the physician or professional medical corporation for the services, but where a participating physician performs professional services for a public authority or body that has received the prior approval of the minister, in addition to the provision of insured services to beneficiaries, the minister may, upon being satisfied that the participating physician is receiving remuneration for the provision by him or her of those professional services, enter into an arrangement with the public authority or body providing for the payment to it for the insured services so provided to beneficiaries, and the minister shall make the payment in accordance with the arrangements made.

(3) Where an insured service is provided in the province to a beneficiary by other than a participating physician as an individual or through a professional medical corporation, the minister shall make payment to the beneficiary in respect of that insured service.

(4) Where an insured service is provided in the province to a person who is an insured resident of another jurisdiction in Canada by other than a participating physician as an individual or through a professional medical corporation, the responsibility for payment will not rest with the medical care plan of this province.

(5) The right of the beneficiary to receive payment from the minister in respect of insured services provided in the province by other than a participating physician, as an individual or through a professional medical corporation, is a contractual right and the beneficiary is entitled to receive payment from the minister in respect of those services in an amount equal to the amount payable, for similar services, to a participating physician by the minister under the regulations.

***Medical Services Payment Act*, RSNB 1973, c M-7, s. 3**

3Subject to sections 2.01, 5.1 and 5.3 and subsection 5.5(6), nothing in this Act or the regulations interferes with

(*a*) the right of a beneficiary to select the medical practitioner or oral and maxillofacial surgeon from whom he will receive entitled services, or

(*b*) the right of a medical practitioner or an oral and maxillofacial surgeon

(i) to accept or refuse to accept a patient who is a beneficiary, except in cases of medical emergency,

(ii) to make charges for services to a patient who is not a beneficiary,

(iii) to choose his method of remuneration in accordance with the regulations, or

(iv) to elect in accordance with the regulations to practise his profession outside the provisions of this Act and the regulations.

3Sous réserve des articles 2.01, 5.1 et 5.3 et du paragraphe 5.5(6), rien dans la présente loi ou dans les règlements ne porte atteinte au

a) droit d'un bénéficiaire de choisir le médecin ou le chirurgien bucco-dentaire et maxillo-facial qui lui dispensera les services assurés, ou

b) droit d'un médecin ou d'un chirurgien bucco-dentaire et maxillo-facial

(i) d'accepter ou de refuser d'accepter un malade qui est un bénéficiaire, sauf en cas d'urgence médicale,

(ii) de faire payer ses services à un malade qui n'est pas un bénéficiaire,

(iii) de choisir son mode de rémunération conformément au règlement, ou

(iv) de choisir, conformément au règlement, d'exercer sa profession hors du cadre des dispositions de la présente loi et du règlement.

***Medicare Protection Act*, RSBC 1996, c 286, s. 45**

45 (1) A person must not provide, offer or enter into a contract of insurance with a resident for the payment, reimbursement or indemnification of all or part of the cost of services that would be benefits if performed by a practitioner.

(2) Subsection (1) does not apply to

(a) all or part of the cost of a service

(i) for which a beneficiary cannot be reimbursed under the plan, and

(ii) that is rendered by a health care practitioner who has made an election under section 14 (1),

(b) insurance obtained to cover health care costs outside of Canada, or

(c) insurance obtained by a person who is not eligible to be a beneficiary.

(3) A contract that is prohibited under subsection (1) is void.

***Saskatchewan Medical Care Insurance Act*, RSS 1978, c S-29, ss. 18(10.1),(10.2), 24, 24.1**

18 (10.1) Notwithstanding subsections (8) to (10), the minister may make payments respecting services that are insured services pursuant to subsection 14(3) to an insurer who, pursuant to an insurance contract, has paid on behalf of a beneficiary for those insured services.

18 (10.2) A payment by the minister to an insurer pursuant to subsection (10.1) is deemed to be in satisfaction of the minister's obligation under this section to make the payment to the beneficiary.

24(1) Services provided by a physician or other person who:

(a) does not have a subsisting agreement with the minister as described in subsection 18(2);

(b) does not have a subsisting arrangement with a non-profit corporation, association or other non-profit organization that has a subsisting agreement with the minister that applies to that physician or other person, as described in subsection 18(3);

(c) Repealed. 1986-87-88, c.56, s.21.

(d) has given notice to the minister in the form prescribed by the minister for the purpose;are deemed to be uninsured services.

(2) A notice given pursuant to clause (1)(d) remains in effect until it is cancelled by giving notice of the cancellation to the minister in the form prescribed by the minister for the purpose.

(3) Before a physician or other person described in subsection (1) provides services to a person that but for this section would be insured services he shall, insofar as it is practicable and reasonable to do so:

(a) advise the person that the services provided are not insured services and that the person is not entitled to payment for those services pursuant to this Act; and

(b) obtain from the person a written acknowledgement that the person understands the advice provided pursuant to clause (a).

24.1(1) Where reasonable access to insured services is jeopardized because physicians or other persons are providing uninsured services as described in subsection 24(1), the Lieutenant Governor in Council may, by regulation, declare that services provided by physicians or other persons, as the case may be, described in subsection 24(1) are no longer deemed to be uninsured services.

(2) The Lieutenant Governor in Council shall make regulations prescribing a process that is to be adhered to before a regulation is made pursuant to sub- section (1).

(3) The Lieutenant Governor in Council may make regulations prescribing criteria to be considered in determining whether a regulation is to be made pursuant to subsection (1).

(4) Before regulations are made pursuant to subsection (2) or (3), the minister shall: (a) in the case of regulations affecting services provided by physicians, consult with the board of directors of the Saskatchewan Medical Association;

***The Health Services Insurance Act*, CCSM c H35, s. 96(1)**

96(1) Subject to subsections (2) and (4)

(a) every contract under which a resident is to be provided with, or to be reimbursed or indemnified for, the costs of hospital services, or medical services, or health services, that are benefits under this Act, has no force or effect and no payments shall be made thereunder to reimburse or indemnify any person for those costs; and

(b) no person shall make or renew a contract under which a resident is to be provided with, or be reimbursed or indemnified for the costs of hospital services, or medical services, or other health services that are benefits under this Act; and

(c) subject to subsection (5), no person shall make or renew a contract under which any amount that is payable to the person insured by reason of his being a patient in a hospital exceeds the cost to that person of services other than hospital services that are benefits under this Act received by him while he is such a patient.

96(1) Sous réserve des paragraphes (2) et (4) :

a) est nul et sans effet le contrat prévoyant le paiement ou le remboursement à un résident des coûts des services hospitaliers ou médicaux ou autres services de santé qui constituent des prestations aux termes de la présente loi; aucun paiement ne doit être fait en vertu de ce contrat pour rembourser ou imdemniser une personne de ces coûts;

b) nul ne peut conclure ou renouveler un contrat aux termes duquel un résident reçoit de l'argent, et est remboursé ou indemnisé pour les coûts des soins hopitaliers, des soins médicaux ou autres services de santé qui constituent des prestations au sens de la présente loi;

c) sous réserve du paragraphe (5), nul ne peut conclure ou renouveler un contrat en vertu duquel une somme, payable à l'assuré du fait de sa qualité de malade dans un hôpital, dépasse le coût pour cette personne des soins autres que les services hospitaliers qui constituent des prestations au sens de la présente loi, et qu'elle a reçus à titre de malade.