IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

IN THE MATTER OF: The Constitutional Questions Act, being Chapter C180, C.C.S.M.;

AND IN THE MATTER OF: a Reference pursuant thereto by the Lieutenant Governor in Council to the Court of Appeal for Manitoba for hearing and consideration of questions relating to The Canadian Charter of Rights and Freedoms, being Part I of The Constitution Act, 1982 and the Criminal Code of Canada, being C-51, and sections 193 and 195.1(1)(c) thereof

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FACTUM OF THE ATTORNEY GENERAL OF BRITISH COLUMBIA
- INTERVENOR -

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I N D E X

PART I

STATEMENT OF FACTS

1. The Intervenor, the Attorney General of British Columbia, accepts the facts as set out by the Appellants and Respondent, the Attorney General of Manitoba.

PART II

POINTS IN ISSUE

2. Is s. 193 of the Criminal Code of Canada inconsistent with s. 7 of the Canadian Charter of Rights and Freedoms?

3. Is s. 195.1(1)(c) of the Criminal Code of Canada inconsistent with s. 7 of the Canadian Charter of Rights and Freedoms?

4. Is the combination of the legislative provisions contained in s. 193 and s. 195.1(1)(c) of the Criminal Code of Canada inconsistent with s. 7 of the Canadian Charter of Rights and Freedoms?

5. Is s. 193 of the Criminal Code of Canada inconsistent with s. 2(b) of the Canadian Charter of Rights and Freedoms?

6. Is s. 195.1(1)(c) of the Criminal Code of Canada inconsistent with s. 2(b) of the Canadian Charter of Rights and Freedoms?

7. Is the combination of the legislative provisions contained in s. 193 and s. 195.1(1)(c) of the Criminal Code of Canada inconsistent with s. 2(b) of the Canadian Charter of Rights and Freedoms?

8. If ss. 193 and 195.1(1)(c) of the Criminal Code of Canada or a combination of both or part thereof are inconsistent with either s. 7 or s. 2(b) of the Canadian Charter of Rights and Freedoms, to what extent, if any, can such limits on the rights and freedoms protected by s. 7 or s. 2(b) of the Canadian Charter of Rights and Freedoms be justified under s. 1 of the Canadian Charter of Rights and Freedoms and thereby rendered not inconsistent with the Constitution Act, 1982?

PART III

ARGUMENT

Is s. 193 of the Criminal Code of Canada inconsistent with s. 7 of the Canadian Charter of Rights and Freedoms?

Is s. 195.1(1)(c) of the Criminal Code of Canada inconsistent with s. 7 of the Canadian Charter of Rights and Freedoms?

Is the combination of the legislative provisions contained in s. 193 and s. 195.1(1)(c) of the Criminal Code of Canada inconsistent with s. 7 of the Canadian Charter of Rights and Freedoms?

9. The Appellants' claim that s. 7 of the Charter guarantees a "right to work" must be rejected: (Factum of Contradictor "Bennett", pp. 25-36 and Factum of Contradictor "Gindim", pp. 12-17). Insofar as it is based on the claim that the Charter is intended to protect economic and property rights (see Factum of Contradictor "Bennett", @ p. 33), that claim is inconsistent with the purposive interpretation of the Charter and enjoys no support in Canadian jurisprudence.

10. The Appellant's (Contradictor Bennett) alternative claim is that the right to work is not a "pure economic or property right" but rather a fundamental human right with only a limited economic aspect: Bennett Factum @ pp. 33, 36.

11. The importance of the non-economic aspect of work cannot be denied. It is, for many if not most persons, "an essential component of [their] sense of identity, self-worth and emotional well-being": Dickson, C.J. in Reference Re Public Service Employee Relations Act, [1987] 1 S.C.R. 313 @ 368.

12. Although the extent to which an activity contributes to one's sense of identity, self-worth and emotional well-being may be relevant in determining whether an activity is to be given constitutional protection, these cannot be controlling considerations. Identity, self-worth and emotional well-being are not rights or freedoms guaranteed under the Charter:

> "The Charter does not give, nor was it ever intended to give, constitutional protection to all the acts of an individual which are essential to his or her personal goals or objectives."
>
> Reference Re Public Service Employees Relations Act, supra, @ 404 and 405

13. If liberty or security of the person were defined to include any activity which contributes to one's sense of identity, self-worth or emotional well-being, it is difficult to conceive of any activity which would not qualify for constitutional protection under s. 7.

14. Carrying on any economic activity can be said to contribute to one's sense of identity, self-worth or emotional well-being. Certainly that would be true of the possession of property, real or personal. It would apply not only to the exercise of a "profession" but to the carrying on of every possible trade, occupation or calling. Nor can any distinction be drawn between the sale of one's service or the sale of one's product or commodity. All aspects of contractual relations would qualify, as would the decision of a worker to go on strike.

15. This point was addressed by the British Columbia Court of Appeal in R.V.P. Enterprises Ltd. (1988), 25 B.C.L.R. (2d) 219 (B.C.C.A.). At issue was whether the right to continue to hold a liquor license was a constitutionally protected liberty interest "because of the enormous impact which the loss of such existing right can have upon the personal well-being of the license holder" (p. 225). The Court of Appeal properly rejected this challenge holding that "the licence here in question is an entirely economic interest ..." (p. 225).

16. Similarly, in Whitbread v. Walley (1988), 26 B.C.L.R. (2d) 203 @ 214-215 (B.C.C.A.), the Court of Appeal rejected "claims for an economic interest" even though such claims were either "founded on a deprivation of life, liberty or security of the person ..." or were claims "which may enhance a person's ability to acquire aids and amenities to improve the person's life, liberty or security of the person ...".

17. Quite out of step with all the jurisprudence in this area is the recent decision of another panel of the British Columbia Court of Appeal, namely Wilson and Maxson v. Medical Services Commission and Attorney General of British Columbia (Unreported, B.C.C.A., August 5, 1988, attached as Appendix). The Court of Appeal drew the wholly unconvincing and unprincipled distinction between the "right to work", which it described as "a purely economic question", and "the right to pursue a livelihood or profession", which it described as "a matter concerning one's dignity and sense of self-worth": pp. 21-22.

18. In defining the content of liberty, the Court of Appeal in Wilson, supra, @ 18, relied heavily on a passage from the decision of Dickson, C.J.C. in Reference Re Public

Service Employee Relations Act, supra, @ 368, (quoted in part above, para. 11), which in turn incorporated a passage from an article by David M. Beatty entitled "Labour is Not a Commodity". Yet the Court of Appeal's distinction between the "right to work" and the "right to pursue a livelihood or profession" appears to contradict Beatty's main thesis -- that all work, whether undertaken through employment or for oneself, and whether menial or high-level, contains (or should contain) the same elements of non-economic worth for the worker. If the Court of Appeal meant to distinguish between employment and self-employment, or between blue-collar and professional work, for the purposes of defining liberty that distinction clearly is not supported by Beatty's article or Dickson, C.J.C.'s decision.

19. Moreover, it could not be the purpose of the Charter to protect the pursuit of the so-called "higher calli[illegible] or professions but not the pursuit of "ordinary" work.

20. The Court in Wilson, supra, referred to four cases as examples of where the plaintiff was attempting to advance "a purely economic interest or freedom" under the rubric of liberty: Re Homemade Wine Crafts (Canada) Ltd. and A.G.B.C.

et al (1986), 26 D.L.R. (4th) 468 (B.C.S.C.), Re Abbotsford Taxi Ltd. and Motor Carrier Commission (1986), 23 D.L.R. (4th) 365 (B.C.S.C.), Re Aluminium Company of Canada Ltd. v. H.M.T.Q. and Dofasco Inc. (1986), 55 O.R. (2d) 522 (Ont. D.C.), Smith, Kline and French Laboratories Ltd. et al v. Attorney General of Canada (1982), 24 D.L.R. (4th) 321; aff'd 34 D.L.R. (4th) 584 (Fed. C.A.). There is no doubt the Court in Wilson was correct in concluding that the plaintiff in each one of these cases was attempting to advance an economic interest, but it is difficult to understand how the practice of medicine (or the sale of one's medical expertise or service) contributes to one's sense of identity, self-worth or emotional well-being, whereas the sale of one's wine: Homemade Wine Crafts, supra; the operation of one's taxi service: Re Abbotsford Taxi, supra; the sale of one's manufactured products: Re Aluminium Company of Canada Ltd., supra; or perhaps even the interest in enjoying the benefits of an invention free and clear of any licensing requirements: Smith, Kline and French Laboratories Ltd., supra, does not.

21. Whether the State could prevent a person from working at all, at any kind of work, is an issue unlikely ever to be tested in our courts. As long as there are other jobs or callings a person can pursue, it cannot be said that

he or she has been stripped of the non-economic and personal consequences of work. As Professor Beatty has written:

> "But even in the least attractive surroundings, work is usually not just getting a pay cheque. Even when it is performed at minimum, poverty-level wages, work can, if done is safe surroundings, ensure a sense of health and well-being unavailable to those who, while sheltered and clothed and fed by various public assistance programs (welfare, unemployment benefits, and so on), are deprived of the opportunity to work."
>
> David M. Beatty, Putting The Charter To Work: Designing a Constitutional Labour Code, (1987 @ 17)

22. What is common, however, are State restrictions on the pursuit of certain occupations or callings. The extent to which the pursuit of a particular occupation enhances an individual's sense of identity, self-worth or emotional well-being is simply too subjective and too personal to be capable of any sort of reliable measurement by the courts. It is a claim that could easily be abused. It would also be difficult, if not impossible, to demonstrate the necessary causal relationship between the restriction on the occupation and its personal and non-economic effects on the individual: Operation Dismantle Inc. et al v. The Queen, [1985] 1 S.C.. 441. Or to disentangle the economic and non-economic aspects of the particular occupation, as the necessary first step in doing so. In defining rights and freedoms under the Charter, the courts must search for objective and manageable

standards: Reference Re. s. 94(2) Motor Vehicle Act, [1985] 2 S.C.R. 486 @ 499.

23. The only consequence that is relatively certain and recognizable by a law which restricts the carrying on of a particular occupation is the economic consequence. Whatever the purpose of such a law, the only effect that should or can be taken into account by the courts when such laws are challenged is the economic effect. Accordingly, any claim for constitutional protection of a right to carry on a particular occupation must be treated as solely, or at least primarily, an economic claim and therefore untenable. As Professor Beatty observed:

> "The biological need is obviously the most basic function satisfied by work. For most people, I suspect, working is, sadly, little more than getting a pay cheque. For too many, the objective of survival, of consumption, is the most compelling inducement to engage in paid-for-productive activity. In the psychologistic's terms, it is the most basic of the motivational needs. It is the reason why, even in the most dull and dirty and dangerous environments, people will seek out and ultimately devote themselves to this activity eight hours a day, five days a week, fifty weeks a year for approximately half of their natural lives. Except for those of independant means, it is only by working that we are able to maintain ourselves in a style of physical well-being (of nourishment, attire, shelter) compatible with the society in which we live."

24. The Appellants, (see Bennett Factum, pp. 37-39; Smordin Factum, p. 29) like the British Columbia Court of Appeal in Wilson, supra, make the further distinction between the regulation of a business, which is not a deprivation of liberty, and its prohibition, which is a deprivation of liberty. This proposed distinction reveals the tenuous nature of the claim that a right to pursue a particular occupation is a liberty interest or involves one's security of person. A true liberty or security interest should prima facie be protected from any significant State interference: R. v. Jones, [1986] 2 S.C.R. 287 @ 299, 314. It is something of an admission that the right to work is not a true liberty interest that its proponents herein feel compelled to adopt the proposition that prohibition of that right is required before s. 7 scrutiny is triggered. Although there may be different kinds of liberty interests, the definition of deprivation of liberty should not vary, as between prohibition and regulation, depending on the kind of liberty interest involved. If there is an unconstitutional state interference with liberty, and it is not in accordance with the principles of fundamental justice, then the manner, extent and degree to which the right to liberty is violated is a matter properly considered in the context of s. 1 of the Charter: Oakes v. The Queen, [1986] 1 S.C.R. 103 @ 139.

25. A review of the jurisprudence involving s. 7 of the Charter illustrates that where a true liberty or security interest is at stake the courts have adopted a liberal approach finding a deprivation notwithstanding that it is not absolute, or certain. See for example:

(a) Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177 @ 207 Wilson, J. held that deprivation of security of the person encompassed "freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself". (emphasis added)

(b) Reference Re S. 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486 @ 515, Lamer, J. held that liberty was deprived by a law which provided for the potential and not only the certainty of imprisonment.

(c) Mills v. The Queen, [1986] 1 S.C.R. 867 Lamer, J. recognized that a deprivation of security of the person encompassed:

> "Protection against 'overlong subjection to the vexations and vicissitudes of a pending criminal accusations' ... These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction."

(d) Morgentaler v. The Queen, [1988] 1 S.C.R. 30: s. 251 of the Criminal Code was held to be a deprivation of security of the person even though it did not prohibit abortion absolutely. Dickson, C.J. held that "state interference with bodily integrity and serious state imposed psychological stress ... constitute a breach of security of the person": (@ p. 56, emphasis added) Beetz, J. held

that "the procedural requirements of s. 251 of the Criminal Code significantly delay pregnant women's access to medical treatment resulting in additional danger to their health, thereby depriving them of their right to security of the person": (@ p. 81, emphasis added). And Wilson, J. held that although the right to liberty was not to be taken as absolute, nevertheless "at some point the legitimate state interest in the protection of health, proper medical standards and pre-natal life would justify its qualification": (@ p. 169, emphasis added).

26. Imposing on the citizen the onus of proving that the law be prohibitory rather merely restrictive or regulatory before the alleged constitutional right to liberty is "deprived" poses the danger that short of an absolute taking, a true and proper liberty interest will be left without any constitutional protection.

27. What is more likely to occur is that if liberty is defined to include the right to work, then it, like true liberty interests, will be protected from all significant State interference. Very few statutes contain absolute prohibitions. Most laws, including ss. 193 and 195.1(1)(c) of the Code, regulate the time, place or manner of activity. The real concern then is that virtually all such time, place and manner restriction will be characterized as deprivations of liberty.

28. Even if the courts treat only prohibitions as deprivations, it is all too easy to characterize any regulation as a prohibition, or vice versa, depending entirely on the level of specificity at which one approaches the law in question. A review of the administrative law cases which involve the distinction between regulation and prohibition reveals, as well, how the distinction is a source of great uncertainty and endless litigation.

See, e.g. City of Toronto v. Virgo, [1896] A.C. 88 @ 93 (P.C.)

Rex v. Sung Chong (1909), B.C.R. 275 (C.A.)

City of Toronto v. Madelbaum, [1932] 3 D.L.R. 604 @ 609 (Ont. S.C.)

Corporation of City of Prince George v. Payne, [1978] 1 S.C.R. 458

Re Romeo's Pizza & Steak House Ltd. and City of Victoria (1982), 137 D.L.R. (3d) 496 (B.C.S.C.)

Cp. City of Montreal v. Morgan (1920), 60 S.C.R. 393

Law Society of British Columbia v. Jabour, [1981] 2 W.W.R. 159 @ 171-172 (B.C.C.A.) aff'd [1982] 2 S.C.R. 307 @ 341-42

Rex v. Island Pacific Oil Co., [1940] 3 D.L.R. 263 (B.C.C.A.)

Re City of Vancouver Licence Bylaw (1978), 5 B.C.L.R. 193 (C.A.)

29. The Wilson, supra, decision itself is a good example of how the courts are likely to subject time, place

or manner restrictions to constitutional scrutiny if the right to work is subsumed within the right to liberty. In Wilson, supra, the impugned legislation did not prohibit any doctor from practising his or her profession. Rather, the law prescribed when a doctor would be entitled to bill the Provincial Medical Services Plan for services rendered. One of the issues on the appeal was "whether liberty in s. 7 is broad enough to encompass the opportunity of a qualified and licensed doctor to practise medicine in British Columbia without restraint as to place, time or purpose ...": (p. 15, emphasis added). Not only did the Court hold that liberty included the right to participate in the Plan (i.e. to be paid for one's services by the government) but included the right to practise a profession within the Province without geographic restriction and the liberty to practise full time in one's own practise and not to be restricted to practise from time to time on a locum tenens basis, or for the purpose of replacing an absent doctor: pp. 15, 31.

30. Similarly, in Regina v. Robson (1985), 19 D.L.R. (4th) 112 (B.C.C.A.) the Court, having elevated driving an automobile to the status of a constitutionally protected liberty, then held that a 24-hour suspension of the right to drive was a deprivation of that liberty interest.

31. Further evidence of the malleability of the concepts of regulation and prohibition, and the difficulty of applying them in a principled fashion, is evidenced by the fact that the Court of Appeal in Wilson, supra, @ p. 27, distinguished the impugned legislation in Milk Board v. Clearview Dairy Farm Inc. (1986), 69 B.C.L.R. 220; aff'd (1987), 8 B.C.L.R. (2d) 394 (C.A.), as involving mere regulation. In Clearview Dairy Farm Inc. the impugned provisions prohibited a person from selling milk in British Columbia without a licence, which in turn required the licensee to be a holder of milk quota. Clearview could only obtain a quota either by purchasing it from an existing quota holder at a cost of three quarters of a million dollars or by joining the list of 600 persons waiting to be allocated quota, many of whom believed that "they will not survive long enough to have their names reach the top of the list": 69 B.C.L.R. 234 (B.C.S.C.).

32. To hold that liberty embraces a right to work will cause the courts to become embroiled in every kind of economic regulation of the private and public sector. Furthermore, all government decisions respecting employment in the public service and the armed services would be

subjected to judicial scrutiny. It is not inconceivable that any government action (e.g. employment standards legislation, tax legislation, regulation of the bank or interest rates, or agreements respecting trade) could be challenged insofar as there were a causal connection between these government acts and unemployment rates.

33. The consequences, should any of these challenges be successful, is one point. Be that as it may, any recognition of the right to work in the Constitution will open a veritable floodgate of litigation. Scarce judicial resources will be unnecessarily burdened leaving even less court time and attention for legitimate constitutional and non-constitutional claims. Another point is that neither lawyers and judges nor the institution of judicial review are properly equipped to deal with complexities of economic regulation. These are not "issues amenable to principled resolution [and] are of a nature peculiarly apposite to the function of the Legislature": Reference Re Public Service Employees Relations Act, supra, @ 419 and 391. If courts were to undertake this task, the very legitimacy of the process of judicial review would be called into question. The task of economic regulation will inevitably cause the courts to cross the "fine line" between the review of

legislation for its constitutionality and "the adjudication of public policy": Morgentaler v. The Queen, supra, @ 53.

Is s. 193 of the Criminal Code of Canada inconsistent with s. 2(b) of the Canadian Charter of Rights and Freedoms?

Is s. 195.1(1)(c) of the Criminal Code of Canada inconsistent with s. 2(b) of the Canadian Charter of Rights and Freedoms?

Is the combination of the legislative provisions contained in s. 193 and s. 195.1(1)(c) of the Criminal Code of Canada inconsistent with s. 2(b) of the Canadian Charter of Rights and Freedoms?

34. The Attorney General of British Columbia incorporates and adopts the submissions made with respect to freedom of expression in its factum in Stagnitta v. The Queen (Supreme Court of Canada No. 20497, a copy of which will be served on the parties in this case who are not parties in Stagnitta).

If ss. 193 and 195.1(1)(c) of the Criminal Code of Canada or a combination of both or part thereof are inconsistent with either s. 7 or s. 2(b) of the Canadian Charter of Rights and Freedoms, to what extent, if any, can such limits on the rights and freedoms protected by s. 7 or s. 2(b) of the Canadian Charter of Rights and Freedoms be justified under s. 1 of the Canadian Charter of Rights and Freedoms and thereby rendered not inconsistent with the Constitution Act, 1982?

35. The Attorney General of British Columbia agrees generally with the submissions of the Attorney General of Manitoba and the Intervenor, the Attorney General of Canada.

PART IV

NATURE OF ORDER SOUGHT

35. The Attorney General of British Columbia submits that the constitutional questions should be answered as follows:

Question 1: No

Question 2: No

Question 3: No

Question 4: No

Question 5: No

Question 6: No

Question 7: Yes

ALL OF WHICH IS RESPECTFULLY SUBMITTED

JOSEPH J. ARVAY, Q.C.
Solicitor for the Attorney General of British Columbia, Intervenor

DATED: This 1st day of November, 1988,
Victoria, B.C.

Court of Appeal

CA007160
CA007198

CA007160
BETWEEN:

PETER SAGER WILSON and
CHRISTYANNE L. MAXSON
PETITIONERS
(APPELLANTS)

AND:

THE MEDICAL SERVICES COMMISSION
OF BRITISH COLUMBIA and THE
ATTORNEY GENERAL OF BRITISH
COLUMBIA
RESPONDENTS
(RESPONDENTS)

CA007198
BETWEEN:

JO ANN ARNASON, GRAHAM CONWAY,
DAVID LEE WILLIAMS and
RAYMOND SIU HONG KWAN
PETITIONERS
(APPELLANTS)

AND:

THE MEDICAL SERVICES COMMISSION
OF BRITISH COLUMBIA and
THE ATTORNEY GENERAL OF
BRITISH COLUMBIA
RESPONDENT
(RESPONDENTS)

REASONS FOR JUDGMENT

OF THE COURT

Before: The Honourable Chief Justice Nemetz
The Honourable Mr. Justice Carrothers
The Honourable Mr. Justice Hinkson
The Honourable Mr. Justice Macfarlane
The Honourable Mr. Justice Wallace

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Counsel for the Appellants, Arnason, Conway, Williams and Kwan (CA007198)	Brian J. Wallace, Q.C. Peter C.P. Behie
Counsel for the Respondents:	E. Robert A. Edwards, Q.C. William D. Pike

Date heard: April 25-26, 1988

Vancouver, British Columbia
August 5, 1988

The question raised by this appeal is whether the Medical Service Amendment Act, 1985, and Regulation 144/68 as amended by 154/5 and 330/85 made thereunder are inconsistent with ss. 6, 7 and 15 of the Canadian Charter of Rights and Freedoms, and are, therefore, of no force and effect by virtue of s. 52 of the Charter.

Introduction

In July, 1983, the government of British Columbia introduced into the Legislative Assembly Bill 24. It was to be followed by an enactment to be called the Medical Service Act. The Bill was not enacted. Nevertheless, the scheme set out in the Bill was implemented by the Medical Services Commission. The implementation was immediately challenged by Dr. R. Mia. The matter came to the trial courts and was heard by Chief Justice McEachern [Mia v. Medical Services Commission of British Columbia (1985), 17 D.L.R. (4th) 385]. He found that the scheme so implemented by the commission was not authorized under the existing Medical Service Act. He held further that Dr. Mia's constitutional rights contained in

s. 6(2)(b) and s. 7 of the Charter of Rights and Freedoms had been infringed (i.e. the right of mobility and the right of liberty). Finally, he held that the scheme could not be justified under s. 1 of the Charter because the scheme was not legislated.

No appeal was taken from this decision. However, the government passed new legislation, Bill 41, and regulations which essentially gave legislative effect to their scheme. Amendments were made to the Medical Service Act in 1985 and those relevant are ss. 8.1 and 8.2. They are as follows:

> **Practitioner numbers**
>
> **8.1** (1) In this section "practitioner" means a practitioner who does not have a practitioner number.
>
> (2) The commission may, in accordance with the regulations, grant a practitioner number under the plan to a practitioner.
>
> (3) On the request of a practitioner made not later than 90 days after the date this section comes into force, the commission shall grant a practitioner number under this section to that practitioner where he
>
> (a) submitted, on or before September 1, 1983 but before the date this section comes into force, a completed application to the commission for a number permitting reimbursement under the plan, or
>
> (b) participated in the plan at any time within the 2 year period immediately preceding the date this section comes into force and has not been declared to be outside the plan for cause.
>
> (4) Notwithstanding subsection (3), where the commission is satisfied that a practitioner has actively participated in the plan during the 6 month period immediately preceding the date section 3 of the Medical Service Amendment Act, 1985 came into force and has not been declared to be outside the plan for cause, the commission shall grant a practitioner number to that practitioner without receipt of a request.

Conditions on practitioners

8.2 (1) The commission may impose one or more of the following conditions on a practitioner:

(a) a condition that restricts reimbursement under the plan to insured services rendered by the practitioner within the geographic area specified in the condition;

(b) a condition that prohibits the transfer of his practitioner number to any other person;

(c) a condition that restricts the term of his practitioner number to a period specified by the commission, where the practitioner number permits the practitioner to submit claims to the commission for insured services rendered by him
(i) during his postgraduate training, or
(ii) in order to carry on the practice of another practitioner while that practitioner is absent;

(d) a condition that permits the practitioner to submit claims to the commission solely for the insured services rendered by him in order to carry on the practice of another practitioner while that practitioner is absent.

(2) The commission shall not impose the conditon referred to in subsection (1)(a) on a practitioner who holds a practitioner number that the commission was required to grant under section 8.1(3) or (4).

Section 17 of the Regulations specified the criteria which the commission shall apply in allocating practitioner numbers. It is cited below, but one provision in particular should be noted. It is 17.08, which states that the residence of a physician is not be considered in allocating a practitioner number:

Residence

17.08 In granting a practitioner number to a medical practitioner under s. 8.1(2) of the Act, the commission shall not consider the residence or former residence of an applicant in making its decision.

Thus, the Medical Service Act was amended. The amended Act was challenged in two suits now consolidated by Drs. Wilson and Maxson, and Drs. Arnason, Conway, Williams and Kwan, on the grounds essentially that the doctors' rights under ss. 6, 7 and 15 of the Charter were infringed. The suits were tried by Mr. Justice Lysyk who disagreed with a part of the Chief Justice's reasoning in Mia and ruled against the doctors.

The doctors now appeal to this Court. By way of prefatory observation it is of interest to note that last year's (1987) British Columbia budget for its entire health system amounted to some four billion dollars. A breakdown shows that $950 million was spent on professional services fees. Thus, the doctors' portion of the entire budget amounted to approximately 24%. The impugned Medical Service Act is concerned only with the professional services category of medical costs. We turn, therefore, to the methodology employed. The broad criteria for assigning numbers are outlined in the Regulations. The relevant regulations are:

DIVISION (17)

Practitioner Numbers to Medical Practitioners

Interpretation

17.01 (1) In this Division

"**active application**" means an application that
(a) has been stamped under section 17.03(2), and
(b) has not lost its status as an active application under section 17.03(4);

"**applicant**" means a medical practitioner who does not have a practitioner number but has an active application on file with the commission;

"**fiscal year**" means a year that commences on April 1 and ends on March 31 of the following calendar year;

"full time equivalent medical practitioners" means full time equivalent medical practitioners determined in accordance with subsection (2);

"full time medical practitioner" means a medical practitioner to whom the commission, in the prior fiscal year, paid a total amount equal to or greater than 1/2 of the average payment made under the plan in the prior fiscal year to all medical practitioners in the same type of practice as that medical practitioner;

"medical practitioner" means, other than in the definition of "applicant", a medical practitioner who has a practitioner number;

"part time medical practitioner" means a medical practitioner who is not a full time medical practitioner;

"practitioner area" means a geographic area established under section 17.02;

"type of practice" means a type of practice referred to in Column 1 of Schedule 2.

(2) In order to determine the number of full time equivalent medical practitioners in a practitioner area, the commission shall count

(a) each full time medical practitioner as one full time equivalent medical practitioner,

(b) notwithstanding paragraph (c), each medical practitioner practising as a pathologist, radiologist, microbiologist or a specialist in nuclear medicine, whether or not he is a full time medical practitioner, as one full time equivalent medical practitioner, and

(c) each part time medical practitioner as a fraction of one full time equivalent medical practitioner where

(i) the numerator of the fraction is the total amount paid under the plan in the prior fiscal year to that part time medical practitioner, and

(ii) the denominator of the fraction is the average payment under the plan in the prior fiscal year to all full time medical practitioners in the same type of practice as the part time medical practitioner whose earnings under the plan are used to determine the numerator.

(3) In order to determine the type of practice of a medical practitioner, the commission shall base the type of practice on the types of insured services for which a medical practitioner submits claims to the commission.

Establishment of practitioner areas

17.02 Each practitioner area listed in Column 1 of Schedule 1 is established and shall comprise the area set out opposite it in Column 2.

Applications for practitioner numbers

17.03 (1) A medical practitioner who does not have a practitioner number may apply for a practitioner number for a practitioner area by filing with the commission an application in the form established by the commission.

(2) On receipt of a completed application, the commission shall stamp the application with the time and date it is received.

(3) For the purpose of subsection (2), where an applicant has full hospital admitting privileges at a hospital in the practitioner area for which he is applying, his application shall specify the hospital at which he had full hospital admitting privileges.

(4) An application loses its status as an active application where the applicant fails to notify the commission in writing that he wishes to have his application remain active during the 6 months preceding each 6 month anniversary of the date that the application was stamped under subsection (2).

Granting practitioner numbers

17.04 Before the commission grants a practitioner number under section 8.1(2) of the Act, the commission shall comply with sections 17.05 to 17.08.

General criteria to be examined by the commission

17.05 (1) The commission shall consider whether the ratio of the population in the practitioner area to the number of full time equivalent medical practitioners in the type of practice that an applicant for a practitioner number for the practitioner area will be carrying on exceeds the ratio set out in Schedule 2.

(2) The commission shall determine whether an applicant has full hospital admitting privileges at a hospital in the practitioner area for which he has applied for a practitioner number.

(3) The commission shall consider whether the hospital at which an applicant has been granted full hospital admitting privileges has a demonstrated need for medical practitioners in the type of practice that the applicant will be carrying on.

Ranking of applicants

17.06 Where there are 2 or more applicants for one practitioner number for the same practitioner area who

(a) will be carrying on the same type of practice, and

(b) have full hospital admitting privileges at a hospital in that practitioner area that has a demonstrated need for medical practitioners in the type of practice that the applicants will be carrying on,

the commission may only grant a practitioner number to the applicant with the earliest time and date stamped on his application.

Specific medical need

17.07 Notwithstanding section 17.06, where the commission considers that there is a specific medical or community need in a practitioner area that justifies granting a practitioner number for that area, it may grant the practitioner number to the applicant who, due to his medical training or qualifications, or other training or qualifications, is the best able to fill that specific medical or community need.

Residence

17.08 In granting a practitioner number to a medical practitioner under s. 8.1(2) of the Act, the commission shall not consider the residence or former residence of an applicant in making its decision.

17.09 Notwithstanding sections 17.04 to 17.06 the commission may grant a practitioner number to an applicant who was employed in the Province on May 30, 1985.

In practice, a physician who seeks a Medical Services Plan Payment Number, enabling the physician to bill the Plan for services rendered to insured persons, is reviewed by a Local Medical Manpower Committee (LMMC). The LMMCs are hospital-based and are composed of representatives from the medical staff and the hospital board. The LMMC reviews those physicians who seek privileges at the hospital in which they are located; the granting of hospital privileges is to be a pre-condition to receiving a practitioner number. The purpose of the LMMC is to estimate the local need for physicians, by region and by specialty, and to advise the Provincial Medical Manpower Committee (PMMC) regarding the need for additional physicians.

In some areas the LMMC will advise a Regional Medical Manpower Committee (RMMC) which in turn advises the PMMC. The PMMC is made up of seven persons: two members from the British Columbia Medical Association; one member from the College of Physicians and Surgeons; one member from the U.B.C. Faculty of Medicine; and a Chairman who is the Executive Director of the Medical Services Plan. The PMMC is to advise the Medical Services Commission on issues relating to medical manpower as requested by the Medical Services Commission.

The activities of the PMMC also include estimating the need for additional physicians by specialty and region, receiving the advice of the LMMC and/or the RMMC, recommending the allocation of practitioner numbers, and monitoring the LMMC and RMMC. The Medical Services Commission, which is made up of one person, ultimately decides whether or not a physician will receive a practitioner number.

We note parenthetically that payment of doctors' fees comes from direct subscriber fees and consolidated revenue. The latter includes federal contributions based on a per capita grant program. The subscribers' premiums amount to approximately 37% of the funding for the Medical Services Plan. The controls have had some effect upon reducing the overall doctors' bill but the reaction of the doctors has been vigorously adverse.

There are six physicians involved in this appeal and each has a slightly different background. Dr. Peter Wilson is a British Columbian who obtained his M.D. from the University of British Columbia in 1982. He interned in Newfoundland and practised there and in Ontario. He returned to British Columbia for personal reasons and received a practitioner number restricted to locum tenens work in December, 1985. He practised in Kelowna. In January, 1986, (after this action had been commenced) he received a permanent practitioner number restricted to the Central Okanagan Regional District. When he received the number he had not met the precondition of having hospital privileges.

Dr. Christyanne Maxson is also a British Columbian from Kelowna who graduated from the University of British Columbia's Faculty of Medicine. She undertook her internship in Saskatchewan and completed it in 1985. She returned to Kelowna and received an offer to join a private practice. Dr. Maxson was unable to join the practice because she did not receive a practitioner number. We are advised by counsel that she has now received a number restricted to Kelowna due to the intervention of the Ombudsman. However, she now resides in Vancouver and cannot use the number.

Dr. Jo Ann Arnason is from Manitoba and received her M.D. in that province in 1984. She interned in Victoria and received a number restricted to the Capital Regional District.

Dr. Graham Conway was born in England but was educated mainly in Ontario and received his M.D. from Queen's University in 1967. He interned in Vancouver and practised in B.C. until 1979. At that time he moved to Micronesia where he continued to practise medicine. Dr. Conway held a billing number until 1985 when the Medical Services Commission informed him that they had deemed his number to be inactive. This designation was based on the assumption that he did not meet the criteria which entitled him to a number as of right. We are advised by counsel that Dr. Conway is now back in British Columbia and has received a locum tenens number.

Dr. David Williams is a British Columbian who received his M.D. from the University of British Columbia in 1975, interned in Vancouver and practised in Dawson Creek from 1976 to 1981. He then moved to Nova Scotia where he has practised since that time. In July, 1985, the Medical Services Commission informed him that they had deemed his practitioner number to be inactive.

Dr. Raymond Kwan received his secondary and post-secondary education in British Columbia and received his M.D. from the University of British Columbia in 1984. He interned in Saskatchewan and the Medical Services Commission granted him a locum tenens number in December, 1985. He has been denied a permanent practitioner number and for this reason was unable to purchase a Vancouver practice, as he had intended.

The judgment from which the appeal is taken

The trial judge held that the Act and the Regulations did not offend the Charter.

It was common ground that the ability to bill the plan which is conferred by a practitioner number is, for all practical purposes, essential to the earning of a livelihood in private practice as a physician in British Columbia.

The issues at trial concerned s. 6 (mobility rights), s. 7 (the right to liberty), and s. 15 (equality rights) of the Charter. The government did not invoke s. 1.

The trial judge made the following findings:

1. Section 6(2)(b) does not establish a free-standing constitutional right to work, or embrace intra-provincial mobility rights: Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357. The challenged enactments do not erect a barrier to inter-provincial mobility because Reg. 17.08 prohibits the commission from considering the residence or former residence of an applicant in making its decision

2. Section 7 does not apply because "liberty" does not extend to economic rights generally or the right to work in particular, and that is the character of the rights being asserted by the doctors.

3. The grandfathering provisions of the enactments (that is, the preference given to those who had participated in the plan before the impugned legislation came into force) do not discriminate within the meaning of s. 15(1) of

the Charter. There are two purposes which the government hopes to achieve by the enactments: cost control of medicare and improved geographic distribution of the physicians whose fees for medical services must be paid for under the plan. Neither the purpose nor the effect of the legislation is so unfair and unreasonable as to constitute discrimination.

The issues on appeal

1. Whether s. 6, having regard to the French language "de se deplacer dans tout le pays", guarantees the right of a person to move from place to place within a province for the purpose of gaining a livelihood.

2. Whether the right to "liberty" under s. 7 of the Charter is broad enough to encompass the opportunity of a qualified and licensed doctor to practise medicine in British Columbia without restraint as to place, time or purpose and if so, whether the impugned enactments, both procedurally and in substance, violate the principles of fundamental justice.

3. Whether the impugned enactments constitute discrimination within the meaning of s. 15 of the Charter.

We propose to deal with the s. 7 issue first.

Section 7: The right to liberty

The section 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.

The appellants submit that the effect of the impugned legislation is to deprive them of the right to liberty guaranteed by s. 7. They say the alleged deprivation takes these forms:

(a) In the case of Wilson, Maxson and Arnason, who have been granted permanent practitioner numbers with geographical restrictions, a restraint on their liberty to practise wherever they choose within British Columbia. Pursuant to s. 8.2(1)(a) of the Act they are restricted to billing for services rendered in a specified geographic area.

(b) In the case of Kwan, who has been refused a permanent practitioner number, but has been granted a locum tenens number permitting him to bill the plan for services rendered while acting in the place of a physician who is temporarily absent from his or her practice, a restraint on his liberty to conduct his own practice anywhere in the province. The imposition of the restriction on him puts in issue the constitutional validity of s. 8.2(1)(c)(ii) and (d) of the Act.

(c) In the cases of Conway and Williams, who have been denied permanent practioner numbers, a restraint on their liberty by being denied the right to practise in British Columbia, although qualified and licensed to do so. Both Conway and Williams, although qualified and licensed to practise in the province

were practising outside the province and had not participated in the plan for the two years preceding the legislation coming into force.

The question then arises whether "liberty" in s. 7 is broad enough to encompass the opportunity of a qualified and licensed doctor to practise medicine in British Columbia without restraint as to place, time or purpose, even though there is an incidental economic component to the right being asserted.

Thus the appeal involves the scope of s. 7 of the Charter and, in particular, whether the word "liberty" embraces these rights:

(a) The liberty to participate in the medical plan for it is conceded that denial of participation in the plan is a denial of the opportunity to practise medicine in British Columbia. That is so because 99% of the citizens of British Columbia subscribe to the plan. As a practical matter, no doctor can work outside it.

(b) The liberty to practise a profession within the province without geographic restriction.

(c) The liberty to practise fulltime in one's own practice and not to be restricted to practise from time to time, on a locum tenens basis, or for the purpose of replacing an absent doctor.

The scope of the word "liberty" in s.7

The interpretation of the section should be "a generous rather than a legalistic one": Her Majesty the Queen v. Big M. Drug Mart Ltd., [1985] 1 S.C.R. 295 at 344. Meaning should be given to each of the elements, life, liberty and security of the person, which make up the right contained in s. 7, and those three concepts are capable of a broad range of meaning: Singh et al. v. Minister of Employment & Immigration, [1985] 1 S.C.R. 177 at 205.

In R. v. Robson (1985), 19 D.L.R. (4th) 112, Nemetz, C.J.B.C., writing for the majority, held (at pp. 114-5) that "liberty" was not confined to mere freedom from bodily restraint, and agreed with Chief Justice Warren of the U.S. Supreme Court who said that "liberty" under the law extends to the full range of conduct which the individual is free to pursue. In Robson, Esson, J.A. (at p. 119) disagreed with the trial judge who had construed liberty as freedom from captivity. Freedom of movement generally, and freedom to move to follow an occupation was, in the opinion of Esson, J.A. a deprivation of liberty in the circumstances of that case (pp. 119-20). The word "liberty" in s. 7 extends beyond the pure legal rights guaranteed by ss. 8-14 of the Charter.

At the other extreme it has been held that property rights and purely economic rights are not within the purview of the Charter: R. v. Robson (per Nemetz, C.J.B.C. at p. 104); R.V.P. Enterprises Ltd. v. Attorney General of British Columbia et al., unreported, B.C.C.A., April 6, 1988, CA007593 (per Esson, J.A. at pp. 7-8); Whitbread v. Walley et al., unreported, B.C.C.A., May 12, 1988, CA008522/8519, (per McLachlin, J.A. at pp. 13-16, who said, at p. 16 that the question whether s. 7 can ever include an interest with an economic component

must be left for later decision). Other cases where it has been held that commercial or economic rights are not protected by the Charter include Gershman Produce Co. Ltd. v. Motor Transport Board, [1986] 1 W.W.R. 303 (Man.C.A.); Smith, Kline & French Laboratories Ltd. et al. v. Attorney General of Canada (1986), 24 D.L.R. (4th) 321 (F.C.T.D.); Milk Board v. Clearview Dairy Farm Inc. (1986), 69 B.C.L.R. 220 (B.C.S.C), [1987] 4 W.W.R. 279 (B.C.C.A); Noyes v. Board of School Trustees, School District 30 (1985), 64 B.C.L.R. 287 (B.C.S.C.) and R. v. Quesnel (1986), 24 C.C.C. (3d) 78 (Ont.C.A.). Other cases indicate that the simple fact that an alleged infringement of s. 7 might have an economic component would not exclude it from the protection of the section.

The right to liberty was examined in Morgentaler v. The Queen, [1988] 1 S.C.R. 30 by Wilson, J. who said at p. 164:

> The Charter and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity. Professor Neil MacCormick, . . . Legal Right and Social Democracy: Essays in Legal and Political Philosophy, speaks of liberty as "a condition of human self-respect and of that contentment which resides in the ability to pursue one's own conception of a full and rewarding life" (p. 39). He says at p. 41:
>
> To be able to decide what to do and how to do it, to carry out one's own decisions and accept their consequences, seems to me essential to one's self-respect as a human being, and essential to the possibility of that contentment. Such self-respect and contentment are in my judgment fundamental goods for human beings, the worth of life itself being on condition of having or striving for them. If a person were deliberately denied the opportunity of self-respect and that contentment, he would suffer deprivation of his essential humanity.
>
> (emphasis added)

The scope of the concept of "liberty" is illustrated in those words from Morgentaler, and by this passage from the judgment of Dickson, C.J.C. (dissenting in the result) in Reference Re Public Service Employee Relations Act (Alta.), [1987] 3 W.W.R. 577 at 618:

> I wish to refer to one further concern. It has been suggested that associational activity for the pursuit of economic ends should not be accorded constitutional protection. If by this it is meant that something as fundamental as a person's livelihood or dignity in the workplace is beyond the scope of constitutional protection, I cannot agree. If, on the other hand, it is meant that concerns of an exclusively pecuniary nature are excluded from such protection, such an argument would merit careful consideration. In the present case, however, we are concerned with interests which go far beyond those of a merely pecuniary nature.
>
> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect. In exploring the personal meaning of employment, Professor D.M. Beatty, in his article "Labour is not a Commodity" in Reiter and Swan (eds.), Studies in Contract Law (1980), has described it as follows, at p. 324:
>
> > As a vehicle which admits a person to the status of a contributing, productive, member of society, employment is seen as providing recognition of the individual's being engaged in something worthwhile. It gives the individual a sense of significance. By realizing our capabilities and contributing in ways society determines to be useful, employment comes to represent the means by which most members of our community can lay claim to an equal right of respect and of concern from others. It is this institution through which most of us secure much of our self-respect and self-esteem.

We hasten to add that the issue in the Alberta Union case involved s. 2(d) of the Charter, and not s. 7, but we repeat the passage because we think, with respect, that it emphasizes, in an eloquent fashion, what has to be said in this case about the inherent character and fundamental importance of work, and the reason to afford constitutional protection to that aspect of liberty, even when an economic component is involved.

Other cases which emphasize the fundamental importance of being able to pursue one's chosen calling include Black et al. v. Law Society of Alberta, (Alta. C.A.). where the court examined provisions which effectively prohibited the forming of inter-provincial law partnerships. Kerans, J.A. said at p. 612:

> The pursuit of a livelihood through a trade or calling has been, in Canada, accepted as an appropriate and vital human ambition, available to those of either sex who want or need to pursue it. . . .

In Re Mia and Medical Services Commission of British Columbia, Chief Justice McEachern stated with regard to s. 7, at pp. 412-14:

> . . . there are some rights enjoyed by our people including the right to work or practise a profession that are so fundamental that they must be protected even if they include an economic element. (p. 412)
>
> * * *
>
> Rights we have enjoyed for centuries include the right to pursue a calling or profession for which we are qualified, and to move freely through the realm for that purpose. These are rights our people have always taken for granted. Who would question them until now? (p. 412)
>
> * * *
>
> Our history shows that restrictions on movement for purpose of employment were, short of

> imprisonment, the most severe deprivation of freedom and liberty. This is demonstrated by a brief glance at medieval English history. (p. 413)
>
> * * *
>
> In more recent times most of our people, or their parents or grandparents, moved to this country and to this province. They came here for many reasons, but principally to improve themselves economically. Until now, it has never been suggested in modern times that options of location within a province could be restricted. After all, this is Canada where freedom of movement for any lawful purpose has always been one of the handmaidens of liberty. (p. 414)
>
> In view of this history I have no doubt that freedom of movement within the province for the purpose of lawful employment or enterprise, of (sic) for the practise of a profession, trade or calling by qualified persons in any community, is indeed a right properly embraced within the rubric of liberty. Practices which purport to limit or restrict that right are invalid and must be struck down unless permitted by the Charter.
>
> I hasten to add that the foregoing does not mean that anyone has an absolute right to a livelihood wherever he wishes. He may pursue such livelihood by the exercise of his skill and industry, . . . but, subject to the general law, others have rights not to employ or retain any particular person, and everyone must make his own lawful way wherever he goes. (pp. 414-5)

Common sense, our history, and our daily experience tell us that liberty is not unrestrained. Regulation of our activities is commonplace. Society could not survive, and chaos would result if we were all at liberty to do as we saw fit. Section 7 recognizes the validity of competing societal interests by providing that a person may be deprived of life, liberty and security in accordance with the principles of fundamental justice. Government may impose an administrative structure which limits or even deprives one of liberty to further its perception of the needs of society "unless the use of such structure is in itself so manifestly unfair, having regard to the decisions it is called upon to make, as to violate the

principles of fundamental justice": Jones v. The Queen (1987), 31 D.L.R. (4th) 569 (per La Forest, J.) restated by Dickson, C.J.C. in Morgentaler, at pp. 72-73.

To summarize: "Liberty" within the meaning of s. 7 is not confined to mere freedom from bodily restraint. It does not, however, extend to protect property or pure economic rights. It may embrace individual freedom of movement, including the right to choose one's occupation and where to pursue it, subject to the right of the state to impose, in accordance with the principles of fundamental justice, legitimate and reasonable restrictions on the activities of individuals.

Is this a case involving pure economic rights?

The trial judge appears to have concluded that the appellants, in asserting a right to pursue their profession, were asserting economic rights generally, or the right to work in particular. He said, at p. 627:

> The core issue can be defined more succinctly. Does the Charter's right to liberty clause guarantee a right to work? Unless it does, one does not reach second echelon issues such as whether the clause also guarantees the right to be paid for such work from public funds and the right to perform work free of statutorily mandated geographic restrictions.
>
> For purposes of classifying rights and freedoms, the right to work is commonly, if not invariably, characterized as an economic right. There is now a considerable body of case authority bearing on the question of whether the right to liberty clause confers or protects economic rights generally or the right to work in particular.

With respect, we think that puts the appellants' case on too narrow a basis. The trial judge has characterized the issue as "right to work" [a purely economic question], when he should have directed his attention to a more important aspect

of liberty, the right to pursue a livelihood or profession [a matter concerning one's dignity and sense of self-worth].

The appellants' case is that the government has deprived them of the opportunity to pursue their profession, or has restricted their mobility in such a way as to deprive them of "liberty" in the broad sense in which that freedom is to be interpreted under the Charter. The government has said, in effect, that they cannot practise without a practitioner number, and that any number that is granted will restrict their movements. A geographic restriction will determine their place of residence, and a locum tenens number will provide only a temporary opportunity to practise and will necessitate movement from place to place, and from office to office. They assert that the scheme deprives them of choices which are fundamental to liberty in the sense in which that word should be understood in the context of Charter freedoms.

The issue then is not payment or no payment for medical services. Denial of the right to participate under the plan is not the denial of a purely economic right, but in reality is a denial of the right of the appellants to practise their chosen profession within British Columbia.

In considering the economic interests involved we must not overlook the fact that the plan does not guarantee an income to doctors. It ensures that a percentage of the bills submitted by physicians for medical services performed for insured patients will be paid. The patients who pay premiums and the governments that subsidize patient care also have an economic interest in the plan as a means by which the provincial government seeks to reduce the cost of our health care system. Cost control is admittedly a worthy purpose and a legitimate

responsibility for the government. Provincial governments have considered and implemented various ways of reducing these costs including reducing the percentage paid of the medical service rendered, excluding certain services from coverage, instituting user fees for certain services, limiting the amount which will be paid for particular services, and increasing premiums.

The economic component of the freedom which the doctors seek to assert is the right to be paid by or on behalf of the patient for such services as may be rendered. The problem with the impugned legislation is that the opportunity to pursue their profession, and the freedom of mobility in practice, can be denied by refusing to allow patients the right to have the doctor reimbursed under the plan. The rights being asserted in this case are personal rights affecting the freedom and quality of life of individual doctors. The effect upon them of the alleged deprivations is personal, and has far reaching implications. It is not a purely business interest which is affected.

The trial judge refused to follow Mia holding that:

> . Most recent decisions have declined to extend the right to Liberty clause to the economic realm and indicate that the clause does not guarantee a right to engage in particular types of commercial activity, employment, or professional callings.

The decisions upon which that conclusion rests include cases of purely economic rights, cases of regulation of business, professional or occupational activity, and cases which hold that s. 7 does not guarantee a "free standing right to work". We will examine these categories in some detail as distinct from the doctors' situation.

The economic rights cases

In the following cases the "liberty" the plaintiff was alleged to have been deprived of was a purely economic interest or freedom: Re Homemade Wine Crafts (Canada) Ltd. and A.G.B.C. et al. (1986), 26 D.L.R. (4th) 468 (B.C.S.C.), Re Abbotsford Taxi Ltd. and Motor Carrier Commission (1986), 23 D.L.R. (4th) 365 (B.C.S.C.), Re Aluminum Company of Canada Ltd. v. H.M.T.Q. and Dofasco Inc. (1986), 55 O.R. (2d) 522 (Ont.D.C.), Smith, Kline & French Laboratories Ltd. et al. v. Attorney General of Canada.

In Homemade Wine Crafts a corporation was prevented by order in council from marketing "Wonder Wine". Section 7 did not apply because a purely economic right in the nature of a property right was asserted (i.e. freedom to advertise). Furthermore, it was not the right of an individual, but that of a corporation.

In Re Abbotsford Taxi the granting to a competitor of a taxi licence was held to relate to a purely economic interest, and not to fall within the rubric of s. 7, or within Mia. The trial judge said the Charter enshrined no "freedom" or right to retain a monopoly.

In Re Aluminum Company of Canada a corporation was prohibited from marketing aluminum cans for two years to protect jobs in the steel industry. It was held that s. 7 did not safeguard economic rights, such as freedom to sell aluminum cans.

At issue in Smith, Kline & French, was legislation which granted patentees exclusivity for 17 years (medicine patents). Strayer, J. was of the view that the

concepts of life, liberty and security of the person have to do with the bodily well-being of a natural person. He said, at p. 363:

> As such, they are not apt to describe any rights of a corporation nor are they apt to describe purely economic interests of a natural person.

Strayer, J. in defining "liberty", accepted as correct the view expressed by Pratte, J. in Operation Dismantle that the word connoted freedom from arbitrary arrest or detention. That narrow view has now been rejected by the Supreme Court of Canada.

We do not quarrel with the conclusion reached in those cases involving corporation business interests and pure economic rights, but we do not think that they detract from the conclusion reached in Mia, that denying doctors the opportunity to pursue their profession falls within the rubric of "liberty" as that word is used in s. 7.

The regulatory cases

Cases which legitimate and reasonable regulation of various professions was examined include Noyes v. Board of School Trustees, Beltz v. The Law Society of British Columbia, [1987] 1 W.W.R. 427 (B.C.S.C.), Branigan v. Yukon Medical Council et al (1986), 1 B.C.L.R. (2d) 350 (Y.T.S.C.), Isabey v. Manitoba Health Services Commission, [1986] 4 W.W.R. 310 (Man.C.A.) and Charboneau v. College of Physicians & Surgeons of Ontario (1986), 22 D.L.R. (4th) 303 (Ont.H.C.)

In Noyes, a school teacher was suspended without pay after being charged with a criminal offence. In Beltz, a lawyer complained that he could not afford to practise because the mandatory insurance fees imposed by the Law Society were

too high. In Branigan, a doctor was suspended pursuant to discipline provisions. In Isabey, a medical disciplinary body had power to compare doctor's billings and penalize doctors who "over serviced" patients. In Charboneau, there was provision for a peer assessment program which permitted random access to doctors' records to monitor standards of practise.

Section 7 did not afford relief in any of these cases. In two of them it was held that the regulating provisions did not breach the principles of fundamental justice. In two of the cases Mia was distinguished on the basis that it did not deal with regulation but with an actual deprivation of the right to practise. We have no doubt that regulation of such matters as standards of admission, mandatory insurance for the protection of the public, and standards of practise and of behaviour will not constitute an infringement of s. 7. We do not think that any of those cases detract from the conclusion reached in Mia.

The right to work cases

To support his conclusion that s. 7 did not extend to the rights being asserted by the appellants, the trial judge equated this case with those in which it was said that there is no common law right to work. The principal cases relied upon by the trial judge were Milk Board v. Clearview Dairy Farm Inc., involving a milk marketing scheme and R. v. Quesnel, involving a challenge to a chicken marketing scheme. Each scheme dealt with the allocation of quota for the production, and marketing of regulated products. In Clearview Dairy Farm Inc., Toy, J. held that s. 7 did not extend to guaranteeing a right to work at one's chosen calling. He said, at p. 241, that he had no quarrel with the liberal interpretation given to the word "liberty" in Mia and in Robson. He distinguished Mia on the basis that the effect upon a

qualified and licensed doctor excluded from practice cannot be compared to the situation of a farmer whose activities are regulated. At p. 244, he said "I do not see in any of the decided cases any absolute common law 'right to work' ". On appeal, Seaton, J.A. at p. 288 dealt with the Charter arguments in this way:

> . . . Together the arguments challenge regulation of industry. If accepted, they lead to the conclusion that unregulated free enterprise is entrenched in our Constitution. That, in the end, is what the Charter arguments amount to and I reject them.

In our opinion, Clearview Dairy Farm Inc. involved the basic question of whether an industry could be regulated in the public interest. The incidental effect of increased costs to enter the dairy business did not amount to a deprivation. Furthermore, there was no suggestion in Clearview Dairy Farm Inc. that the legislation involved a breach of the principles of fundamental justice.

R. v. Quesnel involved a similar marketing scheme. At p. 86, Finlayson, J.A. referred to The Law Society of Upper Canada v. Skapinker, and then said:

> Counsel submits, notwithstanding that high authority, that s. 7 of the Charter dealing with life, liberty and security of the person, provides a free standing right to work. Unfortunately for that argument, it has been authoritatively held in a number of cases that this section does not relate to employment: see R. v. Videoflicks Ltd. et al. (1984), 48 O.R. (2d) 395 at p. 433, 14 D.L.R. (4th) at p. 48, 15 C.C.C. (3d) 353 at p. 391 (C.A.):
>
> > The concept of life, liberty and security of the person would appear to relate to one's physical or mental integrity and one's control over these, rather than some right to work whenever one wishes.

We pause to observe that Skapinker did not decide the right to work issue in relation to s. 7. It had been contended on behalf of a lawyer who had been refused

the right to practise that s. 6(2)(b) ought to be read in isolation from the mobility rights in s. 6(2)(a), and thereby confer an independent constitutional right to work in the province where the lawyer resided. That contention was rejected on the ground that both s. 6(2)(a) and s. 6(2)(b) must be read together as being mobility provisions, (a) to permit movement between provinces for the purpose of taking up residence and (b) to permit movement from province to province for the purpose of gaining a livelihood. Section 7 was not discussed, either in relationship to employment opportunities or mobility.

Another case referred to by the trial judge and in argument here is R. v. Videoflicks which concerned the constitutional validity of Sunday-closing legislation in Ontario. The following is all that was said by the Ontario Court of Appeal about s. 7 (at pp. 390-91):

> In his written statement, although not pressed in oral argument, counsel for the appellant Paul Magder submitted that the Act is so fundamentally discriminatory within its own framework that it ought to be struck down as contravening s. 7 of the Charter, which provides:
>
> * * *
>
> I do not agree. As concluded earlier with respect to s. 2(b) of the Charter, I do not see differences by way of mere regulation of time and place as having such adverse impact as to constitute discrimination. Even if such adverse impact were proved, it would be more appropriate to consider the matter in the context of s. 15 of the Charter. The concept of life, liberty and security of the person would appear to relate to one's physical or mental integrity and one's control over these, rather than some right to work whenever one wishes. Moreover, the second half of s. 7 refers to "the right not to be deprived thereof except according to principles of fundamental justice". Being required to close at certain times is not a "deprivation". Accordingly, the appeal of Paul Magder, under s. 7 of the Charter, must fail.
>
> (emphasis added)

The appeal was heard by the Supreme Court of Canada under the name of Edwards Books and Art Ltd. et al. v. The Queen, [1986] 2 S.C.R. 713. At pp. 785-96, Dickson, C.J.C. dealt with the s. 7 issue in this way:

> Section 7 of the Charter
>
> In disposing of the contention that the Act infringes s. 7, I am content to adopt the following passage from the decision of the Ontario Court of Appeal [pp.390-1 C.C.C., p. 48 D.L.R., pp. 432-3 O.R.]:
>
> > . . . counsel for the appellant Paul Magder submitted that the Act is so fundamentally discriminatory within its own framework that it ought to be struck down as contravening s. 7 of 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."
> >
> > I do not agree. As concluded earlier with respect to s. 2(b) of the Charter, I do not see differences by way of mere regulation of time and place as having such adverse impact as to constitute discrimination. Even if such adverse impact were proved, it would be more appropriate to consider the matter in context of s. 15 of the Charter.
>
> Counsel for Paul Magder argued that the statutory obligation to close his business on Sundays deprived him of "liberty". In my opinion "liberty" in s. 7 of the Charter is not synonymous with unconstrained freedom. In Reference re s. 94(2) of the Motor Vehicle Act (1985), 23 C.C.C. (3d) 289 at p. 318, 24 D.L.R. (4th) 536 at p. 565, [1985] 2 S.C.R.486 at p. 524, Madam Justice Wilson observed:
>
> > Indeed, all regulatory offences impose some restriction on liberty broadly construed. But I think it would trivialize the Charter to sweep all those offences into s. 7 as violations of the right to life, liberty and security of the person even they can be sustained under s. 1.
>
> Whatever the precise contours of "liberty" in s. 7, I cannot accept that it extends to an unconstrained right to transact business whenever one wishes.
>
> Accordingly, the s. 7 argument advanced by Paul Magder is without merit.

In our opinion, R. v. Quesnel and Edwards Books and Arts (sub nom R. v. Videoflicks) ought to be regarded as cases involving the regulation of business. They established the principle that "liberty" in s. 7 is not synonymous with unconstrained freedom and that s. 7 does not extend "to an unconstrained right to transact business whenever one wishes". In our opinion they do not stand for the proposition that government may deprive an individual of the opportunity to pursue freely the practice of his profession.

In our view, the phrase "right to work" was used in Clearview Dairy, Quesnel, and Videoflicks, to describe the right being claimed in those cases - the right not to be regulated. It had little to do with the important personal right of otherwise qualified professional people to have an opportunity to attempt to build a practice in their province and in their chosen communities. One may be deprived of such a right in accordance with the principles of fundamental justice, however, the arbitrary nature of the deprivation effected by the Medical Service Act and Regulations as detailed later in these reasons, excludes resort by the Crown to this exception. Finally, such a right may be overridden by important societal concerns which satisfy the requirements of s. 1 of the Charter. In this case the government does not assert or rely upon such concerns.

We are not persuaded that the foregoing authorities relied upon by the trial judge support the conclusion that the appellants have not been deprived of the "liberty" to pursue their chosen profession.

Furthermore, we are not persuaded that the appellants are pursuing a mere economic interest in the nature of an income guaranteed by the government. The impugned enactments go beyond mere economic concerns or regulation within the

profession. The appellants are all fully qualified and licensed doctors who have been excluded from pursuing the practice of their profession. It matters not whether the exclusion of the opportunity to practise is exclusion from practice everywhere in British Columbia, or exclusion from practice anywhere but specified geographic areas of the province.

Mobility - a component of liberty

As Chief Justice McEachern demonstrated in Mia (at p. 413), history shows that restrictions on movement for the purpose of employment were, short of imprisonment, the most severe deprivation of freedom and liberty.

In R.V.P. Enterprises Ltd., Esson J.A., at pp. 5-6, examines the mobility component of "liberty" by reference to what was said by Nemetz, C.J.B.C. (at p. 141) and by himself (at p. 145) in Robson. He also finds support for that aspect of the matter in R. v. Neale, [1986] 5 W.W.R. 577 (Alta. C.A.) at pp. 584-5. In each case, the court held that a person would be deprived of the right to "liberty" under s. 7 if freedom of movement was impaired. In Robson the court held that the roadside suspension effectively precluded movement (and in the opinion of Esson, J.A., for the purpose of following an occupation). In Neale, the court concluded that the suspension did not limit the right of the person "to go where he chooses".

Consideration of the mobility issue in the judgment appealed from is confined to the arguments made under s. 6. There is no recognition in the judgment that the important freedom of mobility within a province could be embraced by the broad protection afforded by s. 7. In our view, mobility is a fundamental right, and the right to "liberty" bears directly on the right to free movement.

It may be argued that if movement within the province is a protected freedom that such right must be found in s. 6. We do not agree. The Charter is not a statute containing a number of watertight compartments. It is not a document which is to be given a narrow and legalistic interpretation. It guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. In Lyons v. The Queen, [1987] 2 S.C.R. 309, La Forest, J. urged that the rights enshrined by the Charter should not be read in isolation. He states, at p. 326:

> . . . the Charter protects a complex of interacting values, each more or less fundamental to the free and democratic society that is Canada . . . and the particularization of rights and freedoms contained in the Charter thus represents a somewhat artificial, if necessary extrinsically worthwhile attempt to structure and focus the judicial exposition of such rights and freedoms. The necessity of structuring the discussion should not however lead us to overlook the importance of appreciating the manner in which the amplification of the content of each enunciated right and freedom in views and in forms are understandings of the value structure sought to be protected by the Charter as a whole and, in particular, of the content of the other specific rights and freedoms it embodies.

A similar approach to interpretation was adopted in determining the scope of the words "principles of fundamental justice": Re B.C. Motor Vehicle Act at p. 513 (per Lamer, J.); Morgentaler v. The Queen at pp. 175-76 (per Wilson, J.)

Section 6 may or may not be restricted to guaranteeing the right of free movement from province to province. Whatever the answer to that question may be, does not detract from the constitutional and fundamental importance of mobility as it affects the life, liberty and security of the person: "Liberty" must touch the right of free movement.

We are of the opinion, therefore, that the geographic restrictions imposed by government on the right to practise medicine in British Columbia constitute a violation of the right to liberty protected by s. 7 unless that right has been removed in accordance with the principles of fundamental justice, or unless the deprivation can be demonstrably justified under s. 1 of the Charter.

The principles of fundamental justice

Fundamental justice is not confined to procedural fairness or natural justice, or to the application only of the rights protected by ss. 8-14 of the Charter. Fundamental justice extends to the substance of the law or practice under review, and to the conduct of the activity in question: Re B.C. Motor Vehicle Act. A deprivation of the s. 7 right which has the effect of infringing a right guaranteed elsewhere in the Charter cannot be in accordance with the principles of fundamental justice: Morgentaler (per Wilson, J. at p. 176). A legislative or regulatory scheme may be so manifestly unfair, having regard to the decisions which must be made under it, as to violate the principles of fundamental justice: Jones v. The Queen (1986), 31 D.L.R. (4th) 569 at 598; Morgentaler v. The Queen (per Dickson, C.J.C. at pp. 72-3).

The appellants submit that the legislation, and regulatory scheme which operates under it, are unfair in both procedure and substance.

The regulatory scheme: Procedure

The scheme is administered by a commission composed of one man appointed by the government. He is not obliged to hold any hearings, or give any reasons for his decision or lack of decision on any application for a practitioner number.

Regulation 17.02 provides for 34 separate practitioner areas within the province.

Regulation 17.03 provides that a doctor may apply for a practitioner number. No system is established for dealing with any particular application; and the commission does not have any duty to decide, although by the Act the applicant is denied the opportunity to practise medicine until there is a decision in his or her favour.

Regulation 17.04 provides that the commission shall comply with Reg. 17.05 to 17.08 before granting an application.

Regulation 17.05 provides that the commission shall consider general criteria, which are set forth earlier in these reasons but involve the ratio of population to doctors in the area, whether the applicant has full hospital admitting privileges, and whether the hospital has demonstrated need for the applicant's type of service.

Regulations 17.06 and 17.07 provide for the ranking of competing applications, and the priority given to an application which is best able to fill a specific medical or community need.

There appears to be no way in which an applicant can ascertain in what area a practitioner number may be available. Applicants are left to guess where a need may arise.

There is no means by which an applicant can ascertain if her or his application is being considered, or if it is being considered then on what evidence it is being considered.

There is no means by which an applicant can ascertain whether a hospital in any area has or is prepared to demonstrate a need for the applicant's services. The persons, who are in a position to do so, may be the competitors of the applicant, and there is no means by which the applicant has an opportunity to contradict the opinions which may be expressed by those competitors.

A practitioner with an unrestricted number can move into any area of the province and thus erase a demontrated need for an applicant's services. In short, the "outs" (those applying for practitioner numbers) are at the mercy of the "ins" (those "grandfathered" practitioners with unrestricted practitioner numbers) and have no means to pr tect themselves. The system purports to establish a queue, but it is so designed that there is no assurance that a specific applicant can keep his or her place in the line, and there is no means by which an applicant can ensure that he or she will move up in the line. There is evidence before us not only of the potential for abuse of the system, but of actual abuse.

In our opinion, the scheme offends the principles of fundamental justice.

It is based on the application of vague and uncertain criteria, which combined with areas of uncontrolled discretion, leaves substantial scope for arbitrary conduct. The government does not attempt to defend the procedural deficiencies of the scheme, except to submit that the normal processes of judicial review would suffice to give a remedy to an individual applicant. We think that the scheme is so procedurally flawed that it cannot stand.

The substance of the legislation and the scheme

Counsel for the appellants Wilson and Maxson submits:

> The substance of the scheme itself is manifestly unfair. The Act distinguishes between established physicians and new or out of province physicians without regard to qualifications, infirmity, ability, etc. Whether or not this is discrimination pursuant to s. 15 of the Charter, it certainly amounts to less than fundamental justice when at issue is a person's livelihood and ability to reside in his own province. The effect on a young doctor in B.C. is devastating. Young physicians are kept out of their hometowns or even out of the province while others can stay. There is no evidence whatsoever and no rational reason for assuming that it is the new or out-of-province physicians who are responsible for increasing health care costs any more than the established ...s; however, it is they who bear the full burden of the law.

Counsel for the appellants Arnason, Conway, Williams and Kwan submits:

> Bill 41 is also substantively offensive to the notions of fundamental justice. The words of McEachern, C.J.S.C. in Re Mia, supra, apply to the case at bar. As in Mia, the regime impugned in this case empowers the Commission to decide whether and where a doctor may practise. As McEachern, C.J.S.C. said of this practice:
>
> > "Further, as a matter of substance or content, the extent of the deprivation and its uneven application between members of the College make it so patently unfair and unjust that it cannot be allowed to stand.

> For example, the Petitioner cannot practise in any real sense; categories of "ins" and "outs" are created within the College; the practice works against youth and talent by lifting the drawbridge to protect established members already within the plan against competition; and it purports to give the Commission power to dictate where within a free country and a free province physicians may practise and therefore where they will live. In many of its aspects this practice is the antithesis of fundamental justice." (p. 417)

We agree with those submissions, and associate ourselves with the sentiments expressed by McEachern, C.J.S.C. in Mia. We reject the submission of the respondents that the scheme for limiting access to the plan comports with the principles of fundamental justice.

The essence of the government's position is that the legislation and the regulations have legitimate and important purposes: (a) cost control and (b) control over the allocation of physicians' services within the province. As to (a) we have said that cost control may be achieved in a variety of other ways. As to (b) the government does not seek to show that the distribution of medical services is a societal concern of such magnitude that it merits interference with such basic liberties as are involved in this case. Again, there are less intrusive means of achieving such a purpose. We note that the government is not prepared to attempt to justify these purposes by subjecting them to analysis under s. 1 of the Charter.

We conclude that the scheme is so manifestly unfair, having regard to the effect of it upon the appellants, as to violate the principles of fundamental justice.

Conclusion

The Medical Services Amendment Act, 1985, and the impugned regulations made pursuant to it, which exclude the appellants from the opportunity to practise their profession as physicians in open competition with all other doctors in British Columbia, and which exclude the appellants from the opportunity to provide medical services to patients everywhere in the province, have the effect of depriving them of "liberty" within the meaning of s. 7 of the Charter. The scheme of the Act and regulations is so procedurally flawed, and so manifestly unfair in substance, having regard to the effect upon the appellants, as to violate the principles of fundamental justice. The government does not attempt to justify the scheme under s. 1 of the Charter as being a reasonable limit prescribed by law. The impugned enactments are inconsistent with s. 7 of the Charter and are, by virtue of s. 52 of the Constitution Act, 1982, of no force and effect. It is not necessary, therefore, to deal with the submissions of the appellants that the enactments are also inconsistent with s. 6 and s. 15 of the Charter.

We would allow the appeal, and make the order sought by the appellants.

The Honourable Chief Justice Nemetz

The Honourable Mr. Justice Carrothers

The Honourable Mr. Justice Hinkson

The Honourable Mr. Justice Macfarlane

The Honourable Mr. Justice Wallace

PART V

LIST OF AUTHORITIES