AD-0594

GOVERNMENT OF PRINCE EDWARD ISLAND,
as represented by the MINISTER OF HEALTH
AND SOCIAL SERVICES

APPELLANT
(Respondent)

AND
HENRY MORGENTALER

RESPONDENT
(Applicant

(15 pages)
Prince Edward Island Supreme Court - Appeal Division
Before: Carruthers, C.J.P.E.I.; Mitchell, J.A.
And Matheson, J.A. (Ad hoc)
Heard - November 24, 1995
Judgment - September 13, 1996
Appeal from [1995] 1 P.E.I.R. 196

SUBORDINATE LEGISLATION - WHETHER VALID - WHETHER REGULATION AUTHORIZED BY HEALTH SERVICES PAYMENT ACT

The Court of Appeal (Matheson J.A. dissenting) allowed an appeal from a declaratory judgment holding s-s. 2.(a.2)(iv) of the **Health Services Payment Act and Regulations *ultra vires***. The Court of Appeal ruled the Regulation was authorized by the parent statute.

CASES CONSIDERED: Re British Columbia Civil Liberties Association and British Columbia (Attorney-General) (1988), 49 D.L.R. (4th) 493 (B.C.C.A.); **Re Telecommunications Workers Union and B.C. Telephone Co.**, [1985] 1 S.C.R. 840 (S.C.C.); **Lexogest Inc. v. Manitoba (Attorney-General)** (1993), 101 D.L.R. (4th) 523 (Man.C.A.)

STATUTES CONSIDERED: Health Services Payment Act, R.S.P.E.I. 1988, Cap. H-2, ss. 2, 3, 4, 5; s-ss. 1(d), 3(1), 4(a), 4(h), 5(c), (d), (l) and (s); **Canada Health Act**, R.S.C. 1985, Chap. C-6; Manitoba **Health Services Insurance Act**, R.S.M. 1987, c. H-35

.../(ii)

REGULATIONS CONSIDERED: Health Services Payment Act Regulations, s-s. 2.(a.2)(iv)

ARTICLES CONSIDERED: Driedger: **"Subordinate Legislation"**, (1960) 38 C.B.R. 1; reproduced at appendix iv of his text: **The Construction of Statutes**, Butterworths, 1974

Roger B. Langille, Q.C., for the appellant

Anne S. Derrick, for the respondent, and Daphne E. Dumont, Prince Edward Island Agent for the RespondentMITCHELL, J.A.:

This case concerns the validity of subordinate legislation. It is an appeal from a February 1, 1995, decision by a Trial Division judge reported at [1995] 1 P.E.I.R. 196 granting the respondent's application for a declaration that s-s. 2.(a.2)(iv) of the **Health Services Payment Act Regulations** (the Regulations) is ***ultra vires***. The impugned Regulation was made by the Prince Edward Island Health and Community Services Agency (the Agency) with the approval of the Lieutenant-Governor-in-Council. The appellant contends the judge erred in law by holding that the Regulation is not authorized by the **Health Services Payment Act**, R.S.P.E.I. 1988, Cap. H-2 **(the Act**).

The Impugned Regulation

Subsection 2.(a.2)(iv) is located in the definition section of the Regulations and forms part of what they mean by the phrase "basic health services". It provides as follows:

2. In these regulations

. . . . .

(a.2) 'basic health services' means

. . . . .

(iv) services provided in respect of termination of pregnancy performed in a hospital when the condition of the patient is such that the service is determined by the Agency to be medically required; ...

Thus, the definition outlines, in an abortion context, the limits of what is meant by "basic health services" when that phrase is used elsewhere in the Regulations. The trial judge found that the Agency could not employ such a restrictive meaning. He ruled the definition "inconsistent with and contradictory to the **Act**" and therefore of no force or effect. I believe he erred in law by so holding.

The Issue

The case as presented to the Court does not involve any constitutional issue, and contains no allegations of bad faith. The sole question is whether the **Act** authorizes the making of a regulation which effectively denies payment under the Province's health care plan in the case of a therapeutic abortion unless in the Agency's opinion the patient medically requires it and the service is performed in a hospital. The Court is not called upon to examine the wisdom of, or the motives for, the impugned regulation but only whether the **Act** authorizes the making of it. The exercise is thus a matter of measuring the extent of delegated authority rather than one of examining the use of discretionary regulatory powers.

Conclusion

After considering the **Act** as a whole and, in particular, the express limitation on entitlement under s. 3, the definition of "basic health services" in s-s. 1(d), the withholding power in s-s. 4(h), and the specifically described regulatory making provisions contained in s-ss. 5(1)(c), (d), (1) and (s), I have concluded the Legislature gave the Agency the power in question.

Analysis

The trial judge in his decision at p. 213 supra, states:

...The **Act** provides a plan for universal and comprehensive funding of basic health services. ...

And at p. 219 he states:

The Legislature as policy maker created a public medical care plan. ...

These statements disclose a fundamental misapprehension of the nature of the legislation. The purpose of the **Act** is to mandate the Agency to develop, operate, and administer a publicly funded health care insurance scheme for residents of the Province. The **Act** in itself does not create, or provide, any plan at all. Instead, it authorizes and enables the Agency to do so. Section 2 gives **the Agency** the function and power **to develop,** in accordance with the **Act** and the Regulations, **a health services plan** for residents of the Province such as will qualify for financial assistance under the **Canada Health Act**, R.S.C. 1985, Chap. C-6 **. Subsection 5(1)(a) of the Act** authorizes **the Agency**, with the approval of the Lieutenant-Governor-in-Council, to make regulations **establishing a Plan** for the payment of the cost of **basic health services** received by **entitled persons**.

The Agency, pursuant to the broad mandate and extensive powers given it under ss. 2 and 5 of the **Act**, has in fact developed and established a health services payment plan (the Plan) for residents of the Province in respect of which P.E.I. receives financial assistance from the Federal Government under the **Canada Health Act**, supra. **Of course, if the Minister of National Health and Welfare at some point forms the opinion that the Plan has ceased to satisfy the qualifying criteria for financial assistance under the Canada Health Act**, he or she can always take the appropriate remedial action under ss. 14 and 15. However, the Agency would seem to fulfill the letter of its mandate so long as the Plan conforms to the **Health Services Payment Act** and the Regulations made thereunder, and qualifies for at least some degree of financial assistance under the **Canada Health Act**.

The right to benefits under the Plan is set forth in s-s. 3(1) of the **Act** which provides as follows:

3.(1) Subject to this Act and the regulations, all residents of the province who are entitled persons are entitled to the payment of benefits by the Agency in respect of basic health services rendered to them on and after the plan commencement date.

It should be noted that the entitlement to payment under the Plan as provided for in s. 3 is expressly subject to **the Act and the regulations,** and in any event, is only in respect of **basic health services**. Thus, it is obvious the Legislature did not intend that every health care service that might be rendered by a physician would be eligible for coverage.

The **Act** in large measure leaves it to the Agency to decide what physician services will be paid for under the Plan. According to s-s. 1(d) of the **Act** "basic health services" means "all services rendered by physicians that **in the opinion of the agency** are medically required and such other health services as are rendered by such practitioners and **under such conditions and limitations as may be prescribed by the regulations**". This indicates that the Legislature contemplated the Agency would decide whether a particular service was medically required and that it could impose by regulation conditions and limitations which a physician's services would have to meet to qualify as "basic health services". Thus, by virtue of definition, a physician's services, whether in respect of abortion or anything else, do not constitute "basic health services" so as to qualify for payment of benefits under s. 3 unless the Agency considers them medically necessary and unless they meet the conditions and limitations prescribed in the Regulations.

Subsection 4(a) of the **Act** gives the Agency responsibility for administering the Plan and according to s-s. 4(h), "**it is the function** of the Agency **and it has the power** to withhold payment for basic health services for any entitled person who does not, **in the opinion of the Agency**, medically require the services". Thus, the **Act** specifically charges the Agency with the duty and authority to withhold payment, even in respect of what might, in other circumstances, be considered basic health services, unless, in its opinion, the person who receives them medically requires the services. In his decision, supra at p. 217 of [1995] 1 P.E.I.R., the trial judge expressed the view that s-s. 4(h) does not authorize the Agency to withhold payment for medical services because, in its opinion, the person in question does not medically require the service. But that is exactly what it does. In fact, s-s. 4(b) not only gives the Agency the authority to do so, but also charges it with the duty to do it. At p. 217 of his decision supra, he also stated: "The determination which the Agency reserves to itself is whether the condition of the patient is such that the termination of the pregnancy, i.e. the therapeutic abortion, is medically required". This is wrong. The Agency doesn't reserve that determination to itself; s-s. 4(h) of the **Act** does, and that makes a world of difference. Subsection 4(h) is after all not a regulation made by the Agency, but part of the parent statute itself, and its validity has not been questioned in these proceedings. In **Re British Columbia Civil Liberties Association and British Columbia (Attorney-General)** [1988], 49 D.L.R. (4th) 493 , MacEachern C.J.S.C. (as he then was) held invalid a British Columbia regulation similar to the one impugned here because "the Legislature did not authorize the Cabinet by regulation to provide that services that are medically required are to be considered as not medically required". However, in the present case, one only has to look at the definition of "basic health services" in s-s. 1(d) and at s-s. 4(h) of the **Act** to see that the P.E.I. Legislature did give the Agency such a power. Thus, unlike its B.C. counterpart, the P.E.I. regulation conforms with the enabling provision of the statute.

Subsections 5(1)(c), (d), (l) and (s) of the **Act** give the Agency, with the approval of the Lieutenant-Governor-in-Council, specific authority to make regulations:

. . . . .

(c) ***prescribing*** the basic health services for which entitled persons are eligible and the ***exclusions*** under the plan;

(d) ***excepting*** services rendered by a physician or practitioner from the services in respect of which an entitled person is eligible to receive benefits;

. . . . .

(l) ***defining*** for purposes of the plan any word or phrase used in [the] **Act**;

. . . . .

(s) ***prescribing*** services that shall be ***deemed not*** to be ***basic health services*** for the purposes of [the] **Act *and the conditions*** under which the costs of any class of basic health services are

payable ***and limiting*** the payment ***commensurate with the circumstances of the performance of the services.*** *[Emphasis added.]*

These provisions authorize regulations of a definite kind. As Driedger states in his article "Subordinate Legislation" first published in (1960) 38 C.B.R. 1, and reproduced at appendix iv of his text **The Construction of Statutes** (see: p. 299) where an act expressly confers power to make such regulations [prescribing services to be included or excluded, prescribing conditions and limitations for eligibility, defining terms, etc.] "there can be little scope for argument that a regulation doing those very things is ultra vires". In **Re Telecommunications Workers Union and B.C. Telephone Co.**, [1985] 1 S.C.R. 840, it was argued that the regulations were ***ultra vires*** because they were inconsistent with the spirit of the statute in question. La Forest J., writing for the Supreme Court of Canada, rejected this argument and stated:

> Here the Governor in Council did precisely what the Act authorizes it to do. It prescribed the circumstances when a lay-off is not to be deemed a termination of employment. To do precisely what the ***Code*** authorizes can hardly be said to breach its spirit.

By the same token, it can hardly be said in this case the Agency has exceeded its authority by doing precisely what the **Act** says it can do.

In **Lexogest Inc. v. Manitoba (Attorney-General)** (1993) 101 D.L.R. (4th) 523, a majority of the Manitoba Court of Appeal struck down a regulation excluding therapeutic abortions from coverage unless performed in a hospital. The majority held that the regulation was not authorized by the parent statute, the Manitoba **Health Services Insurance Act**, R.S.M. 1987, c. H-35. However, the situation is different in the case of P.E.I. because s-s. 5(s) of the **Act** gives the Agency authority to prescribe by regulation "the conditions under which the costs of any class of basic health services are payable and limiting the payment commensurate with the circumstances of the performance of the services". As pointed out earlier, the P.E.I. legislation also authorizes regulations prescribing exclusions from the Plan [5(1)(c)] and excepting physician services from coverage [5(1)(d)].

Disposition

As a result of all the foregoing, and with the greatest of respect to him, I am of the opinion that the judge in the Court below was incorrect in his conclusion that s-s. 2.(a.2)(iv) of the Regulations is "inconsistent with and contradictory to" the **Act**. I would therefore allow the appeal and set aside the declaration of invalidity.

The appellant shall have costs throughout except in regard to the issue of standing. The decision respecting standing, reported at [1994] 1 P.E.I.R. 138, was not appealed and therefore not considered by this Court.

As a postscript I would add that the trial judge's comments with respect to **res judicata** at p. 200 of [1995] 1 P.E.I.R. are, of course, merely obiter, and should not be viewed as a barrier to a determination of the issue by a judge presiding on any future application, motion or trial.

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Mitchell, J.A.

I CONCUR with Mitchell, J.A.

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Carruthers, C.J.P.E.I.

September 13, 1996

MATHESON, J.A.(dissenting):

I have reviewed the judgment of Mitchell J.A. and, with respect, I cannot agree with his conclusion on the main appeal for the following reasons:

1. The restriction of payment to abortions which are performed in hospitals interferes with the entitled person's right to choose her physician.

Section 7 (a) of the Act states:

> Nothing in this Act
>
> (a) prevents a person from choosing his own physician or practioner. . .

There are no hospitals in Prince Edward Island which perform abortions. Therefore Island

women must obtain the procedure elsewhere. By restricting the payment for such procedures to those performed in hospitals, the Agency limits the entitled person in her choice of physician to those who perform the procedure in hospitals and denies her the right to choose a physician who performs the procedure in a free-standing clinic, even if the procedure has been deemed by the Agency to be medically necessary.

The regulation requiring the procedure to be performed in a hospital restricts a provision in the **Act** which specifically states that nothing in the **Act** prevents a person from choosing her own physician. The entitled person is put to an election by the regulation - either choose a physician who performs the procedure in a hospital or forego payment by the Province. This is contrary to the wording and spirit of s. 7(a) of the **Act**.

2. I cannot agree that s-s. 5(1)(s) of the **Act** authorizes the refusal to pay for an abortion not performed in a hospital. This regulation making power refers to the "conditions" under which the costs of any "class" of basic health services are payable and limits the payment commensurate with the "circumstances of the performance of the service". There is no reference in the authorizing section to the location or type of facility where the procedure is to take place. "Class" of basic health services is not defined, nor is there a specific regulation denying payment for abortions because certain conditions or circumstances are not met. The only reference to abortion in the regulations is the definition of "basic health service".

While the **Act** authorizes the agency by regulation to establish the conditions under which the cost of a class of basic health services may be paid or to limit the costs in certain circumstances, no such a regulation has been passed in relation to abortions. Therefore I do not think the Agency has the authority to deny payment for abortions performed in the respondent's clinic when they are medically required services.

For these reasons I would dismiss the appeal.

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Matheson, J.A.

September 13, 1996