Court File Number: FC-9-21

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

CANADIAN CIVIL LIBERTIES ASSOCIATION.,
Plaintiff,

- and -

THE PROVINCE OF NEW BRUNSWICK,

Defendant.

Pre-Hearing Brief
On behalf of The Province of New Brunswick
May 17, 2021, at 9:30 am

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FACTS

1. On January 8, 2021, the Canadian Civil Liberties Association ("the Plaintiff") filed a Notice of Action with Statement of Claim Attached ("the Action") as against the Province of New Brunswick ("the Province).

2. In the Action, the Plaintiff disputes the constitutional validity of *General Regulation 84-20* pursuant to the *Medical Services Payment Act* ("*the Regulation*").[1]

3. On February 12, 2021, the Plaintiff filed a Notice of Motion seeking a declaration of public interest standing.

4. The Province has yet to issue a Statement of Defence.

ISSUES

5. Should the Court exercise its discretion to grant the Plaintiff public interest standing?

LAW & ARGUMENT

6. The test for public interest standing was established by the Supreme Court of Canada decision in *Downtown Eastside Sex Workers United Against Violence Society v. Canada* ("*Downtown*").[2]

7. The test for public interest standing requires the Plaintiff to show:

    1. A serious justiciable issue;

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[1] RSNB 1973, c. M-7.
[2] 2012 SCC 45.

2. A genuine interest in the question; and

3. The proposed suit constitutes a reasonable and effective means of bringing the matter before the court.

8. The Court in *Downtown* established a new framework for the public interest standing test, which remains, however, an exercise of judicial discretion. The three factors mentioned above are interrelated and must be "weighed cumulatively, in light of the underlying purposes of limiting standing and applied in a flexible and generous manner that best serves those underlying purposes."[3]

9. Recently, the New Brunswick Court of Queen's Bench applied the process established by the New Brunswick Court of Appeal in *Province of New Brunswick v. Morgentaler*[4] where it was held that public interest standing is a status that only the court can grant:

> 17 [...] The authority to deal with such applications is sourced in the superior court's inherent jurisdiction to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them." [5]

10. The Province submits the Plaintiff has not met any of the criteria required by the Court in *Downtown*, and as such, its motion for public interest standing should be denied.

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[3] *Downtown* at para 20.
[4] 2009 NBCA 26
[5] *SANB et FÉÉCUM c. AIINB* 2020 NBQB 19, overturned at 2021 NBCA 21 on other grounds.

Serious Justiciable Issue

11. A party that claims public interest standing must first prove that the matter raises a serious justiciable issue. In the case at bar, the Plaintiff has not demonstrated a serious justiciable issue.

12. In *Downtown,* the Supreme Court gave a clear definition of what constitutes a "serious issue", that is a "substantial constitutional issue" or an "important one" and it must be far from frivolous.[6]

13. The Supreme Court explained the importance for courts to ensure that in the exercise of discretion with respect to standing, they are staying within the bounds of their proper constitutional role.[7]

14. The separation of powers is a rule of law that restricts the court's interference in political issues. This principle is confirmed by the New Brunswick Court of Appeal in *New Brunswick (Minister of Education) v Kennedy*:

> The rule of law was never designed to bring about government by judges. As we noted in remarks incidental to the judgment rendered from the bench "[a]bsent a sufficiently weighty juridical basis for intervention, in a parliamentary democracy, judges, none of whom are elected, must leave standing policy decisions taken by the elected representatives of the people".[8]

15. The Plaintiff claims that the *Regulation* violates sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*.[9] The Plaintiff claims that the

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[6] *Downtown* at para 42.
[7] *Downtown* at para 40.
[8] 2015 NBCA 58 at paragraph 106.
[9] Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 ("*Charter*").

exclusion from coverage for abortions performed out-of-hospital limits access to abortions and discriminates against women. The Plaintiff further claims that the *Regulation* is inconsistent with and in violation of the *Canada Health Act* ("*CHA*").[10]

16. The *Constitution Act, 1867* provides that provinces have exclusive jurisdiction over health care through s. 92(7).[11] The Province submits the decision as to how health care services are offered and delivered in this province, including abortion services, is a governmental policy decision and as such, is not a justiciable question. A court cannot tell the province where and how to provide health care.

17. The country's Medicare system is administered by provincial ministries of health and is paid for in part by contributions from the federal government. To qualify for those contributions, provinces must abide by the requirements of public administration, comprehensiveness, universality, portability and accessibility as prescribed in the *CHA*.

18. The Province submits that the *CHA* is a financial statute; it grants authority to the federal government to spend money or to contribute to the costs of provincial and territorial health care. The *CHA* does not grant rights and obligations that can be resolved in a court of law. Criteria and conditions must be met by each provincial and territorial health insurance plan before a cash contribution is made by the federal government. The sole interpreter and implementer of the *CHA* is the federal government.

19. The *CHA* provides for a consultation process between federal and provincial Ministers where a province fails to abide by the *CHA* requirements. The *CHA* details this as follows:

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[10] RSC 1985, c. C-6

[11] 30 & 31 Vict., c.3, reprinted R.S.C. 1985, App. II, No. 5.

> 14 (1) Subject to subsection (3), where the Minister, after consultation in accordance with subsection (2) with the minister responsible for health care in a province, is of the opinion that
>
> (a) the health care insurance plan of the province does not or has ceased to satisfy any one of the criteria described in sections 8 to 12, or
>
> (b) the province has failed to comply with any condition set out in section 13,
>
> and the province has not given an undertaking satisfactory to the Minister to remedy the default within a period that the Minister considers reasonable, the Minister shall refer the matter to the Governor in Council.

20. Where the consultation provided for above fails to provide results, contributions can be withheld from a province, as established at s. 15.

21. In *B.C. Civil Liberties Assn. v British Columbia (Attorney General)*, the Plaintiff sought to challenge the validity of a regulation which added abortion to a list of services that were not to be considered as medically required, thereby precluding payment for most abortions. The Court examined the impact of the *CHA* and said the following:

> 12 Before I examine the legislation, I wish to dispose of another matter that was mentioned in argument. The Canada Health Act, 1984 (32-33 Eliz. 2), c. 6, provides financial assistance to provincial health care plans that satisfy certain criteria which are described in the federal Act, particularly universality and accessibility. In my view, the possibility that the impugned regulation may disqualify the British Columbia plan from federal funding, if such is the case, is of no consequence in deciding this administrative law question. It is for the Cabinet to assess the risk of losing federal funding and take such other political

> steps and political responsibility as it may be advised.[12]
> (Emphasis added)

22. In *Lexogest Inc. v Manitoba (Attorney General)* ("*Lexogest*") the Respondents sought a declaration that the regulation which limited the funding to therapeutic abortions performed only in a hospital setting was in conflict with the requirements of the *CHA* and should be rendered inoperative. The Court noted that the *CHA* is designed to allow the provinces the flexibility to operate and administer their own health care insurance plans in order to exercise their primary responsibility for the provision of health care services. The purpose is not to override provincial legislation in the area of health care.[13]

23. The Court went on to say that if the federal minister of health is of the view that a province is in breach of the *CHA*, the matter becomes one of consultation. If consultation does not produce results, the federal Cabinet may reduce the cash contribution to the province. Consequently, non-compliance with the *CHA* is a matter of political nature, not judicial.[14]

24. In *Collett v Ontario (Attorney General)* ("*Collett*"), the Applicants asked the Court to declare that a regulation which reduced the maximum in-patient service reimbursement from $400/day to $100/day was *ultra vires* on the basis that it violated the *Health Insurance Act* and the portability criterion of the *CHA*. The Court declined to decide the issue of whether the new regulation violated the portability criterion set under the *CHA* and stated:

> [...] we are satisfied that the consequences of any failure to satisfy the criteria is a matter for consultation and ultimately within the discretion of the Governor-in-Council to decide whether to disqualify the Province of Ontario for contribution. In the event of such

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[12] (1988) 24 BCLR (2d) 189
[13] [1993] WDFL 453 at paras 60 and 62
[14] *Lexogest* at para 63

> disqualification the issue could become justiciable but we must find that the application is premature at this time and must therefore be dismissed.[15]

25. In *Brown v British Columbia (Attorney General)* the petitioners applied to the court for a declaration that a regulation violated the province's obligations pursuant to the *CHA*. The regulation provided for a maximum payment for hospital services delivered outside the province. The petitioners regularly travelled outside the country and sought payment of their medical expenses by the province. Counsel for the AG argued that the issue was not justiciable. The Court came to the following conclusion:

> 65 In my opinion, the statement of the law above from *Lexogest* correctly states the law in British Columbia. There is no provision in the *Act*, such as the one in *Collett*, which limits the Lieutenant Governor in Council's regulation-making powers to comply with the *Canada Health Act*. While it is arguable that such a provision could be the basis of a finding that a non-complying regulation was *ultra vires*, there is no such peg for the petitioners to hang their hat on in this case. The *Canada Health Act* provides a complete code of remedies for violations of it and, as stated by the Manitoba Court of Appeal, such violations are political, not justiciable issues. [16]

26. In *C.U.P.E. v Canada (Minister of Health) ("CUPE")*, the Applicants claimed that the federal Health Minister did not comply with the *CHA*. Unions and public interest organizations alleged that the federal Minister of Health did not adequately monitor compliance with the requirements of legislation and did not properly report to Parliament on the administration and operation of the Act as required. The court found that the questions raised were of "an inherently political nature and should be addressed in a political forum rather than in courts".[17] Regarding the issue of the lack of enforcement

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[15] (1995) 124 DLR (4th) 426 at para 10
[16] (1997) 41 BCLR (3d) 265 at 280
[17] 2004 FC 1334 at para 40.

action from the Minister and preceding federal Minister of Health, the court stated that initiating an investigation and a notice of concern to a province with regard to non-compliance with the *CHA* was a political and policy-oriented one, related to the discretionary decision whether to withhold or cease federal funding for health care. The consequences of non-compliance with the *CHA* are set out within the statute and thus are of a political nature.[18]

27. The court in *CUPE* referred to the decision in *Cameron v Nova Scotia (Attorney General)* for the authority that a failure of a province to comply with the *CHA* is a political and not a justiciable issue:

> 97 If, without deciding that the *Act* fails to meet the standards or objectives of the *Canada Health Act*, it does not follow that the appellants would be entitled to relief in this Court. Jurisdiction over health care is exclusively a provincial matter. Failure of a province to comply with the *Canada Health Act* may result in the Government of Canada imposing a financial penalty on the province. It raises a political, not a justiciable issue. It does not render the provincial legislation unconstitutional. I refer to *Brown v British Columbia (Attorney General),* (1997), 41 B.C.L.R. (3d) 265, [1998] 5 W.W.R. 312 (B.C. S.C.) and *Lexogest Inc. v. Manitoba (Attorney General)* (1993), 101 D.L.R. (4th) 523 (Man. C.A.).[19]

28. In *Soth v Ontario*, the court dealt with judicial review of the *vires* of a regulation. The issue was whether certain provisions of the regulation having to do with coverage for out of country medical treatment were violative of the *CHA*. Following *Collett*, the Court concluded as follows:

> [...] Because the consequence of any failure to satisfy the criteria under the *Canada Health Act* becomes a matter of intergovernmental consultation and ultimately

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[18] Supra at para 44.
[19] 1999 NSCA 14

> is a decision within the discretion of the Governor in Council, the issue is not now justiciable, and the Applicant's challenge to the *vires* of the regulation is premature."[20]

29. Access to and delivery of health care are imminently political and governmental decisions and do not fit the criteria for serious justiciable issue.

30. The Province submits that a court should not get involved in the review of actions or decisions of the Executive or Legislative branches where the subject matter of the dispute is either inappropriate for judicial involvement or where the court lacks the capacity to properly resolve it. The Province submits that the questions in this lawsuit raise issues that are not justiciable and as such, are simply unsuitable for adjudication in court.

Nature of the Plaintiff's Interest

31. The Supreme Court in *Downtown* established that the Plaintiff must have a real stake in the proceedings or be engaged with the issues they raise. The court refers to decisions where it was determined that the plaintiff had a direct and personal interest in the issues raised or that the plaintiff had proved genuine interest as it demonstrated a real and continuing interest in the issues at bar.[21]

32. The evidence submitted does not establish that the Plaintiff has a genuine interest in the issues underlined in the lawsuit. While the Plaintiff asserts its position as an organization advocating for civil liberties and the furtherance of human dignity and rights in Canada, the issue it purports to bring to Court is the exercise by government of its statutory power to determine how health care is delivered and administered in the Province.

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[20] 2012 ONSC 5172.
[21] *Downtown* at paragraph 43.

33. Further, the Plaintiff's connection to the Province is tenuous at best. The Plaintiff claims that it has "several thousand supporters drawn from diverse backgrounds" and a "wide variety of people, occupations, and interests are represented in the national membership, including from New Brunswick". Despite such bold statement, the Plaintiff has not presented evidence as to what constitutes a "supporter" and how such support leads to a connection to this province.

34. The Plaintiff is not directly affected by the subject matter of the litigation as it is not a citizen of the Province of New Brunswick. It does not hold an address in the Province and it is not registered in the Province Lobbyist Registry. Thus, the Plaintiff has not demonstrated that it has a strong engagement in the issue.

Reasonable Means to Bring the issue Before the Court

35. The Supreme Court in *Downtown* refers to this factor as "requiring consideration of whether the proposed suit is, in all of the circumstances, and in light of a number of considerations, a reasonable and effective means to bring the challenge to court".[22] It further details at paragraph 51 :

> [...] The court should turn its mind to whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination. [...] As, for example, in *McNeil*, even where there may be persons with a more direct interest in the issue, the plaintiff may have a distinctive and important interest different from them and this may support granting discretionary standing.

[22] *Downtown* at paragraph 44.

36. It is the Province's position that the way health care is managed and delivered is the prerogative of the Province. If a citizen claims that their rights pursuant to the *Charter* have been violated by the Province's decision as to management and delivery of health care services, it is up to the citizen to make a case for such violation. Specifically, the funding scheme could be challenged by a person who is directly affected, *i.e.* a woman seeking an abortion outside a hospital.[23]

37. In *Lexogest,* the Manitoba Court of Appeal held that there was a more effective way to bring the issue before the court, namely to have the issue determined on the initiative of the patients directly affected by it. The Prince Edward Island Supreme Court came to the opposite conclusion in *Morgentaler v Prince Edward Island* ("*Morgentaler*") stating "that in all the circumstances of pregnancy and a decision regarding abortion, it is unreasonable to expect a woman to pursue government's policy and then carry out a court challenge within the very short time within which all this could be done".[24]

38. The Province submits that this court should favour the reasoning in *Lexogest* over *Morgentaler.* First, the fact that the individual capable of making a direct challenge would face difficult circumstances will exist in all constitutional cases. This consideration did not stop the court from dismissing a challenge brought by an immigration rights advocacy group.[25]

39. The Court in *Morgentaler* relied in part on *Canada (Minister of Justice) v Borowski* in which an individual was given standing to challenge exceptions to the former *Criminal Code* prohibition against abortion.[26] The case seems distinguishable because Mr. Borowski claimed to represent the rights of the

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[23] *Canadian Council of Churches v Canada (Minister of Employment and Immigration) ("Canadian Council of Churches")*, [1992] 1 SCR 236; *Hy and Zel's Inc. v Ontario (Attorney General)*, [1993] 3 SCR 675 at 692.
[24] (1994), 112 DLR (4th) 756 at 763.
[25] *Canadian Council of Churches, supra.*
[26] [1981] 2 SCR 575

foetus, which, unlike a woman seeking an abortion, was truly incapable of independently challenging the law.

40. The fact that an abortion would surely be performed before a final appellate determination also should not prevent adjudication of the issue by a concerned citizen. The issue would not really be moot because the plaintiff, in that eventuality, would still be seeking compensation from the Province for the cost of the abortion or could still seek an Order from the Court to invalidate the *Regulation*.

41. In sum, the Province submits the Plaintiff's Action is not a reasonable and effective means to bring the matter to Court.

Admissibility of Affidavit

42. The Province submits that many paragraphs of the Plaintiff's affidavits filed in support of this motion contain statements that are not admissible evidence, or simply not proper for use as evidence on a motion.

43. The Province refers to rules 4.05(2) and 39.01(4) of the *New Brunswick Rules of Court* which deal with what is proper evidence for affidavits used on motions:

> 4.05 Affidavits
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> [...]
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> Contents
>
> (2) Every affidavit shall be confined to a statement of facts within the personal knowledge of the deponent, except as provided otherwise in these rules.
>
> [...]

> 39.01 By Affidavit
>
> [...]
>
> (4) Subject to section 34 of the Judicature Act, an affidavit for use on a motion need not be confined to statements of fact within the personal knowledge of the deponent, but may contain statements as to the deponent's information and belief, if the source of the deponent's information and the deponent's belief in the statements are specified in the affidavit.

44. It is submitted that paragraphs 5, 6 (in part), 13 (in part), 15, 16 (in part), 17 (in part), 18 (in part), 19 (in part) and 20 of the Affidavit dated February 8, 2021, and paragraphs 2 and 3 of the Affidavit dated April 28, 20121 do not comply with Rules 4.05(2) and 39.01(4) and should be struck.

45. As this Court has said in *Stevens v Associated Lodges of the Village of Douglastown Trust,* courts have to deal with admissibility questions:

> 13 There is no doubt that the Court must execute its role as a gatekeeper to rule on preliminary objections which question the admissibility of statements or evidence contained in affidavits filed in support of or response to a motion. This task is frequently cumbersome and at times, such as in this case, can result in delays in the proceedings. However, the *Rules of Court* mandate that the evidence contained in an affidavit be admissible. As pointed out by *Justice Shaughnessy* in *Chopik*, when the content of an affidavit offends the Rules by containing hearsay, argument, innuendo, legal opinion or unsourced information, the offending portions of the affidavit must be struck. In the present matter, several of the objections of the Respondent are appropriate and several paragraphs as well as portions of paragraphs must therefore be struck to allow for a fair hearing on the merits of the motion.[27]

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[27] 2018 NBQB 82 Para 13 ("*Stevens*")

46. The Province takes issue with statements of opinions and argument in the Plaintiff's affidavit, specifically at paragraphs 5, 6, 13, 15, 18, 19 and 20. Argument and non-expert opinions have no place in an affidavit in support of a motion.

47. As set out by this Court in *Stevens*, "[p]re-hearing briefs are the appropriate venue to set out a party's arguments and, occasionally, opinions. Other than in the context of an expert witness, there is no place for argument and opinion in an affidavit."[28] Some statements found in the paragraphs noted above can also be classified as legal conclusions, which also are not admissible as affidavit evidence.[29]

48. The Province is also concerned with paragraphs 16 and 17 of the Affidavit of February 8, and paragraphs 2 and 3 of the Affidavit of April 28, which contain references to Twitter posts, comments and feeds, and include news articles. The Province considers those paragraphs to be hearsay evidence and not admissible. The source of the posts, tweets, news articles or else is not determinable. As well, the source of the belief is not indicated.

49. This Court summarized the principles applicable to hearsay evidence in *Stevens*.[30] Hearsay evidence is only admissible if it can fit within one of the exceptions. The Court must adopt a principled approach. The Province is of the view that paragraphs 16 and 17 of the Affidavit of February 8, and paragraphs 2 and 3 of the Affidavit of April 28 should be struck in their entirety as the statements are neither necessary nor reliable. The source of the statements cannot be identified, and the contents of the statements do not serve the Court in determining the issue of public interest standing.

50. Further, the source of the belief must be identified, as laid out by the Court in *Fletcher v. Mitrovic*:

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[28] Para 15
[29] *Stevens* para 16-17
[30] See paras 18-21

> 15 The words "information and belief" in an affidavit are not "magic words". They are essential. In order to bring oneself within the exception to the hearsay rule contained in Rule 39.01(4), it is not sufficient to merely give a statement as to the source of information without a statement as to belief (*New Brunswick v. Carleton Enterprises Ltd.* (1973), 8 N.B.R. (2d) 19 (N.B. Q.B.)). In *Rocan Forestry Service Ltd. v. Royal & SunAlliance Insurance Co. of Canada*, 2002 CarswellNB 190 (N.B. Q.B.)), Justice Rideout stated at paragraph 12:
>
> > The law in New Brunswick is now very clear. The facts deposed to must be within the knowledge or belief of the deponent. If it is a situation of belief, the deponent must give an explanation for his belief.[31]

51. In addition, paragraphs 16 and 17 of the Affidavit of February 8, and paragraphs 2 and 3 of the Affidavit of April 28 are clearly being offered for the truth of their content, contravening the exception to the hearsay evidence rule. Not only are they inadmissible, they are offensive, and do not belong in an affidavit.

52. Many paragraphs do not indicate the source of the belief of the deponent, where clearly the information is not within her personal knowledge. For example, paragraphs 7, 8, 9, 10 of the Affidavit of February 8, and paragraphs 2 and 3 of the Affidavit of April 28 do not contain the source of the belief of that information, which clearly cannot be within the deponent's personal knowledge.

53. An affidavit is not a brief, nor a Statement of Claim. As well, there is no role for innuendo in affidavits. As this Court said in *Stevens*, "[i]nnuendo is the antithesis of evidence. It is trite law to state that affidavit evidence is used to set out facts. Innuendo is used to make oblique remarks and has no

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[31] 2009 NBQB 240

place in an affidavit in support of a motion.[32] The Province submits that many references in the Plaintiff's affidavit are not proper as consisting in innuendo.

54. Affidavits filed for use in courts in New Brunswick must abide by *New Brunswick Rules of Court*. Where they do not comply, courts must not hesitate to strike offending portions.

RELIEF SOUGHT

55. The Province submits the Plaintiff does not meet the criteria established in *Downtown*, and as such, its Motion for a declaration of public interest standing should be dismissed.

ALL OF WHICH is respectfully submitted this 17th day of May, 2021.

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[32] *Stevens*, para 25

AUTHORITIES

Caselaw

B.C. Civil Liberties Assn. v British Columbia (Attorney General), (1988) 24 BCLR (2d) 189

Brown v British Columbia (Attorney General) (1997) 41 BCLR (3d) 265

Cameron v Nova Scotia (Attorney General) 1999 NSCA 14

Canada (Minister of Justice) v. Borowski [1981] 2 SCR 575

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Lexogest Inc. v Manitoba (Attorney General) [1993] WDFL 453

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SANB et FÉÉCUM c. AIINB 2020 NBQB 19

Soth v Ontario 2012 ONSC 5172

Stevens v Associated Lodges of the Village of Douglastown Trust 2018 NBQB 82

Legislation

Canada Health Act RSC 1985, c. C-6

Canadian Charter of Rights and Freedoms Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

*Constitution Act, 1867*30 & 31 Vict., c.3, reprinted R.S.C. 1985, App. II, No. 5

General Regulation 84-20 pursuant to the *Medical Services Payment Act* RSNB 1973, c. M-7