



LEGISLATIVE ASSEMBLY  
PROVINCE OF ALBERTA

Office of the Ombudsman

**NOTICE OF DECISION OF THE SCREENER**  
Request Pursuant to the Agreement on Internal Trade Statutes Act 1995

**October 11, 1996**  
**Edmonton, Alberta**

**GIMBEL EYE CENTRE**

**SCREENER: Harley Johnson**  
**Ombudsman**

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On September 16, 1996, notice of intention to commence dispute resolution procedures was received from Mr. Gerald Chipeur on a behalf of the Gimbal Eye Centre. This notice, written on September 11, 1996, outlined the following complaint:

1. On July 1, 1993, the Government of Saskatchewan enacted the regulation attached as Schedule 1 and issued correspondence and press releases (Schedule 2) announcing that the target of the regulations was an Alberta resident, Dr. Howard Gimbel, and explaining that the purpose of the regulations was to force Saskatchewan residents to utilize Saskatchewan resident physicians at the expense of Dr. Gimbel and his practice.
2. Meetings were held with officials in the federal and Saskatchewan Ministries of Health. Both refused to consider this a portability problem under the principles of the Canada Health Act.
3. The policy position of the Ministry of Health in Saskatchewan is that they will not pay for the professional services of Dr. Howard Gimbel so long as there are local Saskatchewan residents who can do the job. In other words, Saskatchewan residents attending at the Gimbel Eye Centre for surgery are never reimbursed under the Saskatchewan Health Care Insurance Plan.
4. This policy is in place notwithstanding the express provision in the regulations for the Government of Saskatchewan to approve surgery at the Gimbel Eye Centre.
5. The question in this case is legal in nature. The facts are undisputed. The simple question is whether Chapter Seven of the Agreement on Internal Trade ("Agreement") requires a province to not discriminate on the basis of individual provincial residence and business location when purchasing health care services on behalf of their residents. The alternative interpretation is that the Agreement only guarantees Dr. Gimbel's right as a nonresident to do business at a physical location in Saskatchewan while he is a resident of Alberta.
6. The plain wording of Chapter Seven can lead to no other

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reasonable conclusion but that both the personal residence and the business residence are of consequence when considering the impact of the Agreement. Saskatchewan may not discriminate on either ground.

7. Saskatchewan has admitted that the purpose for their regulations is directly contrary to the purpose, goals and intent of the Agreement. The Agreement must condemn action directly intended to foster local chauvinism and discrimination.
8. The impact of this matter is not of minor consequence. The jobs of Alberta resident employees and a number of former employees are dependent on access to the Saskatchewan government procurement program for medical services on behalf of Saskatchewan residents.

Finally, in the dispute resolution process, the Gimbel Eye Centre will request a direct payment from the Saskatchewan government to the person or persons who paid the professional medical fees on behalf of each resident of Saskatchewan which the Gimbel Eye Centre has treated since July 1, 1993.

Mr. Chipeur enclosed documents supporting his complaint.

### **JURISDICTION ESTABLISHED**

Appropriate notice to the other parties was completed by Mr. Chipeur. Attempts to have the Alberta Government initiate dispute resolution proceedings were unsuccessful. Therefore, pursuant to the Internal Trade Statutes Act 1995 (the Act) and Order in Council #221/96, dated May 22, 1996, I accepted that jurisdiction to review this request as Screener was established.

### **ISSUE**

The issue before me is to determine if the Gimbel Eye Centre (the person) should be permitted to commence dispute resolution proceedings pursuant to the Act [*Agreement*]. If the answer is "yes," I must also determine which chapter under Part IV of the Act [*Agreement*] the person may proceed under and I must then provide a written decision including the reasons to:

- (i) Gimbel Eye Centre (the person);

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- (ii) Alberta Government (the Party that refused to initiate proceedings or request a Panel);
  - (iii) Saskatchewan Government (the Party complained against); and
  - (iv) Committee on Internal Trade (the Secretariat).

If the answer is "no," I must provide written notice of my decision including the reasons for my decision. Failure to provide notice in either case within 30 days is deemed to be approval.

Notice of my involvement as Screener was issued to all parties as listed above and notice was given to Mr. Chipeur representing the Gimbel Eye Centre, Mr. Norm Kinsella, Alberta Advanced Education and Career Development and Mr. Jim Ogilvy, Alberta Department of Federal and Intergovernmental Affairs. This notice invited them to meet with me to clarify the issues.

### **FACTS**

The Gimbel Eye Centre argues that the facts are undisputed. In reviewing the appropriate files and in my discussions with Mr. Chipeur, Mr. Kinsella and Mr. Ogilvy, I accept that this is generally true. The Saskatchewan Government enacted regulations and issued correspondence and a press release.

Included in the documents submitted by Mr. Chipeur are statements made that resources outside the Province of Saskatchewan may be used but only following an approval process.

As the Gimbel Eye Centre is mentioned in some of the documents submitted by Mr. Chipeur, he has argued that the specific target of the policies of the Saskatchewan Government is directed at the Gimbel Eye Centre. I can see the rationalization in Mr. Chipeur's position but there is an equal rationalization that the Saskatchewan Government was only using the Gimbel Eye Centre as an example of the type of elective service which is no longer available "on demand to" residents of the Province of Saskatchewan.

I use this example to show that while the **facts** may be agreed to by all parties, the **inferences** to be drawn from these facts are not.

### **DECISION**

Mr. Chipeur argues that the question is whether Chapter Seven of the Agreement

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an Internal Trade ". . . requires a province to not discriminate on the basis of individual provincial residence and business location . . ."

In my review of Chapter Seven, Articles 400 (Application) and 406 (Transparency) apply to Chapter Seven. There is no suggestion or evidence that Article 406 as it relates to Transparency is at issue or affects this application. Article 400 (Application) does. In the event of an inconsistency between a specific rule in Part IV and a general rule, the specific rule prevails to the extent of the inconsistency. This Article establishes a guiding principle in the interpretation of Part IV which includes Chapter Seven.

Article 701 identifies the purpose of Chapter Seven. The purpose of this Chapter is to enable any worker qualified for an occupation in the territory of a Party to be granted access to employment opportunities in that occupation **in the territory of any other Party**, as provided in this Chapter. (emphasis added)

There is no evidence before me that the Gimbel Eye Centre has been denied the opportunity to practice ". . . in the territory of any other Party . . ."

Having said this, however, the role of the Screener must be reviewed in relation to this discussion. Clearly the role, as identified in the Act [*Agreement*], is unclear. Indeed the Act [*Agreement*] itself has inconsistencies which at times are addressed and at other times not addressed. In my discussions with the applicant and the Government representatives, both indicated this is as a result of compromises in obtaining agreement.

These difficulties are not mentioned as a criticism per se, but commented on to shed light on how and why I arrived at my final decision.

The criteria for making my decision are set out in Article 1713(1), (4) and (5) as follows:

Article 1713: Screening

1. Each party shall, before the date of entry into force of this Agreement, appoint an individual (the "screener") to review requests made under Article 1712(1) or (2). The screener shall be independent of government and capable of making an independent decision on the merits of the request. Notice of the appointment shall be delivered to the other

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Parties and the Secretariat.

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4. In deciding whether the person should be permitted to commence dispute resolution proceedings, the screener shall take into account the following:
    - a. whether the complaint is frivolous or vexatious;
    - b. whether the complaint has been instituted merely to harass the Party complained against; and
    - c. whether there is a reasonable case of injury or denial of benefit to the person or, in the case of a trade union, injury or denial of benefit to its members.
  5. Where a dispute resolution proceeding is commenced under Article 1712(1)(a), the screener shall also determine the chapter of Part IV under which the person shall proceed.

I have determined that the complaint is not frivolous or vexatious, is not instituted merely to harass, and that there is a reasonable case of injury or denial of benefit.

The Gimbel Eye Centre argues that I am limited to considering those matters in Article 1713(4), and that the matter should proceed under Chapter 7.

This limits the role of the Screener to **process** and this point has been the subject of argument.

Conversely, a review of the correspondence to my office (April 21, 1995) indicates in an attached flow chart that the role of the Screener would also be on the basis that the complaint lacks substance. While trying to grapple with this issue, Article 1713(1) states:

The Screener shall be independent of government and **capable** of making an independent decision on the merits of the request. (emphasis added)

The imprecise direction to a Screener (as contained in the Act [*Agreement*]) thus forces me to determine the question of a broad brush interpretation to include the merit of the issue at hand or to a limited scope as identified in Article 1713(4).

If I accept the limiting terminology of Article 1713(4), I am then left with the second portion of an affirmative decision and that is to determine the Chapter of Part IV

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of the Act under which the person shall proceed. I cannot do so. There is no Chapter of Part IV of the Act which applies. Therefore, returning to the question of a limited or broad interpretation, I have no choice but to accept that merit of the complaint is a basis for my determination.

**DECISION**

On the question of merit, the clear wording of Article 701 prevails. The purpose of Chapter Seven is to prohibit discrimination of employment opportunities of qualified workers of one Party to the agreement access to employment opportunity **in the territory** of any other Party to the Agreement (emphasis added).

The request of the Gimbel Eye Centre is, therefore, rejected,