Summary

Legal Opinion Prepared by Chivers Carpenter LLP for Alberta Federation of Labour and Friends of Medicare on the Proposed Changes to Alberta's Health-care Framework

This legal opinion identifies the key elements of Alberta's core health-care framework. The core health-care framework is comprised of several pieces of legislation and their regulations: the *Alberta Health Care Insurance Act* R.S.A. 2000, c. A-20, the *Hospitals Act* R.S.A. 2000, c. H-12*,* the *Health Care Protection Act* R.S.A. 2000. c. H-1, the *Health Insurance Premiums Act* R.S.A. 2000, c. H-*6*, and the *Nursing Homes Act* R.S.A. 2000, c. N-7.

Alberta's health-care framework prohibits private funding and private delivery of health-care services. The major question is whether these key elements will be preserved if the legislation is amalgamated, and whether it will continue to provide the legal basis for a public, non-profit health system.

Health Law in Alberta and Canada: Who Is Responsible For What?

The *Canada Health Act* R.S.C. 1985, c. C-6 does not prevent private health services, private delivery, or private insurance. The *Canada Health Act* (the *"CHA"*) provides the legislative mechanism to ensure that Government-of-Canada spending on health care supports publicly administered, comprehensive, universal, portable and accessible provincial health-care insurance plans.

Restricting the growth of a parallel for-profit health-care system is the role of provincial Legislatures, not the federal *Canada Health Act*. In Alberta, physicians choose to opt-in to the public health-care system (sections 6 and 7). There is no law against a physician setting up a wholly private practice, but the *Alberta Health Care Insurance Act* contains some powerful disincentives for physicians to go "private." Disincentives include a prohibition against allowing public funds to go to services provided by opted-out physicians; in other words, the private system cannot receive subsidies from the public one.

In addition, the *Alberta Health Care Insurance Act* outlaws contracts for private insurance for services that are covered in the public system, and private insurance is also not allowed to pay for all or part of fees charged by physicians who opt-out of the public system (section 26). Without private insurance or public subsidies covering some or all of the costs of purchasing

private health-care services, the price of private health care is out of reach for almost everyone, even the very wealthy. This is why there is a 100% opt-in rate among Alberta physicians to the public health care insurance plan. The various provisions governing opting-in, subsidization, and private insurance contained in the *Alberta Health Care Insurance Act* are the only barrier to the creation of a private health-care market.

The *CHA* guarantees the existence of a public health-care system for all Canadians; it is silent on whether there is a parallel private system for the wealthy that can be purchased, with private insurance, from doctors who opt-out of the public system. It is the Alberta laws that make a private health-care market impossible, and it is those laws the Minister's Advisory Committee on Health is proposing to change.

The Role of the Hospitals Act and Non-Hospital Surgical Facilities

Alberta's *Hospitals Act* sets out the standards governing hospitals, the range of services hospitals deliver, the costs that are covered by the Hospital Insurance Plan, and which costs are covered by patient fees. The *Hospitals Act* also sets out standards, accountability, accreditation, inspection, and other aspects of hospital governance. It also requires hospitals to be not-for-profit. Similarly, Non-Hospital Surgical Facilities (NHSFs), established by the *Health Care Protection Act* (the *HCPA,* more popularly known as "Bill 11,") have their standards, accountability, and other aspects of governance set out in the *HCPA.* The key difference between Hospitals and Non-Hospital Surgical Facilities lies in the accreditation. Where Hospitals are accredited by a national accreditation body, NHSFs are accredited by the College of Physicians and Surgeons, a form of self-regulation.

The *Hospitals Act* guarantees hospital care is publicly funded and not for profit, and even NHSFs, while privately owned and for profit, are prohibited from allowing queue jumping in the *Health Care Protection Act*. The HCPA prohibits queue jumping based on the payment of money, payment for enhanced services, or provision of an uninsured service for the purpose of giving a person priority for the receipt of insured surgical service (HCPA, s. 3). These guarantees could be easily lost in a new *Alberta Health Act.*

Proposed Changes

The legislative model proposed by the Minister's Advisory Committee on Health for the new "*Alberta Health Act"* is the model used in the *Drug Program Act* (not yet proclaimed). The *Drug Program Act* is enabling legislation, which permits the Minister to establish a drug program for the purpose of providing funding for, or providing, drugs, services and approved drugs (s. 2).

The *Drug Program Act* then permits the Minister to make regulations which will determine all of the details of the plan, including who is covered for what kind of drug coverage, amounts of co-payments and deductibles. The *Drug Program Act* puts most of the power to decide the future of Albertans' drug coverage in the regulations, not the legislation or statute itself.

The key difference between a statute and a regulation is that a statute is approved by the Legislative Assembly following debate before it becomes law, where a regulation is not. If the *Drug Program Act* is accepted as the model for the new *Health Care Act*, Alberta's health-care legislation will contain no details of the core health-care framework. All details will be left to the Minister's discretion and will not subject to debate in the Legislative Assembly. Further, the Minister can change the regulations at any time without notice and without debate. This model offers no assurances that delivery of insured services using public funding will be organized in a manner that preserves delivery of health care on a non-profit model, or appropriate standards for health and health services in Alberta will be established and enforced.

Alberta's Core Health-care Framework: What Is At Stake?

Alberta's health-care framework prohibits private funding and private delivery of health-care services. The "Third Way" debates were in fact about amending Alberta's health-care legislation. To quote the government's materials in 2005: "Amendments [are] required to *Alberta Health Care Insurance Act* and *Hospitals Act*," which "opens [the] market for private health insurance, [and] removes barrier to private delivery." In addition, the Ministry recommended "amending [the] opting-in rule ... doctors and dentists will be able to work in both private and public system for specified procedures." (Source: Removing Barriers, Ministry of Health and Wellness, 2005 www.health.alberta.ca/documents/Removing-Barriers-PPT-2005.pdf)

Amendments to rules prohibiting private insurance and a subsequent private health-care system would be made much easier if Alberta's core health framework is consolidated into one Health Care Act and structured as a piece of enabling legislation. This kind of legislation would allow government to allow private insurance and/or a two-tier health-care system by simply changing the regulations, which would not trigger a public debate in the Legislature.

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Alberta's Core Health-care Framework: Is There A Need For Change?

Our review of the legislation establishing the core health-care framework and the secondary statutes demonstrates that government performs four key functions in the provision of health care in Alberta, namely:

- Establishing, administrating and funding health care insurance plans;
- Prohibiting private insurance, public subsidization of private health services, and physicians working in both public and private systems;
- Organizing the delivery of publicly funded health-care services; and
- Establishing and enforcing standards for health and all health-care services.

Each function plays a key role in the provision of health services to Albertans. There is no obvious need to consolidate all of the core health-care framework legislation into one Act. However, the Legislation could be improved by separating out the Acts into the different functions that are sought to be achieved. For instance, it would make sense to have one Act dealing both with Alberta health-care insurance benefits and hospitalization benefits. A revised health-care insurance act could establish a medical care insurance plan for all insured services by referencing the framework established by the CHA. It should also include a guarantee of continued benefits for seniors and low-income citizens that are currently contained in the plans. It would also make sense, if NHSFs are allowed to continue, to regulate their operations in the same manner that approved hospitals are regulated.

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