

SUPREME COURT OF PRINCE EDWARD ISLAND
(GENERAL SECTION)

BETWEEN:

KEVIN J. ARSENAULT

Applicant

and

**THE GOVERNMENT OF PRINCE EDWARD ISLAND,
as represented by the
MINISTER OF HEALTH AND WELLNESS**

Respondent

AFFIDAVIT

I, Kevin J. Arsenault of Ft. Augustus, Prince Edward Island in the county of Queens,

MAKE OATH AND SAY:

1. I am a Canadian citizen and permanent resident of PEI, living at 32 Father Brady Lane, Ft. Augustus, PEI, C1B 8X0. As a taxpayer, I have an interest in ensuring that PEI tax revenues are not dispersed by the *Minister of Health and Wellness* unless the Minister has the statutory authority to do so.
2. I obtained a Ph.D. in ethics from McGill University in 1996. My doctoral studies focused, in part, on the intersection of various ethical issues, social policies and laws, including the issue of abortion and the rights of the unborn. I have published numerous articles on abortion and the legal protection of the rights of the unborn, and I have been a long-time participant in the ongoing public debate within PEI regarding these matters.

3. Section 2 (1) of the *Health Services Act* states that the *PEI Minister of Health and Wellness* (the “Minister”) is responsible for the administration of the Act [Tab 5, p. 62].
4. Section 2(2) of the *Health Services Act* stipulates that the Minister shall ensure the provision of health services in the province in accordance with the provincial health plan [Tab 5, p. 63].
5. Part II, Section 6(1) of the *Health Services Act* established a Crown corporation to be known as *Health PEI* [Tab 5, p. 64].
6. Sections 12(1) of the *Health Services Act* states that *Health PEI* shall provide, or provide for the delivery of, health services in accordance with the provincial health plan [Tab 5, p. 67].
7. Section 12(2) of the *Health Services Act* clarifies that *Health PEI* is accountable to the Minister in respect of the performance of its functions under the Act and shall do a range of things, including those spelled out under s. 12(b), e.g., “comply with any directions, policies and guidelines issued or established by the Minister with respect to the health services provided by *Health PEI* [Tab 5, p.67].
8. The Minister has, in fact, established a number of “directions, policies and guidelines” regarding the authorization and payment of therapeutic abortion health services.
9. Therapeutic abortions are not performed in PEI
10. The Minister has established two separate and distinct “Out-of-Province” (OOP) abortion policies, one with the QEII hospital in Halifax, N.S. (the “Halifax abortion policy”); and one with the General hospital in Moncton, N.B. (the “Moncton abortion policy”).
11. The essential elements of the OOP Halifax abortion policy and the OOP Moncton abortion policy are outlined on the “Abortion Services” page of *Health PEI’s* website [Tab 10, p. 131].

12. In the case of the OOP Halifax abortion policy, an Island woman seeking to terminate her pregnancy must be no more than 16 weeks pregnant. A referral must be obtained through a PEI physician. Once a referral has been submitted by the PEI physician, *Health PEI* states that it **will** (my emphasis) be approved within 48 hours by the *Out-of-Province Coordinator*. [Tab 10, p.131].
13. In the case of the OOP Moncton abortion policy, an Island woman seeking to terminate her pregnancy must be no more than 14 weeks pregnant. An Island woman can call the Moncton Hospital to set up an appointment herself, and need only present a valid PEI Health Card to obtain the service, which will be paid for under the PEI health services plan. A referral from an Island physician is not required. [Tab 10, p.131].
14. Section 1(d) of the *Health Services Payment Act* states that “basic health services” means all services rendered by physicians that in the opinion of the Minister 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 (my emphasis), (Tab 6, p. 78).
15. Therapeutic abortions are not regarded as “basic health services” for which payment is automatically authorized under PEI's health services plan. They are “elective” medical services with conditions that must be met before payment is to be authorized.
16. Section 2 of the *Health Services Act* gives the Minister the function and power to develop, in accordance with the Act and Regulations, a health services plan for residents of the province. The Minister has exercised this authority in the matter of regulating therapeutic abortions by stipulating conditions which must be met before the PEI government will pay for the procedure. This matter was clarified in the PEI *Supreme Court of Appeal Division* judgment in the case of *Government of Prince Edward Island as represented by the Minister of Health and Social Services and Henry Morgentaler* rendered on September 13, 1996. [Tab 16, p. 193-197].

17. By virtue of the definition in section 1(d) of the *Health Services Payment Act*, a physicians' services do not constitute "basic health services" so as to qualify for benefits under section 3 of the *Health Services Payment Act* unless the Minister considers them "medically required," and unless they meet any other conditions and limitations prescribed in the regulations for those particular health services.
18. The "conditions and limitations prescribed in the regulations" with respect to therapeutic abortion services are found in (a) the *Health Services Payment Act Regulations* and (b) the *Master Agreement Between the Medical Society of Prince Edward Island and the Government of Prince Edward Island and Health PEI*.
19. Section 1(c)(iv) of the *Health Services Payment Act Regulations* excludes therapeutic abortions from the definition of "basic health service" eligible for payment unless the procedure (a) is performed in a hospital and (b) the condition of the patient is such that the service is determined by the Minister to be "medically required" (Tab 7, p. 95).
20. Section 3(2) of the *Health Services Payment Act* states that all claims for benefits under the PEI health services plan are subject to assessment and approval by the Minister and the amount of the benefits to be paid to any claimant shall be determined by the Minister in accordance with the Act and the Regulations (Tab 6, p 81).
21. Section 4(h) of the *Health Services Payment Act* states that it is the function of the Minister and the Minister has power to withhold payment for basic health services for any entitled person who does not, in the opinion of the Minister, medically require the services (Tab 6, p 82).

22. The *Master Agreement between the Medical Society of Prince Edward Island and the Government of Prince Edward Island and Health PEI (April 1, 2010 – March 31, 2015)* [the “*Master Agreement*”] is the *Master Agreement* version currently in effect, notwithstanding the stated “end date” of March 31, 2015. Section A2.2 of the agreement states that “This Agreement shall be in force and effect for the period from April 1, 2010 to March 31, 2015, and shall remain in effect during the period of negotiation, mediation or interest arbitration carried out to achieve a new agreement.” (Tab 9, p. 125). I contacted the office of the *Medical Society of PEI* and received confirmation that that this agreement is still in effect.
23. The *Preamble to the Tariff of Fees* is “...deemed to form part of the regulations, but in the case of a conflict between any provision of the preamble, the regulations or the Act, the provision of the Act or the regulations shall prevail.” (Tab 9, p. 124).
24. Section 30 of the *Tariff of Fees* within the *Master Agreement* outlines the policy governing “Prior Approval” within the *PEI Health Services Plan*. In particular, it states that “All physician referrals made for non-emergency out-of-province physician or hospital services must receive prior approval from Health PEI.” It also states that “Failure to obtain prior or emergency approval shall result in the patient/parent being held responsible for the total costs of the services.” It further states that “Schedule D outlines the policy/procedures for the out-of-province referral program.” (Tab 9, p. 126).
25. Schedule D of the *Tariff of Fees* in the *Master Agreement* includes a two-column chart titled “Fee codes requiring prior approval:” where the first column gives a description of the medical procedure requiring prior approval, and the second column provides a “fee code” for that medical service. “Abortion – therapeutic” with fee code “6010” is listed as one of the medical services requiring prior approval. (Tab 9, p.128).
26. The *Master Agreement* contains a policy entitled “Criteria for out-of-province referrals” (Appendix E) with reference policy #: REF 001. This policy states that “All referrals made to out-of-province medical services and facilities must receive prior approval from the *Department of Health*. Failure to obtain this approval shall result in the patient being held fully responsible for the total costs of the services provided.” (Tab 9, p. 129).

27. The *Criteria for Out-of-Province Referrals* policy in the *Tariff of Fees* stipulates that payment may be provided under the health services plan for an eligible resident of Prince Edward Island only in cases of extreme emergency or sudden illness occurring while outside the Province. Section 1(vii) of the policy further clarifies that other than extreme emergencies occurring while outside the Province, “Prior written approval must be obtained for out-of-province treatment.” (Tab 9, p. 129-130).

28. It was the intention of the *PEI Legislative Assembly* that therapeutic abortions would not be facilitated or approved for payment within the PEI health services plan except in the very extraordinary circumstance that continuation of the pregnancy would endanger the life of the mother. The *PEI Legislative Assembly* enshrined this policy in *Resolution 17* which remains in force (Tab 8, pps. 115-120).

29. It is now well-established within the medical community that therapeutic abortions are never medically required to save the life of the mother and are therefore never “medically necessary”. Given the fact that abortions are not medically required, and given the clear policy of the *PEI Legislative Assembly* which informs the regulation of abortion in PEI, it is my sincere belief that the *Minister of Health and Wellness* lacks the statutory authority to approve payment for abortions under the terms and conditions of the PEI health services plan.

Sworn before me at _____)

in the County of _____, Province of)

Prince Edward Island, on _____)
(Date))

Kevin J. Arsenault

Commissioner for Taking Affidavits)