

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**

**AMENDED NOTICE OF APPLICATION FOR JUDICIAL REVIEW**

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing at a time to be determined by the Court.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a lawyer acting for you must prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the office of the registrar, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant and file it, with proof of service, in the office of the registrar within thirty days after service on you of the applicant's application record, or not later than 2 p.m. on the day before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

[Date]

Issued by: \_\_\_\_\_  
Registrar

\_\_\_\_\_  
Address of Court Office

TO: The Government of Prince Edward Island  
c/o Deputy Attorney General  
Department of Justice and Public Safety  
95 Rochford Street Charlottetown, PE C1A 7N8

## 1. The applicant makes application for:

- 1) A declaration that the ~~Government of Prince Edward Island (the "Province")~~ Minister of Health and Wellness of the Province (the "Minister") acted outside its his authority under the *Health Services Act*, RSPEI 1988, c H-1.6, and the *Health Services Payment Act*, RSPEI 1988, c H-2, by authorizing payments for therapeutic abortions performed out-of-province at the QEH II hospital in Halifax, Nova Scotia (the "Halifax Abortion Policy"). In particular, that therapeutic abortions under the Halifax Abortion Policy fail to meet the statutory requirement of the *PEI Health Services Plan* that prior approvals for therapeutic abortions be granted only if they are "medically required," as stipulated in subsection 1(d) of the *Health Services Payment Act*, RSPEI 1988, c H-2, and subsections 1(c)(iv) & 6(1)(c) of the *Health Services Payment Act Regulations* (Gen. Reg., PEI Reg EC499/13);
  
- 2) A declaration that the ~~Government of Prince Edward Island (the "Province")~~ Minister of Health and Wellness of the Province (the "Minister") acted outside its his authority under the *Health Services Act*, RSPEI 1988, c H-1.6, and the *Health Services Payment Act* RSPEI 1988, c H-2, by authorizing payments for therapeutic abortions performed out-of-province at the Hospital in Moncton, New Brunswick (the "Moncton Abortion Policy"). In particular, that therapeutic abortions under the Moncton Abortion Policy fail to meet the statutory requirements of the *PEI Health Services Plan* set out in subsection 1(d) of the *Health Services Payment Act* and subsections 6(1)(c) and 1(c)(iv) of the *Health Services Payment Act Regulations*, which stipulate that payment for therapeutic abortions be provided only when the Minister has determined that (a) the condition of the pregnant woman is such that an abortion is "medically required;" and that (b) therapeutic abortions are only paid for if they receive "prior approval" as per section 11(3) of the *Health Services Payment Act Regulations* and the "Tariff of Fees" contained in the *Master Agreement* between the Province, the *Medical Society and Health PEI*;

- 3) A declaration that the Minister of Health and Wellness of the Province (the “Minister”) has acted outside the scope of his lawful authority by administering abortion services in a manner inconsistent with the official *Abortion Policy* of the PEI government (Resolution 17) by approving payments for therapeutic abortions, upon the advice and recommendations of the *Health Services Payment Advisory Committee*, which fail to meet the clear and unambiguous meaning of “medically required” found in Resolution 17 (i.e., “endangering the life of the mother”);
- 4) A declaration that the Minister of Health and Wellness of the Province (the “Minister”) failed in his duty to withhold payments for therapeutic abortions contrary to statutory requirements of the *Provincial Health Plan*, specifically subsections 2(2) of the *Health Services Act*, RSPEI 1988, c H-1.6, and subsections 4(b) and 4(h) of the *Health Services Payment Act*, RSPEI 1988, c H-2;
- 5) *An Order under s. 3 of the Judicial Review Act, RSPEI 1988, c J-3, that would prohibit any act by the Minister of Health And Wellness or Health PEI that would not be pursuant to authority conferred by enactment, specifically authorizations for payment of therapeutic abortions that do not endanger the life of the mother, and are therefore not “medically required,” as per the statutory requirements spelled out in the Health Services Act and the Health Services Payment Act and Regulations;*
- 6) If necessary, an extension of time under s. 3(1.1) of the *Judicial Review Act*; and
- 7) Such further and other relief as this Honourable Court deems just.

The Applicant is not seeking an order for costs, and respectively asks that if the ruling of the Court is not in favour of the Applicant, that costs not be awarded to the Defendant.

## 2. The grounds for the application are:

### A. Background and Relevant Facts

#### The Parties

- 8) The applicant, Kevin J. Arsenault, is a Canadian Citizen and permanent resident of Ft. Augustus, Prince Edward Island. The applicant pays PEI provincial taxes and has an interest in ensuring that provincial government tax revenues are not allocated by the provincial government unless properly authorized by statute and regulation. The applicant is also concerned that the province ensures that health-care practices pertaining to therapeutic abortions meet the official provincial government policy objective of protecting the unborn, and that they are not deemed “medically necessary” and funded unless they truly endanger the life of the mother.
- 9) The respondent Minister is responsible for the administration of the PEI health care system under the *Health Services Act RSPEI 1988, c H-1.6*, and the *Health Services Payment Act, RSPEI 1988, c H-2*.

#### Terminology

- 10) “Therapeutic abortions” have historically been defined as abortions performed with the intention of addressing a serious medical condition threatening the life of the mother. The adjective “therapeutic” is universally defined in medical dictionaries as signifying procedures concerned with the remedial treatment or prevention of diseases. More recently, as abortions are increasingly being performed for non-therapeutic reasons (e.g., “convenience,” “socio-economic factors,” or simply because the unborn child is unwanted) many have supplanted the term “therapeutic abortion” with “induced abortion.” Because the PEI government explicitly states in its official Abortion Policy (Resolution 17) that the only exception allowing an abortion to be performed is when “...there are grounds to believe the life of the mother is endangered,” the provincial government, not surprisingly, uses the term “therapeutic abortion.” This *Notice of Application for a Judicial Review*, therefore, also consistently uses the term “therapeutic abortion.”

## The Canadian Health Care System and Legal Jurisdiction over Abortion

- 11) The *Canada Health Act*, RSC 1985, c C-6, establishes criteria and conditions in respect of insured health services and extended health care services provided under provincial law that must be met before a full cash contribution may be made by the federal government.
- 12) In order that a province may qualify for a full cash contribution referred to in section 5 of the *Canada Health Act* for a fiscal year, the health care insurance plan of the province must, throughout the fiscal year, satisfy the criteria described in sections 8 to 12 of the *Canada Health Act*.
- 13) The *Canada Health Act* stipulates that provincial health care insurance plans must provide hospital services "...if the services are medically necessary for the purpose of maintaining health, preventing disease or diagnosing or treating an injury, illness or disability" (section 2).
- 14) Although the *Canada Health Act* makes the provision of funding for provincial health-care services conditional upon the performance of medically-necessary procedures, the federal government leaves the determination of what health services and procedures are "medically necessary" to the provinces, recognizing that health care is a provincial jurisdiction under section 92(13) of the *Constitution Act*, 1867. The term "abortion" is not cited in the *Canada Health Act*.
- 15) Regarding therapeutic abortion services, the *Federal Court of Appeal* ruled in 1984 that: "The general subject of the performing of abortions is also a provincial matter subject to any prohibitions of the criminal law." [*Carruthers et al v. Therapeutic Abortion Committees* (1984), p. 63].

- 16) In 1988, section 251 of the *Criminal Code*, RSC 1970, c C-34, was struck down by the *Supreme Court of Canada* (*r. v. Morgentaler*) resulting in the decriminalization of abortion in Canada. Given that no federal abortion law has been enacted since 1988, and no current prohibitions of the criminal law exist, the statutory authority regarding the regulation of abortion under provincial health plans, as well as the policy determination as to whether payment is provided for therapeutic abortion services, are matters that fall exclusively under provincial jurisdiction.
- 17) Notwithstanding the widely-held and often-published claim that women are guaranteed a right to abortion under the Constitution of Canada, such is not the case. The *Supreme Court of Canada* clarified this issue [*r. v. Morgentaler*, [1988] 1 S.C.R. 30, pps. 14-15] with the following unambiguous statement:
- The proposition that women enjoy a constitutional right to have an abortion is devoid of support in either the language, structure or history of the constitutional text, in constitutional tradition, or in the history, traditions or underlying philosophies of our society. Historically, there has always been a clear recognition of a public interest in the protection of the unborn and there is no evidence or indication of general acceptance of the concept of abortion at will in our society. The interpretive approach to the Charter adopted by this Court affords no support for the entrenchment of a constitutional right of abortion.*
- 18) When the *Supreme Court of Canada* struck down section 251 of the *Criminal Code of Canada* as unconstitutional, it recommended that Parliament enact a new law that would protect the unborn while clarifying the conditions under which therapeutic abortions could be performed legally without offending the constitution. No such federal law has yet to be enacted, thereby leaving the responsibility of affording protection to the unborn by regulating therapeutic abortions to provincial legislators under the provisions of provincial *Health Plans*.
- 19) Although there is currently no law “prohibiting” abortions in Canada, neither is there a law “obliging” abortions in Canada. There is, therefore, no legal obligation incumbent upon provincial governments to either (a) recognize therapeutic abortions as an essential medical procedure; or, (b) pay for therapeutic abortion services under provincial health plans.

## The Official PEI Government Abortion Policy

20) Immediately following the *Supreme Court of Canada* ruling in *r. v. Morgentaler* (1988) which struck down the *Federal Criminal Code* abortion law, the PEI government introduced and debated a resolution pertaining to abortion in the Legislative Assembly.

21) The PEI government passed Resolution 17 on April 7, 1988, thereby establishing an official Abortion Policy for the province. Resolution 17 reads as follows:

WHEREAS the Parliament of Canada must now legislate a new law concerning abortion;

AND WHEREAS the great majority of the people of PEI believe that life begins at conception and any policy that permits abortion is unacceptable;

AND WHEREAS the great majority of Islanders demand that their elected officials show leadership on the very important issue and demonstrate the political will to protect the unborn fetus;

THEREFORE BE IT RESOLVED that the Legislative Assembly of PEI oppose the performing of abortions, except where there are grounds to believe the life of the mother is endangered;

AND BE IT FURTHER RESOLVED that this Resolution be forwarded to the Leaders of all three Federal political parties requesting the passage of legislation consistent with the intent of this Resolution.

22) Resolution 17 has never been rescinded, amended or replaced, and remains the official *Abortion Policy* of the PEI government.

23) P.E.I.'s official *Abortion Policy* (i.e., that the Legislative Assembly of PEI opposes the performing of abortions except where there are grounds to believe the life of the mother is endangered) is explicitly stated in provincial statute: "Nothing in this part authorizes a person to make a decision on an incapable patient's behalf with respect to any of the following:....(c) an abortion except where the continuation of the pregnancy would be likely immediately to endanger her life...." [*Consent to Treatment and Health Care Directives Act*, RSPEI 1988, c C-17.2].

- 24) Drieger's "modern principle" for interpreting statutes holds that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature. [See p. 87 of Elmer Drieger's *Construction of Statutes* (2nd ed. 1983)]. In *Bell ExpressVu Limited Partnership v. Rex*, [2002], Justice Iacobucci of the *Supreme Court of Canada* ruled, on behalf of the entire Court, that Drieger's rule is the overarching and preferred approach to statutory interpretation in Canada. This approach has since been endorsed by the *Supreme Court of Canada* in a number of cases, and is now the dominant approach to statutory interpretation.
- 25) Relying on Dreiger's rule demands that the term "medically required," as it is used and pertains to therapeutic abortions in subsections 1(c)(iv) and 6(1)c) of the *Health Services Payment Act Regulations*, be interpreted with the clear and unambiguous intent expressed in PEI's official *Abortion Policy*; namely, that abortions are only permissible and regarded as medically required when "...there are grounds to believe the life of the mother is endangered." This is especially the case given that no statutory definition of "medically required" exists, nor are there explicit criteria upon which a statutory definition can be extrapolated or deduced.

### **Therapeutic Abortion and the PEI Health Care Insurance Plan**

- 26) Subsection 5(1)(a) of the *Health Services Payment Act* authorizes *Health PEI* (the "Agency") with the approval of the Lieutenant-Governor-in-Council, to make regulations establishing a health services plan for the payment of the cost of basic health services received by entitled persons.
- 27) 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."

- 28) By virtue of the definition in section 1(d) of the *Health Services Act*, a physician's services, whether in respect of abortion or anything else, do not constitute "basic health services" so as to qualify for benefits under section 3 of the *Act* unless the Agency considers them medically necessary, and unless they meet the conditions and limitations prescribed in the regulations.
- 29) Subsection 4(a) of the *Health Services Payment Act* provides the Agency with the authority to administer the Health Services Plan established by the *Act* and *Regulations*, including the authority to withhold payment for basic health services for any entitled person who does not, in the opinion of the Agency, medically require the services. Subsections 4(b) & 4(h) not only give the Agency the authority to withhold payment in such cases, but also charges it with the "duty" to withhold payment for basic health services for entitled persons who do not medically require the services.
- 30) Paragraph 1(c)(iv) of the *Health Services Payment Act Regulations* excluded therapeutic abortions from the definition of "basic health services" eligible for payment, unless the procedure was performed in a hospital *and* the Minister determined in each case that the condition of the patient was such that the procedure was "medically required."
- 31) Paragraph 6(1)(c) of the *Health Services Payment Act Regulations* delegated to the *Health Services Payment Advisory Committee* (the "committee," composed of *between three and five doctors*) the responsibility to advise the Minister whether a therapeutic abortion is "medically required." Although the committee is delegated the duty to review the facts in each case and "advise" the Minister, the determination regarding whether a therapeutic abortion is medically required, and to be paid for under the *PEI Health Plan*, is made, in each case, by the Minister.

## **Out-of-Province Abortion Services within the PEI Health Services Plan**

32) Under the PEI *Health Services Plan*, the Minister provides payment for therapeutic abortions performed in both the QEII hospital in Halifax, Nova Scotia (Halifax Abortion Policy) and the Moncton Hospital in Moncton, New Brunswick (Moncton Abortion Policy). The terms and conditions governing the authorization and payment of out-of-province therapeutic abortions are, however, not the same for the Halifax and Moncton Abortion Policies.

### **(a) The Halifax Abortion Policy**

33) In order for a resident of PEI to obtain an abortion at the QEII hospital in Halifax, Nova Scotia, a PEI physician must first make a determination that the procedure is “medically required” and communicate that determination to *Health PEI*.

34) In order for a doctor referral for an out-of-province therapeutic abortion at the QEH II in Halifax to be in compliance with the law and “medically required,” as per section 6(1)(c) of the *Health Services Payment Act Regulations* [PEI Reg EC499/13], it must first meet the test of the definition of “medically required” contained in the official Abortion Policy of the PEI government, e.g., that abortions are determined to be medically required only when “...there are grounds to believe the life of the mother is endangered.”

35) Given technological and medical advancements, it is the view of obstetrical and gynecological medical experts that it is no longer the case that the condition of a pregnant woman would ever be such that a therapeutic abortion is medically required to save the life of the mother. For example, *Canadian Physicians for Life (CPL)* expresses such an expert opinion in an official public statement on provincial funding of abortion in the following words: “It is our opinion that abortion is never medically necessary and should be de-funded provincially” (“Statement on Provincial Funding of Abortion,” *Vital Signs* - Spring 2012, p.4).

36) Over 1,000 international medical professionals have signed the DUBLIN DECLARATION ON MATERNAL HEALTHCARE (<http://www.dublindeclaration.com>) which reads as follows :

“As experienced practitioners and researchers in obstetrics and gynecology, we affirm that direct abortion – the purposeful destruction of the unborn child – is not medically necessary to save the life of a woman. We uphold that there is a fundamental difference between abortion, and necessary medical treatments that are carried out to save the life of the mother, even if such treatment results in the loss of life of her unborn child. We confirm that the prohibition of abortion does not affect, in any way, the availability of optimal care to pregnant women.”

37) Section 13(1) of the *Health Services Payment Act Regulations* states that where, in the opinion of the Minister, services provided by a physician for which a claim for payment is made under the *Act* and where these regulations are not medically required, the person making the claim is not entitled to any payment of the cost of the services.

38) Section 18 of the *Health Services Payment Regulations* states that the Minister shall not pay a claim under the plan in respect of basic health services unless it contains certain information, including “...the diagnosis or chief complaint or description of services rendered,” as outlined in subsection 18(b). The applicant does not, at this time, have access to the substantive facts regarding the specific advice and recommendations made by the *Health Services Payment Advisory Committee* for each prior approval and referral for therapeutic abortions in the QEII Hospital in Halifax. However, given that therapeutic abortions are never medically necessary to save the life of the mother, it is very unlikely that any of the recommendations of the *Committee* for prior approval would have indicated that an abortion was required as a result of a determination that the life of the mother was endangered. The *Committee* advised the Minister to approve – and the Minister gave prior approval and payment for - 71 therapeutic abortions at the QEII hospital in Halifax in 2011; 86 in 2012; and 105 in 2013. The applicant does not currently have information on the number of therapeutic abortions performed at the QEII hospital in Halifax which were approved and funded by the PEI Minister since 2013.

## (b) The Moncton Abortion Policy

- 39) In June 2015, the Province entered into an agreement with New Brunswick (the “Moncton Agreement”). The Moncton Agreement provides for payment of therapeutic abortions for PEI residents at the Moncton Hospital effective July 1, 2015.
- 40) The payment for health services for entitled residents in PEI, including health services provided to Island residents while out-of-province, is administered in accordance with a “Tariff of Fees” which forms an *Appendix* to the *Master Agreement* negotiated between *Health PEI*, the Province and the *Medical Society of PEI* ( the “Master Agreement”).
- 41) Section 1(e) of the *Interpretation Act* [RSPEI 1988, c I-8] defines a “Tariff of Fees” as a “Regulation” when enacted, (i) in the execution of a power conferred by or under the authority of an Act, or (ii) by or under the authority of the Lieutenant Governor in Council. The “Tariff of Fees” contained in the *Master Agreement* constitutes such a regulation.
- 42) Section 11(3) of the *Health Services Payment Act Regulations* states that the Minister may by policy establish requirements concerning prior approval of coverage for non-emergency services rendered out of the province. A therapeutic abortion is classified as a non-emergency service.
- 43) Prior approval is required from *Health PEI* before some surgical procedures are undertaken. Under Appendix “D” (Prior Approval) of the *Master Agreement* “Abortion – Therapeutic (Code 6010)” is one of the surgical procedures in a list of fee codes requiring prior approval.

- 44) The PEI Moncton Abortion Policy requires neither (a) a physician referral, or (b) prior approval. A pregnant woman who is an entitled resident of P.E.I. under the PEI health plan who wishes to be relieved of her pregnancy can simply call the Moncton hospital and schedule an abortion. If she presents a valid PEI Health Card, the abortion will be paid for under the *PEI Health Services Plan*.
- 45) The *Supreme Court of Canada* has clarified that “... the desire of a woman to be relieved of her pregnancy is not, of itself, justification for performing an abortion” (*r. v. Morgentaler*; SCC, p. 22-23). This same opinion is implicit in the official *Abortion Policy* of the PEI government (Resolution 17); in specific provisions within the *Health Services Act*; and in specific provisions within the *Health Services Payment Act and Regulations*.
- 46) The *PEI Health Services Plan* does not authorize payment for therapeutic abortions without (a) prior approval, and (b) a determination by the Minister that the condition of the patient is such that a therapeutic abortion is “medically required.”
- 47) Because subsection 1(c)(iv) of the *Health Services Payment Act Regulations* states specifically that “...services provided in respect of termination of pregnancy performed in a hospital...” are only paid for under the Plan “...when the condition [singular] of the patient [singular] is such that the service is determined by the Minister to be medically required,” (my emphasis), it is clear that the Minister's duty to render a determination whether a therapeutic abortion is “medically required” must involve a medical examination and assessment of each individual person (patient) separately, thereby precluding that “prior approval” cannot be granted to all pregnant women wanting abortions generally (i.e., as a “class” of patients).
- 48) Given that pregnant Island women wanting an abortion self-refer to the Moncton hospital to schedule and receive a therapeutic abortion without seeing an Island Physician, the statutory requirements authorizing payment for therapeutic abortions by the Minister are clearly not being met with PEI's Moncton Abortion Policy.

**3. The following documentary evidence will be used at the hearing of the application:**

a. Affidavits to be filed; and

b. Such further or other documentary evidence as required and the Court permits.

[Date]

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