Court File No: **SIGS27017** .

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

FACTUM

Part I: Identification of Parties

1) 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 *Minister of Health and Wellness* unless properly authorized by statute and regulation. The applicant is also concerned that the Minister ensures that health-care practices pertaining to therapeutic abortions are in compliance with the official provincial government abortion policy objective of protecting the unborn, at least to the extent of not offering payment for abortions when they are not medically necessary, e.g., when continuing the pregnancy does not endanger the life of the mother.

2) The respondent *Minister of Health and Wellness* 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.

Part II: Summary of Relevant Facts

3) I have provided a more detailed list of facts in the accompanying affidavit which I believe are relevant to the issues on this application for judicial review. I have also provided references, within the affidavit, to documents supporting those facts; documents which are contained in this *Application Record* as tabbed exhibits. What follows in this section of my factum is an abbreviated and more concise summary of those facts.

4) The *Minister of Health and Wellness* (the "Minister") has both the authority and responsibility to ensure that the administration and payment of therapeutic abortion health services comply with the statutory requirements spelled out in the *Health Services Act*, the *Health Services Payment Act*, the *Health Services Payment Act Regulations*, and the "Tariff of Fees" contained in the *Master Agreement between the Medical Society of PEI and the Government of PEI and Health PEI.*

5) Currently, the Minister administers two separate and distinct out-of-province abortion policies; the Halifax abortion policy, and the Moncton abortion policy.

6) In the case of the Halifax abortion policy, referrals from Island physicians are required according to regulation; but instead, all referrals are currently being approved by *Health PEI* automatically - according to information communicated by *Health PEI* to the public via its website – which contravenes section 1(c)(iv) of the *Health Services Payment Act Regulations* which stipulates that the Minister must make a determination that the condition of the patient is such that the therapeutic abortion is "medically required" (Tab 7, p.95).

7) The expert opinion of the *Canadian Physicians for Life* is that "...no abortions are medically necessary;" (Tab 11, p. 133). As well, more than 1,000 Obstetricians and Gynecologists have signed the international *Dublin Declaration on Maternal Healthcare* (Tab 14, pps. 162-17) which declares that, "...direct abortion – the purposeful destruction of the unborn child – is not medically necessary to save the life of a woman," and further that "...the prohibition of abortion does not affect, in any way, the availability of optimal care to pregnant women" (Tab 16, p. 161).

8) Given that the terms "medically necessary" and "medically required" are ambiguous and can be interpreted either very narrowly or very broadly, the *Minister of Health and Wellness* is obliged to ensure that Island physicians making out-of-province abortion referrals are relying on the very narrow criterion contained within PEI's official abortion policy (*Resolution 17*) which was put into force by the *PEI Legislative Assembly;* namely, that abortions are only medically required when there are grounds to believe that the life of the mother is endangered (Tab 8, p. 118).

9) The out-of-province Moncton abortion policy does not require a referral from an Island physician. It, therefore, does not comply with the regulatory requirement found in section 1(c)(iv) of the *Health Services Payment Act Regulations* that stipulates that the Minister must make a determination in each case that the condition of the patient is such that the procedure is "medically required" (Tab 7, p. 95). Such a determination can not be made by the Minister if the patient does not see an Island physician to have her condition assessed. Without such an assessment, it is not possible to make the required determination as to whether the pregnant woman's condition is such that there are grounds to believe her life is endangered by the continuation of the pregnancy and that a therapeutic abortion is therefore "medically required."

10) Both the Halifax and Moncton abortion policies are in non-compliance with section 4(h) of the *Health Services Payment Act,* which confers on the Minister the power and duty 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).

11) Because that the Moncton abortion policy does not require a referral from an Island physician, it therefore does not comply with the *Prior approval* policy contained in the "Tariff of Fees" section of the *Master Agreement (Appendix D).* Therapeutic abortion (fee code 6010) is specifically listed in the policy as a medical/surgical procedure requiring prior approval (Tab 9, p.128).

12) The Moncton abortion policy does not comply with the "criteria for out-of-province referrals" policy contained in the *Master Agreement* (Appendix E), which stipulates under section 1(vii) that "Prior written approval must be obtained for out-of-province treatment," except in the case of extreme emergency or sudden illness occurring while an entitled Island resident is outside the province; circumstances which do not apply to abortions, which are classified as elective procedures (Tab 9, 129).

Part III: Key Issues, Argument & Authorities

There are several key issues relating to this application which will be dealt with in separate sections of this part of the Factum, each under its own heading:

(a) The legal status of abortion in Canada
(b) Provincial jurisdiction for the regulation of abortion
(c) PEI's official abortion policy and abortion law
(d) Statutory Interpretation of the phrase "medically required"

(a) The legal status of abortion in Canada

13) There is considerable confusion and misinformation in the public domain concerning the legal status of abortion in Canada. This confusion is not only prevalent among the general populace, but is also evident within the highest levels of provincial governments, at times, with the very people responsible for regulating abortion health services. For example, in a form letter former Premier of Ontario Dalton McGuinty sent to Ontarians who complained about public funding of abortion in that province, Mr. McGuinty said:

> "You may be aware that, in 1988, the *Supreme Court of Canada* addressed the constitutional validity of abortion. The court ruled that a woman in our country has the legal right to a timely, accessible abortion as an insured service. In compliance with the *Supreme Court* decision, abortion remains a publicly funded procedure in Ontario." (Tab 23, p. 256).

The *Supreme Court* made no such ruling. Similarly, when the former *Minister of Health and Wellness* for the PEI government, Hon. Doug Currie, was interviewed by CBC Compass host Bruce Rainnie to explain the new Moncton abortion policy that was to come into effect on July 1, 2015, he made the following statement:

> "Today was about improving access with a 1-800 number to provide the service to Island women that the *Supreme Court* decided upon over 30 years ago." (Tab 22, p. 255)

Both of the above statements suggest that the *Supreme Court of Canada* established a constitutional right to abortion in the1988 ruling in the case of r*. v. Morgentaler.* Such is not the case. As former PEI Provincial Court Judge (1975-77), PEI Supreme Court Justice (1981-1987) and PEI Chief Justice from 1987 until 2008 clarified in an article published in the *Guardian* newspaper May 22, 2014:

> "Recent public discussion concerning abortion and the criminal law indicates some confusion about the extent and impact of the *Supreme Court of Canada's* ruling on the issue in the 1988 Morgentaler case....None of the seven judges held that there was a constitutional right to abortion on demand. All of the judges acknowledged the state has a legitimate interest in protecting the unborn" (Tab 12, p. 134-135).

14) Not only is there no constitutional right to abortion in Canada, neither is there any federal criminal law prohibiting or restricting abortion. It is therefore not "illegal" in Canada for a woman to have an abortion at any time during her pregnancy, right up to the moment of natural birth. Contrary to popular opinion, the *Canada Health Act does not* establishes a "right" to abortion which would make it a legal requirement for provincial governments to fund under provincial health service plans.

> A provincial government may refuse to fund abortion procedures for its citizens. By means of the *Constitution Act,* 1867, a province has the constitutional jurisdiction to manage health care generally. As such, a provincial *Minister of Health* may determine which medical practices are funded within the province. (Tab 19, p. 222).

15) The federal government has jurisdiction to “prohibit” abortions; but provincial governments have the constitutional jurisdiction to “regulate” abortions. As Mollie Dunsmuir with the federal government *Law and Government Division* stated in a 1998 document entitled *Abortion: Constitutional and Legal Developments,*

> To the extent that it is desirable to prohibit abortions, or establish the conditions under which they cannot be performed, jurisdiction will lie with the federal government, because prohibition of an action for health or moral reasons is constitutionally associated with criminalization. To the extent that it is desirable to regulate abortions, or the conditions under which they can be performed, jurisdiction will lie with the government that has the right or duty to regulate such health issues” (Tab 20, p. 227).

She goes on to explain that the *Constitution Act,* 1867 gave provincial governments authority over the establishment, maintenance and management of hospitals (section 92(7)); public health as a local and private matter (92(16)); and the regulation of health professions (92(16)). Not surprisingly, the *Federal Court of Appeal* in 1983 found that “the general subject of the performing of abortions is also a provincial matter subject to any prohibitions of the criminal law” (Tab 20, p. 228).

16) Because the federal government alone has jurisdiction to prohibit abortion, courts have determined that provincial governments cannot enact legislation that has as its primary purpose the prohibition of abortion. It is, however, well within the jurisdictional right of provincial governments to disapprove of abortion and decide not to offer support to women desiring abortions, financial or otherwise. In the absence of a federal law restricting or prohibiting abortions, women are free to have abortions without fear of penal consequence; however, as Mollie Dunsmuir notes in *Abortion: Constitutional and Legal Developments,* “....the state is required only to respect such decisions, or to refrain from interfering with them, **not to approve or facilitate them** (my emphasis) (Tab 20, p. 234).

(b) Provincial jurisdiction for the regulation of abortion

17) As noted in the previous section, there is currently a widespread misunderstanding that the *Canada Health Act* imposes an obligation on provincial governments to fund abortions. In fact, the *Canada Health Act* does not mention abortion at all, but states only that provincial health plans must provide funded hospital and physician services if they are “medically necessary” (in the case of hospital services) or “medically required” (in the case of physician services) (Tab 4, p. 50-51). As will be discussed subsequently, neither of these terms are defined within the *Canada Health Act* or within Canadian jurisprudence.

18) Provincial governments may have jurisdiction for the regulation of abortion; however, it is still necessary that such regulation be properly authorized with appropriate provincial statutes and regulations, especially when denying or limiting support for abortions, including denying payment under provincial health service plans.

19) In a previous court ruling which hinged on section 1(c)(iv) of the *PEI Health Services Payment Act Regulations,* the PEI *Supreme Court, Appeal Division*, determined that the proper authority was indeed established in statute, thereby allowing the PEI government to limit public funding of abortion. As Mollie Dunsmuir explains:

> The *Prince Edward Island Supreme Court, Appeal Division*, on 13 September 1996 upheld a regulation that limited public funding of abortions to those that were performed "in a hospital when the condition of the patient is such that the service is determined by the [*Health and Community Services] Agency* to be medically required." Although this means that health care coverage for abortions in Prince Edward Island is more restrictive than in most provinces, it is consistent with previous cases. A province can limit coverage for abortions by regulation, provided there is authority in the governing Act to make such a regulation. If the governing legislation clearly conveys such authority, as did the *Prince Edward Island Health Services Act,* then regulatory restrictions on coverage will be valid. (Tab 20, p. 240).

This regulation remains in force and the governing legislation continues to convey the required authority for the *Minister of Health and Wellness* to fund only those therapeutic abortions which meet the conditions set out in regulation, e.g., that the condition of the patient is such that a therapeutic abortion is “medically required.”

(c) PEI's official abortion policy and law

20) Immediately following the *Supreme Court of Canada* ruling in *r. v. Morgantaler* (1988) which struck down the *Federal Criminal Code* abortion law, the PEI government introduced and debated a resolution in the *Legislative Assembly* pertaining to abortion. The *Legislative Assembly* passed *Resolution 17* on April 7, 1988, thereby establishing an official abortion policy for the province. (Tab 8, 115-120).

21) An analysis of *Resolution 17* reveals that members of the PEI *Legislative Assembly* were especially concerned that the *Supreme Court of Canada* ruling in *r. v. Morgantaler* had an immediate impact on the way in which abortion services were to be regulated under the PEI provincial health plan. When the *Supreme Court* struck down s. 287 (then section 237) of the *Criminal Code* it also eliminated therapeutic abortion committees which had, since 1969, provided the only means whereby legal abortions could take place in Canada. Therapeutic abortion committees were comprised of three doctors and a majority had to certify in writing that the continuation of the pregnancy would, or would be likely to, endanger the life or health of the pregnant woman. (Tab 20, p. 230)

22) The *PEI Legislative Assembly* constructed and passed *Resolution 17* out of a clear sense of regulatory necessity. An abortion policy was needed to inform regulations which were now required to be enacted within PEI health law, in order to fill the regulatory void created by the *Supreme Court's* decision striking down both the federal abortion law and the regulatory regime that law had established (e.g., therapeutic abortion committees).

23) There was clearly no attempt on the part of the *PEI Legislative Assembly* to assume the jurisdictional role of prohibiting abortions, which is evidenced by two separate provisions of the Resolution which called upon the federal government to immediately establish a new abortion law that would balance the rights of the unborn child with the rights of women seeking abortions, while at the same time not

offending the constitution. The wording of *Resolution 17* begins by stating this very sentiment: “WHEREAS the Parliament of Canada must now legislate a new law concerning abortion;” and then ends with a very similar notion: “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” (Tab 8, pps. 117-118).

24) The body of *Resolution 17* presents elements of a policy which mirrors the federal abortion policy implicit in the *Criminal Code*. With the responsibility to determine the basis upon which therapeutic abortions would be regulated under the provincial health services plan, the position taken by the *Legislative Assembly* was, more or less, to establish the same restrictive abortion policy which had been in place under the federal regime from 1969-1988. The Supreme Court several times noted in its 1988 r. v. Morgantaler ruling that, “The primary objective of s. 251 of the *Criminal Code* is the protection of the foetus.” (Tab 24, p. 259).

25) The *PEI Legislative Assembly* established an abortion policy based on the following three beliefs: (1) “...the great majority of the people of PEI believe that life begins at conception and any policy that permits abortion is unacceptable;” that (2) “....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;” and (3) “...the *Legislative Assembly of PEI* opposes the performing of abortions, except where there are grounds to believe the life of the mother is endangered.” This policy provided the necessary clarity and criteria needed to properly interpret the ambiguous term “medically required” used in the federal *Canada Health Act* and throughout the PEI *Health Services Payment Act* and PEI *Health Services Payment Act Regulations (Tab 8, p. 117-118).*

26) By declaring that “....any policy that permits abortion is unacceptable” and stating that it was necessary for the elected officials of the *PEI Legislative Assembly* to “...demonstrate the political will to protect the unborn fetus,” the *Legislative Assembly* clearly intended that the term “medically required” which was subsequently written into the health statutes and regulations be interpreted very

narrowly, in a similar way as had been the case federally, e.g., only permitting therapeutic abortions when there were grounds to believe the life of the mother was endangered.

27) Although the *Constitution* does not enshrine a "right to life" for unborn children, nor does the fetus enjoy the legal status of "person" under federal law, it is nonetheless well established that the "state" has both a duty and the right to protect the unborn. This was clarified by several judges in the *r. v. Morgantaler* ruling (Tab 24, pps. 259-260). Protecting the fetus was unanimously regarded as an important governmental objective which justified putting reasonable limits on a woman's right to abortion. As, for example, Justices McIntyre and La Forest expressed it:

> 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 *(R v Morgentaler, at p. 39).*

28) When the *PEI Legislative Assembly* passed *Resolution 17,* members were no doubt not only cognizant of the public interest in protecting the unborn, but were most likely also aware that Canada (and each of the 10 provinces) had signed the *UN Declaration on the Rights of the Child* proclaimed by *General Assembly* resolution 1386(XIV), November, 1959, which stated in its preamble: "Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, **including appropriate legal protection, before as well as after birth....."** (my emphasis) (Tab 17, p. 198).

29) In her article *Statutory Interpretation in Canada*, Ruth Sullivan notes that the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), p 330:

> The legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred" (Tab 13, p. 156).

30) The *Rules of the Legislative Assembly of PEI* provide for a simple and straightforward procedure for rescinding a resolution or order under section 21 of *Chapter 28, "Forms of Proceeding,"* as follows: "Rescinding a resolution or order: That the resolution (or order) adopted by the House on (date) as follows.....be rescinded" (Tab 21, p. 253). Resolution 17 has never been rescinded.

31) There continues to be no federal abortion law enacted to this day. Nor has a federally-inspired regulatory regime been implemented given the absence of any criminal prohibition of abortion. *Resolution 17* therefore continues to serve an essential role as the official abortion policy of the PEI government, both informing and clarifying the manner in which abortion is to regulated in provincial health statute and regulation. Unfortunately, that policy is no longer being relied upon by the *Minister of Health and Wellness* as per statutory requirements.

(D) Statutory Interpretation of the phrase "medically required"

32) There have been very narrow and very broad definitions ascribed to the terms "medically necessary" and "medically required" in Canada over the years, yet there is no existing definition that can be used as a precedent in Canadian jurisprudence. It remains the sole prerogative and responsibility of provincial governments to define these terms within the context of their provincial health service plans. This is clearly outlined in *Health Canada's* document, *Canada's Health Care System.*

> "Medically necessary services are not defined in the *Canada Health Act*. It is up to the provincial and territorial health insurance plans, in consultation with their respective physician colleges or groups, to determine which services are medically necessary for health insurance purposes. If it is determined that a service is medically necessary, the full cost of the service must be covered by the public health insurance plan to be in compliance with the Act. If a service is not considered to be medically required, the province or territory need not cover it through its health insurance plan (Tab 15, p.179).

33) The term "therapeutic abortions" has historically been defined as surgical abortions performed with the express 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 replaced the term “therapeutic abortion” with “induced abortion.” The PEI government uses the term “therapeutic abortion” in its tariff fee codes, which indicates an intent to interpret the meaning of “medically required” in a much narrower sense than would be suggested by the use of the term “induced abortion.”

34) Although there is no definition of “medically required” with respect to abortion within Canadian statutes or jurisprudence, the task of interpreting this ambiguous term within statutes is made easier by considering the distinction between a 'want' and a 'need'. As explained in the document *Medically Necessary: What is it, and who decides?”* by the *Commission on the Future of Health Care in Canada,*

> When a service provided to a patient is medically necessary, it is funded by the government and delivered based on the patient's need, not their ability to pay. If a service is deemed unnecessary, however, patients must pay for it directly. The idea is to have need, not want, dictate what the healthcare system provides. (Tab 18, p. 203).

35) The distinction between medical “need” and “want” is important when considering how to best interpret the intended meaning of the very ambiguous term “medically required” within PEI's health law and abortion regulations. There is a widespread view that because abortions are not illegal, and because surgical abortions require a medical procedure, then abortions are “medically required” whenever a pregnant woman wants an abortion. The *Supreme Court of Canada* did not concur with this view in its 1988 *r. v. Morgantaler* ruling:

> During the Morgentaler (1988) trial, the Chief Justice of the *Supreme Court of Canada* referred to his comments from the 1975 Morgentaler decision that, given Parliament's expressed values, a woman's desire to have an abortion is not in and of itself a desire that makes an abortion medically necessary.” (Tab 19, p. 220-221).

36) When interpreting what “medically required” means in the *Health Services Payment Act* and *Regulations* it is necessary to look to the official abortion policy of the PEI Government. *Resolution 17* has never been rescinded, amended or replaced, and remains the official abortion policy of the PEI government. Given this fact, it was clearly never government's intention to pay for abortions simply because a woman wanted an abortion; but rather, to only pay for abortions in the very unlikely event that the life of the woman is endangered by the pregnancy.

37) Elmer Driedger's “modern principle” has been formally adopted by the *Supreme Court of Canada* as its preferred approach. The modern principle reads as follows:

> Today there is only one principle or approach, namely, the words of the 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 parliament. (Tab 13, p. 141).

38) Statutory interpretation is more or less straightforward when the ordinary meaning of a contentious provision is unambiguous, which is obviously not the case with the term “medically required,” which is so vague as to have no plain meaning. The question the phrase immediately evokes is “medically required for what purpose?” If this question is answered with a broad objective, e.g., “to provide the patient with whatever medical procedure or perceived health benefit he or she wants,” then virtually anything can be construed as “medically necessary”; if the question is answered more narrowly, e.g., “to keep the patient from dying,” then far fewer medical procedures or interventions become “medically necessary”.

39) To determine the intended meaning of ambiguous terms such as “medically required” it is sometimes helpful to interpret the meaning of the term within the entire context, including the entire Act. With respect to the authorizing of therapeutic abortions, the first thing to note within the entire Act is that abortions were not intended to be authorized simply on the basis that a woman wanted an abortion, otherwise it would have been included in the list of “basic health services,” without any limiting conditions associated with the procedure. The fact that limiting conditions were attached to the regulation shows that the government framed the legislation with the intention that not all abortions would be approved and funded. Yet this is what is happening now in PEI with respect to abortion funding approval, most clearly in the case of the Moncton abortion policy. The key question remains, however; what “condition” of the pregnant woman wanting an abortion would preclude that a therapeutic abortion was “medically required?”

40) When a term such as “medically required” is so vague as to have no straightforward and plain meaning; and when a term can not be adequately clarified by reference to the entire text of the Act in question, then it is necessary to look to the intention of the legislator. Given the clear and unambiguous intent expressed in *Resolution 17*, PEI's official abortion policy which is still in force; and given the weight of scientific and medical opinion that abortions are never “medically required” to save the life of the mother; it becomes clear that there is no statutory authority in PEI's health laws permitting the Minister to legitimately pay for abortion services under PEI's health services plan.

Part IV: Statement of what the Applicant is Seeking from the Court

41) A declaration that the *Minister of Health and Wellness* of the Province acted beyond 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) and 6(1)(c)) of the *Health Services Payment Act Regulations* (Gen. Reg., PEI Reg EC499/13);

42) A declaration that the *Minister of Health and Wellness* acted outside 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 payment*s* 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 H*ealth 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;*

43) A declaration that the *Minister of Health and Wellness* 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 Island physicians making referrals for abortion and/or the *Health Services Payment Advisory Committee,* which fail to meet the clear and unambiguous meaning of "medically required" found in *Resolution 17* (e.g., "endangering the life of the mother");

44) A declaration that the *Minister of Health and Wellness* 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;*

45) 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*;

46) If necessary, an extension of time under s. 3(1.1) of the *Judicial Review Act; and* 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.

Schedule A
List of Authorities

Case Law

PEI (Minister of Health and Social Services) v. Morgentaler, 1996 CanLII 3713 (PE SCAD).

Statutory Authorities:

Statute and/or Regulations	Paragraph/Section
Health Services Act, RSPEI 1988, c H-1.6	1(a); 1(d); 2(1); 2(2); 6(1); 12(1)
PEI Health Services Payment Act, RSPEI 1988, c. H-2	1(d); 2(a); 3(2); 4(h);
PEI Health Services Payment Act Regulations, RSPEI 1988, c. H-2	1(c)(iv); 6
"Tariff of Fees" within 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)*	s. 1; s. 30, Appendices D & E

Schedule B
Text of Authorities

Health Services Act, RSPEI 1988, c H-1.6

1. In this Act,
(d) “Health PEI” means the Crown corporation established under subsection 6(1)

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2. (1) The Minister is responsible for the administration of this Act.
(2) The Minister shall ensure the provision of health services in the province in accordance with the provincial health plan. 2009,c.7,s.2.

6. (1) There is hereby established a Crown corporation to be known as Health PEI.

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12. (1) Health PEI shall

(a) provide, or provide for the delivery of, health services in accordance with the provincial health plan;
(b) operate and manage health facilities in accordance with the provincial health plan;
(c) manage the financial, personnel and other resources necessary to provide the health services and operate the health facilities required by the provincial health plan; and;
(d) perform such other functions as the Minister may direct.

(2) Health PEI is accountable to the Minister in respect of the performance of its functions under this Act and shall

(a) meet any standards established by the Minister respecting the quality of health services provided by Health PEI;
(b) comply with any directions, policies and guidelines issued or established by the Minister with respect to the health services provided by Health PEI;
(c) operate in accordance with any accountability framework established by the Minister;
(d) operate in accordance with its approved business plan and approved strategic plan; and;
(e) operate within its approved budget. 2009,c.7,s.12.

PEI Health Services Payment Act, RSPEI 1988, c. H-2

3 (2) All claims for benefits 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 this Act and the regulations.

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4. In addition to the duties and powers enumerated in Part I, it is the function of the Minister and the Minister has power,

(h) to withhold payment for basic health services for any entitled person who does not, in the opinion of the Minister, medically require the services.

PEI Health Services Payment Act Regulations, RSPEI 1988, c. H-2

1. In these regulations,

(c) “basic health services” means

(iv) services provided in respect of termination of pregnancy performed in a hospital when the condition of the patient is such that the service is determined by the Minister to be medically required;

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6. (1) The Health Services Payment Advisory Committee shall

(a) review and make recommendations on all claims submitted to the Minister, or to an agency to whom the Minister has delegated the Minister’s responsibility under subsection 3(2) of the Act, that are referred to it;

(b) review the facts relating to and make recommendations to the Minister or the agency, as the case may be, concerning cases that involve a possible or alleged over-servicing of a patient by a physician or an over-utilization of basic services by an entitled person that are referred to it;

(c) review the facts relating to and make recommendations to the Minister or the agency, as the case may be, relating to the medical requirement of service provided by a physician in cases that are referred to it; and

(d) make recommendations to the Minister or the agency, as the case may be, relating to the establishment, amendment and interpretation of the tariff.

PREAMBLE TO THE TARIFF OF FEES

1. INTRODUCTION

The following outlines the policy of the Department of Health and Wellness of Prince Edward Island as implemented by Health PEI in the assessment of claims for basic health services provided to entitled persons under the *Hospitals Act* and *Health Services Payment Act* of Prince Edward Island. The assessment rules shall be subject to continual review and shall be amended from time to time by the Department in the light of experience in the operation of the PEI Medical Insurance Plan, hereinafter referred to as "the Plan." In the event of a conflict between the assessment rules and this preamble, this preamble shall prevail. 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.

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30. All physician referrals made for non-emergency out-of-province/out-of-country physician or hospital services must receive prior approval from Health PEI. Prior approval is not necessary in the case of emergency transfers but an emergency out-of-province referral request must still be reported on a claim to Health PEI using the appropriate out-of-province referral fee code. Failure to obtain prior or emergency approval shall result in the patient/parent being held responsible for the total costs of the services. Schedule D outlines the policy/procedures for the out-of-province referral program. Such prior approval is valid for a period of one (1) year.

Preamble APPENDIX D
PRIOR APPROVAL

Prior approval is required from Health PEI before some surgical procedures are undertaken. Care should be exercised in ensuring such approval has been granted, before the surgery is undertaken.

Fee codes requiring prior approval:

DESCRIPTION	FEE CODE
Augmentation by prosthesis - Unilateral	3072
Male mastectomy (Benign)	3077
Removal of breast prosthesis	3079
Surgical Planing, face for acne, whole face	3080
Surgical Planing, single area, e.g. trauma scar	3081
Reduction - Mammoplasty - Unilateral	3082
Augmentation by prosthesis - Bilateral	3083
Rhinoplasty, with or without graft, and closure of septal perforation	4016
Gastric partition for morbid obesity	5233
Gastric partition plus all other procedures for morbid obesity	5234
Lipectomy, removal of panniculus	5456
Abortion - therapeutic	6010
Ptosis	7410
Ptosis - secondary repair	7411
Blepharoplasty	7430 and 7431
Repair - reconstruction of the ear with graft of skin or cartilage	7710
Penile prosthesis for impotence	8417
Insertion of Testicular prosthesis (for age 18 and over)	8507
TRAM Flap	3097

Preamble APPENDIX E

POLICY NAME: CRITERIA FOR OUT-OF-PROVINCE REFERRALS

EFFECTIVE DATE: April 1, 1995 POLICY #: REF 001

INTRODUCTION:

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.

POLICY GUIDELINES:

1. *OUT-OF-PROVINCE (WITHIN CANADA)*

   i. Payment may be provided under the Plan for an eligible resident of Prince Edward Island to obtain in-patient and/or out-patient medical services outside the Province in the instances of extreme emergency or sudden illness (*) occurring while outside the Province.

   ii. All cases excluding extreme emergency or sudden illness require written approval from the Department of Health.

   iii. Prior written approval may be granted if after consult with a local specialist and in the opinion of a local general practitioner and/or specialist, adequate medical services are not available in Prince Edward Island.

   iv. Prior written approval may be granted if only one (1) consultant/specialist is available in Prince Edward Island in the specific medical specialty service required.

   v. Prior written approval may be granted if the required medical services are provided in Prince Edward Island but other extenuating circumstances exist. Such cases shall be reviewed by the Medical Director of the Department.

   vi. Eligible residents of Prince Edward Island requesting an out-of-Province referral for medical services by preference only shall not be approved.

   vii. Prior written approval must be obtained for out-of-Province treatment. This referral is effective for a 12 month period only providing the referral is for the same diagnosis and the same physician.

   viii. Payment shall not exceed the daily standard per diem rate as authorized by the Province where the hospital services are rendered.

2. *OUT OF COUNTRY*

i. Insured services may be provided under the Plan for an eligible resident of Prince Edward Island to obtain in-patient and/or out-patient medical services outside Canada if written prior approval is obtained from the Department.

ii. Prior written approval may be granted if after consult with a local specialist and in the opinion of a local general practitioner and/or specialist, adequate medical services are not available in Canada.

iii. Payment may be provided under the Plan for an eligible resident of Prince Edward Island to obtain in-patient and/or out-patient medical services outside Canada in the instances of extreme emergency or sudden illness occurring while outside the country.

In cases where the Medical Director's interpretation of policy is disputed, the case shall be referred to the Medical Advisory Committee of the Department of Health for adjudication.

(*)***Extreme emergency or sudden illness*** - *a medical situation or occurrence of a serious nature, developing suddenly and unexpectedly, and demanding immediate medical attention.*

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Date Kevin J. Arsenault, Applicant

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