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

"HEARING PRESENTATION ON STANDING"

PRESENTED ON JULY 18, AT THE P.E.I. SUPREME COURT

The Minister of Health and Wellness as Respondent contends that I do not have standing to bring forward this application for a judicial review for two reasons: (1) that I do not have a "...sufficiently direct interest in the subject matter of the proceeding;" and (2) that I "...lack sufficient public interest standing in the circumstances of the case to proceed on that basis." The Minister is also alleging that even if I was to meet these conditions and was to be granted standing, the provision within the *Health Payment Act Regulations* governing abortion – section 1(c)(iv) - has recently been amended by the Liberal Cabinet, which now makes, in the opinion of the Minister, the issue raised by my application "moot." I will address each of these issues separately.

But first of all, I would also like to discuss another basis upon which legal standing can be granted which the Respondent does not mention; namely, whether there is any other reasonable, practical and effective manner in which this legal matter can be before the Court. If we turn to the bottom p. 280 of my supplemental Record, under Tab 26, which is the landmark 1981 Minister of Justice v. Borowski Supreme Court ruling on standing, we read the following:

> *"To establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its validity, a person need only show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court."*

I sincerely believe that I have presented facts and arguments that raise a serious issue regarding whether the Minister is exceeding his statutory authority paying for therapeutic abortions, that I am affected by these actions directly, and that I have a genuine interest as a citizen in this issue. I also believe there are unique circumstances pertaining to this matter, in fact, circumstances which are quite similar to those in the Borowski case, which make this Application the most reasonable, practical and effective manner in which the issue can be brought before the Court. I will now address the first of these three issues, the question of whether I have a sufficiently direct interest in the subject matter of the proceeding to warrant being granted standing.

1. **Direct Interest in the Subject Matter**

Paragraph 10 on p. 5 of the Respondent's Factum - found under Tab 1 of the Respondent's Record - states: *"The applicant does not provide any evidence that he is active in taxpayer's rights issues or other activities aimed at achieving greater government accountability. Rather, the Minister submits that he is using his status as a taxpayer to assert his views on abortion."*
First of all, I want to explain that I subscribe to a social and political philosophy that

very much supports paying taxes...I've never been interested in pushing for lower taxes *per se,* or reducing government spending on public services. Having said that, I have been involved in countless social justice and public campaigns over the years aimed at bringing about more equitable and less regressive tax policies and regimes, as well as numerous campaigns and public actions seeking to bring about greater government accountability and transparency. In fact, I have personally initiated a number of educational and citizen action campaigns to this very end, most notably several national campaigns while serving as the Executive Director of the Jesuit Centre for Social Faith and Justice in Toronto during the mid-90's.

So although it may be true, as the Respondent states, that I didn't provide any evidence in my Application Record of "activities aimed at achieving greater government accountability," I easily could have done so; I simply didn't realize the importance of doing so when I filed my documents. To provide one recent example of such activity in PEI, I have brought copies of a Guest Opinion article I published in Island Newspapers a little over a year ago, which I also sent directly to the then newly-elected Premier, titled "P.E.I. Government's lending must be transparent." There were follow-up Letters to the Editor in the Guardian supporting my position, and I'm pleased to say that a number of key policy changes I called for in the article were subsequently brought into force, making the PEI government's lending practices much more transparent.

It is also wrong for the Respondent to suggest that I am using my status as a taxpayer to assert my views on abortion. The truth is that - as a result of my strongly-held views on abortion, and what I regard as my moral and civil duty to advocate on behalf of the "right to life" of the unborn - I do not want any portion of my provincial taxes to be used to facilitate and pay for aborting unborn children if those abortions are not, in fact, medically required. I understand and accept that there is currently no law in Canada which legally prevents, or even puts any limiting conditions on abortions; however, I also know that the regulation of abortion and the provision and payment of abortion services falls exclusively within provincial jurisdiction, so it is a fundamental matter of great importance and direct interest to me whether any portion of my taxes is used to pay for therapeutic abortions which are not only not medically required, but are not properly authorized by provincial statute.

Given the fact that it is not illegal to obtain an abortion within Canada, and given the fact that the PEI government has decided to pay for abortions under the Provincial Health Plan, I have no choice but to contribute to funding therapeutic abortions by paying taxes. I would be breaking the law to withhold taxes in protest, which, I might add, I have no intention of doing. I accept that I can't legally withhold taxes simply because I don't agree with how tax revenues are being used by the government. This issue has already been decided by the court. The bottom paragraph of the document under tab 20 of my application Record, on p. 240 we read:

"In August 1991, the Federal Court of Canada upheld a ruling that a taxpayer could not withhold $50 in taxes to protest government funding of abortions."

The judge in that case argued that because the individual was under a "legal compulsion to pay income tax, " just like everyone else, he was therefore not voluntarily supporting tax-funded abortions, and so he was therefore not offending his freedom of religion conscience rights, which are protected under the Charter. Notwithstanding this line of thinking, there have been a number of high-profiled cases since the time of that ruling where Canadian citizens have chosen to take a public stand against state-funded abortions by refusing to pay their taxes; and, of course, they have suffered punitive legal consequences for doing so. David Little, for example, a resident of Alberton, PEI, has for many years refused to pay taxes because of his religious belief opposing abortion, and has spent time in jail as a result.

The point I am trying to make is that my tax contribution to paying for abortions, no matter how limited on a purely monetary basis, represents a very serious moral issue for me, and I sincerely regret that I am compelled by the law to participate in the funding of abortions in any way, to any extent whatsoever; however, as I already stated, I respect the rule of law and I have no intention of withholding taxes to protest provincial payment of abortions if, in fact, those payments are legal.

If, however, the Minister is not legally authorized to pay for abortions - as I sincerely believe is the case – then I would argue that I should not be denied the chance to bring this issue before the court for a ruling. Tax law compels me to participate and contribute to the facilitation and payment of abortions under the provincial Health Plan, despite the fact that I am an unwilling participant in the scheme; my core religious beliefs, however, also compel me to do everything I legally can to oppose abortions which are not medically necessary, and given that I believe the evidence shows that the government does not have authority to pay for abortions, this situation provides sufficient direct interest for me to be granted standing to have the Court answer the question whether or the payment of abortions by the PEI government is in fact legal under the current legislative regime.

In researching the issue of standing preparing for this morning's hearing, I couldn't help but notice a tendency for Courts to measure the degree of direct impact on individuals by the degree of monetary harm or loss they can show they suffer. If the issues at the heart of this application were costing me $1 million dollars, I suspect there would be little question that I was being sufficiently affected in a direct manner to justify granting me legal standing to bring the matter before the Court. So, I want to stress that monetary loss is only one type of loss, and should only be one consideration when

determining direct negative impact or interest... and for me personally, given that I have made a permanent commitment to live a contemplative religious life of prayer as a diocesan hermit with the Roman Catholic church, which I have been doing on a continuous and dedicated manner for the past five years, the much greater direct harm to me relates to my status as a taxpayer and a citizen in a democratic society where I must abide by government practices which I believe to be both immoral and illegal - with the possibility that I will be denied a means of seeking legal redress, which I would experience as a denial of my civic duty to hold the government accountable to following the law.

And I am certain I am not the only Island citizen who holds these views nor am I the only Islander directly affected by these same issues. They are issues of great importance and interest to many thousands of other Island citizens, perhaps even the majority of Islanders, which brings me to the second consideration related to standing, the Respondent's contention that I lack sufficient public interest standing.

2. Genuine Interest as a Citizen

Legal standing can be granted to an individual if, to repeat what the judge wrote in the Borowski ruling found at the bottom of p. 280, under tab 26 of my supplemental Record the person: "...has a genuine interest as a citizen in the validity of the legislation...." It is important to note that this is not a "both/and" test regarding the two considerations of (1) a direct personal interest and (2) a genuine public interest as a citizen Rather, it is an "either/or" situation...that is, standing can be granted if the person is either sufficiently directly affected, or he has a genuine interest as a citizen in the validity of the legislation. I believe I meet the conditions for both tests; however, as with the Borowski case, and due to the fact that unborn children are directly harmed by the actions of government regarding the facilitation and payment of abortions and they have no voice nor can they represent their own interest before the courts, I believe my genuine interest as a citizen in the validity of the legislation becomes of special importance in bringing forward this matter. I will say more on this advocacy role later, but first I want to discuss how my direct and public interests in the application for judicial review intersect.

My direct concern that I am, as a taxpayer, contributing to something I am morally opposed to; namely, paying for therapeutic abortions which are not medically required, is intrinsically linked to my more public concern, as a citizen, in the validity of the legislation, or, more precisely, the validity of the actions of the government in relation to the legislative authority upon which those actions are based. In Tab 1, paragraph 9 of the Respondent's Record it states:

> *"It is also clear that he [meaning me] takes an anti-abortion or pro-life position which would rarely, if ever, see an abortion allowed. As he puts it in his submissions, 'and given the weight of scientific and medical opinion that abortions are never 'medically required' to save the life of the mother,' he asserts abortions should not be paid for under Prince Edward Island's health services plan."*

Although it is most certainly true that I am categorically opposed to abortion on moral and religious grounds; namely, that as a Catholic Christian I believe in the sanctity of life from the moment of conception, and that the unborn have an intrinsic and fundamental 'right to life'; it is very important that the Court understand that my moral and religious beliefs are in no way the basis for my belief that the province should not pay for therapeutic abortions in this legal action. I am alleging that the province does not have the appropriate statutory authority to pay for abortions which are not medically-required because the parent legislation to the regulations dictates that when health services that are not medically required the Minister of Health must not pay for them; especially under section 4(h) of the *Health Services Payment Act.*

Neither is my belief that abortions are never "medically required" founded on moral and religious beliefs; they are based solely on the expert scientific opinion of medical professionals – expert opinion in the form of documentary evidence included in my Application Record. In particular, under Tab 14 of my Application Record I have provided a list of the names of more than a thousand obstetricians and gynecologists who have signed the International Dublin Declaration on Maternal Healthcare which states:

> *"As experienced practitioners and researchers in obstetrics and gynaecology, 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."*

I have also submitted a policy statement from the *Canadian Physicians for Life* on provincial funding of abortion, found at page 133 under tab 11 of my Record, wherein they declare in the paragraph near the bottom of the page that "...it is our strong belief that no abortions are medically necessary."

As I have already noted, I accept that I am legally required to pay taxes and must contribute to the payment of any and all authorized health services which are legal, whether I morally approve of those health services or not. However, if certain health

services which I am morally opposed to are, in fact, being paid for by the Minister using a portion of my tax revenue illegally, and I have legal recourse to have that matter addressed and possibly rectified, then I believe the legal precedents I have reviewed on standing support that I should be granted standing and not be denied a right to do so– and I would argue that this should be the case not "despite" but "because" of my moral and religious views on the matter.

As it says in the paragraph on the top of p. 285 of my Supplemental Record under tab 26 - the Borowski decision:

> *"In the provincial and federal field, the issue of an illegal, or perhaps unconstitutional, expenditure would not likely arise per se but, in the main, only (as is alleged in this case) in connection with the operation of challenged legislation; the challenge to the expenditure would thus depend on the outcome of the challenge to the legislation."*

I am certain there is an entire class of citizens within PEI who have a similar interest as me in having the Court decide on the issues which I have raised in this application for Judicial Review. Namely, citizens like me who do not support paying for abortions which are not medically required. It is interesting to recall that in a national survey conducted in 2010 by Angus Reid, 61% of Canadians were found to oppose paying for abortions which are not medically-required: The third paragraph on page 216 of the document in tab 20 reads as follows:

> *A great number of Canadians also express that tax dollars should not pay for every abortion procedure. In a 2010 Angus Reid Public Opinion poll, only 44% of respondents felt that the 'health care system should fund abortions whenever they are requested.' However, 39% felt that the system should only pay for abortions in cases of medical emergencies and 10% said that abortions should not be funded at all." [My Emphasis]*

Many Islanders are simply unaware that it falls under the jurisdictional prerogative of the province to decide not to fund abortions. Most have been led to believe that federal laws compel the provincial government to provide abortion services and pay for them. Those lobbying for greater access to abortion services have repeatedly told Islanders that the 1988 Morgantaler Supreme Court decision declared there is a constitutional right to abortion, which is simply not true. Former Chief Justice Gerard Mitchell attempted to correct the widespread and oft-stated view in a Guest Opinion to the Guardian in May of 2014, especially with the statement, *"None of the seven judges held that there was a constitutional right to abortion on demand,"* [Found in p. 134 under Tab 12 of my Application Record], and I have made this same point numerous times in nearly a dozen Guest Opinions in Island Newspapers on Abortion over the past three years, but it seems

the legal myth that such a constitutional right to abortion exists has stubbornly prevailed, and was even cited by the former Minister of Health, Hon. Doug Currie, as the justification for his government's decision that abortion would be paid for on-demand at the Moncton Hospital, without a doctor's referral, and without prior approval of an Island Physician. In a CBC interview aired on June 2, 2015 he said: *"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).

And more recently, when the province recently announced that abortion-on-demand would be offered on P.E.I. By the end of 2016, even the Opposition Leader, Hon. Jamie Fox, who publicly declared that he was pro-life and was strongly opposed to abortion on principle, offered the following conciliatory comment when interviewed by a Guardian reporter, which can be found at Tab 31, p. 330:

> *"I totally respect the Supreme Court and the ruling that they have provided in regards to this being a Constitutional issue and that there is an obligation for all provinces to provide services."*

Such rampant public misinformation on such a serious policy issue has clearly stymied healthy public debate concerning the actual legislative options which are available to the PEI government regarding the regulation of abortion services, including whether, or to what extent, abortions should be provided and funded under the PEI Health Services Plan. Again, I believe this makes the present judicial review that much more important....if I am correct that the parent legislation does not authorize paying for abortions which are not medically required, and the Court agrees with that assertion, then the government – presuming they are ideologically committed to a policy change that would pay for non-medically required therapeutic abortions on demand – would need to bring the matter into the Legislative Assembly and have the issue openly debated, with opportunity for the opposition to raise questions and concerns, etc...which is how an open, transparent and truly democratic process should work. Such crucial policy changes should not be made quietly by cabinet of a majority government by changing a regulation to agree with a major policy change which had already been announced and brought into effect a full year earlier. So I'm asking for standing so the merits of the legal arguments I have brought forward can be fairly assessed by the Court, in part, to ensure that a fully transparent and informed process is ensured for an issue of such significance. If the issue is to be heard, it has to be brought forward by an individual, given that there are no other viable and effective agents to advance such a judicial review.

I would also like to draw the Court's attention to a letter of support which the PEI Right to Life Association has written to me which I have included in my supplemental Record under tab 31. The President, on behalf of the Board of Directors, not only expressed agreement with the facts and arguments contained in my Factum, but also expressed the hope that the judge handling the case would grant the requested declarations and order I am seeking.

This application is of great interest to many fellow Islanders who are opposed, on principle, to using provincial tax revenue to pay for therapeutic abortions, especially if there is no statutory authority for the Minister of Health to do so, and I am confident that it would be of interest to many more if they were properly informed of the actual legal and political options available to the provincial government given its jurisdiction on this matter and the absence of being legally compelled to offer and pay for abortions as I have explained. But as I suggested earlier, it is unborn children who lack any voice or legal representation in this situation who are most severely affected by the implementation of abortion-on-demand for non medically-required surgical abortions – and it is the unborn who must here be granted due consideration.

I believe the fact that unborn children have been almost entirely eclipsed in the process which has brought abortion-on-demand to PEI, with neither voice nor legal representation regarding these issues to date, makes the issue of whether I will be granted standing and this judicial review will take place of central importance. It was, to a large extent, this same consideration that lead the Supreme Court judges to grant Borowski standing in 1981. As Judge Martland stated in his ruling, in the second paragraph of the document under tab 26, on page 302 of my Record:

> *The legislation proposed to be attacked has a direct impact upon the unborn human foetuses whose existence may be terminated by legalized abortions. They obviously cannot be parties to proceedings in court and yet the issue as to the scope of the Canadian Bill of Rights in the protection of the human right to life is a matter of considerable importance. There is no reasonable way in which that issue can be brought into court unless proceedings are launched by some interested citizen.*

I would argue that such is also the case with my application. As the judge also noted in his ruling, Borowski had made numerous attempts to have his legitimate concerns dealt with in a formal and professional manner prior to filing an application for a judicial review of the law – interventions and actions should have resulted in the federal government itself taking the initiative to have the legal issues Borowski raised tested in court – but all his efforts were to no avail. As the judge noted in the first paragraph of p. 296 of the document at tab 26, *"In every instance, the efforts of the plaintiff to move public officials to impugn the validity of the abortion provisions referred to in*

paragraph 4 hereof by judicial proceedings met with negative response. No one undertook to subject these provisions, of great public importance, to judicial review."

Similarly, I have made a number of attempts to have my concerns that the changes to PEI's abortion policy - especially allowing and paying for abortions at the Moncton hospital with neither prior approval nor a doctor's referral based on the abortions being "medically required" - lacked statutory authority, but, like Borowski, to no avail. I have not only raised these issues through numerous published articles, I have also sent these concerns directly to the Premier, but I never received a response to my concerns, nor did the Premier even acknowledge receipt of my communication. Nor has there been any public response from the government to the key questions and concerns I have addressed to the Premier and Minister of Health in my published articles. My efforts to have these key issues addressed have either been ignored or challenged.

Given the fact that it is unborn children who have the greatest interest in the issues brought forth in this application for a judicial review, I would submit that the court should grant standing to me and decide on these issues. There is a strong legal tradition within Canada that governments and Courts are obligated to give due consideration to the best interests of children at all times.

The Respondent included four separate public opinion articles which I published recently in Island Newspapers, one of which is found at tab "C" titled "Names that must not be spoken aloud." One of the main reasons I wrote that article was to draw attention to the fact that not only was no consideration given to the best interests of unborn children in the course of the announcement by the Premier and Minister of Health that abortion services would be offered in PEI and paid for without the need for a doctor's referral, or without the need for pregnant women to even see a doctor and have a determination made that an abortion was medically-required, but to point out that at no time in the entire process were unborn children even mentioned."

There have been a number of recent legal precedents highlighting the obligation governments at all levels have to undertake a thorough analysis to determine the best interest of children when enacting or amending legislation – and, in the case of the courts, when interpreting legislation. Given this legal tradition - the failure of the PEI government to mention or discuss the negative impact of its abortion services changes on the unborn represents a major deficiency which I believe is of central importance to this application for judicial review.

I would like to draw your attention to what the Supreme Court of Canada said in its landmark 2015 ruling - *Kanthasamy v. Canada* - concerning the need to always undertake a "best interests of the child" analysis, and how consideration of the impact of

laws on children must be a primary concern in all government decisions and actions. I will do this by referring to several key citations that were taken from the Supreme Court ruling and relied on in a more recent Federal Court ruling which was delivered in April, 2016, which I have included in my supplemental Record under Tab 25. If you would turn to page 262 you will see four consecutive paragraphs cited. All are important, but I would like to read the first two, paragraphs 36 and 37.

> *[36] Protecting children through the "best interests of the child" principle is widely understood and accepted in Canada's legal system: A.B. v. Bragg Communications Inc., [2012] 2 S.C.R. 567, at para. 17. It means "[d]eciding what ... appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention": MacGyver v. Richards (1995), 22 O.R. (3d) 481 (C.A.), at p. 489.*
>
> *[37] International human rights instruments to which Canada is a signatory, including the Convention on the Rights of the Child, also stress the centrality of the best interests of a child: Can. T.S. 1992 No. 3; Baker, at para. 71. Article 3(1) of the Convention in particular confirms the primacy of the best interests principle:*
> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

Relying on this precedent-setting case, Justice Shore extended these fundamental principles and concerns to the unborn child. Given the direct relevance of his ruling to this application for judicial review, I would like to read the first two arguments of his decision found on page 261 of my supplemental Record under Tab 25.

> *1 One must always ask oneself: Is one's decision (in perspective, in anything, and, overall) good for children? If we have not considered that, then, have we, in the three separate branches of government, executing policy, legislating, or simply, but, interpreting legislation (as judges should) actually fulfilled our mandates, recognizing that Canada is a signatory to the United Nations Convention on the Rights of the Child. It is with this, that the Supreme Court of Canada grappled; and, then, decided in its recent landmark judgment on the consideration of the best interests of the child, in Kanthasamy v. Canada (Citizenship and Immigration), 2015 SCC 61, [2015] 3 SCR 909 [Kanthasamy].*

2. Kanthasamy is a judicial time capsule decision as it genuinely addresses all present and future decisions in respect of the best interests of a child. The judgement of the Supreme Court has been launched as to how to consider in all cases the best interests of a child; yet, nevertheless, to consider the best interests of the child together with all other factors to be balanced, ensuring that the rights of a child and by extension those of an unborn child, are considered significantly and profoundly in view of all circumstances, situations and ramifications of cases.

The judge noted that the federal government *Immigration and Refugee Protection Agency (IRPA)* refused to give due consideration to the unborn child or apply the 'best interest of the child test,' with the argument that the test doesn't apply to unborn children saying,

> *"...the fact of the pregnancy is just that and the panel cannot give it much weight given that until there is a live birth there are per se no best interests of this yet to be born child [that] would be determinate of the appeal."*

Citing another ruling on p.11 of the decision, judge Shore rejected that argument with the following statement: *"....the clear and reasonable best interests of the child analysis above apply equally to any unborn child. <u>There are no distinguishing factors that would make the case of an unborn or newborn child any different.</u> [And he added Emphasis on the sentence: "There are no distinguishing factors that would make the case of an unborn or newborn child any different" which is highly significant]*.

As well, Judge Shore applied the best interest principle to the unborn child relying on the *Convention on the Rights of the Child,* to which Canada is a signatory. The Convention was brought into force on September 2, 1990. That convention carried forward a key principle from the 1959 *Declaration of the Rights of the Child* to which Canada was also a signatory. The 1959 Declaration is found at Tab 17 of my Record where the following statement appears in the 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." In the 1990 *Convention on the Rights of the Child*, in the second paragraph from the bottom, on p. 313 of my Supplemental Record, under Tab 30, this same statement in incorporated as follows: *"Bearing in mind that, as indicated in the Declaration of the Rights of the Child, '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.'"*

By not undertaking a 'best interest of the child analysis' in a move to facilitate and fund what is now effectively abortion-on-demand for PEI residents – at least with respect to the Moncton hospital policy – and by amending the health services payment regulations in a bid to erase the requirement that, in each case, an abortion is determined to be

medically-required, the Minister has shown what can only be called callous disregard for the best interests of unborn children. Given the grave repercussions from these changes for unborn children, and given the fact that the Convention on the Rights of the Child explicitly states that children need "....appropriate legal protection, before as well as after birth," I would submit that standing should be granted to me so that the substantive issues at the heart of this application for judicial review can be deliberated and decided by this court.

3. A Reasonable and Effective Means to Bring the Action Forward

In his review of various issues relating to the granting of standing in his written ruling on the Downtown Eastside Sex Workers case, Judge Cromwell commented on what he referred to as a number of "interrelated matters that courts may find useful to take into account when assessing the third discretionary factor" in the three-part test for standing, namely, whether the application represents a "reasonable and effective means of bringing the issue before the court." He argued that a flexible approach is required to consider the "reasonable and effective means" factor, and lists a number of considerations, which can be found on p. 553 of the ruling under tab 11 of the Respondent's Record.

Those considerations include (1) the capacity of the applicant to bring forward a claim, including whether the issue will be presented in a sufficiently concrete and well-developed factual setting. I would submit that I have met that condition with the quality of the material submitted in my Factum and Application Record. (2) Also, he notes that courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged person in society whose legal rights are affected. I would argue that the unborn as a class are such disadvantaged persons in the present case and they therefore deserve to have the issues I have brought forward duly considered by this Court. If I am not granted standing, this will not happen; (3) the judge also suggested that consideration should be given to whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources, and would present a context more suitable for adversarial determination, adding the suggestion that courts should take a 'practical and pragmatic' approach on this question. I would submit that if I am not granted standing today, the issues brought before this court will not be brought forward by anyone else. As already noted, the issues have been raised with the government and they don't want them considered by the Court, otherwise they would not be seeking to have this action dismissed on the grounds that I don't have standing. Women wanting abortions for non-medical reasons will obviously not bring forward these issues, since the *status quo* which this application challenges currently offers them fully-funded abortions for any reason, without the need for a doctor's referral.

The only organization with a mandate to protect the rights of the unborn have already indicated their support for my action, including agreement with the facts, arguments and remedies I am seeking from the court. It would therefore neither be practical nor pragmatic to deny me standing on the basis that it would be more appropriate for the PEI Right to Life Organization to advance such an action. Doctors are legally protected under the law – especially given the absence of a federal criminal code law on abortion – so would have no reason to bring forward an action other than on the same basis I am bringing it forward, e.g., as a taxpayer and concerned citizen. The same can be said for any other group or class of individuals in PEI.

As with the Borowski case, and as stated at the end of paragraph 1 on page 281 of my supplemental Record, "This issue could not reasonably be brought into Court unless proceedings were launched by an interested citizen." To conclude my comments on this part of my presentation, I would like to read a few lines from the article by Christina Lam and Theresa Yurkewich found at Tab 27 of my supplemental Record in the first paragraph on p. 306. The authors are commenting on the same Supreme Court ruling by Justice Cromwell as I have been discussing:

> *"Justice Cromwell here emphasized the need to balance these purposes with the reason public interest standing was created: to give effect to the principle of legality. In so far as it reinforces the right of the citizenry to state action that conforms to constitutional and statutory limits and provides a practical, effective way to challenge state action, public interest standing is a vital element of legality."*

I would like to now turn to the final issue, namely the contention by the Respondent that I should not be granted standing because the issues have become "moot".

4. Have the Issues become Moot?

In the Respondent's Statement of Facts, in paragraph 13, found on page 6, it states that public interest standing may be lost if the issues raised become moot. Presumably, the Respondent is here alleging that given the fact that the *Health Services Payment Act Regulations* were amended effective June 4, 2016 - specifically Section 1(c) (iv), the provision dealing with abortion - there is no longer any issue for the court to decide, given that the Minister clearly has the power under the *Health Services Payment Act* to make and amend regulations, including the power to decide which health services are 'basic health services' under the provincial *Health Services Plan.*

However, according to the legislation, making a health service a “basic health service” does not, in and of itself, guarantee that the health service will qualify for payment under the provisions of the *Health Services Payment Act.* There is a fundamental requirement attached to all health services in the plan; namely, that they be “medically required,” and this also applies equally to so-called 'basic health services,' as is clearly evidenced by the definition of that term found in both Health Acts, the Regulations, and the Preamble to the Tariff portion of the Master Agreement.

Under tab 6 of my Application Record, p. 78, Section 1(d) of the HSPA defines “basic health services as follows: *“Basic health services” means all services rendered by physicians that in the opinion of the Minister are medically required.....”*

Under tab 7, p.94, Section 1(c)(1) of the HSPA Regulations, “basic health services” are said to include *“only those services that are rendered by physicians that are medically required....”*

Under tab 29, p. 310, Article AS.2 we see the same definition of Basic Health Services which is found in the HSPA, as “....meaning all services rendered by physicians that in the opinion of the Minister are medially required.”

The change made to the abortion regulation 1(c)(iv) effective June 4, 2016, simply removed the wording which explicitly articulated a condition which implicitly applies to all basic health services, as per the meaning of that term in the HSPA, HSPA regulations and the Master Agreement. A comparative analysis of the wording of the regulatory provision prior to and after the amendment illustrates this point: the wording prior to the amendment is found at tab 7, p.95....it reads as follows: “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.” The amended regulation as found in the Respondent's application record, under tab 6, p.2, section 1(c) (iv) reads: “services provided in respect of termination of pregnancy performed in a hospital.”

As we can see, the amended provision simply removed the following words: “....when the condition of the patient is such that the service is determined by the Minister to be medically required.” However, as is clear in the parent legislation, being “medically required” is a condition that applies to all health services, regardless of whether they are called 'basic health services' or whether they may have other conditions attached to them as well, as per the definition of “basic health services” found in the HSPA, HSPA Regulations and the Master Agreement, all of which were previously cited.

The amendment made to 1(c)(iv) in the HSPA regulations was clearly an attempt to circumvent the requirement that abortions be medically required, and it was publicly announced as such. The June 9, 2016 CBC article reporting this change in the regulation, found under tab 28, p. 308 of my Application Record, and makes the intent of this regulatory change obvious with the headline: "Abortions no longer need to be 'medically required' for P.E.I. to pay for them." But according to the parent statutes, both the HSPA and the HSA, they must be medically required.

As I previously mentioned, I am aware that there is no question that the legislation gives the Minister the power to decide which health services are to be included in the *Health Services Payment Plan* – and there are many services which are not included and paid for by the province solely because they are not deemed to be medically required, notwithstanding the fact that they involve medical, and/or surgical procedures – the legislation does not give the Minister the power to waive the requirement that included health services be "medically required." In fact, Section 1 (e) of the *Health Services Act*, found under tab 5, p. 62 of my Application Record, explicitly states that health services means "...services related to the prevention of illness or injury, [therapeutic abortions prevent neither illness nor injury]; the promotion or maintenance of health, [therapeutic abortions do not promote or maintain health, in fact there is a sizable body of scientific literature to the contrary]; or the care and treatment of sick, infirm or injured persons..." [therapeutic abortions do not take place to care or treat the sick, infirm or injured]. This more general definition of "health services" found in the Health Services Act simply does not allow allow non-medically required medical procedures such as therapeutic abortions to be included in the definition of "health services" and be eligible for payment under the Health Services Plan. For example, plastic surgery for purely cosmetic purposes would not meet this basic definition of 'health services' under the Act so it is not surprising that they are therefore not paid for under the PEI Health Services Plan.

The *Health Services Payment Act* not only defines "Basic Health Services" such that they must be medically required, it actually charges the Minister with the duty to ensure that when health services are not medically required, they are not paid for under the Health Payment Plan. Under tab 6, p.81 of my Application Record, section 4 of the HSPA outlines the additional powers of the Minister under the Act. It states: *"In addition to the duties and powers enumerated in Part 1, it is the function of the Minister and the Minister has power...."* and if we move to provision (h) one such function is.... *"to withhold payment for basic health services for any entitled person who does not, in the opinion of the Minister, medically require the services."*

This section of the HSPA is not simply noting a discretionary power, but defines this power as an obligation and duty by using the combined terms “function and power”. The *Interpretation Act*, found under tab 7 of the Respondent's Application Record, p. 1602, section (m) explains that in an enactment the term “functions” includes powers and duties.

Given that the Minister has both the duty and power under the HSPA to not pay for basic health services that are not medically required, and given that the definition of basic health services as health services that are medically required is found in both the parent health statutes - the HSA and the HSPA - the fact that the HSPA Regulation was amended by Cabinet removing the requirement that therapeutic abortions be medically required under the provincial health services payment plan actually brings Section 4(h) in the Health Services Payment Act into play: In other words, in the very act of attempting to authorize paying for abortions which are not medically required by removing that condition from the regulation, the government has triggered the duty explicitly articulated in Section 4(h) of the HSPA which obliges the Minister to withhold payment for such non-medically required abortions.

As outlined in paragraphs 22 – 27 of my affidavit found under tab 2 of my application record, there are two additional issues which are also central to this judicial review. Besides the issue of not paying for abortions which are not medically required I have just finished discussing, I am contending that the Minister is exceeding his authority by paying for abortions for two other completely distinct reasons, which I will deal with separately.

First of all, within the Master Agreement between the Medical society, the Province and Health PEI it states (under tab 9, p. 124) that the Preamble to the Tariff of Fees is deemed to form part of the regulations governing the delivery and payment of health services under the *PEI Health Services Plan.* Although it stipulates that 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), to my knowledge, no such conflict exists, so the regulatory provisions in the two policies at issue which are outlined in the Preamble to the Tariff of Fees continue to have statutory authority; namely, the policy attached to therapeutic abortions requiring *Prior Approval*, and the policy regarding the *Criteria for out-of-Province Referrals.*

Section 30 of the Preamble to the Tariff of Fees outlines the policy governing prior approval within the PEI Health Services Plan. Specifically, the fee code for therapeutic abortions found in Schedule D of the Tariff of Fees (Tab 9, p.128) which explicitly indicates that prior approval is required. Nowhere in either the provisions of the HSPA or Regulations is this regulatory requirement superseded or nullified. Therefore, the practice which the government has publicly announced and continues to promote (as

restated in the email communication to the CBC on June 9, tab 28, p. 308) that the province is paying for therapeutic abortions in Moncton despite the fact that they are not complying with the regulation requiring prior approval.

Another substantive issue I have raised relates to the province's existing policy titled "Criteria for out-of-Province Referrals." This policy is found within the Master Agreement's Preamble to the Tariff of Fees and, again, has the legal status of a regulation. This policy can be found under tab 9, p. 129 of my application record. Section 1(ii) of the policy guidelines states that "All cases excluding extreme emergency or sudden illness require written approval from the Department of Health," and under section 1(viii) it states that "Prior written approval must be obtained for out-of-Province treatment." Again, no where in either the parent statute or regulations is there a provision that supersedes or nullifies this policy; so, as per Article A2 of the Master Agreement (found on tab 29, p. 310 of my Application Record) these provisions of the agreement are binding upon the government of PEI, Health PEI and the Medical Society (A2.1) and can only be amended by mutual agreement, in writing, with no verbal agreements being required, permitted or recognized." (A2.4).

To conclude, I believe that I meet each of the conditions found in paragraph two of the Borowski ruling on page 303 of tab 26 of my Record where he writes:

> *I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court."*

I would submit that I have raised issues which should be of concern to the government regarding their acting without legislative authority, but those concerns have been ignored and, in fact, challenged by the Minister. The issue impacts me directly, and I have a public interest in this issue. The fact of the matter is that there is no one else who will bring this matter before the Court, and I believe it is a matter of significant importance. Given all of the aforementioned reasons and arguments, I respectfully request that I be granted standing.