

Court File No.

SUPREME COURT OF PRINCE EDWARD ISLAND  
(GENERAL SECTION)

**BETWEEN:**

**ABORTION ACCESS NOW PEI INC.**

**Applicant**

and

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

**Respondent**

APPLICATION UNDER s. 2(1) of the *Judicial Review Act*, RSPEI 1988, c J-3, and Rule 14.05(3)(g) of the *Rules of Civil Procedure*.

**NOTICE OF APPLICATION**

TO THE RESPONDENT

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

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

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any document in the application, you or a lawyer acting for you must prepare a notice of appearance and form 38A prescribed by the Rules of Civil Procedure, Service on the applicants lawyer for, where the applicant does not have a lawyer, serve it on the applicant at least three clear days before the hearing, and file it with proof of service in the court office where the application is to be heard, at least three clear days before the hearing date.

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

[Date]

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

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

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

1. The applicant makes application for:
  - 1) A declaration that the policy of the Government of Prince Edward Island (the “Province”) that abortions will not be performed in PEI (the “Abortion Policy”) is *ultra vires* the *Health Services Act*, RSPEI 1988, c H-1.5;
  - 2) A declaration that the Minister of Health and Wellness of the Province (the “Minister”) has acted outside the scope of his lawful authority by administering abortion services in a manner inconsistent with the Provincial Health Plan, contrary to subsection 2(2) of the *Health Services Act*;
  - 3) A declaration that the Abortion Policy unjustifiably infringes sections 15, 7 and 12 of the *Canadian Charter of Rights and Freedoms* (the “Charter”), Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, and is of no force and effect;
  - 4) A declaration that paragraph 1(c)(iv) of the *Health Services Payment Regulation*, PEI Reg EC499/13, unjustifiably infringes subsection 15(1) and section 7 of the Charter and is of no force and effect;
  - 5) A declaration that paragraph 6(1)(c) of the *Health Services Payment Regulation*, to the extent that it applies to termination of pregnancy services including induced abortion, unjustifiably infringes subsection 15(1) and section 7 of the Charter and is, to that extent, of no force and effect;
  - 6) To the extent necessary, an extension of time under s. 3(1.1) of the *Judicial Review Act*;
  - 7) An order for the costs of this proceeding; and

8) Such further and other relief as this Honourable Court deems just.

2. The grounds for the application are:

### **A. Background and Relevant Facts**

#### **The parties**

- 1) The applicant, Abortion Access Now PEI Inc. ("AAN PEI"), is a non-share capital corporation registered under the Prince Edward Island *Companies Act*, RSPEI 1988, c C-14.
- 2) AAN PEI is a non-profit corporation with the purpose of promoting, advocating for and creating the conditions for access to publicly-funded abortion services in PEI. AAN PEI carries out a number of objects in furtherance of this purpose, including education, community outreach and advocacy.
- 3) AAN PEI was registered in 2015 by a group of directors who have individually spent decades advocating on behalf of PEI residents for safe local access to abortion. AAN PEI is the formalization of a network of advocates for reproductive justice that has existed in PEI for many years.
- 4) The membership of AAN PEI is composed of PEI residents who support the purpose of the corporation, and accept the principles of freedom of choice, universality of access, equality and inclusion.
- 5) The membership of AAN PEI includes PEI residents who have been or may be directly impacted by the Abortion Policy.
- 6) No individual woman in PEI is or will be capable of bringing an application for the relief sought in the instant case during the short time that she may be directly affected by the Abortion Policy.

- 7) The social stigmatization of abortion in PEI and the intimate and private nature of the decision to seek an abortion make it unreasonable to require individual women to advance this case in their own names.
- 8) The respondent Minister is responsible for the administration of the PEI health care system under the *Health Services Act* and the *Health Services Payment Act*, RSPEI 1988, c H-2.

### **The PEI health care system and Health PEI**

- 9) Prior to 2010, health services in PEI were administered regionally, under the provincial ministry responsible for health, currently the Ministry of Health and Wellness.
- 10) In 2010, Health PEI was established as a Crown Corporation pursuant to the *Health Services Act*. Health PEI is responsible for the provision and delivery of health services in PEI, and the operation and management of health facilities and resources (the “PEI health care system”).
- 11) Health PEI is accountable to the Minister in its administration of the PEI health care system, under s. 12(2) of the *Health Services Act*.
- 12) Payment for health services and other costs associated with the PEI health care system is governed by the *Health Services Payment Act*.

### **Terminology**

- 13) For the purposes of this Application, the following terminology will be used:
  - a. “termination of pregnancy services” refers to any medical services related to the termination of pregnancy for any reason; and
  - b. “induced abortion” or “abortion” refers to the voluntary or elective termination of a pregnancy by surgical intervention.

- 14) “Therapeutic abortion” is another term for “induced abortion” which pre-dates the decriminalization of abortion in Canada. Section 251 of the *Criminal Code*, RSC 1970, c C-34 (“Section 251”), exempted a woman and her medical practitioner from the criminal prohibition against abortion, if the abortion was performed in a hospital with the prior approval of the hospital’s “therapeutic abortion committee”.
- 15) The term “therapeutic abortion” is still used by the Province. That term is replaced by “induced abortion” or “abortion” in this Application.

### **Induced abortion is not performed in PEI**

- 16) Induced abortions have not been provided in PEI since 1982.
- 17) The Province provides payment for induced abortions for PEI residents if performed in a hospital in Nova Scotia or New Brunswick. In order for a resident to obtain an abortion in Nova Scotia, a PEI physician must first communicate to Health PEI that the procedure is a “medical necessity”.
- 18) There are no private abortion providers in PEI.
- 19) Because PEI residents must travel outside of the province to access abortion, the procedure is unavailable to many residents.

### **The Abortion Policy dates back to 1988**

- 20) The Supreme Court of Canada struck down Section 251 as unconstitutional in January 1988, decriminalizing the provision of abortion in Canada.
- 21) In February 1988, the Legislative Assembly of PEI passed a resolution (“Resolution 17”) in response to the decriminalization of abortion, announcing that the Legislative Assembly of PEI opposed the performing of abortions, and that any policy that permits abortion is unacceptable except to save the life of the mother.

- 22) Resolution 17 remains the Province's guiding statement of its position on the performance and provision of abortion.
- 23) Since 1988, the Province has maintained a policy that induced abortions will not be performed in PEI (the "Abortion Policy").
- 24) Consistent with Resolution 17, the purpose of the Abortion Policy is to advance a particular conception of morality and to restrict access to abortion as a socially undesirable or immoral practice.

### **The Province takes positive steps to enforce the Abortion Policy after 1988**

- 25) Since 1988, the Province has taken measures to structure an administrative and regulatory framework to prevent abortions from being performed in PEI, in accordance with the Abortion Policy.
- 26) The principal tools used by the Province to implement the Abortion Policy include:
  - a. A requirement that induced abortions be provided in hospitals in order to be funded by the Province (the "Hospital Requirement");
  - b. A requirement that induced abortions be pre-approved by at least one PEI physician before they are funded by the Province (the "Pre-Approval Requirement"); and
  - c. The ongoing exercise of the Minister's discretion or authority under the *Health Services Act* and the *Health Services Payment Act* to obstruct the provision of abortions in PEI.
- 27) As a consequence of the positive steps taken by the Province to enforce the Abortion Policy, abortions are not performed in PEI. In particular:

- a. The Hospital Requirement and the Pre-Approval Requirement have had the practical effect of preventing physicians from performing abortions in hospitals in PEI; and
  - b. The actions of the Province to discourage the provision of abortions in PEI, including in relation to the 2014 Business Case (described below), have had a chilling effect on physicians who were otherwise willing to perform abortions in the province.
- 28) The Province has furthered the Abortion Policy by only funding abortions for PEI residents if performed in a hospital in New Brunswick or Nova Scotia, as described below (the “Out of Province Requirement”).
- 29) As a result of the Abortion Policy, women must travel off-Island to obtain induced abortions.
- (i) *The unwritten approval policy and the Abortion Regulations***
- 30) After 1988, the Province had an unwritten policy to fund induced abortions only under conditions that mirrored the limitations contained in Section 251: that is, if deemed to be a medical necessity by a committee of doctors, and performed in a hospital.
- 31) In 1993, Dr. Henry Morgentaler indicated that he wished to open an abortion clinic in PEI, and commenced litigation with the objective of securing funding from the Province for abortions performed outside of a hospital.
- 32) In 1994, in order to defeat Dr. Morgentaler’s litigation and to prevent him from performing abortions in PEI, the Province enacted paragraphs 1(c)(iv) and 6(1)(c) of the *Health Services Payment Act Regulations*, PEI Reg EC499/13 (the “Abortion Regulations”).
- 33) Paragraph 1(c)(iv) excluded any termination of pregnancy from the definition of “basic health services” eligible for payment, unless the procedure was

performed in a hospital *and* the Minister determined in each case that the condition of the patient was such that the procedure was “medically required”.

- 34) Paragraph 6(1)(c) delegated the Minister’s decision on whether a termination of pregnancy is “medically required” to the Health Services Payment Advisory Committee, composed of five doctors.
  - 35) The Abortion Regulations formalized the Hospital Requirement and the Pre-Approval Requirement, which had previously existed only as an unwritten policy.
- (ii) *Health PEI’s billing system implements the Pre-Approval Requirement***
- 36) The payment for health services in PEI is administered in accordance with a “Tariff of Fees”, which forms an Appendix to the Master Agreement negotiated between Health PEI, the Province and the Medical Society of PEI.
  - 37) The Tariff of Fees includes fee code 6010 (“Code 6010”) which is labelled “therapeutic abortion”.
  - 38) Prior approval from Health PEI is required before a physician may bill the Province for services under Code 6010. This request for approval would trigger application of the Pre-Approval Requirement in the Abortion Regulations.
  - 39) No criteria or guidelines exist for the Pre-Approval Requirement in the Abortion Regulations. Neither the Minister nor Health PEI has informed PEI physicians or residents how the Health Service Payment Advisory Committee is to exercise its discretion to approve an abortion under the Regulations.
  - 40) No PEI physician has ever received payment from Health PEI for services rendered under Code 6010.

**(iii) The Out of Province Agreements**

- 41) In 1995, the Province entered into an agreement with the Termination of Pregnancy Unit (“TPU”) at the Queen Elizabeth II Health Sciences Centre in Halifax, Nova Scotia, for the provision of abortion to PEI residents.
- 42) The agreement with the TPU is described in an internal Health PEI policy (the “Out of Province Policy” or “OOP Policy”).
- 43) The OOP Policy provides that a PEI resident can obtain approval for the payment of an abortion performed in Halifax at the TPU only if a request for approval of funding is made by a PEI physician who deems the procedure to be “medically necessary”. This referral requirement is another manifestation of the Pre-Approval Requirement of the Abortion Policy.
- 44) PEI physicians are not required to provide a referral to the TPU when approached by a patient seeking an abortion. Many PEI physicians refuse to provide TPU referrals.
- 45) It is not possible for women to obtain an abortion at the TPU without referral by a physician.
- 46) The OOP Policy states that abortions provided at a private clinic outside of PEI are not eligible for payment by the Province.
- 47) In June 2015, the Province entered into an agreement with the Province of New Brunswick (the “Moncton Agreement”).
- 48) The Moncton Agreement provides for payment for induced abortions for PEI residents at the Moncton City Hospital after July 1, 2015.
- 49) The Moncton City Hospital does not require a physician referral or pre-approval of “medical necessity” for New Brunswick or PEI residents.

- 50) Residents of PEI who obtain an abortion at the TPU or at the Moncton City Hospital are responsible to pay all incidental and travel expenses.
- 51) The OOP Policy and the Moncton Agreement (collectively, the “Out of Province Agreements”) reflect the Out of Province Requirement of the Abortion Policy.
- (iv) *The Minister has actively enforced the Abortion Policy***
- 52) The Minister has exercised his authority under the *Health Services Act* and *Health Services Payment Act* to enforce the Abortion Policy.
- 53) For example, in 2013, a physician from Nova Scotia approached the Medical Directors of two hospitals in PEI and offered to travel to PEI to provide induced abortions to PEI residents twice a month.
- 54) Health PEI developed a business case for the provision of abortions at the Ambulatory Care Centre at the Queen Elizabeth Hospital in Charlottetown (the “2014 Business Case”).
- 55) The 2014 Business Case provided a cost-neutral alternative for the provision of abortions in PEI, as compared with payment by the Province for the procedure at the TPU in Halifax.
- 56) The 2014 Business Case was approved by the Provincial Medical Advisory Committee of Health PEI on or about February 20, 2014, and forwarded to the Health PEI Executive Leadership Team.
- 57) Minister Doug Currie directed the CEO of Health PEI to cease work on the 2014 Business Case because it did not accord with the Abortion Policy.
- 58) The Minister rejected the 2014 Business Case without consideration of its merits, and for the improper purpose of preventing abortions from being performed in PEI.

### **The unavailability of abortion in PEI has caused harm**

- 59) The Abortion Policy has made access to abortions for PEI residents difficult and uncertain.
- 60) The Abortion Policy has caused delays and hardships in access, and in many cases has prevented women from accessing abortion altogether.
- 61) Women who seek an induced abortion or who seek post-abortion care in PEI suffer stigma and receive sub-standard medical care.
- 62) Difficulty, uncertainty, delay, lack of access and stigma cause PEI women physical and psychological harm, including harm to conscience and dignity.

### **B. The Abortion Policy is *ultra vires* the *Health Services Act***

- 63) The Abortion Policy is *ultra vires* the *Health Services Act* and the *Health Services Payment Act*.

### **Health Services to be Provided in the Province**

- 64) Subsection 3(1) of the *Health Services Act* requires the Minister to establish a Provincial Health Plan (the "Plan"). Subsection 2(2) of the *Health Services Act* requires the Minister to ensure the provision of health services in the province in accordance with the Plan.
- 65) In or about July 2010, the Minister established a Provincial Health Plan as required by the *Health Services Act*. This Plan remains in effect to date.
- 66) The Plan sets out the health services to be provided in the province.
- 67) Induced abortion falls within the categories of health services the Plan states are to be provided in the province.
- 68) The exclusion of induced abortion from the health services to be provided in the province is inconsistent with the Plan.

- 69) Although hospitals in PEI provide termination of pregnancy services comparable to induced abortion, including “incomplete abortion” or “missed abortion”, they do not provide induced abortions.

### **Health Services to be Provided Out of Province**

- 70) The Plan provides that PEI residents will be referred out of province only for highly specialized in-patient and out-patient treatments, procedures and consultations.
- 71) Induced abortion is not a specialized procedure.
- 72) The Out of Province Requirement created by the Abortion Policy is inconsistent with the Plan.

### **Goals of Quality, Equity, Efficiency and Sustainability**

- 73) The Plan provides that health services will be delivered in accordance with the principles of quality, equity, efficiency and sustainability.
- 74) The Abortion Policy is inconsistent with the principles of the Plan, including equity and efficiency.

### **The Minister has Acted Outside the Scope of his Authority**

- 75) Subsection 2(2) of the *Health Services Act* requires the Minister to ensure the provision of health services in PEI in accordance with the Plan.
- 76) The Minister has acted and continues to act outside the scope of his authority by administering abortion services in PEI contrary to the Plan.
- 77) The Minister has acted and continues to act outside the scope of his authority by administering abortion services in accordance with the Abortion Policy, for purposes extraneous or irrelevant to the legislative grant of authority under the *Health Services Act* and *Health Services Payment Act*.

## C. The Abortion Policy and Abortion Regulations offend the Charter

### Breaches of Section 15 of the Charter

78) Subsection 15(1) of the Charter states:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

79) The Abortion Policy and Abortion Regulations infringe the right to equality under subsection 15(1) of the Charter.

#### (i) ***The Abortion Policy is discriminatory***

80) The Abortion Policy constitutes government action taken under the authority of the *Health Services Act*.

##### ***a. The Abortion Policy creates a distinction based on pregnancy or sex***

81) Abortion is a medical procedure accessed exclusively by persons who become pregnant. Pregnancy discrimination is sex discrimination.

82) The Abortion Policy treats abortion in a manner that is different from the way the Province treats comparable basic health services.

83) The Abortion Policy singles out abortion for disadvantageous treatment and thereby creates a distinction based on pregnancy or sex.

##### ***b. The Abortion Policy has a discriminatory purpose***

84) The purpose of the distinction created by the Abortion Policy is to restrict women's access to induced abortion on the basis that it is a socially undesirable or immoral practice.

85) The purpose of the distinction is discriminatory on the basis of sex and infringes subsection 15(1) of the Charter.

***c. The Abortion Policy has a discriminatory effect***

86) The sex-based distinction drawn by the Abortion Policy creates a disadvantage by perpetuating prejudice or stereotyping, contrary to section 15 of the Charter.

87) Women historically have experienced disadvantage in the form of barriers to accessing reproductive health services, including abortion.

88) Women historically have faced prejudice, stereotyping and stigmatization in relation to reproductive decision-making.

89) The effects of the Abortion Policy perpetuate the historical disadvantage, prejudice and stereotyping experienced by women in relation to reproductive health.

(1) *The Abortion Policy limits access to induced abortion and imposes burdens on women*

90) The Abortion Policy perpetuates the pre-existing disadvantage experienced by women in relation to reproductive health by erecting barriers to abortion access.

91) The Out of Province Requirement created by the Abortion Policy makes it necessary for women to travel to another province in order to access abortion, and has the effect of limiting or preventing women's access to abortion.

92) The Out of Province Requirement imposes costs, causes delay, and requires time away from work and family obligations, which prevent some women from accessing abortion.

- 93) Where the Out of Province Requirement prevents women from accessing abortion, it denies them the freedom to make important decisions concerning their health and their bodies.
- 94) The Out of Province Requirement also has the discriminatory effect of imposing a disproportionate amount of the costs of reproductive health upon women.
- 95) The Out of Province Requirement imposes costs, delay, and other burdens on pregnant women who require abortion, which are not imposed on other groups in relation to comparable health services.

(2) *The Abortion Policy perpetuates stigma*

- 96) The Abortion Policy perpetuates stigma against women who have had, or choose to have, an abortion.
- 97) Induced abortion is a stigmatized medical procedure. Stigma against women who seek or have previously obtained an abortion has existed historically, and continues to persist in PEI today.
- 98) Women who seek abortion are subject to public opprobrium, social ostracism, and negative treatment by medical professionals and others within the health care system.
- 99) The Abortion Policy:
- a. Expresses disapproval for abortion and those who obtain it;
  - b. Reaffirms a view of women who exercise control over their reproduction by seeking or obtaining an abortion as reprehensible, immoral or unworthy;
  - c. Shames women who seek or obtain an abortion; and

d. Communicates to women who require an abortion that they have breached established norms of acceptable social behaviour.

100) The Abortion Policy harms the dignity of women who require or obtain an abortion, by telling them they are less worthy of recognition or value as a human being.

(3) *The Abortion Policy perpetuates disadvantage for people experiencing intersecting grounds of discrimination*

101) The Abortion Policy disproportionately disadvantages younger women, Aboriginal women, disabled women, single mothers, LBGTQ people, and victims of domestic violence.

102) These groups historically have been socially and economically disadvantaged. They continue to face prejudice, disadvantage and stereotyping in PEI today.

103) The Abortion Policy perpetuates the historical disadvantage, prejudice and stereotyping of these groups.

104) Age, race, family status, marital status, disability, sex, gender identity and sexual orientation are enumerated or analogous grounds of discrimination under subsection 15(1) of the Charter.

***d. The Abortion Policy renders the public health care system under-inclusive***

105) The Abortion Policy renders the PEI health care system under-inclusive in a manner that offends section 15 of the Charter.

106) The Provincial Health Plan purports to provide a comprehensive health care system, fair allocation of health services, and timely access to health services based on need.

- 107) The Abortion Policy excludes abortion from the medical procedures that are performed in the province.
- 108) The Abortion Policy denies women who seek abortion a state benefit enjoyed by others: the ability to access a basic ambulatory care service in their home province.
- 109) By excluding abortion from the health services provided in PEI, for purposes extraneous to the Plan, the Province has rendered the PEI health care system under-inclusive in a manner that is arbitrary, not based on need, and does not correspond to the situation or circumstances of PEI women.

**2. *The Abortion Regulations are discriminatory***

- 110) The Abortion Regulations discriminate against women and people assigned female at birth on the basis of pregnancy or sex, contrary to subsection 15(1) of the Charter.

***a. The Abortion Regulations create a distinction based on pregnancy or sex***

- 111) The Abortion Regulations create a distinction based on pregnancy or sex.
- 112) Paragraph 1(c)(iv) of the Regulation creates the Hospital Requirement which requires abortion to be performed in a hospital for payment, even though it is a procedure that can be performed safely outside of a hospital.
- 113) Paragraphs 1(c)(iv) and 6(1)(c) of the Regulation together create the Pre-Approval Requirement, which singles out abortion as a medical procedure that must be certified as “medically necessary” by a committee of physicians before it is considered a “basic health service”. No other comparable medical procedure is subject to the same requirement of prior approval.

***b. The Abortion Regulations have a discriminatory purpose***

- 114) The legislative purpose of the Abortion Regulations discriminates on the grounds of pregnancy and sex, contrary to subsection 15(1) of the Charter.
- 115) The primary purpose of the Abortion Regulations is to restrict women's access to induced abortion, including by deterring physicians from providing the service and by erecting procedural barriers.
- 116) The secondary purpose of the Abortion Regulations is to advance a particular conception of morality, which posits that life begins at conception and that abortion is morally wrong.

***c. The Abortion Regulations have a discriminatory effect***

- 117) The effects of the sex-based distinction created by the Abortion Regulations perpetuate the prejudice, historic disadvantage and stereotyping experienced by women.

(1) The Abortion Regulations perpetuate historical disadvantage in accessing abortion

- 118) Women have historically experienced disadvantage as a result of lack of access to reproductive health services, including abortion.
- 119) The Abortion Regulations perpetuate and exacerbate the historical disadvantage experienced by women requiring induced abortion, by creating barriers in the form of the Hospital Requirement and the Pre-Approval Requirement.
- 120) Due to the Hospital Requirement, the Province will only fund abortions if performed in a hospital. To date, the Minister has blocked all physicians' efforts to perform abortions in PEI hospitals including, most recently, by directing Health PEI not to proceed under the 2014 Business Case.
- 121) Even if abortions were to be made available in PEI hospitals, the Pre-Approval Requirement would still present a further barrier to access. A

committee of doctors would need to deem the procedure a “medical necessity” before the Province would fund the procedure. No other comparable medical procedure requires similar pre-approval.

122) The Pre-Approval Requirement in the Abortion Regulations has never been engaged but serves as a barrier to the provision of abortion in PEI.

(2) The Abortion Regulations deny women personal autonomy and decision-making capacity

123) Women historically have faced disadvantage in exercising control or autonomy over their bodies with respect to reproduction in both social and medical contexts.

124) The Pre-Approval Requirement in the Abortion Regulations perpetuates prejudice and stereotyping by denying women the freedom to make important decisions concerning their health, bodies and families.

125) The Pre-Approval Requirement perpetuates women’s historic disadvantage and harms their dignity by:

- a. Perpetuating the stereotype that women are not worthy or capable of making reproductive decisions;
- b. Perpetuating the historical legacy of state control over women’s reproductive decision-making, a matter fundamental to women’s personal autonomy;
- c. Communicating to women that the state knows what is best for women’s bodies and families;
- d. Diminishing respect for women’s autonomy and self-determination in relation to the decision whether to terminate a pregnancy; and
- e. Communicating to women that they are less worthy of recognition or value as human beings.

## Breach of Section 7 of the Charter

126) Section 7 of the Charter states:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

127) The Abortion Policy and Abortion Regulations infringe section 7 of the Charter by depriving PEI residents of the right to liberty and security of the person in a manner that does not accord with the principles of fundamental justice.

*(i) Governmental Action*

128) The Abortion Policy, including the Abortion Regulations, constitutes governmental action engaging section 7 of the Charter.

129) The Province established the Abortion Policy in response to the decriminalization of abortion and in an effort to prevent the performing of abortion in the province.

130) In particular, the Pre-Approval Requirement in the Abortion Regulations mirrors the requirements of Section 251, which was declared unconstitutional by the Supreme Court of Canada in 1988.

131) While the Province has established the PEI health care system, and has elected to provide termination of pregnancy services within that system, the Province has singled out induced abortion for restricted access within the PEI health care system.

132) The Province has singled out induced abortion for restricted access by structuring an administrative and regulatory framework that includes the Abortion Policy, the Out of Province Agreements, Code 6010 in the Master Agreement, and the Abortion Regulations.

133) In addition, the Minister has exercised his power under the *Health Services Act* to direct Health PEI to prevent the performing of abortion in PEI.

**(ii) Liberty**

134) The Abortion Policy and the Abortion Regulations engage and infringe the right to liberty.

135) The decision whether to terminate a pregnancy is a decision of fundamental personal importance.

136) The existence and operation of the Abortion Policy and the Abortion Regulations constitute state interference with the right of the individual to a protected sphere of autonomy over decisions of fundamental personal importance.

137) In particular, the Pre-Approval Requirement removes reproductive decision-making power from individual women and places it in a state-controlled committee of physicians.

138) In addition, by preventing women from accessing abortion, the Abortion Policy constitutes state interference with a woman's decision about whether or not to terminate her pregnancy.

**(iii) Security of the Person**

139) The Abortion Policy, including the Abortion Regulations, engages and infringes the right to security of the person.

140) The Abortion Policy is a state-imposed barrier to the right and ability of individual women to exercise control over matters fundamental to their physical, emotional and psychological integrity.

141) The Abortion Policy interferes with the physical integrity of women in need of induced abortion and deprives them of security of the person, including by:

- a. Increasing health risks associated with delays in accessing abortion;
- b. Requiring women to seek risky alternative options for the termination of pregnancy;
- c. Deterring physicians from providing safe abortions or post-abortion care; and
- d. Imposing unwanted pregnancy and delivery, and associated health risks, on women who are ultimately unable to access abortion.

142) Each of the effects of the Abortion Policy listed above also deprives women of security of the person by causing serious and profound psychological harm.

**(iv) *Principles of Fundamental Justice***

143) The Abortion Policy and the Abortion Regulations are arbitrary. None of the Hospital Requirement, the Pre-Approval Requirement, or the Out of Province Requirement is rationally connected to any valid governmental objective, including the Plan objective of delivering health services in accordance with the principles of quality, equity, efficiency and sustainability.

144) The increased risks to health and the psychological and physical harm caused by the Abortion Policy and the Abortion Regulations are grossly disproportionate to the objectives of the governmental action.

145) The Abortion Policy and the Abortion Regulations are overbroad.

**Breach of Section 12 of the Charter**

146) Section 12 of the Charter states:

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

147) The Abortion Policy, including the Abortion Regulations, infringes section 12 of the Charter by subjecting residents of PEI who require abortion and post-abortion care to cruel and unusual treatment.

**(i) *The Abortion Policy is state treatment***

148) The Province has established the PEI health care system. The Province controls the administration and delivery of health services within the PEI health care system.

149) PEI residents who require medical care in connection with a pregnancy are within the administrative control of the Province. Medical care in connection with a pregnancy, including termination of pregnancy services, is not available in PEI outside of the PEI health care system.

150) The Province, through the Abortion Policy and the Abortion Regulations, has eliminated the availability of induced abortion in PEI, whether in or outside of hospitals.

151) A woman seeking medical care in relation to her pregnancy, including an abortion, is subject to an active state process involving state control over the individual.

152) The Abortion Policy targets PEI women for particular treatment within the PEI health care system, in order to advance a particular conception of morality.

**(ii) *Treatment is cruel and unusual***

153) By deliberately structuring an administrative and regulatory framework to prevent the provision of abortions in PEI pursuant to the Abortion Policy, the Province has targeted women in order to advance a particular conception of morality. It has done so with cruel indifference to the effects of the Abortion Policy on PEI women.

154) The Abortion Policy causes:

- a. Limited, uncertain or delayed access to induced abortion;

- b. Recourse to risky alternative treatment options;
  - c. Disproportionate harm to minors and other particularly vulnerable sub-groups;
  - d. A chilling effect which deters health care providers from providing access to safe abortion or post-abortion care; and
  - e. Hardships associated with travel to obtain an abortion.
- 155) All of the above-listed impacts of the Abortion Policy cause PEI women grossly disproportionate physical and psychological harm, including harm to conscience.
- 156) This state treatment is grossly disproportionate, arbitrary, has no value or social purpose, shocks the general conscience, is unusually severe and degrading to human dignity and worth, and amounts to cruel and unusual treatment contrary to section 12 of the Charter.

### **Section 1 of the Charter**

- 157) Section 1 of the Charter states:
1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
- 158) The said infringements of sections 15, 7 and 12 of the Charter cannot be justified pursuant to the criteria of section 1, the burden of proof of which lies on the Province.
3. The following documentary evidence will be used at the hearing of the application:
- a. Affidavits to be filed; and

- b. Such further or other documentary evidence as counsel advises and the Court permits.

[Date]

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Nasha Nijhawan

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