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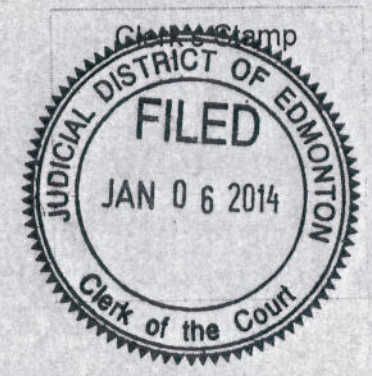
| COURT FILE NUMBER | 1203 05815 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | EDMONTON |
| APPLICANT | C.F. |
| RESPONDENT | DIRECTOR OF VITAL STATISTICS |
| INTERVENER | THE MINISTER OF JUSTICE AND SOLICITOR GENERAL OF ALBERTA |
| DOCUMENT | **Merits Brief** of the Respondent and Intervener |

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# MERITS BRIEF OF THE RESPONDENT AND INTERVENER FOR A SPECIAL CHAMBERS APPLICATION SCHEDULED FOR JANUARY 17, 2014 AT 10:00 a.m.

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## INDEX

## PART I – STATEMENT OF FACTS

### A. Introduction and Factual Background

1. This case is about the extent to which the Legislature must make special provisions in its Vital Statistics legislation to accommodate transgendered individuals who choose not to surgically change their anatomical sex structure to the opposite sex from that which appears on the individual's birth registration document.

2. It is the Respondent and the Intervener's position ("Alberta") that the current legislative scheme records sex at birth and provides birth certificates that reflect the sex as recorded in the Vital Statistics Registry. It does not record gender identity. This scheme is supported by a neutral and rationally defensible policy choice that is not discriminatory. Permitting those who have undergone surgery to change their anatomical sex structure to change the sex designation on their record of birth pursuant to s. 30 of the *Vital Statistics Act* is ameliorative under s. 15(2) of the *Charter*. It is therefore not discriminatory under s. 15(1) of the *Charter*.

3. The Applicant has the initial burden of showing that s. 30 creates a distinction that is based on an enumerated or analogous ground. It is Alberta's position that there is no such distinction. If the Court were to conclude that there is a distinction based on enumerated or analogous grounds it is Alberta's position that it is ameliorative under s. 15(2) of the *Charter*.

4. The Applicant was born with male sexual anatomy. The Applicant's birth registration shows the Applicant's sex as male.[1] The Applicant was diagnosed with Gender Identity Disorder[2] and currently lives as a woman but the Applicant's anatomical sex structure has not been surgically changed to the opposite sex from that which appears on the Applicant's birth registration document. The Applicant applied to the Director of Vital Statistics (now the Registrar of Vital Statistics) to change the sex designation on the Applicant's birth registration from "male" to "female" on the basis of an error in registration.

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[1] Certified Record of Proceedings, Tab C, p. ABJ0026, Registration of Live Birth

[2] Letter from Dr. Warneke (psychiatrist) dated November 3, 2011, Certified Record of Proceedings, Tab C, p. ABJ0030.

5. The Application was denied on the basis that there was no error in the birth registration. An error is defined in s. 1(1)(h) of the *Vital Statutes Act*, SA 2007, c V-4.1 [**Applicant's Book of Authorities Tab 1**], (as it was in the prior *Act*) as "incorrect information, and includes the omission of information". The Applicant was referred to the provision of the legislation which addresses amendment to a birth registration when the person has had the person's anatomical sex structure changed to a sex other than that which appears on the person's birth certificate.[3]

6. The Applicant brings this application for judicial review of the refusal of the Director of Vital Statistics to change the sex designation on the Applicant's record of birth from "male" to "female" and challenges the constitutional validity of the entire *Vital Statistics Act*, SA 2007, c V-4.1 [**Applicant's Book of Authorities Tab 1**], and in particular s. 30(1) which states that:

> 30(1) When a person's anatomical sex structure has been changed to the opposite sex from that which appears on the person's birth registration document, the Registrar, on receipt of
>
> (a) an affidavit from each of 2 physicians, each affidavit stating that the anatomical sex of the person has been changed, and
>
> (b) evidence as to the identity of the person as prescribed in the regulations,
>
> shall amend the sex on the person's record of birth ....

7. The Applicant's application to the Director of Vital Statistics for the change to the sex designation was made under s. 24(3) of the *Vital Statistics Act*, RSA 2000, c V-4 which provided for corrections in registrations. That legislation was repealed and replaced with the *Vital Statistics Act*, SA 2007, c. V-4.1 (the "*VSA*") [**Applicant's Book of Authorities Tab 1**], which came into force on May 14, 2012. Section 30 (the "change of sex provision") of the current *VSA* addresses amendment of a person's record of birth on change of anatomical sex structure and is almost identical to s. 22 of the repealed legislation. Errors after registration are now provided for in s. 60 of the current *VSA*. The definition of "error" has not changed.

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[3] Section 22(1) of the *Vital Statistics Act*, RSA 2000, c V-4, the legislation in effect at the time of the Applicant's application, refers to 'birth certificate'. The current legislation, the *Vital Statistics Act*, SA 2007, c V-4.1, s. 30(1) refers to 'birth registration document'.

8. The Amended Originating Application for Judicial Review filed by the Applicant on December 9, 2013 alleges the following at paragraphs 14-16:

- The Director erred by finding that the Applicant's sex was recorded correctly at the time of birth, despite the evidence before the Director establishing otherwise;
- Alternatively, the Director erred by:
    - interpreting s. 24(3) [s. 60 of current *VSA*] to be limited to correcting errors based on the information available at the time of birth, as opposed to the best information available at the time of the Application, or otherwise interpreting s. 24(3) of the Act incorrectly or unreasonably, and
    - failing to find that, on the proper interpretation of s. 23(4), the Applicant's Application should have been granted;
- The Director owed the Applicant a duty of fairness, which the Director breached by:
    - relying on materials which the Applicant had no knowledge of,
    - failing to provide the Applicant with a copy of those materials,
    - failing to provide the Applicant with an opportunity to make submissions in regard to those materials before making the decision; and
    - failing to provide reasons for the decision.

9. The Applicant has not addressed any of these issues in the Brief of Law filed in this matter. Accordingly, Alberta considers these arguments abandoned.

10. The Amended Originating Application for Judicial Review filed by the Applicant on December 9, 2013 also alleges that the *VSA* and especially s. 30 of the *VSA* violates two rights that are constitutionally protected under the *Charter of Rights and Freedoms, Constitution Act, 1982*. Specifically it is alleged that there are violations of:

> Section 7 – the right to life, liberty and security of the person in a manner that is inconsistent with the principles of fundamental justice that laws not be arbitrary, overbroad, grossly disproportionate or impermissibly vague.
>
> Section 15 – the right to equality on the grounds of sex, mental or physical disability, gender identity, trans status and on the basis of being asexual. The Applicant claims that transgendered individuals are denied the benefit of a "birth registration that accurately reflects their lived sex".

11. The Applicant has not addressed s. 7 of the *Charter* in the Brief of Law filed in this matter. Accordingly, Alberta considers this argument abandoned. Therefore the only issue to be argued on this application is whether the *VSA* and especially s. 30 of the *VSA* violate s. 15 of the *Charter*.

12. The Applicant requested the following constitutional relief in the Amended Originating Application for Judicial Review:

- a declaration that s. 22 of the prior *VSA* and s. 30 of the current *VSA* is inconsistent with ss. 7 and 15(1) of the *Charter* and not reasonably justifiable under s. 1 of the *Charter* and consequently of no force or effect to the extent of the inconsistency (para. 34(e) and(g));

- an Order "severing the effective requirement to have surgery, in a manner to be determined by the Court" (para. 34(f) and (h); and

- if necessary, a constitutional exemption from the requirements of s. 22 of the *VSA* and/or s. 30 of the current *VSA*.

13. However, in the Brief of Law filed by the Applicant, the following relief is requested:

- an Order directing Alberta to amend the sex designation on the Applicant's birth registration from "male" to "female" (Applicant's Brief, pages 35-36); and

- a declaration that the *VSA* is "unconstitutional in its entirety and of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*" (Applicant's Brief, page 36).

14. By letter dated April 17, 2012 to the Attorney General of Alberta, [**Alberta's Book of Authorities TAB 1**] the Applicant states that the text of the Originating Application for Judicial Review provides the necessary written notice contemplated by s. 24 of the *Judicature Act*. It is the position of the Minister of Justice and Solicitor General of Alberta that the Applicant has not complied with the provisions of s. 24(3) of the *Judicature Act*, RSA 2000, c J-2.

15. While Alberta has received sufficient particulars of the proposed argument relating to the constitutional validity of s. 30 of the *VSA* it has not received sufficient advance particulars relating to the constitutional validity of the recording of sex at birth and the reporting of sex at birth on a birth certificate. Alberta requests that should the Applicant's arguments be accepted that the provisions for recording sex at birth and reporting sex on a birth certificate be found to be unconstitutional, Alberta be given an opportunity to present evidence and make submissions with regard to justification under s. 1 of the *Charter* at a later date.

16. Alberta intervenes pursuant to s. 24(4) of the *Judicature Act*, R.S.A. 2000, c. J-2, as amended, to defend the impugned legislation.

17. Alberta relies on the above facts as well as the entire legislative context of this application. In this regard, it is trite to say that in a legislative context, words may acquire a distinct legislative meaning. Though the meaning of the words "sex" and "gender" may overlap in some contexts, the words are not synonyms, and in the context of the *VSA*, they are not interchangeable. Furthermore, it would be a clear error to read "sex" in the *Act* to mean gender identity, or socially and culturally defined or constructed gender. The birth registration records apparent and observed sex at birth and the birth certificate certifies sex as recorded at birth. The impugned change of sex provision allows for a change of sex when an individual's anatomical sex structure has changed. The *VSA* does not provide for recording or certifying gender or gender identity.

### B. Additional Legislative Facts

18. In the broader legislative context, the Government of Alberta makes available to the general public of Alberta identity documents that specifically address and provide for the recognition of assumed sex, which reflects a gender identity without a change in anatomical sex structure in the *Identification Card Regulation*, AR 221/2003, ss. 1(d.1), 9.1, 9.2, 9.3 [**Bichai Affidavit**, Exhibit V, pp. 6-10)] and in the *Operator Licensing and Vehicle Control Regulation*, AR 320/2002, ss. 1(x.2), 20.1, 20.2, 20.3 [**Bichai Affidavit**, Exhibit V, pp. 1-5]. Unlike the birth certificate, both of these documents contain a photograph of the bearer.

19. In order to obtain a Driver's Licence or Identification Card which reflects a transgendered person's lived gender, the individual need only make an application in writing to the Registrar of Motor Vehicles or the Minister of Service Alberta and provide a current letter from the applicant's psychiatrist or psychologist, who must be an accredited member of any College of Physicians and Surgeons or College of Psychologists in Canada that states that the applicant is under the care of the psychiatrist or psychologist, and that in the opinion of the psychiatrist or psychologist the change in the sex designation on the person's identification card is appropriate.

## PART II – ALBERTA'S POSITION

20. The application should be dismissed because:

- The s. 15(1) *Charter* claim is without merit. The change of sex provision under the repealed and current *Vital Statistics Acts* does not make any distinction on the basis of an enumerated or analogous ground of discrimination, and even if it did, it ameliorates the condition of transsexual individuals who have changed their anatomical sex structure. There is no discrimination.

- If the change of sex provision is in violation of s. 15(1) of the *Charter*, the infringement can be demonstrably justified in a free and democratic society.

## PART III – POINTS OF LAW AND ARGUMENT

Historical Context

21. Alberta has filed the Affidavit of Mona Bichai, the Deputy Registrar of Vital Statistics in these proceedings. The Affidavit explains the genesis of the vital statistics registry.

22. The responsibility for "The Census and Statistics" is assigned to the federal government under s. 91(6) of the *Constitution Act, 1867*. In 1879 Parliament passed the *Census and Statistics Act*, 1879, vol. 1. That *Act* provided that a census was to be taken in 1881 and every 10 years thereafter. One of the items of information required to be collected when taking a census was the sex of an individual.[4] The accuracy of the census record created was important and defects and inaccuracies were to be corrected.[5] Penalties could be imposed in a number of circumstances and in particular persons who without lawful excuse refused or neglected to answer a census question or who wilfully answered a census question falsely could be assessed a monetary penalty.[6]

23. Over the years, the federal *Census and Statistics Acts* were repealed and replaced or amended but the content remained similar. The *Census and Statistics Act*, 1906, 4-5 E. VII, c. 5, established the Census and Statistics Office.[7] The Dominion Bureau of Statistics was created by Parliament pursuant to The *Statistics Act*, 1918, RSC, -9 G.V. c. 43.[8] That *Act* also authorized the Minister of Trade and Commerce to enter into arrangements with the government of any province for the collection by any provincial department or officer of any statistical or other information

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[4] Bichai Affidavit, Exhibit "A", s. 3
[5] Bichai Affidavit, Exhibit "A", ss. 9, 10, 11
[6] Bichai Affidavit, Exhibit "A", s. 16
[7] Bichai Affidavit, para. 7, Exhibit "B"
[8] Bichai Affidavit, para. 8, Exhibit "C"

required for the purpose of carrying out or giving effect to the *Act*.[9] Provincial officers executing the power or duty imposed on them under the *Act* were deemed to be officers under the Act.[10]

24. The current federal Act, *Statistics Act*, RSC 1985 c. S-19,[11] continues the statistics bureau (now known as Statistics Canada) whose duties are:

(a) To collect, compile, analyse, abstract and publish statistical information relating to the commercial, industrial, financial, social, economic and general activities and condition of the people;

(b) To collaborate with departments of government in the collection, compilation and publication of statistical information, including statistics derived from the activities of those departments;

(c) To take the census of population of Canada and the census of agriculture of Canada as provided in this Act;

(d) To promote the avoidance of duplication in the information collected by departments of government; and

(e) Generally, to promote and develop integrated social and economic statistics pertaining to the whole of Canada and to each of the provinces thereof and to coordinate plans for the integration of those statistics.[12]

25. Section 10(1) of the *Statistics Act*, RSC, 1985, s. S-19 also allows for arrangements with provincial governments providing for any matter necessary or convenient for the purpose of carrying out or giving effect to the *Act*.[13]

26. In 1919 the Privy Council of Canada passed Order P.C. 693 to establish a national system of vital records and statistics. It was agreed that the provinces would undertake to obtain the returns of marriages, births and deaths and forward the information to the Dominion Bureau of Statistics.[14]

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[9] Bichai Affidavit, para. 9, Exhibit "C"
[10] Bichai Affidavit, para. 9, Exhibit "C"
[11] Bichai Affidavit, para. 32 and 33, Exhibit "O"
[12] Bichai Affidavit, para. 32, s. 3 of Exhibit "O"
[13] Bichai Affidavit, para. 33, Exhibit "O"
[14] Bichai Affidavit, paras. 13 and 14, Exhibit "F"

27. The Minister of Trade and Commerce of the Government of the Dominion of Canada (the "Dominion") and the Minister of Health of the Government of the Province of Alberta entered into an agreement on May 5, 1945 regarding the supply by the Province of transcripts or certified copies of the original returns of marriages, births and deaths occurring in the province to the Dominion. This agreement is still in effect.[15]

28. In 1946 the Privy Council passed Order P.C. 4851 which, among other things, created the Vital Statistics Council of Canada (the "Council") which is still in existence. The Council "is an interjurisdictional advisory group composed of the heads of the vital statistics divisions/agencies from all of the provincial and territorial governments and the Health Statistics Division of Statistics Canada".[16] Mona Bichai, the Deputy Registrar of Vital Statistics for Alberta is Alberta's representative on the Council.[17]

29. The key business functions of the Council are to:

- Exist as a forum to discuss issues around registration and certification of births, deaths, stillbirths and changes of name
- Facilitate sharing exchange and retention of information, data and research between jurisdictions
- Facilitate discussions with a view to creating a uniform approach with regard to governing legislation, data collection and certification of vital events. The group also facilities the transfer and receipt of national and provincial/territorial data to Statistics Canada
- Liaise with service providers groups (e.g. physicians, coroners, funeral directors, law enforcement agencies, lawyers, notaries, etc.)
- Liaise with federal and provincial government departments
- Liaise with US counterparts:
    - National Centre for Health Statistics
    - National Association for Public Health Statistics and Information Systems

[15] Bichai Affidavit, para. 16, Exhibit "H"
[16] Bichai Affidavit, paras. 17 and 19, Exhibit "I"
[17] Bichai Affidavit, para. 20

30. The Council has agreed that the registrars in each of the provinces and territories will collect the following specified set of statistical data elements with regard to each birth and transmit that same information to Statistics Canada for inclusion in the Canadian Vital Statistics system:

- Date and place of child's birth
- Child's sex, birth weight and gestational age
- Parents' age, marital status and birthplace
- Mother's place of residence
- Type of birth (single or multiple); and
- Parity (the number of times a woman has come to term and delivered a child.[18]

31. Changes to registrations due to errors, amendments or omissions are also provided to Statistics Canada.[19]

32. Privy Council Orders P.C. 693 and 4851 are still in effect today and govern the relationship between the provinces and territories and Statistics Canada.[20]

33. Mona Bichai understands that in 1949 the Uniform Law Conference of Canada adopted the Uniform Vital Statistics (Model) Act.[21] Section 31(1) of the Model Act detailed the information that had to appear on a birth certificate and included the sex of the person. In 1959 the particulars to be included on a birth certificate as set out in the Model Act, were added to Alberta's *Vital Statistics Act*, 1959, c. 94 as s. 32.[22]

34. These are the same details included on a birth certificate issued today. Birth certificates are issued under s. 48(1) of the *VSA*. The details to be included in the standard birth certificate are set out in s. 24(1))(a) of the *Vital Statistics Ministerial Regulation*, Alta Reg 12/2012 and are as follows:

- The full legal name of the person to whom the birth certificate applies;
- The date on which and the place at which the person was born;
- The sex of the person;
- The date on which the person's birth was registered;
- The registration number assigned to it; and

[18] Bichai Affidavit, para. 34
[19] Bichai Affidavit, para. 35
[20] Bichai Affidavit, para. 18
[21] Bichai Affidavit, para. 22, Exhibit "K"
[22] Bichai Affidavit, para. 23, Exhibit "L"

- The date on which the certificate was issued.[23]

35. In 1992 the Uniform Law Conference of Canada undertook a review of the Uniform Vital Statistics Act (1949). W.D. Burrowes prepared a Report Relative to The Proposed Revision of The Model Vital Statistics Act (1949). W.D. Burrows notes in his Report that some provinces, including Alberta, provide for a sex change on a birth registration when a person has undergone surgery to change their sex but suggests that "it would be more appropriate to meet this need [some form of formal documentation of the change] by means of some kind of certificate of transsexual surgery, which could be presented along with a birth certificate when required."[24]

36. The Uniform Law Conference of Canada is in the process of conducting a review of the current Vital Statistics legislation in force in Canada.[25]

The Alberta Legislative History

37. The *Vital Statistics Act*, c 13 of the Statutes of 1907, respecting the registration of births, marriages and deaths occurring in the province, required that births be reported to the registrar by completing as far as possible the particulars required on form A, Registration of Birth, in the schedule to the Act.[26] The person who was required to provide the information had to certify that the information set out in the Registration of Birth form was true and correct to the best of that person's knowledge and belief. One of the items of information to be recorded on the Registration of Birth form was the "sex (Male or Female)" of the child born. That Act also imposed a duty on the registrar of vital statistics to correct errors in the entry of any birth, marriage or death information (s. 25). Penalties could be imposed on persons who knowingly or wilfully made or caused to be made false statements with regard to any particulars required to be reported and entered under the Act (s. 34).[27]

38. The 1907 *Vital Statistics Act* and amendments thereto was repealed and replaced with the *Vital Statistics Act*, c 22 of the Statutes of Alberta, 1916. That Act had similar provisions to the

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[23] Bichai Affidavit, para. 24
[24] Bichai Affidavit, para. 30, Exhibit "N"
[25] Bichai Affidavit, para. 31
[26] Section 14
[27] Bichai Affidavit, paras. 10 and 11

predecessor Act. Unlike the prior Act, this Act provided that at the time of registration of a birth, the district registrar was to issue to the person registering the birth, a certificate of registration of birth according to form F in the schedule to the Act (s. 20). The Certificate of Registration of Birth form certified that the birth of the specified individual was registered as having taken place at a specified location on a specified day.[28]

39. In 1949 a draft *Uniform Vital Statistics (Model) Act* was presented to the Uniform Law Conference of Canada. Section 31(1) of the Model Act provided that a birth certificate shall contain the following particulars:

> The name of the person
> The date of birth
> The place of birth
> The sex of the person
> The date of registration; and
> The serial number of the registration[29]

40. In 1959 the particulars to be included on a birth certificate as set out in s. 31(1) of the Model Act were added to Alberta's *Vital Statistics Act* as s. 32.[30]

41. These are the same details included on a birth certificate issued in Alberta today. Birth Certificates are issued under the authority set out in s. 48(1) of the *VSA*. Section 24(1) of the *Vital Statistics Ministerial Regulation*, Alta Reg 12/2012 permits the Registrar to issue two types of birth certificates, a standard birth certificate (s. 24(1))(a)) and a standard birth certificate with parentage (s. 24(1)(b)).[31]

42. In 1973 a provision was added to the *Vital Statistics Act* through a statute amendment (*Vital Statistics Amendment Act* 1973, c 86, s. 2, in force on assent, October 30, 1973 [**Applicant's Book of Authorities Tab 3**]) permitting the sex indicator on a person's record of birth to be amended if the person has had surgery which changes their anatomical sex structure from their sex

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[28] Bichai Affidavit, para. 12
[29] Bichai Affidavit, para. 22
[30] Bichai Affidavit, para. 23
[31] Bichai Affidavit, para. 24

at birth to that of the opposite sex. This section has remained virtually unchanged since its creation, with the exception of some small wording and structural changes to the provision.[32]

43. At second reading of Bill 65, The *Vital Statistics Amendment Act*, 1973, Minister Crawford, who introduced the Bill, states "[F]or those extraordinary and extremely rare cases where that [sex change operation] might occur, this now makes appropriate provision for registration of the change of sex."[33]

**The protection afforded by s. 15 of the *Charter* is not infringed by the *VSA***

44. It is now apparent based on arguments in the Applicant's Brief of Law, which were not disclosed in the Amended Originating Application (which served as the Applicant's constitutional notice under s. 24 of the *Judicature Act*) that two discrete parts of the *VSA* must be considered in the s. 15 analysis:

(1) The provision that permits recording and issuing a birth certificate that reflects a change in anatomical sex structure: s. 30 *VSA* [**Applicant's Book of Authorities Tab 1**]; and

(2) The provisions that require issuing a birth certificate that reflects sex as recorded at birth: s. 3 *VSA*(1) [**Applicant's Book of Authorities Tab 1**], *Vital Statistics Information Regulation*, Alta Reg 3/2012, s. 3(1) [**Alberta's Book of Authorities TAB 2**] and *Vital Statistics Ministerial Regulation*, Alta Reg 12/2012, s. 24(1)(a) and (b). [**Applicant's Book of Authorities Tab 6**]

45. The current test for discrimination under s. 15(1) of the *Charter* is as stated by the Supreme Court of Canada in ***R v. Kapp***, 2008 SCC 41, [2008] SCR 483 [**Applicant's Book of Authorities Tab 15**] and as further explained and refined by the Supreme Court of Canada in ***Withler v. Canada (AG)***, 2011 SCC 12, [2011] 1 SCR 396 [**Applicant's Book of Authorities Tab 16**]. A claimant must show that:

- The law creates a distinction that is based on an enumerated or analogous ground; and
- The distinction creates a disadvantage by perpetuating prejudice or stereotyping.

46. The latest discrimination decision from the Supreme Court of Canada, ***Quebec (AG) v A***, (***sub nom Droit de la famille – 091768***) 2013 SCC 5, [2003] SCJ No 5 [**Applicant's Book of**

[32] Bichai Affidavit, para. 26
[33] Bichai Affidavit, para. 26, Exhibit "M"

**Authorities Tab 13**] did not change the test – the test was simply applied differently by the members of the Court resulting in different results. This "reflects the somewhat malleable or flexible nature of that test as well as the inherent difficulty that has always existed when applying s. 15(1) equality rights to government action."

> ***R v B (TM)***, 2013 ONSC 4019; 2013 CarswellOnt 10174, at para. 27 [**Alberta's Book of Authorities TAB 3**]

47. Abella J for a majority of the Supreme Court on the s. 15(1) analysis in ***Quebec (AG) v A***, *supra*, [**Applicant's Book of Authorities Tab 13**] indicates at para. 331 that with regard to the second stage of the analysis:

> *Kapp* and *Withler* guide us, as a result, to a flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group. As *Withler* makes clear, the contextual factors will vary from case to case -- there is no "rigid template":
>
> > *The particular contextual factors relevant to the substantive equality inquiry at the second step [of the Andrews test] will vary with the nature of the case. A rigid template risks consideration of irrelevant matters on the one hand, or overlooking relevant considerations on the other:* Kapp. Factors such as those developed in *Law* -- pre-existing disadvantage, correspondence with actual characteristics, impact on other groups and the nature of the interest affected -- may be helpful. However, they need not be expressly canvassed in every case in order to fully and properly determine whether a particular distinction is discriminatory … [Emphasis added; para. 66]

48. All factors relevant to the analysis should be considered; it may be necessary to consider the larger social, political and legal context:

> Just as there will be cases where each and every factor need not be canvassed, so too will there be cases where factors not contemplated in *Law* will be pertinent to the analysis. At the end of the day all factors that are relevant to the analysis should be considered. As Wilson J. said in *Turpin*,
>
> > In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, **it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context**. [p. 1331] [Emphasis added]
>
> ***Withler* v. *Canada (AG)***, *supra*, at para. 66 [Headnote Applicant's Book of Authorities Tab 16, quoted passage **Alberta's Book of Authorities Tab 4**]

49. Alberta's Court of Appeal has indicated that a more nuanced approach is required when it comes to adverse effects discrimination:

> [...] However, when it comes to adverse effect discrimination, a more nuanced approach is required. Under the *McGill University* analysis (at para. 49), the mere presence of a disproportionate effect on a protected group is not conclusive if it does not engage artificial and stereotypical assumptions. "**It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, that triggers the possibility of a remedy**." The extent to which the prohibited ground factored into the decision is inherently relevant to the test. [Emphasis added]
>
> ***Wright v College and Assn. of Registered Nurses of Alberta***, 2012 ABCA 267, 68 Alta LR (5th) 219 at para. 61 **[Alberta's Book of Authorities TAB 5]**

50. Abella J's decision has not eliminated the need for a claimant to establish a causal link between the distinction in the law and the substantive discrimination complained of. In ***Symes v R***, [1993] 4 SCR 695, 110 DLR (4th) 470 **[Alberta's Book of Authorities TAB 6]**, Iacobucci J writing for the Court states at para. 142 (WL):

> If the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved. We must take care to distinguish between effects which are **wholly caused, or are contributed to**, by an impugned provision, and those social circumstances which exist independently of such a provision. ... [Emphasis added]

51. The Supreme Court of Canada has repeatedly emphasized that not every difference in treatment between individuals or groups will constitute discrimination under s. 15(1) of the *Charter*.

> ***R v Kapp***, supra, at para. 28 **[Headnote Applicant's Book of Authorities Tab 15]**

**Section 30 of the *VSA* is not discriminatory under s. 15 of the *Charter***

52. The claimant must establish that he or she has been denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1). An analogous ground is one based on a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity: ***Corbiere v Canada (Minister of Indian & Northern Affairs)***, [1999] 2 SCR 203, 173 DLR (4th) 1 at para. 13 (WL). To date the Supreme Court of Canada has recognized citizenship, marital status and sexual orientation as analogous grounds.

53. It is therefore for the Applicant to establish that a distinction is drawn by s. 30 of the *VSA* or by the other provisions of the *VSA* on the basis of an enumerated or analogous ground. If the Applicant can do so, then it is open to Alberta to attempt to establish that the legislative provision is ameliorative under s. 15(2). If Alberta cannot discharge its burden under s. 15(2), the analysis returns to s. 15(1) to determine whether, having regard to all relevant factors, the distinction the law makes between the claimant group and others substantively discriminates by perpetuating disadvantage or prejudice to the claimant group, or by stereotyping it.

> ***Alberta (Aboriginal Affairs and Northern Development) v Cunningham*** (*sub nom Peavine Métis Settlement* v. *Alberta (Minister of Aboriginal Affairs & Northern Development)*, **[Cunningham]** 2011 SCC 37, [2011] SCR 670 at para. 44 and 47 **[Applicant's Book of Authorities Tab 17]**

54. Under s. 15(2), the government must show that the program is a genuinely ameliorative program directed at improving the situation of a group that is in need of ameliorative assistance in order to enhance substantive equality. There must be a correlation between the program and the disadvantage suffered by the target group. The goal is to promote the substantive equality of the group. To ascertain whether these conditions are met, one looks first to the object of the program, and then asks whether it correlates to actual disadvantage suffered by the target group.

> ***Cunningham***, *surpa*, at para. 44 **[Applicant's Book of Authorities Tab 17]**

55. The first step of the s. 15(1) analysis requires the Applicant to identify the distinction at issue and to establish that the distinction is based on an enumerated or analogous ground.

> ***Quebec (AG) v A***, *supra*, per Abella J, para. 348 **[Applicant's Book of Authorities Tab 13]**

56. The Applicant (Brief, para. 80) refers to the "impugned regime" rather than to s. 30 and alleges that the "impugned regime" draws a distinction on the basis of being transgendered: someone who is not transgendered can obtain a birth certificate with a sex designation that accords with his or her lived sex simply by asking for one pursuant to s. 48 of the *VSA* whereas someone who is transgendered cannot obtain a birth certificate with a sex designation that accords with his or her lived sex unless and until the person first undergoes surgery.

57. The Applicant does not properly identify the distinction made in s. 30 of the *VSA* and has not established that the distinction is based on an enumerated or analogous ground.

58. Section 30 of the *VSA* does not make a distinction based on an enumerated or analogous ground, and no one is denied the right to change their registered birth sex on the basis of an enumerated or analogous ground, either directly or by adverse effect. The distinction is based on a change of the anatomical sex structure. Providing for a change of birth sex on the basis of change in the anatomical sex structure does not discriminate against those who suffer gender identity disorder/dysphoria. Rather, it provides a benefit that only they can reasonably be expected to enjoy.

59. In short, the provision that permits a change in sex on a birth registration where evidence of a change of anatomical sex structure is provided is neutral and non-discriminatory and is not based on a distinction that can give rise to discrimination within the meaning of s. 15(1) of the *Charter*.

60. Furthermore, even if the distinction was based on an enumerated or analogous ground, s. 30 of the *VSA* would remain clearly ameliorative, and would simply reflect an approach to a complex matter that respects substantive equality.

**Section 30 of the *VSA* is an ameliorative provision under s. 15(2) of the *Charter***

61. Section 30 of the *VSA* is an ameliorative provision intended to benefit those who suffer from gender identity disorder/dysphoria and who have undergone medical procedures that have changed the person's anatomical sex structure.

62. The provisions qualifies as a genuinely ameliorative program because it

(a) is directed at improving the situation of those who have changed their anatomical sex structure and are in need of ameliorative assistance,

(b) has a correlation between the recording a change of sex and the disadvantage suffered by those whose anatomical sex after surgery is incongruent with their reported sex, and

(c) promotes the substantive equality of those who have changed their anatomical sex structure.

63. Though the Applicant asserts that the change of sex provision is underinclusive, the legislative distinction is the product of an ameliorative purpose that does not perpetuate disadvantage or stereotyping. Any alleged underinclusiveness does not make it discriminatory.

64. In ***Lovelace v Ontario***, 2000 SCC 37, [2000] 1 S.C.R. 950, (*sub nom Ardoch Algonquin First Nation & Allies v Ontario*) [**Applicant's Book of Authorities Tab 20, quoted passage Alberta's Book of Authorities TAB 7**] at paras. 85 and 86 the Supreme Court of Canada states:

> [...] Here, the focus of analysis is not the fact that the appellant and respondent groups are equally disadvantaged, but that **the program in question was targeted at ameliorating the conditions of a specific disadvantaged group rather than at disadvantage potentially experienced by any member of society**. In other words, we are dealing here with a targeted ameliorative program which is alleged to be underinclusive, rather than a more comprehensive ameliorative program alleged to be underinclusive.
>
> Having said this, **one must recognize that exclusion from a targeted or partnership program is less likely to be associated with stereotyping or stigmatization** or conveying the message that the excluded group is less worthy of recognition and participation in the larger society. [Emphasis added]

65. Section 30 of the *VSA* is targeted at ameliorating the conditions of those who suffer from gender identity disorder/dysphoria and have surgically changed their anatomical sex structure. The provision simply recognizes the immutable nature of surgical changes to a person's anatomical sex structure and the categorically different circumstances the surgical change to the anatomical sex structure produces.

66. In ***Cunningham***, *supra*, [**Alberta's Book of Authorities TAB 8**] the Supreme Court of Canada adds:

> [51] While *Lovelace* pre-dated *Kapp*, the Ontario Court of Appeal's analysis followed a broadly similar template. The court first examined whether the program was a genuinely ameliorative program. Having confirmed that it was, it then asked whether restriction of the benefits of the casino program to on-reserve Indians (members of registered reserve bands) conformed to the object of the program. It concluded that it did. The object of the scheme was to benefit on-reserve Indians. **The narrow focus of the program**

> **corresponded to historic, social and governance differences between the targeted groups and other Aboriginal groups**. … [Emphasis added]

67. The Court goes on to state at para. 53:

> This brings us to the following propositions. **Ameliorative programs, by their nature, confer benefits on one group that are not conferred on others. These distinctions are generally protected if they serve or advance the object of the program, thus promoting substantive equality**. This is so even where the included and excluded groups are aboriginals who share a similar history of disadvantage and marginalization: *Lovelace*. [Emphasis added]

68. The simple fact that s. 30 of the *VSA* is not more inclusive does not make it discriminatory. The provision simply draws a line at a place that will not frustrate the purpose of the *VSA* while serving an ameliorative purpose.

69. In short, the distinction drawn by s. 30 of the *VSA* is not based on an enumerated or analogous ground, and it cannot therefore operate in a discriminatory fashion within the meaning of s. 15(1) of the *Charter*. Even if one were to assume that s. 30 of the *VSA* makes a discriminatory distinction, it would nevertheless not infringe s. 15 of the *Charter* because it qualifies as an ameliorative provision protected by s. 15(2) of the *Charter*.

70. The Applicant asserts (Brief, paras. 96 and 97) that s. 30 of the *VSA* is not an ameliorative program for three reasons.

71. First, the Applicant (Brief, para. 97(a)) asserts that the "*VSA* regime" cannot properly be characterized as an ameliorative program because Alberta is already under a positive obligation to accommodate all transgendered people with respect to its birth registration system.

72. The Applicant has broadened the scope of s. 15(2) to include the provisions regarding the recording of sex at birth and the reporting of sex on a birth certificate. It is only s. 30 of the *VSA* that Alberta characterizes as an ameliorative program under s. 15(2) of the *Charter*.

73. The Applicant asserts (Brief, paras. 97(a), 103, 105, 107) that by choosing to enact a birth registration system and given it the societal significance that it has, Alberta becomes positively

obligated to treat transgendered people on a substantively equal basis with respect to that system. Further, the Applicant alleges (Brief, para. 106) that all of the cases in which s. 15(2) has been successfully invoked dealt with gratuitous schemes implemented by the government, schemes which it was not already under a positive obligation to implement and cites ***Lovelace***, ***Kapp*** and ***Cunningham***.

74. First, Alberta alleges only s. 30 provides an ameliorative program. Second, there is no positive obligation on the government to treat all transgendered people on an equal basis in this case. Section 30 specifically targets those transgendered individuals who have changed their anatomical sex structure. Alberta was under no obligation to enact s. 30 of the *VSA*.

75. The Applicant states (Brief, para. 102) that any justification for the differential basis on which Alberta deals with transgendered people are not relevant at this stage of the analysis and should be handled under s. 1 of the *Charter*.

76. The Applicant is referring to comments made by Abella J in ***Quebec (AG) v A***, *supra*. Abella J's comments relate to an analysis under the second part of the *Kapp* test under s. 15(1) of the *Charter* and do not relate to the test under s. 15(2). The Supreme Court of Canada made it very clear in ***Kapp***, *supra*, that under s. 15(2) the government must prove that the law or program at issue has an ameliorative or remedial purpose, <u>as opposed to effect</u>.

77. The Applicant next focuses attention on ***Vriend v Alberta***, [1998] 1 SCR 493, [1998] SCJ No 29 [**Applicant's Book of Authorities Tab 21**] (Brief, paras. 107-109) and states that "Applying Alberta's argument from the case at bar, Alberta would say that since Alberta's human rights legislation in ***Vriend*** was ameliorative in nature, any underinclusiveness was insulated from judicial review by s. 15(2) because Alberta was free to pick and choose a subset of disadvantaged groups to assist with its human rights legislation" and submits that "applying Alberta's logic to ***Vriend*** results in an absurdity".

78. ***Vriend*** concerned a challenge to the human rights legislation in effect at the time which prohibited discrimination on a number of specified grounds but did not include sexual orientation.

It was a general anti-discrimination benefit scheme. Section 30 of the *VSA* is limited to persons with gender identity disorder/dysphoria who have undergone surgery to change their anatomical sex structure.

79. Second, the Applicant states in the alternative (Brief, para. 97(b)), that if the "impugned regime" were to be characterized as an ameliorative program, its goal would have to be properly understood as improving the situation of transgendered people generally. The Applicant states that the means chosen to achieve that goal are irrational because most transgendered people do not undergo any surgeries, surgeries have serious risks, and the need for an amended birth certificate is not related to a change in "anatomical sex structure".

80. Again, it is Alberta's position that an ameliorative program can target a specific group of people, and in this case, that group is transgendered individuals who have changed their anatomical sex structure through surgery.

81. Section 30 of the *VSA* is intended to improve the position of those who suffer from gender identity disorder/dysphoria and have changed their anatomical sex structure. This interest is furthered by s. 30 of the *VSA* because it allows those whose anatomical sex structure following surgery is incongruent with their reported sex at birth, which is based on the newborn infant's apparent and observable sex, to have a change made to their birth registration so that the two correspond.

82. Limiting the scope of s. 30 protects the meaning of sex certified on birth certificates. Expanding the opportunity to change sex on a birth certificate risks altering the meaning of sex to gender identity as occurred in the Ontario Human Rights case of ***XY* v *Ontario (Government and Consumer Services)***, 2012 HRTO 726, [2012] OHRTD No 715 [**Applicant's Book of Authorities Tab 10**].

83. The Applicant alleges (Brief paras. 114-116) that the purpose of legislation must be determined by reference to intention at the time the provision is passed not by any variable that shifts with time. The Applicant points out that the provision was enacted in 1973 and its purpose

cannot be to "benefit those who suffer from gender identity disorder and who underwent procedure to change anatomical sex structure" as "gender identity disorder" did not exist as a diagnosis until 1980.

84. A plain reading of the Alberta, Legislative Assembly, *Hansard*, 16 October 1973 at 63-3372 **[Bichai Affidavit, Exhibit M]** makes it clear that talking about anatomical sex change. The reference is to "sex change".

> ... For the record, that reference was to **sex change**. I think we agreed that this particular provision of the bill might receive a relatively infrequent application. Therefore, for those extraordinary and extremely rare cases where that might occur, this now makes appropriate provision for **registration of the change of sex**. [Emphasis added]

85. The fact that the American Psychiatric Association first introduced gender identity disorder as a diagnostic condition in the 1980 Diagnostic and Statistical Manual of Mental Disorders does not mean that physicians were not performing "sex change" operations prior to 1973 or that the government had no knowledge of that.

86. Lastly, the Applicant alleges (Brief, para. 97(c)) that in the further alternative, if the goal of the ameliorative program is properly understood as assisting only those transgendered people who have changed their "anatomical sex structure, as opposed to transgender people generally, then the means chosen to achieve that goal are still irrational. The Applicant alleges that making a sex designation amendment conditional on surgery does not benefit those individuals because the need for an amended birth certificate does not arise when they undergo surgery, nor does the need to an amended birth certificate arise as a result of undergoing surgery. The Applicant states (Brief para. 126) that a transgendered person requires a change to the birth record when they start presenting as their felt sex.

87. This suggests that a transgendered person is well served by the birth certificate until they assert a gender identity that is inconsistent with or that does not correspond with the recorded sex. This further suggests that the complaint lies with the fact that the birth certificate does not change to reflect a changing gender identity, but simply certifies birth sex. This attacks the principle of recording and then certifying facts correctly recorded, and suggests that what is being sought here

is an ameliorative program to assist transgendered people rather than a remedy for allegedly discriminatory legislation.

88. In conclusion, s. 30 of the *VSA* is an ameliorative program under s. 15(2).

**The Applicant has not established that s. 30 of the *VSA* violates substantive equality**

89. In the alternative, if it is found that s. 30 of the *VSA* is not an ameliorative program under s. 15(2) of the *Charter*, it does not violate substantive equality.

90. The Applicant alleges (Brief, para. 144) that by making recognition of sex conditional on submission to surgical procedures the impugned regime is reinforcing prejudice.

91. The Applicant appears to be arguing that failing to help transgendered persons who have not had surgery to change their anatomical sex structure exacerbates discrimination. However, in truth, failing to help simply does not ameliorate a condition that exists independently of the *VSA*. The Applicant appears to equate surgery to change anatomical sex structure with any other type of cosmetic surgery that is freely available for a price from cosmetic surgeons, and fails to recognize that surgery to change anatomical sex structure is typically only available at an advanced stage of treatment for a properly diagnosed medical condition. In short, it is the treatment that requires surgery and not the *VSA*. The *VSA* simply recognizes that where surgery has been performed, a change in sex can be recorded.

**The recording of sex at birth and certification of sex on the Birth Certificate does not violate s. 15(1) of the *Charter***

92. In the Brief of Law filed in this matter, the Applicant appears to suggest that in addition to s. 30 of the *VSA*, the current legislative scheme for recording sex at birth and providing birth certificates that reflect the sex as recorded in the vital statistics registry are also discriminatory, although the Applicant's constitutional notice did not provide any particulars relating to this argument.

93. Section 2 of the *VSA* [**Applicant's Book of Authorities Tab 1**] provides that the birth of every child born in Alberta must be registered. Section 3(1)(c) of the *Vital Statistics Information Regulation*, Alta Reg 3/2012 [**Alberta's Book of Authorities TAB 2**] makes it mandatory to collect the sex of the child at the time a birth is registered. Two forms must be completed and submitted to the Registrar of Vital Statistics with regard to each birth. The first is a birth registration document. Within 10 days after the date of birth of a child a birth registration document must be completed by the birth mother or someone on behalf of the birth mother and delivered to the Registrar (s. 3(1) *VSA*). The second form is a notice of birth (s. 4 *VSA*) and is intended to confirm the birth facts, including the sex of the newborn child as reported to the Registrar in the birth registration document.[34] The notice of birth form is generally completed and delivered to the Registrar by the physician who attends a birth, but in some cases it will be completed and delivered to the Registrar by a nurse or other person who attends the birth, or by a hospital administrator.

94. If the information contained in the birth registration document and the notice of birth document correspond, the birth registration document is imaged into the database. Vital Statistics records the facts of a birth event as they are reported to it.[35]

95. Birth Certificates are issued under the authority set out in s. 48(1) of the *VSA* [**Applicant's Book of Authorities Tab 1**]. Section 24(1) of the *Vital Statistics Ministerial Regulation*, Alta Reg 12/2012 [**Applicant's Book of Authorities Tab 6**] permits the Registrar to issue two types of birth certificates, a standard birth certificate (s. 24(1))(a)) and a standard birth certificate with parentage (s. 24(1)(b)). The information that must appear on the standard birth certificate is as follows:

(i) the full legal name of the person to whom the birth certificate applies,

(ii) the date on which and the place at which the person was born,

(iii) the sex of the person,

(iv) the date on which the person's birth was registered,

(v) the registration number assigned to it, and

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[34] Bichai Affidavit, para. 37

[35] Bichai Affidavit, paras. 36 and 39

(vi) the date on which the certificate was issued.

96. The information that must appear on a standard birth certificate with parentage is the same information that is to appear on the standard birth certificate with the addition of the names and places of birth of the persons listed as parents on the person's birth registration document.

97. The Applicant (Brief, para. 80) alleges that the *VSA* regime draws a distinction on the basis of being transgendered. Specifically it is alleged that someone who is not transgendered can obtain a birth certificate with a sex designation that accords with his or her lived sex simply by asking for one pursuant to s. 48 of the *VSA* whereas a transgendered person can only obtain a birth certificate with a sex designation that accords with his or her lived sex if they meet the conditions set out in s. 30 of the *VSA*.

98. Further, the Applicant (Brief, paras. 84-85) alleges that the *VSA* regime discriminates on the basis of sex as transgendered people are the only people who live as a different sex from the one associated with their anatomical sex structure and that tying the sex designation to anatomical sex structure means that almost all transgendered people cannot obtain a birth certificate that accords with their lived sex.

99. First, the birth certificate reflects the birth records of Vital Statistics made at birth, subject to correction for error, or a change of anatomical sex. As a benefit the birth certificate simply serves to certify facts known to the Government because it records prescribed facts related to births in the province and keeps records of those facts in the Registry. A birth certificate certifying prescribed facts as recorded is available to all who are born in Alberta without discrimination.

100. Second, the birth certificate does not comment on subjectively experienced gender; it certifies anatomical sex at birth.

101. For the purpose of its birth records, the Province does not inquire into subjective or assumed gender identity, does not inquire into the veracity of reports of subjective or assumed gender identity, and does not record subjective or assumed gender identity. Consequently, the

birth certificates it issues, which reflect the facts contained in the Registry, do not and cannot reflect a record of subjective or assumed gender identity. The implicit and explicit criteria make it clear on the face of the legislation that the purpose of the legislation is not to record or certify a subjective or assumed gender identity.

102. Recording sex and providing a certificate that reflects the record of sex does not produce an adverse distinction in relation to a benefit provided by Alberta. Any adverse effect that may arise does not arise from issuing the birth certificate as a benefit to Albertans.

103. In ***Auton v British Columbia (AG)***, 2004 SCC 78, [2004] 3 S.C.R. 657, at para. 43 [**Alberta's Book of Authorities TAB 9**], McLachlin CJC writing for the Court states:

> The legislative scheme in the case at bar, namely the *CHA* and the *MPA*, **does not have as its purpose the meeting of all medical needs**. As discussed, its only promise is to provide full funding for core services, defined as physician-delivered services. Beyond this, the province may, within their discretion, offer specified non-core services. It is, by its very terms, a partial health plan. **It follows that exclusion of particular non-core services cannot without more be viewed as an adverse distinction based on an enumerated ground**. Rather, it is an anticipated feature of the legislative scheme. It follows that one cannot infer from the fact of exclusion of ABA/IBI therapy for autistic children from non-core benefits that this amounts to discrimination. **There is no discrimination by effect.** [Emphasis added]

104. As indicated in the Applicant's Brief at para. 3, the birth certificate has been described by Vital Statistics as a "primary identification document".

105. However, the Driver's Licence is the most commonly used and accepted form of identification. Unlike a birth certificate, a driver's licence has the holder's photograph and a digital photograph of every licenced driver is placed in a facial recognition data bank.

> ***Hutterian Brethren of Wilson Colony v Alberta***, 2009 SCC 37, [2009] 2 SCR 567 at paras. 9-10 [**Alberta's Book of Authorities TAB 10**]

106. If a person does not have a driver's licence, he or she can obtain an Identification Card which also has the holder's photograph on it [*Identification Card Regulation*, Alta Reg 221/2003, **Bichai Affidavit, Exhibit v, ps. 6-10**]. The Applicant has an Identity Card [Applicant's Affidavit affirmed September 25, 2013, paras. 57-59].

107. A birth certificate is a record of facts recorded at birth, including sexual anatomy. It does not contain a photograph of the person identified in the document. The driver's licence and identity cards are more commonly used in daily life and include a photograph of the holder. Moreover, the birth certificate is based on a statistical record whereas the other two pieces of identification have no statistical significance. Upon death, the death record and the birth record are matched to prevent "tombstoning".

108. The birth certificate is a prescribed certification of the birth records held by the Government (s. 1(1)(e) *VSA*) **[Applicant's Book of Authorities Tab 1]**, which may assist in establishing a person's identity by providing certified information relevant to identity that is presumptively true (s. 53(1) *VSA*) **[Applicant's Book of Authorities Tab 1]**. Though the birth certificate may, in this regard, serve as a primary identity document, it is not intended to be, and it does not serve as a general purpose identity document. The fact that the presumptive evidence contained on a birth certificate, which indicates a person's sex at birth, may be incongruent with a subjective or assumed gender identity and, consequently, may be inapt or problematic for a person who wants to use the birth certificate to establish a gender identity, does not render the certification of facts as recorded in the Registry discriminatory.

109. In ***Granovsky v Canada (Minister of Employment & Immigration)***, 2000 SCC 28, [2001] 1 SCR 703 at para. 33 **[Alberta's Book of Authorities TAB 11]**, the Supreme Court states:

> **The *Charter* is not a magic wand that can eliminate physical or mental impairments, nor is it expected to create the illusion of doing so. Nor can it alleviate or eliminate the functional limitations truly created by the impairment.** What s. 15 of the *Charter* can do, and it is a role of immense importance, is address the way in which the state responds to people with disabilities. Section 15(1) ensures that governments may not, intentionally or through a failure of appropriate accommodation, **stigmatize the underlying physical or mental impairment, or attribute functional limitations to the individual that the underlying physical or mental impairment does not entail**, or fail to recognize the added burdens which persons with disabilities may encounter in achieving self-fulfillment in a world relentlessly oriented to the able-bodied. [Emphasis added]

110. The law provides a benefit in relation to sex recorded at birth and does not provide a benefit in relation to subjective or assumed gender identity. As stated in ***Auton v British Columbia (AG)***, *supra*, **[Alberta's Book of Authorities TAB 9]** at para. 38:

> [...] ***Eldridge*, was concerned with unequal access to a benefit that the law conferred and with applying a benefit-granting law in a non-discriminatory fashion. By contrast, this case is concerned with access to a benefit that the law has not conferred**. For this reason, *Eldridge, supra*, does not assist the petitioners. [Emphasis added]

111. Alberta does not provide to the public birth certificates that certify a person's subjective or assumed gender identity. Failing to provide a birth certificate that will serve to identify the Applicant's subjective or assumed gender identity as that person's sex does not result in a denial of a benefit available to others:

> [....] Where stereotyping of persons belonging to a group is at issue, assessing whether a statutory definition that excludes a group is discriminatory, as opposed to being the legitimate exercise of legislative power in defining a benefit, involves consideration of the purpose of the legislative scheme which confers the benefit and the overall needs it seeks to meet. **If a benefit program excludes a particular group in a way that undercuts the overall purpose of the program, then it is likely to be discriminatory**: it amounts to an arbitrary exclusion of a particular group. If, on the other hand, the exclusion is consistent with the overarching purpose and scheme of the legislation, it is unlikely to be discriminatory. **Thus, the question is whether the excluded benefit is one that falls within the general scheme of benefits and needs which the legislative scheme is intended to address**. [Emphasis added]
>
> ***Auton v British Columbia (AG)***, *supra*, at para. 42 [**Alberta's Book of Authorities TAB 9**]

112. Consequently, the provisions of the *VSA* are not discriminatory and are consistent with s. 15 of the *Charter*:

> **Such a claim depends on a prior showing that there is a benefit provided by law.** There can be no administrative duty to distribute non-existent benefits equally. [...] [Emphasis added].
>
> ***Auton v British Columbia (AG), supra***, at para. 46 [**Alberta's Book of Authorities TAB 9**]

113. The use of the birth certificate to establish or bolster subjective or assumed gender identity is a use that is not contemplated by the *VSA*.

114. Accordingly, it cannot be said that transgendered persons are being denied equal benefit of a law as compared to other persons.

**There is no substantive discrimination**

115. While the Applicant may not be required to demonstrate the effect of the impugned regime on prejudice and stereotyping toward transgendered persons (Brief, para. 130), the effect of the impugned regime on prejudice and stereotyping toward transgendered people may be helpful in answer the question as to whether the challenged law violates the norm of substantive equality under s. 15(1) of the *Charter*. In any event, the onus remains on the Applicant to establish a violation of substantive equality.

116. It is not sufficient for a person alleging a violation of s. 15(1) of the *Charter* to simply assert stereotyping, prejudice or disadvantage. The disadvantage must be connected to the impugned legislation. The fact that Alberta records sex as reported to it at the birth of the child and subsequently reports that information on a birth certificate is not the cause of the disadvantage.

117. In order to make out an indirect discrimination claim, the Applicant must adduce evidence showing that the impugned provision is responsible for the effect, not other circumstances.

***Symes v R***, *supra*, at para. 142 **[Alberta's Book of Authorities TAB 6]**

118. The Applicant states (Brief at para. 134) that the primary discriminatory nature of the impugned regime has been stated in ***XY*** [at para. 171] as follows:

> First, giving transgendered persons an official government document with a sex designation which is dissonant with their gender identity conveys the message that their gender identity in and of itself is not valid. This message, in turn, is the very same message that lies at the root of the stigma and prejudice against transgendered persons. As the applicant stated during her testimony, this official government document tells the transgendered person, "You are not who you say you are." This might not be the aim of the law. As the applicant points out, however, it is the effect of the law on transgendered persons who receive birth certificates with sex designations that are not aligned with their own sense of who they are.

119. In response, Alberta states that that giving a transgendered person an official government document with a sex designation which is dissonant with their gender identity does not convey any message about the validity of a person's gender identity – it simply reflects known facts determined at birth. Insisting on only certifying the record of sex determined at birth conveys the message that the historical facts of birth are important. Changing the facts as known and recorded

at birth to reflect a subsequently developed gender identity would send the message that there is something shameful about a birth sex that is inconsistent with a gender identity, and in need of correction, when the inconsistency is in fact an integral part of the transgendered person's identity. In short, altering the birth record to conform to a subsequently developed gender identity sends the message that transgendered people need to hide (or need to be ashamed of) their true identity as transgendered persons who identify with the opposite sex.

120. The ***XY*** case is a Human Rights Tribunal decision out of Ontario and was not subjected to judicial review. Its persuasive value is limited. It will be distinguished more fully when the within application is argued.

121. The Applicant alleges (Brief, paras. 138-140) that the *VSA* regime has had a negative impact on the Applicant. Specifically, that as a result of the regime society including people in positions of authority, do not consider the Applicant to be "really female" or to have "completed gender transition unless the requirements of s. 30 of the *VSA* are met.

122. Essentially, the Applicant is stating that when assessing services the "impugned regime" negatively impacts the Applicant and causes others to question the Applicant's sex. Assuming that the issue arises because the Applicant is required to show a birth certificate, three issues arise.

123. First, producing the birth certificate reveals that the individual is transgendered. Assisting in hiding true identity is a harm that the Court in ***Vriend***, *supra*, indicated should be avoided. Implicit in the Applicant's submission is the notion that Alberta must assist the Applicant in hiding the Applicant's transgendered identity to avoid being discriminatory, when in fact it is the act of hiding transgendered identity that perpetuates the stereotype and disadvantage. Second, its use as a foundation document is not mandated by the *VSA*. The parties requiring its use must justify their choices, not the Alberta.

124. A birth certificate simply provides a presumptively true record of sex as recorded at birth. The evidence in the case at bar is that the record remains correct, and the presumption reflects true facts recorded and certified on the birth certificate.

125. The Applicant quotes from para. 172 of the ***XY*** case (Brief, para. 142) in support of a statement that the impugned regime on its face reinforces the message that the real life lived sex of transgendered people does not need to be respected unless and until they submit to risky surgeries. The quote from ***XY*** is "After all, if the law says that a transgendered woman is not 'female' until she has had and proved that she has had 'transsexual surgery', how can we expect more from citizens at large?"

126. First, the law simply states that a person was male or female at birth. It does not comment on a person's transgendered status. Second, The Applicant's conclusion, as the conclusion of the Ontario Human Rights Tribunal in ***XY***, is unsubstantiated. The statement relies on a misinterpretation of the legislation and fails to recognize the ameliorative aspect of the sex change provision. Recognizing that some transgendered people will undergo sex change surgery placing them in a categorically different situation than those who do not, does not indicate that some transgendered people are less deserving; rather, it responds to a real change in circumstances in a way that respect the nature of the change. It does not reinforce prejudice. The legislation does not address gender identity and does not recognize gender identity except to the extent that it can be said that the ameliorative sex change provision results in such *de facto* recognition. The scheme does not comment on the validity of gender identity. It cannot therefore be said that it gives force to a prejudicial notion.

127. The Applicant states (Brief, para. 148) that there is a causal connection between the impugned regime and the fact that people rely on birth certificate "sex" data. The Applicant claims that it makes no sense for every third party to have to develop its own policies about "sex", instead, they should just be able to rely on Alberta's birth certificates, which should contain a sex designation congruent with the person's lived sex.

128. The requirements of downstream users are not the responsibility of Alberta unless it mandates that downstream use. In the case of the Canadian Passport Office, it is clear that its requirement is not within the control of the provinces. If the Passport Office mandates the use of a birth certificate, it must be accepted that the Passport Office wants to have proof of the certified

information, and is aware of the information appearing on a birth certificate. Though forcing the Province to change its birth certificate may appear to be an attractive solution to the passport issue (or issues related to other downstream users), it is in fact an ineffective collateral attack on the passport, since Parliament remains free to insist on evidence of the birth sex before issuing a passport.

129. With regard to the Applicant's comments (Brief, para. 154), with regard to Driver's Licences and Identification Cards, the Applicant fails to appreciate the context in which a birth certificate is used. Because it is only available on request and remains under the control of the holder, harm caused by using it as an identity document when other true identity documents are available is harm for which the holder is responsible. In those cases where its production is legislatively mandated, it is the effect of the mandating legislation and not the *VSA* that needs to be considered. In short, to hold the *VSA* responsible for the harm, it must be shown that the *VSA* mandates its use. Consequently, the availability of an Identification Card or a Driver's Licence, which serves as an identify document is not just a matter of diminished harm, it shows that the harm is not attributable to the *VSA*.

130. The relevance of a Driver's Licence or Identify Document is relevant at the liability stage of the analysis as it demonstrates how Alberta recognizes gender identity, and clearly serves to show how Alberta distinguishes between a record of sex and a record of gender identity, and between a certified record of an historical birth event and an identity document. Though the Driver's Licnece or Identity Card provisions may lessen the harm and have an ameliorative effect, relevant in a s. 1 analysis, they also highlight the different purpose of the birth certificate.

131. The Applicant alleges (Brief, para. 155) that the most harmful effect of the legislation is that it coerces people into surgery so they can obtain a congruent birth certificate. The Applicant mischaracterizes the legislation. It does not require anyone to undergo surgery; it simply recognizes that those who have, may, if they choose, apply to have their birth sex as recorded at birth changed.

132. Section 30 *VSA* does not coerce an individual diagnosed with gender identity disorder/dysphoria to undergo or submit to surgery to change his or her anatomical sex structure, does not remove or restrict an individual's discretion to decline to have surgery and does not interfere in any way with the doctrine of informed consent. An individual diagnosed with gender identity disorder, in consultation with his or her medical professional, can freely chose an appropriate treatment for gender identity disorder/dysphoria, which may or may not include surgery to change the person's anatomical sex structure.

133. In conclusion, the Applicant has the onus of establishing discrimination under s. 15(1) of the *Charter*. That onus has not been discharged.

**Section 1 Justification**

134. Any violation of s. 15(1) which might arguably be found to result from s. 30 which allows transgendered persons who have changed their anatomical sex structure through surgery to change their sex identifier on their birth record is readily justifiable pursuant to s. 1 of the *Charter*.

135. The *Oakes* [1986] 1 S.C.R. 103 test is well known. "When a protected right is infringed, the government must justify its action by identifying a pressing and substantial objective, by demonstrating that there is a rational connection between the objective and the infringement, and by showing that the means chosen interferes as little as possible with the right and that the benefits of the measure taken outweigh its deleterious effects".

***Toronto Star Newspapers Ltd.* v *R***, 2010 SCC 21; [2010] SCR 722; 2010 at para. 19

136. The Supreme Court of Canada has repeatedly stated that context is the key to understanding the scope and impact of a limit on a *Charter* right.

***Toronto Star Newspapers Ltd.* v *R***, *supra*, at para. 3

Prescribed by Law

137. The Applicant alleges that s. 30 is too vague for the *VSA* regime to constitute a limitation prescribed by law (Brief, para. 159). The Applicant alleges that

- the terms "anatomical sex structure", "anatomical sex" and "sex" are used in various places in the *VSA* but are not defined which implies some difference in meaning (para. 161).

- Transgendered people have to "guess" which surgery or surgeries are required to satisfy the requirements of s. 30 of the V*SA* (para. 162).

- The requirement of an affidavit from each of two physicians (rather than just one) recognizes the fact that the phrase "anatomical change of sex" is so broad, open-ended, and vague that different physicians will readily disagree on whether one has occurred (para. 167).

- The determination of whether a person has undergone an "anatomical change of sex" is completely insulated from judicial review (para. 169)

138. The Applicant indicates (Brief, paras. 168-169) that test for vagueness is whether the legislature has provided an intelligible standard according to which judiciary must do its work. However, whether a person has undergone an "anatomical change of sex" is completely insulated from judicial review. If a physician declines to swear an Affidavit stating that the person's anatomical sex structure has been changed, and the person disputes that interpretation, the *VSA* contains no provision allowing an appeal of a decision of a physician relative to s. 30 (para. 170).

139. Alberta submits that the provisions have to be "interpreted in a manner that fits the context and achieves a rational result".

> ***J.T.I. MacDonald Corp.* c *Canada (Procureure générale)***, 2007 SCC 30, [2007] 2 S.C.R. 610 at para. 55 [**Alberta's Book of Authorities TAB 12**]

140. Courts apply what is known as the modern approach to statutory interpretation:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> ***R v Sharpe***, 2001 SCC 2, [2001] 1 SCR 45 at para. 33, quoting E.A. Driedger, *Construction of Statutes* (2nd ed. 1983) at p. 87) [**Alberta's Book of Authorities TAB 13**]

141. A court will only find that a law in unconstitutionally vague after it has exhausted its interpretive function.

> [47] A court can conclude that a law is unconstitutionally vague only after exhausting its interpretive function. The court "must first develop the full interpretive context surrounding an impugned provision": *Canadian Pacific*, at paras. 47 and 79.
>
> [48] To develop a provision's "full interpretive context", this Court has considered: (i) prior judicial interpretations; (ii) the legislative purpose; (iii) the subject matter and nature of the impugned provision; (iv) societal values; and (v) related legislative provisions: *Canadian Pacific*, at paras. 47 and 87.
>
> ***R* v *Levkovic***, 2013 SCC 25, 296 CCC (3d) 457, at paras. 47 and 48 [Alberta's Book of Authorities **TAB 14**]

142. The word "sex" is not defined in the *VSA* or in the associated regulations, and therefore, the ordinary meaning of sex applies. In short, sex means the observable or apparent sex of an infant at birth as truthfully reported to the Registrar. In the context of the *VSA*, the reported sex is based on a physical observation of the new born child's sexual anatomy, or in other words, the observable anatomical sex structure of the newborn child as observed at or soon after birth.

143. Sex is defined in the *Operator Licensing and Vehicle Control Regulation*, Alta. Reg. 320/2002 in s. 1(x/2) [**Bichai Affidavit, Exhibit "V" , pp. 1-5**) as "the anatomical sex of a person at birth or the assumed sex of a person who meets the criteria set out in section 20.1". Sex is defined in s. 1(d.1) of the *Identification Card Regulation*, Alta. Reg. 221/2003 [**Bichai Affidavit, Exhibit "V", pp. 6-10**] as "the anatomical sex of a person at birth or the assumed sex of a person who meets the criteria set out in section 9.1". Thus, it is clear that the legislature has acknowledged the difference between "anatomical sex of a person at birth" and "assumed sex".

144. The phrase "anatomical sex structure" and "anatomical sex" are used in s. 30 of the *VSA*. From a reading of the provision it is clear that what is required is a change to a person's sexual anatomy so that they resemble the sexual anatomy of a person of the opposite sex to that of the person at birth.

145. Stella Hoeksema, the administrator of the Final Stage Gender Reassignment Surgery Program" deposes at para. 4 of the Affidavit sworn in this matter that the Gender Reassignment Surgery Program provides funding for final stage gender reassignment surgery, that is Female to

Male – Phalloplasty with penile implant and testicular implants; metoidioplasty; or clitoral release and Male to Female – Vaginoplasty.

146. Although not required to, some physicians in the Affidavits submitted under s. 30 of the *VSA*, indicate the procedures performed. This was the case with the sample Affidavits appended as Exhibit "T" to the Bichai Affidavit.

147. Section 30 of the *VSA* does not use the phrases "anatomical sex structure" or "anatomical sex" in a vacuum. The introductory words of the provision read: When a person's anatomical sex structure has been changed to the opposite sex from that which appears on the person's birth registration document, ..."

148. It can reasonably be expected that a medical professional will know what is required to effect a change to a person's anatomical sex structure, particularly when it involves changing that anatomical sex structure to that of the opposite sex that the person was born as. By virtue of the fact that the Director is to rely on the evidence of two physicians, the provision would appear to regard, at the very least, an honest medical opinion that the required "anatomical sex structure" had changed.

149. Section 30 of the *VSA* identifies the kind of evidence required and is clear in that regard. The Registrar has no discretion to weigh evidence. If the evidence submitted satisfies the requirement, the Registrar must amend the birth record. The Applicant attempts to make a vagueness argument out of the fact that medical opinions may vary and all physicians may not act in the same fashion. That is not vagueness in the legislation.

150. The requirement for two Affidavits reduces the risk that there will be a difference of opinion as to what constitutes a change to anatomical sex structure and that a change in a birth record will occur when a person's anatomical sex structure has in fact not been changed.

151. The Applicant asserts that the determination of whether a person has undergone an "anatomical change of sex" is completely insulated from judicial review. This determination is a

medical diagnosis and is outside the scope of the *VSA*. If there is a complaint with the medical diagnosis this is more properly brought within the regulatory scheme regarding physicians. In addition, the applicant is free to seek a second opinion.

152. Reading the *VSA* in its entire context and reading the words in their grammatical and ordinary sense harmoniously with the scheme of the *VSA*, the object of the *VSA* and the intention of the Legislature, the meaning of "anatomical sex structure" and "sex structure" are clear.

(a) The objective of the measure is of sufficient importance

153. Section 30 of the *VSA* was introduced as a measure to help those who went to the degree of changing the physical appearance of their anatomy to match the sex that is opposite to what they were born with. Improving the circumstances of a disadvantaged minority is an objective of sufficient importance.

(b) There is a rational connection between the limit and the objective

154. The query at this stage of the analysis" requires nothing more than a showing that the legitimate and important goals of the legislature are logically furthered by the means government has chosen to adopt".

> ***Harvey v New Brunswick (AG)***, [1996] 2 SCR 876, 137 DLR ($4^{th}$) 142 at para. 40 **[Alberta's Book of Authorities TAB 15]**

155. The government is not required to show that limit will further the goal.

> ***Hutterian Brethren of Wilson Colony v Alberta***, *supra*, at para. 48 **[Alberta's Book of Authorities TAB 10]**

156. Transgendered individuals seek to have their gender identity reflected in documents issued by Alberta and used to establish their identity. Having a birth certificate that reflects a sex that is consistent with a transgendered person's gender identity is a benefit that is much sought after by transgendered individuals. Therefore, allowing transgendered individuals who have surgically altered their anatomical sex structure to have their birth certificate reflect the sex that is consistent with their new anatomical sex is rationally connected to the purpose of providing an accommodating benefit.

The objective is met in a minimally impairing way

157. If permitting only those transgendered individuals who have surgically changed the appearance of their sexual anatomy to match the sex of the opposite sex than the person was born with violates 15 of the *Charter*, it does so no more than is reasonably necessary to achieve its objective.

158. "The minimal impairment requirement does not impose an obligation on the government to employ the least intrusive measure available. Rather, it only requires it to demonstrate that the measures employed were the least intrusive, *in light of both the legislative objective and the infringed right*." [Emphasis in original]

> ***Harvey v New Brunswick (AG)***, *supra*, at para. 44, quoting from *RJR-MacDonald Inc. c Canada (Procureur general)*, [1995] 3 SCR 199 at p. 305 **[Alberta's Book of Authorities TAB 15]**

159. The Supreme Court has been unwilling to "second-guess" the legislature in choosing between acceptable options. It is not the role of the courts to substitute judicial decisions for legislative decisions as to where precisely to draw the line.

> ***Harvey v New Brunswick (AG)***, *supra*, at para. 47 **[Alberta's Book of Authorities TAB 15]**

160. Minimal impairment may be achieved where the means chosen to implement the legislative goal is carefully tailored to "avoid excessive impairment."

> ***R v Sharpe***, *supra*, at para. 78 **[Alberta's Book of Authorities TAB 13]**

161. Although there may be other ways through which the Legislature may attempt to achieve its objective, the minimal impairment requirement will be met if the Legislature has chosen one of several "reasonable alternatives".

> ***J.T.I. MacDonald Corp. c Canada (procureure générale)***, *supra*, at para. 43 **[Alberta's Book of Authorities TAB 12]**

162. Nor do the means selected have to be the "least impairing option" available to the legislature.

> ***Harper v Canada (AG)***, 2004 SCC 33, [2004] 1 SCR 827, at para. 110 **[Alberta's Book of Authorities TAB 16]**

163. To require justification for discrimination, s. 30 of the *VSA* must have been found not to be ameliorative within the meaning of s. 15(2) of the *Charter*. In short, providing an accommodation for some transgendered people on the basis of a change in the person's anatomical sex structure allegedly discriminates against other transgendered people who do not have surgery to alter their anatomical sex structure.

164. With that in mind, it is also important to remember that the legislative authority to record and certify the sex of an individual born in Alberta did not appear from the Amended Originating Application to be challenged here. In fact, the Applicant wants to rely on the legislative authority to obtain a birth certificate with a certification of the Applicant's sex, albeit one that reflects the Applicant's gender identity and not the Applicant's anatomical sex structure. In short, the substance of the claim is that Alberta must assist the Applicant to establish the Applicant's public gender identity because Alberta assists those who have had their anatomical sex structure altered.

165. However, to preserve the integrity of the birth certificate as a statement about a person's sex, it is necessary to support the facts known to the registry with evidence of a person's sex. Providing for an accommodation on the basis of a change in a person's anatomical sex allows for the preservation of the meaning of sex within the *VSA* and does not threaten the integrity of the birth certificate. However, expanding the scope of s. 30 to allow evidence of gender identity other than changes to a person's anatomical sex to serve as evidence of sex would alter the meaning of the certified statement concerning sex on the birth certificate and would transform the statement into a statement about gender identity with no way of distinguishing on the birth certificate between a person's sex and a person's gender identity. It would deny the registrar the ability to certify on the birth certificate a person's sex rather than gender identity. In short, the accommodation provided by s. 30 is as far as the legislature can go without transforming the meaning of sex in the *VSA* into a reference to gender identity.

166. The *VSA* does not currently provide for recording and reporting gender identity. Though the facts regarding birth sex recorded in the registry may for some serve as a proxy for gender

identity, it is not the purpose of the legislation or the intention of the legislators to have birth certificates certify gender identity.

There is proportionality between the deleterious and salutary effects of the measure

167. The question under this part of the test is one of balance – whether the overall effects of the law on the claimant is disproportionate to the government's objective.

> ***Hutterian Brethren of Wilson Colony v Alberta***, supra, at para. 73 **[Alberta's Book of Authorities Tab 10]**

168. The pressing and substantial objective of s. 30 of the *VSA* is to assist transgendered individuals who have surgically changed their anatomical sex structure. Limiting the benefit to those who have changed their anatomical sex structure does not seriously jeopardize the legislation's ability to certify sex recorded at birth because the number of individuals seeking a change is small and the criterion for change mirrors the same criterion used at birth to determine sex.

169. To expand the benefit to those who have not changed their anatomical sex structure would (1) expand the number of individuals who would be entitled to have their sex designation changed on their birth record with would therefore diminish confidence in the sex designation, (2) if vital statistics records cannot be relied on for their accuracy, then a valuable and useful identifier is lost; (3) would necessitate establishing a different standard for determining when the sex designation could be determined, which would inevitably exclude some or risk becoming a subjective, rather than an objective, record, and (4) would effectively deny Alberta the ability to certify what it knows to be the sex of an individual when requested to do so and limit Alberta to making some other certified representation about facts reported to Alberta.

170. The benefits in having a reliable Vital Statistics registry system far outweigh the deleterious effects of the alleged violations of s. 15 of the *Charter*.

**Conclusion**

171. The certification of sex on a birth certificate simply reflects the facts related to birth that are recorded in the Registry. The benefit that is embodied in the certification of sex as recorded in the Registry is, under the *VSA*, available to the Applicant without discrimination.

172. Furthermore, s. 30 of the *VSA* makes a distinction on the basis of a change in circumstances and is ameliorative. It is directed at assisting a group in need: those whose anatomical sex structure has changed. Section 30 of the *VSA* correlates to a disadvantage: it allows a change to anatomical sex to be recorded where the requisite evidence of change is provided. The purpose of the provision is genuine: amelioration is not used as an excuse to deny other deserving groups a benefit. The provision does not provide an advantage to some at the expense of others. The provision simply draws a line at a place that will not frustrate the purpose of the *VSA*. In short, the simple fact that the ameliorative provision is not more inclusive does not make it discriminatory.

**Costs**

173. Neither the Respondent nor the Intervener is seeking costs and request that no order issue to require either to pay costs.

## PART IV – NATURE OF RELIEF SOUGHT

174. Alberta requests this Honourable Court to dismiss the application for judicial review and uphold the constitutional validity of s. 30 of the *VSA*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of January, 2014.

Lillian H. Riczu
Counsel for the Registrar of Vital Statistics,
Respondent and for the Attorney General
of Alberta, Intervener

Estimated time for argument 45 minutes

# LIST OF AUTHORITIES

**Correspondence**



**Legislation**



**Authorities**

[TAB 16] ***Harper v Canada (AG)***, 2004 SCC 33, [2004] 1 SCR 827