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JUDICIAL CENTRE	EDMONTON
APPLICANT	C.F.
RESPONDENT	DIRECTOR OF VITAL STATISTICS
INTERVENOR	MINISTER OF JUSTICE AND SOLICITOR GENERAL OF ALBERTA
DOCUMENT	**BRIEF**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

C.F.

MERITS BRIEF OF C.F., APPLICANT

(in support of C.F.'s originating application for judicial review)

Before a Justice in Special Chambers at 10:00 AM on January 17, 2014 in Edmonton

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I. OVERVIEW AND STATEMENT OF FACTS

A. INTRODUCTION

1. Pursuant to the *Vital Statistics Act*[1] [*VSA*], the birth of every child born in Alberta must be entered into a government registry[2]. As the child ages, important life events are also entered into the registry, including changes in legal parentage[3], adoption[4] (including adoption as an adult[5]), marriage[6], changes to the person's name[7], and death[8].

2. When a person requests a "birth certificate" from Vital Statistics, the certificate is issued showing the most up-to-date information in the registry, taking into account all of the person's life events. For example, after somebody changes her or his name, their birth certificate changes to show their new name, not their old name[9]. And after a person dies, their birth certificate is stamped with a notation to indicate they are no longer alive[10].

3. Because birth certificates exist from when a person is born and are continually updated to reflect life events right up until the person dies, they take on a special significance as a foundational document, since a person has one their entire life. Accordingly, Vital Statistics describes a birth certificate as a "primary identification document"[11].

4. Birth certificates are useful for a wide variety of purposes, including applying for government services, travelling, proving Canadian citizenship and identity, and generally participating fully in society. Indeed, a birth certificate is so important that, according to the former Minister of Service Alberta, a fraudulent birth certificate could be used to successfully assume an entirely false identity[12].

5. To reinforce the special significance of birth certificates, the *VSA* provides that a birth certificate is to be taken as proof of the facts recorded on it[13]. The *Alberta Evidence Act*[14] also contains a related provision at s 36. There is no doubt that the birth registration system plays an important societal role.

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1 SA 2007, c V-4.1 (Tab 1)
2 *VSA*, s 2
3 *VSA*, s 11
4 *VSA*, s 16
5 See the *Adult Adoption Act*, RSA 2000, c A-4, and *VSA,* s 16(2)
6 *VSA*, s 20
7 *VSA*, ss 15, 22-29
8 *VSA*, s 31
9 *VSA*, s 27(1). Note that in Alberta (unlike some other provinces), when a person informally adopts a new last name after marriage, this is not legally considered a change of name and is accordingly not reflected on the person's birth certificate, but any legal change of name would be so reflected.
10 *VSA*, s 38
11 "New Alberta Birth Certificate", Service Alberta: Vital Statistics, retrieved from <http://www.servicealberta.ca/1060.cfm> on December 21, 2013 (Tab 31)
12 "New Alberta birth certificate designed to thwart identify theft", CBC News, December 10, 2007, retrieved from <http://www.cbc.ca/news/canada/edmonton/new-alberta-birth-certificate-designed-to-thwart-identify-theft-1.690941> on December 21, 2013 (Tab 32)
13 *VSA*, s 53
14 RSA 2000, c A-18 (Tab 2)

B. Overview of this application

6. Alberta's birth registration system does not take into account the needs or the constitutional rights of transgender people.

7. "Transgender" refers to people who live and identify as a sex other than the one that was assigned to them at birth. For example, a transgender woman lives and identifies as female, even though she was assigned the "male" sex at birth.

8. According to the respondent Director of Vital Statistics and the intervenor Minister of Justice and Solicitor General of Alberta [collectively, "Alberta"], the *VSA* provides that the designation of sex on an Alberta birth certificate must reflect only the sex assigned to the person at birth (notwithstanding that the person might live as a different sex), unless and until the person submits to unspecified surgery to change their "anatomical sex structure" and then attends for a genital inspection before two separate physicians, each of whom must depose after such inspection that the person's "anatomical sex has been changed"[15].

9. In Alberta's view, the fact that a person might not want to undergo risky, dangerous, and unspecified surgeries is not relevant. The present regime was introduced into Alberta law in 1973 by the *Vital Statistics Amendment Act, 1973*[16] and has not been substantively amended since then.

10. Before the Court is an application originally filed on April 17, 2012 by the applicant Cathy Fitzpatrick[17] for a determination that the *VSA* violates s 15 of the *Canadian Charter of Rights and Freedoms*[18] [the "*Charter*"] by making recognition of a transgender person's lived sex conditional on submission to unspecified surgery and subsequent genital inspection [hereinafter, the "surgery requirement"].

11. Alberta vigorously opposes the application and defends its surgery requirement.

C. Evidence of Ms. Fitzpatrick

12. Ms. Fitzpatrick is a 23 year old transgender woman. She has continuously lived as a woman for over three years, the majority of her adult life[19]. Ms. Fitzpatrick's birth certificate lists her name as "Cathy Fitzpatrick", her place of birth as Edmonton, and her sex as "male".

13. Ms. Fitzpatrick asks the Court to order Alberta to amend her registration of birth to designate her sex as "female", and to sever the surgery requirement from the *VSA* and allow transgender people to obtain congruent birth certificates without surgery, or to strike the entire *VSA* and force Alberta to draft a constitutional version.

14. In support of her application, Ms. Fitzpatrick filed a 142-paragraph affidavit, styled the Affidavit of C.F., affirmed on September 25, 2013 [the "Fitzpatrick Affidavit"], setting out in detail her (so far unsuccessful) attempts to integrate into society legally as a woman, starting in early 2011. At each step of the way, she has had

15 See *VSA*, s 30, which, according to Alberta, is the only route available to transgender people to amend the sex designation on their birth certificate.
16 SA 1973, c 86 (Tab 3)
17 Ms. Fitzpatrick is referred to in the style of proceedings as "C.F.".
18 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (Tab 4)
19 Fitzpatrick Affidavit, para 9

to deal with various obstacles and barriers imposed by Alberta[20]. Three years later, and thanks to Alberta's surgery requirement, Ms. Fitzpatrick is still stuck in a legal limbo between genders, with a few documents saying she is female but others saying she is male, including her birth certificate and documents based on it[21].

15. If Alberta allowed transgender people to obtain a birth certificate with a sex designation congruent to their lived sex without surgery, Ms. Fitzpatrick would not entertain the notion of undergoing a dangerous and risky unspecified surgery to change the shape of her genitals[22], as it would be of no value to her[23]. Ms. Fitzpatrick is terrified by the prospect of dangerous surgery to satisfy a government requirement to obtain a congruent birth certificate[24]. Ms. Fitzpatrick does not even know what surgery or surgeries she is required to undergo in order to satisfy Alberta's surgery requirement[25].

16. Because of Alberta's surgery requirement, Ms. Fitzpatrick is forced to choose between unwanted surgery or else not being able to participate in society fully. This is a very difficult decision. Currently she has chosen the latter option because she still has a chance to prevail on this application and avoid undergoing unnecessary harmful surgery, but, as a result of everything Alberta has put her through, she has become reclusive and generally disillusioned with life[26].

17. Alberta's surgery requirement interferes with Ms. Fitzpatrick's employment[27], limits her movement[28], causes her depression[29], and interferes with her privacy and medical decision-making[30], among other hardships, and generally prevents her from getting closure with respect to her gender (by having a fully congruent set of documents) and moving on in life to be a productive member of society[31].

18. Ms. Fitzpatrick's circumstances will be referenced throughout this brief and are described in much more detail in the Fitzpatrick Affidavit.

D. Evidence of Dr. Karasic

19. To assist the Court on this application, Ms. Fitzpatrick also filed the Affidavit of Dr. Dan Karasic, affirmed on December 19, 2013 [the “Karasic Affidavit”].

20. Dr. Karasic is a psychiatrist specialising in the treatment and care of transgender people, among other things[32]. He is a Clinical Professor of Psychiatry at University of California San Francisco, has worked in transgender care for over 22 years, participates in all the relevant professional organisations including recently

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20 Fitzpatrick Affidavit, paras 26-86
21 Fitzpatrick Affidavit, para 27
22 Fitzpatrick Affidavit, para 130 among others
23 Fitzpatrick Affidavit, para 10 among others
24 Fitzpatrick Affidavit, para 12
25 Fitzpatrick Affidavit, paras 135-138
26 Fitzpatrick Affidavit, para 22
27 Fitzpatrick Affidavit, paras 96-110
28 Fitzpatrick Affidavit, paras 111-116
29 Fitzpatrick Affidavit, paras 117-123
30 Fitzpatrick Affidavit, paras 124-141
31 Fitzpatrick Affidavit, para 133 among others
32 Karasic Affidavit, para 1

being elected to the Board of Directors of the World Professional Association for Transgender Health ["WPATH"], has been honoured with various awards, and has advised governments and courts on transgender matters[33].

21. In his affidavit, Dr. Karasic explains that although some transgender people are unhappy with their genitals, others are comfortable with their genitals without surgery[34]. According to Dr. Karasic, in North America, gender transition often involves a change in social role (i.e. living as the person's felt sex) and hormonal therapy, but that surgery is much less common[35]. He notes that, according to available surveys, most transgender people do not have genital surgery[36].

22. Dr. Karasic explains that although some trans people do not require surgery, they still benefit from social transition to the sex associated with their gender identity[37], and that such social transition generally requires a change in legal documents to their new sex[38] so that their documents, including their birth certificate[39], "uniformly match their appearance and lived sex"[40]. Dr. Karasic notes that the authoritative body on transgender health care, WPATH, supports this position, having issued the followed statement on June 16, 2010[41]:

> No person should have to undergo surgery or accept sterilization as a condition of identity recognition. If a sex marker is required on an identity document, that marker could recognize the person's lived gender, regardless of reproductive capacity. The WPATH Board of Directors urges governments and other authoritative bodies to move to eliminate requirements for identity recognition that require surgical procedures.

23. WPATH also explains its professional position in more detail in a letter included in the Book of Authorities as Tab 33[42]. In the letter, WPATH explains that surgery is not necessary for all transgender people, that surgery is risky and comes with attendant health risks including various complications, that involuntary surgery (e.g. as a result of coercive legislation) has deleterious mental health effects, and that no one should be forced to undergo surgery in order to obtain an amendment to sex on a legal document.

24. According to Dr. Karasic, medical treatment of transgender people is highly individualised and varies according to the needs of each individual person[43]. Dr. Karasic explains that when Vital Statistics laws were drafted in the early 1970s, we did not yet have our current understanding of the diversity of transgender experience and there was an erroneous assumption that transgender people would be treated through the administration of genital surgery by centralised gender programs, rather than our current highly individualised model of transgender care[44].

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33 Karasic Affidavit, paras 3-14 and Exhibit "A". Dr. Karasic was elected to the WPATH Board on December 20, 2013, so that particular fact is not mentioned in the Karasic Affidavit.
34 Karasic Affidavit, para 17
35 Karasic Affidavit, para 19
36 Karasic Affidavit, para 20
37 Karasic Affidavit, para 22
38 Karasic Affidavit, para 23
39 Karasic Affidavit, para 24
40 Karasic Affidavit, para 40
41 Karasic Affidavit, para 23 and Exhibit "B"
42 Letter from the WPATH Board of Directors to the Seoul Western District Court, dated December 28, 2012
43 Karasic Affidavit, para 21
44 Karasic Affidavit, paras 25-27

25. According to Dr. Karasic, requiring surgery as a condition of document amendment is simply not an accurate reflection of our current medical understanding of transgender people[45] and is not something that is supported or endorsed by the expert medical community[46].

26. Dr. Karasic goes on to note that various jurisdictions around the world have updated their laws to reflect current medical understanding accordingly, so that surgery is not required to update birth certificates and other legal documents[47]. For example, various US states (including California, the largest state) and the US federal government no longer require surgery to amend birth certificates.

27. In Canada, Ontario removed its surgery requirement to update the sex designation on birth certificates in 2012 as a result of the order of the Human Rights Tribunal of Ontario in ***XY v Ontario (Government and Consumer Services)***[48] (Tab 10), a case that will be discussed in more detail below.

28. The Quebec Legislature also recently took steps to remove that province's surgery requirement for updating birth certificates (apparently known as an "act of birth" in Quebec). Bill 35, *An Act to amend the Civil Code as regards civil status, successions and the publication of rights*[49] [the "Quebec Act"] (Tab 5), was introduced in the Quebec Legislature on April 17, 2013. It received royal assent on December 6, 2013. Section 3 of the Quebec Act amends the *Civil Code of Québec* to read in relevant part:

> Every person whose sexual identity does not correspond to the designation of sex that appears in that person's act of birth may, if the conditions prescribed by this Code and by government regulation have been met, have that designation and, if necessary, the person's given names changed.
>
> These changes may in no case be made dependent on the requirement to have undergone any medical treatment or surgical operation whatsoever.

29. The government of Quebec has not yet passed the regulations referred to in the provision, so it is not yet usable by transgender people, but nonetheless the provision is explicit that whatever the regulations require, there will be no requirement to "undergo[] any medical treatment or surgical operation whatsoever".

30. According to Statistics Canada, Quebec comprises 23.1% of Canada by population and Ontario comprises 38.5% of Canada by population[50]. It follows that approximately 62% of Canadians live in a province that does not require surgery as a condition to amend the sex designation on one's birth certificate. The remaining provinces have yet to update their legislation to follow modern medical understanding, but they are in the minority now.

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45 Karasic Affidavit, para 28
46 Karasic Affidavit, para 41
47 Karasic Affidavit paras 29-35
48 2012 HRTO 726, [2012] OHRTD No 715
49 SQ 2013, c 27
50 "Population by year, by province and territory", Statistics Canada, 2013-11-25, available at <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo02a-eng.htm> (Tab 34)

E. EVIDENCE OF MS. BICHAI

31. Ms. Bichai is the Director of Alberta's Vital Statistics office and the Deputy Registrar of Vital Statistics under the *VSA*[51]. Alberta filed an affidavit from Ms. Bichai, sworn November 29, 2013 [the "Bichai Affidavit"].

32. In her affidavit, Ms. Bichai provides some historical information on the Vital Statistics system, stressing that the system is nationally coordinated. Her affidavit explains that Vital Statistics data is provided by each province to Statistics Canada to "create a National Register of Vital Statistics"[52]. She claims that each province transmits the same set of information to Statistics Canada[53]. For all those reasons, at questioning, Ms. Bichai confirmed that, in her view, an important goal of Vital Statistics is national uniformity[54].

33. As explained above, fully 62% of Canadians currently live in a province where surgery is not required for a transgender person to obtain a birth certificate with a designation of sex congruent with their gender identity. That is a sizable majority. It is clear, then, that a national standard has indeed formed on the issue of whether surgery ought to be required as a condition to obtain an amended sex designation; and the standard is that it should not be required. Currently the majority of data in the National Register is from provinces with no surgery requirement.

34. Ms. Bichai's evidence would appear to support granting Ms. Fitzpatrick's application, in order to promote national uniformity of Vital Statistics. After Alberta no longer mandates surgery, fully 73% of Canadians will live in a province without a surgery requirement.

35. At questioning, Ms. Bichai did not attempt to explain how requiring surgery promoted national uniformity in Vital Statistics. Counsel for Alberta objected to all questions along these lines[55].

36. In her affidavit, Ms. Bichai asserts that identity theft is reduced or otherwise mitigated by requiring the designation of sex on a person's birth certificate to reflect the sex assigned to the person at birth unless and until the person undergoes an "anatomical change of sex" and then provides satisfactory proof thereof[56]. At questioning, this assertion was revealed to be baseless[57]:

51 Bichai Affidavit, paras 1, 3
52 Bichai Affidavit, para 17
53 Bichai Affidavit, para 34
54 Questioning on Affidavit of Mona Bichai [the "Bichai Questioning"], page 5:10-15
55 Bichai Questioning, pages 13-14
56 Bichai Affidavit, para 49
57 Bichai Questioning, pages 65, 67

MS. FITZPATRICK: ...[Ms. Bichai] alleges this regime reduces identity theft. I'm asking how is that the case. I'll just phrase it open-ended like that.

[...]

A: Well when you're required to provide ID, the ID matches who you are. That eliminates any suspicion.

[…]

Q: ...[S]ubject to certain conditions[,] Alberta will issue an Alberta ID card with your sex designated as female despite the fact that your birth registration lists your sex as male[.] [T]hat's not hypothetical because my Affidavit already says that's the case for me.

So I'm asking isn't it the case [that] in that situation there [is] actually a mismatch between a person's several documents, right? So for example my birth certificate would say I'm male but my Alberta ID card says I'm female. So your sex scheme actually introduced that mismatch, doesn't it?

A: Yes, I guess.

Q: So how does that reduce identity theft? Presumably the witness had some reasons for thinking this scheme helped with identity theft. I'd like to know what those are?

A: I don't know.

37. As admitted by Ms. Bichai, Alberta's scheme actually interferes with accurate identification of persons by creating inconsistencies between their documents (and inconsistencies between a person's appearance and their documents).

38. In her affidavit, Ms. Bichai asserts that mandating surgery to amend the sex designation facilitates the identification of birth records when Alberta is called on to identify a particular adult's birth record[58]. However, at questioning, Ms. Bichai admitted she had no personal knowledge of a case where the only thing that allowed a record to be identified was the sex recorded on the file[59]. She also noted that “there are many ways we can locate the records”[60]. After that, Ms. Bichai went on to repeat her allegation that the sex data is essential in some cases, but again denied any personal knowledge of those cases. Ultimately, in response to an undertaking, Alberta admitted that Vital Statistics staff have no knowledge of the sex data being required to identify a record at any time in the last year[61]. In any case, allowing transgender people to obtain congruent birth certificates would likely make it easier (not harder) to identify their records because then their records would match their appearance and other documents.

39. Ms. Bichai's affidavit does not disclose any purpose in requiring surgery to amend the sex designation

58 Bichai Affidavit, e.g. paras 42-23
59 Bichai Questioning, page 38
60 Bichai Questioning, pages 40-41
61 Letter from Lillian Riczu (counsel for Alberta) to Cathy Fitzpatrick, dated December 20, 2013 (Tab 35). This letter is being referenced because Ms. Riczu did not provide Ms. Fitzpatrick with the filed answer to undertaking in time for it to be referenced in this brief.

on a transgender person's birth certificate. Questions on this topic were not answered[62].

F. EVIDENCE OF MS. HOEKSEMA

40. Alberta filed an affidavit from Stella Hoeksema, sworn November 20, 2013 [the "Hoeksema Affidavit"].

41. The Hoeksema Affidavit is of marginal relevance to the application before the Court.

42. Ms. Hoeksema is an Alberta Health employee who manages a program that, subject to a lengthy list of conditions, provides funding to a small number of (presumably transgender) people for three named surgical procedures: metoidioplasty, phalloplasty, and vaginoplasty[63].

43. In her capacity as special programs manager, Ms. Hoeksema stated at questioning that she does not know whether the three named surgeries, or any of them, constitute an "anatomical change of sex" within the meaning of the *VSA* and she has no position on whether they do[64].

44. Alberta has declined to file any materials that shed light on whether these three named procedures are sufficient to constitute an "anatomical change of sex". Indeed, according to the Insurance Plan Bulletin which Ms. Hoeksema attached to her affidavit as Exhibit "A", a person must also have "obtained the necessary preliminary surgeries required" before applying to her program[65] and an "operative report" describing these "prior...surgeries" must be included in an application to her program[66]. No hint is given as to what these other surgeries might be, although her affidavit does appear to indicate that Alberta does not pay for them under any conditions[67]. Alberta takes the position that the cost of these various surgeries is irrelevant[68].

45. There is no factual nexus between the Hoeksema Affidavit and the issues before the Court, as we have no way of knowing whether the surgeries her program funds (under lengthy conditions) are even the same surgeries mandated by the *VSA*. For example, we cannot know whether undergoing a vaginoplasty is sufficient to secure a female sex designation. Indeed, Ms. Bichai, Director of the Vital Statistics office, went so far as to claim under questioning that she has "no idea" what a vaginoplasty even is[69].

46. It is also instructive to consider the timing of the matters described in the Hoeksema Affidavit. In 2009, Alberta ceased funding the three named surgical procedures for all new applicants[70]. After that point, funding was provided only to people already in the program who had made choices relying on the former availability of

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62 Bichai Questioning, e.g., pages 80:24-27, 81:1
63 Hoeksema Affidavit, paras 1, 4
64 Questioning on Affidavit of Stella Hoeksema [the "Hoeksema Questioning"], pages 1-2, e.g., Question: "You're currently the special programs manager of this program; in that capacity do you have a position on whether these surgeries constitute an anatomical change of sex in the *Vital Statistics Act*?" / Answer: "No, I do not have a position on that."
65 See page 2 of 7 of Exhibit "A" to the Hoeksema Affidavit, which says "Page 1 of 2" in the footer
66 See page 3 of 7 of Exhibit "A" to the Hoeksema Affidavit, which says "Page 2 of 2" in the footer. This is listed as requirement (c) under the heading "GRS Program Application to Alberta Health"
67 See pages 1-2 of 7 of Exhibit "A" to the Hoeksema Affidavit
68 Hoekemsa Questioning, page 17:8-9, etc. Note that in the transcript when Ms. Fitzpatrick says she cannot decide whether to have surgery until after this litigation, what she means is that if she loses this litigation, she will be forced to have surgery, but if she wins, she won't; so the outcome of this litigation will govern the decision.
69 Bichai Questioning, page 50:21-24
70 Hoeksema Affidavit, para 8

the three named procedures (referred to as the "phase-out program")[71]. Three years later, on April 17, 2012, Ms. Fitzpatrick filed her application currently before the Court and served it on Alberta[72], which states that Alberta's surgery requirement to obtain an amendment to sex designation under the *VSA* violates the *Charter*. Less than 60 days later, Alberta reopened its funding of the three named procedures to new applicants[73] and Alberta now seeks to somehow rely on that as part of its case resisting this application.

47. Alberta seems to have missed the point of this application, because coercing transgender people such as Ms. Fitzpatrick into unwanted and risky surgeries does not become less harmful merely because Alberta will pay for the surgeries — and in any case, as previously discussed, we have no way of knowing whether the three named surgeries are even adequate to secure an amendment to sex designation under the *VSA*. Moreover, Ms. Fitzpatrick does not qualify for the program because she has not undergone any of the unspecified "preliminary surgeries"[74] (and she does not even know what they are[75]), and furthermore, Ms. Fitzpatrick is reclusive[76] as a result of Alberta's unconstitutional policies, but Alberta's program requires the applicant to have a "stable lifestyle" and an "adequate support network"[77], criteria Ms. Fitzpatrick could not meet, but criteria that are irrelevant to the fact that she has lived as female for over three years but is still considered male by the *VSA*.

II. QUESTIONS PRESENTED

48. The following issues will be argued on this application:

(a) Does the *VSA* violate s 15 of the *Charter* by mandating that the sex designation on an Alberta birth registration and certificate must reflect the sex assigned to the person at birth unless and until the person undergoes risky surgery to change their "anatomical sex structure" and then provides two affidavits of genital inspection to the respondent?

Answer: Yes.

(b) If so, can the violation of s 15 be saved under s 1 of the *Charter?*

Answer: No.

(c) What is the appropriate remedy for the violation of s 15 of the *Charter*?

Answer: The Court should order Alberta to amend the sex designation on Ms. Fitzpatrick's birth registration to read "female", and the Court should declare the *VSA* in its entirety to be invalid so that Alberta can draft a constitutional version that respects the rights of transgender people.

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71 Hoeksema Questioning, page 10:19-23
72 Affidavit of Service of C.F., affirmed and filed in this action on May 3, 2012, paras 2-3
73 Hoeksema Affidavit, para 9
74 Fitzpatrick Affidavit, para 125, where Ms. Fitzpatrick notes she has never undergone any kind of surgery for any reason
75 Fitzpatrick Affidavit, paras 135-138
76 Fitzpatrick Affidavit, para 91
77 See page 3 of 7 of Exhibit "A" to the Hoeksema Affidavit, which says "Page 2 of 2" in the footer

III. DISCUSSION

A. LEGISLATIVE FRAMEWORK AND PROCEDURAL POSTURE

49. On this application, Ms. Fitzpatrick is challenging the fact that the sex designation on a person's Alberta birth registration and certificate must reflect only the sex assigned to the person at birth, unless and until the person submits to risky unspecified surgery to change their "anatomical sex structure" and then attends before two separate physicians for a genital inspection, each of whom must depose in an affidavit that the person's "anatomical sex has been changed". This will be referred to as "the impugned regime".

50. The impugned regime arises from the combination of several different legislative provisions.

51. Section 2 of the *VSA* provides that "the birth of every child born in Alberta must be registered".

52. Section 48 of the *VSA* empowers any eligible person to apply for a birth certificate (or certain other certificates). A birth certificate is to contain the particulars set out in the regulations: *VSA*, s 48(2). Section 77(j) of the *VSA* authorises the Minister to make regulations respecting the information to be provided on certificates issued under s 48.

53. According to s 24(1)(a)(iii) of the *Vital Statistics Ministerial Regulation*[78], a birth certificate must contain "the sex of the person". Alberta interprets this provision to mandate that birth certificates designate only the sex assigned to the person at birth based on external genitalia, subject only to ss 30 and 60 of the *VSA*. This interpretation is not required by the legislation, but the affidavit of Ms. Bichai confirms it is the interpretation applied by Vital Statistics[79]. Ms. Bichai goes so far as to claim that the inclusion of "anatomical sex" on birth certificates is a "legislative mandatory field"[80], although this is false (and also improper material to include in an affidavit[81]).

54. Section 60 of the *VSA* provides that the Registrar "shall" inquire into alleged errors in documents and "may" amend records on the production of satisfactory evidence. Section 60 is open-ended and does not contain any conditions precedent before the Registrar "may" amend a record, other than that the Registrar must receive a report that an error exists in a document. Notably, s 60 does not require the Registrar to determine that a record contains an error before amending it, and amendments under the provision are seemingly not limited to correcting errors; the provision only requires the Registrar to receive a report of an alleged error before acting. Section 1(j) says that "error" means "incorrect information, and includes omission of information", although this definition is merely the natural meaning of "error" and does not serve to clarify s 60.

55. Section 30 of the *VSA* reads as follows:

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78 Alta Reg 12/2012 (Tab 6)
79 Bichai Affidavit, paras 40 (sex is assigned at birth based on external genitalia), 47 (birth certificates must include "anatomical sex")
80 Bichai Affidavit, para 47
81 See, e.g., ***Bell Canada v Canada (Human Rights Commission)***, [1991] 1 FC 356, [1990] FCJ No 951 (Tab 11) at paras 9-13 (administrator's interpretation of home legislation not to be included in affidavit; such arguments are properly advanced by counsel)

Amendment of records on change of sex

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 and may, with the consent of the other party to the marriage, amend the sex on the record of a subsisting marriage, if any, of the person that is registered in Alberta.

(2) Every birth or marriage certificate of the person referred to in subsection (1) issued after amending the sex on the record under this section must be issued as if the registration had been made with the sex as changed.

56. According to Alberta, s 30 is the only manner in which a transgender person may amend the sex designation on their registration of birth and birth certificate. On December 7, 2011, Ms. Fitzpatrick applied to the respondent and asked that the sex designation on her birth registration be amended to read "female" on the basis of the open-ended power contained in the predecessor legislation to s 60 of the *VSA* (which was the *Vital Statistics Act,* RSA 2000, c V-4 [the "former *VSA*"], s 24 (Tab 7))[82]. On March 21, 2012, Ms. Bichai denied that application on the basis that s 24 of the former *VSA* (and s 60 of the current *VSA*) is not available to transgender people, who must apply under s 30 of the *VSA* (which was s 22 of the former *VSA*)[83]. It later transpired, in an answer to undertaking filed December 17, 2013, that the respondent's interpretation of these provisions had been long detailed in two internal policy documents dated November 7, 2005[84]. The respondent had previously declined to include these documents in the Record filed March 6, 2013 even though it was required to do so by rules 3.19(a) and 3.18(2)(e) of the *Alberta Rules of Court*[85].

57. Ms. Fitzpatrick filed an application for judicial review of the respondent's refusal to amend the sex designation on her birth registration, challenging the constitutionality of the legislative scheme. That application is currently before the Court.

58. The combined effect of the above provisions and Alberta's interpretation of them is that the sex designation on a person's birth certificate must reflect the sex assigned to the person at birth unless and until the person undergoes a change in "anatomical sex structure" and then attends for genital inspections before two physicians, each of whom must provide an affidavit to the respondent Director stating that the person's "anatomical sex has been changed". That overall regime is what is being challenged on this application.

59. The terms "sex", "anatomical sex", and "anatomical sex structure" are not defined in the *VSA*.

60. It is important to observe that there is no single provision that could be struck from the impugned

82 Fitzpatrick Affidavit, paras 82-83
83 See the Certified Record of Proceedings [the "Record"], filed in this action on March 6, 2013
84 Response to Request for Records and Response to Undertakings Relating to Questioning of Mona Bichai, filed in this action by Alberta on December 17, 2013
85 See ***Greater St. Albert Roman Catholic Separate School, District No. 734 v Buterman***, 2013 ABQB 485 (Tab 12) at para 82 (test for production in Record is relevance).

legislation to alleviate the discrimination that Ms. Fitzpatrick complains of. For example, if the Court were to strike s 30, then under Alberta's interpretation, birth certificates would still have to reflect the sex assigned to the person at birth, notwithstanding that the person might live as a different sex. For this reason, throughout this brief Ms. Fitzpatrick will speak of the "the impugned regime" rather than identifying a specific provision because it is the combined effect of all these provision and Alberta's interpretation of them that results in the impugned regime.

61. Many of Alberta's arguments in opposition to this application are directed at establishing that the addition of s 30 to the legislation was not discriminatory. Those arguments are an attempt at misdirection. Whether or not s 30 is present in the legislation, Alberta's interpretation of the legislation requires the sex designation on birth certificates to reflect the sex assigned to the person at birth rather than the sex that the person actually lives as, and that is what is being challenged.

62. It would be possible to cure the constitutional deficiencies in the *VSA* by making s 30 broader, for example, by providing that a person can obtain an amended sex designation by applying with an affidavit stating that the sex designated on the record is different from the sex that they live as. However, it would also be possible to cure the constitutional deficiencies in the *VSA* by leaving s 30 alone and adding a new provision that allows amendment of sex designation when the person's lived sex is inconsistent with the sex recorded on the document (similar to what the Quebec Act mentioned above does).

B. ALBERTA'S BIRTH REGISTRATION SYSTEM VIOLATES S 15 OF THE *CHARTER*

i. General principles

63. Section 15 of the *Charter* is titled "Equality Rights" and reads as follows:

Equality before and under law and equal protection and benefit of law	**15.**	(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
Affirmative action programs		(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

64. The controlling judgment on the application of s 15 of the *Charter* is the judgment of Abella J in ***Quebec (Attorney General) v A***[86], released in January 2013[87]. The judgment in ***A*** synthesises and clarifies the Supreme

86 2013 SCC 5 (Tab 13)

87 Abella J was writing on behalf on herself only, but her analysis of s 15 was concurred in by Deschamps J writing on behalf on himself and on behalf of Cromwell and Karakatsanis JJ (see the reasons of Deschamps J at ***A***, para 385: "I agree with Abella J's analysis of s 15 of the *Charter*") and was also concurred in by McLachlin CJ writing on behalf of herself only (see the reasons of McLachlin CJ at para 415: "I agree with the s 15 analysis set out in Abella J's reasons").

Court's earlier decisions on s 15. As recently noted by the Federal Court of Appeal, "[t]he Supreme Court's descriptions [of discrimination], different as they may be, are all helpful in understanding the nature of discrimination": ***Miceli-Riggins v Canada (Attorney General)***[88] at para 45.

65. In ***A***, Abella J describes the purpose of s 15 as follows:

> The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory.
>
> ***A*** at para 332 per Abella J

66. "State conduct" must be understood as including state action, state inaction, and legislation: ***Miceli-Riggins*** at para 46.

67. Prior to ***A***, the test for discrimination contrary to s 15 had been as set out in ***R v Kapp***[89] and ***Withler v Canada (Attorney General)***[90]. Those cases created a two-part test for a finding of discrimination: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? See ***Withler*** at para 30; ***Kapp*** at para 17.

68. In ***A***, however, Abella J clarified that perpetuation of prejudice or stereotyping were merely intended as indicia that may help answer the real question, which is whether the law violates the norm of substantive equality. A claimant under s 15 is not obliged to demonstrate the perpetuation of prejudice or stereotyping in order to prevail on her claim: ***A*** at para 325 per Abella J. Indeed, requiring claimants to prove that the law perpetuates negative attitudes would be a largely irrelevant and ineffable burden: ***A*** at para 330 per Abella J.

69. The intention of the law is irrelevant to s 15: ***A*** at para 328 per Abella J. It does not matter what the state's intent may have been in enacting the law. If the impact of the law is discriminatory, then it violates s 15: ***A*** at para 323-324 per Abella J; ***Withler*** at para 39.

70. Any consideration of whether the legislative purpose in the distinction is justified or reasonable must take place under the analytical framework of s 1 of the *Charter* where the state bears the burden of proof: ***A*** at para 333 per Abella J. It is an error of law to collapse justification of the distinction into s 15, causing the claimant to bear what should be the government's burden: ***A*** at para 340 per Abella J.

71. In this case, Alberta asserts that the impugned regime is an affirmative action program insulated from judicial review under s 15(2) of the *Charter*, so a brief comment on that is necessary in formulating the appropriate test to be applied to the s 15 analysis. Sections 15(1) and 15(2) are intended to work together in order to promote the goal of substantive equality: ***Kapp*** at para 16; ***Alberta (Aboriginal Affairs and Northern***

Overall, then, the s 15 analysis of Abella J in ***A*** was agreed to by a majority of the justices of the Supreme Court and is thus binding on this Court.

88 2013 FCA 158 (Tab 14)

89 2008 SCC 41, [2008] 2 SCR 483 (Tab 15)

90 2011 SCC 12, [2011] 1 SCR 396 (Tab 16)

Development) v Cunningham[91] at para 38.

72. Section 15(2) does not operate to shield discriminatory regimes which are claimed by the government to be affirmative action programs; the means chosen by the state to implement the program must be rational: ***Cunningham*** at para 46. It is still an open question in the jurisprudence exactly which distinctions are insulated from review by s 15(2); the criteria may be "refined and developed as different cases emerge": ***Cunningham*** at para 45.

73. According to ***Kapp*** at para 40, the question of whether the impugned regime is insulated from judicial review by s 15(2) should be considered after the claimant has established a distinction on the basis of an enumerated or analogous ground, but before proceeding to consider whether the distinction constitutes discrimination contrary to s 15(1) of the *Charter*.

74. In summary, the determination of Ms. Fitzpatrick's s 15 claim must proceed in three parts:

(a) Does the impugned regime draw a distinction on the basis of an enumerated or analogous ground by providing that the designation of sex on an Alberta birth registration and certificate must reflect the sex assigned to the person at birth unless and until the person undergoes risky surgery to change their "anatomical sex structure" and then submits to genital inspection before two physicians, each of whom must provide an affidavit to the respondent deposing that the person's "anatomical sex has been changed"?

Ms. Fitzpatrick bears the burden of establishing this.

(b) If so, is the impugned regime insulated from judicial review as a protected affirmative action program pursuant to s 15(2) of the *Charter*?

Alberta bears the burden of establishing that the impugned regime is protected by s 15(2), which it fails to do.

(c) If the impugned regime is not protected by s 15(2), does the distinction violate the norm of substantive equality contained in s 15 of the *Charter* and thus constitute discrimination?

Ms. Fitzpatrick must establish this, bearing in mind that any consideration of the legislative purpose or how reasonable the distinction might be, is not relevant and must be addressed at the s 1 stage instead.

75. Before proceeding to the application of this test, Ms. Fitzpatrick wishes to draw the Court's attention to a highly pertinent and highly persuasive case: ***XY***, which was a challenge to Ontario's requirement that the sex on an Ontario birth certificate reflect the sex assigned at birth, subject only to "transsexual surgery" and certification thereof. The Human Rights Tribunal of Ontario applied the test for discrimination set out in ***Withler*** (the case was decided before ***A***) and determined that Ontario's regime discriminated against transgender people, exacerbating their historical disadvantage in society and promoting stereotyping about them. The ***XY*** decision is extremely

91 2011 SCC 37, [2011] 2 SCR 670 (Tab 17)

detailed, carefully written, and provides a thorough analysis of all the same issues before the Court on the current application. Ms. Fitzpatrick will make further reference to ***XY*** throughout the discussion.

76. We now turn to the merits of the s 15 claim.

ii. The impugned regime draws a distinction on the basis of an enumerated or analogous ground

a. Enumerated or analogous ground

77. The impugned regime in this case discriminates against transgender people.

78. Transgender people are an historically disadvantaged group who face extreme social stigma and prejudice in our society: ***XY*** at para 164. As explained by Dr. Karasic, transgender people suffer levels of discrimination, harassment, and violence unmatched by other minority groups[92]. According to the Ontario Human Rights Commission, "[t]here are, arguably, few groups in our society today who are as disadvantaged and disenfranchised as [trans people]. Fear and hatred of [trans people] combined with hostility toward their very existence are fundamental human rights issues."[93] The (US) National Transgender Discrimination Survey found that discrimination against trans people is pervasive, with high rates of harassment, mistreatment, discrimination at work, discrimination in housing, discrimination in public accommodations, inability to obtain congruent documentation, and harassment when using incongruent documents, among other things[94]. In short, transgender people form the kind of "discrete and insular minority" entitled to protection under s 15 of the *Charter*.

79. Under provincial and federal human rights legislation, discrimination on the basis of being transgender has typically been handled as discrimination on the basis of "sex" or "disability" or both: ***XY*** at para 88 (citing various human rights cases). This approach could be adopted under the *Charter* as well. Alternatively, the status of being transgender could be viewed as an analogous ground. It does not really matter which approach is adopted, although Ms. Fitzpatrick considers it analytically preferable to consider the status of being transgender to be an analogous ground.

b. Distinction

80. The distinction in this case is quite straightforward. The impugned regime draws a distinction on the basis of being transgender as follows:

(a) **Non-transgender person**: Somebody who is not transgender can obtain a birth certificate with a sex designation that accords with her lived sex simply by asking for one pursuant to s 48 of the *VSA*.

(b) **Transgender person**: Somebody who is transgender cannot obtain a birth certificate with a sex designation that accords with her lived sex unless and until she first undergoes risky, unspecified surgeries and then attends for a genital inspection before two separate physicians, each of whom

92 Karasic Affidavit, para 38

93 "Policy on discrimination and harassment because of gender identity", a policy document of the Ontario Human Rights Commission, published March 30, 2000 (Tab 36)

94 Grant, Jaime M., Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling. *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*. Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011, Executive Summary (Tab 37)

must depose in an affidavit to the respondent that the person's “anatomical sex has been changed”. Then and only then can the person apply pursuant to s 48 of the *VSA* to obtain a birth certificate with a sex designation that accords with her lived sex.

81. In other words, the provision of a birth certificate with a sex designation that accords with the person's lived sex is administered on a **distinct and differential basis** to transgender people, who must satisfy an exceedingly harsh additional requirement (submission to risky surgery and subsequent genital inspection and affidavit evidence thereof), and this requirement is not required of people who are not transgender. “Lived sex” here means the sex the person lives and identifies as (“female” in the case of Ms. Fitzpatrick).

c. Alberta's arguments

82. Alberta has advanced numerous arguments to resist the conclusion that the impugned regime draws a distinction on the basis of an enumerated or protected ground. These arguments are all misguided.

83. Alberta says that the impugned regime draws a distinction purely on the basis of whether the person has changed their “anatomical sex structure” or not[95]. According to Alberta, this distinction on the basis of “anatomical sex structure” is not on an enumerated or analogous ground[96]. This argument must fail.

84. It is central to Alberta's position in this litigation that the term “sex” in the *VSA* and regulations refers specifically to “anatomical sex structure” and not any other notion of sex. Ms. Bichai even deposes to that in her affidavit: Bichai Affidavit, para 47, where she claims that “anatomical sex” must be included on birth certificates because “sex” in s 24(1)(a)(iii) of the *Vital Statistics Ministerial Regulation* means “anatomical sex”. Ms. Bichai reiterated this position on questioning[97]. Thus, Alberta's own position in this litigation is that “sex” is synonymous with “anatomical sex structure” in a Vital Statistics context, and “sex” is an enumerated ground under s 15(1) of the *Charter*, so Alberta's argument that the distinction is on the basis is “anatomical sex structure” must be taken as an admission that the impugned regime draws a distinction on the basis of an enumerated ground.

85. Even accepting (contrary to Alberta's own admissions) that “anatomical sex structure” is not an enumerated or analogous ground, drawing a distinction on the basis of “anatomical sex structure” obviously has a distinct and differential effect on transgender people, because transgender people are — by definition — the only people who will live as a different sex from the one associated with their “anatomical sex structure”. Tying the sex designation on birth registrations and certificates to “anatomical sex structure” means that almost all transgender people cannot obtain a birth certificate that accords with their lived sex, but that non-transgender people can easily obtain a birth certificate that accords with their lived sex, which is a distinction on the basis of an analogous ground (being transgender). It simply does not assist Alberta's case to state that the legislation draws a distinction on the basis of “anatomical sex structure”, because this is an admission of the legislation drawing a distinction (by adverse effect) against transgender people.

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95 Alberta's brief in opposition to C.F.'s interim application, filed November 16, 2012 [“Alberta Interim Brief”], para 62
96 Alberta Interim Brief, para 63
97 Bichai Questioning, pages 62:26-27, 63:1-4

86. Alberta's argument in this respect would be similar to arguing that a distinction on the basis of "being pregnant" is neutral and non-discriminatory and not a distinction on the basis of sex. This argument has been specifically rejected by the Supreme Court in ***Brooks v Canada Safeway Ltd***[98]. In ***Brooks***, the Supreme Court dealt with an employer's group insurance plan which excluded certain benefits relative to pregnancy. The employer argued that the exclusion was neutral and did not constitute a distinction on a basis of one of the grounds enumerated under the provincial human rights legislation. The Supreme Court rejected this argument and explained that:

> The disfavoured treatment accorded [to the complainants] flowed entirely from their state of pregnancy, a condition unique to woman. They were pregnant because of their sex. Discrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant.
> ***Brooks*** at para 38

87. ***Brooks*** is similar to the case at bar because by the definition of being "transgender", only transgender people will ever live and identify as a sex other than the other associated with their "anatomical sex structure" — so by drawing a distinction on the basis of "anatomical sex structure", Alberta is in fact drawing a distinction on the basis of being transgender, an analogous ground.

88. It must also be noted that Alberta's assertion that the impugned regime draws a distinction purely on the basis of "anatomical sex structure" is false. In order to obtain a birth certificate congruent with one's lived sex as opposed to the sex assigned at birth, the impugned regime requires more than a change in "anatomical sex structure": the impugned regime also requires the person to submit to *two* genital inspections before *two* physicians and supply the respondent with *two* affidavits, each one deposing that the person's "anatomical sex has been changed". Even if the requirement of surgery were not enough to ground a reviewable *distinction*, the requirement of multiple genital inspections and affidavit evidence thereof would be.

89. Next, Alberta says that the impugned regime in fact provides a benefit to transgender people that "only they can reasonably be expected to enjoy" and therefore does not constitute a reviewable distinction on an enumerated or analogous ground[99]. This argument is without merit, but more importantly, it is irrelevant to the analysis of whether the impugned regime draws a distinction on the basis of an enumerated or analogous ground. Alberta's argument is merely an attempt to state that the impugned regime has a compelling purpose, but the purpose of the impugned legislation is simply not relevant at this stage: ***A*** at para 333 per Abella J.

90. Finally, Alberta says that Ms. Fitzpatrick fails to understand the *VSA* because the *VSA* has nothing to do with lived sex or gender identity. Indeed, Alberta cautions the Court that to read any place for "gender identity" into the *VSA* would be "clear error" and stresses that the *VSA* is based purely on "anatomical sex structures"[100]. This argument does not assist Alberta's case, because it is merely an admission that the *VSA* does not adequately accommodate transgender people, contrary to s 15(1) of the *Charter*.

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98 [1989] 1 SCR 1219, [1989] 1 SCR 1219 (Tab 18)
99 Alberta Interim Brief, para 62
100 Alberta Interim Brief, para 10

91. If Alberta believes that it has strong reasons for limiting the provision of a congruent birth certificate to only those transgender people who undergo risky surgeries and then provide affidavit evidence thereof, it is free to make those arguments relative to s 1 of the *Charter*, but they are not relevant at this stage: ***A*** at para 335 per Abella J ("Any discussion of the reasonableness of distinctions based on this ground, or justifications for such distinctions, must take place under s 1"); ***Law Society British Columbia v Andrews***[101] at para 47 (factors justifying the enactment to be considered under s 1, not s 15).

92. The Supreme Court has been clear that it is for the government to demonstrate that its legislative purpose is reasonable, under the framework of s 1, and not for Ms. Fitzpatrick to demonstrate that it is unreasonable under the framework of s 15: ***A*** at para 343 per Abella J. Alberta's arguments about what the *VSA* is intended to do or the role that the *VSA* allegedly plays in society are all irrelevant. All that matters at this stage is the very obvious distinction that the *VSA* draws in the provision of a birth certificate with a sex designation that accords with the person's lived sex.

93. In the result, Alberta's arguments are without merit. The impugned regime draws a distinction on the basis of an analogous ground, namely the quality of being transgender. Having established that, we now turn to the next step of the analysis, namely whether Alberta can demonstrate that the impugned regime is an affirmative action program insulated from judicial review by s 15(2) of the *Charter*.

iii. The impugned regime is not insulated from judicial review by s 15(2) of the Charter

94. Alberta says that the requirement that the sex designation on an Alberta birth certificate reflect the sex assigned to the person at birth, subject only to submission to risky surgery and subsequent genital inspection and affidavit evidence thereof, is an affirmative action program for the benefit of a subset of transgender people and therefore insulated from judicial review by s 15(2) of the *Charter*[102].

95. The current jurisprudence on s 15(2) of the *Charter* starts in 2008 with ***Kapp*** and was further clarified in 2011 in ***Cunningham***. According to ***Kapp*** and ***Cunningham***, s 15(2) is to be viewed as an independent provision from s 15(1), and not merely an interpretative aid to the application to s 15(1). Prior to ***Kapp***, the fact that a program might be ameliorative was considered as part of the s 15(1) test, a factor to be weighed in whether the law was discriminatory or promoted substantive equality.

96. Before turning to the merits of Alberta's s 15(2) argument, it must be emphasised that Alberta bears the affirmative burden of proving that the impugned legislation falls within the protection of s 15(2): ***Kapp*** at para 41 (government must demonstrate that program falls within s 15(2)). Also, the government's declaration that a program is ameliorative is not enough: ***Kapp*** at para 46 (the Court can examine the legislation to determine whether the government's claimed purpose is genuine).

97. Alberta's s 15(2) argument must be rejected for the following reasons:

(a) The requirement that the sex designation reflect the sex assigned at birth unless and until the

101 [1989] 1 SCR 143, [1989] SCJ No 6 (Tab 19)
102 Alberta Interim Brief, para 65

person undergoes surgery and provides proof thereof cannot be viewed as an ameliorative program because Already is already under a positive obligation to accommodate all transgender people with respect to its birth registration system, whether or not s 30 of the *VSA* exists (the alleged affirmative action program). Alberta cannot extinguish that obligation using s 15(2) of the *Charter*.

(b) Alternatively, if the impugned regime were to be characterised as an ameliorative program, its goal would have to be properly understood as improving the situation of transgender people generally. The means chosen to achieve that goal are irrational because most transgender 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", so s 15(2) does not protect the legislation.

(c) In the further alternative, if the goal of the ameliorative program is properly understood as assisting only those transgender 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.

Even if Alberta wants to help transgender people who undergo surgery, making a sex designation amendment *conditional* on surgery and subsequent genital inspection does not benefit them because the need for an amended birth certificate does not arise when they undergo surgery, nor does the need for an amended birth certificate arise as a result of undergoing surgery. Also, even if a person intends to undergo surgery, it will likely occur a year or more after the person starts living as her or his felt sex. Alberta has chosen to make a benefit conditional on something to which it bears no rational connection.

98. Each of the above reasons will be considered in turn.

a. The impugned regime cannot be properly characterised as an ameliorative program

99. The entitlement of transgender people to a birth certificate congruent with their lived sex flows from the fact that Alberta has chosen to enact a birth registration system and given it a prominent significance in society. The significance of the system has been discussed above and will be discussed more later. Ms. Fitzpatrick's affidavit sets out the many ways in which the impugned regime interferes with Ms. Fitzpatrick's life and prevents her from participating in society on an equal basis. In short, Alberta's discriminatory birth registration system has very nearly ruined her life and nearly coerced her into unwanted and unknown risky medical procedures, subject only to a chance to prevail on this application.

100. Alberta's affirmative action argument is premised on the fact that s 30 of the *VSA* affirmatively authorises the Registrar to amend the sex designation on birth records in some cases.

101. However, the discriminatory effect of the impugned regime would be very similar whether or not s 30 of the *VSA* existed. If s 30 of the *VSA* did not exist, Ms. Fitzpatrick would still not be able to obtain a congruent birth certificate and would still not be able to participate in society fully. In such a scenario, she would still be before this Court making very similar arguments to the ones she is making in this brief, and Alberta would not be able to

make a s 15(2) *Charter* argument because there would be no s 30 of the *VSA*.

102. It should be repeated that any justifications for the differential basis on which Alberta deals with transgender people (such as an argument that there are strong reasons for limiting the *VSA* to "anatomical sex") are not relevant at this stage; such arguments must be handled as part of any s 1 *Charter* argument advanced by Alberta.

103. In short, by choosing to enact a birth registration system and giving it the societal significance that it has, Alberta becomes positively obligated to treat transgender people on a substantively equal basis with respect to that system (namely by providing them with certificates bearing a sex designation congruent with their lived sex, rather than the sex assigned at birth), or else Alberta will violate s 15(1) of the *Charter*[103].

104. It would be truly remarkable if Alberta could escape this positive obligation by:

(a) enacting a new provision (*VSA*, s 30) that does not satisfy the obligation which Alberta is already under; and then

(b) claiming that the new provision (*VSA,* s 30) is an affirmative action program, thereby extinguishing the original positive obligation.

105. There is no authority for the proposition that s 15(2) of the *Charter* can be used by the government to avoid satisfying positive obligations that it is already under. Such an interpretation would transform s 15(2) of the *Charter* into a tool for evading, rather than enhancing, substantive equality, which is entirely contrary to the point of s 15 of the *Charter*: ***Cunningham*** at para 38.

106. 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:

(a) ***Lovelace v Ontario***[104] dealt with a "casino project" implemented by Ontario to distribute money to some, but not all, first nations groups. The excluded first nations groups argued that their exclusion was discriminatory, but the Supreme Court found that the casino project was protected by s 15(2). This result is not surprising because Ontario was not under a positive obligation to distribute the funds of the casino project to any first nations groups. Indeed, no one in the case argued that there was a positive aboriginal right to these funds: ***Lovelace*** at para 9. Ontario was thus free to choose which groups to ameliorate pursuant to s 15(2). Ontario was not attempting to use s 15(2) to escape a positive obligation to distribute funds that it was already under. ***Lovelace*** is not helpful to Alberta's position in the case at bar.

(b) In ***Kapp***, the federal government granted a fishing licence authorising certain first nations to commercially fish for a single day in a river where such commercial fishing was otherwise prohibited:

103 Of course, Alberta can attempt to justify such violations under s 1 of the *Charter*, at which point of the reasonableness of the legislative objective can be given a full and thorough consideration.
104 2000 SCC 37, [2000] 1 SCR 950 (Tab 20)

Kapp at para 8. Several people who were prohibited from fishing argued that the commercial fishing license was discriminatory, but the Supreme Court found it was protected by s 15(2) of the *Charter*. The government was not under a positive obligation to issue anybody a commercial fishing licence: ***Kapp*** at para 5. The federal government did not create a commercial fishing licence scheme of general application and then exclude the complainants, but that is what Alberta has done in this case by creating a birth registration system of general application and then essentially excluding transgender people from it by treating them on a distinct and disadvantageous basis with respect to that system of general application.

(c) In ***Cunningham***, Alberta enacted the *Metis Settlements Act*[105] [*MSA*] to provide several benefits to Metis people. Section 75 of the *MSA* excludes most federal status Indians from taking advantage of the *MSA*. This was challenged as discriminatory. The Supreme Court found that the *MSA* was protected by s 15(2). This was another case where Alberta was not under any positive obligation to ameliorate the condition of Metis people, so it was free to do so on the terms it chose. Alberta did not enact first nations self-governance legislative of general application and then exclude the ***Cunningham*** complainants; instead, the *MSA* was targeted only at a specific disadvantaged group.

107. It is informative to consider how Alberta's argument would apply in another case in which the government was declining to fulfill a positive obligation that it was already under as a result of having enacted legislation of general application. In ***Vriend v Alberta***[106], the Supreme Court considered the constitutionality of human rights legislation that was then in force in Alberta. The impugned legislation enacted a regime for dealing with discrimination in the public and private sectors on the basis of gender, race, disability, and various other grounds. The legislation was clearly enacted to ameliorate the conditions of disadvantaged groups on the basis of the named grounds: ***Vriend*** at paras 1-3. However, by omission, the legislation did not provide any protection against discrimination on the basis of sexual orientation: ***Vriend*** at para 4. The Supreme Court found that although Alberta was not under any obligation to enact human rights legislation, by choosing to enact such a system of general application, Alberta became under a positive obligation to treat gay people on a substantively equal basis with respect to that system: ***Vriend*** at para 96 (“The comprehensive nature of the Act must be taken into account in considering the effect of excluding one ground from its protection.”).

108. The ***Vriend*** case predated modern jurisprudence on s 15 and s 15(2) of the *Charter* but it is still informative to consider how Alberta's argument in this case would apply to the ***Vriend*** case. 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. Therefore, the Supreme Court should have dismissed Mr. Vriend's appeal.

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105 RSA 2000, c M-14
106 [1998] 1 SCR 493, [1998] SCJ No 29 (Tab 21)

109. It is submitted that applying Alberta's logic to ***Vriend*** results in an absurdity. When Alberta enacts a system of general application, it is under a positive obligation to respect s 15(1) of the *Charter* with respect to that system and it cannot rely on s 15(2) to avoid treating transgender people on a substantively equal basis with respect to that system.

110. For those reasons, the impugned regime cannot be properly characterised an ameliorative program and the distinction at issue is not insulated from judicial review by s 15(2) of the *Charter*. This conclusion does not mean that Alberta automatically loses this litigation. On the contrary, Alberta still has a full opportunity (at the next step) to argue that the distinction does not violate the norm of substantive equality and therefore is not discrimination contrary to s 15 of the *Charter*. Alberta also has the opportunity to justify any discrimination under s 1 of the *Charter*, at which point the legislative intent can be fully canvassed and weighed against the discriminatory effects of the regime. However, Alberta's attempt to invoke s 15(2) must be rejected; its arguments are properly dealt with under other aspects of the overarching analytical framework.

b. Alternatively, the goal of the program is to help transgender people, and the means chosen are irrational

111. Alberta's s 15(2) argument should be dismissed on the basis described above. However, in the alternative, if the impugned regime is capable of being characterised as some form of affirmative action program, its object must be understood as being to ameliorate the conditions of transgender people generally, and the means Alberta has chosen to implement that object are irrational, so the impugned regime is not protected by s 15(2) of the *Charter*.

112. In order to benefit from s 15(2), Alberta must show that there is a correlation between the program and the disadvantage suffered by the target group: ***Cunningham*** at para 44. Also, s 15(2) only protects those distinctions which serve and are necessary to advance the ameliorative object of the program: ***Cunningham*** at paras 44-45. Section 15(2) does not apply if, for example, the state chooses irrational means to pursue its ameliorative goal: ***Cunningham*** at para 44. There may also be other cases where s 15(2) does not protect a distinction as well; the jurisprudence is still evolving: ***Cunningham*** at para 44.

113. It is apparent from the Supreme Court's statement of the law on s 15(2) that much turns on the “object” of the alleged affirmative action program, because the determination of the object will be highly relevant to whether the means chosen to achieve that object are rational.

114. The government cannot merely state that the object of the program is to do exactly what the impugned regime in fact does, because that is tautological. If that strategy were permitted, then the Supreme Court's test would be completely pointless because the “object” and the “means” would by definition be the same thing, which would preclude any analysis of whether the means are a rational way to achieve the objective. Stating a tautological objective would also be a very strong strategy under a s 1 *Charter* justification because since the objective and provision would be the same thing, the proportionality test would always be satisfied. It is thus clear that the objective of the statute cannot merely be a tautology, as it would make the jurisprudence vacuous.

115. The purpose of legislation is determined by reference to the intention of the Legislature at the time the

provision was passed, not by any variable that shifts with time: ***R v Big M Drug Mart Ltd***[107] at para 91. In this case, the impugned legislation was implemented in 1973 and has not been materially amended in the intervening 40 years.

116. Alberta asserts that the purpose of the impugned regime is to "benefit those who suffer from gender identity disorder and who have undergone medical procedures that have changed the person's anatomical sex structure"[108]. This purpose cannot possibly be accurate because "gender identity disorder" did not even exist as a diagnosis until 1980[109] and the impugned legislation was passed in 1973. Alberta's proffered purpose is an attempt to rely on a theory of shifting legislative purpose in order to advance its position in this litigation.

117. The expert evidence of Dr. Karasic establishes that in the early 1970s, we had very limited understanding of transgender people and there was an assumption that all transgender people would be treated by the administration of genital surgeries through centralised gender clinics[110].

118. Viewed in the context of the uncontradicted evidence of Dr. Karasic, the goal of the impugned regime can only be understood as an attempt to help transgender people generally, albeit a misguided attempt. In the early 1970s, we did not even have knowledge of the variation among transgender people[111], so it simply would not have been possible for the Legislature to have turned its mind to which transgender people should be helped or not. Attempting to imbue the 1973 Legislature of Alberta with an intention to exclude most transgender people[112] from the ambit of the program being enacted is an attempt at revisionist history; the Legislature would not have had the knowledge that it was excluding any transgender people.

119. The conclusion that the object of the program was to help transgender people generally is also bolstered by a review of the Alberta Hansard: Bichai Affidavit, Exhibit "M". In introducing the relevant bill, Minister Crawford described how the provision was intended to be comprehensive: it dealt with amendment of both birth records and marriage records and it even attempted to amend records present in other jurisdictions (by sending a notice to the relevant Vital Statistics department; a provision that has since been removed). On a fair reading, the provision was clearly intended to be a complete solution to the needs of transgender people relative to the Vital Statistics system.

120. There is no hint in the Hansard that Minister Crawford or the Legislature intended to exclude most transgender people from the provision. To imbue our historical legislators with such an intent is disrespectful of them. They did their best based on the knowledge available in 1973, in their attempt to help transgender people generally.

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107 [1985] 1 SCR 295 (Tab 22)
108 Alberta Interim Brief, para 65
109 "Report of the APA Task Force on Treatment of Gender Identity Disorder Calls for Development of Practice Recommendations and Official Position Supporting the Rights of Gender Variant Persons", American Psychiatric Association, July 2, 2012 (Tab 38)
110 Karasic Affidavit, paras 25-28
111 Karasic Affidavit, paras 25-26
112 Most transgender people do not have surgery: Karasic Affidavit, paras 19-20, 38.

121. However, we now know:

(a) that most transgender people do not have surgery[113],

(b) that gender transition is a highly individualised process[114],

(c) that requiring surgery as a condition of amending birth records has no basis in contemporary medicine[115], and

(d) that all transgender people, regardless of genital status, have a need for documents, including birth certificates, that uniformly reflect their lived sex[116].

122. Alberta bears the burden of proving that the impugned regime is a rational way to achieve the object of helping transgender people generally. It has not filed any evidence capable of proving that. The evidence before the Court proves that the alleged affirmative action program is in fact irrational, based on knowledge we have now that we did not have in 1973. Alberta's s 15(2) argument must be dismissed on this basis.

c. Alternatively, if the goal is to help only people who have had surgery, the means chosen are still irrational

123. In the further alternative, if, contrary to all evidence, the 1973 Alberta Legislature intended to exclude most transgender people from an ameliorative program that it was enacting and the object of the impugned regime is properly understood as being to help only those transgender people who undergo surgery to change their "anatomical sex structure" (whatever that means), then the impugned regime is still irrational and is not protected by s 15(2) of the *Charter*.

124. First of all, this view of the object of the impugned regime (that it is intended to help exactly those transgender people who undergo an "anatomical change of sex") is tautological. As discussed above, a tautological purported purpose cannot be used to justify the impugned regime, because that would render the test from the jurisprudence vacuous. This alternative argument should be dismissed on that basis alone.

125. Even for transgender people who actually undergo one or more surgeries, the need for a congruent birth certificate does not arise at the moment the person undergoes surgery. There is nothing about surgery that causes a person to suddenly need a congruent birth certificate. None of the purposes for which a person might use a birth certificate have anything to do with genitals; they all have to do with the person's presentation. This was admitted by Ms. Bichai on questioning when she explained that "when you're required to provide ID [meaning a birth certificate], the ID matches who you are. That eliminates any suspicion."[117] Ms. Fitzpatrick is not aware of any government program or other use for a birth certificate that requires the person to present their genitals for comparison to their birth certificate.

126. As such, even for people who actually undergo surgeries, the impugned regime is irrational because it

113 Karasic Affidavit, paras 19-20, 38
114 Karasic Affidavit, paras 21-23
115 Karasic Affidavit, para 28
116 Karasic Affidavit, para 40
117 Bichai Questioning, page 65:10-13

denies those people a congruent birth certificate right up until the moment they undergo surgery, attend two genital inspections, and then provide the respondent with two affidavits, even though those activities have nothing to do with when the person actually starts to require a congruent birth certificate — which is when they start presenting as their felt sex. Dr. Karasic confirms that all transgender people have a need for uniformly congruent documents, including birth certificates, regardless of genital status[118] — the need for such documents does not arise as a result of a change in "anatomical sex structure".

127. It is also important to note that it will typically be a year or more after a person transitions to her felt sex before she can any undergo surgery, even if she actually wants to. That is a long time to go without a congruent birth certificate, considering that the need arises when the person transitions. Indeed, Exhibit "A" to the Hoeksema Affidavit says that a person cannot even qualify for Ms. Hoeksema's program until the person has lived as her felt sex for at least a year[119], plus any waiting time to receive surgery itself (and we don't even know whether the surgeries her program funds are sufficient for s 30 of the *VSA*, so the delay could be even longer to receive further surgeries and meet the requirements).

128. Thus, even assuming, contrary to the evidence, that the purpose of the alleged affirmative action program is to help only those transgender people who undergo an "anatomical change of sex", the impugned regime is still an irrational way to achieve that goal because it makes obtaining a congruent birth certificate conditional on requirements unrelated to when the person starts to require a congruent birth certificate. The impugned regime forces even the supposed beneficiaries of the program to wait years before securing a congruent birth certificate. This is irrational and the impugned regime is not protected by s 15(2).

iv. The impugned regime violates the norm of substantive equality

129. Having dispensed with Alberta's s 15(2) argument on any of the grounds mentioned above, we now return to the question of whether the impugned regime is discriminatory contrary to s 15 of the *Charter*.

130. At this final stage of the s 15 analysis, the question is: "Does the challenged law violate the norm of substantive equality in s 15(1) of the *Charter*?": ***A*** at para 325 (internal quotation marks omitted). The effect of the impugned regime on prejudice and stereotyping toward the disadvantaged group (transgender people) may be helpful in answering this question, but the claimant is not required to demonstrate these: ***A*** at para 325.

131. An analysis involving comparator groups may lead to serious substantive inequality despite formal "sameness" and such an analysis is disfavoured: ***A*** at paras 345-346 per Abella J and 167-168 per LeBel J.

132. The inquiry is whether the *actual impact* of the impugned regime is discriminatory, without regard to whether the government intends it to be discriminatory: ***A*** at paras 323. This analysis is to take place grounded in the context of the actual situation of the claimant and the historical disadvantage of the group: ***Withler*** at para 37. It would be an error to analyse the impugned regime through any gloss or interpretation provided by Alberta.

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118 Karasic Affidavit, para 40

119 Page 2 of Exhibit "A" to the Hoeksemsa Affidavit (labelled "Page 1 of 2") says that "[t]he patient must have completed at least one year of ... 'real-life experience' [living as one's felt sex]" prior to applying for her program.

What matters is the perspective of Ms. Fitzpatrick and other transgender people and the actual effects of the impugned regime. The government's motive is not relevant: ***A*** at para 328. Alberta will certainly advance many arguments about its motive and intent, but these arguments must be disregarded because they are nonresponsive to the issue before the Court.

133. The analysis of whether substantive equality has been violated is to be flexible and must consider contextual factors relevant to the disadvantaged group: ***A*** at para 331. In particular, the impugned regime must be analysed in the context of being yet another barrier in the long line of obstacles that Ms. Fitzpatrick has had to deal with in order to attempt to gain legal recognition of her lived sex of female (many of which obstacles were caused, enabled, or facilitated by Alberta), as described in detail in the Fitzpatrick Affidavit[120].

134. The primary discriminatory nature of the impugned regime has been stated in ***XY*** 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.
>
> ***XY*** at para 171

135. Alberta argues that no judgment is implied by giving Ms. Fitzpatrick a birth certificate that says she is male. According to Alberta, this merely indicates a fact about her "anatomical sex structure" and reading anything else into the designation is a mistake. This argument cannot be accepted.

136. First, the field designated on birth certificates is sex, not "anatomical sex structure"[121]. Designating Ms. Fitzpatrick's "sex" as **male** obviously conveys a judgment about her sex, not about her "anatomical sex structure". Secondly, and in any case, Alberta's notion of "anatomical sex structure" is nothing like what ordinary English might expect. For example, Ms. Bicahi testified that a female sex designation does not require what might appear to be a vagina[122]. The intuitive appeal of Alberta's reference to "anatomical sex structures" is an implication that the impugned regime is rooted in medical science, but that implication simply has no basis in the record before the Court. The expert evidence of Dr. Karasic unequivocally confirms that the impugned regime is not an accurate reflection of our medical understanding of "sex" in the context of transgender people[123].

137. Also, it must be recalled that in opposing the existence of a distinction on the basis of an enumerated or analogous ground, Alberta claimed that "anatomical sex structure" was quite distinct from "sex" and was not an enumerated or analogous ground[124]. It does not lie in Alberta's mouth to argue the opposite for the purpose of

120 Fitzpatrick Affidavit, paras 26-86
121 *Vital Statistics Ministerial Regulation*, s 24(1)(a)(iii)
122 Bichai Questioning, page 72:1-9
123 Karasic Affidavit, paras 25-28
124 Alberta Interim Brief, para 62

opposing a finding of discrimination. Given that both terms are used in the legislation, Alberta's choice to designate “sex” and not “anatomical sex structure” on a birth certificate must be given significance. Properly interpreted, the *VSA* uses “anatomical sex structure” as a proxy for measuring sex. This proxy works fine for most people, but has a discriminatory impact in the case of transgender people such as Ms. Fitzpatrick, because their lived sex will be different from what Alberta considers their “anatomical sex structure” to be.

138. In any case, it does not matter what Alberta intentions or motives are. They are an irrelevant smokescreen. What matters is the impact of the impugned regime. The evidence of Ms. Fitzpatrick discloses that the result of the impugned regime is that society, including many people in positions of authority, do not consider her to be “really female” or to have “completed” her gender transition unless and until she satisfies the requirements of the impugned regime.

139. Indeed, the set of people (including authority figures) who have disregarded, challenged, inquired into, or otherwise asked inappropriate questions about Ms. Fitzpatrick's identity as female include Edmonton police officers[125], the RCMP[126], nurses[127], doctors[128], Service Alberta registry agents[129], Service Canada officials[130], Alberta Health registry agents[131], Alberta Education officials[132], the Canada Revenue Agency[133], among others.

140. In fact, even Alberta's own Vital Statistics staff refer to Ms. Fitzpatrick as a “man” in internal memoranda[134]. At some point, Alberta must have realised that this tactic was not assisting its position in this litigation because in the Alberta Interim Brief, Alberta instead carefully crafts its prose to avoid using any pronouns to refer to Ms. Fitzpatrick.

141. Alberta asserts that all of this evidence is irrelevant because (a) not of all the interactions mentioned above involved presenting a birth certificate, and (b) Alberta is not responsible for how people interpret its birth certificates. Both arguments must be rejected.

142. The impugned regime on its face reinforces a message, already existing in society, that the real life lived sex of transgender people does not need to be respected unless and until they submit to risky surgeries and then prove that they have done so: ***XY*** at para 172 (“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?”). The fact that a birth certificate does not need to be presented in order for a transgender person to experience discrimination does not assist Alberta's case, because the nature of Alberta's regime endorses, accepts, and propagates this prejudice. Legislation that reinforces an existing prejudicial notion is

125 Fitzpatrick Affidavit, para 37
126 Fitzpatrick Affidavit, para 36 and Exhibit “H”
127 Fitzpatrick Affidavit, paras 44-45
128 Fitzpatrick Affidavit, para 46
129 Fitzpatrick Affidavit, para 59
130 Fitzpatrick Affidavit, para 62
131 Fitzpatrick Affidavit, para 66
132 Fitzpatrick Affidavit, para 69
133 Fitzpatrick Affidavit, paras 70-72 and Exhibit “G”
134 Fitzpatrick Affidavit, para 41; Record, ABJ0048

discriminatory.

143. Indeed, the fascination of Alberta (and others) with Ms. Fitzpatrick's genitals as a condition of respecting her identity as female is well established in the evidence. She has been questioned about her genitals by doctors[135], Service Alberta registry agents[136], Alberta Health registry agents[137], among others. Alberta Vital Statistics has sent her a letter asking for "prompt" information about her genitals[138], apparently not realising how disturbing that is. Alberta also sprinkled gratuitous references to Ms. Fitzpatrick's genitals throughout the Alberta Interim Brief[139], which does not assist its case. It is notable that there is in fact no evidence before the Court about what Ms. Fitzpatrick's genitals might look like, because it is not relevant, but the rules of evidence do not stop Alberta from employing rhetoric that discloses its discriminatory prejudices.

144. By making recognition of Ms. Fitzpatrick's sex conditional on submission to risky surgical procedures and affidavit evidence thereof, the impugned regime is reinforcing prejudice which is amply demonstrated on the record.

145. Alberta claims it is not responsible for how anybody might interpret its birth certificates, but this argument is also without merit. Alberta prides itself on the provision of high quality information on its birth certificates, including reliable information about the person's sex[140]. The *VSA* has a provision assigning a special evidential significance to birth certificates[141]. Alberta has actually claimed that amending Ms. Fitzpatrick's birth certificate to designate her sex as "female" could cause irreparable harm to Alberta's reputation because it would require Alberta to certify to a fact "known to be false", namely that Ms. Fitzpatrick is female[142]. These facts all point to the obvious — namely, there is a causal connection between the impugned regime and the fact that people rely on the "sex" information on Alberta's birth certificates. Alberta cannot be heard to complain that it is not responsible for people treating Ms. Fitzpatrick as male, when it issues her a document that says she is male and the legislative scheme encourages other people and organisations to rely on it. This in turn reinforces the prejudicial notion that a transgender person's lived sex does not need to be respected unless and until they first satisfy the requirements of the impugned regime, namely surgery, inspection, and proof thereof, whether or not the impugned birth certificate is ever actually used.

146. The impugned regime also causes significant psychological harm to transgender people, by conveying the message to them that their lived sex is not authentic, not deserving of respect, and suggesting that if they are misgendered, they have no recourse from the state. Ms. Fitzpatrick has personally been greatly psychologically adversely affected by the impugned regime[143]. In addition, since a birth certificate is Ms.

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135 Fitzpatrick Affidavit, para 46
136 Fitzpatrick Affidavit, para 59
137 Fitzpatrick Affidavit, para 66
138 Fitzpatrick Affidavit, paras 80-81
139 Alberta Interim Brief, paras 2, 23, among others
140 Bichai Affidavit, paras 50-52 among others
141 *VSA*, s 53
142 Alberta Interim Brief, para 45
143 Fitzpatrick Affidavit, para 122

Fitzpatrick's proof of being born in Canada, her inability to get one that designates her sex as “female” interferes even with her conception of herself as a Canadian, since her primary indicator of citizenship is hurtful for her to even look at[144].

147. The impugned regime causes Ms. Fitzpatrick significant practical problems with respect to employment[145], movement[146], depression[147], privacy and medical decision-making[148], and generally prevents her from getting closure with respect to her gender[149]. Indeed, after filing the Fitzpatrick Affidavit, Ms. Fitzpatrick has already had to miss two business trips to foreign countries as a result of her inability to obtain congruent travel documents because they would be based on her birth certificate, which says she is male. This has the potential to threaten her continued ability to hold a job.

148. Alberta argues that if Ms. Fitzpatrick is misgendered by third parties, including the travel authorities such as Passport Canada, she should take it up with them and not blame Alberta. This argument has already been dealt with above — there is a clear causal connection between the impugned regime and the fact that other parties rely on birth certificate “sex” data. In fact, 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. Anything else is discriminatory. Alberta is basically suggesting that Ms. Fitzpatrick should initiate a large number of separate lawsuits against a wide variety of different agencies, both within and without Canada, in order to deal with a problem that fundamentally stems from Alberta's own discriminatory impugned regime. It is far more fair (not to mention economical) for the Court to resolve the matter once and for all on this application rather than force Ms. Fitzpatrick to sue an arbitrarily large number of third parties in order to gain equal rights.

149. In her affidavit, Ms. Bichai claims that s 51 of the *VSA* allows a person to obtain a letter containing information from the person's birth record, which she characterises as an “accommodation”[150]. However, s 51 of the *VSA* has nothing to do with the issues involved in this application; it is intended to allow genealogical researchers to obtain information that they would not otherwise be able to obtain. Such a letter has no evidential value and is not useful for accessing government services or anything else for which a birth certificate can be used. Section 51 of the *VSA* does nothing to alleviate any of the discriminatory effects of the impugned regime.

150. Alberta also argues in the Bichai Affidavit that the impugned regime is not discriminatory because Alberta allows transgender people to obtain a congruent driver's licence or non-driver ID card without surgery, by presenting a letter from a doctor or psychologist when applying and then a new letter each time the licence or ID card is renewed[151]. This argument is a red herring.

144 Fitzpatrick Affidavit, paras 73-78
145 Fitzpatrick Affidavit, paras 96-110
146 Fitzpatrick Affidavit, paras 111-116
147 Fitzpatrick Affidavit, paras 117-123
148 Fitzpatrick Affidavit, paras 124-141
149 Fitzpatrick Affidavit, para 133 among others
150 Bichai Affidavit, para 45
151 Bichai Affidavit, paras 66-69

151. Even assuming the driver's licence regime does not violate s 15 of the *Charter*, that is simply not probative into whether the *VSA* violates s 15 of the *Charter*. It is entirely possible for one of Alberta's laws to violate the *Charter* even though a different law does not violate the *Charter*. In any case, a driver's licence and a birth certificate are different documents with different purposes and Ms. Fitzpatrick's application is specific to birth certificates, not driver's licences. Also, the requirement to repeatedly produce letters is arguably discriminatory in any event (although it is not relevant to this application), because it perpetuates a notion that transgender people are continually under medical care, which is known to be false in the case of Ms. Fitzpatrick — she does not see any doctors[152]. Indeed, part of the reason Ms. Fitzpatrick has not acquired a learner's licence is that she does not want to have to persuade a doctor to write such a letter as she considers it an unreasonable requirement (she already had to submit one doctor's letter to get an ID card that designates her sex as female — why should she need to keep submitting more letters for the rest of her life?). And then just a year later, she would need to get another letter for a full operator's licence. Indeed, a congruent birth certificate would allow her to access this system on the same basis as non-transgender people.

152. In addition, an Alberta driver's licence or ID card is specific to Alberta. If Ms. Fitzpatrick moved to another province or country, there is no guarantee she would be able to get such congruent documents under any conditions, because outside of Alberta, the primary document on which the “sex” would be based is either her birth certificate (which says she is male) or a passport (which would be based on the birth certificate and say she is male[153]).

153. There are also many reasons why a person might temporarily lose access to a driver's licence or ID card; for example, losing one's wallet, or moving to another address (which requires destruction of the old driver's licence or ID card and then waiting two weeks for the new one, according to Exhibit “X” to the Bichai Affidavit). To deal with these life events, it is essential to have more congruent documents. In fact, Exhibit “X” to the Bichai Affidavit says that in addition to a driver's licence or ID card, a person should also “carry some other form of photo ID”, but of course Ms. Fitzpatrick cannot obtain any other photo ID with a congruent sex designation because of the impugned regime being challenged on this application.

154. As should be abundantly clear, Alberta's invocation of its driver's licence and non-driver ID card policies is mostly irrelevant to this application and does not assist its position.

155. Perhaps the most harmful aspect of the impugned regime is that it coerces transgender people into surgery so that they can avoid the harm flowing from the inability to otherwise obtain a congruent birth certificate. Ms. Fitzpatrick herself deposed that she feels coerced into surgery[154] and one of the main reasons she has not given up yet is that she thinks her position on this application is strong and that she can avoid surgery by succeeding on the application.

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152 Fitzpatrick Affidavit, para 94
153 Passport Canada Policy Manual, section on “Sex” (Tab 39)
154 Fitzpatrick Affidaivt, para 134

156. For all those reasons, the impugned regime is discriminatory contrary to s 15 of the *Charter*.

C. ALBERTA'S VIOLATION OF S 15 CANNOT BE SAVED UNDER S 1 OF THE *CHARTER*

i. The impugned legislation is too vague to give rise to a limitation "prescribed by law"

157. The state can occasionally justify limitations of *Charter* rights under s 1 of the *Charter*, but s 1 protects only "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (emphasis added).

158. In order to benefit from s 1, Alberta must first prove that its violation of s 15 is prescribed by law. If Alberta's violation of s 15 arises from legislation which is too vague, then it will not constitute a limitation "prescribed by law" and Alberta cannot rely on s 1 of the *Charter*: ***R v Nova Scotia Pharmaceutical Society***[155] at para 28 (outlining principles of a vagueness challenge).

159. In the case at bar, s 30 of the *VSA* (a key element in the impugned regime) is too vague for the impugned regime to constitute a limitation prescribed by law.

160. Section 30 of the *VSA* authorises amendments to sex designation when (a) "a person's anatomical sex structure has been changed" and (b) the person applies to the respondent, after genital inspection, with two affidavits from two physicians, each affidavit stating that the person's "anatomical sex has been changed".

161. The terms "anatomical sex structure", "anatomical sex", and "sex" are all used in various places in the *VSA*, but none of them are defined. The fact that different terms are used implies some difference in meaning, but we can only guess as to what those differences are.

162. As discussed above (and as illustrated by the Hoeksema Affidavit), there are many different possible surgeries which a transgender person could conceivably undergo. We have no way of knowing which surgery or surgeries are required to satisfy the requirements of s 30 of the *VSA*. Ms. Bichai testified that the Vital Statistics Council of Canada has no standards[156], and she refused to answer any questions about what Alberta's standards are[157]. A transgender person is essentially required to guess which surgery or surgeries are required, possibly undergoing multiple risky surgeries until finding the right combination to use s 30 of the *VSA*.

163. Alberta says that the respondent relies on the judgment of medical professionals to determine whether the requirements of s 30 have been met and that the role of the respondent is essentially clerical in nature, merely looking for the magic language in the affidavits submitted. However, Ms. Bichai testified that she is not actually aware of any medical standards on the issue[158]. Ms. Hoeksema also has no position on which surgery or surgeries are required to use s 30 of the *VSA*; she does not even know whether the surgeries funded by her program are related to s 30 of the *VSA*[159].

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155 [1992] 2 SCR 606, [1992] SCJ No 67 (Tab 23)
156 Bichai Questioning, page 29:13-18
157 Bicahi Questioning, pages 68:21-27, 69:1-2
158 Bichai Questioning, page 30:1-10
159 Hoeksema Questioning, pages 1-2

164. The suggestion that the provision is adequately defined by the medical community is without merit. Most importantly, it is the responsibility of Alberta to establish any defence under s 1 of the *Charter. A* condition precedent to doing so is proving that the impugned regime is not unduly vague. Alberta has failed to file any evidence suggesting that the language in s 30 of the *VSA* provides an intelligible standard. Alberta cannot rely on alleged medical evidence that it has not actually filed. Alberta bears the burden of proof on this issue.

165. Moreover, the evidence of Dr. Karasic establishes that the requirement of surgery contained in s 30 of the *VSA* has no basis in modern medicine[160]. Dr. Karasic explains that this standard is firmly rooted in "early 1970s" medical thinking[161]. The impugned provision is thus based on obsolete medical thinking which cannot possibly provide an intelligible standard constituting a limitation prescribed by law.

166. Section 30 of the *VSA* is similar to asking doctors to apply the phlogiston theory of heat, the four humours theory of disease, the spontaneous theory of generation, or any other obsolete medical theory. Application of obsolete and discredited medicine cannot possibly be an intelligible standard constituting a limitation prescribed by law.

167. There is another fact that casts serious doubt on the proposition that s 30 of the *VSA* is intelligibly defined by the medical community. Section 30 requires not just one but two affidavits of two physicians, each deposing that the person's "anatomical sex has been changed". According to s 132 of the *Criminal Code*[162], perjury is an indictable offence punishable by up to 14 years in prison. It is thus highly unlikely that a physician would risk such a punishment by swearing a false affidavit in support of an application under s 30 of the *VSA*. The requirement of two affidavits must be understood as a recognition of the fact that the condition of an "anatomical change of sex" is so broad, open-ended, and vague that different physicians will readily disagree on whether one has occurred. Thus, requiring two affidavits is intended to smooth out some of the variation which might otherwise occur from each physician having his or her own standard. However, this is also essentially a recognition that the standard is not intelligible.

168. In setting out the test for vagueness, the Supreme Court has explained that "[a]bsolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work." (emphasis added): ***Irwin Toy Ltd v Québec (Attorney General)***[163] at para 63.

169. That pronouncement of law leads us to another reason why the impugned regime does not constitute a limitation prescribed by law: the determination of whether a person has undergone an "anatomical change of sex" is completely insulated from judicial review. Under the structure of the impugned regime, there is no way for any judicial construction or interpretation of the terms to occur. It is thus impossible for an intelligible standard to be developed through judicial consideration.

160 Karasic Affidavit, para 28
161 Karasic Affidavit, para 25
162 RSC 1985, c C-46 (Tab 8)
163 [1989] 1 SCR 927, [1989] SCJ No 36 (Tab 24)

170. Suppose that a physician declines to swear an affidavit stating that a person's anatomical sex has been changed, and the person disputes that interpretation. How can it be challenged? The *VSA* contains no provision allowing an appeal of a decision of a physician relative to s 30. There are perhaps two possible routes to challenge the physician's decision:

(a) File an application for judicial review of the decision of the physician not to swear an affidavit; or

(b) persuade the physician to swear an affidavit containing some other language that the physician is comfortable with (i.e. not the language required by s 30 of the *VSA*), and then submit that affidavit to the Registrar under s 30, and then when the application is denied, appeal the decision of the Registrar to this Court under s 62 of the *VSA*.

171. The trouble with the first possible route is that judicial review only lies from decisions that are "quasi-judicial": ***Nguyen v Alberta (Appeals Commission for Alberta Workers' Compensation)***[164] at para 19. A physician is a private person and by declining to swear an affidavit on request, he or she is not exercising a state function or otherwise performing a quasi-judicial role. The *VSA* does not compel physicians to swear affidavits for the purpose of s 30 or otherwise. *Mandamus* only lies when there is a pre-existing duty to act. Ms. Fitzpatrick is not aware of any authority suggesting that the Court can order a physician to swear an arbitrary affidavit merely because the contents of the affidavit are true. It is highly unlikely that judicial review lies to compel a physician to swear an affidavit stating that a person's anatomical sex has been changed.

172. The second possible route is also hopeless. The respondent's interpretation of the statute is that she merely looks in the submitted affidavit for the magical language that the person's "anatomical sex has been changed". On a statutory appeal under s 62 of the *VSA*, a "reasonableness" standard of review would almost certainly apply to the respondent's interpretation of the her own home statute: ***Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association***[165] at para 39. On a reasonableness standard, this Court would likely be unable to disturb the respondent's interpretation that her role is merely to look for the magical language in the affidavits. Hence, this Court would be unable to reach the substantive issue of what the terms in s 30 of the *VSA* actually mean.

173. It follows, then, that the meaning of the terms in s 30 of the *VSA*, including what it means for a person's "anatomical sex" to have "changed", are completely out of reach of construction by this Court. That fact prevents any intelligible meaning from being developed in the case law. It also means that every physician has essentially become his or her own superior court, which is so contrary to the rule of law that the impugned regime is clearly not a limitation prescribed by law.

174. For those reasons, Alberta cannot meet the condition precedent to invoke s 1 of the *Charter* because the impugned regime does not constitute a limitation of equality rights prescribed by law.

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164 2008 ABQB 624 (Tab 25)
165 2011 SCC 61, [2011] 3 SCR 654 (Tab 26)

ii. The limitation of equality rights is not justifiable in a free and democratic society

175. In the alternative, if the impugned regime constitutes a limitation prescribed by law, then it cannot be demonstrably justified in a free and democracy society.

176. In order to justify the impugned regime under s 1 of the *Charter*, Alberta will have to demonstrate that a pressing and substantial state interest is advanced by restricting the provision of a congruent birth certificate to only those transgender people who undergo unspecified risky surgeries, attend genital inspections, and provide affidavit evidence thereof. Alberta will also have to demonstrate that the impugned regime is a proportional means to achieve the objective: ***R v Oakes***[166] at paras 69-71. If another jurisdiction manages to satisfy similar state interests without violating the rights at issue, it suggests that the means chosen are not proportional and the government will not be able to pass the s 1 test: ***Charkaoui v Canada (Citizenship and Immigration)***[167] at para 69.

177. Alberta's argument that the impugned regime is an affirmative action program and thus serves a pressing state interest has already been addressed at length above. It is without merit. It does not need to be addressed again under this heading. That is strictly speaking sufficient to dispose of any s 1 justification because the purpose of the legislation is fixed at the time of enactment, and it has already been established above that the means chosen are irrational relative to the purpose (to help transgender people generally).

178. It is clear that Alberta feels that the *VSA* should be limited to the profiling of “anatomical sex structures”. Alberta has stated that many times in various materials. What is notably missing from Alberta's materials is a single reason why the *VSA* should be limited to the profiling of “anatomical sex structures”. Alberta cannot succeed under s 1 merely by stating what it believes the legislation currently does or should do.

179. In any case, the simple fact is that 62% of Canadians live in a province that does not require surgery in order to amend the sex designation on one's birth certificate[168]. It is thus known that it is possible to satisfy all of the state objectives involved in a birth registration system without violating s 15 of the *Charter*. Alberta cannot succeed under s 1 unless there is something special and unique about Alberta's birth registration system compared to the other provinces that would justify the s 15 *Charter* violation, and Alberta's own evidence forecloses this possibility because Ms. Bichai testified that Alberta strives for consistency in Vital Statistics policies with other provinces, noting “we try to stay uniform”[169].

180. Therefore, the impugned regime is not justifiable under s 1 of the *Charter*.

D. THE APPROPRIATE REMEDY FOR ALBERTA'S *CHARTER* VIOLATIONS

181. Having determined that the *VSA* violates s 15 of the *Charter* and cannot be saved under s 1, it remains to determine the appropriate remedy.

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166 [1986] 1 SCR 103 (Tab 27)
167 2007 SCC 9, [2007] 1 SCR 350 (Tab 28)
168 For Ontario's policies, see Tab 40. For Quebec's policies, see Tab 5.
169 Bichai Questioning, page 78, Question: “I mean Vital Statistics in general[,] is it exactly the same across the Canada or are there differences between the provinces” / ... Answer: “Yes, we try to stay uniform.”

i. The Court should order Alberta to amend the sex designation on Ms. Fitzpatrick's birth registration

182. Typically in an action to invalidate a statute, if the statute is determined to be unconstitutional, that will be the end of the matter, the claimant having been successful, and it will be neither necessary nor desirable to grant the claimant a personal remedy, which would be duplicative relief: ***Schachter v Canada***[170] at para 89.

183. However, there is no absolute bar to granting the claimant a personal remedy in conjunction with the successful invalidation of a statute, if it would be appropriate in the circumstances of the case. The Supreme Court recently did so in ***Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401***[171] [***UFCW***]. In that case, a union applied for judicial review of an administrative order restricting its striking activities on the basis that the statute under which the order was issued (the *Personal Information Protection Act*[172] [*PIPA*]) was unconstitutional. The Supreme Court agreed and issued a declaration that *PIPA* in its entirety was invalid, but it also went further and quashed the impugned administrative order restricting the union's activities: ***UFCW*** at para 41. This quashing was not just a natural consequence of having invalidated the statute, because declarations of invalidity are prospective only and do not invalidate past actions carried out pursuant to the statute: ***Schachter*** at para 89. Moreover, the declaration of invalidity had been suspended for a year but the quashing took effect immediately. The Supreme Court did not explain what jurisdiction it was exercising when it quashed the impugned order, but it could have been either *certiorari* or a remedy pursuant to s 24(1) of the *Charter*. In any case, it is obvious why the Supreme Court quashed the impugned order — the union's success would have been hollow otherwise.

184. In the case at bar, any victory will be purely pyrrhic for Ms. Fitzpatrick unless the Court also grants her a personal remedy in the nature of an order requiring the respondent to amend her registration of birth to designate her sex as “female”. Ms. Fitzpatrick has already lived as female for over three years without a congruent birth certificate. In addition to the three years already elapsed, judgment on the within application could be reserved for some additional length of time. If a personal remedy is not granted, Ms. Fitzpatrick would then need to wait for the statute to be amended by the Legislature (which could take a long time) and then she would need apply through the normal administrative channels and wait for the respondent to deal with her application in due course pursuant to the new legislation — in short, it could be another year or several years before she finally obtains a congruent birth certificate. That would be an extremely unjust result for Ms. Fitzpatrick, especially considering all the work she had to put into this application in order to secure a determination that the *VSA* is unconstitutional, putting her life on hold in the meanwhile.

185. In order for Ms. Fitzpatrick to secure a meaningful victory on this application, the Court should grant her a personal remedy. Similar to ***UFCW***, the Court has jurisdiction to grant the relief sought either as an order in the nature of *mandamus* or mandatory injunction pursuant to rule 3.15 of the *Alberta Rules of Court*, or as an appropriate and just remedy pursuant to s 24(1) of the *Charter*.

170 [1992] 2 SCR 679, [1992] SCJ No 68 (Tab 29)
171 2013 SCC 62 (Tab 30)
172 SA 2003, c P-6.5

ii. The Court should strike Alberta's *Vital Statistics Act*

186. In addition to the personal remedy for Ms. Fitzpatrick, the Court should issue a declaration that the *Vital Statistics Act* is unconstitutional in its entirety and of no force or effect pursuant to s 52 of the *Constitution Act, 1982*[173]. This was the other component of the remedy issued in ***UFCW***.

187. In ***UFCW***, the impugned statute was complicated and the unconstitutionality arose from a failure to provide a mechanism to balance the union's free speech rights against the privacy rights of others. There was no obvious way for the Supreme Court to sever any part of the statute in order to make it constitutional, so it simply struck the entire statute: ***UFCW*** at paras 40-41 ("Given the comprehensive and integrated structure of the statute, we do not think it is appropriate to pick and choose among the various amendments that would make *PIPA* constitutionally compliant").

188. The same reasoning applies to the case at bar. There is no single provision in the *VSA* that the Court could strike or amend in order to make the statute constitutional. Striking s 30 of the *VSA* would not assist transgender people and would not compel the Legislature to consider how to amend the statute to accommodate transgender people.

189. Striking the entire statute will allow the Legislature to consider the appropriate way to amend it so that transgender people can amend the sex designation on their birth certificates to reflect their lived sex, without surgery and without genital inspections.

190. The declaration of invalidity should be suspended in order to avoid disruption to Alberta's Vital Statistics system, but the suspension should be less than a year. Ms. Fitzpatrick proposes a suspension of 3 to 6 months. The Legislature already has several templates after which it could pattern the revised legislation, because Ontario and Quebec already do not require surgery, so it should not require a year to revise the *VSA* to be constitutional.

191. In the alternative, if the Court sees a clean way to amend the statute to remove the surgery requirement and allow transgender people to obtain congruent birth certificates without surgery, it is invited to do so.

IV. SUBMISSIONS CONCERNING COSTS

192. Ms. Fitzpatrick requests that the Court entertain submissions on costs after deciding the application.

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173 Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (Tab 9)

V. CONCLUSION

193. The application must be allowed. The *Vital Statistics Act* is unconstitutional. The Court should order the respondent to amend the designation of sex on Ms. Fitzpatrick's registration of birth to read “female”.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: December 30, 2013.

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Cathy Fitzpatrick / C.F.

Applicant

VI. LIST OF AUTHORITIES

Legislation

[Tab 1] *Vital Statistics Act*, SA 2007, c V-4.1

[Tab 2] *Alberta Evidence Act*, RSA 2000, c A-18, s 36

[Tab 3] *Vital Statistics Amendment Act, 1973*, SA 1973, c 86

[Tab 4] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss 1, 15, 24

[Tab 5] *An Act to amend the Civil Code as regards civil status, successions and the publication of rights*, SQ 2013, c 27, ss 1-3

[Tab 6] *Vital Statistics Ministerial Regulation*, Alta Reg 12/2012, s 24

[Tab 7] *Vital Statistics Act,* RSA 2000, c V-4, ss 22, 24

[Tab 8] *Criminal Code*, RSC 1985, c C-46, s 132

[Tab 9] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 52

Cases

[Tab 10] ***XY v Ontario (Government and Consumer Services)****,* 2012 HRTO 726, [2012] OHRTD No 715

[Tab 11] ***Bell Canada v Canada (Human Rights Commission)***, [1991] 1 FC 356, [1990] FCJ No 951

[Tab 12] ***Greater St. Albert Roman Catholic Separate School, District No. 734 v Buterman***, 2013 ABQB 485, [2013] AJ No 909

[Tab 13] ***Quebec (Attorney General) v A***, 2013 SCC 5, [2013] SCJ No 5

[Tab 14] ***Miceli-Riggins v Canada (Attorney General)***, 2013 FCA 158, [2013] FCJ No 689 (styled ***SM-R v Canada (Attorney General)***)

[Tab 15] ***R v Kapp***, 2008 SCC 41, [2008] 2 SCR 483

[Tab 16] ***Withler v Canada (Attorney General)***, 2011 SCC 12, [2011] 1 SCR 396

[Tab 17] ***Alberta (Aboriginal Affairs and Northern Development) v Cunningham***, 2011 SCC 37, [2011] 2 SCR 670

[Tab 18] ***Brooks v Canada Safeway Ltd***, [1989] 1 SCR 1219, [1989] 1 SCR 1219

[Tab 19] ***Law Society British Columbia v Andrews***, [1989] 1 SCR 143, [1989] SCJ No 6

[Tab 20] ***Lovelace v Ontario***, 2000 SCC 37, [2000] 1 SCR 950

[Tab 21] ***Vriend v Alberta***, [1998] 1 SCR 493, [1998] SCJ No 29

[Tab 22] ***R v Big M Drug Mart Ltd***, [1985] 1 SCR 295, [1985] SCJ No 17

[Tab 23] ***R v Nova Scotia Pharmaceutical Society***, [1992] 2 SCR 606, [1992] SCJ No 67

[Tab 24] ***Irwin Toy Ltd v Québec (Attorney General)***, [1989] 1 SCR 927, [1989] SCJ No 36

[Tab 25] ***Nguyen v Alberta (Appeals Commission for Alberta Workers' Compensation)****,* 2008 ABQB 624, [2008] AJ No 1222

[Tab 26] ***Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association***,

2011 SCC 61, [2011] 3 SCR 654

[Tab 27] ***R v Oakes***, [1986] 1 SCR 103, [1986] SCJ No 7

[Tab 28] ***Charkaoui v Canada (Citizenship and Immigration)***, 2007 SCC 9, [2007] 1 SCR 350

[Tab 29] ***Schachter v Canada***, [1992] 2 SCR 679, [1992] SCJ No 68

[Tab 30] ***Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401***, 2013 SCC 62, [2013] SCJ No 62

Other authorities

[Tab 31] "New Alberta Birth Certificate", Service Alberta: Vital Statistics, retrieved from <http://www.servicealberta.ca/1060.cfm> on December 21, 2013

[Tab 32] New Alberta birth certificate designed to thwart identify theft", CBC News, December 10, 2007, retrieved from <http://www.cbc.ca/news/canada/edmonton/new-alberta-birth-certificate-designed-to-thwart-identify-theft-1.690941> on December 21, 2013

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[Tab 35] Letter from Lillian Riczu (counsel for Alberta) to Cathy Fitzpatrick, concerning answers to undertakings of Mona Bichai, dated December 20, 2013

[Tab 36] "Policy on discrimination and harassment because of gender identity", a policy document of the Ontario Human Rights Commission, published March 30, 2000

[Tab 37] Grant, Jaime M., Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling. *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*. Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011, Executive Summary

[Tab 38] "Report of the APA Task Force on Treatment of Gender Identity Disorder Calls for Development of Practice Recommendations and Official Position Supporting the Rights of Gender Variant Persons", American Psychiatric Association, July 2, 2012

[Tab 39] Passport Canada Policy Manual, section on "Sex"

[Tab 40] Ontario Application for a Change of Sex Designation on a Birth Registration and Ontario Statutory Declaration by a Person for a Change of Sex Designation on a Birth Registration