

SCC Court File No.: \_

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE ALBERTA COURT OF APPEAL)

**BETWEEN:**

**ANNETTE LEWIS**

**APPLICANT**  
**(Appellant)**

- and -

**ALBERTA HEALTH SERVICES, ABC HOSPITAL,  
DR. A, DR. B, DR. C, DR. D, DR. E, and DR. F**

**RESPONDENTS**  
**(Respondents)**

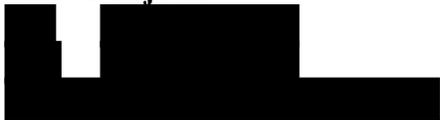
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**APPLICATION FOR LEAVE TO APPEAL**  
**(ANNETTE LEWIS, APPLICANT)**  
(Pursuant to s. 40(1) of the *Supreme Court Act*, RSC, 1985)

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**TABLE OF CONTENTS**

<b><u>Tab</u></b>	<b><u>Page</u></b>
<b>1. Notice of Application for Leave to Appeal</b> .....	1
<b>Schedule “A”</b>	
A. Reasons for Decision of the Court of Queen’s Bench of Alberta by Justice Belzil, July 12, 2022, <i>Lewis v. Alberta Health Services</i> , <a href="#">2022 ABQB 479</a> .....	5
B. Judgment, Court of Queen’s Bench of Alberta, July 25, 2022.....	21
C. Memorandum of Judgment of the Court of Appeal of Alberta by Justices Schutz, Crighton and Pentelechuk, November 8, 2022, <i>Lewis v. Alberta Health Services</i> , <a href="#">2022 ABCA 359</a> .....	24
D. Judgment Roll, Court of Appeal of Alberta, December 9, 2022 .....	42
<b>2. Memorandum of Argument</b> .....	45
<b><u>PART I – OVERVIEW AND STATEMENT OF FACTS</u></b> .....	45
A. Overview .....	45
B. Background .....	47
High-Priority Status on Transplant Waitlist .....	47
Unwritten Covid-19 Vaccine Requirement .....	47
Applicant Challenges Unclear Requirement.....	49
C. The Decision of the Alberta Court of Queen’s Bench .....	50
D. The Decision of the Alberta Court of Appeal .....	51
<b><u>PART II – STATEMENT OF THE QUESTIONS IN ISSUE</u></b> .....	51
<b><u>PART III – STATEMENT OF ARGUMENT</u></b> .....	52
Clarifying the Application of the <i>Charter</i> to Provincial Medical Programs.....	52
<u>Issue No. 1</u> – Are transplant physicians’ mandatory vaccine requirements, which apply to all patients within provincial government transplant programs, immune from scrutiny under the <i>Charter</i> and provincial bill of rights legislation? .....	53
<u>Issue No. 2</u> – Are provincial government mandatory vaccine requirements for transplant candidates that mirror policies of physicians within a government transplant program immune from scrutiny under the <i>Charter</i> and provincial bill of rights legislation? .....	55
<u>Issue No. 3</u> – Does forcing a transplant candidate to take a novel drug in order to be eligible for a life-saving transplant without offering any other alternatives violate constitutional rights?.....	58
Section 2 – <i>Freedom of Conscience</i> .....	58
Section 7 – <i>Right to Life, Liberty, and Security of the Person</i> .....	59
i. <i>Life</i> .....	59
ii. <i>Liberty</i> .....	60

iii. <i>Security of the person</i> .....	61
The national importance of these arguments .....	63
<u>PART IV</u> – SUBMISSIONS ON COSTS .....	64
<u>PART V</u> – ORDER SOUGHT.....	64
<u>PART VI</u> – TABLE OF AUTHORITIES.....	65
<b>3. Documents Relied Upon</b>	
A. Excerpt of the Affidavit of Dr. A, sworn January 6, 2022.....	66
B. Excerpt of the Transcript from Questioning of Dr. A, March 21, 2022.....	75
C. Excerpt of the Affidavit of Annette Lewis, sworn November 19, 2021 .....	89
D. Excerpt of the Transcript of Questioning of Deanna Paulson, April 5, 2022 .....	123
E. Excerpt of the Transcript of Questioning of Dr. Michael Houghton, April 1, 2022 .....	132
F. Excerpt of the Transcript of Questioning of Dr. Marcelo Cypel, April 8, 2022 .....	140
G. Excerpt of the Affidavit of Deanna Paulson, sworn January 6, 2022 .....	150
H. Excerpt of the Affidavit of Dr. Bonnie Mallard, sworn February 18, 2022, sworn February 18, 2022 [“Mallard Affidavit 1”] .....	153
I. Excerpt of the Transcript of Questioning of Dr. Byram Bridle, April 6, 2022 .....	158
J. Excerpt of the Affidavit of Dr. Bonnie Mallard, sworn February 18, 2022 [“Mallard Affidavit 2”] .....	164

## **PART I – OVERVIEW AND STATEMENT OF FACTS**

### **A. Overview**

1. This test case is about personal medical decision-making in Canada: whether provincial transplant programs are immune from scrutiny under the *Canadian Charter of Rights and Freedoms* (“the *Charter*”) and provincial bills of rights legislation.

2. The underlying facts present a stark juridical choice. The Applicant can:

- either exercise her right to refuse a novel vaccination and decide what is put into her body,
- or she can receive a tested life-saving transplant.

But not both.

3. The chambers judge found the *Charter* had no application to the impugned Covid-19 vaccine requirement, and the Court of Appeal below agreed. How is this finding squared with this Honourable Court’s jurisprudence applying the *Charter* to government programs, and does it improperly insulate medical-related decisions from judicial scrutiny?

4. In 1997, this Honourable Court in *Eldridge v. British Columbia (Attorney General)* found that “the *Charter* applies to private entities in so far as they act in furtherance of a specific governmental program or policy.” The Court further held that governments cannot “evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities.”<sup>1</sup> *Eldridge*, however, was not specifically about health care providers but instead about sign language interpreters, so the question of what specific circumstances doctors can be liable to *Charter* scrutiny has not been addressed by this Honourable Court in the almost three decades since *R. v. Dersch*.<sup>2</sup> The facts of this case are markedly different from those in *Dersch*, and this leave application deals with the first appellate decision to address the *Charter* and

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<sup>1</sup> *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624, at p. 627 [“*Eldridge*”].

<sup>2</sup> *R. v. Dersch*, [1993] 3 SCR 768, at p. 777.

provincial bills of rights' applicability to healthcare policies within a provincial transplant program. As such, this is the Court's first opportunity to consider this foundational question.<sup>3</sup>

5. While this Honourable Court has previously ruled that the *Charter* does not confer a freestanding constitutional right to health care, it has also found that "where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*."<sup>4</sup> These important legal principles in the context of provincial transplant programs have not been judicially reconciled.

6. At the core of this test case is the intersection of the *Charter* and bills of rights legislation and making the choice between possible life or certain death conditional upon receiving an experimental drug treatment. Past jurisprudence strongly suggests that the *Charter* and the *Alberta Bill of Rights* ought to apply to both the Applicant's treating physicians' and government Covid-19 vaccine policies. The case law further supports a finding that her section 2 freedom of conscience and section 7 rights to life, liberty and security of the person have been infringed in a manner that is not in accordance with fundamental justice, and that cannot be saved under section 1 of the *Charter*. However, the courts below found that the operative decisions in the present case are not subject to *Charter* scrutiny.

7. Covid-19 vaccine mandates effectively force dying individuals into taking novel medications still in clinical trials if they want a chance to survive with a recognized and tested life-saving transplant. This scenario highlights important questions regarding the *Charter* that have yet to be answered by this Honourable Court, specifically:

- whether personal medical choices which result in either (1) death (without the Covid-19 vaccine) or (2) a chance at life but with new unknown risks from an experimental novel medical treatment which can cause injury and death, can be made freely and with true "liberty"; and

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<sup>3</sup> Although leave to appeal to the SCC has been requested in *Selkirk v. Trillium Gift of Life Network*, 2021 ONSC 2355, aff'd in 2022 ONCA 478 on other grounds, the question of the *Charter* applicability to both doctors' and provincial health authority's program-wide policies (within a transplant program) has not been before this Court.

<sup>4</sup> *Chaoulli v. Quebec (Attorney General)*, [2005] 1 SCR 791, at para. 104 ["*Chaoulli*"].

- whether or not “life” and “security of the person” are engaged through government ultimatums to a dying transplant candidate.

8. Granting leave will allow this Honourable Court to address these issues of public importance.

## **B. Background**

### ***High-Priority Status on Transplant Waitlist***

9. The Applicant has a progressive, terminal disease called idiopathic [REDACTED] fibrosis. She will not survive without a double [REDACTED] transplant.<sup>5</sup>

10. In May 2020, she was accepted into the Alberta Health Services (“AHS”) [REDACTED] transplant program at the ABC Hospital in Alberta. The Applicant underwent many tests and was designated by the [REDACTED] transplant program as a suitable candidate for a [REDACTED] transplant. In June 2020, the Respondent physicians confirmed that the Applicant was in excellent health apart from her diseased [REDACTED] and was a good candidate for a [REDACTED] transplant.<sup>6</sup> She was placed on the high-priority transplant list known as “Status 2” by October 5, 2020.<sup>7</sup>

11. AHS retained [REDACTED] as independent contractors to provide medical services within the [REDACTED] transplant program (“Respondent physicians”).<sup>8</sup> Prior to Covid-19, the Respondent physicians required the Applicant to receive all of her childhood vaccinations as a condition to her becoming eligible for a [REDACTED] transplant. The Applicant complied.<sup>9</sup>

### ***Unwritten Covid-19 Vaccine Requirement***

12. In March 2021, the Respondent physicians advised the Applicant that she would have to take the Covid-19 vaccine in order to remain on the Status 2 waitlist. The Respondent physicians’ Covid-19 vaccine requirement applies to all [REDACTED] transplant candidates except those with a medical

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<sup>5</sup> *Lewis v. Alberta Health Services*, 2022 ABCA 359, at para. 1 [“*ABCA Decision*”].

<sup>6</sup> *Lewis v. Alberta Health Services*, 2022 ABQB 479, at para. 11 [“*ABQB Decision*”].

<sup>7</sup> *ABCA Decision*, at para. 14.

<sup>8</sup> *ABQB Decision*, at para. 52.

<sup>9</sup> *ABQB Decision*, at para. 13.

exemption.<sup>10</sup> The Applicant does not qualify for a medical exemption that would apply to this Covid-19 vaccine policy.<sup>11</sup>

13. The Respondent physicians are willing to transplant an unvaccinated [REDACTED] transplant candidate with a medical exemption, such as an allergy to one of the ingredients in the Covid-19 vaccines.<sup>12</sup> One of the Respondent physicians confirmed in oral evidence that an unvaccinated transplant candidate with a medical exemption has the same risk of catching Covid-19, transmitting Covid-19, or dying from Covid-19, as an unvaccinated transplant candidate without a medical exemption, all other things being equal.<sup>13</sup>

14. Also, in March 2021, AHS provided the Applicant with a written Covid-19 vaccine policy from the Northern Alberta Organ and Tissue Donation Program that stated the Covid-19 vaccine was “strongly recommended”, but not required.<sup>14</sup> On September 1, 2021, the Applicant received another written Covid-19 policy via email from Northern Alberta Transplant Services (formerly known as Northern Alberta Organ and Tissue Donation Program). The subject line of the email was “[REDACTED] Transplant Program.” That written policy also “strongly recommended” the Covid-19 vaccine for pre-transplant candidates but did not require it.<sup>15</sup> The [REDACTED] [REDACTED] [REDACTED] transplant programs are run within the Northern Alberta Transplant Services program, which itself is run by AHS. The Director of Donation and Transplant Services at the ABC Hospital, who is employed by AHS, testified that the transplant program provides about 300 transplants annually.<sup>16</sup> She further testified that the goal of the donation and transplant

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<sup>10</sup> *ABCA Decision*, at para. 15.

<sup>11</sup> *ABCA Decision*, at para. 19.

<sup>12</sup> *ABCA Decision*, at para. 15; Affidavit of Dr. A, sworn January 6, 2022, at para. 38 [“Dr. A Affidavit”].

<sup>13</sup> Cross Examination Transcript of Dr. A, March 21, 2022, p. 28, lines 22-25; p. 29, lines 1-2, 10-25; p. 30, lines 1-2, 10-14 [“Dr. A Transcript”].

<sup>14</sup> Affidavit of Annette Lewis, sworn November 19, 2021, at para. 14, Exhibit “B” [“Lewis Affidavit 1”].

<sup>15</sup> Lewis Affidavit 1, at para. 24, Exhibit “I.”

<sup>16</sup> Cross Examination Transcript of Deanna Paulson April 5, 2022, at page 18, lines 19-25 [“Paulson Transcript”].

service is to help ensure that the organ allocation process is carried out in a fair and efficient way and that it's done leading to an equitable distribution of donated [REDACTED] based on medical criteria.<sup>17</sup>

15. On November 17, 2021, a Respondent physician advised the Applicant that AHS was now requiring all transplant candidates to get the Covid-19 vaccine. He also advised her that the requirement may be removed once the pandemic was over.<sup>18</sup> AHS did not and has never provided the Applicant with a written Covid-19 policy which sets out the requirement of the Covid-19 vaccine.

***Applicant Challenges Unclear Requirement***

16. The Applicant filed her Notice of Application in this matter on November 25, 2021.

17. The ABC Hospital completed its written Covid-19 vaccine policy for transplant candidates by April 2022.<sup>19</sup> The Applicant has never seen or been provided with this written policy.

18. The Applicant's unchallenged evidence is that none of the Respondent physicians ever explained to her all of the known risks of the Covid-19 vaccines, including the risks of Bell's Palsy, blood clots, venous thrombocytopenia or myocarditis, which are outlined by Health Canada on its website.<sup>20</sup> None of the Respondent physicians' medical notes identify that those risks were explained to the Applicant by a physician.

19. The Respondent physicians have not considered testing the Applicant to determine whether she has antibodies to Covid-19 in her blood.<sup>21</sup> The Respondents' experts agreed that both natural immunity to Covid-19 and the immunity derived from the Covid-19 vaccines are temporary.<sup>22</sup>

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<sup>17</sup> Paulson Transcript, at page 18, lines 13-15; page 31, lines 14-22.

<sup>18</sup> Dr. A Affidavit, at para. 55, Exhibit "K."

<sup>19</sup> Paulson Transcript, at page 61, lines 2-6.

<sup>20</sup> Lewis Affidavit 1, at para. 31, Exhibit "M."

<sup>21</sup> Dr. A Transcript, at page 16, lines 8-25; page 17, lines 1-12.

<sup>22</sup> Cross Examination Transcript of Dr. Michael Houghton, April 1, 2022, page 29, lines 8-16, page 91, lines 9-17 ["Houghton Transcript"]; Cross Examination Transcript of Dr. Marcelo Cypel, April 8, 2022, page 20, lines 16-23 ["Cypel Transcript"].

20. The Respondent physicians have new medications to treat █████ transplant patients after they have received a transplant if they contract Covid-19.<sup>23</sup> Further, none of them have expertise or training in vaccinology or immunology.<sup>24</sup>

21. The Covid-19 vaccines are still in clinical trials, which test for safety and efficacy of the Covid-19 vaccines.<sup>25</sup> The only Respondent physician who provided sworn evidence in this matter was unaware of this fact and mistakenly asserted the contrary in sworn testimony.<sup>26</sup> The Respondent physicians and the Alberta government require that transplant candidates are up to date on their childhood vaccinations prior to their transplant, and the Applicant agreed to take them. Unlike those childhood vaccines which have 30+ years of safety data, there is no long-term safety data available for the Covid-19 vaccines.<sup>27</sup>

22. The Respondents' experts (Dr. Michael Houghton and Dr. Marcelo Cypel) before the Court agreed that the Covid-19 vaccines are known to cause blood clots, myocarditis, and death.<sup>28</sup>

### C. The Decision of the Alberta Court of Queen's Bench

23. The Alberta Court of Queen's Bench dismissed the Applicant's application. The court found that the *Charter* did not apply to the Respondents' Covid-19 vaccine requirements because the requirement was a clinical decision immune from *Charter* scrutiny. It also found that the *Alberta Bill of Rights* did not apply because the Applicant's *Charter* claim failed. No other reasoning was provided as to why the Applicant's claim under the *Alberta Bill of Rights* failed.

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<sup>23</sup> Dr. A Transcript, p. 78, lines 8-11; Ms. Paulson: monoclonal antibodies treat active Covid-19 upon presentation of symptoms: Affidavit of Deanna Paulson, sworn January 6, 2022, at para. 26 ["Paulson Affidavit"].

<sup>24</sup> Dr. A Transcript, at page 10, lines 6-10; page 11, lines 2-6; page 26, lines 14-22.

<sup>25</sup> Affidavit of Dr. Bonnie Mallard, sworn February 18, 2022, Exhibit "A," Schedule "B," pages 2-3, page 16, para. 2 ["Mallard Affidavit 1"]; Cross Examination Transcript of Dr. Byram Bridle, April 6, 2022, at page 45, lines 13-25; page 46, lines 1-2 ["Bridle Transcript"].

<sup>26</sup> Dr. A Transcript, at page 33, lines 20-25.

<sup>27</sup> Cypel Transcript, at page 16, lines 9-13; page 17, lines 5-25; p. 18, lines 1-2; page 55, lines 22-25; page 56, line 1; Houghton Transcript, page 94, lines 1-6 and lines 10-17.

<sup>28</sup> Houghton Transcript, page 91, lines 9-17; Cypel Transcript, page 20, lines 16-23.

#### **D. The Decision of the Alberta Court of Appeal**

24. The Alberta Court of Appeal dismissed the Applicant's appeal. It found the Respondent physicians' Covid-19 vaccine requirement was a clinical decision immune from *Charter* scrutiny. It also found that AHS' Covid-19 vaccine requirement was immune from *Charter* scrutiny because AHS simply implemented a policy put into place by doctors who were themselves immune from *Charter* scrutiny.

25. The Court of Appeal undertook a *Charter* analysis, in *obiter*, and surprisingly found that even if the *Charter* applied to the Covid-19 vaccine policies, the Applicant's *Charter* rights of conscience, life, liberty and security of the person, and equality under sections 2, 7, and 15 were not engaged.

26. The appellate decision failed to specifically address one of the Applicant's grounds of appeal, which asked the court to determine whether the trial judge erred in his determination that the Applicant's claim under the *Alberta Bill of Rights* must fail simply because her *Charter* claim failed. It made no mention of the *Alberta Bill of Rights* whatsoever and there was no analysis of the merits of that ground of appeal. The Applicant promptly requested that the Court re-open the appeal to address the missed ground of appeal. The Court responded by letter that the Applicant's request was denied and that all grounds of appeal were dismissed.

#### **PART II – STATEMENT OF THE QUESTIONS IN ISSUE**

27. This Application for Leave to Appeal raises the following issues of national and public importance:

No. 1. Are transplant physicians' mandatory vaccine requirements, which apply to all patients (regardless of individual circumstances) within provincial transplant programs, immune from scrutiny under the *Charter* and provincial bills of rights legislation?

No. 2. Are provincial government mandatory vaccine requirements for transplant candidates which mirror policies of physicians within a government transplant program immune from scrutiny under the *Charter* and provincial bills of rights legislation?

No. 3. Does forcing a transplant candidate to take a novel drug, still in clinical trials and for which long-term safety data is non-existent, as a precondition for a life-saving transplant amount

to a justifiable violation of her *Charter*-protected freedom of conscience and her rights to life, liberty and security of the person, or her rights to liberty and security under the *Alberta Bill of Rights*?

### **PART III – STATEMENT OF ARGUMENT**

#### **Clarifying the Application of the *Charter* to Provincial Medical Programs**

28. The present case provides an opportunity for this Honourable Court to further expand upon *Eldridge* and clarify the *Charter*'s and provincial bills of rights legislations' roles in healthcare decisions. Specifically at issue here are those decisions of physicians acting within a provincial transplant program who institute a blanket policy of general application for all transplant candidates regardless of their specific personal characteristics. It is also an opportunity for this Honourable Court to address whether the actions of AHS (a government entity) in implementing a transplant program-wide Covid-19 vaccine requirement are indeed subject to *Charter* and *Alberta Bill of Rights* scrutiny. As it stands today, the findings of the courts below will set a precedent for other provincial healthcare providers that shows they can contract out of their *Charter* obligations.

29. This case also raises questions of *Charter* rights and rights under the bill of rights statutes that are at issue when Canadians are faced with highly personal decisions involving death. In *R. v. Morgentaler*, this Honourable Court found that a woman's section 7 *Charter* right was engaged when the state told her she could not end the life of her unborn baby.<sup>29</sup> In *Carter v. Canada*, this Court found that section 7 protected a woman's right to end her own life with medically assisted suicide.<sup>30</sup>

30. The Court of Appeal's *Charter* analysis raises important questions about one's right to make a decision that will determine whether she has a chance at life or faces certain death under duress and without informed consent. It raises the issue of whether the state, in removing a woman from a life-saving transplant list after she had been waiting for a transplant – simply because she

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<sup>29</sup> *R. v. Morgentaler*, [1988] 1 SCR 30.

<sup>30</sup> *Carter v. Canada (Attorney General)*, 2015 SCC 5 ["Carter"].

would not agree to take an experimental drug - caused her serious psychological distress that violated her security of the person, and removes her right to life.

31. The Alberta Court of Appeal framed these decisions as consequences borne out of the Applicant's choices, as opposed to actions by the state that violated her *Charter* rights. Is there now a proper lens within which to examine and analyze the conflict between state action and personal choice in the context of a mandatory vaccination requirement?

**Issue No. 1 – Are transplant physicians' mandatory vaccine requirements, which apply to all patients within provincial government transplant programs, immune from scrutiny under the *Charter* and provincial bill of rights legislation?**

32. The Court of Appeal below concluded that the Respondent physicians' Covid-19 vaccine requirement was not a government policy but a clinical decision that was immune from *Charter* scrutiny. This decision has the potential to impact a wide range of government programs and improperly insulate them from the courts' purview. Practically speaking, any government program which has a clinical component could be exempt from the *Charter*.

33. Prior to the decisions of the courts below, courts in Canada were consistent in holding that in delivering medical services to the public pursuant to government legislation providing for those services, physicians are subject to the *Charter* even as independent contractors. This was the case because hospitals, physicians and other publicly funded healthcare providers could readily be characterized as acting "as agents for government in providing the specific medical services set out" in provincial health insurance legislation, under the general framework of the *Canada Health Act*.<sup>31</sup>

34. Similar to the legislative structures across Canada, health services are delivered in Alberta pursuant to the *Alberta Health Act*<sup>32</sup> and *Alberta Health Care Insurance Act*<sup>33</sup> and their regulations, all in accordance with the *Canada Health Act*<sup>34</sup>. Pursuant to the *Canada Health Act*

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<sup>31</sup> *Eldridge*, at para. 665, citing the *Canada Health Act*, RSC 1985, c C-6.

<sup>32</sup> *Alberta Health Act*, SA 2010, c A-19.5.

<sup>33</sup> *Alberta Health Care Insurance Act*, RSA 2000, c A-20.

<sup>34</sup> *Canada Health Act*, RSC 1985, c C-6.

definitions, AHS is Canada's largest province-wide, fully integrated health system, responsible for delivering health services in Alberta and provides insured health services to Albertans.

35. The *Alberta Health Care Insurance Act* creates the framework for a publicly administered health services plan in Alberta pursuant to the definitions and section 7 of the *Canada Health Act*. Pursuant to the *Alberta Health Care Insurance Plan*, [REDACTED] transplants are covered under section 45.5, "Other Operations on Bronchus and [REDACTED]"<sup>35</sup> In furthering the objectives set out in the *Canada Health Act*, *Alberta Services Act*, and *Alberta Health Care Insurances Act* and their regulations, AHS and ABC Hospital deliver one-tier, state-funded medical services.

36. Because the Respondent physicians provide life-saving [REDACTED] transplants under essentially monopolized provincial health insurance and health services legislation, and in furtherance of AHS' Northern Alberta Transplant Services program, such health care services are among the most significant social policies and programs provided by Canadian governments. The Respondent physicians in delivering medical services as part of the [REDACTED] transplant program at ABC Hospital would therefore seemingly be subject to the same *Charter* scrutiny in delivering those services. Yet, the courts below found that was not the case.

37. How can that be? Through legislation and insurance plans, the Government of Alberta and the Federal Government have established healthcare services to entitle Canadians to essential medical care. This system is properly recognized as a cornerstone of governmental policy.

38. Further, the [REDACTED] transplant program is run through AHS in furtherance of the provision of publicly funded government healthcare policy. Through AHS, the Respondent physicians are the vehicles of governmental healthcare policy and are delegated the ability to determine who of the public is qualified to receive lifesaving and medically necessary services, specifically in relation to [REDACTED] transplants. What the preceding paragraphs show that is that the Alberta government has, in essence, set-up a "health care scheme" for transplantation through AHS.

39. The Respondent physicians' Covid-19 vaccination requirement is not a "clinical decision." It is not a decision made specifically for the Applicant based on factors unique to her medical history or status. It is a blanket rule of general application that is imposed on all [REDACTED] transplant

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<sup>35</sup> *Alberta Health Care Insurance Plan*, April 12, 2022.

candidates regardless of their age, weight, height, other unique characteristics, or other clinical considerations, with the exception of patients whom the Respondent physicians determine are medically exempt from the Covid-19 vaccination requirement.

40. Finally, the *Alberta Bill of Rights* should not be automatically inapplicable simply due to the chambers' judge's finding that the *Charter* is inapplicable. There is, in fact, no statutory or constitutional basis for the position taken by the trial judge in this regard. The inception of the *Charter* in 1982 did not renovate Canadian Constitutional history. All of the common law rights, customs, statutes, and traditions are still in place.

41. As noted above, although squarely before it and supported in the record, the Alberta Court of Appeal did not address the *Alberta Bill of Rights* whatsoever in its decision. There was no reference to it or any analysis of why the Court agreed with the chambers judge that the *Alberta Bill of Rights* was inapplicable to the Respondent doctors' Covid-19 vaccine requirement. While bills of rights have taken a backseat juridically to the *Charter*, it remains in the interests of justice to have a proper legal analysis of provincial bills of rights legislation and how they protect (or fail to protect) Canadians' rights in healthcare settings.

**Issue No. 2 – Are provincial government mandatory vaccine requirements for transplant candidates that mirror policies of physicians within a government transplant program immune from scrutiny under the *Charter* and provincial bill of rights legislation?**

42. The Alberta Court of Appeal found that while AHS is subject to the *Charter*, its or ABC Hospital's implementation of the Respondent physicians' Covid-19 vaccine policy would not be subject to *Charter* scrutiny.<sup>36</sup> The Alberta Court of Appeal's decision is at odds with this Honourable Court's decision in *Chaoulli*. In *Chaoulli*, the Court found that government healthcare schemes must comply with the *Charter*. As noted above at paragraphs 39-43, the Applicant has argued that the transplant program at issue in the present case is a government healthcare scheme; however, the courts below characterized it in such a manner that it did not need to comply with the *Charter*.<sup>37</sup>

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<sup>36</sup> *ABCA Decision*, at para. 28.

<sup>37</sup> *Chaoulli*, at para. 104.

43. Likewise, in *Eldridge*, the Court found that the *Charter* applies to private entities acting in furtherance of a specific governmental program or policy and it continues to apply even where implementation of the policy has been delegated to private entities. The legal principles discussed in *Eldridge* strongly suggest that the AHS and ABC Hospital cannot escape *Charter* scrutiny for the Respondent physicians' actions regardless of whether a formal, written Covid-19 vaccine policy for transplant services was provided to the Applicant. Indeed, the AHS and ABC Hospital have set up a health care scheme for organ transplantation - specifically ██████ transplantation - and need to ensure that it complies with the *Charter*.

44. The Alberta Court of Appeal relied on the *Selkirk v. Trillium Gift of Life Network*<sup>38</sup> decision in its finding that “even if the policy was implemented by AHS or ABC Hospital, the clinical decision to support that policy does not equate to government action.”<sup>39</sup> If leave is granted, the Applicant will argue that this is an error.

45. In the *Selkirk* case, the court considered the issue of criteria for liver transplants; specifically, that potential recipients abstain from alcohol for a six-month period before they could be considered for a transplant. The applicant in that case was the wife of a deceased man, Mr. Selkirk, who was denied access to a life-saving liver transplant because he was unable to show that he had been sober for six months. He passed away before he could meet that six-month milestone. The respondent Trillium Gift of Life Network managed the listing criteria for patients to be listed for a liver transplant.<sup>40</sup> It conceded that its 6-month abstinence from alcohol criteria violated Mr. Selkirk's *Charter*-protected section 7 rights to life and security of the person, but the court found that those violations were in accordance with the principles of fundamental justice.<sup>41</sup> The case involved a liver transplant where the donors were alive. In the Applicant's case, a ██████ donor is deceased. The court in *Selkirk* made an important distinction between a living and deceased donor program:

[197] The living donor program has never been controlled by the government. **It was not until 2012 that Trillium, which acknowledges that it is subject to *Charter* scrutiny, pronounced listing criteria pursuant to its statutory**

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<sup>38</sup> *Selkirk v. Trillium Gift of Life Network*, 2021 ONSC 2355 [“*Selkirk*”].

<sup>39</sup> *ABCA Decision*, at para. 28.

<sup>40</sup> *Selkirk*, at paras. 1, 3, 5.

<sup>41</sup> *Selkirk*, at paras. 183-187.

**mandate in connection with the deceased donor program. The deceased donor program is, in some senses, very different from the living donor program. Organs from deceased donors must be allocated fairly, while a living donor is generally prepared to donate only to a certain person. There is no question of fair allocation of organs when dealing with a living donor because a donation from a living donor does not impact the pool of organs that are available for transplantation to liver disease patients at large. As a result, government control of the deceased donor program through Trillium serves desirable public interest goals, in ensuring, among other things, a fair system for the distribution of tissue and organs from deceased donors.<sup>42</sup> [Emphasis Added]**

The Applicant agrees with the court in *Selkirk* that government control of a deceased donor program (such as AHS's ██████ transplant program in the Applicant's case) serves desirable public interest goals.

46. Further, what is absent from the Alberta Court of Appeal's decision is a discussion about AHS' obligations as *per Chaoulli*. It remains unclear as a question of law whether *Chaoulli* stands for the proposition that a government entity like AHS, which has an obligation to ensure that its healthcare schemes are *Charter* compliant, must ensure that policies which set criteria for ██████ transplantation do not unjustifiably breach *Charter* rights and freedoms, regardless of whether AHS, the ABC Hospital, or the Respondent physicians that they hire create those policies. The connection between *Eldridge* and *Chaoulli* remains unclear when it comes to governments' responsibilities in providing healthcare and how doctors' (hired as independent contractors) policies are to be scrutinized. This uncertainty will lead to inconsistent judicial treatment of government policies as they impact *Charter* rights.

47. Finally, the present case provides an opportunity for this Honourable Court to weigh in on the applicability of the *Alberta Bill of Rights* to AHS' and the ABC Hospital's Covid-19 vaccine requirement, as the Alberta Court of Appeal's decision is silent regarding the statutory rights of the Appellant under this legislation. There is a lack of jurisprudence on Canadians' rights under provincial bills of rights legislation, especially since the advent of the *Charter*. These statutes are still in existence and have not been repealed, and this Court's guidance on their proper role in protecting Canadians is needed.

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<sup>42</sup> *Selkirk*, at para. 197.

**Issue No. 3 – Does forcing a transplant candidate to take a novel drug in order to be eligible for a life-saving transplant without offering any other alternatives violate constitutional rights?**

48. The Alberta Court of Appeal conducted a *Charter* analysis of the Applicant’s case in *obiter*. While its findings are not binding, they are persuasive and will influence future constitutional cases involving challenges to vaccine mandates. As noted above, the Court neglected to do any analysis of the Applicant’s rights under the *Alberta Bill of Rights*, despite the Applicant pleading her rights under that statute in her Notice of Application and on appeal.

**Section 2 – Freedom of Conscience**

49. In dismissing the Applicant’s claim of a violation of her freedom of conscience, the Court of Appeal below relied on the Ontario Superior Court decision in *Costa, Love, Badowich and Mandekic v. Seneca College*.<sup>43</sup> In *Costa*, students argued that a Covid-19 vaccine mandate infringed their freedom of conscience. However, the judge’s findings on the students’ *Charter* rights were made within the context of an application for an injunction, and not a hearing on the merits. The decision denying the injunction is under appeal. The *Charter* application on the merits in *Costa* has still not been heard, and further affidavit evidence supporting the *Charter* arguments is forthcoming.

50. The Alberta Court of Appeal in the present case stated that the Applicant’s conscientious belief in bodily autonomy was “better addressed” under section 7 of the *Charter*.<sup>44</sup> It is true that this Court has declined to address section 7 or section 15 *Charter* claims in cases where it found that section 2 had already been violated (as examples).<sup>45</sup> However, in this case, the Alberta Court of Appeal declined to analyze the Applicant’s section 2 freedom of conscience because it added nothing to her section 7 right and found that her section 7 right was not infringed.

51. The rights protected under section 2 and section 7 are different, even if the facts that give rise to claims involving those rights are the same. Although this *Charter* analysis is in *obiter*, it has a precedential value which will affect the proper adjudication of other Canadians’ *Charter*

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<sup>43</sup> *Costa, Love, Badowich and Mandekic v. Seneca College*, 2022 ONSC 5111, at paras. 56-63, [“*Costa*”], cited in the *ABCA Decision*, at para. 39.

<sup>44</sup> *ABCA Decision*, at para. 40.

<sup>45</sup> *Carter*, at para. 93; *R. v. Taylor*, 2014 SCC 50, at para. 36.

rights in future cases. Is it unjust to the Applicant to deny her the opportunity to have a claim under one *Charter* right (s. 2) properly adjudicated while denying her other *Charter* claim (s. 7)? This is particularly the case where it is a matter of first impression. There are no decisions addressing the role that freedom of conscience plays in protecting Canadians who have moral objections to vaccine mandates. These are prescient issues facing Canadians, and this case presents a clear record in which to analyze them and to clarify the law in terms of adjudicating *Charter* rights when the facts that give rise to the claims are similar.

### **Section 7 – *Right to Life, Liberty, and Security of the Person***

#### ***i. Life***

52. The Alberta Court of Appeal rejected the Applicant’s claim that the Respondents deprived her of the right to life as it determined that no sufficient causal connection existed between the AHS Covid-19 vaccine requirement and an increased risk of the Applicant’s death.<sup>46</sup> The Court held that the Covid-19 vaccine requirement did not prohibit her access to medical treatment, finding that the vaccine “is part of the medical treatment.”<sup>47</sup> In its analysis, the Alberta Court of Appeal was dismissive of the Applicant’s argument, supported by expert scientific evidence before the Court, that the Covid-19 vaccines have caused injuries and death. This Honourable Court in *Chaoulli* held that state action giving rise to an increased risk of death engages the section 7 right to life. The creation and implementation of the Covid-19 vaccine requirement as a condition precedent to treatment has increased the Applicant’s risk of death. Without a transplant, the Applicant’s death is a certainty.

53. Unlike other criteria within the transplant program, such as eating a healthy diet, maintaining a healthy weight, and cessation of smoking and drinking, which are indisputably good for transplant candidates’ health, the Covid-19 vaccines have no long-term safety data and are known to cause blood clots, heart problems, and death. All experts from all parties agreed on these facts about the Covid-19 vaccines.

54. The Appellant does not contest the requirement to be up to date on her childhood vaccinations, a requirement which is supported by over 30 years of safety data. In contrast, the

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<sup>46</sup> *ABCA Decision*, at para. 45.

<sup>47</sup> *ABCA Decision*, at para. 46.

risks associated with the Covid-19 vaccines are both known and unknown. If granted leave, the Applicant will argue that under these circumstances, it is an error of law for the Court to defer to the Respondent physicians, simply because they claim it is medically necessary for the Applicant to take the Covid vaccine in order to survive after transplant surgery, and that therefore this condition is not an infringement of her right to life.<sup>48</sup>

55. Thus far in Canada, no appellate court has waded into the science about the efficacy and safety of the Covid-19 vaccines, which has become the juridical elephant in the room. The Covid-19 vaccines are themselves known to cause injury and death which all experts in this matter agreed upon.<sup>49</sup> It is impossible to adjudicate the section 7 issues herein without demonstrable consideration of this fact – yet the Court of Appeal did just that. The Applicant urges this Honourable Court to provide much-needed guidance to safeguard the vulnerable lives of Canadians. The law as it stands following the decisions of the courts below is that physicians can impose experimental pharmaceuticals on patients as a condition of receiving lifesaving treatment, despite the known risks of death and unknown long-term risks of the drug treatments they mandate.

## *ii. Liberty*

56. The Alberta Court of Appeal found that the Covid-19 vaccine requirement did not violate the Applicant’s liberty interest because she was able to successfully decline the Covid-19 vaccine, as is her right.<sup>50</sup> Since she was able to say “no”, the Court found there was no deprivation of liberty. This reasoning is flawed and ignores the attempt by the Respondents to leverage the Applicant’s fear of her mortality to obtain her compliance with the Respondents’ new Covid vaccine policy.

57. The point is not whether the Applicant was able to say “no” to a new drug therapy which has not yet concluded its long-term clinical trials. The Applicant has declined this treatment. The

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<sup>48</sup> *ABCA Decision*, at para. 46.

<sup>49</sup> Houghton Transcript, p. 91, lines 9-11; note: the transcript says, “seven deaths,” and it should say “sudden deaths”; Cypel Transcript, p. 20, lines 16-23; Pfizer’s own data from its “Cumulative Analysis of Post-authorization Adverse Event Reports” indicated that 1223 were fatal, which comprised 2.9% of the 42,086 events reported during its combined Phase 1/2/3 clinical trial as of February 28, 2021: Affidavit of Dr. Bonnie Mallard, sworn February 18, 2022, Exhibit “A,” Schedule “A”, at pages 23-24 [“Mallard Affidavit 2”].

<sup>50</sup> *ABCA Decision*, at para. 52.

point is that section 7 of the *Charter* protects, or ought to protect against *both* the kind of leverage that was brought to bear on the Applicant to obtain her capitulation and compliance, and *also* the Respondents' removal of a government services when she refused to agree with them. The actions of the Respondents are not only coercive, but the removal of services has the appearance of being punitive. The Court of Appeal below has also ignored the fact that the Respondents' refusal of service continues to be coercive to this day, because the Respondents refuse to provide treatment to the Applicant *until* she consents to their demands. Her choice is a particularly unenviable one: each day she is confronted with the only choice the Respondents have given her: the only way she can obtain lifesaving treatment is to agree to take a product which may injure her, as it has injured others.

58. In *Carter*, this Honourable Court found that a law which prohibited aiding or abetting a person to commit suicide deprived the plaintiff of liberty in a manner not in accordance with the principles of fundamental justice. It found that: “**An individual’s response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy.** The law allows people in this situation to request palliative sedation... **but** denies them the right to request a physician’s assistance in dying.”<sup>51</sup> [Emphasis added]. This Honourable Court protected a dying person’s right to choose to die in the manner she chose, i.e., with a physician’s assistance. The Applicant, if granted leave, will ask this Honourable Court to protect her right to live, in the manner she chooses – she chooses life without being put at risk by an experimental drug treatment that has killed other people.

### *iii. Security of the person*

59. The right to security of the person encompasses “a notion of personal autonomy involving...control over one’s bodily integrity free from state interference.”<sup>52</sup> It is also engaged by state interference with an individual’s physical or psychological integrity, including any state action that causes physical or serious psychological suffering.<sup>53</sup> The Alberta Court of Appeal found that the Respondents, in imposing the Covid-19 vaccine requirement upon the Applicant, who was

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<sup>51</sup> *Carter*, at para. 64.

<sup>52</sup> *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 SCR 519, at pp. 587-588.

<sup>53</sup> *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46 at para. 58; *Chaoulli* at paras. 43, 191 and 200.

previously given the green light for a [REDACTED] transplant, did not cause her “serious state-imposed psychological stress.”<sup>54</sup>

60. The approach of the Court of Appeal, however, disregards that the Covid-19 vaccine requirement itself, imposed by the state, has caused the Applicant incredible stress and sorrow.<sup>55</sup> She had hope for survival from October 2020 until March 2021, when she was at high priority Status 2 on the [REDACTED] transplant waitlist and was waiting for the news that a compatible set of [REDACTED] was available to her for a transplant. The Respondents took that hope away from her with their Covid-19 vaccine requirement. The requirement itself has caused the Applicant significant psychological suffering. To suggest otherwise is to ignore the Applicant’s unchallenged evidence on this very point.<sup>56</sup>

61. The Alberta Court of Appeal factored in the safety and efficacy of the Covid-19 vaccine into its analysis of whether the Applicant’s section 7 security of the person right was engaged, even though it declined to assess the scientific evidence, including significant evidence of the vaccine’s **lack** of safety and efficacy. The Court wrote: “We are not persuaded the COVID-19 vaccine requirement, deemed medically necessary to protect Ms Lewis and others in the transplant context, amounts to serious state-imposed psychological stress.”<sup>57</sup> The Alberta Court of Appeal made no specific findings on the safety and efficacy of the vaccines, yet it implicitly accepted the Respondents’ position that they are medically necessary. There was a plethora of evidence, from experts from both sides,<sup>58</sup> that called the safety and efficacy of the Covid-19 vaccines into question, which was not outright rejected by the Court, but completely ignored in analyzing whether a section 7 right was engaged.

62. Further, the Alberta Court of Appeal found that *Morgentaler* did not assist the Applicant because, unlike a woman prohibited from getting an abortion, the Applicant could control whether she took the Covid-19 vaccine and was eligible for a [REDACTED] transplant.<sup>59</sup> In *Morgentaler*, this

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<sup>54</sup> *ABCA Decision*, at para. 60.

<sup>55</sup> Lewis Affidavit 1, at paras. 28, 34.

<sup>56</sup> *Ibid.*

<sup>57</sup> *ABCA Decision*, at para. 60 [Emphasis added].

<sup>58</sup> Houghton Transcript, page 91, lines 9-17; Cypel Transcript, page 20, lines 16-23.

<sup>59</sup> *Morgentaler*, at para. 59.

Honourable Court wrote: “Not only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress.”<sup>60</sup> The Alberta Court of Appeal, however, overlooked the evidence that one of the Respondent physicians advised the Applicant in November 2021 that there was a possibility that the Covid-19 vaccine requirement would be lifted when the Covid-19 pandemic was over.<sup>61</sup> Like in *Morgentaler*, the Applicant bore the stress of wondering if the requirement would be lifted as the threat of Covid waned.

63. These are important legal issues that involve Canadians waiting for life-saving treatment and governments developing controversial blanket pre-transplant requirements which would benefit from this Honourable Court’s guidance. It is trite to say that state-imposed Covid-19 vaccine mandates have caused many Canadians significant stress. The difficulty with the logic in the Alberta Court of Appeal’s decision is that it shifts the cause of the stress away from the state, which imposed the requirement, to the individuals making a choice not to comply with the mandates. It suggests that they caused their own stress as a consequence of their own refusals. It’s like prosecuting the victim; we do not do that in criminal law. Such a decision is troubling for Canadians as it minimizes the *Charter*’s value in protecting Canadians from harsh state action. Unchecked, it will have significant precedential value for future legal challenges to vaccine mandates.

### **The national importance of these arguments**

64. This case raises fundamental questions about healthcare in Canada: whether the state is obligated to ensure that physicians’ blanket policies within a government healthcare scheme comply with the *Charter*, and whether government can absolve themselves of responsibility over patients within their own healthcare scheme by contracting out to third parties. It is also important to have a clear answer as to whether government policies can be excused from *Charter* and provincial bills of rights scrutiny simply because they followed the policies of third parties who are exempt from scrutiny under those statutes.

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<sup>60</sup> *Morgentaler*, at p. 56; *ABCA Decision*, at para. 58.

<sup>61</sup> Dr. A Affidavit, at para. 55, Exhibit “K”.

65. The Applicant argues that neither physicians, and especially not government, can be exempt from *Charter* and *Alberta Bill of Rights* scrutiny over blanket policies which affect her very chance at life. The relationships between (1) government institutions providing healthcare, (2) the healthcare providers they enter into contracts with, (3) both parties' blanket policies for patients, and (4) the *Charter* and provincial bills of rights, have not yet been considered by this Honourable Court. These are crucial questions for constitutional rights in Canada.

66. Further, the issue as to the constitutionality of the requirement to be vaccinated for Covid-19 in a government transplant program has not been determined by any court, as the Alberta Court of Appeal dealt with it only in *obiter*. There are many cases in lower courts which are challenging the constitutionality of Covid-19 vaccine mandates. This makes it all the more important to have clear direction at the appellate level on Canadians' *Charter* rights *viz-a-viz* vaccine mandates. This is especially the case where rights to life, liberty and security are violated when faced with the prospect of a chance at life-saving medical treatment on the condition that they take an experimental medical treatment without any consideration of alternatives, or certain death if they refuse.

67. Should the denial of access to education, employment, travel, religious worship, and most of all life-saving treatment, ever occur due to someone's refusal to take a novel medication known to cause death and injury, which has no long-term safety data? Canadians desperately need this Honourable Court to take a good hard look at these issues and decide what value and protection the *Charter* and provincial bills of rights legislation actually provide.

#### **PART IV – SUBMISSIONS ON COSTS**

68. The Applicant does not seek costs on this leave to appeal.

#### **PART V – ORDER SOUGHT**

69. The Applicant submits that leave should be granted.

CALGARY this 9th day of January 2022

  
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**Allison Pejovic, Counsel for the Applicant**

**PART VI – TABLE OF AUTHORITIES**

<b>APPLICANT’S AUTHORITIES</b>	<b>CITED AT PARAGRAPH NO.</b>
<b>CASES</b>	
<i>Carter v. Canada (A.G.)</i> , <a href="#">2015 SCC 5</a>	29, 50, 58
<i>Chaoulli v. Quebec (Attorney General)</i> , <a href="#">[2005] 1 SCR 791</a>	5, 42, 46, 52, 53
<i>Costa, Love, Badowich and Mandekic v. Seneca College</i> , <a href="#">2022 ONSC 5111</a>	49
<i>Eldridge v. British Columbia (Attorney General)</i> , <a href="#">[1997] 3 SCR 624</a>	4, 28, 33, 43, 46
<i>New Brunswick (Minister of Health and Community Services) v. G. (J.)</i> , <a href="#">[1999] 3 SCR 46</a>	59
<i>R v. Dersch</i> , <a href="#">[1993] 3 SCR 768</a>	4
<i>R. v. Morgentaler</i> , <a href="#">[1988] 1 SCR 30</a>	29, 62
<i>R v. Taylor</i> , <a href="#">2014 SCC 50</a>	50
<i>Rodriguez v. British Columbia (Attorney General)</i> , <a href="#">[1993] 3 SCR 519</a>	59
<i>Selkirk v. Trillium Gift of Life Network</i> , <a href="#">2021 ONSC 2355</a> , aff’d in <a href="#">2022 ONCA 478</a>	4, 44, 45
<b>SECONDARY SOURCES</b>	
<a href="#">Alberta Health Care Insurance Plan</a> , April 12, 2022	35
<b>LEGISLATION</b>	
<i>Alberta Bill of Rights</i> , <a href="#">RSA 2000, c A-14</a>	
<i>Alberta Health Act</i> , <a href="#">SA 2010, c A-19.5</a>	
<i>Alberta Health Care Insurance Act</i> , <a href="#">RSA 2000, c A-20</a>	
<i>Canada Health Act</i> , RSC 1985, c C-6	<a href="#">7</a>
<i>Loi canadienne sur la santé</i> , LRC 1985, c C-6	7
<i>Canadian Charter of Rights and Freedoms</i> <i>Charte canadienne des droits et libertés</i>	<a href="#">1, 2, 7, 15</a> <a href="#">1, 2, 7, 15</a>