

Court file No.
CV-21-000 86750.-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

EGALE CANADA, MORGAN HOLMES and JANIK BASTIEN-CHARLEBOIS

Applicants

and

**HER MAJESTY THE QUEEN as represented by
THE ATTORNEY GENERAL OF CANADA**

Respondent



APPLICATION UNDER Rule 14.05(3)(g.1) and (h) of the *Rules of Civil Procedure*

NOTICE OF APPLICATION

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the Applicant appears on the following pages.

THIS APPLICATION will come on for a hearing (*choose one of the following*)

- In person
- By telephone conference
- By video conference

at the following location

61 Elgin St, Ottawa, ON, K2P 2K1

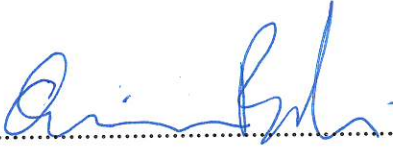
on a day to be set by the registrar.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have

a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date JUN 15 2021 Issued by 
Local registrar

Address of 161 Elgin Street
court office: Ottawa, ON
K2P 2K1

TO: ATTORNEY GENERAL OF CANADA
Deputy Attorney General
Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, Ontario
K1A 0H8

APPLICATION

1. The Applicants make application for:
 - a) a declaration, pursuant to s. 52(1) of the *Constitution Act, 1982*, that the wording “normal sexual appearance” in s. 268(3)(a) of the *Criminal Code*, RSC, 1985, c C-56 (the “*Criminal Code*”), which exempts from criminal liability certain surgeries performed on intersex infants and children, prior to these individuals being old enough to themselves consent to such surgeries (the “Explicit Exemption”), violates ss. 7, 12, and 15 of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”), is not saved by s. 1 of the *Charter*, and is thus of no force or effect;
 - b) a declaration, pursuant to s. 52(1) of the *Constitution Act, 1982*, that ss. 265 and 268 of the *Criminal Code* do not exempt from criminal liability surgeries performed on intersex infants and children, prior to these individuals being old enough to themselves consent to such surgeries, solely to achieve ‘normal sexual appearance’;
 - c) in the alternative, to the extent that ss. 265 and 268 of the *Criminal Code* are interpreted to exempt from criminal liability surgeries performed on intersex infants and children, prior to these individuals being old enough to themselves consent to such surgeries, solely to achieve ‘normal sexual appearance’ (the “Implicit Exemption”) (the Explicit Exemption and the Implicit Exemption together, the “Exemptions”), that the Implicit Exemption violates ss. 7, 12, and 15 of the *Charter*, is not sot saved by s. 1 of the *Charter*, and is thus of no force or effect;
 - d) costs of this application in any event of the cause; and
 - e) such further relief as this Honourable Court deems appropriate and just in the circumstances.
2. The grounds for the application are as follows.

A. Overview

3. In Canada, 'normalizing' aesthetic surgeries on intersex infants and children are permitted and performed.
4. Examples of these aesthetic surgeries include, but are not limited to:
 - a. clitoridectomy;
 - b. clitoroplasty;
 - c. clitoral recession;
 - d. clitoral reduction;
 - e. vaginoplasty;
 - f. labiaplasty;
 - g. gonadectomy; and
 - h. orchidopexy.
5. As a result of the Exemptions, such surgeries performed on intersex infants and children for the sole purpose of attaining 'normal' sexual appearance are shielded from criminal liability.
6. In this context, this application challenges the constitutionality of the Exemptions.
7. First, the Exemptions violate s. 7 of the *Charter*. The Exemptions deprive the liberty interest protected by s. 7 of the *Charter* by denying intersex people the right to make fundamental choices about their bodily integrity, medical care, and reproduction, as well as the ability of some intersex people to align such decisions with their gender identity. The performance of irreversible 'normalizing' aesthetic surgeries on intersex children –

permitted and sanctioned by the Exemptions – when they are too young to provide their own consent to those surgeries, substantially interferes with their later ability, as informed and capable adolescents or as adults, to make decisions of a fundamental and personal nature; that is, the Exemptions impermissibly limit the scope of liberty for their later, capable selves. The Exemptions also deprive intersex people of security of the person by permitting invasive and irreversible surgeries, which compromise the bodily integrity of intersex people. Neither of these deprivations is in accordance with the principles of fundamental justice.

8. Second, the Exemptions violate s. 12 of the *Charter*. ‘Normalizing’ aesthetic surgeries on intersex infants and children – the sole purpose of which is to impose the sex binary upon intersex persons, i.e., an intersexist purpose – are a form of abhorrent and intolerable treatment, are grossly disproportionate in overall impact and effect, and as such are cruel and unusual.
9. Third, the Exemptions violate s. 15 of the *Charter*. The Exemptions are discriminatory on the basis of sex, which is an enumerated ground. Further, the Exemptions perpetuate disadvantage for intersex people – indeed, they are a form of state-sanctioned intersexism. The Exemptions violate substantive equality because they put intersex people in a worse position than other Canadians by depriving them of the protection of the criminal law against genital mutilation because they are intersex. This discriminatory impact is aggravated because the assaults to which the Exemptions expose intersex people have as their objective the erasure of intersex bodies; thus, the Exemptions constitute a fundamental and severe denial of the equal dignity and worth of intersex people. Additionally, the

Explicit Exemption itself invokes prejudicial and stereotypical views about intersex people, and feeds harmful stigma.

10. Fourth, none of these *Charter* breaches are justified under s. 1 of the *Charter*.

B. The Parties

a. The Applicants

i. Egale Canada (“Egale”)

11. The Applicant, Egale, is a national organization committed to advancing equality and justice for LGBTQI2S people, and their families, across Canada.
12. Egale has extensive litigation experience in cases affecting LGBTQI2S issues. Egale has intervened before the Supreme Court of Canada in almost every LGBTQI2S case that has reached the Court. Egale has also participated in numerous lower court cases.
13. Further, Egale has considerable experience advocating for LGBTQI2S interests. Egale has appeared before several federal Parliamentary Committees. Egale has also participated in various ministerial legislative reviews, federal departmental consultations, and public hearings and consultations.
14. Additionally, Egale has been involved in extensive public education and international activities related to human rights and LGBTQ2IS matters.
15. With respect to intersex concerns specifically, Egale has a demonstrated and continuing interest in matters affecting intersex people in Canada. Egale has undertaken sustained advocacy to raise awareness about issues affecting intersex people in Canadian society, as well as to demand legislative changes to protect intersex people from human rights breaches. As part of these efforts, Egale has convened conferences on intersex matters and

prepared and disseminated public education resources on intersex issues. It has also submitted reports on intersex issues to the United Nations, various Canadian federal ministries, and Canada's federal political parties.

ii. Morgan Holmes

16. The Applicant, Morgan Holmes, is Professor of Sociology at Wilfred Laurier University in Waterloo, Ontario. Prof. Holmes has published extensively on the effect of diagnosis and treatment on intersex infants and children.
17. Prof. Holmes was born intersex. In 1974, she underwent a clitoridectomy at age seven.
18. As a result of this procedure, Prof. Holmes has suffered psychological and physical harm.

iii. Janik Bastien-Charlebois

19. The Applicant, Janik Bastien-Charlebois, is Professor of Sociology at the Université du Québec à Montréal. Prof. Bastien-Charlebois has published widely on intersex issues.
20. Prof. Bastien-Charlebois was born intersex. Shortly after Prof. Bastien-Charlebois's birth, various genital treatments and procedures were suggested to Prof. Bastien-Charlebois's mother, including genital examinations and a clitoridectomy, to which her mother refused to consent to at the time.
21. Despite there being no pressing medical concerns related to her intersex variations, Prof. Bastien-Charlebois underwent repeated invasive genital examinations throughout her childhood.
22. In July 1991, at age 17, following urging from her doctors, Prof. Bastien-Charlebois elected to undergo a clitoridectomy.

23. As a result of the stigmatizing medicalization of her body throughout her childhood, and the eventual surgery, Prof. Bastien-Charlebois has suffered physical and psychological harm.

b. The Respondent

24. The Respondent, Her Majesty the Queen in Right of Canada (“Canada”) is represented in this application by her designated Minister, the Attorney General of Canada.

C. Standing

25. Three factors must be weighed to determine whether to grant public interest standing:
- a. whether the case raises a serious justiciable issue;
 - b. whether the party bringing the application has a real stake or a genuine interest in its outcome; and
 - c. whether, in all the circumstances, the proposed application is a reasonable and effective way to bring the issue before the courts.
26. The Applicants meet the test to be granted public interest standing to bring this application, in that:
- a. this application, which concerns the mutilation of intersex infants and children and, more generally, the fundamental rights of intersex people in Canada, clearly raises serious issues of public concern;
 - b. the constitutional validity of the Exemptions and the scope of the protection of the *Charter* rights implicated by this application affect significant numbers of intersex people and therefore transcend the interests of any single intersex person;

- c. the Applicants have a demonstrated, serious, and genuine interest in the subject matter of this litigation (as set out in paragraphs 11–23 above);
- d. the Applicants have familiarity with the impugned provisions, the necessary factual background, and the capacity to bring forward this application to ensure that the issues will be presented in a sufficiently concrete and well-developed factual setting (as set out in paragraphs 11–23 above);
- e. as those that undergo the surgeries permitted by the Exemptions are infants and children, they are incapable of mounting a legal challenge themselves and thus this application is the only feasible way to bring these urgent and grave matters to a court’s attention; and
- f. the application is, in all of the circumstances, a reasonable and effective means of bringing the matter before a court.

27. In addition, the Applicants, Profs. Holmes and Bastien-Charlebois, bring this application based on the violation of their individual rights under ss. 7, 12, and 15 of the *Charter*. Due to the Respondent’s denial of the protection of the criminal law: Prof. Holmes was subjected to an intersexist ‘normalizing’ aesthetic surgery, and its attendant physical and psychological harms, without her meaningful participation in the decision or consent thereto; and, Prof. Bastien-Charlebois underwent an intersexist ‘normalizing’ aesthetic surgery and was subjected to various related medical interventions throughout her childhood, as well as to the physical and psychological harms attendant to such medical interventions and surgery.

28. In addition to these harms, as intersex people, Profs. Holmes and Bastien-Charlebois experience ongoing harms as a result of the prejudicial and stereotypical views about intersex people that the Exemptions invoke, as well as the intersexist stigma that the Exemptions foster.

D. The Impugned Provisions and the Surrounding Legislative Context

29. The *Criminal Code* currently contains the following provisions:

Assault

265 (1) A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
- (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
- (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

Application

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

Voies de fait

265 (1) Commet des voies de fait, ou se livre à une attaque ou une agression, quiconque, selon le cas :

- a) d'une manière intentionnelle, emploie la force, directement ou indirectement, contre une autre personne sans son consentement;
- b) tente ou menace, par un acte ou un geste, d'employer la force contre une autre personne, s'il est en mesure actuelle, ou s'il porte cette personne à croire, pour des motifs raisonnables, qu'il est alors en mesure actuelle d'accomplir son dessein;
- c) en portant ostensiblement une arme ou une imitation, aborde ou importune une autre personne ou mendie.

Application

(2) Le présent article s'applique à toutes les espèces de voies de fait, y compris les agressions sexuelles, les agressions sexuelles armées, menaces à une tierce personne ou infliction de lésions

corporelles et les agressions sexuelles graves.

Consent

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

- (a) the application of force to the complainant or to a person other than the complainant;
- (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
- (c) fraud; or
- (d) the exercise of authority.

Consentement

(3) Pour l'application du présent article, ne constitue pas un consentement le fait pour le plaignant de se soumettre ou de ne pas résister en raison :

- a) soit de l'emploi de la force envers le plaignant ou une autre personne;
- b) soit des menaces d'emploi de la force ou de la crainte de cet emploi envers le plaignant ou une autre personne;
- c) soit de la fraude;
- d) soit de l'exercice de l'autorité.

Accused's belief as to consent

(4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

Croyance de l'accusé quant au consentement

(4) Lorsque l'accusé allègue qu'il croyait que le plaignant avait consenti aux actes sur lesquels l'accusation est fondée, le juge, s'il est convaincu qu'il y a une preuve suffisante et que cette preuve constituerait une défense si elle était acceptée par le jury, demande à ce dernier de prendre en considération, en évaluant l'ensemble de la preuve qui concerne la détermination de la sincérité de la croyance de l'accusé, la présence ou l'absence de motifs raisonnables pour celle-ci.

Aggravated assault

268 (1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

Voies de fait graves

268 (1) Commet des voies de fait graves quiconque blesse, mutile ou défigure le plaignant ou met sa vie en danger.

Punishment

(2) Every one who commits an aggravated assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Excision

(3) For greater certainty, in this section, "wounds" or "maims" includes to excise, infibulate or mutilate, in whole or in part, the labia majora, labia minora or clitoris of a person, except where

(a) a surgical procedure is performed, by a person duly qualified by provincial law to practise medicine, for the benefit of the physical health of the person or for the purpose of that person having normal reproductive functions or *normal sexual appearance* or function [emphasis added]; or

(b) the person is at least eighteen years of age and there is no resulting bodily harm.

Consent

(4) For the purposes of this section and section 265, no consent to the excision, infibulation or mutilation, in whole or in part, of the labia majora, labia minora or clitoris of a person is valid, except in the cases described in paragraphs (3)(a) and (b).

Peine

(2) Quiconque commet des voies de fait graves est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans.

Excision

(3) Il demeure entendu que l'excision, l'infibulation ou la mutilation totale ou partielle des grandes lèvres, des petites lèvres ou du clitoris d'une personne constitue une blessure ou une mutilation au sens du présent article, sauf dans les cas suivants :

a) une opération chirurgicale qui est pratiquée, par une personne qui a le droit d'exercer la médecine en vertu des lois de la province, pour la santé physique de la personne ou pour lui permettre d'avoir des fonctions reproductives normales, ou une *apparence sexuelle* ou des fonctions sexuelles *normales* [nos soulignements];

b) un acte qui, dans le cas d'une personne âgée d'au moins dix-huit ans, ne comporte pas de lésions corporelles.

Consentement

(4) Pour l'application du présent article et de l'article 265, ne constitue pas un consentement valable le consentement à l'excision, à l'infibulation ou à la mutilation totale ou partielle des grandes lèvres, des petites lèvres ou du clitoris, sauf dans les cas prévus aux alinéas (3)a) et b).

a. The Explicit Exemption

30. Aggravated assault is a criminal offence in Canada. It is committed whenever someone “wounds, maims, disfigures or endangers the life of” someone.
31. For “greater certainty”, the *Criminal Code* specifically defines what is (and is not) included within the legal definition of “wounds” or “maims.”
32. With respect to what is included within “wounds” or “maims”, the *Criminal Code* specifically lists certain forms and locations of surgical intervention, i.e., “to excise, infibulate or mutilate, in whole or in part, the labia majora, labia minora or clitoris of a person.”
33. From this explicit *inclusion* for the purposes of criminal liability, the *Criminal Code* specifically lists certain *exclusions*, including a subset of surgeries:
- ... a surgical procedure is performed, by a person duly qualified by provincial law to practise medicine, for the benefit of the physical health of the person or for the purpose of that person having normal reproductive functions or *normal sexual appearance* or function [emphasis added].
34. In effect, s. 268(3)(a) of the *Criminal Code* excludes three types of surgeries from the scope of wounding or maiming:
- a. physical health surgeries, i.e., when a “surgical procedure is performed, by a person duly qualified by provincial law to practise medicine, for the benefit of the physical health of the person”;
 - b. functional surgeries, i.e., when “a surgical procedure is performed, by a person duly qualified by provincial law to practise medicine ... for the purpose of that person having” either “normal reproductive functions” or “normal sexual ... function”; and

- c. 'normalizing' aesthetic surgeries, i.e., when "a surgical procedure is performed, by a person duly qualified by provincial law to practise medicine ... for the purpose of that person having ... normal sexual appearance."
35. Accordingly, s. 268(3)(a) defines a set of surgeries that do not constitute aggravated assault under the *Criminal Code*. That is, s. 268(3)(a) excludes certain surgeries, and the people on whom they are performed, from the protection of the criminal law.
36. The exemption in s. 268(3)(a) for 'normalizing' aesthetic surgeries on the labia majora, labia minora, or clitoris of a person serves to remove the protection of the criminal law for surgeries performed on these genital organs solely for reasons of *appearance*, as surgeries for physical health or function are dealt with separately. When this application refers to the Explicit Exemption, it refers to this withdrawal of criminal law protection in respect of aesthetic surgeries on these particular genital organs.
37. The aesthetic surgeries defined by the Explicit Exemption are 'normalizing', i.e., they contemplate sexual appearance that is 'normal', as well as the types of surgery needed to achieve this normalcy.

b. The Possible Implicit Exemption

38. On its face, s. 268(3)(a) of the *Criminal Code* only concerns surgeries performed on the labia majora, labia minora, or clitoris.
39. However, while the Applicants submit that such an interpretation would be erroneous, the Explicit Exemption may also have a broader interpretive effect. That is, s. 268(3)(a) of the *Criminal Code* may communicate tacit recognition in the wider legislative scheme of an

exemption for aesthetic surgeries on other genital organs not expressly identified in the statutory text.

40. Construed in this way, ss. 265 and 268 of the *Criminal Code* would (the Applicants submit erroneously) exempt from criminal liability ‘normalizing’ aesthetic surgeries on *other* genital organs – i.e., *not* the labia majora, labia minora, or clitoris. When this application refers to the Implicit Exemption, it refers to the withdrawal of criminal law protection in respect of these procedures.
41. As set out below, the Implicit Exemption would violate ss. 7, 12, and 15 of the *Charter* in a manner not justified by s. 1. For this reason, the Applicants submit that no such exemption should be implied and request declaratory relief to that effect (see paragraph 1(b) above). In the alternative, the Applicants request that the Implicit Exemption be declared of no force or effect (see paragraph 1(c) above). However, since the constitutional defects of any Implicit Exemption mirror those of the Explicit Exemption, this application deals with the two together – they do not, in so doing, admit the existence of the Implicit Exemption (which is denied).

E. The Exemptions Violate s. 7 of the Charter

42. Section 7 of the *Charter* provides that:

Life, liberty and security of person

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

Vie, liberté et sécurité

Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

43. The Exemptions deprive intersex infants and children – as well as the adolescents and adults that they will become – of their s. 7 *Charter* rights to liberty and security of the person in a manner that does not accord with the principles of fundamental justice.
44. There is conceptual overlap between liberty (which implicates notions of autonomy) and security of the person (which implicates notions of physical and psychological suffering). The deprivation of autonomy can, itself, be a source of physical and psychological suffering. While liberty and security of the person are distinct, they often have similar and interrelated features, especially in the context of personal medical decisions.

a. State Withdrawal of the Protection of the Criminal Law Constitutes a Deprivation of the s. 7 Interests the Criminal Law Protects

45. The criminal law is the mechanism by which the state protects the liberty and security of its citizens. Where the application of the criminal law is withdrawn from a portion of the population, the state has removed the protective force of the law from this group. The absence of this protective force, and the correlative sanction by the state of what would otherwise be an assault, amounts to a deprivation of liberty and security of the person.

b. The Exemptions Deprive Intersex People of their Right to Liberty

i. The Meaning of Liberty and what Constitutes its Violation

46. The right to liberty under s. 7 of the *Charter* protects an individual's autonomy over fundamental personal choices. Section 7 of the *Charter* ensures that individuals may make these inherently private choices – that go to the core of what it means to enjoy individual dignity and independence – free from state interference.
47. Decisions about bodily integrity and medical care are fundamental personal choices.

48. Interfering with a person's ability to make decisions about their bodily integrity or medical care qualifies as interfering with liberty.
49. Additionally, forced medical treatments on children – even life-saving treatments – interfere with liberty. Irreversible interventions on children, too young to make decisions, irremediably compromises their scope of liberty later in life.

ii. The Exemptions Deprive Intersex Persons of their Liberty Interest

50. The Exemptions deprive liberty. The performance of 'normalizing' aesthetic surgeries on intersex children – permitted and sanctioned by the Exemptions – when they are too young to provide their own consent to those surgeries, substantially interferes with the ability of intersex people to make decisions about bodily integrity and medical care. This deprives them of their liberty within the meaning of s. 7 of the *Charter*.
51. An individual's decision to surgically alter their own genitalia to match their aesthetic preferences is a fundamental personal choice. Such decisions and preferences pertain to bodily integrity and medical care.
52. By permitting 'normalizing' aesthetic surgeries on intersex infants and children, the Exemptions rob intersex people of the right to make fundamental personal medical decisions. Respect for the liberty interest of intersex persons requires that they be allowed to gain maturity and the ability to decide for themselves whether they would like to undergo invasive surgical intervention to alter the appearance of their genitalia. By depriving intersex infants and children of the protection of the criminal law for this fundamental liberty interest, the Exemptions allow and sanction the imposition on intersex infants and children by others (parents and physicians carrying out government health

policy) of a conception of binary-sexed bodies without any physical health or functional justification. Such procedures are far removed from the standard medical decisions made for infants and children as they are deeply harmful to the best interests of intersex children and the adults whom they will become. Rather, these procedures are intersexist violence. Depriving intersex infants and children of protection from this violence gravely interferes with the autonomy of intersex persons.

53. Additionally, the irreversible surgeries protected and sanctioned by the Exemptions deprive intersex individuals of their autonomy over future decisions of a fundamental and personal nature. Some intersex people, by virtue of the mutilation they suffered in infancy, are rendered infertile; such a denial of reproductive choice is a profound violation of the liberty of intersex people.

54. Further, by imposing binary-sexed bodies on intersex children, the surgeries protected and sanctioned by the Exemptions deprive some intersex children, i.e., those whose gender identity will not align with the binary-sexed body imposed upon them, of the right to subsequently make physical and medical decisions about their bodies that align with their gender identity.

a. The Exemptions Deprive Intersex People of their Right to Security of the Person

i. The Meaning of Security of the Person and what Constitutes its Violation

55. The absence of the protective force of the criminal law, and the correlative sanction by the state of what would otherwise be aggravated assault, amounts to a deprivation of the security of the person interest.

56. The right to security of the person is further violated where the state interferes with an individual's physical or psychological integrity, including where state action causes physical or serious psychological suffering.
57. Decisions taken by others about an individual's body, to accord with state-mandated priorities or aspirations, also constitutes an interference of security of the person.
58. Interference can also occur when the state hinders or prevents an individual's control over their own body. Interfering with fundamentally important and personal medical decision-making, depriving an individual of control over their bodily integrity, and denying an individual the opportunity to make a choice that may be important to their sense of dignity and personal integrity, violate security of the person.
59. Additionally, forced medical treatment on minors – even life-saving treatments – interferes with security of the person.

ii. The Exemptions Violate Security of the Person

60. The Exemptions deprive intersex people of security of the person. By withdrawing the protection of the criminal law from intersex people, the Exemptions permit state-sanctioned mutilation of the genitalia of intersex infants and children, which would otherwise amount to aggravated assault. This removal of state protection exposes intersex infants and children to severe violations of their physical integrity.
61. The physical harm resulting from surgeries is not limited to the genital mutilation sustained during the procedure itself; rather, such procedures can additionally cause severe and irreversible physical harm, including loss of sexual sensation, pain during intercourse,

incontinence, scarring, and the need for repeat surgeries (which, itself, can lead to feelings of dissatisfaction with physical appearance).

62. Genital mutilation of intersex people also causes psychological harm. Genital mutilation can cause emotional distress, including by imposing a state-sanctioned body on intersex persons, subjecting intersex persons to an extreme expression of stigma regarding their bodies, and (for some) precipitating divergence between the imposed gender assignment and their gender identity.
63. Additionally, medical genital examinations and pathologizing of the appearance of intersex bodies, notably in relation to proposed surgical procedures, can themselves cause psychological trauma and contribute to negative body image.
64. Furthermore, many of the physical harms stated above (such as loss of sexual sensation, infertility, scarring, etc.) can cause significant psychological harm as well.
65. The aesthetic of one's own genitals is a fundamentally important and personal medical decision implicating bodily integrity. Surgeries on intersex infants and children deny them the opportunity to make choices about their genital appearance which may be very important to their sense of dignity, identity, or personal integrity.

b. The Deprivations Caused by the Exemptions Do Not Conform with the Principles of Fundamental Justice

66. A deprivation of the rights to liberty and security of the person violates s. 7 of the *Charter* unless such a deprivation conforms with the principles of fundamental justice.

i. The Prohibition Against Intentional Discrimination by Government is a Principle of Fundamental Justice

67. For a principle to be recognized as a principle of fundamental justice: (i) it must be a *legal* principle; (ii) that is sufficiently *precise* to yield a manageable standard against which to measure deprivations; and (iii) there must be significant societal consensus that it is *fundamental* to the way in which the legal system ought fairly to operate.
68. The prohibition against intentional discrimination – which through s. 7 of the *Charter* prohibits government from depriving individuals of their life, liberty, or security of the person for a discriminatory purpose – satisfies the test to be recognized as a principle of fundamental justice: it is a *legal* principle, with sufficient *precision*, and is of *fundamental* importance.
69. Applying this principle of fundamental justice, government may not deprive individuals of their life, liberty, or security of the person for an intentionally discriminatory purpose.
- ii. The Principles of Fundamental Justice Include Prohibitions on Arbitrariness, Overbreadth, and Gross Disproportionality***
70. Additionally, the principles of fundamental justice include the principles that laws should not be arbitrary, overbroad, or grossly disproportionate.
- iii. The Exemptions are not in Accordance with the Principle of Fundamental Justice that Prohibits Government Action with a Discriminatory Purpose***
71. Given the statutory language (“normal sexual appearance”), and the legislative debates (which are silent on that statutory language), the objective of the Exemptions is maintaining the sex binary by ensuring that ‘normalizing’ aesthetic surgeries are permissible. Put another way, the purpose of the Exemptions is to permit the erasure of intersex bodies and identities. While the immediate effect is protecting doctors from criminal responsibility, the

ultimate objective is to further intersexist health policy. In short, the purpose of the Exemptions is discriminatory.

72. Where the aesthetic consequences of a surgery are incidental to its *functional* motivations, such a surgery is not the target of this application. But where the aesthetic consequences are the exclusive *purpose* of the surgery, such a procedure is inseverable from intersexism. Even where the intention of purely aesthetic surgeries is to *protect* intersex people from intersexist prejudice and attitudes, the means to achieve these is the *erasure* of intersex bodies and identity. This is profoundly intersexist, and confirms the fundamentally discriminatory purpose of the Exemptions.
73. The Exemptions are not in accordance with the principle of fundamental justice prohibiting intentional discrimination as they deprive intersex people of their liberty and security of the person for an intersexist purpose.

iv. In the Alternative, the Exemptions are Arbitrary, Overbroad, and Grossly Disproportionate

74. To the extent that the Respondent asserts that the Exemptions have another purpose, the Exemptions are arbitrary, overbroad, and grossly disproportionate to that purpose.

F. The Exemptions Violate s. 12 of the Charter

75. Section 12 of the *Charter* provides that:

Treatment or punishment

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

Cruauté

Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

76. Section 12 of the *Charter* is engaged where there is state action that qualifies as either punishment or treatment. To violate s. 12 of the *Charter*, such punishment or treatment must be cruel or unusual.

a. Canada's International Treaty Obligations and s. 12

77. Canada's international obligations inform the interpretation of s. 12 of the *Charter* (as set out in detail below at paragraphs 109–110). In this regard, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the “*Convention against Torture*”) and the *International Covenant on Civil and Political Rights* (the “*ICCPR*”) are of particular relevance for s. 12.

i. The Convention Against Torture

78. As a state party to the *Convention against Torture*, Canada has an obligation to take positive steps to protect its citizens from torture and other forms of cruel, inhuman, and degrading treatment. Notably, Canada must take effective legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its jurisdiction; Canada must ensure that all acts of torture are offences under national criminal law; and Canada must prevent, in any territory under its jurisdiction, other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture, when such acts are committed by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity.

79. The prohibition of torture is an absolute and non-derogable human right and a peremptory norm of customary international law.

80. Canada's obligation to prohibit torture and cruel, inhuman, or degrading treatment or punishment applies in the health care and hospital context. This obligation applies not only to public officials, but also to doctors and other health care professionals, including those working in private hospitals or other health care institutions, as Canada is directly responsible for the action of private institutions and persons when it outsources medical services.
81. Medical interventions that cause severe suffering for an intentionally discriminatory reason are torture, whereas medical interventions that do so for no justifiable reason are cruel, inhuman, or degrading treatment.

ii. The ICCPR

82. As a state party to the *ICCPR*, Canada has an obligation to take positive steps to adopt laws or other measures as may be necessary to give effect to (without distinction of any kind based on, among other things, sex) the rights recognized in the *ICCPR*, including the right not to be subject to torture or cruel, inhuman, or degrading treatment.
83. Canada must take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman, or degrading treatment on others within their power.
84. Canada has a duty to afford everyone protection through legislative and other measures as may be necessary against acts of torture or cruel, inhuman, or degrading treatment, whether inflicted by people acting in their official capacity, outside their official capacity, or in a private capacity.
85. The positive obligations on Canada to ensure *ICCPR* rights are only discharged if individuals are protected by the state, not just against violations of *ICCPR* rights by state

agents, but also against acts committed by private persons or entities that would impair the enjoyment of *ICCPR* rights.

86. Failing to ensure *ICCPR* rights – that is, permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate, or redress the harm caused by such acts by private person or entities – is a violation by Canada of those rights.

b. The Exemptions Allow for and Sanction Treatment that is Cruel and Unusual

87. The Exemptions engage s. 12 of the *Charter* because state-sanctioned medical interventions on intersex children are *treatment*.
88. The Exemptions violate s. 12 of the *Charter* because ‘normalizing’ aesthetic surgeries on intersex infants and children – the sole purpose of which is to impose the sex binary upon intersex persons, i.e., an intersexist purpose – are a form of abhorrent and intolerable treatment, are grossly disproportionate in overall impact and effect, and as such are *cruel* and *unusual*.
89. The Exemptions allow for and lead to the bodily mutilation of intersex children which (as discussed above) gives rise to myriad physical and psychological harms.
90. Maintaining the sex binary is not a legitimate objective. Rather, such a discriminatory objective makes treatment that is otherwise cruel and unusual amount to torture. In any event, forced surgeries on children, simply for being who they are, is a grossly disproportionate measure to attain such an objective.
91. ‘Normalizing’ aesthetic surgeries on intersex infants and children amount to torture or, at least, to inhuman or degrading treatment. As such, they are always prohibited by

international law. By withdrawing the protection of the criminal law, the Exemptions expose intersex people to torture and cruel, inhuman, and degrading treatment.

92. The Exemptions' specific exclusion of 'normalizing' aesthetic surgeries performed on intersex infants and children from criminal responsibility (procedures which would otherwise be considered aggravated assault) violates s. 12 of the *Charter*.

G. The Exemptions Violate s. 15 of the Charter

93. Section 15 of the *Charter* provides that:

Equality before and under law and equal protection and benefit of law

(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.

Égalité devant la loi, égalité de bénéfice et protection égale de la loi

(1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

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.

Programmes de promotion sociale

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

94. The two-step analysis to determine whether s. 15(1) of the *Charter* has been violated asks: first, whether the government action creates a distinction on the basis of an enumerated or analogous ground; and second, whether the distinction is discriminatory, i.e., whether it

imposes burdens or denies benefits in a manner that reinforces, perpetuates, or exacerbates disadvantage.

95. Section 15(2) of the *Charter* clarifies that ameliorative programs (such as affirmative action) do not constitute discrimination, despite the fact that they could, superficially, satisfy the two-step analysis for s. 15(1).

a. The Exemptions Draw a Sex-based Distinction

96. The Exemptions make a distinction based on the enumerated ground of sex. The text of the Exemption specifically deploys sex as a means of delineating its scope: surgeries for ‘normal *sexual* appearance’ are exempt from criminal liability. The Exemptions’ exclusion of intersex people from the protection of the criminal law relates to their sex.
97. A distinction based on a person’s status as intersex is captured by the s. 15 ground of “sex.”
98. What qualifies as ‘normal’ sexual appearance is inextricable from sex. Normal connotes primary sexual characteristics deemed ordinary because of their alignment with binary-sexed bodies, i.e., males having a penis and two testicles and females having a vagina and ovaries. Normal also connotes expectations about the size, visual appearance, and position of the sexual organs. These characteristics are not simply related to sex; they are, according to the intersexism motivating the Exemptions, definitive of sex.

b. The Exemptions are Discriminatory Because they Reinforce the Disadvantage of Intersex People

99. To be discriminatory, the impugned government action must result in a discriminatory impact.

100. Intersex people face a host of challenges and prejudices in Canadian society, including public ignorance and misunderstanding, shame with respect to body image, and stigmatization.
101. The Respondent's withdrawal of the protection of the criminal law for intersex people has a discriminatory impact.
102. The Exemptions themselves have a discriminatory impact on intersex children because they expose them to egregious physical harm, i.e., genital mutilation. That is, the Exemptions exclude intersex people from the protection against such mutilation that the criminal law affords to others, and it does so simply because they are intersex.
103. This discriminatory impact is exacerbated because the aggravated assaults to which the Exemptions expose intersex people have as their objective the erasure of intersex bodies. In this way, the Exemptions constitute a fundamental and severe denial of the equal dignity and worth of intersex persons.
104. Further, when a legislature condones harm against a marginalized group, that, too, perpetuates disadvantage. By specifically permitting the mutilation of bodies lacking 'normal' sexual appearance – in order to 'normalize' those bodies – the Exemptions (and the Explicit Exemption in particular) artificially sustain the sex binary and approve the erasure of intersex people's bodies from the Respondent's conception of legitimate human form. Such a targeted measure sends a strong and sinister message to all members of Canadian society that intersex people are unworthy of dignity or protection. Indeed, intersex people already suffer from popular conceptions of their bodies being illegitimate or inhuman. Exempting the mutilation of those bodies from criminal liability exacerbates

those pernicious attitudes, further stigmatizes intersex people, and perpetuates the disadvantage they experience.

105. Thus, the Exemptions violate the norm of substantive equality in two respects: they put intersex people in a worse position than other Canadians by depriving them of the protection of the criminal law against genital mutilation because they are intersex; and the Exemptions (particularly the Explicit Exemption) themselves invoke prejudicial and stereotypical views about intersex people, feeding harmful stigma. Both effects perpetuate the historical and enduring disadvantage experienced by intersex people.
106. To deny criminal law protection against genital mutilation to intersex children dehumanizes and denies the dignity of intersex people, and it turns intersex children, for the purposes of the *Criminal Code*, into second-class citizens.

c. The Exemptions' Violations are not Justified as Ameliorative Schemes Under s. 15(2) of the Charter

107. Section 15(2) of the *Charter* is only relevant where the source of the impugned violation is a genuinely ameliorative program directed at improving the situation of a group that is in need of ameliorative assistance or in order to enhance substantive equality.
108. The Exemptions are not ameliorative programs. The Exemptions hinder, rather than enhance, substantive equality and accordingly cannot be justified under s. 15(2) of the *Charter*.

H. 'Normalizing' Aesthetic Surgeries are in Breach of International Human Rights Treaties, to which Canada is a State Party

109. The protections of the *Charter* are presumed to conform to the values and principles of the international treaties to which Canada is a state party. The rights afforded by ss. 7, 12, and

15 of the *Charter* are informed by, and to be interpreted in a manner consistent with, the requirements of the following:

- a. *Convention on the Rights of the Child*, notably arts. 3, 8, 12, 19, and 37;
 - b. *Convention against Torture*, notably arts. 1, 2, 4, 10, 12, 14, and 16;
 - c. *ICCPR*, notably arts. 2, 7, 9, and 17;
 - d. *International Covenant on Economic, Social and Cultural Rights*, notably art. 12;
 - e. *Convention on the Rights of Persons with Disabilities*, notably arts. 12, 16, and 25;
- and
- f. *Universal Declaration of Human Rights* notably arts. 1, 2, 3, 6, and 7.

110. These international legal instruments require the humane treatment and protection of intersex people, and reinforce that ‘normalizing’ aesthetic surgeries on intersex infants and children – to which they are unable to themselves consent– unjustifiably deprive liberty and security of the person, constitute cruel and unusual treatment, and are discriminatory.

I. The Violations of ss. 7, 12, and 15 are not Justified Under s. 1 of the *Charter*

111. Section 1 of the *Charter* permits limitations on the rights guaranteed by the *Charter* only where such limitations are reasonable and can be demonstrably justified in a free and democratic society.

112. The violations of ss. 7, 12, and 15 of the *Charter*, as enumerated above, are not justified under s. 1 of the *Charter*.

113. The burden of proof for establishing that the ss. 7, 12, and 15 violations are justified under s. 1 of the *Charter* lies on the Respondent.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE APPLICATION:

- (a) affidavit of Helen Kennedy, Executive Director of Egale Canada;
- (b) affidavit of Morgan Holmes;
- (c) affidavit of Janik Bastien-Charlebois; and
- (d) such further and other materials as Counsel may advise and this Honourable Court may permit.

Date of Issue:

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Applicants

-and-

HER MAJESTY THE QUEEN as represented by the
ATTORNEY GENERAL OF CANADA
Respondent

Court file no. **CV-21-00086750-0000**

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