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| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | EDMONTON |
| APPLICANT | C.F. |
| RESPONDENT | DIRECTOR OF VITAL STATISTICS |
| INTERVENOR | MINISTER OF JUSTICE AND SOLICITOR GENERAL OF ALBERTA |
| DOCUMENT | **REPLY BRIEF** |

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

C.F.

**REPLY BRIEF OF C.F., APPLICANT**

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

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

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## I. REPLY TO ALBERTA'S BRIEF

1. This reply brief will address several issues raised in Alberta's brief filed January 6, 2014. The submissions herein are intended to supplement Ms. Fitzpatrick's merits brief filed December 30, 2013.

### A. ALBERTA MISREPRESENTS THE RELIEF SOUGHT IN THE COMMENCEMENT DOCUMENT

2. In Ms. Fitzpatrick's brief, she requests an order that the respondent amend her registration of birth to designate her sex as "female"[1]. Alberta alleges at paras 12-15 of its brief that this relief was not requested in Ms. Fitzpatrick's Amended Originating Application for Judicial Review ["Application"]. To make this point, Alberta quotes several paragraphs of the Application, including the first part of para 34(i) of the Application. However, Alberta deliberately avoids quoting the rest of para 34(i) of the Application, which explicitly asks the Court for "a remedy under s. 24(1) of the Charter in the nature of *mandamus* requiring the Director to correct <C.F.>'s registration of birth forthwith by changing the sex from male to female".

3. It is difficult to describe Alberta's selective quoting in charitable terms.

4. In addition, in the Alberta Interim Brief[2] (filed 14 months ago), Alberta describes the "ultimate relief sought" on this Application as an injunction requiring the respondent to amend the sex designation on Ms. Fitzpatrick's birth registration to read "female": Alberta Interim Brief, para 53.

5. In conclusion, this relief was explicitly requested in the Application and Alberta has been aware for at least 14 months that it was explicitly requested in the Application[3].

### B. ALBERTA WAS NOT SURPRISED BY MS. FITZPATRICK'S MERITS BRIEF

6. Alberta claims in its brief that it has been taken by surprise by the argument in Ms. Fitzpatrick's brief. At para 15 of its brief, Alberta complains that Ms. Fitzpatrick has considered the context of the entire *VSA*:

> While Alberta has received sufficient particulars of the proposed argument relating to the constitutional validity of s 30 of the *VSA* it has not received sufficient advance particulars regarding the constitutional validity of the recording of sex at birth and the reporting of sex at birth on a birth certificate.

7. Alberta goes on to say that if the Court were inclined to rule in favour of Ms. Fitzpatrick, it should first grant Alberta leave to file additional evidence because of the alleged surprise: Alberta Brief, para 15.

8. Ms. Fitzpatrick's Application, originally filed April 17, 2012, in fact contains exactly the same argument advanced in her brief, although the Application was drafted with reference to the former *Vital Statistics Act*[4]

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1 Fitzpatrick Merits Brief, paras 182-185

2 Alberta's brief in opposition to C.F.'s interim application, filed November 16, 2012 ["Alberta Interim Brief"]

3 With respect to the other heading of relief requested in the brief, a declaration that the *VSA* is unconstitutional, this is covered by para 35(h) of the Application, which asks the Court to sever the surgery requirement "in a manner to be determined by the Court". As discussed in the Fitzpatrick Merits Brief (paras 186-191), Ms. Fitzpatrick would prefer the Court to "cleanly" amend the statute to remove the surgery requirement; however, that does not appear to be possible, so the only option is to strike the entire statute, an approach endorsed by the Supreme Court in ***Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401***, 2013 SCC 62 (Fitzpatrick Authorities, Tab 30).

4 RSA 2000, c V-4 (Fitzpatrick Authorities, Tab 7)

(which was in force at the time). Under the former *VSA*, amendments to sex designation were governed by s 22.

9. Paragraph 29 of Ms. Fitzpatrick's Application reads as follows:

> The Act, and especially s. 22 thereof, is inconsistent with s. 15(1) of the Charter because:
>
> (a) The Act, and especially s. 22 thereof, operates so that non-trans people born in Alberta are entitled to have a birth registration that accurately reflects their lived sex, but trans people (a group to which <C.F.> belongs) are forced to have birth registrations that do *not* reflect their lived sex unless they submit to Genital Surgery.
>
> (b) This distinction constitutes discrimination, which perpetuates prejudice and stereotyping, on the basis of the following grounds or a combination of any of them: sex; mental or physical disability; gender identity; and trans status (the quality of being trans or not).

10. This is transparently the same argument which has been advanced in Ms. Fitzpatrick's merits brief[5] (and it is also the only constitutional argument advanced in Ms. Fitzpatrick's merits brief). It is not apparent how this argument could have been stated any more clearly in the Application.

11. It is notable that the Application uses the language of "The Act, and especially s 22 thereof [which is now s 30]". The Application explicitly alleges that the overall Act is inconsistent with the *Charter*. The pleadings state "especially s 22", not "exclusively s 22". Thus, Alberta has always been aware that the entire context of the Act was in issue.

12. It is difficult to imagine how the constitutionality of s 30 of the *VSA* (the amendment to sex designation provision) could be considered without considering the context of the overall legislative scheme — namely, that sex is assigned at birth and reported on birth certificates. Alberta has in fact already filed evidence dealing with the entire statutory scheme, namely the Affidavit of Mona Bichai, sworn November 29, 2013. The Bichai Affidavit discusses how sex is assigned at birth[6] and reported on birth certificates[7]. The fact that Ms. Fitzpatrick addresses the entire context of the legislative scheme in her brief is not something that Alberta can credibly claim to be surprised by. Statutory interpretation always requires consideration of the entire statute: ***R v Sharpe***[8] at para 33 (words to be read in "entire context"). Alberta's claim of surprise is illogical and should be rejected.

13. It is true that Alberta's arguments in opposition to the Application rely on looking at s 30 in isolation from the rest of the *VSA*. However, that is merely an indication that Alberta's arguments are devoid of merit; it is not an indication of Alberta being taken by surprise. Alberta has been well aware of the particulars of the Application since it was filed on April 17, 2012.

14. Furthermore, Ms. Fitzpatrick advanced the exact same discrimination argument in her Interim Brief filed November 8, 2012 (14 months ago). At para 14 of her Interim Brief, Ms. Fitzpatrick states:

> Most people born in Alberta can apply for a birth certificate and obtain one that accurately reflects

5 See paras 80-81 of the Fitzpatrick Merits Brief, where Ms. Fitzpatrick explicitly sets out this distinction. This distinction is then used as the basis for the entire argument.
6 Bichai Affidavit, para 40
7 Bichai Affidavit, para 47
8 2001 SCC 2 (Alberta Authorities, Tab 13)

> their gender identity. However, when a trans person applies for a birth certificate, she can only obtain an inaccurate one, unless and until she submits to surgery and then provides proof of the same.

15. Ms. Fitzpatrick also explained this same argument orally in Court on November 30, 2012. The same argument is also contained in her "Oral Argument Outline" for that application, filed on November 30, 2012 and served on Alberta at the hearing, 14 months ago[9]. The Oral Argument Outline of November 30, 2012 also contained Ms. Fitzpatrick's refutation of Alberta's s 15(2) argument.

16. Alberta was thus aware of the particulars of Ms. Fitzpatrick's s 15 *Charter* argument. Alberta has had at least 14 months to marshal evidence in support of its position. Despite having 14 months, Alberta waited until the last minute to provide Ms. Fitzpatrick with its evidence, forcing her to frantically deal with it during December and the Christmas holiday, and leaving her with limited time to write her brief[10]. Alberta is the party who is guilty of employing surprise tactics. Alberta's failure to put together a convincing case is merely a result of the fact that there is no merit to Alberta's position, and the fact that Alberta was overconfident because its opponent is self-represented. Alberta's feigned surprise is merely another tactic to surprise Ms. Fitzpatrick. The Court should decline Alberta's request for leave to file additional evidence, as it would be highly prejudicial to Ms. Fitzpatrick.

17. Alberta alleges surprise at several other places in its brief (e.g. paras 44, 92,164). These should also be disregarded for the reasons given above. For example, at para 44, Alberta claims to be surprised by Ms. Fitzpatrick's reference to the provisions that require the sex designation on birth certificates to reflect the sex assigned at birth, asserting that this was "not disclosed in the [Application]". This is simply false[11], and in any event it would obviously be impossible to consider the amendment to sex designation provision without also considering the provision that provides for designation of sex in the first place.

18. Throughout this entire litigation, from start to present, Ms. Fitzpatrick's complaint has always been that the scheme of the *Vital Statistics Act* denies her the ability to obtain a birth certificate that designates her sex as "female" unless and until she undergoes risky, unspecified surgeries and then provides proof thereof: e.g., Application, para 21. Alberta has been completely aware of this and its suggestion of surprise is incredible[12].

19. Disingenuously claiming surprise and requesting leave to file further evidence is a tactic that has been employed by Alberta in other cases. Represented by the same counsel as in this case, Alberta attempted a similar strategy in ***DWH v DJR***[13] at paras 31-35, where it was rejected by Bensler J of this Court. It should be rejected in the present litigation as well[14].

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9 The same theory of discrimination is also summarised in the Fitzpatrick Affidavit affirmed September 25, 2013, paras 4-8.

10 It is not clear whether Ms. Fitzpatrick's employment will survive this litigation. Alberta's discriminatory legislation already interferes with her ability to satisfy job requirements (see, e.g., Fitzpatrick Merits Brief, para 147) and dealing with Alberta's tactics has forced her to take many weeks off, including most of December and January.

11 Paragraph 22 of the Application states that "In Alberta, birth certificates are issued based on the data in a person's registration of birth."

12 Also, even if the previous notices were inadequate (and they were manifestly adequate), s 24 of the *Judicature Act* requires only 14 days' notice. Ms. Fitzpatrick's brief was served on Alberta on December 30, 2013, more than 14 days before the hearing of this application on January 17, 2014.

13 2011 ABQB 791 (Reply Brief, Tab 1), appeal dismissed ***DWH v DJR***, 2013 ABCA 240

14 Alberta's claim of surprise is especially strange because Ms. Fitzpatrick has taken every possible courtesy at every step of these proceedings to avoid surprise to Alberta. She even provided Alberta with a draft of the Fitzpatrick Affidavit and

20. It is curious that Alberta has attempted to rely on a procedural/timing argument in light of the fact that Alberta declined to comply with the Consent Order of Nielsen J dated December 9, 2013, which required Alberta to file and serve its brief and authorities at or before 4:30 PM on January 6, 2014. Ms. Fitzpatrick did not receive Alberta's authorities until 23 hours after the deadline specified in the Order. Alberta did not seek or receive judicial permission to violate the Order[15]. Alberta did not even apologise to Ms. Fitzpatrick[16].

### C. Alberta misstates the appropriate test for causation

21. Alberta has chosen to base most of its arguments on an assertion that Alberta is not responsible for any of the harm identified in the Fitzpatrick Affidavit or the Fitzpatrick Merits Brief (see, e.g., Alberta Brief, paras 49-50, 116, 119, 127-128). Citing no legal authority, Alberta asserts that "to hold the *VSA* responsible for the harm, it must be shown that the *VSA* mandates [the use of a birth certificate]"[17]. In essence, Alberta says that because the *VSA* does not prescribe a particular use for a birth certificate, Alberta is blameless for all of the harm flowing from its discriminatory regime. Contrary to Alberta's submissions, this is not the law in Canada.

22. The Supreme Court has recently considered the required standard of causation for *Charter* claims in ***Canada (Attorney General) v Bedford***[18], which was a *Charter* challenge to certain *Criminal Code* provisions related to prostitution. Among other things, the impugned provisions prohibited indoors prostitution, living on the avails of prostitution (including hiring bodyguards), and communicating for the purpose of prostitution. The claimants argued that the impugned provisions infringed on their right to security of the person because prostitution was riskier when conducted outdoors and without bodyguards, etc. Because of the impugned provisions, the claimants were forced to conduct prostitution under conditions where they were vulnerable to violence from customers, employers, and others.

23. The Attorneys General of Ontario and Canada argued that there was no causal connection between the impugned provisions and the harm alleged because the harm was caused entirely by third parties (johns, etc.) and not by the government, and similarly, no one was mandated by the provisions to engage in prostitution in the first place.

24. The Supreme Court resoundingly rejected this argument, explaining that the required causal standard is merely a "sufficient casual connection", which "does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant". The standard is satisfied by "a reasonable inference, drawn on a balance of probabilities": ***Bedford*** at paras 74-78.

25. The Supreme Court goes on to explain the irrelevance of the fact that the direct cause of the harm is third parties:

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the Karasic Affidavit on May 16, 2013, months before they were eventually filed, in order to allow Alberta to prepare.

15 Alberta also withheld relevant documents until December 17, 2013 in contravention of rules 3.19(a) and 3.18(2)(e). See Fitzpatrick Merits Brief, para 56 for details.

16 Alberta did provide Ms. Fitzpatrick with an electronic copy of its *brief* before the deadline, but it declined to provide its authorities until well after the deadline. It also declined to provide Ms. Fitzpatrick with any advance notice about this.

17 Alberta Brief, para 128

18 2013 SCC 72 (Reply Brief, Tab 2)

> It makes no difference that the conduct of pimps and johns is the immediate source of the harms suffered by prostitutes. The impugned laws deprive people engaged in a risky, but legal, activity of the means to protect themselves against those risks. The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence.
>
> ***Bedford*** at para 89

26. In the context of ***Bedford***, the causal question was "whether the impugned laws make this lawful activity more dangerous": ***Bedford*** at para 87. Similarly, since Alberta's discriminatory birth certificate regime results in a heightened risk of a person experiencing various forms of harm when engaging in lawful activities, a sufficient causal connection has been established. See also ***Quebec (Attorney General) v A***[19] at para 337 ("the fact that a person could avoid discrimination by modifying his or her behaviour does not negate the discriminatory effect. [...] The very act of forcing some people to make such a choice violates human dignity, and is therefore inherently discriminatory.").

27. Secondly, some of the harm from Alberta's discriminatory regime is in fact caused *immediately* by Alberta; for example, the significant psychological harm caused to transgender people such as Ms. Fitzpatrick[20], as well as the fact that impugned regime coerces transgender people into unknown and risky surgeries so that they can avoid all of the harm otherwise present. Although Alberta baldly asserts the regime is not coercive, it does nothing to impugn the credibility of the evidence before the Court which proves that it is coercive[21] and Ms. Hoeksema admitted that Alberta makes no attempt to track whether people who undergo its surgeries are actually happy with them[22] (and we do not even know whether the surgeries her program offers are related to s 30 of the *VSA*, as she disclaims any knowledge of that[23]).

28. Similarly, another form of harm caused immediately by Alberta *merely by the law existing* is the propagation of certain stereotypes already existing in society, such as that an unknown surgery is a thing that changes a person from being male to female, and that a person's lived sex does not need to be respected before that time[24]. This mythical concept of a "big surgery" that changes somebody's sex has no basis in reality, but this concept is firmly endorsed by the *VSA*. Alberta has not led any evidence that such a mythical surgery actually exists, and it does not. Although Alberta appeals to medicine and biology throughout its brief, the only medical evidence before the Court proves that the impugned regime has no basis in medicine[25] and is not supported or endorsed by the medical community[26].

### D. ALBERTA MISCHARACTERISES THE PURPOSE OF BIRTH CERTIFICATES

29. Alberta asserts throughout its brief that birth certificates are an historical record, the purpose of which is to certify the facts as reported at birth (e.g. Alberta Brief, paras 107, 119, 124, etc.). This proposition is false. As

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19 2013 SCC 5 (Fitzpatrick Authorities, Tab 13)
20 Fitzpatrick Merits Brief, para 146
21 Fitzpatrick Merits Brief, para 155; see also Fitzpatrick Affidavit, para 134
22 Hoeksema Questioning, page 20:8-11, Question: "Do you track customer satisfaction, client satisfaction[,] relative to this program? Do you ask people how satisfied they were with this program?" / Answer: "No, we haven't."
23 Hoeksema Questioning, page 3:9-15
24 Fitzpatrick Merits Brief, paras 134-144
25 Karasic Affidavit, paras 25-28
26 Karasic Affidavit, paras 41-42

explained in the Fitzpatrick Merits Brief at paras 1-5, the *VSA* provides for a government identity registry that records a variety of important life events. When a person requests a birth certificate, it is issued showing the most up-to-date information available in the registry — not the information available at birth.

30. For example, when a person changes her name, any birth certificate obtained after that point shows her new name, not her old name[27]. Ms. Fitzpatrick's birth certificate lists her name as “Cathy Fitzpatrick”, which is not the name she was given at birth. Her current birth certificate does not include her old name. Similarly, changes in legal parentage are also reflected on a person's birth certificate. A person can change her legal parents at any time using the *Adult Adoption Act*[28], and then those changes are reflected on the person's birth certificate. And indeed, any birth certificate obtained after a person has died indicates that they are dead[29], even though that was obviously not a fact recorded at birth. To the extent that Alberta argues that all of these cases are exceptions, its argument defies credibility because these so-called “exceptions” are pervasive throughout the entire scheme of the *VSA.*

31. Indeed, a birth certificate contains the date on which it was issued[30], which indicates that the information recorded on the certificate reflects the facts about that person as of that date.

32. Although Alberta is wrong about the purpose of birth certificates, that is not in any event relevant to the s 15 analysis because the analysis of discrimination is based on the *effect* of the legislation, not the intent behind it: ***A*** at para 328. The effect of the *VSA* is that people who are not transgender are entitled to obtain a birth certificate that accurately reflects their lived sex; transgender people are denied this benefit unless and until they first undergo risky unspecified surgeries and then attend for two genital inspections (similar to a strip search) and then provide the respondent with two affidavits confirming the same. That is the effect of the *VSA*, and the effect is what is relevant for the analysis of s 15 of the *Charter*.

33. At para 2 of its brief, Alberta asserts that the present regime is "supported by a neutral and rationally defensible policy choice that is not discriminatory". However, a close reading of all 174 paragraphs of Alberta's brief reveals that the alleged neutral policy choice has not been articulated. For example, at para 82, Alberta explains that accepting Ms. Fitzpatrick's arguments would involve considering “gender identity”. That may be true, but Alberta fails to articulate why this is a problem. Indeed, Alberta's own evidence is that national consistency is a very important object of Vital Statistics[31]. Fully 62% of Canadians live in a province that does not require surgery to amend the sex designation on a birth certificate[32]. Alberta has not provided even a single reason why this is bad; it works well for most of the country and also works well in the US (including California, which has more vital records than all of Canada combined) as well as many other jurisdictions[33]. Alberta merely

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27 *VSA*, s 27(1)
28 RSA 2000, c A-4, and *VSA,* s 16(2)
29 *VSA*, s 38
30 *Vital Statistics Ministerial Regulation*, Alta Reg 12/2012 (Fitzpatrick Authorities, Tab 6), s 24(1)(a)
31 Bichai Questioning, e.g., pages 5:10-15, 78
32 Fitzpatrick Merits Brief, paras 26-30
33 Karasic Affidavit, paras 29-35

relies on the tautology that changing the system would mean the system is no longer based on a change in "anatomical sex structures". Tautology is not an argument.

34. Alberta also states that the "genesis" of the Vital Statistics system is the Canadian census[34]. The census uses a self-reporting system for "sex". There is no reference to "anatomical sex structures". Ms. Fitzpatrick accurately selects her sex as "female" when completing the census. Alberta seems to be admitting that this does not interfere with the census records; indeed, it likely enhances their accuracy.

35. To the extent Alberta argues that it is not required to consider the effect on transgender people when drafting legislation (e.g. Alberta Brief, para 74), that is not the law in Canada. As the Supreme Court has explained, "to promote the objective of the more equal society, s 15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons": ***Eldridge v British Columbia (Attorney General)***[35] at para 64, adopting the opinion of Lamer CJ in ***Rodriguez v British Columbia (Attorney General)***[36] at para 47. In other words, it is not open to Alberta to draft a legislative scheme that does not take into account the existence of people who live as a different sex from the one associated with their "anatomical sex structure", because that is discrimination against transgender persons. When Alberta asserts that it has done so intentionally (see all of Alberta's protestations that the *VSA* does not consider "gender identity"), it is an admission that the impugned legislation is unconstitutional; it is not a defence.

36. Alberta asserts that because it does not *intend* to provide birth certificates certifying a notion of lived sex or gender identity, Alberta's failure to do so is not discriminatory because a birth certificate certifying a notion of lived sex is not a benefit available at law: Alberta Brief, paras 108-112, among others. However, if this argument were accepted, it would be impossible for any legislation to be adverse effect discrimination.

37. For example, suppose Alberta's educational system made no special provisions for people with learning disabilities and simply provided everybody with the same general curriculum. If this were challenged as discriminatory, Alberta could then say that since Alberta does not *intend* to provide any special forms of education, its failure to do so is not discriminatory because a special education is not a benefit available at law. However, this argument would be absurd. The Supreme Court has been clear that in order for the right to equality to be meaningful, the service in question has to be viewed generally as "education", not "special education", or else the definition would already include discrimination and create a "separate but equal" system: ***Moore v British Columbia (Education)***[37] at para 30.

38. In the case at bar, the service has to be viewed as "the provision of a birth certificate", not "the provision of a birth certificate certifying the person's genitals", because the latter definition is defined in such a way that it *already incorporates discrimination against transgender people* and therefore circumvents the entire inquiry. The Supreme Court describes that error as "one of the potential dangers of comparator groups": ***Moore*** at para 30.

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34 Alberta Brief, para 21
35 [1997] 3 SCR 624, [1997] SCJ No 86 (Reply Brief, Tab 3)
36 [1993] 3 SCR 519, [1993] SCJ No 94
37 2012 SCC 61, [2012] 3 SCR 360 (Reply Brief, Tab 4)

39. Alberta thinks it is being very clever when it repeatedly asserts throughout its brief that the *VSA* does not certify gender identity or lived sex. However, in truth, this is merely an admission that the legislation is discriminatory against transgender people, because a definition of "sex" based purely in terms of genitals has an adverse effect on transgender people, and the fact that Alberta has chosen that definition *intentionally* does not assist its case[38]. There is no authority for the proposition that discrimination is legal if carried out intentionally.

### E. Alberta concedes that the violation of s 15 is not prescribed by law

40. There is no longer any need to conduct a s 1 *Charter* analysis in this case because Alberta has conceded that the limitation of equality rights is not prescribed by law. At para 151 of its brief, Alberta admits that under the current system, the decision of whether a person is entitled to a congruent birth certificate is not controlled by law but rather "[t]his determination is a medical diagnosis and is outside the scope of the *VSA*". Thus, Alberta has conceded that the limitation is prescribed by physicians rather than prescribed by law. This means Alberta cannot avail itself of s 1 of the *Charter*.

41. This is similar to when a limitation of *Charter* rights is imposed by police conduct. In such cases, there is no need to conduct a s 1 analysis because the limitation is prescribed by the police, rather than prescribed by law: ***R v Therens***[39] at para 10 per Estey J and para 17 per Lamer J. In the case at bar, Alberta has admitted that the limitation is prescribed not by law but by physicians. Section 1 of the *Charter* is therefore not applicable.

42. As a side note, to the extent Alberta implies its scheme is supported or endorsed by the medical community, that proposition is disproved by the evidence before the Court: Karasic Affidavit, paras 29-35, 41-42.

### F. Alberta profoundly misunderstands transgender people

43. At para 123 of its brief, Alberta asserts that allowing transgender people to obtain congruent birth certificates would perpetuate disadvantage because "hiding true identity is a harm that the Court in ***Vriend***, *supra*, indicated should be avoided".

44. This argument discloses a profound misunderstanding of what it means to be transgender, and a disturbing wilful blindness to the actual situation of transgender people *vis à vis* society.

45. First, nothing in ***Vriend*** suggests that it would be a good idea to have a government registrar of homosexuals or to have official legal documents of homosexuality that have to be presented to participate in society. The Supreme Court contemplated that any positive disclosure would be on the person's own terms, not forced by the government.

46. Second, Ms. Fitzpatrick's true identity is **that she is female**. By issuing Ms. Fitzpatrick an official government document that lists her name as "Cathy" and her sex as "**male**", Alberta is preventing Ms. Fitzpatrick's true identity and true sex from being recognised and is imposing severe gender dysphoria on her[40].

47. Over three years ago, Ms. Fitzpatrick "came out" as female and ever since then she has been living

38 Also, the *VSA* is not based purely on genitals in any event. See Fitzpatrick Merits Brief, para 88, among others.
39 [1985] 1 SCR 613, [1985] SCJ No 30 (Reply Brief, Tab 5)
40 See also Karasic Affidavit, paras 21-24

openly as her true sex of female. At every step of the way, Alberta has put forth various barriers to prevent the recognition of Ms. Fitzpatrick's true sex, but Ms. Fitzpatrick has persisted nonetheless, even in the face of severe societal stigma and even in the face of Alberta's discriminatory legislation. For Alberta to suggest that Ms. Fitzpatrick has been “hiding” her true identity is profoundly offensive.

48. The following table shows how the concepts of “in the closet” and “living openly” apply to gay people compared to transgender people:

| | **“in the closet”** | **“living openly”** |
|---|---|---|
| **Gay people** | When gay people are in the closet, it means they conceal their identity as gay and pretend to be straight. | When gay people live openly, it means they freely share that they are gay. |
| **Transgender people** | When transgender people are in the closet, it means they conceal their true sex, and pretend to be the sex that was assigned to them at birth. | When transgender people live openly, it means they openly identify and live as their true sex — not the sex assigned to them at birth. |

49. In other words, Alberta's discriminatory legislation actually interferes with transgender people living openly, because it prevents them from being openly recognised as their true sex.

50. Also, Ms. Fitzpatrick's birth certificate does not state that she is transgender; it states that she is male (which is untrue). This does more than invalidate her true sex; it also discloses that she has not undergone any surgeries, which is private medical information and not appropriate for an official document required to participate in society.

51. Disturbingly, Alberta is willfully blind to the obvious problems with using an official government document that lists a name of “Cathy” and a sex of “male”. These problems were discussed in the Fitzpatrick Merits Brief at paras 129-156. In short, Alberta is exposing transgender people to severe disadvantage and preventing them from participating fully in society, and thereby coercing them into risky surgeries in order to avoid this harm.

52. As Dr. Karasic has explained, “transgender people suffer levels of discrimination, harassment, and violence unmatched by other minority groups“, which results in “high rates of unemployment and poverty”[41]. Alberta prefers to shut its eyes to this, but it does not change the fact that its discriminatory legislation is exacerbating the situation, as well as all the other harm it causes.

53. Finally, Alberta's discriminatory system is so oppressive that it discourages transgender people from living openly as their true sex and instead encourages them to continue to live as sex assigned to them at birth, hiding their true identity, in order to avoid all of the problems caused by incongruent documents and the inability

41 Fitzpatrick Affidavit, paras 38-39

to participate fully in society. Ms. Fitzpatrick has deposed that if she knew what Alberta what going to put her through in advance, she may have given up on living openly and instead hidden her true sex of female forever[42].

## II. CONCLUSION

54. Alberta's brief fails to counter the arguments in Ms. Fitzpatrick's merits brief filed December 30, 2013. Alberta makes no attempt to impugn the evidence before the Court. Instead, Alberta makes virtually no reference to the evidence, because the evidence is highly unfavourable to Alberta's position.

55. The *Vital Statistics Act* is contrary to modern medical understanding[43] and violates substantive equality. Every jurisdiction that has been confronted with this question in recent years has changed its system to allow transgender people to obtain congruent birth certificates without surgery and without genital inspections[44]. Alberta's regime is inconsistent with the majority of Vital Statistics records in Canada.

56. This Court has been presented with an opportunity to spare Ms. Fitzpatrick and many other transgender people from the fate of unwanted government-mandated surgeries and allow them to become full citizens and participate in society on an equal basis. For the reasons given in Ms. Fitzpatrick's merits brief, as supplemented herein, the application must be allowed. The *Vital Statistics Act* is unconstitutional. Ms. Fitzpatrick is entitled to a birth certificate that designates her sex as female.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

Dated: January 10, 2014.

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Cathy Fitzpatrick / C.F.
Applicant

42 Fitzpatrick Affidavit, paras 117-123
43 Karasic Affidavit, paras 25-28
44 Karasic Affidavit, paras 29-35, 41-42

## III. LIST OF AUTHORITIES

Cases

[Tab 1] ***DWH v DJR***, 2011 ABQB 791, [2011] AJ No 1499

[Tab 2] ***Canada (Attorney General) v Bedford***, 2013 SCC 72, [2013] SCJ No 72

[Tab 3] ***Eldridge v British Columbia (Attorney General)***, [1997] 3 SCR 624, [1997] SCJ No 86

[Tab 4] ***Moore v British Columbia (Education)***, 2012 SCC 61, [2012] 3 SCR 360

[Tab 5] ***R v Therens***, [1985] 1 SCR 613, [1985] SCJ No 30

Other authorities

[Tab 6] Letter from Susan Jessop, Director, Security, Policy, and Entitlement, Passport Canada, dated August 29, 2002, explaining Passport Canada's sex designation policy (namely, that the sex on a person's birth certificate is used because birth certificates have special evidential significance under provincial law — not because Passport Canada or other downstream users care about a person's genitals), obtained under the *Access to Information Act*, RSC 1985, c A-1