File Number: 31955

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA)

B E T W E E N:

A.C., A.C. and A.C.

Appellants (Appellants)

- and -

DIRECTOR OF CHILD AND FAMILY SERVICES

Respondent (Respondent)

- and -

ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF ALBERTA, and ATTORNEY GENERAL OF BRITISH COLUMBIA

Interveners

APPELLANT'S FACTUM

FILED BY APPELLANT [redacted]

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I — STATEMENT OF FACTS

A. Overview

1. The treatment decisions of Appellant [redacted] an exceptional young woman judicially accepted as capable of deciding her own medical care, should have been respected. The common law, which recognizes the right of capable persons of any age to decide their medical care, is not superseded by Manitoba's *Child and Family Services Act* (*CFSA*), ss. 25(8) and 25(9).[1] That common law right is incorporated in a trilogy of legislation adopted by the Manitoba Legislature. Even if the *CFSA* ss. 25(8) and 25(9) superseded the common law, those subsections, as construed and applied to Ms. [redacted] unjustifiably infringed her rights under the *Canadian Charter of Rights and Freedoms* (*Charter*), ss. 2(a), 7, and 15(1).[2]

2. On April 16, 2006, four days after Ms. [redacted] went to Winnipeg's Health Sciences Center (Hospital) for treatment for her Crohn's disease, she was apprehended without warrant by the Respondent Director who then obtained a treatment order from Kaufman J. authorizing forced blood transfusions. Ms. [redacted] was almost 15 years old. Kaufman J. granted the order although he accepted Ms. [redacted] "is a person with capacity to give or refuse consent to her own medical care."[3] She was denied the right to decide her medical treatment solely because she was under age 16.

3. Blood transfusions were forced on Ms. [redacted] on the late afternoon of April 16. It was "painful spiritually, mentally, emotionally and even physically" to her. She felt "helpless," feels "incensed," and is "still suffering."[4] She remained apprehended, under the Director's control, until May 1, 2006. The Director then gave notice he may again intervene because her disease could relapse before she turned 16 on June 7, 2007.[5] That threat caused Ms. [redacted] further serious psychological stress until she moved from Manitoba to Ontario on April 1, 2007.

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1 *The Child and Family Services Act*, S.M. 1985-86, c. 8, ss. 25(8), (9) [*CFSA*] **[herein, Tab 1, p. 51]**

2 *Canadian Charter of Rights and Freedoms* **[Appellant's Book of Authorities (BOA), Vol. 2, Tab 48]**

3 Corrected Order of the Court of Queen's Bench of Manitoba, Kaufman J. (April 16, 2006) **[Appellant's Record (AR), Tab 9, p. 91, lns. 10-11]**

4 Affidavit of [redacted] (April 30, 2006), paras. 24-25, 27-28 **[AR, Tab 29, pp. 216-217]**

5 Letter from Ms. Buchanan to Dr. Lipnowski (May 1, 2006); Letter from Ms. Buchanan addressed "To Whom It May Concern" (May 1, 2006); Letter from Ms. Buchanan to Mr. & Mrs. [redacted] (May 3, 2006) **[AR, Tab 30, p. 246, lns. 38-40; p. 248, lns. 30-34; p. 268, lns. 30-35]**

B. [redacted] and Her Illness

4. Ms. [redacted] has Crohn's disease, a chronic inflammation of her gastrointestinal tract. She takes medication to control her disease. Occasionally, she bleeds from her bowel.[6]

5. Ms. [redacted] baptized at her request as one of Jehovah's Witnesses on July 17, 2004, sincerely believes the Biblical injunction to abstain from blood, which for her includes blood transfusions. She explains: "I will not violate Jehovah God's command to abstain from blood. I have dedicated my life to Him. Turning my back on God, who made my life possible, is not a compromise I am willing to make."[7]

6. Ms. [redacted] was 14 years 10 months on April 16, 2006, when Kaufman J. granted the treatment order; her classmates were age 16 and 17. She was 15 years 8 months on February 5, 2007, when the Court of Appeal dismissed her appeal of the treatment order and *Charter* claim.[8]

C. Statutory Provisions

7. The *CFSA* is part of a trilogy of legislation Manitoba enacted in the 1990s affecting medical treatment decisions made by persons under the statutory age of majority (age 18). The Legislature intended individual capacity, not a fixed age, would govern those decisions. This is confirmed by *The Health Care Directives Act* (*HCDA*), Preamble: "Manitoba law recognizes that mentally capable individuals have the right to consent or refuse consent to medical treatment."[9] The *HCDA*, enacted in 1992, prescribes a rebuttable presumption of incapacity below age 16:[10]

> 2 For the purpose of this Act, a person has capacity to make health care decisions if he or she is able to understand the information that is relevant to making a decision and able to appreciate the reasonably forseeable consequences of a decision or lack of decision.
>
> 4(1) Every person who has the capacity to make health care decisions may make a health care directive.
>
> 4(2) In the absence of evidence to the contrary, it shall be presumed for the purpose of this Act

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6 Affidavit of [redacted] (April 30, 2006), paras. 6-7 **[AR, Tab 29, pp. 210-211]**

7 Affidavit of [redacted] (April 30, 2006), paras. 5, 9-12 **[AR, Tab 29, pp. 210-212]**

8 Affidavit of [redacted] (April 30, 2006), para. 3 **[AR, Tab 29, p. 210]**

9 *The Health Care Directives Act*, S.M. 1992, c. 33, Preamble [*HCDA*] **[herein, Tab 2, p. 52]**

10 Manitoba, Law Reform Commission, *Self-Determination in Health Care (Living Wills and Health Care Proxies)*, Report No. 74 (Manitoba: Queen's Printer, 1991) at 13-14 **[BOA, Vol. 3, Tab 69]**

> (a) that a person who is 16 years of age or more has the capacity to make health care decisions [rebuttable by the state]; and
>
> (b) that a person who is under 16 years of age does not have the capacity to make health care decisions [rebuttable by the person below age 16].[11] [Emphasis added.]

8. The *CFSA*, amended in 1995, likewise provides for a rebuttable presumption of capacity at ages 16 and 17, but is silent concerning treatment decisions by capable persons below age 16:

> 25(8) Subject to subsection (9), upon completion of a hearing, the court may authorize a medical examination or any medical or dental treatment that the court considers to be in the best interests of the child.
>
> 25(9) The court shall not make an order under subsection (8) with respect to a child who is 16 years of age or older without the child's consent unless the court is satisfied that the child is unable
>
> (a) to understand the information that is relevant to making a decision to consent or not consent to the medical examination or the medical or dental treatment; or
>
> (b) to appreciate the reasonably forseeable consequences of making a decision to consent or not consent to the medical examination or the medical or dental treatment.[12] [Emphasis added.]

9. *The Mental Health Act* (*MHA*) was enacted in 1998. Like the *HCDA*, the *MHA* prescribes a rebuttable presumption of incapacity below age 16:

> 2 In the absence of evidence to the contrary, it shall be presumed
>
> (a) that a person who is 16 years of age or more is mentally competent to make treatment decisions and to consent for the purpose of this Act; and
>
> (b) that a person who is under 16 years of age is not mentally competent to make treatment decisions or to consent for the purpose of this Act. [Emphasis added.]
>
> 26 Except as provided in this Act, a patient of a facility has the right to consent to or refuse psychiatric and other medical treatment.
>
> 29(1) Except as provided in this section, an attending physician shall not administer treatment to a patient
>
> (a) who is mentally competent to make treatment decisions, without the patient's consent.[13]

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[11] *HCDA*, *supra*, ss. 2, 4(1), (2) **[herein, Tab 2, p. 53]**

[12] *CFSA*, *supra*, ss. 25(8), (9) **[herein, Tab 1, p. 51]**

[13] *The Mental Health Act*, S.M. 1998, c. 36, ss. 2, 26, 29(1) [*MHA*] **[herein, Tab 3, pp. 63, 64, 68]**

D. April 12, 2006: Ms. [redacted] Seeks Medical Treatment

10. On April 12, 2006, Ms. [redacted] disease caused bleeding from her bowel. She sought medical treatment by arranging for her admission to the Hospital. She told Hospital staff she was one of Jehovah's Witnesses and would not consent to blood transfusions; at her request staff placed her *Advance Medical Directive* refusing blood transfusions in her hospital chart. She requested alternatives to blood transfusions, such as intravenous (I.V.) iron and erythropoietin, drugs that stimulate the body's production of red blood cells.[14]

11. Dr. Stanley Lipnowski was the pediatrician who treated Ms. [redacted] at the Hospital. Earlier that day a medical staff member of the Hospital's Blood Conservation Program, in response to a request for a consultation by Ms. [redacted] recommended that she receive I.V. iron and erythropoietin to improve her blood levels. Ms. [redacted] asked Dr. Lipnowski to consult with the Program. He declined. Further, he declined her request to begin her on I.V. iron and erythropoietin. He told her she was stable and no longer bleeding.[15]

12. On April 13, 2006, Dr. Lipnowski requested from the Hospital's Department of Psychiatry a formal assessment of Ms. [redacted] capacity to decide her own medical care, without blood transfusions. Department psychiatrists Drs. Altman, Bristow, and Kuzenko conducted the assessment, alone, with Ms. [redacted] Their written report concluded she was capable of deciding her medical treatment: "The patient understands the reason why a transfusion may be recommended, and the consequences of refusing to have a transfusion."[16]

E. April 16, 2006: Director Apprehends Ms. [redacted]

13. After midnight on Sunday, April 16, 2006, at the Hospital, Ms. [redacted] again bled from her bowel. Dr. Lipnowski asked her to consent to blood transfusions. Ms. [redacted] refused. She repeated her earlier requests that Dr. Lipnowski start her on I.V. iron and erythropoietin, and

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[14] Affidavit of [redacted] (April 30, 2006), paras. 12-15 **[AR, Tab 29, pp. 212-214]**

[15] Affidavit of [redacted] (April 30, 2006), paras. 16-17 **[AR, Tab 29, p. 214]**

[16] The capacity standard used to assess Ms. [redacted] is the same test reviewed by this Court in *Starson v. Swayze*, [2003] 1 S.C.R. 722 at paras. 78-81 **[BOA, Vol. 1, Tab 40]**; Capacity Assessment Report (April 13, 2006) [courtesy typed version] **[AR, Tab 29, p. 227, lns. 5-20; p. 229, lns. 9-17]**

consult with the Hospital's Blood Conservation Program. Dr. Lipnowski declined.[17]

14. Later in the early morning of April 16, 2006, social worker Audrey Lumsden, for the Director, apprehended Ms. [redacted] without warrant, under s. 21(1) of the *CFSA*.[18]

15. Ms. [redacted] asked Dr. Lipnowski to administer recombinant factor VIIa, a rapid-acting blood clotting agent. At Ms. [redacted] request, Dr. Lipnowski discussed with her the risks and benefits of factor VIIa. With her consent, Ms. [redacted] was given factor VIIa.[19]

F. April 16, 2006: Proceedings in Queen's Bench Before Kaufman J.

16. Commencing at 8:00 a.m., April 16, 2006, in a short-notice telephone application before Kaufman J. the Director sought a treatment order under s. 25(8) of the *CFSA*. The Director did not disclose the April 13, 2006, Hospital Psychiatry Department's capacity assessment report; he submitted Ms. [redacted] "position" need not be considered because she was below age 16.[20]

17. Kaufman J. conducted the hearing by telephone from the Law Courts building at 411 Broadway Street, Winnipeg, Manitoba. Director's counsel was present at the court house while Dr. Lipnowski, social worker Ms. Lumsden, and the Hospital's counsel were connected by telephone from a boardroom in the Hospital at 840 Sherbrook Street, Winnipeg, Manitoba. Ms. [redacted] was in her hospital room receiving factor VIIa; her parents were with her.[21]

18. About 8:20 a.m. Hospital counsel came to Ms. [redacted] hospital room and told her parents Kaufman J. required them in the Hospital boardroom for the telephone hearing.[22] Her father attended. Ms. [redacted] expected Kaufman J. would connect her to the hearing by telephone in her room or hold the hearing in her presence so she could give *viva voce* evidence.[23]

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17 Affidavit of [redacted] (April 30, 2006), paras. 19-21 **[AR, Tab 29, p. 215]**

18 Examination-in-Chief of Audrey Lumsden (April 16, 2006) **[AR, Tab 28, p. 187, lns. 11-21]**

19 Affidavit of [redacted] (April 30, 2006), para. 21 **[AR, Tab 29, p. 215]**; Transcript of Proceedings before Kaufman J., Court of Queen's Bench of Manitoba (April 16, 2006) **[AR, Tab 28, p. 177, lns. 7-10; p. 190, lns. 26-30; p. 193, lns. 17-30; p. 196, ln. 31 to p. 197, lns. 15-16]**

20 Transcript of Proceedings before Kaufman J. (April 16, 2006) **[AR, Tab 28, p. 167, lns. 22-29; p. 169, ln. 3; p. 178, ln. 32 to p. 179, ln. 4]**

21 Transcript of Proceedings before Kaufman J. (April 16, 2006) **[AR, Tab 28, p. 166, lns. 21-25]**

22 Transcript of Proceedings before Kaufman J. (April 16, 2006) **[AR, Tab 28, p. 172, lns. 1-9]**

23 Affidavit of [redacted] (April 30, 2006), para 24 **[AR, Tab 29, p. 216]**

19. By about 8:30 a.m. Winnipeg lawyer Allan Ludkiewicz (at the request of Ontario counsel for Ms. [redacted] parents) was driving to the Hospital where, he believed, the hearing would occur. While on the TransCanada Highway, he was connected by the court to the hearing on his cell phone and told the hearing was at the court house. Mr. Ludkiewicz stopped his vehicle and made two motions: (a) it was "incumbent" that Kaufman J. reconvene at the Hospital to permit *viva voce* evidence of Ms. [redacted] and determine her capacity; and (b) the April 13, 2006, assessment report of Ms. [redacted] be received as an exhibit.[24] Mr. Ludkiewicz also raised Ms. [redacted] rights under the *Charter*, ss. 2(a) and 7.[25]

20. Kaufman J. dismissed Mr. Ludkiewicz's motions, ruling the court would instead "accept that [Ms. [redacted] has the capacity" to decide her medical treatment, and accept she would not consent to blood transfusions.[26] Director's counsel did not object.[27] Kaufman J. then requested Mr. Ludkiewicz drive to the Hospital while attempting to listen on his cell phone to examinations-in-chief, and the court's questioning, of both Dr. Lipnowski and Ms. Lumsden.[28]

21. At approximately 8:55 a.m.—after the examinations-in-chief and court questioning of Ms. Lumsden and Dr. Lipnowski were complete—Kaufman J. briefly adjourned to allow

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[24] Transcript of Proceedings before Kaufman J. (April 16, 2006) **[AR, Tab 28, p. 174, ln. 5 to p. 175, ln. 13; p. 178, lns. 10-13, 21-24; p. 180, lns. 1-4; p. 182, lns. 19-27]**

[25] Transcript of Proceedings before Kaufman J. (April 16, 2006) **[AR, Tab 28, p. 179, lns. 5-13]**

[26] Transcript of Proceedings before Kaufman J. (April 16, 2006) **[AR, Tab 28, p. 185, lns. 7-11; p. 199, lns. 15-17; p. 201, lns. 20-31; p. 206, lns. 27-32]**; Corrected Order of Kaufman J. (April 16, 2006) **[AR, Tab 9, p. 91, lns. 10-11]**

[27] Transcript of Proceedings before Kaufman J. (April 16, 2006) **[AR, Tab 28, p. 185, lns. 7-15; p. 201, ln. 34]**; Corrected Order of Kaufman J. (April 16, 2006) **[AR, Tab 9, p. 91, lns. 10-11]**

The April 16, 2006, order was "corrected" because the original order failed to state Kaufman J. accepted Ms. [redacted] was capable of deciding her own medical treatment. Counsel pointed out this error in his April 21, 2006, letter to the Trial Coordinator. On April 27, 2006, the Trial Coordinator provided counsel with Kaufman J.'s handwritten comments on the April 21 letter directing them to prepare a new order. Kaufman J.'s comments read: [page 1] "Get me new order with consents as to form. If problems they should see me. Put in preamble that wrong draft was inadvertently signed." [page 2] "File agreed upon draft with consent of parties & give it to me to sign." **[AR, Tab 9, pp. 94.1 to 94.3]** The parties then agreed on the form of the "Corrected Order" which was signed by Kaufman J. on May 4, 2006, and entered that same day. **[AR, Tab 30, p. 251, lns. 36-38]**

[28] Transcript of Proceedings before Kaufman J. (April 16, 2006) **[AR, Tab 28, p. 186, lns. 3-23; p. 188, lns. 19-24; p. 192, lns. 3-12]**

Mr. Ludkiewicz to reach the Hospital and attend the remainder of the hearing by speakerphone.[29] Kaufman J. chose not to reconvene at the Hospital, 2.5 kilometers from the court house.[30]

22. The telephone hearing resumed at 9:15 a.m. After brief cross-examinations of Ms. Lumsden and Dr. Lipnowski and a brief statement by Ms. [redacted] father, Kaufman J. granted the treatment order under s. 25(8) of the *CFSA*. Kaufman J. was of the view Ms. [redacted] treatment instructions should not "govern" because she was below age 16.[31]

23. Kaufman J. relied entirely on Dr. Lipnowsi's narrative and opinion evidence. Kaufman J. provided Ms. [redacted] no opportunity to be present or represented. Mr. Ludkiewicz, then acting as agent for her parents' counsel, had no adequate opportunity to challenge Dr. Lipnowski's testimony by meaningful cross-examination or by contrary medical evidence.

24. On April 27, 2006, Ms. [redacted] appealed Kaufman J.'s treatment order and, later, filed a notice challenging the constitutionality of *CFSA* ss. 25(8) and 25(9).[32] (On appeal, Ms. [redacted] challenged pediatrician Dr. Lipnowski's opinion by proffering the evidence of Dr. Aryeh Shander, an expert in Critical Care Medicine and Anesthesiology.[33])

G. Opinion of Dr. Lipnowski Is Not Reliable

25. Dr. Lipnowski's opinion, even absent Ms. [redacted] proffered expert evidence, is not reliable.[34] First, that Ms. [redacted] condition was not nearly as urgent as Dr. Lipnowski claimed is confirmed by the fact blood transfusions were not imposed on Ms. [redacted] until

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29 Transcript of Proceedings before Kaufman J. (April 16, 2006) **[AR, Tab 28, p. 194, lns. 2-12]**

30 Google Maps of Canada **[herein, p. 86]**

31 Transcript of Proceedings before Kaufman J. (April 16, 2006) **[AR, Tab 28, p. 180, lns. 9-10]**; Oral Reasons for Judgment of Kaufman J., Court of Queen's Bench of Manitoba (April 16, 2006) **[AR, Tab 2, p. 4, ln. 33 to p. 5, ln. 9]**

32 Notice of Appeal (April 27, 2006) **[AR, Tab 12, p. 102]**; Notice of Constitutional Questions (May 23, 2006), paras. 23-27 and Questions No. 2 and 4 **[AR, Tab 14, pp. 118-121]**

33 Ms. [redacted] has filed concurrently with this factum a motion seeking leave to renew the motion she filed in the Court of Appeal to adduce Dr. Shander's expert medical opinion.

34 Dr. Lipnowski is a paediatrician. He did not profess to have any expertise in Critical Care Medicine, Anesthesiology, Gastroenterology (bowel disorders), or Haematology.

commencing at 3:30 p.m., about six hours after the treatment order was granted.[35] The hearing could have been adjourned to later that day to allow Ms. [redacted] opportunity to arrange for the contrary expert testimony of Dr. Aryeh Shander and gastroenterologist Dr. Ricky Snipes.[36]

26. Second, the dilution effect of intravenous fluids Ms. [redacted] received was contrary to what Dr. Lipnowski claimed.[37] The intravenous fluids given Ms. [redacted] early that morning did not change the actual amount of hemoglobin (red blood cells) circulating and available in her blood stream. Those fluids had created a false low hemoglobin reading of 44 g/L. That her true level was significantly higher than 44 g/L is illustrated by events on April 25, 2006. On that date, a test reported her hemoglobin level to be 46 g/L. Ms. [redacted] surgeon, Dr. Posthuma, told her there was no need for concern because the intravenous fluids given during surgery artificially lowered her hemoglobin test results; once her body eliminated those excess fluids her reported hemoglobin level would increase to its true level.[38] (On April 22, 2006, Dr. Posthuma removed a diseased portion of her bowel, without blood transfusion.)

27. Third, Dr. Lipnowski's *in terrorem* claim Ms. [redacted] hemoglobin level posed a significant risk to her organs[39] is contradicted by the fact she carried on numerous detailed discussions on the morning of April 16, 2006. About 2:30 a.m. Dr. Lipnowski discussed with

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35 Examination of Dr. Lipnowski by the Court (April 16, 2006) **[AR, Tab 28, p. 171, lns. 23-34]**; Affidavit of [redacted] (April 30, 2006), para. 27 **[AR, Tab 29, p. 217]**

36 Following the hearing, Ms. [redacted] asked Dr. Lipnowski to consult with Dr. Snipes in Michigan, U.S.A. Dr. Lipnowski refused, stating he did not need to consult with an expert from the United States.—Affidavit of [redacted] (April 30, 2006), para. 26 **[AR, Tab 29, p. 216]**; Later, Dr. Lipnowski refused Ms. [redacted] request to consult with Dr. Shander, again stating he did not need to consult with an expert outside Manitoba, an erroneous position adopted by Hospital counsel.—Affidavit of [redacted] (April 30, 2006), para. 36; Letter from C. Tolton to S. Brady (April 28, 2006) **[AR, Tab 29, pp. 219-220, 232-233]**

Dr. Lipnowski's refusal to consult with Drs. Shander and Snipes is directly contrary to *The Report of the Manitoba Pediatric Cardiac Surgery Inquest: An Inquiry Into Twelve Deaths at the Winnipeg Health Sciences Centre in 1994*. That enquiry recommended (p. 481) that Manitoba hospitals inform patients about their "right to a second opinion" and their right to "an out-of-province referral . . . where the surgeon or institution in Manitoba lacks the same experience." **[BOA, Vol. 3, Tab 79]**

37 Examination of Dr. Lipnowski by the Court (April 16, 2006) **[AR, Tab 28, p. 170, lns. 16-28; p. 175, lns. 28-29; p. 190, lns. 13-17]**

38 Affidavit of [redacted] (April 30, 2006), para. 7, 30-31, 34 **[AR, Tab 29, pp. 211, 218-219]**

39 Examination of Dr. Lipnowski by the Court (April 16, 2006) **[AR, Tab 28, p. 171, lns. 23-34]**

Ms. [redacted] whether she would consent to blood transfusions. Shortly before 8:00 a.m., he discussed with her the benefits and risks of factor VIIa and obtained her consent to use the drug. After the hearing, Ms. [redacted] requested Dr. Lipnowski consult with Dr. Snipes.[40] Prior to the hearing, social worker Ms. Lumsden spoke with Ms. [redacted] other health care providers.[41] Hospital counsel went to Ms. [redacted] hospital room.[42] Yet, at the court hearing, no one alleged Ms. [redacted] exhibited any signs of compromised oxygen delivery. This is not the picture of a young woman in immediate need of blood transfusion.

H. April 16 to May 1, 2006: Warrantless Apprehension and Petition

28. Under the warrantless apprehension Ms. [redacted] remained in the Director's control for 16 days, from April 16 to May 1, 2006.[43] On May 1, 2006, while still apprehended, she filed an application for relief under the *Charter*, s. 24(1), claiming the apprehension and the Director's related actions violated her *Charter* rights contrary to *Winnipeg Child & Family Services (Central Area) v. W. (K.L.)*.[44] About an hour after being served with Ms. [redacted] application, the Director withdrew the apprehension and his guardianship Petition he filed April 21, 2006.[45]

29. Ms. [redacted] pursued her application for a *Charter*, s. 24(1), remedy. On June 28, 2006. Goldberg J. dismissed the application, ruling the Court of Queen's Bench lost jurisdiction to grant a s. 24(1) remedy when the Director withdrew the apprehension and Petition. Ms. [redacted] would instead need to start a separate civil action in the same court, based on the same evidence, seeking the same remedy.[46] Ms. [redacted] appealed Goldberg J.'s order. (That appeal was heard by the Court of Appeal on June 26, 2007; judgment remains reserved.)

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40 Affidavit of [redacted] (April 30, 2006), paras. 20-21, 26 **[AR, Tab 29, pp. 215-216]**; Examination of Dr. Lipnowski by the Court **[AR, Tab 28, p. 177, lns. 7-10]**

41 Examination-in-Chief of Audrey Lumsden (April 16, 2006) **[AR, Tab 28, p. 187, lns. 13-21]**

42 Affidavit of [redacted] (April 30, 2006), para. 22 **[AR, Tab 29, p. 216]**

43 *CFSA*, *supra*, ss. 21(1), 25(1) **[herein, Tab 1, pp. 48-49]**. Kaufman J.'s treatment order was not a custody order and did not authorize imposing transfusions on Ms. [redacted] beyond April 16, 2006.

44 *Winnipeg Child & Family Services (Central Area) v. W. (K.L.)*, [2000] 2 S.C.R. 519 at paras. 125-126, 128, 131 **[BOA, Vol. 1, Tab 45]**; Oral Reasons for Judgment of Goldberg J., Court of Queen's Bench of Manitoba (June 28, 2006) **[AR, Tab 3, p. 6, ln. 33 to p. 8, ln. 2]**

45 Petition and Notice of Hearing (April 21, 2006) **[AR, Tab 11, p. 100, lns. 5-10]**

46 Order of the Court of Queen's Bench of Manitoba, Goldberg J. (June 28, 2006) **[AR, Tab 17, p. 131]**; Oral Reasons of Goldberg J. (June 28, 2006) **[AR, Tab 3, p. 9, lns. 6-31]**

30. Meanwhile on May 1, 2006, the Director wrote Dr. Lipnowski and the Hospital stating the Director "would again need to be contacted" if Ms. [redacted] disease relapsed. On May 3, 2006, the Director wrote Ms. [redacted] parents stating he might intervene, again, in Ms. [redacted] treatment decisions (Ms. [redacted] was released from Hospital May 4, 2006).[47]

I. June to August 2006: Interlocutory Motions in Court of Appeal

31. From June to August 2006, the parties brought three interlocutory motions before the Court of Appeal (in Chambers). On June 1, 2006, Monnin J.A. set Ms. [redacted] appeal from Kaufman J.'s treatment order for hearing on September 7, 2006.[48] On July 20, 2006, Monnin J.A. admitted the April 30, 2006, affidavit of Ms. [redacted] into the appeal record.[49] On August 15, 2006, Freedman J.A. adjourned the Director's motion to meet privately with Ms. [redacted] doctors ("disclosure" motion) to the September 7, 2006, appeal hearing.[50]

J. September 7, 2006: Appeal Hearing From Kaufman J.'s Treatment Order

32. Ms. [redacted] appeal of Kaufman J.'s treatment order was heard September 7, 2006. Two preliminary factual issues were raised at the appeal hearing: (a) whether Ms. [redacted] judicially accepted by Kaufman J. to be capable of giving or refusing consent to her own medical care, was in fact capable; and (b) whether the blood transfusions proposed by Dr. Lipnowski were in fact medically necessary. The Court of Appeal and the parties agreed it was not necessary to decide either factual issue. They agreed, first, the court "would proceed in the same manner as did [Kaufman J.]; that is, by assuming that [Ms. [redacted] had capacity" and on that basis, determine the "pure question of law with respect to statutory interpretation [of *CFSA*

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47 Letter from Ms. Buchanan to Dr. Lipnowski (May 1, 2006); Letter from Ms. Buchanan addressed "To Whom It May Concern" (May 1, 2006); Letter from Ms. Buchanan to Mr. & Mrs. [redacted] (May 3, 2006) **[AR, Tab 30, p. 246, lns. 38-40; p. 248, lns. 30-34; p. 268, lns. 30-35]**

48 Reasons for Judgment of Monnin J.A., in Chambers, Court of Appeal of Manitoba (July 20, 2006), para. 11 **[AR, Tab 4, p. 18]**

49 Reasons of Monnin J.A. (July 20, 2006), paras. 20-21 **[AR, Tab 4, pp. 20-21]**

50 Reasons for Judgment of Freedman J.A., in Chambers, Court of Appeal of Manitoba (August 15, 2006), para. 19 **[AR, Tab 5, p. 27]**

ss. 25(8) and 25(9)] and the impact of that interpretation on [Ms. [redacted] *Charter* rights."[51] And, second, the "medical dispute" was not before the court; Dr. Lipnowski's disputed evidence would be used only to show that the Director had some belief for engaging the *CFSA* s. 25(3).[52] The court was not to assume, or decide whether, the blood transfusions were in fact necessary or whether any medical justification existed for the hurriedly convened hearing on April 16, 2006. The Director's "disclosure" motion and a motion by Ms. [redacted] to adduce expert opinion, including the May 25, 2006, opinion of Dr. Shander, were adjourned, by consent, *sine die*.[53]

33. Ms. [redacted] challenged the constitutionality of the *CFSA* ss. 25(8) and 25(9), as applied to her on April 16, 2006 (the retrospective challenge) and the threatened application of those sections to her until the day she turned age 16 on June 7, 2007 (the prospective challenge).[54] She was concerned her disease might flare before she turned 16, and result in the Director again overruling her capable treatment decisions.[55] (The Court of Appeal cited the "possibility of a reoccurrence" of Ms. [redacted] disease as one reason why the appeal should be decided.[56])

K. February 5, 2007: Appeal From Kaufman J.'s Treatment Order Dismissed

34. On February 5, 2007, the Court of Appeal dismissed Ms. [redacted] appeal.

35. On October 25, 2007, this Honourable Court granted leave to appeal.[57] On December 3, 2007, McLachlin C.J.C. granted Ms. [redacted] motion to state the constitutional questions.[58]

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[51] The scope of the agreement was clarified significantly by the Court of Appeal in Reasons for Judgment of Scott C.J.M., Steel, Hamilton JJ.A., Court of Appeal of Manitoba (May 14, 2007) at paras. 13-16 [Reasons of Steel J.A. (rehearing motion) (May 14, 2007)] **[AR, Tab 8, pp. 85-87]**

[52] Reasons of Steel J.A. (rehearing motion) (May 14, 2007), para. 16 **[AR, Tab 8, p. 86]**

[53] Reasons for Judgment of Huband, Steel, Hamilton JJ.A., Court of Appeal of Manitoba (February 5, 2007), para. 21 **[AR, Tab 7, p. 38]**; Reasons of Steel J.A. (rehearing motion) (May 14, 2007), paras. 14-15 **[AR, Tab 8, pp. 85-86]**

[54] *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at paras. 50-51 **[BOA, Vol. 1, Tab 27]**

[55] Affidavit of [redacted] (May 30, 2006), paras. 2, 4; Letter from Ms. Buchanan to Dr. Lipnowski (May 1, 2006); Letter from Ms. Buchanan to Mr. & Mrs. [redacted] (May 3, 2006) **[AR, Tab 30, pp. 235-236, 246, 248]**; Notice of Constitutional Questions (May 23, 2006), para. 20 **[AR, Tab 14, p. 117]**

[56] Reasons of Steel J.A. (February 5, 2007), para. 32 **[AR, Tab 7, p. 45]**

[57] Order of the Supreme Court of Canada, Binnie, LeBel, Deschamps JJ.S.C.C. (October 25, 2007) **[AR, Tab 25, p. 156]**

[58] Order of the Supreme Court of Canada, McLachlin C.J.C. (December 3, 2007) **[herein, Tab 4, p. 82]**

PART II — STATEMENT OF QUESTIONS IN ISSUE

36. This appeal raises the following questions:

ISSUE ONE: **Do *CFSA* ss. 25(8) and 25(9) Supersede the Common Law Right of a Capable Young Person to Choose Medical Treatment Without State Interference?**

ISSUE TWO: **Did *CFSA* ss. 25(8) and 25(9) Unjustifiably Infringe the Rights of [redacted] Under the *Charter*, ss. 2(a), 7, and 15(1)?**

PART III — STATEMENT OF ARGUMENT

ISSUE ONE: **Do *CFSA* ss. 25(8) and 25(9) Supersede the Common Law Right of a Capable Young Person to Choose Medical Treatment Without State Interference?**

A. Synopsis

37. The central issue on this appeal is whether Ms. [redacted] had the legal right to make autonomous medical treatment decisions. This included the right to choose alternatives to blood transfusions, a procedure that violated her religious conscience. There is no dispute that in Manitoba, at common law and under statute, a capable person age 16 and older possesses the same legal right to decide medical treatment as does a capable person over the age of majority (age 18).[59] The question Ms. [redacted] raises is whether the Legislature intended the *CFSA* ss. 25(8) and 25(9) to deny that same right to her as a capable person ("mature minor") and, if so, whether those sections unjustifiably infringed her rights under the *Charter*, ss. 2(a), 7, and 15(1).

B. Common Law "Mature Minor" Rule

38. "Mature minors are children who understand the nature and consequences of their decisions. At common law, mature minors, similar to adults, have the capacity to decide their own medical care."[60] The Court of Appeal accepted the "long line of decisions" confirming this common law right.[61]

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[59] Reasons of Steel J.A. (February 5, 2007), paras. 49-50 **[AR, Tab 7, p. 51]**

[60] Reasons of Steel J.A. (February 5, 2007), para. 24 **[AR, Tab 7, p. 42]**

[61] Reasons of Steel J.A. (February 5, 2007), para. 53 **[AR, Tab 7, p. 52]**; Rozovsky, Lorne E., *The Canadian Law of Consent to Treatment*, 3d ed. (Markham, ON: LexisNexis Butterworths, 2003) c. 5 at 7-8, 80-83 **[BOA, Vol. 3, Tab 76]**; Picard, Ellen I. & Robertson, Gerald B., *Legal Liability of*

39. *Van Mol (Guardian ad litem of) v. Ashmore* summarizes the common law. The British Columbia Court of Appeal held that Ms. Van Mol (age 15 when admitted to hospital for heart surgery)[62] possessed "all rights" to decide whether to undergo the surgery and selection of the surgical method; decisions which posed serious, potentially life-altering, medical risks:

> But once the required capacity to consent has been achieved by the young person reaching sufficient maturity, intelligence and capability of understanding, the discussions about the nature of the treatment, its gravity, the material risks and any special or unusual risks, and the decisions about undergoing treatment, and about the form of the treatment, must all take place with and be made by the young person whose bodily integrity is to be invaded and whose life and health will be affected by the outcome. At that stage, the parent or guardian will no longer have any overriding right to give or withhold consent. All rights in relation to giving or withholding consent will then be held entirely by the child. The role of the parent or guardian is as advisor and friend. There is no room for conflicting decisions between a young person who has achieved consenting capacity, on the one hand, and a parent or guardian, on the other. [Emphasis added.]
>
> The propositions of law in the previous paragraph are of long-standing duration. The discretion of a child to make his or her own decisions before achieving the age of majority in relation to important life events is discussed in *Blackstone's Commentaries*, 17th ed. (1830) vol. 1 c.16 and 17, at p. 463, as mentioned in the leading English authority of *Gillick v. West Norfolk & Wisbech Area Health Authority*, [1986] 1 A.C. 112 (U.K. H.L.), particularly by Lord Fraser of Tullybelton and Lord Scarman, which reaffirms the common law position as I have described it in the previous paragraph.[63]

40. The Alberta Court of Appeal, in *C. (J.S.) v. Wren*[64] and in *U. (C.) (Next Friend of) v. Alberta (Director of Child Welfare)* agrees, affirming that treatment decisions of a capable young person "cannot be overridden by a parent or guardian."[65] The New Brunswick Court of Appeal,

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Doctors and Hospitals in Canada, 4th ed. (Scarborough: Carswell, 2007) c. 2 at 82-84 **[BOA, Vol. 3, Tab 75]**; Sharpe, Gilbert, "Consent and Minors" (1993) 13 Health Law in Canada 197 at 197-201 **[BOA, Vol. 3, Tab 78]**

62 *Van Mol (Guardian ad litem of) v. Ashmore* (1999), 168 D.L.R. (4th) 637 at para. 84 (B.C.C.A.) **[BOA, Vol. 1, Tab 43]**

63 *Van Mol, supra*, at paras. 75-76, 89, 112 **[BOA, Vol. 1, Tab 43]**. *Van Mol* confirms the right to consent to treatment includes the right to refuse treatment. Kaufman J. accepted Ms. [redacted] "is a person with capacity to give or refuse consent to her own medical care."—Corrected Order of Kaufman J. (April 16, 2006) **[AR, Tab 9, p. 91, lns. 10-11]**; Picard & Robertson, *Legal Liability of Doctors and Hospitals in Canada, supra*, at 44-45, 82 (fn. 223) **[BOA, Vol. 3, Tab 75]**

64 *C. (J.S.) v. Wren* (1986), 76 A.R. 115 at paras. 14-16 (C.A.) **[BOA, Vol. 1, Tab 8]**

65 *U. (C.) (Next Friend of) v. Alberta (Director of Child Welfare)* (2003), 327 A.R. 25 at paras. 29, 32 (C.A.) **[BOA, Vol. 1, Tab 42]**

sitting *en banc* in *Walker (Litigation Guardian of) v. Region 2 Hospital Corp*., likewise concluded: "At common law, when a minor is mature, no parental consent is required."[66] Relying on *Re Eve*[67] and *Fleming v. Reid*,[68] the New Brunswick Court of Appeal also affirmed that when a young person achieves decisional capacity "there is no room for the court to exercise its *parens patriae* jurisdiction."[69]

41. The House of Lords in *Gillick v. West Norfolk and Wisbech Area Health Authority* agrees. Rejecting that legal capacity depends on attaining a minimum "fixed age,"[70] Lord Scarman wrote:

> The law relating to parent and child is concerned with the problems of the growth and maturity of the human personality. If the law should impose on the process of 'growing up' fixed limits where nature knows only a continuous process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to human development and social change.
>
> . . .
>
> In the light of the foregoing I would hold that as a matter of law the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves sufficient understanding and intelligence to enable him or her to understand fully what is proposed.[71]

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66 *Walker (Litigation Guardian of) v. Region 2 Hospital Corp.* (1994), 4 R.F.L. (4th) 321 at paras. 27-28, 30 (N.B.C.A.) **[BOA, Vol. 1, Tab 44]**

67 *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388 at 426, (*sub nom. Re Eve*) 31 D.L.R. (4th) 1 **[BOA, Vol. 1, Tab 12]**

68 *Fleming v. Reid* (1991), 4 O.R. (3d) 74 at paras. 45, 47-49 (C.A.) **[BOA, Vol. 1, Tab 13]**

69 *Walker*, *supra*, at paras. 27-28 **[BOA, Vol. 1, Tab 44]**; Picard & Robertson, *Legal Liability of Doctors and Hospitals in Canada*, *supra*, at 85 **[BOA, Vol. 3, Tab 75]**; The Alberta Court of Appeal, in *U. (C.)*, *supra*, at paras. 32-33, agrees *parens patriae* jurisdiction terminates when a young person achieves consenting capacity, but goes on to hold (para. 33) provincial legislatures possesses a "general jurisdiction" to override treatment decisions of capable persons of any age. **[BOA, Vol. 1, Tab 42]** That position is surely wrong. This Court has held bodily inviolability is an "original freedom," that cannot be abolished by provincial or territorial legislation.—see Hogg, Peter W., *Constitutional Law of Canada*, 5th ed., vol. 1 (Scarborough: Carswell, 2007) c. 21 at 21-3 to 21-4 **[BOA, Vol. 3, Tab 65]**; Scott, F.R., "Dominion Jurisdiction Over Human Rights and Fundamental Freedoms" (1949) 27 Can. Bar Rev. 497 at 509 [**BOA, Vol. 3, Tab 77]**; *Saumur v. Quebec (City of)*, [1953] 2 S.C.R. 299 at 329 **[BOA, Vol. 1, Tab 38]**

70 *Gillick v. West Norfolk and Wisbech Area Health Authority*, [1985] 3 All E.R. 402 at 422 (para. g), 423 (para. c) (H.L.) **[BOA, Vol. 1, Tab 14]**

71 *Gillick*, *supra*, at 421 (para. h), 423 (para. j) (Lord Scarman); see also concurring reasons of Lord Fraser at 410 (para. j) to 412 (para. c) **[BOA, Vol. 1, Tab 14]**

42. As stated by the Canadian Medical Protective Association, "[t]he legal concept of the 'mature minor' has become widely accepted and firmly entrenched" in Canada:[72]

> The legal age of majority has become progressively irrelevant in determining when a young person may consent to his or her medical treatment. As a result of consideration and recommendation by law reform groups as well as the evolution of the law on consent, the concept of maturity has replaced chronological age. The determinant of capacity in a minor has become the extent to which the young person's physical, mental, and emotional development will allow for a full appreciation of the nature and consequences of the proposed treatment, including refusal of such treatments.[73]

43. The Manitoba Law Reform Commission, in consultations with physicians, observed:

> We found that the mature minor rule is a well-known, well-accepted and workable principle which seems to raise few difficulties on a day-to-day basis. There was quite strong opposition to the use of a fixed age limit; the development of children was seen to be too variable to permit a fixed age to be a practical or workable concept. The interviews revealed no reason for concern in respect of the operation of the mature minor rule. Based on these interviews, the Commission has concluded that, generally, health care providers appear to approach the task in a highly responsible, caring and compassionate manner; good communication is a priority and significant amounts of information and advice are provided to mature minors.[74]

The common law has long recognized the capacity of persons under the age of majority, see: Blackstone, Sir William & Chase, George, *The American Students' Blackstone Commentaries on The Laws of England*, 3d ed. (Albany, N.Y.: Banks & Bros., 1903) at 181 **[BOA, Vol. 2, Tab 55]**; *R. v. Smith* (1845), 1 Cox C.C. 260 **[BOA, Vol. 1, Tab 32]**

72 Evans, Kenneth G., *A Medico-Legal Handbook for Physicians in Canada*, 6th ed. (Ottawa: Canadian Medical Protective Association, 2005) at 8-9, 28 **[BOA, Vol. 2, Tab 61]**

"Once [adolescents] have sufficient decision-making capacity, they should become the principal decision maker for themselves."—Canadian Paediatric Society, Position Statement, B2004-01, "Treatment Decisions Regarding Infants, Children and Adolescents" (2004) 9 Paediatric Child Health 99 at 99 **[BOA, Vol. 2, Tab 56]**

The College of Physicians and Surgeons of Ontario states concerning Ontario's legislation: "The [*Health Care Consent Act, 1996*] does not identify any age at which minors may exercise independent consent for health care because the capacity to exercise independent judgment for health care decisions varies according to the individual and the complexity of the decision at hand. Physicians must make a determination of capacity of consent for a child just as they would for an adult."—College of Physicians and Surgeons of Ontario, Policy Statement, 4-05, "Consent to Medical Treatment" (College of Physicians and Surgeons of Ontario, 2006) at 3 [emphasis added] **[BOA, Vol. 2, Tab 58]**

73 Evans, Kenneth G., *Consent: A Guide for Canadian Physicians*, 4th ed. (Ottawa: Canadian Medical Protective Association, 2006) at 5 **[BOA, Vol. 2, Tab 62]**

74 Manitoba, Law Reform Commission, *Minor's Consent to Health Care*, Report No. 91 (Manitoba: Queen's Printer, 1995) at 33, 38 **[BOA, Vol. 3, Tab 68]**

44. Ms. [redacted] accepted by Kaufman J. to be "a person with capacity to give or refuse consent to her own medical care," had the common law right to choose medical treatment that respected her bodily autonomy and religious conscience (above paras. 5, 13, 15).[75]

C. *CFSA* ss. 25(8) and 25(9) Do Not Supersede Common Law

45. The Court of Appeal held, however, that the *CFSA* superseded the common law.[76] The court reasoned this was because the *CFSA* s. 1(1) defines a "child" as a person under the age of majority; ss. 2(1) and 2(2) permit a child to make his or her "views and preferences" known; and s. 25(9) refers only to medical consent of a young person "16 years of age or older."[77] The court reasoned the language of those sections was "sufficiently clear to oust the common law rule for those under 16."[78] That statutory language falls far short of the "clear"[79] and unambiguous[80] words needed to oust Ms. [redacted] fundamental common law right to bodily integrity.

(i) *CFSA* ss. 25(8) and 25(9) Apply Only to Medical Decisions Made by Parents for an Incapable Child

46. Nothing in the *CFSA* shows the Legislature intended to oust the common law.[81] First, subsection 1(1) is consistent with the common law, which has long defined "infant" as a person under the age of majority.[82] Second, ss. 2(1) and 2(2) reflect the common law *parens patriae*

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75 Corrected Order of Kaufman J. (April 16, 2006) **[AR, Tab 9, p. 91, lns. 10-11]**; *Fleming, supra,* at paras. 41, 54-55 **[BOA, Vol. 1, Tab 13]**; *Starson, supra,* at para. 75 (Major J.); paras. 7, 19 (McLachlin C.J.C.) **[BOA, Vol. 1, Tab 40]**

76 Reasons of Steel J.A. (February 5, 2007), paras. 57, 60-61 **[AR, Tab 7, pp. 54, 56-57]**

77 *CFSA*, *supra*, ss. 1(1), 2(1), (2) **[herein, Tab 1, p. 45.1-45.3]**

78 Reasons of Steel J.A. (February 5, 2007), paras. 57, 60 **[AR, Tab 7, p. 54, 57]**

79 *Re Eve*, *supra*, at 406 **[BOA, Vol. 1, Tab 12]**; *Gillick*, *supra*, at 409 (para. d) (Lord Fraser) **[BOA, Vol. 1, Tab 14]**

80 *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919 at para. 95 **[BOA, Vol. 1, Tab 1]**

81 *Morguard Properties Ltd. v. Winnipeg (City of)*, [1983] 2 S.C.R. 493 at 509 **[BOA, Vol. 1, Tab 25]**; *Goodyear Tire & Rubber Co. of Canada LTd. v. T. Eaton Co. Ltd.*, [1956] S.C.R. 610 at 614 **[BOA, Vol. 1, Tab 15]**; see also *Kennett Estate v. Manitoba (A.G.)* (1998), 42 R.F.L. (4th) 27 at paras. 28, 48 (Man. C.A.) where the Manitoba Court of Appeal observed, in *obiter*, that the *CFSA* s. 25 does not override the common law mature minor rule. **[BOA, Vol. 1, Tab 22]**

82 Weisstub, David N., *Enquiry on Mental Competency: Final Report* (Toronto: Queen's Printer, 1990) at 123 **[BOA, Vol. 3, Tab 82]**; Sharpe, "Consent and Minors," *supra*, at 198 **[BOA, Vol. 3, Tab 78]**; *Gillick*, *supra*, at 420 (paras. c-e), 422 (paras. g-h) (Lord Scarman) **[BOA, Vol. 1, Tab 14]**; *Johnston v. Wellesley Hospital* (1970), 17 D.L.R. (3d) 139 at paras. 18-19 (Ont. S.C.) **[BOA, Vol. 1, Tab 21]**;

jurisdiction. Third, legislative silence in s. 25(9) concerning treatment decisions of persons below age 16 does not oust the common law. The House of Lords considered similar language in *Gillick*. There, the court rejected the argument legislative silence meant persons below age 16 could not give legally effective consent; the common law was unaffected by the legislation.[83]

47. The Court of Appeal failed to consider the *CFSA* as a whole.[84] The *CFSA* is a legislative exercise of *parens patriae*,[85] an authority that can be exercised only for the protection of persons incapable of protecting themselves.[86] Thus, the *CFSA* permits the state to "step into the shoes of the parent."[87] *Parens patriae* (including parental authority) over a young person's medical treatment, however, "terminates" when the young person becomes capable.[88] "The *parens patriae* jurisdiction has never been used to permit a court to make [treatment decisions] for competent women."[89]

48. The *CFSA* implicitly acknowledges the limit of *parens patriae*. The *CFSA* is engaged only if s. 17(1) is met.[90] A child needs protection if "endangered by the act or omission of a person." The grammatical and ordinary sense of "a person," in the context of s. 17(1), refers to someone other than "the child." The *CFSA* does not purport to "protect" a capable person from her own treatment decision.[91] Furthermore, an individual may report his or her belief a child

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Blackstone, *The American Students' Blackstone Commentaries on The Laws of England*, *supra*, at 180-181 **[BOA, Vol. 2, Tab 55]**

83 *Gillick*, *supra*, at 407 (para. h) to 408 (para. f) (Lord Fraser), 419 (para. b) (Lord Scarman) **[BOA, Vol. 1, Tab 14]**; Sullivan, Ruth, ed., *Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at 342, 349-350, 352-354, 399 **[BOA, Vol. 3, Tab 81]**

84 Sullivan, *Driedger on the Construction of Statutes*, *supra*, at 281 **[BOA, Vol. 3, Tab 81]**

85 *G. (J.)*, *supra*, at paras. 61, 70 **[BOA, Vol. 1, Tab 27]**

86 *Fleming*, *supra*, at para. 49 **[BOA, Vol. 1, Tab 13]**; *Re Eve*, *supra*, at 426 **[BOA, Vol. 1, Tab 12]**; *Starson*, *supra*, at para. 75 **[BOA, Vol. 1, Tab 40]**; *Walker*, *supra*, at paras. 27-28 **[BOA, Vol. 1, Tab 44]**; *U. (C.)*, *supra*, at paras. 32-33 **[BOA, Vol. 1, Tab 42]**

87 *Winnipeg Child & Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925 at para. 49 **[BOA, Vol. 1, Tab 46]**; Sharpe, "Consent and Minors," *supra*, at 204-206 **[BOA, Vol. 3, Tab 78]**

88 *Van Mol*, *supra*, at paras. 75, 89, 112 **[BOA, Vol. 1, Tab 43]**; *Wren*, *supra*, at para. 13 **[BOA, Vol. 1, Tab 8]**; *U. (C.)*, *supra*, at para. 29 **[BOA, Vol. 1, Tab 42]**; *Walker*, *supra*, at para. 26 **[BOA, Vol. 1, Tab 44]**; *Gillick*, *supra*, at 423 (para. j) **[BOA, Vol. 1, Tab 14]**

89 *G. (D.F.)*, *supra*, at paras. 56-57 **[BOA, Vol. 1, Tab 46]**

90 *CFSA*, *supra*, s. 17(1) **[herein, Tab 1, p. 46]**

91 *Starson*, *supra*, at paras. 19 (McLachlin C.J.C.), 75-76, 112 (Major J.) **[BOA, Vol. 1, Tab 40]**

needs protection to the Director or to the child's parent or guardian.[92] That a report may be made to a parent or guardian reflects the Legislature's intent the *CFSA* applies to circumstances where the parent or guardian has legal authority over the child to resolve the protection concern.

49. Ms. [redacted] parents did not have legal authority to interfere with their daughter's choice of treatment. Their parental right and obligation to consent to treatment had 'terminated' when Ms. [redacted] achieved decisional capacity.[93] The role of Ms. [redacted] parents was then as "advisor and friend."[94] The *CFSA* did not apply to Ms. [redacted] treatment decisions.

(ii) Legislature Enacts Coherent Health Care Scheme Recognizing Capacity, Not a Fixed Age, Governs Medical Treatment Decisions

50. The Court of Appeal erred in reading the *CFSA* in isolation from the coherent and consistent scheme created by Manitoba's health care legislation. The *CFSA* is part of a trilogy of legislation affecting medical treatment decisions made by persons under age 18 in which capacity, not a fixed age, governs. When the *MHA* (the third part of the trilogy) was enacted the Minister of Health announced it reflected "policy decisions that were made in *The Health Care Directives Act* as well as *The Child and Family Services Act* . . . [the purpose of which was] to recognize the ability of older youths to make decisions respecting their health and welfare."[95]

51. The *HCDA*, *CFSA*, and *MHA* must be read in the context of each other:

> Statutes enacted by a legislature that deal with the same subject are presumed to be drafted with one another in mind, so as to offer a coherent and consistent treatment of the subject. The governing principle was stated by Lord Mansfield in *R. v. Loxdale:*
>
> > Where there are different statutes *in pari materia* though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other.
>
> In effect, the related statutes operate together as part of a single scheme. The provisions of each are read in the context of the others and consideration is given to their role in the overall scheme. The presumptions of coherence and consistent expression apply as if the provisions of these statutes were part of a

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92 *CFSA*, *supra*, ss. 18(1), (1.1) **[herein, Tab 1, p. 47]**

93 Corrected Order of Kaufman J. (April 16, 2006) **[AR, Tab 9, p. 91, lns. 10-11]**

94 *Van Mol*, *supra*, at para. 75 **[BOA, Vol. 1, Tab 43]**

95 Manitoba, Legislative Assembly, Standing Committee on Law Amendments, "Bill 35—*The Mental Health and Consequential Amendments Act*" in *Debates and Proceedings (Hansard)*, Vol. 48, No. 9 (22 June 1998) at 324-325 **[BOA, Vol. 3, Tab 71]**

> single Act. In addition, any definitions in one statute are taken to apply in the others.[96]

52. The *HCDA* and *MHA* establish a rebuttable presumption of capacity from age 16 and a rebuttable presumption of incapacity below age 16.[97] The *CFSA*, ss. 25(8) and 25(9), read together with, and in the context of, the *HCDA* and *MHA*, does the same. Read together as a "single Act," the three statutes evince a common theme of respect for the treatment decisions of capable persons of any age.

(a) *HCDA*—Autonomy Over Future Care Decisions

53. As previously noted (para. 7), the *HCDA* preamble[98] summarizes statute and common law in Manitoba: "Manitoba law recognizes that mentally capable individuals have the right to consent or refuse consent to medical treatment."[99] The *HCDA* confirms that capable persons like Ms. [redacted] have the same legal authority over future medical treatment decisions as they do over current medical treatment decisions.[100]

54. When enacting the *HCDA*, the Legislature refused to set a minimum age for medical consent because it would "bar some mature minors with the necessary capacity from directing their future medical treatment" and risk allowing persons above the arbitrary age, without capacity, to "direct their future medical treatment."[101] The Law Reform Commission explains:

> Clearly, the legislation anticipates that a mature minor under the age of 16 may make a health care decision if evidence is produced of that patient's capacity.
>
> The Act is an important indication of legislative policy in respect of the independence and autonomy of mature minors. Minors with sufficient capacity may make health care directives refusing blood transfusions or, in the case of anorexia nervosa, refusing certain kinds of treatment such as forced feeding. The policy of the Legislature appears to be that a finding of capacity places the minor in the same position in respect of health care as an adult.[102] [Emphasis added.]

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96 Sullivan, *Driedger on the Construction of Statutes*, *supra*, at 323-324 **[BOA, Vol. 3, Tab 81]**

97 *HCDA*, *supra*, s. 4(2) **[herein, Tab 2, p. 53]**; *MHA*, *supra*, s. 2 **[herein, Tab 3, p. 63]**

98 Sullivan, *Driedger on the Construction of Statutes*, *supra*, at 296-300 **[BOA, Vol. 3, Tab 81]**

99 *HCDA*, *supra*, Preamble **[herein, Tab 2, p. 52]**

100 MLRC, *Self-Determination*, *supra*, at 13-14 **[BOA, Vol. 3, Tab 69]**

101 MLRC, *Self-Determination*, *supra*, at 13-14 **[BOA, Vol. 3, Tab 69]**; Manitoba, Legislative Assembly, "Bill 73—*The Health Care Directives and Consequential Amendments Act*" in *Debates and Proceedings (Hansard)*, Vol. 41, No. 57 (1 May 1992) at 2855 **[BOA, Vol. 3, Tab 70]**

102 MLRC, *Minor's Consent to Health Care*, *supra*, at 9, 32 (see also 33, 38) **[BOA, Vol. 3, Tab 68]**

55. The *HCDA* does not limit the treatment decisions that may be made by a capable person like Ms. [redacted] *HCDA* defines "treatment" as "anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose, and includes a course of treatment."[103] Its preamble confirms capable persons of any age "have the right" to give or refuse consent to medical "treatment." As with contemporaneous treatment decisions, a court is bound by a capable young person's treatment decision expressed in a valid advance directive.[104] A health care directive takes effect when the maker "ceases to have capacity" or is "unable to communicate" his or her treatment instructions.[105] Contrary to the Court of Appeal's ruling, s. 25 of the *HCDA* ("existing rights not abrogated") ensures the *HCDA* would not be interpreted as impeding courts from "expanding" pre-existing common law rights.[106]

(b) *MHA*—Autonomy Over Present and Future Care Decisions

56. Manitoba's previous mental health legislation precluded all persons under age 18 from deciding their medical care. In 1998 the Legislature adopted the recommendations of the *Mental Health Act* Review Committee and enacted the *MHA* in its present form. As with the *HCDA*, the Legislature rejected setting a fixed minimum age for medical consent:

> The Review Committee also recognized that not infrequently children under 18 years of age are able to make their own treatment decisions. After debating whether there should be a fixed age of capacity, no age of capacity, or a presumed age of capacity, the Review Committee recommended the latter with the age set at 16 years. It was noted this approach is consistent with other legislation in Manitoba.
>
> This recommendation was one of the most misunderstood suggestions offered in the Discussion Paper. . . . [Some] responders confused presumed capacity at 16 years with setting a fixed age of 16 for having capacity.[107] [Emphasis added.]

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[103] *HCDA*, *supra*, ss. 1, 2, 4(1) (see "health care decision" and "treatment" at s. 1) **[herein, Tab 2, p. 53]**

[104] *HCDA*, *supra*, s. 17(2) **[herein, Tab 2, p. 57]**

[105] *HCDA*, *supra*, s. 6(1) **[herein, Tab 2, p. 54]**

[106] Reasons of Steel J.A. (February 5, 2007), para. 46 **[AR, Tab 7, p. 50]**; MLRC, *Self-Determination*, *supra*, at 11, 37 **[BOA, Vol. 3, Tab 69]**. The *HCDA*, *supra*, s. 3, states the *MHA* prevails where there is a conflict between the two pieces of legislation. Both pieces of legislation, however, work hand in glove.—see *MHA*, *supra*, ss. 31(1), 50(1)(c), 56(1)3, 63(3), 75(4), 91 **[herein, Tab 3, pp. 71-73, 77, 79, 81]**

[107] Manitoba, Report of *The Mental Health Act* Review Committee (January 1997) at 3-4, 23-25 **[BOA, Vol. 3, Tab 72]**

57. Under the *MHA*, treatment instructions of a capable person of any age—whether expressed orally or in writing and whether for contemporaneous treatment decisions or for future care—are binding on health care providers, the court, the Mental Health Review Board, the Public Trustee, and court-appointed Committees.[108] The *MHA* governs when a person has a "mental disorder," as defined.[109] Under the *MHA*, a capable person of any age is entitled to give or refuse consent to any medical treatment and may express those treatment instructions orally or through a health care directive made under the *HCDA*.[110] Contrary to the Court of Appeal's inference, there is no significance to the fact the *MHA* uses "competence" while the *HCDA* and *CFSA* use "capacity."[111] The statutory tests for determining "competence" and "capacity" are the same;[112] the terms are interchangeable.[113]

D. Court of Appeal's Interpretation of *CFSA* Leads to Inconsistent Results

58. The Court of Appeal's narrow interpretation of the *CFSA* leads to inconsistent results.[114] According to the court, the *CFSA* permitted the state to impose a medical procedure on Ms. [redacted] in her purported "best interests." If she had a "mental disorder" when hospitalized, however, the *MHA* would govern and her capable current and future treatment decisions would bind her doctors and the court.[115] No imposed treatment. Or, if she had been "unable to communicate," her *Advance Medical Directive* refusing blood transfusions would govern and

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[108] *MHA*, *supra*, ss. 2, 26, 29, 56(1), 59(3), 63(3), 91. Under the *MHA*, a patient found incapable by a doctor may apply to the Mental Health Review Board and, if necessary, the Court of Queen's Bench to review that finding.—*MHA*, *supra*, ss. 27(4), 31(1), 50(1)(a), (c), 59(3) **[herein, Tab 3, pp. 65, 71-72, 75]**

[109] *MHA*, *supra*, s. 1 "mental disorder" **[herein, Tab 3, p. 61]**; *Starson*, *supra*, at para. 77 **[BOA, Vol. 1, Tab 40]**

[110] *MHA*, *supra*, ss. 26, 29(1), 31(1), 50(1)(b), (c), 56(1)1-3, 59(3), 63(3), 91 **[herein, Tab 3, pp. 64, 68, 71-73, 75, 77, 81]**

[111] Reasons of Steel J.A. (February 5, 2007), para. 48 **[AR, Tab 7, p. 51]**

[112] *MHA*, *supra*, s. 27(2) **[herein, Tab 3, p. 64]**; *HCDA*, *supra*, s. 2 **[herein, Tab 2, p. 53]**

[113] Hoffman, Brian F., *The Law of Consent to Treatment in Ontario*, 2d ed. (Toronto: Butterworths, 1997) c. 1 at 1 **[BOA, Vol. 2, Tab 64]**; *Weisstub Enquiry*, *supra*, at 29-33 **[BOA, Vol. 3, Tab 82]**

[114] Reasons of Steel J.A. (February 5, 2007), para. 48 **[AR, Tab 7, p. 51]**; Sullivan, *Driedger on the Construction of Statutes*, *supra*, at 236, 243-244, 246-248 **[BOA, Vol. 3, Tab 81]**

[115] *MHA*, *supra*, ss. 2, 26, 28(4), 29(1), 31, 63(3), 91 **[herein, Tab 3, pp. 63-64, 66, 68, 77, 81]**

would bind her doctors and the court.[116] No imposed treatment. The Legislature did not intend Ms. [redacted] decisional capacity be respected under the *MHA* and *HCDA* but not the *CFSA*.

59. Reading Manitoba's health care legislation as a "single Act" and considering the preamble of the *HCDA* (above para. 53) as a correct statement of Manitoba's statute and common law, it is evident the Legislature intended: (i) the *CFSA* applies to current treatment decisions made by a parent or guardian for an incapable person under age 18; (ii) the common law continues to apply to current health care decisions of capable persons of any age while the *HCDA* applies to their future health care decisions; and (iii) the *MHA*, incorporating provisions of the common law and *HCDA*, applies to capable persons of any age who suffer from a "mental disorder."

60. When enacting the *HCDA* and *MHA* the Legislature expressly set a rebuttable presumption of incapacity below age 16 and, like the *CFSA*, a rebuttable presumption of capacity at age 16 and above.[117] "[C]oherent and consistent treatment of the subject" requires the *CFSA* ss 25(8) and 25(9) be read as setting a rebuttable presumption of incapacity below age 16.[118]

E. Relief Sought

61. Kaufman J., having accepted Ms. [redacted] was capable of deciding her own medical treatment, erred in concluding the court could overrule her treatment decisions under the *CFSA* s. 25(8). Ms. [redacted] therefore seeks an order setting aside Kaufman J.'s April 16, 2006, treatment order. She also seeks an order under the *Charter*, s. 24(1), declaring the treatment order and its application violated her rights under the *Charter*, ss. 2(a), 7, and 15(1); adopting *mutatis mutandis* paragraphs 63 to 97 below. The violations were not prescribed by law and cannot be justified under the *Charter*, s. 1.[119]

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116 *HCDA*, *supra*, ss. 6(1), 13, 17(2) **[herein, Tab 2, p. 54-55, 57]**

117 *HCDA*, *supra*, s. 4(2) **[herein, Tab 2, p. 53]**; *MHA*, *supra*, s. 2 **[herein, Tab 3, p. 63]**

118 Sullivan, *Driedger on the Construction of Statutes*, *supra*, at 324, 368, 370-372 **[BOA, Vol. 3, Tab 81]**

119 *Multani v. Marguerite-Bourgeoys (Commission scolaire)*, [2006] 1 S.C.R. 256 at para. 22 **[BOA, Vol. 1, Tab 26]**; *M. (J.) v. Alberta (Director of Child Welfare)* (2004), 364 A.R. 93 at paras. 34-35 (Q.B.) **[BOA, Vol. 1, Tab 24]**

ISSUE TWO: Did *CFSA* ss. 25(8) and 25(9) Unjustifiably Infringe the Rights of [redacted] Under the *Charter*, ss. 2(a), 7, and 15(1)?

A. Synopsis

62. If the Legislature intended the *CFSA* ss. 25(8) and 25(9) to supersede the common law and apply to Ms. [redacted] capable treatment decisions (Issue One), then those subsections unjustifiably infringed her rights under the *Charter*, ss. 2(a), 7, and 15(1) (Issue Two).[120]

B. *Charter*, s. 7: Violation of Ms. [redacted] Liberty and Security of the Person

(i) April 16, 2006: Forced Blood Transfusions Infringed Ms. [redacted] Liberty and Security of the Person

63. The right to be free from non-consensual medical treatment "is a right deeply rooted in our common law."[121] In *Ciarlariello v. Schacter* this Court affirmed: "Everyone has the right to

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[120] Four lower courts have divided on this issue. In *H. (T.) v. Children's Aid Society of Metropolitan Toronto* (1996), 138 D.L.R. (4th) 144 at para. 40 (Ont. Gen. Div.), Wilson J. accepted the position of the parties and Attorney General of Ontario that a capable young person has the exclusive legal right to decide her own medical treatment. **[BOA, Vol. 1, Tab 19]**

In *Re D. (T.T.)* (1999), 171 D.L.R. (4th) 761 at paras. 5-7 (Sask. Q.B.), Rothery J. ruled that if a young person is capable then the "Minister's consent is no longer required, the same way that the parent's consent would no longer be required." The capable young person "is entitled" to decide his medical care without state interference. [**BOA, Vol. 1, Tab 34]**

In *H. (B.) (Next Friend of) v. Alberta (Director of Child Welfare)* (2002), 302 A.R. 201 at paras. 47-48, 51-52, 55 (Q.B.), Kent J. held Alberta's *Child Welfare Act* did not violate B.H.'s *Charter* rights; that decision was *obiter* because Kent J. held B.H. was not capable. **[BOA, Vol. 1, Tab 18]** The Alberta Court of Appeal did not express an opinion on Kent J.'s *Charter* analysis.—*H. (B.) (Next Friend of) v. Alberta (Director of Child Welfare)* (2002), 303 A.R. 115 (C.A.) **[BOA, Vol. 1, Tab 17]** For a critical analysis of *H. (B.)* see: Beaman, Lori G., *Defining Harm: Religious Freedom and the Limits of the Law* (Vancouver: UBC Press, 2008) at 42-43, 56-57, 74-83, 89, 95-97, 107-108, 114, 118-125, 130-133 **[BOA, Vol. 4, Tab 84]**

In *B. (S.J.) (Litigation Guardian of) v. British Columbia (Director of Child, Family & Community Service)* (2005), 42 B.C.L.R. (4th) 321 at paras. 85, 91, 96 (S.C.), Boyd J. relied on *H. (B.)* and found B.C.'s child welfare legislation did not violate the *Charter* rights of mature minor Ms. Bahris. **[BOA, Vol. 1, Tab 5]** Ms. Bahris then went to Ontario and sought a second medical opinion and possible transfer to Toronto or New York. The Director obtained from Boyd J. an *ex parte* custody order over Ms. Bahris compelling her return to B.C, which was enforced by the Ontario courts. After her forced return, the B.C. Director and Attorney General permitted her to transfer her care to New York where her cancer was successfully treated without blood transfusions, but only after both required that she first abandon her appeal of Boyd J.'s original decision to the B.C. Court of Appeal. Ms. Bahris appealed the decisions of the Ontario courts to the Ontario Court of Appeal. Her appeal was allowed.—*British Columbia (Director of Child, Family & Community Service) v. Bahris (Litigation Guardian of)* (2006), 270 D.L.R. (4th) 536 at paras. 2-4, 6, 22-32 (Ont. C.A.) **[BOA, Vol. 1, Tab 7]**

[121] *Fleming*, *supra*, at para. 33 **[BOA, Vol. 1, Tab 13]**

decide what is to be done to one's own body."[122] More recently, in *Starson* this Court held the "right to refuse unwanted medical treatment is fundamental to a person's dignity and autonomy."[123] With the *Charter* this common law right has been "elevated to the status of a constitutional norm."[124] A capable person's right to bodily autonomy free from state interference is at the core of the s. 7 guarantees to liberty and security of the person.

64. The s. 7 "liberty" interest is rooted in "human dignity, personal autonomy, privacy and choice in decisions regarding an individual's fundamental being."[125] It is "engaged where state compulsions or prohibitions affect important and fundamental life choices."[126]

65. Similar to the liberty interest, s. 7 "security of the person" operates to protect the individual from "serious" state-sanctioned incursions on the individual's physical, psychological, and emotional integrity.[127] It encompasses the fundamental value of "bodily integrity free from state-interference."[128] It is engaged when state-imposed psychological and emotional stress transcends the "ordinary anxiety caused by the vicissitudes of life."[129]

66. In the exercise of her dignity and autonomy, Ms. [redacted] sought medical treatment for her disease that respected her religious conscience.[130] She approached the Hospital's Blood Conservation Program and requested its assistance; she arranged for expert medical consultations

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122 *Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119 at para. 135 **[BOA, Vol. 1, Tab 10]**

123 *Starson*, *supra*, at paras. 75, 112; see also paras. 7, 19 **[BOA, Vol. 1, Tab 40]**

124 *Fleming*, *supra*, at paras. 33, 41 **[BOA, Vol. 1, Tab 13]**; *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 53 **[BOA, Vol. 1, Tab 30]**; *Rodriguez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519 at 598 (Sopinka J.) **[BOA, Vol. 1, Tab 37]**; *Chaoulli v. Québec (A.G.)*, [2005] 1 S.C.R. 791 at paras. 43 (Deschamps J.), 122 (McLachlin C.J.C. and Major J.), 205 (Binnie and Lebel JJ.) **[BOA, Vol. 1, Tab 9]**

125 *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at paras. 50, 76, **[BOA, Vol. 1, Tab 6]**; *Morgentaler*, *supra*, at 166 **[BOA, Vol. 1, Tab 30]**; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at para. 80 **[BOA, Vol. 1, Tab 4]**

126 *Blencoe*, *supra*, at para. 49 **[BOA, Vol. 1, Tab 6]**

127 *G. (J.)*, *supra*, at paras. 58-59 **[BOA, Vol. 1, Tab 27]**; *Rodriguez*, *supra*, at 587-588 (Sopinka J.), 618 (McLachlin J.) **[BOA, Vol. 1, Tab 37]**

128 *Chaoulli*, *supra*, at paras. 116, 122 (McLachlin C.J.C. and Major J.) **[BOA, Vol. 1, Tab 9]**; *Blencoe*, *supra*, at para. 55 **[BOA, Vol. 1, Tab 6]**

129 *Chaoulli*, *supra*, at paras. 204 (Binnie and Lebel JJ.), 116, 122 (McLachlin C.J.C. and Major J.) **[BOA, Vol. 1, Tab 9]**; *Blencoe*, *supra*, at paras. 82-83, 86 **[BOA, Vol. 1, Tab 6]**

130 Affidavit of [redacted] (April 30, 2006), para. 9 **[AR, Tab 29, p. 211]**

of Drs. Shander and Snipes; she requested erythropoietin and I.V. iron to assist her body in more rapidly producing red blood cells.[131]

67. The state instead enforced its choice of medical treatment by application of the *CFSA* ss. 25(8) and 25(9). Ms. [redacted] was effectively ordered to submit to an imposed medical procedure she considered grossly objectionable. She was denied the fundamental right to decide what would be done to her body and thus deprived of her liberty, suffering profound emotional and psychological stress. She describes her ordeal:

> I will never forget that horrible day.
>
> . . .
>
> At about 3:30 p.m., nurses came into my room to force three transfusions of red blood cells on me. It was painful spiritually, mentally, emotionally and even physically. Having someone else's blood pumping through my veins, stressing my body, caused me to reflect on how my rights over my body could be taken away by a judge who did not care enough to talk with me. My rights had been given to someone who had never even glanced at me or spoken to me. That day, my tears flowed non-stop.
>
> . . . I felt incredibly horrible that there are really no words to describe. Nothing can properly describe how I was feeling and still feel today. I could liken it to being raped and violated but even those words do not express my feelings strong enough. I did not once look at the blood being poured into me for fear I would break down again in tears.[132] [Emphasis in original.]

68. The treatment order infringed Ms. [redacted] liberty and security of the person.[133]

(ii) April 16, 2006, to April 1, 2007: Threat of More Forced Blood Transfusions Subjected Ms. [redacted] to Serious Psychological and Emotional Stress

69. The infringements continued. From April 16 to May 1, 2006, Ms. [redacted] was subject to the control of the Director as a result of the warrantless apprehension (see above paras. 28-29).

70. From May 1, 2006, Ms. [redacted] was exposed to the serious threat the events of April 16, 2006, would be repeated. The nature of her Crohn's disease made it possible her disease

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131 Affidavit of [redacted] (April 30, 2006), paras. 15-26, 31-33; Letter from C. Tolton to S. Brady (April 28, 2006) **[AR, Tab 29, pp. 213-216, 218-219, 232-233]**

132 Affidavit of [redacted] (April 30, 2006), paras. 19, 24-25, 27-28 **[AR, Tab 29, pp. 215-217]**

133 Reasons of Steel J.A. (February 5, 2007), paras. 4, 65 **[AR, Tab 7, pp. 32, 58]**

would relapse before she turned 16 (June 7, 2007).[134] On May 1, 2006, the Director wrote Dr. Lipnowski and the Hospital, instructing that the Director must be contacted if Ms. [redacted] again suffered "deterioration" in her medical condition. On May 3, 2006, the Director wrote Ms. [redacted] parents stating that if Ms. [redacted] disease relapsed the Director would need to "determine what, if any, interventions were needed according to the *Child and Family Services Act*."[135] For Ms. [redacted] the message was unmistakable:

> I am very concerned that if my appeal is not heard soon my Crohn's Disease might flare up again and the Director will try to interfere with my treatment choices, including my decision not to consent to blood transfusion.
>
> . . .
>
> I believe [the May 1 and 3, 2006, letters from the Director] confirm the Director will go to court to try to obtain another Treatment Order to force blood transfusions on me if I have another bleed from my bowel.[136]

71. Ms. [redacted] therefore also suffered ongoing serious state-imposed emotional and psychological stress and threat[137] to her liberty from April 16, 2006, when the treatment order was made, to April 1, 2007, the day she moved from Winnipeg to Toronto.[138]

(iii) Infringement Contrary to the Principles of s. 7 Fundamental Justice

(a) Court of Appeal Erred in Its Approach to Determining Whether *CFSA* ss. 25(8) and 25(9) Are Arbitrary

72. These infringements of Ms. [redacted] s. 7 *Charter* rights were not in accord with the principles of fundamental justice. The engaged principle of fundamental justice is that no law affecting life, liberty and security of the person should be arbitrary.[139]

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134 Reasons of Steel J.A. (February 5, 2007), para. 32 **[AR, Tab 7, p. 45]**; Affidavit of [redacted] (April 30, 2006), paras. 6-7, 36 **[AR, Tab 29, pp. 210-211, 219]**

135 Letter from Ms. Buchanan to Dr. Lipnowski (May 1, 2006); Letter from Ms. Buchanan addressed "To Whom It May Concern" (May 1, 2006); Letter from Ms. Buchanan to Mr. & Mrs. [redacted] (May 3, 2006) **[AR, Tab 30, p. 246, lns. 38-40; p. 248, lns. 30-34; p. 268, lns. 30-35]**

136 Affidavit of [redacted] (May 30, 2006), paras. 2, 4 **[AR, Tab 30, pp. 235-236]**; see also para. 7 of the May 24, 2006, Affidavit of [redacted] originally filed in Queen's Bench in reply to the May 22, 2006, Affidavit of Maureen Buchanan **[AR, Tab 30, pp. 255-256]**

137 *G. (J.), supra*, at para. 51 **[BOA, Vol. 1, Tab 27]**

138 Had she remained in Manitoba, the s. 7 infringement would have continued to the day she turned 16.

139 *Chaoulli, supra*, at para. 128 **[BOA, Vol. 1, Tab 9]**

73. The Court of Appeal erred in finding the *CFSA* ss. 25(8) and 25(9), as applied to Ms. [redacted] were not arbitrary. First, having accepted "arbitrariness" as the applicable principle of fundamental justice, it erred in "balancing" competing interests under the *Charter*, s. 7, rather than s. 1.[140] "It is not appropriate for the state to thwart exercise of [*Charter*] right[s] by attempting to bring societal interests into the principles of fundamental justice. . . . Societal interests are to be dealt with under s. 1 of the *Charter*, where the Crown has the burden of proving that the impugned law is demonstrably justified in a free and democratic society."[141]

74. Second, even if it were appropriate to balance societal values with Ms. [redacted] autonomy under s. 7, the court erred in concluding, from three journal articles, that it was a societal value in Manitoba that capable persons under age 16 should not be permitted to decide their medical treatment. The societal values of Manitobans are evident in the common law, the *HCDA*, the *MHA*, and the recommendations of the Law Reform Commission. These affirm that once a young person achieves "sufficient decision-making capacity, they should become the principal decision maker for themselves."[142] That is also the expressed societal values of Ontario, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, and Yukon where 44 percent of Canada's 2,169,385 adolescents (age 13-17) reside (see paras. 109-110 below).[143] The Canadian Medical Protective Association and the Canadian Paediatric Society agree.[144]

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140 Reasons of Steel J.A. (February 5, 2007), paras. 3, 71-72, 79, 81 **[AR, Tab 7, pp. 32, 61-62, 64-65]**

141 *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571 at para. 98, citing with approval the judgment of Lamer C.J.C. in *R. v. Swain*, [1991] 1 S.C.R. 933 at 977 **[BOA, Vol. 1, Tab 29]**

142 CPS, Position Statement, "Treatment Decisions Regarding Infants, Children and Adolescents," *supra*, at 99 **[BOA, Vol. 2, Tab 56]**; Evans, *A Medico-Legal Handbook for Physicians in Canada*, *supra*, at 8-9, 28 **[BOA, Vol. 2, Tab 61]**; *Van Mol*, *supra*, at paras. 75, 89, 112 **[BOA, Vol. 1, Tab 43]**; MLRC, *Minor's Consent to Health Care*, *supra*, at 33, 38 **[BOA, Vol. 3, Tab 68]**; MLRC, *Self-Determination*, *supra*, at 13 **[BOA, Vol. 3, Tab 69]**; Manitoba, "Report of *The Mental Health Act* Review Committee," *supra*, at 24 **[BOA, Vol. 3, Tab 72]** MLA, "Bill 35," *supra*, at 324-325 **[BOA, Vol. 3, Tab 71]**

143 Chart: Population by Age **[herein, Tab 5, p. 85]**

144 Evans, *Consent: A Guide for Canadian Physicians*, *supra*, at 5 **[BOA, Vol. 2, Tab 62]**; CPS, Position Statement, "Treatment Decisions Regarding Infants, Children and Adolescents," *supra*, at 99 **[BOA, Vol. 2, Tab 56]**; For review of rights given to mature minors under the *Convention of the Rights of the Child* see Cook, R. & Dickens, B.M., "Recognizing Adolescents' 'Evolving Capacities' to Exercise Choice in Reproductive Healthcare" (2000) 70 Int'l J. of Gynecology & Obstetrics 13 at 14-15 **[BOA, Vol. 2, Tab 59]**

75. Third, the Court of Appeal erred in taking judicial notice of alleged "social facts" in the three journal articles[145] "close to the center of the controversy between the parties"[146] and introduced by the court *ex proprio motu* while the appeal was under reserve. Relying on these articles, the court concluded it was not arbitrary for the Legislature to set 16 as the minimum fixed age for medical consent in view of the potential difficulties of determining capacity in allegedly urgent situations. The court gave Ms. [redacted] no opportunity to distinguish, challenge, test, or disprove these articles. Ms. [redacted] had put before the court all relevant government-commissioned reports and *Hansard* evidence concerning Manitoba's health care legislation. The Attorney General and Director did not lead any evidence of justification.[147]

76. The alleged "social fact" evidence contained in the three journal articles are contradicted by a number of studies on developmental capacity and learned treatises, some of which Ms. [redacted] submits to this Court in the form of a "Brandeis Brief" (Volume IV of her Book of Authorities). The Brandeis Brief is proffered merely to highlight the unfairness occasioned by the Court of Appeal introducing the journal articles, *ex proprio motu* while the appeal was under reserve, to justify infringement of Ms. [redacted] *Charter* rights. The Brief begins with a table comparing the opinions expressed in the journal articles with the contrary expert conclusions of studies on developmental capacity and learned treatises proffered by Ms. [redacted]

(b) *CFSA* ss. 25(8) and 25(9), as Applied to Ms. [redacted] Are Arbitrary

77. "A law is arbitrary where 'it bears no relation to, or is inconsistent with, the objective that lies behind [it].'"[148] The more serious the impingement on liberty and security of the person "the more clear must be the connection" between the legislative objective and the infringement.[149] Forcing a young woman to submit her body to a state-authorized medical procedure that she considers grossly objectionable, strikes at the heart of the core values of autonomy and dignity protected by *Charter*, s. 7 guarantees of liberty and security of the person.

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[145] The articles were authored by law student Ed Schollenberg and law professors Jennifer Rosato and Caroline Bridge and are relied on in the judgment at paras. 73, 76-77, 96. **[AR, Tab 7, pp. 62-64, 72]**

[146] *R. v. Spence*, [2005] 3 S.C.R. 458 at para. 60 **[BOA, Vol. 1, Tab 33]**

[147] Reasons of Steel J.A. (February 5, 2007), para. 37 **[AR, Tab 7, p. 46]**; *Spence*, *supra*, at paras. 58, 60-61, 64, 68 **[BOA, Vol. 1, Tab 33]**

[148] *Chaoulli*, *supra*, at para. 130 **[BOA, Vol. 1, Tab 9]**

[149] *Chaoulli*, *supra*, at para. 131 **[BOA, Vol. 1, Tab 9]**

78. Fundamental justice requires that each person, considered individually, be treated fairly.[150] The *CFSA* ss. 25(8) and 25(9), as interpreted by the Court of Appeal, adopt a 'one size fits all' approach and sets age 16 as a proxy for decisional capacity. Persons below that age, regardless of whether they are in fact capable, may not decide what will be done to their body free of state review and control.[151] That arbitrary non-rebuttable prohibition, as applied to Ms. [redacted] (who Kaufman J. accepted was capable), is manifestly unfair.[152]

79. In *Starson*, McLachlin C.J.C. observed "young children generally lack capacity to make medical decisions because of their age."[153] The corollary is that some young persons, regardless of age, are in fact capable as confirmed by the Manitoba *Mental Health Act* Review Committee, the Manitoba Law Reform Commission, Ontario's *Weisstub Enquiry*,[154] the Canadian Paediatric Society, the Canadian Medical Protective Association, the College of Physicians and Surgeons of Ontario and centuries of common law (see above paras. 39, 42-43, 53-57, and their footnotes).

80. Moreover, the *CFSA*'s absolute prohibition against capable persons below age 16 deciding their medical treatment without state review and control is not connected to the objective of the Act.[155] The objective of the *CFSA* is the exercise of *parens patriae* jurisdiction on behalf of persons unable to care for themselves.[156] *Parens patriae* jurisdiction has nothing to do with an arbitrarily set minimum age and everything to do with individual capacity:[157]

> I do not read the judgment in *Re Eve*, or in *Beson v. Director of Child Welfare*, [1982] 2 S.C.R. 716, another decision of the Supreme Court of Canada upon which the respondent and intervener relied, as supporting the proposition that the *parens patriae* jurisdiction can be invoked to deprive competent mentally-ill patients of rights expressly granted by statute or to abrogate their *Charter* rights. The *parens patriae* jurisdiction was intended to operate only where a person is

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150 *Rodriguez*, *supra*, at 621 (McLachlin J.) **[BOA, Vol. 1, Tab 37]**

151 *Ciarlariello*, *supra*, at 135 **[BOA, Vol. 1, Tab 10]**

152 *Chaoulli*, *supra*, at paras. 131-133 **[BOA, Vol. 1, Tab 9]**

153 *Starson*, *supra*, at para. 7 [emphasis added] **[BOA, Vol. 1, Tab 40]**

154 *Weisstub Enquiry*, *supra*, at 30-31, 131, 144-146, 148, 152 **[BOA, Vol. 3, Tab 82]**

155 *Chaoulli*, *supra*, at paras. 130-131 **[BOA, Vol. 1, Tab 9]**; *Rodriguez*, *supra*, at 594 (Sopinka J.) **[BOA, Vol. 1, Tab 37]**

156 *G. (J.)*, *supra*, at paras. 61, 70 **[BOA, Vol. 1, Tab 27]**; *W. (K.L.)*, *supra*, at para. 75 (L'Heureux-Dubé J.) **[BOA, Vol. 1, Tab 45]**; *B. (R.)*, *supra*, at para. 88 **[BOA, Vol. 1, Tab 4]**

157 *G. (D.F.)*, *supra*, at paras. 56-57 **[BOA, Vol. 1, Tab 46]**

> unable to take care of himself or herself. It cannot be exercised by the state to overrule a treatment decision made by a competent patient, who, by definition, is able to direct the course of his or her medical care, regardless of the fact that the decision may be considered, by objective standards, medically unsound or contrary to the patient's best interests.[158]

81. Ms. [redacted] ordeal illustrates the arbitrariness of the *CFSA* ss. 25(8) and 25(9). When the court dismissed her appeal on February 5, 2007, she was age 15 years and 8 months. If her disease had relapsed during the next four months, the Director could intervene under the *CFSA*, overrule her treatment decisions, and force her to submit to an unwanted medical procedure. On June 7, 2007, Ms. [redacted] turned 16. By the toll of a clock, she now had undisputed authority over her body as a capable young woman. Nothing had changed, other than her age.

82. In contrast, the *HCDA* and the *MHA* strike the correct constitutional balance. Rather than draw an arbitrary line, both presume incapacity below age 16.[159] That presumption may be rebutted by presenting sufficient evidence of the young person's capacity. A rebuttable presumption of incapacity below age 16 read into the *CFSA* would satisfy the state's *parens patriae* interest of protecting incapable persons, while also respecting the autonomy and dignity of an exceptional young person like Ms. [redacted]

83. The Court of Appeal reasoned a fixed age for medical consent is not arbitrary because ages are fixed for other activities such as voting, driving or marriage.[160] Administrative convenience, cited to justify a fixed minimum age for such activities, can never justify violating

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[158] *Fleming*, *supra*, at para. 49 **[BOA, Vol. 1, Tab 13]**; *Starson*, *supra*, at para. 75 **[BOA, Vol. 1, Tab 40]**; *Re Eve*, *supra*, at 426 **[BOA, Vol. 1, Tab 12]**; *Walker*, *supra*, at para. 27 **[BOA, Vol. 1, Tab 44]**; *U. (C.)*, *supra*, at paras. 32-33 **[BOA, Vol. 1, Tab 42]**

In England, Lord Donaldson of the Court of Appeal has held *parens patriae* jurisdiction over persons under age 18 is unlimited. His opinion has been harshly criticized as out of step with *Gillick*, medical practice, the history of *parens patriae*, and recent legislation; it is not followed in Scotland—see Kennedy, Ian & Grubb, Andrew, *Medical Law*, 3d ed. (London: Butterworths, 2000) c. 6 at 984-988 **[BOA, Vol. 3, Tab 67]**; Elliston, Sarah, *The Best Interests of the Child in Healthcare* (London: Routledge-Cavendish, 2007) c. 3 at 128 (see generally 111-143) **[BOA, Vol. 2, Tab 60]**

[159] *HCDA*, *supra*, s. 4(2) **[herein, Tab 2, p. 53]**; *MHA*, *supra*, s. 2 **[herein, Tab 3, p. 63]**

[160] Reasons of Steel J.A. (February 5, 2007), para. 79; Steel J.A. also states at para. 80 the legislation is not arbitrary because "the determination is made within the context of the best interests test." **[AR, Tab, 7, pp. 64-65]**; Best interest, however, is an expression of *parens patriae* and has no application to the treatment decisions of capable persons of any age.—*Re Eve*, *supra*, at 426 **[BOA, Vol. 1, Tab 12]**; *Starson*, *supra*, at paras. 19, 76, 112 **[BOA, Vol. 1, Tab 40]**

bodily integrity. An individual assessment of capacity of a person almost age 15 does not unduly burden the health care system any more than assessing capacity of a person age 16. Regardless of a patient's age, the doctrine of informed consent requires that health care providers must—as they do, every day—determine in each case whether the presenting patient is capable of giving or refusing consent to the treatment in question.[161] In many cases, capacity is obvious. In others, further inquiry is necessary. A formal assessment may be needed.[162] Where uncertainty remains, capacity issues may be submitted to the courts or specialized tribunals (e.g. the Mental Health Review Board under the *MHA*) for final determination.[163] The process works. The Law Reform Commission observed the "mature minor rule is a well-known, well-accepted and workable principle which seems to raise few difficulties on a day-to-day basis."[164]

84. The Court of Appeal held an arbitrary age is necessary because of the potential difficulty of determining capacity in a medical "emergency."[165] The Director and Attorney General led no evidence and cited no case to show why that alleged difficulty is somehow greater for a person almost age 15 than a person age 16. Moreover, that concern (and the other points the court cited to conclude the *CFSA* is not arbitrary) is irrelevant at Bar; Kaufman J. accepted Ms. [redacted] was capable of giving or refusing consent to her own medical treatment. "Even one person whose *Charter* rights are unjustifiably limited is entitled to seek redress under the *Charter*."[166] The court should not have interpreted ss. 25(8) and 25(9) through the lens of an "emergency." The *CFSA* s. 25 is clearly not intended to be primarily an "emergency" treatment section, as is

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161 CPSO, Policy Statement, "Consent to Medical Treatment," *supra*, at 3 **[BOA, Vol. 2, Tab 58]**; Rozovsky, *The Canadian Law of Consent to Treatment*, *supra*, at 10-11 **[BOA, Vol. 3, Tab 76]**; Picard & Robertson, *Legal Liability of Doctors and Hospitals in Canada*, *supra*, at 46, 49, 67, 79, 124-126 **[BOA, Vol. 3, Tab 75]**

162 The common law test for determining capacity is set out in *Van Mol*, which is indistinguishable from the statutory test used in Manitoba's *HCDA* and *MHA*, and in Ontario's legislation.—see *Van Mol*, *supra*, at para. 75 **[BOA, Vol. 1, Tab 43]**; *HCDA*, *supra*, s. 2 **[herein, Tab 2, p. 53]**; *MHA*, *supra*, s. 27(2) **[herein, Tab 3, p. 64]**; *Starson*, *supra*, at paras. 78-81 **[BOA, Vol. 1, Tab 40]**

163 *MHA*, *supra*, s. 50(1) **[herein, Tab 3, p. 72]**

164 MLRC, *Minor's Consent to Health Care*, *supra*, at 33, 38 **[BOA, Vol. 3, Tab 68]**; MLRC, *Self-Determination*, *supra*, at 13-14 **[BOA, Vol. 3, Tab 69]**; Manitoba, "Report of *The Mental Health Act* Review Committee," *supra*, at 3-4, 24 **[BOA, Vol. 3, Tab 72]**

165 Reasons of Steel J.A. (February 5, 2007), paras. 79, 81 **[AR, Tab 7, pp. 64, 66]**

166 *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 at para. 55 **[BOA, Vol. 1, Tab 39]**

evident by s. 25(4) which requires two days notice of an application for a treatment order.[167] In the unlikely event of a genuine emergency, a rebuttable presumption of incapacity below age 16 meets the state's legitimate concerns. In that rare exigent circumstance, immediately necessary medical treatment may be given without the young person's consent (in exercise of a doctor's common law emergency treatment power)[168] pending a prompt and fair judicial hearing to determine if the young person is capable of deciding his or her further medical treatment.[169]

85. The *CFSA* ss. 25(8) and 25(9), as construed and applied to Ms. [redacted] arbitrarily infringed her right to liberty and security of the person contrary to the *Charter*, s. 7.

C. *Charter*, s. 15(1): Ms. [redacted] Suffered Discrimination

86. To establish discrimination Ms. [redacted] must show: (i) the *CFSA* ss. 25(8) and 25(9) imposed differential treatment between her and others, in purpose or effect; (ii) an enumerated or analogous ground is the basis for the differential treatment; and (iii) the impugned law has a purpose or effect that denies Ms. [redacted] human dignity by stereotypical application of "presumed group or personal characteristics" which do not relate to her "capacities, or merits."[170]

87. The objective of s. 15(1) is substantive equality.[171] The fact a law is applied uniformly to all within a group or achieves a "valid social purpose" for some is no answer. "The main consideration" is the "*impact* of the law upon the individual."[172] Overbroad application of the law without consideration of the claimant's individual circumstances will generally mean the law is discriminatory.[173] A distinction based on an enumerated ground, like age, "reveals a strong suggestion" the law is discriminatory.[174]

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167 *CFSA*, *supra*, s. 25(4) **[herein, Tab 1, p. 50]**

168 *B. (R.)*, *supra*, at para. 116 **[BOA, Vol. 1, Tab 4]**

169 *MHA*, *supra*, s. 29(5) **[herein, Tab 3, p. 69]**; *HCDA*, *supra*, s. 6(1) **[herein, Tab 2, p. 54]**

170 *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 at paras. 51, 53 **[BOA, Vol. 1, Tab 23]**

171 *Auton (Guardian ad litem of) v. British Columbia (A.G.)*, [2004] 3 S.C.R. 657 at para. 40 **[BOA, Vol. 1, Tab 3]**

172 *Law*, *supra*, at paras. 25, 70 [emphasis in original] **[BOA, Vol. 1, Tab 23]**

173 *Law*, *supra*, at paras. 26, 70 **[BOA, Vol. 1, Tab 23]**; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 165, 174-175 (McIntrye J.) **[BOA, Vol. 1, Tab 2]**

174 *Gosselin v. Québec (A.G.)*, [2002] 4 S.C.R. 429 at para. 228 (Bastarache J., dissenting) **[BOA, Vol. 1, Tab 16]**

(i) Steps One and Two: Ms. [redacted] Treated Differently on Enumerated Ground of Age

88. The appropriate comparator is one of Ms. [redacted] fellow students on April 16, 2006, when Kaufman J. granted his treatment order (the retrospective challenge) and on February 5, 2007, when the Court of Appeal dismissed Ms. [redacted] appeal (the prospective challenge). That student, who we will call Ms. Fréchette, is a 16-year-old young woman with Crohn's disease and who has been formally assessed to have the requisite capacity to give or refuse consent to her own medical treatment, including blood transfusions.[175]

89. Ms. [redacted] and Ms. Fréchette have the same disease, want to make the same medical treatment decisions, and have the same capacity. The only difference between the two is age; for example, at the time Ms. [redacted] appeal was dismissed (February 5, 2007) she was 15 years and 8 months while Ms. Fréchette was 16 years of age. Ms. Fréchette has the unqualified legal right under the *CFSA* s. 25 to decide her own medical treatment without state interference. For Ms. [redacted] the state may authorize a doctor to forcibly impose on her a medical procedure she considers grossly objectionable.[176] Unlike Ms. Fréchette, if Ms. [redacted] wants to receive medical treatment that respects her bodily autonomy her only recourse is to move to another province or territory where her capable treatment instructions govern (see paras. 109-110 below). The *CFSA* ss. 25(8) and 25(9) treat Ms. [redacted] differently on the enumerated ground of age.

(ii) Step Three: Ms. [redacted] Human Dignity Denied on the Basis of Stereotypical "Group" Characteristics

90. The Court of Appeal held Ms. [redacted] human dignity was not infringed because the *CFSA* ss. 25(8) and 25(9) attempt to respond to the "dependency and reduced maturity of children as a group."[177] The court applied the wrong test. This is not a social benefits case (as in *Law* or *Gosselin*) where the claimant challenges the legislation for being underinclusive.

91. A social benefits scheme need not perfectly match the circumstances of all possible claimants. The s. 15(1) duty on the state in such a case is to craft a scheme that reasonably

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[175] *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357 at paras. 23-25 **[BOA, Vol. 1, Tab 20]**

[176] Kennedy & Grubb, *Medical Law*, *supra*, at 987 **[BOA, Vol. 3, Tab 67]**

[177] Reasons of Steel J.A. (February 5, 2007), para. 105 **[AR, Tab 7, p. 75]**

correlates to the "actual needs and circumstances" of the targeted group.[178]

92. There is a vast difference between a social benefits case and the case at Bar. Generally, there is no constitutional obligation on the state to enact a particular social benefit scheme.[179] The *Charter*, however, explicitly prohibits the state from interfering with a capable person's bodily autonomy and human dignity. It is no answer for the state to say the *CFSA* in some cases, or even in most cases, responds to the actual needs of persons under the age of 16 "as a group." The Court of Appeal's reasons are a return to the "similarly situated test," rejected by this Court nearly twenty years ago in *Andrews*, and completely ignore Ms. [redacted] circumstances.[180]

93. Discrimination occurs when people are treated differently on the basis of "presumed group characteristics" and without regard to their individual circumstances and "capacities."[181] The *CFSA* ss. 25(8) and 25(9) are discriminatory precisely because, notwithstanding Ms. [redacted] judicially-accepted capacity to make the medical treatment decision in question, she is treated in exactly the same way as an incapable child.[182]

94. A reasonable person in Ms. [redacted] circumstances would conclude that compared to Ms. Fréchette the *CFSA* ss. 25(8) and 25(9) unlawfully discriminated against Ms. [redacted] by denying her right to make medical treatment decisions she was accepted as capable of making solely because she was below the arbitrary age of 16.

D. *Charter*, s. 2(a): Ms. [redacted] Freedom of Religion Infringed

95. To establish violation of freedom of religious conscience a claimant must show: (a) he or she "sincerely believes in a practice or belief that has a nexus with religion"; and (b) the impugned conduct "interferes with the [claimant's] ability to act in accordance with that practice or belief in a manner that is non-trivial."[183]

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[178] *Gosselin*, *supra*, at paras. 54-55 (McLachlin C.J.C.) **[BOA, Vol. 1, Tab 16]**

[179] *Auton*, *supra*, at para. 41 **[BOA, Vol. 1, Tab 3]**

[180] *Andrews*, *supra*, at 166-168 **[BOA, Vol. 1, Tab 2]**; *Law*, *supra*, at para. 70 **[BOA, Vol. 1, Tab 23]**

[181] *Law*, *supra*, at paras. 51, 53 **[BOA, Vol. 1, Tab 23]**

[182] Reasons of Steel J.A. (February 5, 2007), paras. 49, 105 [emphasis added] **[AR, Tab 7, pp. 51, 75]**

[183] *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at paras. 37, 40-41, 46-47, 59, 65 **[BOA, Vol. 1, Tab 41]**; *Multani*, *supra*, at para. 34 **[BOA, Vol. 1, Tab 26]**

96. Ms. [redacted] firmly and sincerely believes God's commandments are for her good and must be obeyed. Violating the Biblical injunction to abstain from blood "is not a compromise [she] is willing to make."[184] The sincerity of her religious objection to blood transfusions is beyond dispute. (See above paras. 5, 10, 66-67).[185]

97. The interference with Ms. [redacted] religious conscience far exceeded the "non-trivial" threshold established in *Syndicat Northcrest*.[186] The Court of Appeal agreed.[187]

E. *Charter*, s. 1: Infringements of Ms. [redacted] Rights and Freedoms Under the *Charter*, ss. 2(a), 7, and 15(1), Cannot Be Justified

(i) Attorney General and Director Led No Evidence of Justification

98. On May 23, 2006, Ms. [redacted] in the case on appeal, served Notice of Constitutional Questions on the Manitoba Attorney General and the Director. Neither led any evidence under *Charter*, s. 1, attempting to justify infringements of Ms. [redacted] *Charter* rights (they conceded infringement of s. 2(a) and s. 7 liberty and security of the person). At the September 7, 2006, appeal hearing, the court asked counsel for the Attorney General whether she wished to adduce s. 1 evidence; counsel replied she "was content to rely on the record as it stood."[188]

99. Justification for these serious *Charter* infringements should not be left to untrammeled 'common sense' or the assertion it is "self-evidently important."[189] It is not self-evident why Ms. [redacted] at nearly 15 years (April 16, 2006, treatment order) or nearly 16 years (February 5, 2007, Court of Appeal decision) should be denied the right to decide her medical care, although capable, and yet be granted that right the day she turns 16. The difference defies common sense.

100. In a contest between the individual and the state, as at Bar, it is doubtful 'common sense' could ever supplant the state's duty to present cogent and compelling evidence justifying the

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[184] Affidavit of [redacted] (April 30, 2006), paras. 5, 9-11, 37 **[AR, Tab 29, pp. 210-212, 220]**

[185] Affidavit of [redacted] (April 30, 2006), paras. 15-17, 20-21, 26, 29, 31-35, 37-38 **[AR, Tab 29, pp. 213-220]**; *Multani*, *supra*, at paras. 3, 38, 40-41 **[BOA, Vol. 1, Tab 26]**

[186] *Syndicat Northcrest*, *supra*, at para. 65 **[BOA, Vol. 1, Tab 41]**

[187] Reasons of Steel J.A. (February 5, 2007), paras. 4, 92 **[AR, Tab 7, pp. 32, 70]**

[188] Reasons of Steel J.A. (February 5, 2007), para. 37 **[AR, Tab 7, p. 46]**

[189] Reasons of Steel J.A. (rehearing motion) (May 14, 2007), para. 10 **[AR, Tab 8, pp. 83-84]**

infringement. "Deference may be appropriate on a decision involving competing social and political policies. It is not appropriate, however, on a decision to limit fundamental rights." The state must instead justify the infringement with cogent and compelling evidence and not "stereotypes cloaked as common sense."[190]

101. *R. v. Bryan* is of no assistance to the Attorney General or Director.[191] *Bryan* stands for the proposition a court may adopt a "deferential approach" in political policy cases where "traditional forms of evidence (or ideas about their sufficiency) may be unavailable." In *Bryan*, the state at least attempted to present some evidence. The evidence was "somewhat speculative" because the three-hour ban on publishing election results had been in place for nearly seventy years and thus the ban's effect on voting patterns was "almost impossible to measure."[192]

102. At Bar, the Attorney General and Director did not attempt to provide any explanation why they presented no evidence, let alone cogent and compelling evidence, to justify denying Ms. [redacted] the right to make a treatment decision she was capable of making.

103. *Corporation professionnelle des médecins du Québec v. Thibault* is authority that in these circumstances Ms. [redacted] is entitled to a remedy declaring the *CFSA* ss. 25(8) and 25(9) unjustifiably infringed her rights under the *Charter*, ss. 2(a), 7, and 15(1).[193]

(ii) Infringement Fails *Oakes* Test

(a) No Rational Connection Between *CFSA* and Legislature's Objective

104. The *CFSA* is an exercise of the Legislature's *parens patriae* authority (see above

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190 *Sauvé*, *supra*, at paras. 10, 12-14, 16, 18 **[BOA, Vol. 1, Tab 39]**; Beaman, *Defining Harm: Religious Freedom and the Limits of the Law*, *supra*, at 95-97 **[BOA, Vol. 4, Tab 84]**

191 Reasons of Steel J.A. (rehearing motion) (May 14, 2007), para. 10 **[AR, Tab 8, pp. 83-84]**

192 *R. v. Bryan*, [2007] 1 S.C.R. 527 at paras. 19-20, 28 **[BOA, Vol. 1, Tab 28]**

193 *Corporation professionnelle des médecins du Québec v. Thibault*, [1988] 1 S.C.R. 1033 at 1045-1046 **[BOA, Vol. 1, Tab 11]**. It matters not that Kaufman J. did not decide whether Ms. [redacted] was in fact capable. It was unnecessary to make such a finding since Kaufman J. and the Court of Appeal accepted, for the purpose of deciding the legal issues raised (including Ms. [redacted] claim for *Charter* relief), that she was capable of deciding her own medical care.—Corrected Order of Kaufman J. (April 16, 2006) **[AR, Tab 9, p. 91, lns. 10-11]**; Transcript of Proceedings before Kaufman J. (April 16, 2006) **[AR, Tab 28, p. 185, lns. 1-11]**; Reasons of Steel J.A. (rehearing motion) (May 14, 2007), para. 14 **[AR, Tab 8, p. 85]**

paras. 47, 80). The objective of the *CFSA* is to protect persons under the age of majority who "cannot care for themselves."[194] There is no rational connection between that objective and the overbroad interpretation[195] the Court of Appeal gave to ss. 25(8) and 25(9), namely that the impugned subsections apply to all persons under the age of 16, capable or incapable.

105. The Legislature indicated in the trilogy of statutes (above paras. 7-9) that treatment decisions of capable persons, of any age, must be respected. The preamble of the *HCDA* is one such example.[196] Similar expressions of the Legislature's objective are found in the provisions of the *HCDA*, the *MHA*, recommendations of the Manitoba Law Reform Commission, and recommendations of the Mental Health Act Review Committee (see above paras. 7, 50-59).

106. Ms. [redacted] was denied the right to make medical treatment decisions she was capable of making for no reason other than she happened to be below the arbitrary age of 16.

(b) *CFSA* ss. 25(8) and 25(9) Fail Minimal Impairment

107. Minimal impairment and the duty to make reasonable accommodation are analogous.[197] To achieve the Legislature's objective of protecting incapable persons below age 16 it is unnecessary to also bar capable persons below age 16 from deciding their medical care.[198]

108. The Legislature has demonstrated, by enacting the *HCDA* and the *MHA*, that autonomous medical decision-making of capable persons below age 16 can be accommodated and respected while, at the same time, ensuring incapable persons receive needed protection.

109. Ontario, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, and Yukon where 44 percent (950,235) of Canada's 2,169,385 adolescents (age 13-17) reside, all permit capable persons of any age to decide their own medical treatment without state interference.[199]

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[194] *Re Eve*, *supra*, at 426 **[BOA, Vol. 1, Tab 12]**; *Fleming*, *supra*, at para. 49 **[BOA, Vol. 1, Tab 13]**; *Starson*, *supra*, at para. 75 **[BOA, Vol. 1, Tab 40]**; *Walker*, *supra*, at paras. 27-28 **[BOA, Vol. 1, Tab 44]**; *U. (C.)*, *supra*, at paras. 32-33 **[BOA, Vol. 1, Tab 42]**

[195] *R. v. Oakes*, [1986] 1 S.C.R. 103 at 139 **[BOA, Vol. 1, Tab 31]**

[196] *HCDA*, *supra*, Preamble **[herein, Tab 2, p. 52]**

[197] *Multani*, *supra*, at paras. 50-53 **[BOA, Vol. 1, Tab 26]**

[198] *Sauvé*, *supra*, at paras. 54-56 **[BOA, Vol. 1, Tab 39]**

[199] Chart: Population by Age, *supra* **[herein, Tab 5, p. 85]**

110. For example, Ontario's *Health Care Consent Act, 1996* (the province to which Ms. [redacted] moved on April 1, 2007) prohibits administration of treatment to a presently capable person of any age without that person's consent.[200] The Consent and Capacity Board, a specialized tribunal that administers the *Health Care Consent Act, 1996*, confirms that in Ontario: "Everyone, regardless of age, is entitled to make their own treatment decisions if they are capable of doing so."[201] *The Law of Consent to Treatment in Ontario* adds: "In this legislation, as in the common law, there is no age below which a child is assumed to be incapable and above which the child becomes capable to consent to treatment."[202] Prince Edward Island[203] and the Yukon[204] have enacted consent to treatment legislation similar to Ontario's. Newfoundland and Labrador permits capable persons under the age of 16 to make a binding health care directive.[205] Nova Scotia, which does not have consent to treatment legislation, expressly adopts the common law.[206] The experience of these jurisdictions confirms Manitoba could reasonably accommodate treatment decisions of capable persons under age 16.

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200 *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sch. A, s. 4(2), 10(1) **[BOA, Vol. 2, Tab 51]**. The Act codifies the common law right of a capable person under age 16 to make contemporaneous treatment decisions; it does not recognize future care instructions (termed "wishes" under ss. 1(c)(iii), 5, 21(1)) expressed by a presently incapable person while under age 16.—Himel, Susan G., "The Highlights of Health Care Consent Act" (Paper presented to the Canadian Institute Conference, 19-20 June 1996) (Toronto: Canadian Institute Publications, 1996) at 16 **[BOA, Vol. 2, Tab 63]**

201 Ontario, Consent and Capacity Board, *Applying for a Review of Capacity to Make Decisions With Respect to Treatment (Form A)* at 2, online: www.ccboard.on.ca **[BOA, Vol. 3, Tab 74]**; Himel, Susan G., "The Highlights of Health Care Consent Act," *supra*, at 5, 14 **[BOA, Vol. 2, Tab 63]**; *Re E.J.G.*, 2007 CanLII 44704 at 4 (Ont. C.C.B.) **[BOA, Vol. 1, Tab 35]**; *Re H.W.*, 2005 CanLII 57736 at 8-9, 12 (Ont. C.C.B.) **[BOA, Vol. 1, Tab 36]**; Ontario adopted many of the recommendations of the *Weisstub Enquiry*, *supra*, at 152 **[BOA, Vol. 3, Tab 82]**

202 Hoffman, *The Law of Consent to Treatment in Ontario*, *supra*, at 12-14 **[BOA, Vol. 2, Tab 64]**; Jeffries, Rosalind, *et al.*, "Child and Adolescent Issues" in Bloom, Hy & Bay, Michael, eds., *A Practical Guide to Mental Health, Capacity, and Consent Law of Ontario* (Scarborough: Carswell, 1996) c. 14 at 316-317, 320-322 **[BOA, Vol. 3, Tab 66]**; CPSO, Policy Statement, "Consent to Medical Treatment," *supra*, at 3 **[BOA, Vol. 2, Tab 58]**; College of Nurses of Ontario, "Practice Guideline: Consent" (College of Nurses of Ontario, 2005) at 6 **[BOA, Vol. 2, Tab 57]**

203 *Consent to Treatment and Health Care Directives Act*, S.P.E.I. 1996, s. 3(1), 4 **[BOA, Vol. 2, Tab 50]**

204 *Care Consent Act*, S.Y. 2003, c. 21, Sch. B, ss. 3, 6(2), (3) **[BOA, Vol. 2, Tab 49]**; Yukon Health and Social Services, "Practice Guidelines for Determining Incapability to Consent to Health Care and Need for Financial Protection" (May 2005) at 5-6, 12 **[BOA, Vol. 3, Tab 83]**

205 *Advance Health Care Directives Act*, S.N. 1995, c. A-4.1, s. 7(c) **[BOA, Vol. 2, Tab 47]**

206 Nova Scotia, Health Promotion and Protection, *Guidelines for Youth Health Centres* (Nova Scotia: Public Heath, 2006) at 54-55 **[BOA, Vol. 3, Tab 73]**

111. The mature minor rule "is a well-known, well-accepted and workable principle which seems to raise few difficulties on a day-to-day basis."[207] Consent to treatment legislation of the above-mentioned provinces and territory has been in effect for more than a decade. None have reported difficulty in assessing capacity.

112. Reading into the *CFSA* ss. 25(8) and 25(9) a rebuttable presumption of incapacity for persons under age 16, as is expressly done in the *HCDA* and *MHA*, more than adequately addresses the Court of Appeal's concerns about the hypothetical medical emergency. As argued above (para. 84), in the unlikely situation of a genuine medical emergency, immediately necessary medical treatment may be given without consent to the young person pending a fair judicial hearing to determine the young person's capacity to decide further medical treatment.[208]

(c) Effect of *CFSA* ss. 25(8) and 25(9) Is Disproportionately Severe

113. A prohibition against all persons under age 16 from deciding their medical care without state interference has a disproportionately severe and unjustified impact on capable persons, like Ms. [redacted] under age 16. No such burden is placed on capable persons age 16 and older.[209]

F. Relief Sought

114. Ms. [redacted] seeks an order declaring that the *CFSA* ss. 25(8) and 25(9), on their face or as construed and applied, unjustifiably violated her rights under the *Charter*, ss. 2(a), 7, and 15(1). Alternatively, she seeks an order under the *Charter*, s. 24(1), or *Constitution Act, 1982*, s. 52(1), reading in or reading down the *CFSA* ss 25(8) and 25(9) so they did not apply to her as a capable young woman or an order declaring under the *Constitution Act, 1982*, s. 52(1), those subsections of no force or effect.

PART IV — SUBMISSION ON COSTS

115. Considering the "special and peculiar problems" this case raises, this is an appropriate case to award Ms. [redacted] her costs here and in the courts below, in any event of the cause.[210]

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[207] MLRC, *Minor's Consent to Health Care*, *supra*, at 33, 38 **[BOA, Vol. 3, Tab 68]**; see also Evans, *A Medico-Legal Handbook for Physicians in Canada*, *supra*, at 8-9, 28 **[BOA, Vol. 2, Tab 61]**

[208] *MHA*, *supra*, s. 29(5) **[herein, Tab 3, p. 69]**; *HCDA*, *supra*, s. 6(1) **[herein, Tab 2, p. 54]**

[209] *Sauvé*, *supra*, at paras. 60, 62 **[BOA, Vol. 1, Tab 39]**

[210] *B. (R.)*, *supra*, at para. 122 **[BOA, Vol. 1, Tab 4]**

PART V — STATEMENT OF ORDER SOUGHT

116. Ms. [redacted] seeks an order:

(a) Setting aside the April 16, 2006, treatment order of Kaufman J.;

(b) An order under the *Charter*, s. 24(1):

(i) declaring the treatment order and its application violated Ms. [redacted] rights under the *Charter*, ss. 2(a), 7, and 15(1);

(ii) granting Ms. [redacted] and her parents, [redacted] and [redacted] full indemnity for costs in this Honourable Court and in the courts below.

(c) Alternatively, an order:

(i) answering the constitutional questions stated by Chief Justice McLachlin on December 3, 2007, as follows: "Yes" to questions 1, 3, and 5 and "No" to questions 2, 4, and 6;

(ii) under the *Charter*, s. 24(1), or *Constitution Act, 1982*, s. 52(1), reading in or reading down the *CFSA* ss. 25(8) and 25(9) so they did not apply to Ms. [redacted] or declaring those subsections of no force or effect under the *Constitution Act, 1982*, s. 52(1).

(d) Costs in any event of the cause in this Honourable Court and the courts below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 9th day of February, 2008.

David C. Day, Q.C.
LEWIS, DAY
Counsel for Appellant [redacted]

Allan Ludkiewicz
LUDKIEWICZ, BORTOLUZZI
Co-Counsel for Appellant [redacted]

PART VI — TABLE OF AUTHORITIES

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