

COURT FILE NO.:

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

DEBRA SELKIRK

- and -

THE ESTATE OF MARK SELKIRK

- and -

APPLICANTS

HMQRO AS REPRESENTED BY THE
MINISTRY OF HEALTH AND LONG TERM CARE

RESPONDENT

- and -

TRILLIUM GIFT OF LIFE NETWORK

RESPONDENT

-and-

UNIVERSITY HEALTH NETWORK

RESPONDENT

NOTICE OF CONSTITUTIONAL QUESTION

The Applicant, Debra Selkirk, intends to question the constitutional validity of contraindication #6 of the Trillium Gift of Life's Liver Transplantation Referral & Listing Criteria as set out by the Provincial Liver / Small Bowel Working Group and currently in use at Ontario's designated liver transplant facilities; and, to claim declaratory remedy under section 24(1) and 52(1) of the *Canadian Charter of Rights and Freedoms* in relation to a policy created under s. 8.8.4 of the Trillium Gift of Life Network Act and act or omission of an agent of the Government of Ontario.

The question is to be argued on a date and time as fixed by the Ontario Superior Court of Justice at 393 University Ave., Toronto.

The following are the material facts leading to the constitutional question:

- a. The Applicant is the widow of Mark Selkirk.
- b. On November 24 2010, Mark died of multi-organ failure caused by an alcohol addiction disability. He was denied a liver transplant upon admission to Toronto General Hospital (the "Hospital") on November 7, 2010 because, according to doctors, persons suffering from alcohol addiction must prove they can quit drinking for six months before they are assessed for inclusion on the liver transplant waitlist.
- c. The Applicant offered to provide a lobe of her liver as a living donor through directed donation, but was told alcoholics "just waste the organ", "only drink again" and that doctors would not "waste the money on the surgery". Mark died two weeks later.
- d. The Applicant is filing a constitutional challenge of contraindication #6 of the Criteria. It stipulates that at Ontario liver transplant designated facilities, persons suffering liver failure caused by an alcohol addiction disability require 6-months sobriety before they are allowed on the waitlist.
- e. There are two documents at dispute in this application:

The first document:

- f. From on or about February 1991 until November 12, 2012, Ontario's designated liver transplant facilities used the Canadian Transplantation Society (the "CTS") / Canadian Liver Transplantation Study Group's (the "CLTSG") Consensus Statements on Specific Indications for Liver Transplantation (the "Consensus Statements") as part of their

referral and waitlist criteria for liver transplants. Each transplant centre made referrals to the waitlist independently.

- g. Section IV (3) of the Consensus Statements sets out six months' abstinence for patients suffering from liver failure caused by alcohol as a condition for inclusion on the liver transplant waitlist. It acknowledges most patients suffering from end stage liver disease caused by alcoholic hepatitis will not survive this requirement.

The second document:

- h. In 2010 and 2011, the Ministry of Health and Long Term Care funded the Trillium Gift of Life Network to oversee the development of standardized provincial criteria for organ transplantation in response to the 2010 Auditor General's report on Organ and Tissue Donation and Transplantation.
- i. On November 13, 2012, Trillium Gift of Life Network released the provincial Referral and Listing Criteria for Liver Transplantation (the "Criteria").
- j. Contraindication #6 of the Criteria sets out that all persons suffering from liver failure caused by alcohol addiction are psychologically unstable until they have been sober for 6 months; therefore, doctors at the Hospital will not assess patients for inclusion on the waitlist until this time period has passed, even when a family member offers to be a living donor.
- k. Since Dr. Thomas Starzl, the pioneer of liver transplant surgery wrote the first article in 1988, researchers in the field of liver transplantation have consistently concluded that the rate of return to heavy drinking after liver transplantation is low and the

subsequent loss of the transplanted organ is rare in patients suffering from alcohol addiction disabilities; they have also proven that the 6-month wait is an arbitrary timeframe that has little or no impact on the likelihood of a patient returning to drinking.

The following is the legal basis for the constitutional question:

- a. Section 25 of the Canadian Human Rights Act (the “Act”) identifies alcohol addiction as a disability. Section 3.1 of the Act states that disability is a prohibited ground of discrimination. Section 5 of the Act states that it is discrimination to deny access to, any such good, service, facility or accommodation to any individual, or to differentiate adversely in relation to any individual.
- b. Contraindication #6 singles out a group of persons identified by personal characteristics under a prohibited ground based on presumed behaviour of being “psychologically unstable” and return to drinking after transplant surgery. It then limits access to treatment and places conditions on the treatment this group is allowed to receive. This constitutes prima facie discrimination.
- c. This denial of treatment infringes on ss. 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms* (the “Charter”).
- d. The 6-month wait for a liver transplant for patients suffering from acute liver failure caused by an alcohol addiction disability is based on stigma, not medical data, and is thus not saved by s. 1.

Question #1: Does the 6-month wait infringe on Section 7 of the Charter?

- e. The sanctity of life is a fundamental Canadian value. Section 7 of the *Charter* guarantees the right to life and the right not to be deprived thereof. A 6-month wait for a liver transplant in patients suffering from acute liver failure caused by alcohol addiction deprives 80-90% of these patients of their lives, infringing their right to life.
- f. Section 7 also protects the security of the person, defined in *Carter v. Canada (Attorney General)*, 2015 SCC 5, Docket 35591, para. 64 as a state action that causes physical or serious psychological suffering. It also protects the dignity of an individual. Telling someone they are dying but cannot have a transplant because they caused their own condition is an affront to human dignity and imposes psychological suffering.
- g. Our justice system is founded on a belief in the dignity and worth of every human person. To deprive a person of constitutional rights arbitrarily or in a way that is overbroad or grossly disproportionate diminishes that worth and dignity, defying the principles of fundamental justice.
- h. Contraindication #6 is arbitrary as it does not meet the government's interest in providing universal health care and protecting the vulnerable.
- i. Contraindication #6 is also overbroad. The object of the referral and listing criteria is to ensure equity and fairness in access to donor organs, and to optimize survival in patients suffering from end-stage liver disease. This cannot be done by placing a 6-month barrier in front of one group of patients to improve the opportunity for others to receive a transplant.

- j. Death is a grossly disproportionate effect of an objective that purports to optimize survival.

Question #2: Does the 6-month wait infringe on Section 12 of the Charter?

- k. When imposing a 6-month wait, doctors tell persons suffering from acute liver failure caused by an alcohol addiction disability that they are dying, that there is a treatment that will save their lives. But, because doctors believe their disease is caused by their own (mis)behavior, patients must prove for six months they can control their disease with a 80-90% chance they will die before meeting that requirement.
- l. Under s. 12 of the *Charter*, this is cruel and unusual punishment, particularly when it is imposed by a health care system bound to a commitment of universality and whose primary purpose is to save lives and treat disease.

Question #3: Does the 6-month wait infringe on Section 15 of the Charter?

- m. Section 15(1) of the Charter guarantees every person's equal right to be free from discrimination.
- n. Contraindication #6 deems all persons suffering from an alcohol addiction disability as psychologically unstable; their access to treatment is limited based on a judgement of presumed behavior that all alcoholics "just drink again" and "waste the organ". These patients have a right to be assessed as individuals, like any other patient considered for liver transplant surgery.
- o. The s. 15 test, as set out in *Withler v. Canada (Attorney General)*, [2011] 1 SCR 396, 2011 SCC 12 (CanLII) at para. 30 as (1) Does the law create a distinction that is based on an

enumerated or analogous ground? and (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

- p. Alcohol addiction is identified as a disability in the Canadian Human Rights Act R.S.C., 1985, c. H-6, s. 25, an enumerated ground.
- q. Persons with an alcohol addiction disability are the only ones who are required to stop doing something in order to receive health care treatment, and who pay with their lives for not completing that requirement.
- r. People whose behavior is actually based on lifestyle choices do not face the same scrutiny or conditions for treatment: high performance athletes are not made to stop practicing their sport before receiving treatment for their injuries; persons with gunshot wounds are not made to prove they will discontinue gang-related activities before they undergo surgery; and, people who are injured in car crashes caused by driving at excessive speeds do not have to stop driving too fast before they are treated in hospital.
- s. Contraindication #6 “blames the victim”; doctors deny the transplant, basing their decision on stereotypes. In doing so, they send the message that the lives of persons suffering from an alcohol addiction disability are not worth saving.

Question #4: Is the infringement of ss. 7, 12 and 15 a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society?

- t. Under section 1, *the Charter* guarantees rights and freedoms, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

- u. Contraindication #6 does not meet the Oakes test for establishing that a limit is demonstrably justified in a free and democratic society. It contravenes the objective of fair and equal distribution of organs: therefore the connection between the limit and the objective is not rational; and, the impairment is maximum: death.
- v. There is no factual basis for contraindication #6. Leading medical research for the past 25 years has consistently confirmed that the rate of return to drinking is very low in persons suffering from liver failure caused by alcohol addiction after liver transplant surgery. These patients' prognosis is as good as, or better than patients suffering from liver failure caused by other diseases; they rarely return to heavy drinking; and, those who do drink heavily rarely end up with damage to the new liver.

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Proceeding commenced at *TORONTO*

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