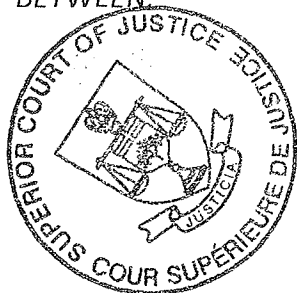


CV-15-539225

COURT FILE NO.:

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN:



DEBRA SELKIRK

- and -

APPLICANT

THE ESTATE OF MARK SELKIRK

- and -

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 APPLICATION**

TO THE RESPONDENTS

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing on at date and time to be fixed by the Registrar, at 393 University Avenue, Toronto, Ontario, M5G 1E6.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a

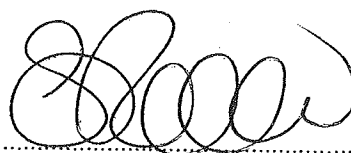
notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

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

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

Date October 27, 2015

Issued by .....



Local registrar

Address  
of court  
office

.....  
.....  
SUPERIOR COURT  
OF JUSTICE  
393 UNIVERSITY AVE.  
10TH FLOOR  
TORONTO, ONTARIO  
M5G 1E6

.....  
.....  
COUR SUPÉRIEURE  
DE JUSTICE  
393 AVE. UNIVERSITY  
10E ÉTAGE  
TORONTO, ONTARIO  
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TO: **HMQRO** as represented by Minister of Health and Long Term Care  
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## APPLICATION

1. **The Applicant, Debra Selkirk makes an application to the Court pursuant to s. 14.05(3) (g.1) for:**
  - a. A declaration that Mark Selkirk's rights were infringed, and that this infringement caused his death on November 24, 2010.
  - b. A declaration that the 6-month wait for liver transplants imposed on persons suffering from liver failure caused by alcohol addiction as set out in contraindication #6 of the Trillium Gift of Life "Liver Transplantation Referral & Listing Criteria" (the "*Criteria*") infringes and denies rights guaranteed under ss. 7, 12 and 15(1) of the *Charter*; that such infringement cannot be demonstrably justified as a reasonable limit pursuant to s. 1 of the *Charter*; and,
  - c. A declaration that, insofar as the impugned provisions infringe and deny the rights and freedoms guaranteed by ss. 7, 12 and 15(1) of the *Charter*, this criteria is invalid and of no force and effect;
  - d. The grounds for the application are:

### Material facts

2. **The material facts of the application are as follows:**
  - e. The Applicant is the widow of Mark Selkirk. Her personal story is set out in her affidavit.
  - f. On November 7 2010, Mark was admitted to Toronto General Hospital (the "Hospital").
  - g. He was diagnosed as suffering from acute alcoholic hepatitis, which carries an 80-90% likelihood of death without a liver transplant.
  - h. Mark and the Applicant were told the hospital policy dictated that persons suffering from liver failure caused by alcohol addiction had to be abstinent for 6 months before being added to the liver transplant waitlist.

- i. The Applicant offered to provide a lobe of her liver as a living donor through directed donation; she was told the 6-month rule applied regardless of the provenance of the donated organ.
- j. Two weeks later, on November 24 2010, Mark died of multi-organ failure. He was 52 years old.
- k. 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 being assessed for inclusion on the waitlist.

#### **The parties to this application**

- l. The Applicant is acting as a personal interest and public interest litigant to ensure the *Charter* is applied as intended, that persons suffering from an alcohol addiction disability are afforded the protection the Legislatures intended as pertaining to the referral and listing criteria used in liver transplant programs in Ontario; that other families do not have to endure the pain and personal loss that the Selkirk family has suffered as a result of Mark's denial of treatment and subsequent death.
- m. The Respondent Minister (the "Minister") as the head of the Ministry of Health and Long Term Care (the "MOHLTC") is responsible for all aspects of health care in Ontario, ensuring universality and accessibility through the administration and enforcement of health care acts in Ontario inter alia the *Canada Health Act*, the *Health Insurance Act*, the *Local Health System Integration Act*, the *Public Hospitals Act* and the *Trillium Gift of Life Network Act*.
- n. The Respondent Trillium Gift of Life Network ("Trillium") is responsible for the Liver Transplantation Referral & Listing Criteria under the *Trillium Gift of Life Network Act*.
- o. The Respondent University Health Network ("UHN") is the Local Health Integration Network (LHIN) to which the Hospital belongs. The Hospital chose to use the Canadian Transplant Society (the "CTS") / "Canadian Liver Transplant Study Group" (the "CLTSG") *Consensus*

*Statements on Specific Indications for Liver Transplantation* (the “Consensus Statements”) to refuse to provide a liver transplant to Mark Selkirk, and in doing so, caused his death.

#### **Documents in question in this application**

- p. There are two documents at dispute in this application.

#### ***The first document***

- q. From on or about February 1991 until November 12, 2012, Ontario’s designated liver transplant facilities used the Consensus Statements as part of their referral and waitlist criteria for liver transplants. Each transplant centre made referrals to the waitlist independently.
- r. 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:***

- s. In 2010 and 2011, the MOHLTC funded Trillium 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.
- t. On November 13, 2012, Trillium Gift of Life Network released the provincial Referral and Listing Criteria for Liver Transplantation (the “Criteria”).
- u. 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.



### Judicial history

- v. On October 12, 2012, the Applicant filed an application with the Human Rights Tribunal of Ontario under *section 24(1) of the Charter* against the Hospital for alleged discrimination and the Minister as the person responsible for the alleged discriminatory policy at Ontario transplant centres.
- w. The Tribunal set aside the application for six months while the Applicant acquired a certificate of appointment of estate trustee, sending copies of the application to the Hospital and the Minister.
- x. On June 24, 2013 the Applicant submitted the certificate of appointment of estate trustee. The Tribunal initiated the processing of the application, re-sending copies of the application to the respondents and directing them to reply.
- y. On August 1, 2013 the MOHLTC submitted their reply.
- z. On August 21, 2013, the Hospital filed their response, along with a copy of the Consensus Statements.
- aa. On November 28, 2013, the HRTTO dismissed the application on time delay.
- bb. On December 30, 2013 the Applicant submitted a request for reconsideration.
- cc. On January 14, 2014 the Reconsideration Request was denied.
- dd. On March 12, 2014, the Applicant filed an Application for Judicial Review.
- ee. On December 10, 2014, the Application was dismissed.

### Statutory provisions

- ff. At the core of this application is the interplay between ss. 3, 7, 8 and 10 of the *Canada Health Act*; Preamble of the *Commitment to the Future of Medicare Act*; Preamble of the *Local*

*Health System Integration Act*; s. 8 of the *Trillium Gift of Life Network Act*, and ss. 1, 7, 12 and 15 of the *Charter of Rights and Freedoms*.

***Alcohol addiction is a disability***

gg. Alcohol addiction is recognized as a disability.

**Canada Health Act**

***Health care is universal and accessible***

hh. Section 7 of the Canada Health Act, R.S.C., 1985, c. C-6 (the “Health Act”) ensures that health care in Canada is universal and accessible.

***Provincial Minister of Health responsible for universality and accessibility***

ii. The provincial minister is responsible under section 14 of the Health Act for ensuring its programs are universal and accessible as conditions for receiving health care funding from the federal health minister.

**Commitment to the Future of Medicare Act**

***Ontario Government commitment to universality and accessibility***

jj. The Government of Ontario commits to the principles of universality and accessibility in the Preamble of the Commitment to the Future of Medicare Act 2004, S.O. 2004, CHAPTER 5 (the “Medicare Act”).

**Local Health System Integration Act**

***Hospital has statutory obligation to universal and accessible services***

kk. In the Preamble (a) of the Local Health System Integration Act, Ontario hospitals are committed to the principles of universality and accessibility.

**Trillium Gift of Life Network Act**

***Trillium Gift of Life responsible for fair system***

ll. Under 8.8 of the Trillium Gift of Life Network Act, Trillium Gift of Life is responsible for establishing and managing a system that fairly allocates organs.

## Listing Criteria

### *A barrier of 6-months' abstinence constitutes prima facie discrimination*

- mm. Contraindication #6 of the Listing Criteria singles out all members of a group of persons identified by personal characteristics under a prohibited ground based on presumed behaviour of being "psychologically unstable" and returning to drinking after transplant surgery. It then denies access to treatment until a condition of six months sobriety is met. This constitutes prima facie discrimination.

## Charter of Rights and Freedoms

### *Section 7 of the Charter guarantees the right to life*

- nn. Under s. 7 of the Charter, all persons have the right to life, security of person and the right not to be deprived thereof.

### *6-month wait infringes section 7 of the Charter*

- oo. Section 7 applies in this case because the 6-month wait for a liver transplant infringes the right to life, causing death in up to 90% of patients suffering from acute liver failure caused by an alcohol addiction disability before they are assessed for inclusion on the waitlist.
- pp. It also applies because the 6-month wait infringes the security of the person defined in Carter v. Canada (Attorney General), 2015 SCC 5 (CanLII) at para. 64 as being "engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering".
- qq. Doctors tell the person there is a 90% chance they will die unless they receive a liver transplant, but because they caused their own illness, they must prove for 6 months they can control their disease. They lie in a hospital ward, for days or weeks, feeling that their illness is their own fault and terrified they are not going to live. This is an affront to their sense of human dignity and personal integrity.

***6-month rule does not meet principles of fundamental justice***

- rr. The 6-month rule does not meet the principles of fundamental justice identified by McLachlin CJ. in *Canada (Attorney General) v. Bedford* for measuring reasonableness under s. 7: arbitrariness, overbreadth and gross disproportionality.

***Section 12 of the Charter guarantees the right not to be subjected to cruel and unusual punishment***

- ss. Under section 12 of the Charter, all persons have the right not to be subjected to any cruel and unusual treatment or punishment.

***The 6-month rule infringes section 12 of the Charter***

- tt. Section 12 applies in this case because the lives of persons suffering from acute alcoholic hepatitis depend on receiving a liver transplant, a service strictly controlled by an entity carrying out a government service - health care. Doctors tell patients that because their lifestyle choice caused their condition, they must prove for six months they can control their disease before being allowed on the waitlist; and, that there is an 80-90% chance they will die before they receive it. This is cruel and unusual treatment.

***Section 15 of the Charter***

- uu. Under Section 15 of the Charter, all persons are equal before and under the law and have the right to the equal protection and equal benefit of the law without discrimination.

***The 6-month rule infringes section 15 of the Charter***

- vv. Section 15 applies in this case because the “Referral and Listing Criteria” tell persons suffering from an alcohol addiction disability that they are not equal when it comes to the benefits of the Ontario health care system: that group of patients must pass the 6-month rule before being assessed for placement on the waiting list for a liver transplant, a barrier not placed in front of patients suffering from liver failure caused by any other type of liver disease that can be caused by perceived “lifestyle choices”.

- ww. A policy that excludes a group of persons with a disability based on presumed behavior is not a fair policy for members of that group.
- xx. In *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396, the Supreme Court simplified its s. 15 test to be comprised of two questions: Is the distinction based on an enumerated ground, which in this case is disability; and, does that distinction create a disadvantage by creating prejudice or stereotyping, which in deeming all persons suffering from alcohol addiction as psychologically unstable, and will only drink again, meets this requirement.

**The 6-month rule is not justifiable in a free and democratic society**

- yy. The infringement of ss. 7, 12 and 15(1) of the *Charter* caused by contraindication #6 of the “Referral and Listing Criteria” does not constitute a reasonable limit demonstrably justified in a free and democratic society pursuant to s. 1 of the *Charter*.

***The infringement cannot be saved under section 1***

- zz. The 6-month wait does not advance a sufficiently important government objective, and fails to meet the three proportionality requirements of s. 1 of the Charter as set out in *R. v. Oakes*, [1986] 1 SCR 103: rational connection, minimal impairment, and proportionality.

***Irrational connection: Fair and equal distribution vs. death***

- aaa. Medical research since 1988 has consistently reported high death rates without transplant, and survivability and prognosis for patients suffering from alcohol addiction equal to, or better than, patients with other types of liver disease after transplantation. Therefore the 6-month wait is an arbitrary timeframe that serves no purpose in patients who cannot wait that long.
- bbb. The 6-month wait contravenes the objective of fair and equal distribution of organs for the group with a disability: therefore the connection between the limit and the objective is not rational; and, the impairment is maximum: death.

***Irrational connection: Directed donation not same process as waitlist assessment***

- ccc. Further, in the Selkirk case, the Applicant offered to be a living donor for her husband, called a “directed donation” between the donor and the patient, usually a family member or friend. On the surface, the Applicant met the basic donor organ criteria; but, she was refused the opportunity to be further assessed for suitability. Had she not been a match, there were four other family members also willing to donate. Alternatively, someone else on the waitlist could have potentially had a living donor match for Mr. Selkirk, while Mrs. Selkirk could have been a match for the other patient, a process commonly occurring at the Hospital.
- ddd. A directed donation would not have interfered with the liver program’s assertion that their objective is to make the best use of the available organs, and that an alcoholic is less suitable than patients suffering from other types of diseases causing liver failure.

**The statutory provisions in support of this application are:**

- eee. Sections 1, 7, 12, 15(1), 24(1) and 32(1)(b) and 52(1) of the *Canadian Charter of Rights and Freedoms*;
- fff. ss. 3, 7, 8 and 10 of the Canada Health Act R.S.C., 1985, c. C-6
- ggg. Preamble of the Commitment to the Future of Medicare Act 2004, S.O. 2004, CHAPTER 5;
- hhh. Preamble of the Local Health System Integration Act 2006 S.O. 2006, CHAPTER 4;
- iii. Section 8.8 of the Trillium Gift of Life Network Act R.S.O. 1990, CHAPTER H.20 ;
- jjj. Rule 14.04.3 (g.1) of the Rules of Civil Procedure; and
- kkk. Such further and other grounds as the Applicant may propose and this Honourable Court may permit.

The following documentary evidence will be used at the hearing of the application:

***Application Record – Volume 1:***

III. Affidavit of Dr. John J. Fung sworn September 13, 2015.

mmm. Letter from Maui Paraskakis.

***Application Record – Volume 2:***

nnn. Affidavit of Debra Selkirk sworn October 16, 2015.

***Brandeis Briefs***

ooo. The Applicant will also file a Brandeis briefs comprised of: full copies of medical research listed in documents sent to her by Trillium Gift of Life Network; further medical research with ethical arguments and survival statistics of patients who received a liver transplant due to organ failure caused by alcohol; and, government documents.

***Other evidence***

ppp. Such other evidence as the Applicant may propose and this Honourable Court may permit.

Date: October 20, 2015

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DEBRA SELKIRK and  
THE ESTATE OF MARK  
SELKIRK

v.

HMQRO as represented by the MINISTRY OF HEALTH  
AND LONG TERM CARE et al.

RESPONDENTS

APPLICANTS

Court file no:

ONTARIO  
SUPERIOR COURT OF JUSTICE

Proceeding commenced at *TORONTO*

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