

Cause No.

IN THE COURT OF QUEEN'S BENCH OF
NEW BRUNSWICK

COUR DU BANC DE LA REINE DU
NOUVEAU-BRUNSWICK

TRIAL DIVISION

DIVISION DE

JUDICIAL DISTRICT OF FREDERICTON

CIRCONSCRIPTION JUDICIAIRE DE
FREDERICTON

B E T W E E N:

E N T R E:

**CANADIAN CIVIL LIBERTIES
ASSOCIATION**

Plaintiff

demandeur

- and -

- et -

THE PROVINCE OF NEW BRUNSWICK

Defendant

défendeur

**NOTICE OF ACTION WITH
STATEMENT OF CLAIM ATTACHED
(FORM 16A)**

**AVIS DE POURSUITE ACCOMPAGNÉ
D'UN EXPOSÉ DE LA DEMANDE
(FORMULE 16A)**

TO: The Province of New Brunswick
c/o The Office of the Attorney General
Chancery Place, 675 King Street
Fredericton, NB E3B 1E9

DESTINATAIRE:

LEGAL PROCEEDINGS HAVE BEEN
COMMENCED AGAINST YOU BY FILING
THIS NOTICE OF ACTION WITH
STATEMENT OF CLAIM ATTACHED.

PAR LE DÉPOT DU PRÉSENT AVIS DE
POURSUIITE ACCOMPAGNÉ D'UN EXPOSÉ
DE LA DEMANDE, UNE POURSUITE
JUDICIAIRE A ÉTÉ ENGAGÉE CONTRE
VOUS.

If you wish to defend these proceedings, either
you or a New Brunswick lawyer acting on your
behalf must prepare your Statement of Defence
in the form prescribed by the Rules of Court and
serve it on the plaintiff or the plaintiff's lawyer at
the address shown below and, with proof of such
service, file it in this Court office together with
the filing fee of \$50

Si vous désirez présenter une défense
dans cette instance, vous-même ou un avocat du
Nouveau-Brunswick chargé de vous représenter
devrez rédiger un exposé de votre défense en la
forme prescrite par les Règles de procédure, le
signifier au demandeur ou à son avocat à
l'adresse indiquée ci-dessous et le déposer au
greffe de cette Cour avec un droit de dépôt de \$50
et une preuve de sa signification:

(a) if you are served in New Brunswick, WITHIN 20 DAYS after service on you of this Notice of Action with Statement of Claim Attached, or

(b) if you are served elsewhere in Canada or in the United States of America, WITHIN 40 DAYS after such service, or

(c) if you are served anywhere else, WITHIN 60 DAYS after such service.

If you fail to do so, you may be deemed to have admitted any claim made against you, and without further notice to you, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE.

You are advised that:

- (a) you are entitled to issue documents and present evidence in the proceeding in English or French or both;
- (b) the plaintiff intends to proceed in the English language; and
- (c) your Statement of Defence must indicate the language in which you intend to proceed.

If you pay to the plaintiff or the plaintiff's lawyer the amount of the plaintiff's claim, together with the sum of \$100 for the plaintiff's costs, within the time you are required to serve and file your Statement of Defence, further proceedings will be stayed or you may apply to the court to have the action dismissed.

THIS NOTICE is signed and sealed for the Court of Queen's Bench by _____, Clerk of the Court at Fredericton, New Brunswick, the ____ day of January, 2021.

(a) DANS LES 20 JOURS de la signification qui vous sera faite du présent avis de poursuite accompagné d'un exposé de la demande, si elle vous est faite au Nouveau-Brunswick ou

(b) DANS LES 40 JOURS de la signification, si elle vous est faite dans une autre région du Canada ou dans les États-Unis d'Amérique ou

(c) DANS LES 60 JOURS de la signification, si elle vous est faite ailleurs.

Si vous omettez de le faire, vous pourrez être réputé avoir admis toute demande formulée contre vous et, sans autre avis, JUGEMENT POURRA ETRE RENDU CONTRE VOUS EN VOTRE ABSENCE.

Sachez que:

- (a) vous avez le droit dans la présente instance, d'émettre des documents et de présenter votre preuve en français, en anglais ou dans les deux langues;
- (b) le demandeur a l'intention d'utiliser la langue _____; et
- (c) l'exposé de votre défense doit indiquer la langue que vous avez l'intention d'utiliser.

Si, dans le délai accordé pour la signification et le dépôt de l'exposé de votre défense, vous payez au demandeur ou à son avocat le montant qu'il réclame, plus \$100 pour couvrir ses frais, il y aura suspension de l'instance ou vous pourrez demander à la cour de rejeter l'action.

CET AVIS est signé et scellé au nom de la Cour au Banc de la Reine par _____ greffier de la Cour à Justice, Fredericton, New Brunswick, ce _____, jour de 2021.

.....
Clerk of the Court of Queen's Bench of New
Brunswick

Justice Building
427 Queen Street, Room 207
P.O. Box 5001
Fredericton NB E3B 5H1

.....
G R E F F I E R

STATEMENT OF CLAIM

1. The Plaintiff claims:

- (a) A declaration that Schedule 2(a.1) of *Regulation 84-20*, enacted pursuant to the *Medical Services Payment Act*, R.S.N.B. 1973, c. M-7, is inconsistent with and in violation of the *Canada Health Act*, R.S.C., 1985, c. C-6;
- (b) A declaration that Schedule 2(a.1) of *Regulation 84-20* is *ultra vires* the powers of the province of New Brunswick, as it is in pith and substance criminal law falling within the exclusive legislative jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*, and is therefore of no force and effect;
- (c) A declaration that Schedule 2(a.1) of *Regulation 84-20* violates sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* (the “*Charter*”), and is therefore of no force and effect;
- (d) A declaration that Section 2.01(b) of the *Medical Services Payment Act* does not apply to medical offices and clinics;
- (e) Costs of this action; and
- (f) Such other orders and declarations and other relief including consequential and ancillary orders that may be necessary and advisable to the Court.

A. Overview

2. An abortion is a medical procedure that ends a pregnancy. It is a basic reproductive-related healthcare need for any person who can become pregnant, such as women, girls and transgender people. Abortion is a common procedure; approximately 1 in 3 Canadian women will have an abortion, whether surgically or by taking a number of special medications. Canadian women, girls

and transgender people have the right to reproductive choice and abortion service should be readily available.

3. It has been over thirty years since the Supreme Court of Canada's landmark ruling in *R. v. Morgentaler* struck down the criminal prohibition on abortion as a violation of Canadian's constitutional rights. However, abortion remains inaccessible in New Brunswick, particularly to those living in rural areas of the province and to the vulnerable facing personal hardships like poverty and domestic violence.

4. This inaccessibility is no accident. It is because the Province of New Brunswick remains politically and principally opposed to providing barrier-free abortion services, particularly in a clinical setting. The Province has therefore imposed barriers to abortion access through Schedule 2(a.1) of *Regulation 84-20* to the *Medical Services Payment Act*, which unjustifiably excludes out-of-hospital abortions from medical insurance coverage and, in so doing, improperly deems clinical abortions as non-essential services.

5. Schedule 2(a.1) of *Regulation 84-20* is arbitrary and was enacted as part of the province's attempt to give Dr. Morgentaler the "fight of his life" if he tried to open an abortion clinic in the province. Abortions (and the resulting impact they have on patients' lives and mental health) are not, and should not be treated as, an elective procedure.

6. In stark contrast, New Brunswick does provide coverage for other out-of-hospital services, such as vasectomies.

7. Schedule 2(a.1) of *Regulation 84-20* has served its purpose: abortion is inaccessible to many New Brunswickers. In order to obtain a surgical abortion covered by the province's medical

insurance plan, a patient's only option is to travel across the province to one of two cities (Bathurst or Moncton) that have a hospital approved to offer such services.

8. This is insufficient, for many reasons. *First*, patients need to obtain an appointment within the hospital's early gestational limits, which is a real issue due to wait times, quotas and delays at the hospitals. *Second*, travelling across the province, particularly in the winter, is an insurmountable burden to many, particularly for those who cannot take time off work, arrange childcare or transportation, or afford to travel. These financial and logistical barriers also have major implications for patients' privacy rights, in addition to their rights of liberty and security of the person, as many patients (e.g., minors or those suffering from ongoing domestic violence) cannot travel hours across the province, often requiring an overnight stay, without informing their family members.

9. For the many patients who cannot access the hospitals in those two cities due to financial, geographic, timing and/or personal restrictions, their other option is to pay out of pocket for a surgical abortion at a clinic. There is only one clinic in the province that provides this type of abortion services and it is the only place to get a surgical abortion in Fredericton, the province's third largest city. However, even though this clinic performs a huge proportion of the province's abortions, this option is soon to be unavailable to New Brunswickers as the clinic has reduced its services and is about to close its doors due to a lack of provincial funding for one of the key healthcare services it provides.

10. The *Canada Health Act* requires that Canadians have reasonable access to medically necessary healthcare services without financial or other barriers. Such services must be provincially funded. However, New Brunswick refuses to comply with this important piece of

federal legislation and, in doing so, violates both sections 7 and 15 of the *Charter*. Schedule 2(a.1) of *Regulation 84-20* is also *ultra vires* on the ground that the *Regulation* is in pith and substance criminal law falling within the exclusive legislative jurisdiction of the Parliament of Canada. It must be struck down.

B. The Parties

11. The Plaintiff, the Canadian Civil Liberties Association (“CCLA), is a national human rights organization with supporters in New Brunswick and across the country. CCLA is committed to defending the rights, dignity, safety, and freedoms of all people in Canada. Founded in 1964, CCLA is an independent, national, nongovernmental organization, working in the courts, before legislative committees, in the classrooms, and in the streets, protecting the dignity and rights of people in Canada.

12. The CCLA’s mandate as a public interest organization devoted to the protection of civil liberties, the organization’s legal resources and institutional capacity, and its past experience acting as a plaintiff and intervener in many Charter claims and appeals make it well-placed to advance the present litigation in the interest of safeguarding fundamental rights and freedoms more broadly across Canada.

13. The Defendant is the Crown in Right of the Province of New Brunswick, which is named pursuant to *The Proceedings Against the Crown Act*, R.S.N.B., c. P.18.

C. Overview of the *Canada Health Act*: Abortion is a Medically Necessary Service

14. Medicare is a term that refers to Canada’s publicly funded and administered health care system. The Canadian health insurance system is achieved through 13 provincial and territorial health care insurance plans.

15. The *Canada Health Act*, R.S.C., 1985, c. C-6 is the federal legislation governing Medicare. The aim of the *Act* is to facilitate reasonable access to medically necessary hospital and physician services on a prepaid basis, without charges related to the provision of insured health service. The policy of the *Canada Health Act* is universal healthcare for all, without regard for ability to pay.

16. The *Canada Health Act* establishes the criteria and conditions that the provincial/territorial healthcare insurance plans must fulfill in order to receive the full federal cash contribution under the Canada Health Transfer. These conditions or criteria include accessibility (Canadians must have reasonable access to insured services without charge or fees and without discrimination on the basis of age, health status, financial circumstances, or location within the province), comprehensiveness (all insured services must be covered by the plan), and universality (all insured persons in the province must be entitled to health insurance coverage on uniform terms and conditions). Extra-billing and user charges are violations of the *Canada Health Act*.

17. The federal government has clearly communicated to the provinces and territories that abortion services are a medically necessary service that must be covered by provincial health insurance plans.

C. Statutory Framework in New Brunswick: New Brunswick Seeks to Suppress Access to Abortion by Limiting Medical Insurance Coverage of Surgical Abortions

18. In New Brunswick, the formal name for Medicare is the Medical Services Plan. The Minister of Health is responsible for operating and administering the plan through the *Medical Services Payment Act* and its Regulations. The Act and Regulations establish a Medicare plan, and define which Medicare services are covered and which are excluded.

19. Schedule 2 of *Regulation 84-20* lists the services that are specifically excluded from the range of “entitled” medical services under the *Medical Services Payment Act*. Schedule 2(a.1) states that abortion is “deemed not to be” an entitled service “unless the abortion is performed in a hospital approved by the jurisdiction in which the hospital facility is located.”

20. Excluding of out-of-hospital abortions is unjustifiable and arbitrary. It improperly deems clinical abortions as non-essential services. The Province has a long history of seeking to limit access to abortion care in the province, as the history and context of the enactment of Schedule 2(a.1) of *Regulation 84-20* shows.

21. In 1988, in *R. v. Morgentaler*, the Supreme Court of Canada struck down section 251 of the *Criminal Code*, which required women seeking abortions to obtain approval from a therapeutic abortion committee at an accredited hospital. As a result of this decision, abortion was officially removed from the *Criminal Code* and classified as a medical procedure to be regulated by the provinces and territories like any other under the *Canada Health Act*.

22. Shortly after this decision, Premier McKenna told reporters he would give Dr. Morgentaler the “fight of his life” if he tried to establish an abortion clinic in the province. The Province promulgated regulations and legislation seeking to prohibit abortions outside of hospitals in order to restrict access to abortions and prevent the establishment of abortion clinics.

23. In 1985, in direct response to a letter from Dr. Morgentaler seeking to establish a funded abortion clinic, the Province passed Bill 92, which amended the *Medical Act* and allowed the suspension of physicians’ licenses where they performed abortions outside of an approved hospital.

24. In 1994, the New Brunswick Court of Queen’s Bench struck down these amendments as *ultra vires* because the impugned sections of the *Medical Act* were enacted by the Legislature to suppress or punish what the government “perceived to be the socially undesirable conduct of abortion.” The Court found that the purpose of the amendments was to prohibit the establishment of freestanding abortion clinics, in particular a clinic run by Dr. Morgentaler.

25. In May 1989, the Province enacted Schedule 2(a.1) of *Regulation 84-20*, which essentially maintained the same therapeutic abortion committee the Supreme Court held to infringe the *Charter*. For abortion to be an “entitled service”, a patient needed written approval from two doctors who had determined that an abortion was “medically necessary” and the abortion needed to be provided by a gynecologist in an approved hospital.

26. In 2015, Schedule 2(a.1) was amended to remove the requirements for prior doctor approval and a gynecologist. However, the amended *Regulation* maintained the restriction on abortions performed outside of approved hospitals.

27. There is no medical reason requiring abortions to be performed in hospitals rather than clinics. Other processes, such as vasectomies, are covered in New Brunswick whether they are performed in a hospital or a clinic. The purpose of Schedule 2(a.1) of *Regulation 84-20* is to suppress access to abortion services and prevent or undermine the establishment of abortion clinics.

D. Surgical Abortion is Not Accessible in New Brunswick

28. Schedule 2(a.1) of *Regulation 84-20* makes access to abortions for New Brunswickers difficult and uncertain. It has caused delays and hardships in access and can prevent access altogether.

29. Abortion is one of the most commonly performed surgical procedures in the country. However, although New Brunswick has numerous hospitals, only three hospitals in two cities provide these types of abortions: one hospital in Bathurst (a city in the north-east with a population of approximately 13,000 people) and two hospitals in Moncton (a city in the south-east with a population of approximately 70,000 people). These hospitals only provide abortions during the first trimester, *i.e.*, up to 13 weeks and six days of the pregnancy.

30. The hospital in Bathurst only accepts patients from the Bathurst area. That means for all other residents, their only option for accessing a Medicare-funded abortion is to travel to Moncton, in the southeastern part of the province. For residents in the northwestern part of the province (*e.g.*, Edmundston), that is an 8-hour return trip by car.

31. Moreover, abortion is not particularly accessible through these hospitals. In order to access abortion services, patients must first secure appointments within a matter of days or weeks after finding out they are pregnant in order to meet the hospital's early gestational limits. This can be a real issue due to delay caused by quotas and wait times. Assuming the patient can obtain an appointment in time, the patient must then travel to Moncton or Bathurst. This burden is significant in a province where both poverty (particularly with respect to single mothers) and weather can make travel into a serious impediment. This is made even more difficult where the hospitals require multiple visits.

32. As a result, there are many significant barriers to patients accessing abortion services, including:

- (a) patients must have the funds to pay for the travel, such as staying overnight in a hotel, and arranging for transportation (such as obtaining a car, paying for gas, etc.);

- (b) patients need to be able to make personal arrangements to have the time to travel, such as taking more time off work (often on short-notice), arranging childcare, etc.; and
- (c) as the hospitals provide a patient an anesthetic for the procedure, patients also require someone to accompany them and pick them up from the hospital after the procedure. This requires the patients to have such family or personal support available.

33. Not all patients have these financial or personal resources available. As a result, abortion services can be inaccessible to many patients. Such burdens have (and will continue to have) disproportionate effects on the underprivileged, marginalized and vulnerable.

34. In addition to the impact of these accessibility issues on rights to liberty and security of the person, discussed below, these financial and logistical barriers to abortion also have major implications for patients' privacy rights. For example, younger patients may be unable to access the procedure without their parents finding out about their pregnancy and their plan to terminate it. Patients suffering domestic violence or in abusive relationships may also be unable to access the procedure without their partner finding out.

35. For patients who cannot travel or cannot obtain an appointment in the limited timeframe in which the three hospitals provide abortion services, their only other option to obtain access to abortion services is Clinic 554, a family medical practice that is the only abortion provider in Fredericton. It is a four-hour return trip from Fredericton to Moncton by car and six-hour return trip to Bathurst. Clinic 554 is also the only second trimester abortion provider in the province (it provides abortions up to 15 weeks and 6 days of pregnancy).

36. Clinic 554 abortions are not publicly funded. Patients having abortions at Clinic 554 had to pay a fee for the procedure. Clinic 554 tried to manage these barriers to abortion access, such as by lowering or waiving the fee for patients in certain circumstances.

37. Clinic 554 is clearly a necessary option for patients in New Brunswick: it has provided more than 1,000 abortions since it opened in 2015. Its predecessor, the Morgentaler Clinic, performed about 60% of abortions in New Brunswick before its closed in 2014 from the absence of funding.

38. Like its predecessor, Clinic 554 is now closing as it cannot afford to provide services without provincial funding. By excluding abortions from Medicare, New Brunswick has achieved its unconstitutional goal of ensuring freestanding abortion clinics are not available in the province.

39. In sum, the in-hospital limitation in the *Regulation*, coupled with the lack of approved hospitals, renders this vital healthcare service extremely inaccessible in New Brunswick.

40. New Brunswick does provide coverage for the cost of medical abortions. Medical abortions involve taking two pills of a medication called Mifegymiso and can be used to terminate a pregnancy up to nine weeks in gestation. While providing access to medical abortion is an important step, it does not address the inaccessibility caused by Schedule 2(a.1) of *Regulation 84-20* for a variety of reasons, including:

- (a) Mifegymiso is a relatively new drug in Canada that is not widely prescribed;
- (b) medical abortion is only available at the very early stages of a pregnancy. Many patients do not know of their pregnancy and/or cannot procure a medical appointment prior to 9 weeks of pregnancy;

- (c) Mifegymiso is not a viable option for many patients, such as those low in iron, those with bleeding problems or clotting conditions, those taking certain drugs, etc.;
- (d) some patients prefer surgical abortions, due to uterine pain, the longer duration, discomfort or fear about aborting at home without professional supervision; and
- (e) surgical abortion access must be available for patients who first try medical abortions because medical abortions can fail. An incomplete abortion can cause harm and even death if left untreated.

41. Providing proper access to abortion services requires real access to medical abortions and surgical abortions. Canadians have the right, as part of their right to health and right to autonomy over their bodies, to a choice among equally safe and cost-effective methods.

E. Schedule 2(a.1) of Regulation 84-20 Violates the Canada Health Act

42. The exclusion of out-of-hospital abortions from the *Medical Services Payment Act*, and thus their status as non-essential health services is contrary to the *Canada Health Act*.

43. The federal Government has concluded that Schedule 2(a.1) of *Regulation 84-20* violates the *Canada Health Act*. In July 2019, the Minister of Health wrote to all provinces and territories about the persistent barriers to access for abortion services across the country, which pose concerns under the accessibility and comprehensiveness criteria of the *Canada Health Act*. The federal Minister of Health also wrote specifically to New Brunswick's Minister of Health and informed him that any patient charges for abortions would be considered extra-billing and user chargers under the *Canada Health Act* and would result in penalties.

44. In March of 2020, the federal Government penalized New Brunswick for violating the *Canada Health Act* due to its exclusion of out-of-hospital abortions. The federal Government

withheld money from the Canada Health Transfer reflecting the quantum New Brunswickers paid for abortions at Clinic 554. However, the federal government temporarily reimbursed the withheld transfer payments due to the COVID-19 pandemic's impact on the health care system.

E. Schedule 2(a.1) of Regulation 84-20 is unconstitutional

45. There are three reasons that Schedule 2(a.1) of *Regulation 84-20* is unconstitutional:

- (a) it is *ultra vires* on the ground that the *Regulation* is in pith and substance criminal law falling within the exclusive legislative jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*;
- (b) it violates section 7 of the *Charter of Rights and Freedoms*; and
- (c) it violates section 15(1) of the *Charter of Rights and Freedoms*.

46. **Schedule 2(a.1) of Regulation 84-20 is ultra vires.** An examination of the terms and effect of Schedule 2(a.1) of *Regulation 84-20*, its history, and the circumstances surrounding its enactment show that the *Regulation's* central purpose and dominant characteristic is the restriction of abortion and to undermine the establishment of abortion clinics to ensure the restriction of access to abortion because of the Province's position that abortion is a socially undesirable practice which should be suppressed. Both the intent and impact of the *Regulation* has been to restrict access to abortion.

47. There is no valid health-related concern that can justify excluding out-of-hospital abortions from public funding. The in-hospital requirement is not justified from a medical point of view. Indeed, abortions in hospitals may carry many risks or barriers that are reduced or mitigated by clinic abortions, such as delays and waiting lists, quotas, shorter gestational limits, lack of privacy,

lack of counselling and increased medical risks (such as the use of a general anesthetic instead of a local one).

48. ***Schedule 2(a.1) of Regulation 84-20 violates section 7 of the Charter.*** Section 7 of the *Charter* states that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

49. Patient autonomy in medical decision-making is a protected right. Individuals have a right to make decisions about their bodily integrity and to direct the course of their own medical care. State interference with bodily integrity and serious state-imposed psychological stress constitutes a breach of security of the person. Schedule 2(a.1) of *Regulation 84-20* clearly interferes with patients’ physical, bodily and psychological integrity.

50. The exclusion of out-of-hospital abortions limits access to abortions by imposing financial barriers, location barriers, privacy barriers and other logistical barriers. Abortion is very time-sensitive. The barriers to accessing abortions caused by Schedule 2(a.1) result in great risks to the patient. There is a greater risk to the health of patients due to delays in accessing abortions (*e.g.*, due to wait times and delays at the three hospitals providing such services). A delay of even a few days or weeks can have serious impacts on the health and psychological well-being of patients.

51. There is also serious risk to women, girls and transgender people that they will be unable to obtain the abortion (either because they cannot access timely abortion care within the early gestational limits; because they cannot afford to travel to the hospitals; or because other personal circumstances deny them the ability to travel across the province to access one of the three hospitals that provide abortions, such as the ability to maintain their privacy from other family members). Such outcomes increase the risk that patients will seek risky alternative options for the

termination of the pregnancy and increase the risk of imposing unwanted pregnancy and delivery (and the associated health risks) on patients who cannot obtain access to abortion.

52. All of the concerns listed above not only interfere with patients' physical and bodily integrity, but also cause serious psychological stress and harm.

53. The barriers created by Schedule 2(a.1) of *Regulation 84-20* also engage and infringe the right to liberty. The difficulty, delay, uncertainty, lack of access, resulting stigma and, in some cases, unwanted pregnancy caused by Schedule 2(a.1) cause women, girls and transgender people physical and psychological harm, including harm to conscience and dignity. This denies women, girls and transgender people the freedom to make important decisions concerning their health and their bodies.

54. By restricting and in some cases preventing access to abortion, the *Regulation* constitutes state interference with the right of the individual to a protected sphere of autonomy over decisions of fundamental personal importance, such as whether to terminate a pregnancy. The right to reproductive freedom is central to a person's autonomy and dignity.

55. This infringement of the right to life, liberty and security of the person is not consistent with the principles of fundamental justice. Schedule 2(a.1) of *Regulation 84-20* is arbitrary and was created for improper reasons. New Brunswick established Schedule 2(a.1) in response to the decriminalization of abortion following *R. v. Morgentaler* and to prevent Dr. Morgentaler and others from opening an abortion clinic in the province. The original terms of the *Regulation* largely mirrored the *Criminal Code* provision that was struck down.

56. Schedule 2(a.1) of *Regulation 84-20* regulates the place *where* an abortion may be obtained because of the Province's political and moralistic position that abortion is a socially undesirable or immoral practice, and not due to any medical or proper healthcare justification.

57. Furthermore, Schedule 2(a.1) further restricts coverage to *approved* hospitals. Only three hospitals in two cities across the entire province fall within this definition and provide this service. Aside from the complete absence of such services in the province's heavily populated rural communities, the Province has not even made this medically necessary service available in two of its largest cities (Saint John and Fredericton). The Province is using the limitation in Schedule 2(a.1) to further fulfil its improper agenda of restricting access to abortion by denying the practical availability of *approved* hospitals.

58. ***Schedule 2(a.1) of Regulation 84-20 violates section 15 of the Charter.*** Section 15(1) of the *Charter* states that “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” Section 15(1) reflects a profound commitment to promote substantive equality and prevent discrimination against disadvantaged groups.

59. Schedule 2(a.1) of *Regulation 84-20* violates section 15(1) of the *Charter* as it (1) creates a distinction based on enumerated or analogous grounds (both on its face and in its impact) and (2) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating a disadvantage.

60. Schedule 2(a.1) of *Regulation 84-20* creates a distinction based on enumerated or analogous grounds. Schedule 2(a.1) of *Regulation 84-20* creates this distinction on its face as it

excludes from healthcare coverage out-of-hospital abortions, even though abortion is a procedure that can be performed safely outside of a hospital. This creates a distinction based on pregnancy and sex. Abortion is a medical procedure accessed almost exclusively by women and girls, as well as by transgender people, who become pregnant. Pregnancy discrimination is sex discrimination.

61. The *Regulation* also has an adverse and disproportionate impact on women, girls and transgender people for the reasons set out above. Abortion is an essential healthcare that is required almost exclusively by women and girls – as such no comparator is needed. Women, girls and transgender people seeking an abortion are denied the benefits provided to others. The *Regulation* treats abortion services in a manner that is different from the way the Province treats similar basic health services. For example, men seeking vasectomies are not subject to the same barriers put in place with respect to abortions. The *Regulation* singles out abortion, regulating and limiting *where* an abortion may be obtained, and creates an underinclusive and discriminatory regime under the *Medical Services Payment Act* on prohibited grounds of sex.

62. Schedule 2(a.1) of Regulation 84-20 has the effect of reinforcing, perpetuating or exacerbating disadvantage. Women, girls and transgender people historically have experienced disadvantage in the form of barriers to accessing reproductive health services, including abortion. Women, girls and transgender people also faced prejudice, stereotyping and stigmatization in relation to reproductive decision-making. The effect of *Regulation 84-20* reinforces, perpetuates and/or exacerbates these disadvantages. In particular:

- (a) the *Regulation* has the effect of reinforcing, perpetuating and/or exacerbating the historical disadvantage of access to reproductive health services by erecting barriers to abortion access;

- (b) the *Regulation* has the effect of reinforcing, perpetuating and/or exacerbating the current and historical stigma against women, girls and transgender people who have had, or choose to have an abortion as it treats abortion as a stigmatized medical procedure. This reflects on those who seek clinical abortions; and
- (c) the *Regulation* harms the dignity of those who require or obtain an abortion. By treating such services differently to and less worthy than similar health services it communicates that those who use them are less worthy of recognition or value.

63. *Regulation 84-20* also imposes costs, delay and other burdens on pregnant persons who require abortion which are not imposed on other groups in relation to similar health services.

64. The discriminatory restriction of New Brunswickers' access to abortion services is inconsistent with a number of international legal agreements signed and ratified by Canada, and by which Canada is bound under international law, including:

- (a) The Convention on the Elimination of All Forms of Discrimination Against Women, ratified by Canada in 1981. Article 12 requires State Parties to take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
- (b) The United Nations Convention against Torture (“UNCAT”), ratified by Canada in 1985. A delay or denial of abortion services amounts to torture or cruel, inhuman or degrading treatment in contravention of the UNCAT.

65. ***Schedule 2(a.1) of Regulation 84-20 cannot be saved by section 1 of the Charter.*** The infringements of sections 7 and 15 of the *Charter* cannot be justified pursuant to the criteria of

section 1. For the reasons set out above, Schedule 2(a.1) of *Regulation 84-20* was imposed for improper purposes and not a legitimate state objective.

66. There is no pressing and substantial objective for limiting the *Charter* right. There is no pressing and substantial policy concern, purpose or principle that explains why out-of-hospital abortions should be excluded from Medicare. In fact, this limitation is inconsistent with appropriate purposes and goals of the *Medical Services Payment Act* and the *Canada Health Act*, which is to ensure access, without financial barriers, to medically required services.

F. Section 2.01(b) of the *Medical Services Payment Act* Has No Application to Medical Office and Clinics

67. Section 2.01 of the *Medical Services Payment Act* states that “the medical services plan shall not provide payment for [...] (b) entitled services furnished in a private hospital facility in the Province.”

68. The Province has made recent public statements that suggests that if Schedule 2(a.1) of *Regulation 84-20* were struck down, it would still limit access to out-of-hospital abortions as “private clinics are not funded” (a quote from Premier Higgs in and around September 2020). Such statements make it necessary for the CCLA to seek declaratory relief that ensures the Province cannot use this provision to continue to limit access to abortion if Schedule 2(a.1) of *Regulation 84-20* is struck down as unconstitutional.

69. CCLA seeks a declaration that Section 2.01(b) of the *Medical Services Payment Act* does not apply to medical offices or clinics, like Clinic 554. Section 2.01(b) does not state that it will not fund privately-operated clinics. Rather, it states that it excludes private *hospital* facilities. A

private hospital facility is defined as “a *hospital facility* established, operated, or maintained by a person other than a regional health authority.” The term “hospital facility” is not defined.

70. As such, if Schedule 2(a.1) of *Regulation 84-20* is struck down as unconstitutional for the reasons set out above, Section 2.01(b) has no application to medical offices or clinics that offer such services.

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