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Court of Appeal Ruling Advances Funding for Gender Affirming Care

The Court of Appeal recently issued a significant decision, *Ontario (Health Insurance Plan) v KS,* on funding for gender affirming care. The ruling provides clarity on access to insured gender affirming procedures while leaving some questions unresolved for future consideration.

Background

The respondent, KS, is a transgender and non-binary individual. Their doctor requested pre-approval from the Ontario Health Insurance Plan ("OHIP") for gender affirming care, specifically, a vaginoplasty (surgery to create a vagina) without a penectomy (surgery to remove the penis). Since the procedure is not available in Canada, KS planned to undergo the procedure in Texas.

Regulation 552 (the "Regulations") under the *Health Insurance Act* (the "Act") refers to a Schedule of Benefits, which lists the medical services covered by the Act. KS was assessed by two health care professionals, both of whom confirmed that she met the criteria in the Schedule of Benefits for sex-reassignment surgery funding.

However, OHIP denied KS's funding request, arguing that a vaginoplasty without a penectomy is not listed as a covered procedure. According to OHIP, vaginoplasty would only be funded if performed together with a penectomy.

The Schedule of Benefits does list both vaginoplasty and penectomy as separate insured services. Additionally, Appendix D of the Schedule of Benefits refers to the World Professional Association for Transgender Health (WPATH) Standards of Care, which support an individualized approach to gender affirming care.

Procedural History

KS appealed OHIP's decision to the Health Services Appeal and Review Board (the "Board") on the basis that vaginoplasty was an insured service. The Board allowed her appeal, namely because vaginoplasty and penectomy are listed as separate surgeries in the Schedule of Benefits. The Board also found that

the reference to WPATH Standards of Care in the Schedule of Benefits demonstrates an intent for the Schedule of Benefits to be interpreted in a manner that is consistent with the WPATH Standards of Care.

OHIP unsuccessfully appealed the Board's decision to the Divisional Court, where they also refused to allow OHIP to raise a new issue – specifically, whether vaginoplasty without penectomy is generally accepted by the medical profession in Ontario as appropriate for someone in KS's situation. If the procedure were not found to be generally accepted, the Regulations would have allowed OHIP to deny coverage for the service when performed outside Canada

OHIP appealed the Divisional Court's decision.

The Court of Appeal Dismisses OHIP's Appeal

The Court of Appeal dismissed OHIP's appeal on the following grounds:

- Relying on statutory interpretation, the Court found that the drafters of the Schedule of Benefits could have specified different types of vaginoplasty – such as with or without a penectomy – but chose not to. The Court also echoed the Board's comments with respect to the WPATH Standards of Care.
- The Court determined it did not need to decide whether the Board and Divisional Court erred in failing to make a factual finding on whether the procedure is considered experimental in Ontario.
- The Court held that under section 24(1) of the Regulations, a service remains insured if it is specifically listed in the Schedule of Benefits, even if it would otherwise be considered uninsured, such as when deemed experimental in Ontario. The Court also confirmed that the Divisional Court was correct in refusing to consider OHIP's new argument under section 28.4(2) of the Regulations. OHIP had claimed that coverage could be denied because the procedure was performed outside Canada (in Texas) and was allegedly not generally accepted by the Ontario medical profession. The Court did not address the substance of this argument.

Key Takeaways and Looking Ahead

Overall, the Court of Appeal's decision is a win for persons seeking gender affirming care in Ontario. By upholding the Board's decision, the Court of Appeal recognized the importance of WPATH Standards of Care and the importance of

an individualized approach to gender affirming care.

The Court recognized that although the Divisional Court did not directly address KS's *Charter* arguments, the Divisional Court nevertheless found that the Board's interpretation was consistent with *Charter* values of equality and security of the person.

However, some questions remain about how gender affirming care will be treated moving forward. The Schedule of Benefits clearly lists certain insured services. However, for gender affirming procedures not specifically listed, there remains uncertainty about whether they may be denied coverage on the basis that they are "generally accepted within Ontario as experimental". In light of rising discrimination on the basis of gender identity, and as the legal and political landscape evolves, this leaves uncertainty about whether courts may in the future classify some unlisted procedures as "experimental", which could significantly impact gender affirming care.

While OHIP's arguments about section 28.4(2) of the Regulations were not heard due to a procedural defect, the question remains as to how this issue will next be adjudicated in the context of gender affirming care sought outside of Canada. It will be interesting to monitor how courts navigate whether these services are considered "generally accepted by the medical profession in Ontario as appropriate for a person in the same medical circumstances as the insured", and what kind of evidence the court will rely on in making such a determination.