

Official English Version of the judgment of the Court

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-029391-216
(500-17-082257-141)

DATE: March 21, 2024

**CORAM: THE HONOURABLE GENEVIÈVE MARCOTTE, J.A.
MARIE-JOSÉE HOGUE, J.A.
STEPHEN W. HAMILTON, J.A.**

ATTORNEY GENERAL OF QUEBEC
APPELLANT/INCIDENTAL RESPONDENT – Defendant
v.

CENTRE FOR GENDER ADVOCACY
RESPONDENT/INCIDENTAL APPELLANT – Plaintiff
and

**SAMUEL SINGER
SARAH BLUMEL
ELIZABETH HELLER
JENNA MICHELLE JACOBS**
RESPONDENTS – Plaintiffs
and

COALITION DES PROFESSIONNELS EN SANTÉ TRANS/NON-BINAIRE
INTERVENER
and

**EGALE CANADA (formerly known as EGALE CANADA HUMAN RIGHTS TRUST)
GENDER CREATIVE KIDS**
IMPLEADED PARTIES – Interveners

JUDGMENT

[1] The Attorney General of Quebec (“**AGQ**”) appeals a judgment of the Superior Court, District of Montreal (the Honourable Gregory Moore), rendered on January 28, 2021 and corrected on February 9, 2021, granting in part the respondents’ application for a declaratory judgment and declaring several provisions of the *Civil Code of Québec* (“**C.C.Q.**”) and of the *Regulation respecting change of name and of other particulars of civil status* (“**Regulation**”) invalid and of no force or effect on the ground that they violate the dignity and equality rights of transgender and non-binary persons.

[2] Whereas several legislative provisions were in dispute at trial, this appeal only concerns two of them, which impose specific requirements on minors who wish to change the designation of their sex or one or more of their given names on their acts of civil status.

[3] In the principal appeal, the Attorney General of Quebec challenges the judgment’s conclusion that invalidated the second paragraph of section 23.2 of the *Regulation* that requires that an application for a change of the designation of sex on the act of birth of a minor child be accompanied by a letter of a professional declaring that the requested change is appropriate. For its part, by way of incidental appeal, the Centre for Gender Advocacy complains that the judge refused to declare article 62 C.C.Q. invalid and of no force or effect, whereas that provision appears to require that minors 14 years of age or over notify their parents if they wish to have the given names appearing on their act of birth changed and to allow their parents to oppose that request.

[4] For the reasons of Marcotte et Hogue, J.J.A. and the concurring reasons of Hamilton, J.A., **THE COURT:**

[5] **ALLOWS** the principal appeal;

[6] **ALLOWS** in part the incidental appeal;

[7] **QUASHES** in part the judgment in first instance as follows:

[8] **STRIKES OUT** paragraph 341 of the judgment in first instance that declares invalid section 23.2 of the *Regulation respecting change of name and of other particulars of civil status*;

[9] **ADDS** the following conclusion:

[344 A] **DECLARES** that article 62 C.C.Q. must be read and interpreted such that the application for a change of given name made by a minor 14 years of age

or over and motivated by a gender identity issue constitutes a *compelling reason* within the meaning of that article.

[10] **THE WHOLE**, without legal costs, given the outcome of the appeal.

GENEVIÈVE MARCOTTE, J.A.

MARIE-JOSÉE HOGUE, J.A.

STEPHEN W. HAMILTON, J.A.

Mtre Marie-France Le Bel
Mtre Stephanie Lisa Roberts
BERNARD ROY (JUSTICE-QUÉBEC)
Mtre Amélie Pelletier-Desrosiers
Mtre Gabrielle Saint-Martin-Deaudelin
SOUS-MINISTÉRIAT DES AFFAIRES JURIDIQUES (SMAJ)
For the Attorney General of Quebec

Mtre Audrey Boctor
Mtre François Goyer
IMK
For the Centre for Gender Advocacy, Samuel Singer, Sarah Blumel, Elizabeth Heller and
Jenna Michelle Jacobs

Mtre Michael Lubetsky
Mtre Joseph-Anaël Lemieux
Mtre Faiz Munir Lalani
DAVIES WARD PHILLIPS & VINEBERG
For Egale Canada (formerly known as Egale Canada Human Rights Trust)

Mtre Michel Bélanger-Roy
Mtre Jérémy Boulanger-Bonnely
NORTON ROSE FULBRIGHT CANADA
For Gender Creative Kids

Mtre Molly Krishtalka
Mtre Alexandra Belley-McKinnon

Mtre Kariane Lebel
CABINET D'AVOCATS NOVALEX
For the Coalition des professionnels en santé trans/non-binaire

Hearing dates: April 5 and 6, 2022

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REASONS OF MARCOTTE AND HOGUE, JJ.A.

[11] This appeal is concerned with the validity of the requirements imposed by the legislator upon transgender or non-binary minors of 14 years of age or over who wish to change the designation of their sex or one or more of their given names in their acts of civil status.

I. BACKGROUND

Description of the Parties

[12] Several organizations and persons are parties to the appeal, and it is useful to begin by describing them.

[13] The Centre for Gender Advocacy (the “**Centre**”) is a Concordia University non-profit organization whose mandate is to promote gender equality and empowerment, especially within marginalized communities. The respondents Samuel Singer (“**Singer**”) and Jenna Michelle Jacobs (“**Jacobs**”) are, respectively, a non-binary person and a transgender person, that is to say people whose gender identity does not correspond to the sex indicated on their act of birth; the respondents Sarah Blumel and Elizabeth Heller are their respective partners.

[14] The impleaded parties are also non-profit organizations. Egale Canada (formerly known as Egale Canada Human Rights Trust) engages in the defense of the rights and interests of the 2SLGBTQI+ community in Canada and internationally, while Gender Creative Kids (“**GCK**”) promotes the rights and interests of transgender and non-binary children and offers them and their families support, information and other resources.

[15] Finally, the intervener, Coalition des professionnels en santé trans et non binaire (“**Coalition des professionnels en santé**”), comprises health professionals working in various specialties with Quebec’s transgender and non-binary community.

Procedural History

[16] In May 2014, the Centre applied for a declaratory judgment before the Superior Court to strike down several provisions of the C.C.Q. alleging that they prevented transgender and non-binary persons from fully participating in society.

[17] At the time, it challenged articles 71 and 72 C.C.Q., which made changing the designation of sex that appears in an act of birth conditional upon having successfully undergone medical treatment and sexual reassignment surgery, being a Canadian citizen and being at least 18 years of age. It also challenged articles 111, 115 and 116 C.C.Q., which required that a person's sex be designated on acts of birth and death.

[18] Singer and Jacobs as well as their partners later joined in that application. In the autumn of 2015, the three impleaded parties, the LGBT Family Coalition,¹ Egale Canada and GCK voluntarily intervened in the proceedings.²

[19] The application was amended a first time to take into account legislative amendments made in 2013, but that came into force on October 1st, 2015, which did away with the requirement of having to undergo medical treatment and surgical operations to be able to have the designation of sex that appears in an act of birth changed.³

[20] The application was again amended, this time to reflect legislative amendments made in 2016,⁴ which added to s. 10 of the Quebec *Charter of Human Rights and Freedoms* ("**Quebec Charter**")⁵ gender identity and expression as a protected right and which henceforth allowed the designation of sex that appears in the act of birth of a minor to be changed.⁶

[21] In the final version of the application, the respondents challenged the provisions which, in their opinion, were still problematic under the *Canadian Charter of Rights and Freedoms* ("**Canadian Charter**")⁷ and the *Quebec Charter* (collectively, the "**Charters**"), i.e. articles 59, 62, 71, 111, 115 and 116 C.C.Q. and the second paragraph of section 23.2 of the *Regulation*⁸, objecting to the following aspects thereof:

- the obligation to declare a newborn's sex in the register of civil status (arts. 111, 115 and 116 C.C.Q.);

¹ The LGBT Family Coalition discontinued on appeal.

² *Centre for Gender Advocacy c. Québec (Attorney General)*, 2015 QCCS 6026, paras. 27-30. The Extended Healthcare Professionals Coalition intervened on appeal, *Attorney General of Quebec c. Center for Gender Advocacy*, 2021 QCCA 1300.

³ *An Act to amend the Civil Code as regards civil status, successions and the publication of rights*, S.Q. 2013, c. 27, s. 3.

⁴ *An Act to strengthen the fight against transphobia and improve the situation of transgender minors in particular*, S.Q. 2016, c. 19.

⁵ *Charter of Human Rights and Freedoms*, CQLR, c. C-12.

⁶ *An Act to strengthen the fight against transphobia and improve the situation of transgender minors in particular*, *supra*, note 4, ss. 2 and 9.

⁷ *Canadian Charter of Rights and Freedoms*, part I of the *Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, 1982, c. 11.

⁸ *Regulation respecting change of name and of other particulars of civil status*, CQLR, c. CCQ, r. 4.

- the identification of the parents as father and mother in the register of civil status (arts. 111, 115 and 116 C.C.Q.);
- the fact that non-binary persons cannot identify themselves as such on their act of birth (art. 71, paragraph 1 C.C.Q.);
- the citizenship requirement to make a change to the designation of sex or name (arts. 59 and 71, paragraph 3 C.C.Q.);
- the requirement of a letter from a designated professional declaring that the requested change of the designation of sex is appropriate before a minor can change their designation of sex (s. 23.2 of the *Regulation*);
- a parent's right to be notified of the request for a change of their child's given name and to object to it (art. 62 C.C.Q.);
- the impossibility of changing an act of civil status of a child whose parent has changed the designation of their sex (art. 132 C.C.Q.);
- the designation of sex on the certificate of civil status (art. 146 C.C.Q.).

Conclusions of the Judgment under Appeal

[22] On January 28, 2021,⁹ following a 21-day hearing¹⁰ during which 29 witnesses, including 7 expert witnesses, were heard, Justice Gregory Moore declared the following provisions invalid and of no force or effect:

- arts. 111, 115 and 116 C.C.Q., to the extent that they oblige non-binary parents to be identified as mother or father instead of parent;
- art. 71, paragraph 1 C.C.Q., to the extent that it does not allow non-binary people, unlike transgender people, to change the designation of sex on their act of birth so that it corresponds to their gender identity;
- arts. 59 and 71 C.C.Q. to the extent that they require that an applicant be a Canadian citizen;
- s. 23.2 of the *Regulation*, to the extent that it requires that the application for a change of the designation of sex on a minor child's act of birth be accompanied

⁹ *Centre for Gender Advocacy c. Attorney General of Quebec*, 2021 QCCS 191 [Judgment under appeal]; the Judgment under appeal was corrected on February 9, 2021, to correct the spelling of the respondent's name, Centre for Gender Advocacy.

¹⁰ More precisely, the trial was held on January 15, 17, 18, 23, 24, 25, 29, 30 and 31 and on February 1, 6, 7, 8, 13, 14, 15, 19, 25, 26 and 27, 2019.

by a letter from a designated professional declaring that the requested change is appropriate;

- art. 146 C.C.Q., to the extent that it requires a designation of sex on certificates of civil status.

[23] As for art. 132 C.C.Q., the judge declared that it must be interpreted and applied to authorize the registrar of civil status to draw up new acts of civil status for a person whose parent has changed their name or their designation of sex.

[24] However, wishing to allow the legislator to make the required changes, the judge suspended the effect of most of his declarations of invalidity until December 31, 2021.¹¹

[25] However, although he acknowledged that the designation of sex on the act of birth discriminated against transgender and non-binary people, he concluded that such discrimination was justified to the extent that it provided an important benefit to society by allowing the recording of births in Quebec to be centralized and making it easier for people to prove their civil status. He therefore rejected the respondents' proposal to remove any designation of sex on the act of birth before a person has had the opportunity to choose the designation that best corresponds to their true gender identity. In his view, this was a minimal impairment, and it would be possible in any event to apply to the registrar of civil status at a later time to change the designation of sex that appears in the act of birth so as to reflect the person's true gender identity.

[26] Moreover, he refused to strike down art. 62 C.C.Q because he found that allowing parents to object to their child's application for a change of given name, when the application is motivated by a gender identity issue, did not infringe the rights of transgender or non-binary minors.¹²

[27] In response to the judgment, the legislator introduced new legislative amendments in 2022.¹³ Among other things, it deleted the Canadian citizenship requirement contained in articles 59 and 71 C.C.Q.¹⁴ and added a new article 70.1 C.C.Q. to provide that the designation of sex that appears in a person's act of birth or act of death can refer to the "non-binary" identifier.¹⁵ It amended several provisions of the *Civil Code* which referred to the father and mother, including articles 111 and 115 C.C.Q., to add the notion of "parent"¹⁶ and allowed a change of designation as father, mother or parent of a person mentioned in their child's act of birth so that it corresponds to the designation of sex in

¹¹ Judgment under appeal, *supra*, note 9, paras. 337-345.

¹² *Id.*, paras. 289-310.

¹³ *An Act respecting family law reform with regard to filiation and amending the Civil Code in relation to personality rights and civil status*, S.Q. 2022, c. 22.

¹⁴ *Id.*, ss. 17, 28.

¹⁵ *Id.*, s. 26.

¹⁶ *Id.*, ss. 32, 34.

their own act of birth or so that the designation of “parent” appears instead.¹⁷ Finally, it amended art. 146 C.C.Q. to specify that a person’s certificate of civil status states their designation of sex,¹⁸ whereas the previous version provided that “[a] certificate of civil status sets forth the person’s name, sex, place and date of birth.”

[28] Before turning to the analysis of the provisions challenged on appeal, it will be helpful to provide a brief overview of the legislative background in Quebec and its evolution.

Overview of the Legislative Background and its Evolution in Quebec

[29] The rules for obtaining a change of the designation of sex or a name appearing in the register and acts of civil status are found in Chapter I, entitled *NAME AND DESIGNATION OF SEX*, of Title Three of the *Civil Code of Québec*, entitled *CERTAIN PARTICULARS RELATING TO THE STATUS OF PERSONS*.

[30] Pursuant to those provisions, the acts of civil status are acts of birth, acts of marriage or civil union and acts of death (art. 107 C.C.Q.) and the registrar of civil status is the officer responsible for drawing up and modifying those acts. The registrar is also responsible for the keeping and custody of the register of civil status (consisting of all the acts of civil status and the juridical acts by which they are modified) and for ensuring its publication (art. 103 C.C.Q.).

[31] A newly born person’s act of birth is drawn up on the basis of the attestation of birth and of the declaration of birth. The attestation of birth is drawn up by the accoucheur (the person who delivered the baby) and indicates the place, date and time of birth, the apparent sex of the child, and the name and domicile of the mother or of the parent who gave birth to the child (art. 111 C.C.Q.). The accoucheur transmits a copy of the attestation to those who are required to declare the birth and transmits another copy of the attestation to the registrar of civil status (art. 112 C.C.Q.). The parents, or one of them, then declare the birth of the child to the registrar of civil status (art. 113 C.C.Q.). That declaration of birth contains various information, including the name assigned to the child and the child’s sex (art. 115 C.C.Q.).

[32] The obligation to declare a child’s birth and indicate their name and sex is consistent with the general principle that, at birth, every person is assigned a name, which is comprised of the surname and the given names (art. 50 C.C.Q.). Each person has a single surname, although it may be composed of two parts taken from those which compose their parents’ surnames, whereas a person may have multiple given names

¹⁷ *An Act respecting family law reform with regard to filiation and amending the Civil Code in relation to personality rights and civil status*, S.Q. 2022, c. 22, s. 39.

¹⁸ *Id.*, s. 41.

(art. 51 C.C.Q.). The name is entered in the act of birth which is drawn up by the registrar of civil status and appears in the register of civil status (art. 50 C.C.Q.).

[33] Although surnames are gender-neutral in Quebec, given names are often gendered. Indeed, though non-gendered, mixed or gender-neutral given names do exist, a given name's gender and its attributes generally correspond to a child's apparent sex.¹⁹ While it is true that this Court, in another context, has already held that, legally, a given name is not meant to designate a person's sex,²⁰ it remains that, factually, it is related thereto in most cases and people tend to associate a given name to a gender.

[34] A person's name plays an important role in their life given that, typically, it is by that name by which they will identify themselves and be known. Generally, citizens use the name than was given to them at birth throughout their entire lives. Although the legislator has not enacted any formal obligation to use that name, it has provided that a person who uses another name is liable for any resulting confusion or injury (art. 56 C.C.Q.); moreover, a person's right to use only one or some of the given names stated in their act of birth is recognized (art. 55 C.C.Q.).

[35] That being so, despite all of the stability that a person's name may call for,²¹ the legislator has taken care to establish a scheme by which it may be changed in acts of civil status.

[36] Given the importance of the acts and of the register of civil status, however, that scheme requires that any change of name always be authorized by the registrar of civil status or, as the case may be, by the court (art. 57 C.C.Q.). The change of name authorized by the registrar of civil status is a *change of name by way of administrative process* (arts. 58 to 64 C.C.Q.) and that which is within the jurisdiction of the court is a *change of name by way of judicial process* (arts. 65 to 66.1 C.C.Q.).

[37] Before the enactment of the *Civil Code of Québec*, only Canadian citizens of full age, who had been domiciled in Québec for one year or more, could file an application for a change of name by way of administrative process.²² The change of name of a minor could only occur if one of their parents effected that change for all of their descendants.²³

¹⁹ Charton, L. & C. de Pierrepont. "Les forums de discussion dans le processus de prénomination de l'enfant". *Enfances Familles Générations*, 2018, 31 : 81-90, online: <https://id.erudit.org/iderudit/1061780ar>, at para. 61.

²⁰ *Montreuil c. Directeur de l'état civil*, [1999] R.J.Q. 2819 (C.A.).

²¹ On the importance of name stability: *Plante c. Directeur de l'état civil*, [1996] R.D.F. 54 (C.S.); *Montreuil c. Directeur de l'état civil*, [1999] R.J.Q. 2819 (C.A.); in Benoît Moore, *Le droit de la famille et les minorités*, 2004 34-1-2 *Revue de Droit de l'Université de Sherbrooke* 229, 2004 CanLIIDocs 184, <<https://canlii.ca/t/2s41>>, consulted on 2023-03-13.

²² *Act respecting the change of name and of other particulars of civil status*, R.S.Q., c. C-10, s. 3.

²³ *Id.*, ss. 6, 8.

[38] It should also be noted that it was in 1977, by the enactment of the *Act to amend the Act respecting the change of name*,²⁴ that the Quebec legislator first granted to unmarried Canadian citizens of full age, residing in Quebec for at least a year, the right to have the designation of sex and one or more given names appearing in their civil status documents changed.²⁵ At the time, that act made that change conditional upon certain requirements, including that of having “successfully undergone medical treatments as well as surgical treatments involving a structural modification of the sexual organs intended to change the secondary sexual characteristics of the person.”²⁶

[39] In 1991, with the enactment of the *C.C.Q.*, minor changes were made to the statutory language regarding the change of designation of sex, without removing this requirement.²⁷

[40] The *C.C.Q.* did however introduce certain changes to the mechanism for the change of name of a minor. First, it allowed such an application to now be made by the minor’s tutor.²⁸ It also provided that, except for a compelling reason, the application for a

²⁴ *Act to amend the Act respecting the change of name*, S.Q. 1977, c. 19.

²⁵ *Id.*, ss. 16ff.

²⁶ *Id.*, s. 16.

²⁷ *C.C.Q.*, art. 71, as it read in 1994:

Art. 71. Every person who has successfully undergone medical treatments and surgical operations involving a structural modification of the sexual organs intended to change his secondary sexual characteristics may have the designation of sex which appears on his act of birth and, if necessary, his given names changed.

Only an unmarried person of full age who has been domiciled in Québec for at least one year and is a Canadian citizen may make an application under this article.

Art. 71. La personne qui a subi avec succès des traitements médicaux et des interventions chirurgicales impliquant une modification structurale des organes sexuels, et destinés à changer ses caractères sexuels apparents, peut obtenir la modification de la mention du sexe figurant sur son acte de naissance et, s’il y a lieu, de ses prénoms.

Seul un majeur, non marié, domicilié au Québec depuis au moins un an et ayant la citoyenneté canadienne, peut faire cette demande.

²⁸ *C.C.Q.*, art. 60, as it read in 1994:

Art. 60. The tutor to a minor may apply for the change of the name of his pupil, if the latter is a Canadian citizen and has been domiciled in Québec for at least one year.

Art. 60. Le tuteur d’un mineur peut demander le changement de nom de son pupille, si ce dernier a la citoyenneté canadienne et est domicilié au Québec depuis au moins un an.

The Minister’s commentaries are instructive in this regard:

[TRANSLATION]

This article amends the rules set out in sections 6 and 8 of the *Act respecting the change of name and of other particulars of civil status*. Given that art. 442 *C.C.Q.* (1980), reproduced in article 393, establishes that each spouse keeps their name during marriage, and that article 51 provides that the child does not necessarily or solely bear the name of one of their parents, it is no longer necessary to require the consent of the spouse and of the minor aged fourteen or over for the change of name of the parent who requires it for himself. However, it is still necessary to allow the minor’s tutor or the minor aged fourteen or over to object to the change of the minor’s name or, in the case of the addition of a part to the minor’s surname, to object to the

change of name of a child made by a parent would no longer be granted by the registrar of civil status if the minor of 14 years of age or over or their tutor had not been notified of the application or objected to it.²⁹

[41] In 2004, following the Court's judgment allowing same-sex marriages³⁰ and in order to ensure a certain consistency of the legal order,³¹ given that marriage was no longer heterosexual in nature,³² the C.C.Q. was again amended by removing the requirement that a person not be married to be able to modify the designation of sex appearing in an act of civil status.³³

[42] In April 2013, the Minister of Justice, Bertrand St-Arnaud, proposed new amendments.³⁴ In its initial form, the bill was only intended to remove the requirement of publicizing the change of name application where it was clearly related to gender identity issues³⁵ and to allow a person of full age born in Quebec, but domiciled outside of the province, to have the designation of their sex changed if such a change proved impossible in the country where the person was domiciled.³⁶

change of the minor's name. The right to maintain one's name is in addition to the other rights recognized by the Code. Underlying this article is the obligation to notify the child's tutor and the child aged fourteen and over, so that they can object if they wish.

Ministère de la Justice. *Commentaires du ministre de la Justice: Le Code civil du Québec*, t. I., Québec: Publications du Québec, 1993, at p. 51.

²⁹ C.C.Q., art. 62, as it read in 1994:

Art. 62. Except for a compelling reason, no change of name of a minor child may be granted if the tutor or the minor, if fourteen years of age or over, has not been notified of the application or objects to it.

However, in the case of an application for the addition to the surname of the minor of a part taken from the surname of the father or mother, only the minor has the right to object.

Art. 62. À moins d'un motif impérieux, le changement de nom à l'égard d'un enfant mineur n'est pas accordé si le tuteur ou le mineur de quatorze ans et plus n'a pas été avisé de la demande ou s'il s'y oppose.

Cependant, lorsque l'on demande l'ajout au nom de famille du mineur d'une partie provenant du nom de famille de son père ou de sa mère, le droit d'opposition est réservé au mineur.

³⁰ *Ligue catholique pour les droits de l'homme c. Hendricks*, [2004] R.J.Q. 851, [2004] R.D.F. 247.

³¹ National Assembly, *Journal des débats*, 38th Leg., 1st sess., No. 59, 21 September 2004 (Jacques P. Dupuis).

³² *Ibid.*

³³ *An Act to amend the Civil Code as regards marriage*, S.Q. 2004, c. 23, s. 1.

³⁴ National Assembly, *Journal des débats*, 40th Leg., 1st sess., vol. 43, No. 40, 17 April 2013, p. 2492.

³⁵ Bill 35, *An Act to amend the Civil Code as regards civil status, successions and the publication of rights*, 40th Leg. (Qc.), 1st sess., 2013, ss. 1, 2.

³⁶ *Id.*, ss. 3, 38.

[43] Following the work of the Standing Committee on Institutions (the “Committee”),³⁷ the bill was amended to abolish the requirement that a person of full age successfully undergo medical treatments and surgical operations involving a structural modification of the sexual organs to be able to have the designation of sex changed. That amendment did not however come into force when the bill was assented to on December 6, 2013, since it provided that the change of the designation of sex would be made conditional upon regulatory requirements,³⁸ which required the enactment of a regulation that would have to be examined by the Committee.³⁹ In 2015, the Committee undertook special consultations on the proposed regulation to establish the terms of the process for changing the designation of sex of a person of full age appearing on an act of civil status.

[44] Initially, the proposed regulation required that the person of full age requesting that the designation of sex be changed declare having lived for at least two years under the appearance of the sex that they wished to see designated thereafter and having the intention of living at all times under that appearance until their death.⁴⁰ It also required that the application be supported by a letter from a physician, a psychologist, a psychiatrist or a sexologist declaring having evaluated or followed the person requesting the change and being of the opinion that it was appropriate.⁴¹ Finally, it required that the applicant provide an affidavit of a person of full age who has known the applicant for at least two years and attesting that, to their knowledge, the person requesting the change has been living for the last two years under the appearance of the sex that the applicant wants to see designated.⁴²

³⁷ National Assembly, *Journal des débats*, 40th Leg., 1st sess., vol. 43, No. 54, 22 May 2013, pp. 15-1 (Mathieu-Joel Gervais). At the time, the latter expressed reservations about the requirement to obtain a letter from a professional in order to change one’s sex designation, given the difficulties of access, and proposed a simple solemn declaration (p. 19); National Assembly, *Journal des débats*, 40th Leg., 1st sess., vol. 43, No. 54, 23 May 2013, p. 28 et seq. (Gabrielle Bouchard); Quebec, National Assembly, *Mémoire déposé par le Comité trans du Conseil québécois LGBT dans le cadre des consultations particulières et auditions publiques sur le projet de loi 35*, CI-007M, 23 May 2013, p. 4; Quebec, National Assembly, *Mémoire déposé par la Commission des droits de la personne et des droits de la jeunesse dans le cadre des consultations particulières et auditions publiques sur le projet de loi 35*, CI-001M, 17 May 2013, pp. 6-10; Quebec, National Assembly, *Mémoire déposé par Dre Karine J. Igartua dans le cadre des consultations particulières et auditions publiques sur le projet de loi 35*, CI-009M, 23 May 2013, p. 4; Quebec, National Assembly, *Mémoire déposé par Aide aux transsexuels et transsexuelles du Québec dans le cadre des consultations particulières et auditions publiques sur le projet de loi 35*, CI-011M, May 2013, p. 4; Quebec, National Assembly, *Mémoire déposé par l’association canadienne des professionnels en santé des personnes transsexuelles dans le cadre des consultations particulières et auditions publiques sur le projet de loi 35*, CI-008M, 23 May 2013, p. 2-5.

³⁸ *An Act to amend the Civil Code as regards civil status, successions and the publication of rights*, S.Q. 2013, c 27, ss. 3, 4.

³⁹ *Id.*, s. 43.

⁴⁰ *Regulation to amend the Regulation respecting change of name and other particulars of civil status* (Draft Regulation), (2014) 146 G.O. II, 2789, s. 1.

⁴¹ *Ibid.*

⁴² *Ibid.*

[45] During the consultation process, a number of concerns were raised with respect to those requirements, however. Several participants questioned the appropriateness of requiring that a person of full age live for two years under the appearance of the sex that they wished to enter in their civil status document. They argued that such a requirement risked placing transgender people in a state of discrimination and vulnerability by forcing them to live for two years in a situation where their gender identity did not correspond to their civil identity, in addition to feeding discriminatory prejudices and stereotypes.⁴³ They also questioned the requirement of providing a letter from a health professional declaring having evaluated or followed the person requesting the change and being of the opinion that it was appropriate, as well as the requirement of providing a declaration from a third party who has known the applicant for at least two years and attesting that, to their knowledge, the person requesting the change has been living for the last two years under the appearance of the sex that the applicant chose to designate, noting that such

⁴³ Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par la Commission des droits de la personne et des droits de la jeunesse*, CI-003M, 13 February 2015, p. 21; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par la Coalition jeunesse montréalaise de lutte à l'homophobie*, CI-010M, 30 January 2015, p. 1; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par la Coalition des familles LGBT*, CI-001M, 29 January 2015, p. 1; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par Action Santé travesti(e)s & transsexuel(le)s du Québec*, CI-011M, 15 April 2015, pp. 2-3; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par Françoise Susset*, CI-004M, 13 April 2015, pp. 2-3; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par le Conseil québécois LGBT*, CI-008M, January 2015, pp. 9-10; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par le Barreau du Québec*, CI-008M, January 2015, pp. 5-6; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par le groupe d'action trans de l'Université de Montréal*, CI-006M, 12 April 2015, pp. 6-11; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par Matthew McLauchlin*, CI-012M, 27 January 2015, pp. 1-2.

requirements only increased the social isolation that transgender people typically experience.⁴⁴

[46] During exchanges with the Committee members, several witnesses acknowledged that an attestation by a third party could be an acceptable compromise⁴⁵ to ensure the stability of acts of civil status, whereas others argued that that it would be sufficient to require that the person requesting the change confirm their intention of maintaining the requested gender identity.⁴⁶ Most objected to the requirement of an attestation from a

⁴⁴ Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par la Commission des droits de la personne et des droits de la jeunesse*, CI-003M, 13 February 2015, p. 22; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par la Coalition jeunesse montréalaise de lutte à l'homophobie*, CI-010M, 30 January 2015, p. 2; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par le Conseil québécois LGBT*, CI-008M, January 2015, p. 8; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par le groupe d'action trans de l'Université de Montréal*, CI-006M, 12 April 2015, pp. 15-16; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par Matthew McLauchlin*, CI-012M, 27 January 2015, p. 4.

⁴⁵ Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par le Centre d'orientation sexuelle de l'Université McGill*, CI-015M, 1 May 2015, p. 3.

⁴⁶ Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par la Commission des droits de la personne et des droits de la jeunesse*, CI-003M, 13 February 2015, p. 22; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par Françoise Susset*, CI-004M, 13 April 2015, p. 6; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par le Barreau du Québec*, CI-008M, January 2015, p. 8; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par le Comité visibilité intersexe*, CI-013M, 24 April 2015, p. 3; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par le groupe d'action trans de l'Université de Montréal*, CI-006M, 12 April 2015, pp. 17-20; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement*

health professional, however, because of accessibility issues and the pathologization implied by such an obligation.⁴⁷

[47] The debates show that the Committee was attempting to strike a delicate balance between the exercise of transgender people's rights, on one hand, and the stability of acts of civil status on the other.⁴⁸ Following those public consultations, it recommended

de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par le Centre d'orientation sexuelle de l'Université McGill, CI-015M, 1 May 2015, p. 3.

⁴⁷ Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par la Commission des droits de la personne et des droits de la jeunesse*, CI-003M, 13 February 2015, p. 23; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par la Coalition jeunesse montréalaise de lutte à l'homophobie*, CI-010M, 30 January 2015, p. 2; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par la Coalition des familles LGBT*, CI-001M, 29 January 2015, p. 2; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par Action Santé travesti(e)s & transsexuel(le)s du Québec*, CI-011M, 15 April 2015, pp. 3-4; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par Françoise Susset*, CI-004M, 13 April 2015, pp. 4-5; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par le Conseil québécois LGBT*, CI-008M, January 2015, p. 11; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par le Barreau du Québec*, CI-008M, January 2015, pp. 4-5, 6-7; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par le Collège des médecins*, CI-014M, 29 April 2015, p. 2; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par le groupe d'action trans de l'Université de Montréal*, CI-006M, 12 April 2015, pp. 12-14; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par le Centre d'orientation sexuelle de l'Université McGill*, CI-015M, 1 May 2015, p. 3; Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par Matthew McLaughlin*, CI-012M, 27 January 2015.

⁴⁸ National Assembly, *Journal des débats*, 41st Leg., 1st sess., vol. 44, No. 30, 15 April 2015, pp. 1-2. In his comments, the registrar of civil status reiterated the importance of stability, corroboration and consistency: Quebec, National Assembly, *Mémoire déposé lors du mandat « Consultations particulières et auditions publiques sur le projet de règlement relatif au Règlement sur le changement*

removing the obligation of having lived at least two years under the appearance of the sex for which the change was requested⁴⁹ and proposed that such a request be supported by an affidavit of the applicant stating that the new designation is that which best corresponds to the applicant's gender identity and that the applicant understands the seriousness of the undertaking.⁵⁰ It also recommended doing away with the requirement of providing a letter from a health professional and to simply require an affidavit of a person of full age who has known the transgender person for at least six months attesting to the seriousness of the undertaking.⁵¹

[48] The proposed regulation thus limited the requirements imposed upon the person of full age wishing to change the designation of gender to 1) the obligation to attest by affidavit that the designation of sex requested was the designation that best corresponded to the applicant's gender identity, that the applicant assumed and intended to continue to assume that gender identity, that the applicant understood the seriousness of the undertaking, and that it was voluntary, and that the applicant's consent was given in a free and enlightened manner (s. 23.1 of the *Regulation*); and 2) the obligation to provide an affidavit of a person of full age attesting to having known the applicant for at least one year and that the applicant is fully aware of the seriousness of the undertaking (first paragraph of s. 23.2 of the *Regulation*.)⁵²

[49] Shortly thereafter, MNA Manon Massé introduced a bill which was this time intended to allow transgender minors to have the designation of their sex changed on their acts of civil status.⁵³ A few weeks later, the then Minister of Justice, Stéphanie Vallée, introduced a bill of her own,⁵⁴ to allow minors to obtain a change of the designation of their sex that appears in their act of birth from the registrar of civil status by submitting, in the case of an applicant aged 14 or over, an application made by themselves or by their tutor with their consent, or, in other cases, by their tutor only.⁵⁵ This bill also recognized, for the first time, the right of minors of 14 years of age or over to ask

de nom et d'autres qualités de l'état civil pour les personnes transsexuelles ou transgenres » par le directeur de l'état civil, CI-016M, 7 May 2015, p. 5.

⁴⁹ Quebec, National Assembly, Committee on Institutions, Special consultations and public hearings on the draft regulation concerning the Regulation respecting change of name and of other particulars of civil status for transsexual and transgender persons: observations and recommendations, May 2015, p. 2.

⁵⁰ Quebec, National Assembly, Committee on Institutions, Special consultations and public hearings on the draft regulation concerning the Regulation respecting change of name and of other particulars of civil status for transsexual and transgender persons: observations and recommendations, May 2015, p. 2.

⁵¹ *Id.*, p. 3.

⁵² *Regulation to amend the Regulation respecting change of name and of other particulars of civil status*, (2015) 147 G.O. II, 2204, s. 1.

⁵³ Bill 598, *An Act to amend the Civil Code as regards civil status to allow a change of designation of sex for transgender children*, 41st Leg. (Qc.), 1st sess., 2016.

⁵⁴ Bill 103, *An Act to strengthen the fight against transphobia and improve the situation of transgender minors in particular*, 41st Leg. (Qc.), 1st sess., 2016.

⁵⁵ *Id.*, ss. 8, 9.

for themselves that their name be changed.⁵⁶ It also provided the parents' right to be notified of such an application for a change of name and to object to it.⁵⁷ The bill proposed to amend the *Regulation* by adding the second paragraph of section 23.2 establishing the terms of the process aimed at having the designation of sex appearing in an act of civil status relating to a minor changed.⁵⁸ It also provided amendments to the *Quebec Charter* by adding "gender identity" as a prohibited ground of discrimination.⁵⁹

[50] For the most part, the proposed amendments were welcomed favourably by the participants, who recognized that they represented a further step towards full recognition of the rights of transgender people in Quebec.⁶⁰ Many welcomed the bill without reservation,⁶¹ while others suggested that social workers and marriage and family therapists be added to the list of professionals that could provide the required

⁵⁶ Bill 103, *An Act to strengthen the fight against transphobia and improve the situation of transgender minors in particular*, s. 2.

⁵⁷ *Id.*, s. 4.

⁵⁸ *Id.*, s. 19.

⁵⁹ *Id.*, s. 11.

⁶⁰ Quebec, National Assembly, *Mémoire déposé par le Dr Shuvo Ghosh dans le cadre des consultations particulières sur le projet de loi 103 visant à renforcer la lutte contre la transphobie et à améliorer notamment la situation des mineurs transgenres*, CRC-008M, 7 June 2016, pp. 3-4; Quebec, National Assembly, *Mémoire déposé par la Coalition des familles LGBT dans le cadre des consultations particulières sur le projet de loi 103 visant à renforcer la lutte contre la transphobie et à améliorer notamment la situation des mineurs transgenres*, CRC-001M, 2 June 2016, p. 1; Quebec, National Assembly, *Mémoire déposé par l'ordre des psychologues du Québec dans le cadre des consultations particulières sur le projet de loi 103 visant à renforcer la lutte contre la transphobie et à améliorer notamment la situation des mineurs transgenres*, CRC-003M, 6 June 2016, p. 3; Quebec, National Assembly, *Mémoire déposé par la Commission des droits de la personne et des droits de la jeunesse dans le cadre des consultations particulières sur le projet de loi 103 visant à renforcer la lutte contre la transphobie et à améliorer notamment la situation des mineurs transgenres*, CRC-005M, 6 June 2016, pp. 1-2; Quebec, National Assembly, *Mémoire déposé par le Conseil québécois LGBT dans le cadre des consultations particulières sur le projet de loi 103 visant à renforcer la lutte contre la transphobie et à améliorer notamment la situation des mineurs transgenres*, CRC-007M, 6 June 2016, p. 2; Quebec, National Assembly, *Mémoire déposé par la Fondation émergence dans le cadre des consultations particulières sur le projet de loi 103 visant à renforcer la lutte contre la transphobie et à améliorer notamment la situation des mineurs transgenres*, CRC-004M, 6 June 2016, p. 1; Quebec, National Assembly, *Mémoire déposé par l'Ordre des travailleurs sociaux et des thérapeutes conjugaux et familiaux du Québec dans le cadre des consultations particulières sur le projet de loi 103 visant à renforcer la lutte contre la transphobie et à améliorer notamment la situation des mineurs transgenres*, CRC-006M, 6 June 2016, p. 1; Quebec, National Assembly, *Mémoire déposé par Enfants transgenres Canada dans le cadre des consultations particulières sur le projet de loi 103 visant à renforcer la lutte contre la transphobie et à améliorer notamment la situation des mineurs transgenres*, CRC-002M, 3 June 2016, pp. 2 & 5.

⁶¹ Quebec, National Assembly, *Mémoire déposé par le Conseil québécois LGBT dans le cadre des consultations particulières sur le projet de loi 103 visant à renforcer la lutte contre la transphobie et à améliorer notamment la situation des mineurs transgenres*, CRC-007M, 6 June 2016, p. 2.

attestation.⁶² Some, on the other hand, expressed reservations about the requirements retained by the government.

[51] Finally, the bill was enacted on June 10, 2016⁶³ and it was in that legislative context that the Superior Court was called upon to decide the application for a declaratory judgment.

II. JUDGMENT UNDER APPEAL

[52] In his reasons, the trial judge explained the social and factual circumstances in which relief was being sought, he undertook a review of the legislative framework, he summarized the parties' submissions and the conclusions sought, after which he proceeded to analyse each of the impugned provisions on the evidence adduced before drawing the conclusions summarized above.⁶⁴

[53] It will be helpful to return to his analysis of the two provisions concerning minors that are the subject of this appeal.

1. On the Requirement to Provide a Declaration from a Health Professional (s. 23.2 of the Regulation)

[54] The judge found that the requirement in paragraph 2 of s. 23.2 of the *Regulation*⁶⁵ that minors provide a letter from a designated health professional confirming that the

⁶² Quebec, National Assembly, *Mémoire déposé par la Fondation émergence dans le cadre des consultations particulières sur le projet de loi 103 visant à renforcer la lutte contre la transphobie et à améliorer notamment la situation des mineurs transgenres*, CRC-004M, 6 June 2016, p. 2; Quebec, National Assembly, *Mémoire déposé par l'Ordre des travailleurs sociaux et des thérapeutes conjugaux et familiaux du Québec dans le cadre des consultations particulières sur le projet de loi 103 visant à renforcer la lutte contre la transphobie et à améliorer notamment la situation des mineurs transgenres*, CRC-006M, 6 June 2016, p. 2; Quebec, National Assembly, *Mémoire déposé par Enfants transgenres Canada dans le cadre des consultations particulières sur le projet de loi 103 visant à renforcer la lutte contre la transphobie et à améliorer notamment la situation des mineurs transgenres*, CRC-002M, 3 June 2016, p. 2.

⁶³ *An Act to strengthen the fight against transphobia and improve the situation of transgender minors in particular*, S.Q. 2016, c. 19.

⁶⁴ See paras. 22-26 above.

⁶⁵ Section 23.2, para. 2 of the *Regulation* reads as follows:

23.2.
(...)
An application for a change of the designation of sex for a minor child must be accompanied by, in addition to the documents referred to in section 4, a letter from a physician, a psychologist, a psychiatrist, a sexologist or a social worker authorized to practise in Canada or in the State in which the child is domiciled who declares having evaluated or followed the

23.2.
[...]
La demande de changement de la mention du sexe d'un enfant mineur doit, outre les documents prévus à l'article 4, être accompagnée d'une lettre d'un médecin, d'un psychologue, d'un psychiatre, d'un sexologue ou d'un travailleur social autorisé à exercer au Canada ou dans l'État du domicile de l'enfant, qui déclare avoir évalué ou suivi l'enfant et qui

change of the designation of sex applied for is appropriate created a distinction based on age, since persons of full age need only provide an affidavit of a person of full age, who has known them for at least one year, who confirms the seriousness of the undertaking.⁶⁶

[55] In his view, that requirement constituted an administrative hurdle that transgender minors may find impossible to overcome, rendering it more unlikely that they be able to obtain a change of designation of sex appearing on their civil status documents,⁶⁷ since they have to call upon the health and social services system to find a designated professional able to help them, besides having to miss school or work to meet them, and bearing the costs thereof.

[56] He therefore proceeded with the analysis under section 1 of the *Canadian Charter* and found no rational connection between that requirement and the legislative objective being pursued, which is that of ensuring the seriousness of a transgender youth's application to change their designation of sex that appears in their act of birth.⁶⁸ He based his conclusion on four grounds: 1) the health professional's declaration that the change is appropriate serves no useful purpose in achieving the legislative objective, because only the person concerned by the application is able to affirm or confirm their gender identity;⁶⁹ 2) the legislative provision denies the minor the power to make a decision which concerns them by entrusting it instead to the health professional who, in many instances, will only have a fleeting acquaintance with them;⁷⁰ 3) the provision contradicts its enabling legislation by imposing medical treatment without regard to the 2013 legislative amendments,⁷¹ whereas nothing in the evidence suggests that being transgender is a health issue; and, 4) the *Regulation* does not provide any guidance as to the declaration's contents, thereby showing its limited usefulness.⁷²

child and is of the opinion that the change of designation is appropriate.

est d'avis que le changement de cette mention est approprié.

⁶⁶ Judgment under appeal, at paras. 257-258. Indeed, s. 23.2, para. 1 of the *Regulation* provides as follows for persons of full age:

23.2. An application for a change of the designation of sex that appears in an act of birth of a person of full age must be accompanied by, in addition to the documents referred to in section 4, an affidavit of a person of full age who attests to having known the applicant for at least one year and who confirms that the applicant is fully aware of the seriousness of the application.
(...)

23.2. La demande de changement de la mention du sexe figurant à un acte de naissance d'une personne majeure, outre les documents prévus à l'article 4, doit être accompagnée d'une déclaration sous serment d'une personne majeure qui atteste connaître le demandeur depuis au moins un an et qui confirme que le demandeur reconnaît le sérieux de sa demande
[...]

⁶⁷ Judgment under appeal, *supra*, note 9, paras. 260-263.

⁶⁸ *Id.*, para. 266.

⁶⁹ *Id.*, para. 267.

⁷⁰ *Ibid.*

⁷¹ *Id.*, para. 268.

⁷² *Id.*, paras. 272-273.

[57] In his opinion, requiring such a letter was not a minimal impairment of the protected rights, since transgender minors who cannot find, afford, meet with, or confide in a health professional who is knowledgeable about the reality of transgender people will have their applications rejected and their rights violated.⁷³ Moreover, the second paragraph of s. 23.2 of the *Regulation* complicates the recognition of their identity, when they are particularly vulnerable.⁷⁴ Further, the judge was of the view that the AGQ had not shown how the requirements imposed on adults would be insufficient to demonstrate that the undertaking by transgender minors was serious.⁷⁵

[58] He therefore concluded that section 23.2 of the *Regulation* violated their dignity and equality rights and that the infringement was not justified under s. 1 of the *Canadian Charter*. He therefore declared it invalid and of no force or effect. After pointing out that section 23.2 of the *Regulation* applied to all minors, he noted that the concerns raised with regard to the designated professional's confirmation letter only involved minors 14 years of age or over. He suspended the declaration of invalidity until December 31, 2021, to allow the legislator time to develop an alternative means of ensuring that applicants aged 14 to 17 are serious in their desire to correct the designation of sex appearing on their act of birth to conform to their gender identity.⁷⁶

2. On Parental Objection to the Change of Name (article 62 C.C.Q.)

[59] In the judge's view, a parent's right to object to the application for change of their child's name is not discriminatory within the meaning of section 15 of the *Canadian Charter* even though article 62 C.C.Q.⁷⁷ creates a distinction based on age because youth between the ages of 14 and 17 are treated differently from adults and even though it leads

⁷³ Judgment under appeal, *supra*, note 9, paras. 276-277.

⁷⁴ *Id.*, paras. 279-281.

⁷⁵ *Id.*, para. 278.

⁷⁶ *Id.*, at para. 284.

⁷⁷ Article 62 C.C.Q. reads as follows:

62. Except for a compelling reason, no change of name of a minor child may be granted if, as the case may be, the father and mother or the parents of the minor child as legal tutors, the tutor, if any, or the minor, if 14 years of age or over, have not been notified of the application or if any of those persons object to it.

The same applies in the case of an application for the addition to the surname of the minor of a part taken from the surname of the father or mother or of one of the parents, except with respect to the right to object reserved to the tutor of a minor under 14 years of age or to the minor 14 years of age or over.

62. À moins d'un motif impérieux, le changement de nom à l'égard d'un enfant mineur n'est pas accordé si, selon le cas, les père et mère ou les parents de l'enfant mineur à titre de tuteurs légaux, le tuteur, le cas échéant, ou le mineur de 14 ans et plus n'ont pas été avisés de la demande ou si l'une de ces personnes s'y oppose.

Il en est de même lorsque l'on demande l'ajout au nom de famille du mineur d'une partie provenant du nom de famille de son père ou de sa mère ou de l'un de ses parents, sauf en ce qui concerne le droit d'opposition qui est réservé au tuteur du mineur de moins de 14 ans ou au mineur de 14 ans et plus.

to a distinction between minors whose parents object to the change of name and those whose parents do not.⁷⁸

[60] He found it possible for a transgender minor to circumvent any parental objection.⁷⁹ First, because article 62 C.C.Q. allows them to request permission not to notify their parents of their application to change their name and to request that any parental objection be disregarded. Second, because, for a compelling reason, the registrar of civil status can evaluate their application on its merits without the parents having been notified and notwithstanding their objection. Moreover, article 66.1 C.C.Q. allows a minor who anticipates that their parents will object to file their application to change their name with the court instead of the registrar of civil status, in which case the objection will be subject to cross-examination and may be dismissed. Finally, article 74 C.C.Q. expressly provides that decisions by the registrar of civil status may be reviewed by the court.

[61] The judge also noted the lack of evidence that any application for a change of name would have been denied on the grounds of the parents' objection.⁸⁰

[62] He therefore concluded that the respondents had failed to demonstrate that article 62 C.C.Q. had a discriminatory impact on transgender youth who wish to change their name without changing the designation of their sex in their act of birth.

III. ISSUES IN DISPUTE

A. *Principal Appeal*

[63] The AGQ raises two issues in its principal appeal, divided in various sub-issues that can be restated as follows:

1. **Did the trial judge err in his interpretation of s. 23.2 of the *Regulation*?**
 - 1.1 In failing to read s. 23.1 and paragraph 2 of s. 23.2 of the *Regulation* together?
 - 1.2 In interpreting the condition of having “evaluated or followed the child” contained in paragraph 2 of s. 23.2 of the *Regulation* as being in the nature of a medical treatment?
 - 1.3 In reading into paragraph 2 of s. 23.2 of the *Regulation* a requirement that the professional be knowledgeable about transgender and non-binary reality?

⁷⁸ Judgment under appeal, *supra*, note 9, para. 291.

⁷⁹ *Id.*, paras. 298-306.

⁸⁰ *Id.*, para. 309.

2. Did the trial judge err in determining that s. 23.2 of the *Regulation* violated the rights to dignity and equality of transgender minors of 14 years of age or over?

2.1 In finding an unjustified violation of the right to equality protected by s. 15 of the *Canadian Charter*?

2.2 In finding that age constituted *per se* a prohibited ground of distinction within the meaning of s. 10 of the *Quebec Charter*?

2.3 In finding a violation of the right to dignity protected by s. 4 of the *Quebec Charter*?

B. Incidental Appeal

[64] For its part, the incidental appellant Centre raises three issues:

1. Did the trial judge err in holding that article 62 C.C.Q. did not breach transgender minors' right to equality guaranteed by section 15 of the *Canadian Charter*?

2. Did the trial judge err in holding that article 62 C.C.Q. did not breach transgender minors' rights to equality, dignity, inviolability, freedom, security and privacy conferred by sections 10, 1, 4 and 5 of the *Quebec Charter*?

3. Can article 62 C.C.Q. be interpreted so as to conform to the *Charters*?

C. Intervention

[65] The Coalition des professionnels en santé, as an intervener in the principal appeal and in the incidental appeal, also challenge the validity of paragraph 2 of section 23.2 of the *Regulation* and article 62 C.C.Q., but by arguing, rather, that they violate the rights protected by section 7 of the *Canadian Charter*.

IV. ANALYSIS

A. Principal Appeal

1. *Did the trial judge err in his interpretation of section 23.2 of the Regulation?*

[66] There is no dispute that the interpretation of a provision such as section 23.2 of the *Regulation* is subject on appeal to the standard of correctness.

[67] It is useful to begin our analysis by recalling the language of sections 23.1 and 23.2 of the *Regulation*:

23.1. If an applicant's affidavit required under section 1 is in support of an application made by a person 14 years of age or over for a change of the designation of sex that appears in the person's act of birth, the affidavit must also attest that

(1) the designation of sex requested is the designation that best corresponds to the applicant's gender identity;

(2) the applicant assumes and intends to continue to assume that gender identity;

(3) the applicant understands the seriousness of the undertaking;

(4) the applicant's undertaking is voluntary and his or her consent is given in a free and enlightened manner.

If a tutor's affidavit is in support of an application made by the tutor for a minor child, the affidavit must also attest that

(1) the designation of sex requested for the minor child is the designation that best corresponds to the child's gender identity;

(2) the minor child assumes that gender identity;

(3) the tutor understands the seriousness of the minor child's undertaking; and

(4) the tutor's undertaking for the minor child is voluntary and his or her consent is given in a free and enlightened manner.

23.1. Si elle appuie une demande de changement de la mention du sexe figurant à son acte de naissance faite par une personne âgée de 14 ans et plus, la déclaration sous serment du demandeur prévue à l'article 1 doit en outre attester:

1° que la mention du sexe qu'il demande est celle qui correspond le mieux à son identité de genre;

2° qu'il assume et a l'intention de continuer à assumer cette identité de genre;

3° qu'il comprend le sérieux de sa démarche;

4° que sa démarche est faite de façon volontaire et que son consentement est libre et éclairé.

Si elle appuie une demande faite par le tuteur pour un enfant mineur, cette déclaration sous serment du tuteur doit en outre attester:

1° que la mention du sexe qu'il demande pour l'enfant mineur est celle qui correspond le mieux à l'identité de genre de cet enfant;

2° que l'enfant mineur assume cette identité de genre;

3° qu'il comprend le sérieux de la démarche de l'enfant mineur;

4° que sa démarche pour l'enfant mineur est faite de façon volontaire et que son consentement est libre et éclairé.

23.2. An application for a change of the designation of sex that appears in an act of birth of a person of full age must be accompanied by, in addition to the documents referred to in section 4, an affidavit of a person of full age who attests to having known the applicant for at least one year and who confirms that the applicant is fully aware of the seriousness of the application.

An application for a change of the designation of sex for a minor child must be accompanied by, in addition to the documents referred to in section 4, a letter from a physician, a psychologist, a psychiatrist, a sexologist or a social worker authorized to practise in Canada or in the State in which the child is domiciled who declares having evaluated or followed the child and is of the opinion that the change of designation is appropriate.

23.2. La demande de changement de la mention du sexe figurant à un acte de naissance d'une personne majeure, outre les documents prévus à l'article 4, doit être accompagnée d'une déclaration sous serment d'une personne majeure qui atteste connaître le demandeur depuis au moins un an et qui confirme que le demandeur reconnaît le sérieux de sa demande.

La demande de changement de la mention du sexe d'un enfant mineur doit, outre les documents prévus à l'article 4, être accompagnée d'une lettre d'un médecin, d'un psychologue, d'un psychiatre, d'un sexologue ou d'un travailleur social autorisé à exercer au Canada ou dans l'État du domicile de l'enfant, qui déclare avoir évalué ou suivi l'enfant et qui est d'avis que le changement de cette mention est approprié.

[68] We note that section 23.1 and the first paragraph of section 23.2 were enacted in 2015 when article 71 C.C.Q. was amended to allow a change of the designation of sex of a person of full age without requiring them to have undergone “medical treatments and surgical operations involving a structural modification of the sexual organs intended to change their secondary sexual characteristics.”

[69] For its part, the second paragraph of section 23.2 was added in 2016 when article 71 C.C.Q. was further amended and article 71.1 C.C.Q. was added to henceforth allow the change of designation of sex of a minor person.

1.1 *Did the trial judge err in failing to read section 23.1 and paragraph 2 of section 23.2 of the Regulation together?*

[70] The AGQ argues that the judge committed an overriding error of law in failing to read sections 23.1 and 23.2 of the *Regulation* together, as a whole. In its view, the term “appropriate” in the second paragraph of section 23.2 refers exclusively to the general conditions of section 23.1, to which are subject both persons of full age as well as minor persons 14 years of age or over. Consequently, it submits that the second paragraph of section 23.2 does not add any further condition to that imposed upon persons of full age

under the first paragraph, but is intended, rather, to tailor it to the reality of minor persons who may have difficulty in obtaining their parents' consent.

[71] The respondents, for their part, argue that the AGQ's reasoning is inconsistent with the interpretive principles that it relies upon. Under the systematic and logical method pursuant to which legislation must be read as a whole and taking into account the interpretive principle that the use of distinct terms suggests that they have a different meaning, the use of distinct terms in paragraphs one and two of section 23.2 of the *Regulation* must necessarily refer to different conditions. Further, they submit that the judge committed no error in finding that the requirement that a professional declare having followed or evaluated the person concerned and confirm that the change of sex is appropriate constitutes a condition that is different from that provided in the first paragraph for transgender people of full age.

[72] As to the applicable interpretive principles, both parties are correct: paragraph 2 of section 23.2 of the *Regulation* must be read together with its first paragraph and with section 23.1, considering their respective terminology as well as the *Regulation* as a whole.

[73] The conditions set out in the first paragraph of s. 23.1 are common substantive conditions that must be satisfied in order to vary the designation of sex that appears in a civil status document, regardless of whether the person concerned is of full age or a minor: 1) the designation of sex requested must best correspond to the person's gender identity; 2) the person must assume and intend to continue to assume that gender identity; 3) the person must understand the seriousness of the undertaking; and 4) the person's undertaking must be voluntary and their consent must be given in a free and enlightened manner. Whether the person is of full age or a minor 14 years of age or over, they must state in an affidavit that they comply with those conditions.⁸¹

[74] For its part, section 23.2 requires that a third party corroborate a part of that statement.

[75] For persons of full age, that corroboration takes the form of an "affidavit" from "a person of full age who attests to having known the applicant for at least one year and who confirms that the applicant is fully aware of the seriousness of the application". That person is thus required to corroborate the veracity of only one of the four conditions provided in s. 23.1.

[76] For minors 14 years of age or over, that corroboration instead takes the form of a "letter" from a person practicing one of the five professions listed, "who [must] declare

⁸¹ In the case of a minor under the age of 14, the application is made by their tutor and the tutor must provide the affidavit.

having evaluated or followed [the minor].” The professional must further declare « [being] of the opinion that the change of designation is appropriate.”

[77] There are thus important differences between the requirements set forth in the first and second paragraphs of section 23.2 of the *Regulation* as to the form of the document and its author’s identity.

[78] As for its substance, we note that the term “appropriate” appearing in the second paragraph of section 23.2 of the *Regulation* is not defined. Some could infer from this that the change of the designation of sex must be “appropriate” according to the subjective assessment of the designated professional, but by construing that requirement in light of what is set forth in section 23.1, one understands that the change in the designation of sex is “appropriate” if it satisfies the four conditions of section 23.1.

[79] Consequently, the AGQ correctly argues that section 23.2 adds no condition to section 23.1, since the corroboration required from the third-party only concerns the conditions enumerated in section 23.1. At the same time, we nevertheless recognize that the second paragraph of section 23.2 sets forth a requirement that is different from that found in the first paragraph when the person involved is of full age.

[80] The judge offered no analysis in attempting to understand the meaning of the second paragraph of section 23.2 of the *Regulation* before addressing the issue of its validity, whereas such an analysis would have been apposite.

[81] In his analysis under section 15 of the *Canadian Charter*, the judge simply held that there is a difference between the requirements set forth in the two paragraphs of section 23.2⁸² and thereupon engaged in his analysis based on section 1 of the *Canadian Charter*.

[267] First, the legislative objective seeks to ensure that the young person is serious in their desire to change their designation of sex but section 23.2 asks a health professional to determine if the change is appropriate. Only the applicant can determine whether the change is appropriate. Moreover, youth aged fourteen and over can determine their best interests and make important decisions in line with them. Article 23.2 takes this decision away from the young person and imposes it on a health professional, who may, as will be

[267] Premièrement, l’objectif législatif cherche à garantir que le mineur est sérieux dans son désir de changer la mention de son sexe, mais l’article 23.2 demande au professionnel de la santé de déterminer si le changement est approprié. Seul le demandeur peut déterminer si le changement est approprié. De plus, les jeunes âgées de 14 à 17 ans peuvent déterminer leurs meilleurs intérêts et prendre des décisions importantes en lien avec ceux-ci. L’article 23.2 retire la prise de décision du mineur et l’impose au professionnel de la santé, qui peut,

⁸² Judgment under appeal, *supra*, note 9, paras. 256-257.

demonstrated below, have only a fleeting acquaintance with the young person and their gender identity.

comme il le sera démontré ci-dessous, avoir une connaissance superficielle du mineur et de son identité de genre.

[Emphasis in original]

[82] In our opinion, the judge misunderstood the meaning of the second paragraph of section 23.2 of the *Regulation* and the role of the designated professional. In our view, he erred in suggesting that the *Regulation* gives the professional authority to decide for the minor if the change in the designation of sex is appropriate, whereas the professional's task is limited to determining whether the change of the designation of sex is "appropriate" in light of the four conditions enumerated in section 23.1 of the *Regulation*.

[83] That mistaken interpretation, while not determinative, will have an impact on the constitutional analysis that he engaged in afterwards. We will return to this point below.

1.2 *Did the trial judge err in interpreting the condition of having "evaluated or followed the child" contained in paragraph 2 of section 23.2 of the Regulation as being in the nature of a medical treatment?*

[84] The AGQ submits that the judge erred in finding that the requirement provided in paragraph 2 of section 23.2 of the *Regulation* that the professional "evaluate(...) or follow(...) the child" implies that this is a medical treatment, which would be contrary to the *Regulation's* enabling provision, article 71 C.C.Q. In its view, all of the definitions of "medical treatment", whether established by the case law or legislation, distinguish between such treatment and the follow-up or evaluation provided in the *Regulation*, so that by requiring a letter from a designated professional, the legislator is not subjecting the minor person to any medical treatment.

[85] The respondents counter that the judge committed no error, since the evidence shows that two or three sessions are required before a professional agrees to provide such a letter. Ultimately, those sessions are of no value and constitute an additional burden on transgender minors, which consequently medicalizes the process.

[86] GCK, which supports the respondents' arguments, adds that paragraph 2 of section 23.2 of the *Regulation* is contrary to its enabling legislation and that it is *ultra vires*. To the extent that "medical treatment" is not defined in the C.C.Q., it submits that the expression is to be interpreted on the basis of the grammatical and ordinary meaning of the words, taking into account the statute's entire context, scheme and purpose. In its second paragraph, however, article 71 C.C.Q. provides that changes to the designation of sex may in no case be made dependent on the requirement to have undergone any medical treatment or surgical operation whatsoever. In its view, the context of that article suggests a broader conception of the notion of "medical treatment" that includes the evaluations and follow-ups required under section 23.2 of the *Regulation*. It relies in that

regard on the legal literature which, addressing the former version of article 71 C.C.Q., states that “medical treatment” includes [TRANSLATION] “psychological follow-up to ensure that the patient presents a real case of transsexualism.”⁸³ It submits that by using that expression again in the current version of article 71 C.C.Q., the legislator intended to maintain the meaning given in its previous version.

[87] It adds that, in any event, even if it were to be found that the judge erred in his interpretation of section 23.2 of the *Regulation*, that would not be an overriding error since it related to only one of the grounds on which he relied in finding no rational connection between the provision and the legislator’s objective. Moreover, even if the declaration required is not characterized as a medical treatment strictly speaking, the fact remains that section 23.2 of the *Regulation* “medicalizes” the condition of transgender persons by limiting the list of professionals able to make that declaration to health and social services professionals, without there being a rational connection with the legislative objective sought.

[88] The issue raised requires us to interpret what is meant by “medical treatment” in the second paragraph of article 71 C.C.Q.:

These changes [to the designation of sex and name in their birth certificate] may in no case be made dependent on the requirement to have undergone any medical treatment or surgical operation whatsoever.

Ces modifications [de la mention du sexe figurant à son acte de naissance et de ses prénoms] ne peuvent en aucun cas être subordonnées à l’exigence que la personne ait subi quelque traitement médical ou intervention chirurgicale que ce soit.

(Emphasis added)

[89] As we have already seen, this provision replaced that which existed when the *Civil Code of Québec* came into force in 1994:

Art. 71. Every person who has successfully undergone medical treatments and surgical operations involving a structural modification of the sexual organs intended to change his secondary sexual characteristics may have the designation of sex which appears on his act of birth and, if necessary, his given names changed.

Art. 71. La personne qui a subi avec succès des traitements médicaux et des interventions chirurgicales impliquant une modification structurale des organes sexuels, et destinés à changer ses caractères sexuels apparents, peut obtenir la modification de la mention du sexe figurant sur son acte de naissance et, s’il y a lieu, de ses prénoms.

⁸³ Benoît Moore, *Le droit de la famille et les minorités*, (2003) 34 R.D.U.S.229, *supra*, note 21, at p. 257.

Only an unmarried person of full age who has been domiciled in Québec for at least one year and is a Canadian citizen may make an application under this article.

Seul un majeur, non marié, domicilié au Québec depuis au moins un an et ayant la citoyenneté canadienne, peut faire cette demande.

(Emphasis added)

[90] In 2013, when the legislator amended article 71 to provide that the change could no longer be made dependent on the requirement of having undergone “any medical treatment or surgical operation whatsoever,”⁸⁴ it wished to abolish the obligation of having to “successfully undergo(...) medical treatments and surgical operations involving a structural modification of the sexual organs intended to change his secondary sexual characteristics” that appeared in the 1994 version. In this latter version, “medical treatment” included more intrusive medical treatment which, without being a surgical operation, was intended to change a person’s secondary sexual characteristics, such as drug treatment. There is therefore no contradiction between the abolition of the requirement of having already undergone such medical treatments and surgical operations, and the enactment, in 2016, of the second paragraph of section 23.2 of the *Regulation* that requires providing a letter from a designated professional who has declared having evaluated or followed the child and is of the opinion that the change of designation of sex is appropriate.

[91] Moreover, the professionals designated in section. 23.2 of the *Regulation* include not only health professionals, but also social workers who are neither authorized nor able to deliver “medical treatment.”

[92] Finally, the debates in parliamentary committee indicate that the legislator had no intention of “medicalizing” the situation when it enacted the second paragraph of section 23.2 of the *Regulation*.⁸⁵

[93] The judge therefore erred in finding that section 23.2 of the *Regulation* is contrary to its enabling legislation and that it subjects transgender or non-binary youths to the law as it stood prior to the 2013 amendment.⁸⁶

[94] That erroneous finding also had an impact on his constitutional analysis because it was one of the four grounds on which he relied in finding that there was no rational connection between the impugned provision and the legislative objective being pursued in his application of the proportionality test under section 1 of the *Canadian Charter*.

⁸⁴ It should be recalled that this amendment only came into force on October 1, 2015.

⁸⁵ National Assembly, Committee on Citizen Relations, *Journal des débats*, 41st Leg., 1st sess., vol. 44 No 59, 7 June 2016, 10:20 (S. Vallée); National Assembly, Committee on Institutions, *Journal des débats*, 40th Leg., 1st sess., vol. 43 No 96, 26 November 2013, 21:04 (G. Ouimet).

⁸⁶ Judgment under appeal, *supra*, note 9, para. 268.

[95] We will determine below, in our section 1 analysis, if this was an overriding error. To decide this, it will indeed be necessary to examine to what extent the three other grounds relied upon are sufficient to support his finding.

1.3 *Did the judge read into paragraph 2 of section 23.2 of the Regulation a requirement that the professional be knowledgeable about transgender and non-binary reality?*

[96] The AGQ argues, rightly, that section 23.2 of the *Regulation* does not require that the professional be knowledgeable about transgender or non-binary reality to be able to provide the required letter. Contrary to what it maintains, however, the judge did not read in such a condition in section 23.2. He simply found that: 1) it could be difficult to find a designated professional who is familiar with⁸⁷ or who is knowledgeable about⁸⁸ the reality of transgender or non-binary people; and 2) anyone who is unfamiliar with or who is not sufficiently knowledgeable about that reality would probably not agree to sign a letter declaring that a change to the designation of sex was appropriate.⁸⁹

[97] Moreover, the various professions listed in the second paragraph of section 23.2 each have a code of ethics which requires, generally, that the professional give their opinion only on questions of which they have sufficient knowledge.

[98] Consequently, without concluding that the *Regulation* requires that the designated professional be knowledgeable about transgender or non-binary reality, we recognize that a lack of knowledge may sometimes make it difficult to obtain the required letter.

[99] The judge therefore did not err on that point.

2. Section 23.2 of the Regulation and the Rights Guaranteed by the Canadian Charter and the Quebec Charter

[100] At trial, the respondents alleged that the second paragraph of section 23.2 of the *Regulation* violated several rights guaranteed by the *Canadian Charter* and the *Quebec Charter*.

- The right to life, and to personal security, inviolability and freedom (s. 1 of the *Quebec Charter*) and the right to life, liberty and security of the person (s. 7 of the *Canadian Charter*)
- The right to the safeguard of their dignity, honour and reputation (s. 4 of the *Quebec Charter*)
- The right to respect for their private life (s. 5 of the *Quebec Charter*)

⁸⁷ Judgment under appeal, *supra*, note 9, para. 259.

⁸⁸ *Id.*, para. 277.

⁸⁹ *Id.*, para. 262.

- The right to equal recognition and exercise of rights and freedoms (s. 10 of the *Quebec Charter* and s. 15 of the *Canadian Charter*)

[101] In light of his conclusions, the judge limited his analysis to the rights to equality and to dignity, although he did deal briefly with the rights to life, to security and to inviolability.

[102] On appeal, the debate focussed on the right to equality guaranteed by section 15 of the *Canadian Charter* and by section 10 of the *Quebec Charter* as well as on the safeguard of one's dignity, protected by section 4 of the *Quebec Charter*. The Coalition des professionnels en santé, as an intervener, submits for its part that paragraph 2 of section 23.2 of the *Regulation* violates, rather, the rights protected by section 7 of the *Canadian Charter*.

[103] We will deal with the alleged violations in that order.

2.1 The Right to Equality

[104] We begin the analysis by first examining the right to equality as protected by section 15 of the *Canadian Charter*. Such an analysis entails two sub-issues: 1) whether the second paragraph of section 23.2 of the *Regulation* violates the right to equality protected by section 15 of the *Canadian Charter*, and 2) in the affirmative, whether that violation is justified under section 1.

[105] The respondents have the *onus* of showing that the right to equality has been violated, whereas the burden of showing the reasonableness of the violation and its justification, if any, falls on the AGQ. As discussed above, on appeal, such issues are to be reviewed for correctness,⁹⁰ whereas the judge's findings of fact remain subject, for their part, to the standard of palpable and overriding error.

[106] According to the AGQ, the respondents have not shown any violation of section 15 of the *Canadian Charter* because, even if section 23.2 of the *Regulation* draws a distinction based on age by requiring different documents depending on whether the person involved is of full age or a minor, they have not proven that it imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating a disadvantage, whether or not historical. In its view, the legislator is merely considering that, over time, minors acquire [TRANSLATION] "science, judgment, maturity and wisdom and thus grants them rights as they evolve." It also points to other provisions of the *Civil Code of Québec* that establish distinctions based on age as well.

[107] Consequently, in the AGQ's view, the judge erred in finding that paragraph 2 of section 23.2 imposed a burden on the respondents, especially when he had determined that paragraph 2 is less stringent as to the contents of the professional's letter than is paragraph 1 as to the third-party's declaration that must accompany the application by

⁹⁰ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, para. 57.

persons of full age. According to the AGC, far from being a disadvantage for transgender or non-binary minors, paragraph 2 provides a simple procedure tailored to their needs or situation, chosen by the legislator after it found, following public consultations, that the families of transgender or non-binary children often benefit from professional guidance.

[108] The respondents reply that while age, sex or gender identity alone would each be sufficient grounds of discrimination, the intersection of these various grounds provides a more accurate picture of the various discriminatory effects visited upon a specific group. Consequently, they submit that the judge correctly held that requiring a letter from a professional imposes a burden upon transgender or non-binary minors and, to the extent that the AGQ does not allege any error in those findings of fact, the Court ought not to intervene.

[109] Furthermore, the fact that some youths are accompanied by a professional, even though this may make it easier to obtain the required letter, in no way changes, in their view, the burden that such a requirement imposes upon those who are not.

[110] Moreover, they add, the judge did not err in finding that the distinction between minors and persons of full age exacerbates the disadvantages and prejudices that transgender or non-binary people otherwise face. Also, the AGQ's argument that the legislator is justified in "modulating" the rights of transgender or non-binary people on the basis of age, as this reflects the fact that [TRANSLATION] "they acquire over time science, judgment, maturity and wisdom" simply perpetuates stereotypes, which are indicative of discrimination, even though it is not necessary to prove that the discrimination stems from such stereotypes.

[111] It is settled law that the purpose of the right to equality, protected by the *Canadian Charter*, is the "promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."⁹¹ That right must be interpreted in a broad manner.⁹² It does not always presuppose identical treatment, because there may be circumstances where substantive equality requires, rather, that persons or groups be treated differently, to ensure the accommodation of differences that may exist between them and to respond to their

⁹¹ *Andrews v. Law Society of British Columbia*, 1989 CanLII 2, [1989] 1 S.C.R. 143, p. 171. This conception of the right to equality has been echoed recently in the jurisprudence of the Supreme Court: *Ontario (Attorney General) v. G*, 2020 SCC 38, paras. 44ff.; *Fraser v. Canada (Attorney General)*, 2020 SCC 28, paras. 40ff.; *R. v. Kapp*, 2008 SCC 41, para. 15; *Law c. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675, [1999] 1 S.C.R. 497, p. 529.

⁹² *Andrews v. Law Society of British Columbia*, *supra*, note 91, pp. 163ff. See also: *Ontario (Attorney General) v. G*, *supra*, note 91, para. 44; *Fraser v. Canada (Attorney General)*, *supra*, note 91, para. 40. The Charter sets out four rights to equality: (1) equality before the law, (2) equality under the law, (3) equal protection of the law, and (4) equal benefit of the law.

specific needs.⁹³ The Supreme Court thus recognized that “not only does the *Charter* protect from direct or intentional discrimination, it also protects from adverse impact discrimination,”⁹⁴ because “[a]t the heart of substantive equality is the recognition that identical or facially neutral treatment may frequently produce serious inequality.”⁹⁵

[112] Consequently, the issue at the heart of the right to equality analysis is whether “the impugned law violates the animating norm of section 15(1), substantive equality.”⁹⁶

[113] In deciding that issue, the Supreme Court proposes a two-part analysis:⁹⁷

[19] The first part of the s. 15 analysis therefore asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground. Limiting claims to enumerated or analogous grounds, which “stand as constant markers of suspect decision making or potential discrimination”, screens out those claims “having nothing to do with substantive equality and helps keep the focus on equality for groups that are disadvantaged in the larger social and economic context”. Claimants may frame their claim in terms of one protected ground or several, depending on the conduct at issue and how it interacts with the disadvantage imposed on members of the claimant’s group.

[19] Le premier volet de l’analyse fondée sur l’art. 15 consiste donc à se demander si, à première vue ou de par son effet, une loi crée une distinction fondée sur un motif énuméré ou analogue. Limiter les demandes à celles fondées sur des motifs énumérés ou analogues — qui « constituent des indicateurs permanents de l’existence d’un processus décisionnel suspect ou de discrimination potentielle » —, permet d’écartier « les demandes [traduction] qui n’ont rien à voir avec l’égalité réelle et de mettre l’accent sur l’égalité dans le cas de groupes qui sont défavorisés dans un contexte social et économique plus large ». Le demandeur peut fonder son allégation sur un ou sur plusieurs motifs, selon l’acte de l’État en cause et son interaction avec le désavantage infligé aux membres du groupe dont il fait partie.

[20] The second part of the analysis focuses on arbitrary — or discriminatory — disadvantage, that is, whether the impugned law fails to

[20] Le second volet de l’analyse est axé sur les désavantages arbitraires — ou discriminatoires —, c’est-à-dire sur la question de savoir si la loi contestée

⁹³ *Law v. Canada (Minister of Employment and Immigration)*, *supra*, note 91. See also: *Andrews v. Law Society of British Columbia*, *supra*, note 91, pp. 165ff.

⁹⁴ *Fraser v. Canada (Attorney General)*, *supra*, note 91, para. 45.

⁹⁵ *Id.*, para. 47.

⁹⁶ *Withler v. Canada (Attorney General)*, 2011 SCC 12, para. 2, restated in *Ontario (Attorney General) v. G*, *supra*, note 91, para. 43; *Fraser v. Canada (Attorney General)*, *supra*, note 91, para. 47; *Quebec (Attorney General) v. A*, 2013 SCC 5, para. 325.

⁹⁷ *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548.

respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage:

The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory.

ne répond pas aux capacités et aux besoins concrets des membres du groupe et leur impose plutôt un fardeau ou leur nie un avantage d'une manière qui a pour effet de renforcer, de perpétuer ou d'accentuer le désavantage dont ils sont victimes :

À la base, l'art. 15 résulte d'une prise de conscience que certains groupes ont depuis longtemps été victimes de discrimination, et qu'il faut mettre fin à la perpétuation de cette discrimination. Les actes de l'État qui ont pour effet d'élargir, au lieu de rétrécir, l'écart entre le groupe historiquement défavorisé et le reste de la société sont discriminatoires.

[References omitted]

[114] As it noted more recently in *Fraser*, the test requires that the party relying on it show “that a law or policy creates a distinction based on a protected ground, and that the law perpetuates, reinforces or exacerbates disadvantage.”⁹⁸

[115] Here, the judge’s finding that section 23.2 of the *Regulation* creates a distinction on the basis of age is not challenged: on its face, the documents required are different depending on whether the person involved is of full age or a minor. Indeed, that distinction is expressly authorized by paragraph 5 of article 71 C.C.Q. whose constitutionality is not in question. It provides:

The conditions prescribed by government regulation that must be met to obtain such changes may vary, in particular according to the age of the person who is the subject of the application.

Les conditions déterminées par règlement du gouvernement qui doivent être satisfaites pour obtenir de telles modifications peuvent varier notamment en fonction de l'âge de la personne visée par la demande.

[116] However, the respondents argue that what is at stake here goes beyond the sole issue of age-based discrimination and that the provision discriminates against transgender and non-binary people.

[117] We disagree. In our view, the *Regulation* creates no distinction based on gender identity. It allows any person wishing to change the designation of sex that appears in their act of birth to do so by complying with certain conditions without making any distinction other than a distinction based on age. Of course, those conditions effectively

⁹⁸ *Fraser v. Canada (Attorney General)*, *supra*, note 91, para. 50.

apply only to people who wish to change the designation of their sex in their act of birth, that is, only transgender and/or non-binary people. However, subjecting such a change to certain conditions is not *per se* discriminatory and it cannot be argued that the *Regulation* thus creates inequality with cisgender people or that it imposes upon transgender or non-binary people more stringent conditions than those that apply to cisgender people. Accepting this argument would compel us to conclude that by allowing transgender or non-binary people to change the designation of sex that appears in their act of birth, upon certain conditions, article 71 C.C.Q. violates the right to equality and that it could only be respected if the right to change the designation of sex was absolute and unconditional. We disagree with such a proposition.

[118] The second paragraph of section 23.2 of the *Regulation* assuredly creates a distinction, but on the basis of age, which, in our view, is not illegal.

[119] The AGQ notes, correctly, that the law often sets an age from which a person may exercise certain rights – the right to vote, the right to consume alcohol or cannabis, the right to drive, etc. Such rules are generally based on the premise that human beings acquire maturity and develop an enhanced capacity to make decisions and exercise certain rights over time.⁹⁹ Although some maintain that such premise stems from a stereotype, we are of the view that this is a truth, while recognizing, on the other hand, that the precise age at which a given person may acquire full capacity to decide may vary.

[120] It is in fact the realization that human beings only acquire the necessary maturity over time that explains why the courts generally acknowledge the validity of provisions that impose a minimum age for the exercise of certain rights, being of the view that they are required to maintain order in our society.¹⁰⁰

[121] Transgender and non-binary youths between the ages of 14 and 17 are certainly part of a protected group, transgender and non-binary people having undisputedly been disadvantaged on account of their gender identity. However, the *Regulation* does not reinforce, perpetuate or exacerbate such a disadvantage.

[122] The *Quebec Charter*, for its part, provides in its section 10 that age is a ground of discrimination “except as provided by law,” thus recognizing the legislator’s right to make distinctions based on age.

[123] To the extent that the legislator chose to provide specific conditions for minors who request that the designation of their sex be changed, and that the *Quebec Charter*

⁹⁹ Regarding cannabis use in Quebec, the age of 21 has been set according to the age at which the human brain stops developing in humans (see [Pas de cannabis avant 21 ans, disent des psychiatres du Québec | Radio-Canada.ca](#)).

¹⁰⁰ *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, para. 31, cited in *R. v. C.P.*, 2021 SCC 19, para. 142 (Justice Wagner).

provides for such a possibility, there is, in our view, no basis here for finding a violation of the right to equality on the basis of age.

[124] To the extent that we find no violation of the right to equality, there is no need to address the second question of whether the violation is justified under section 1.

[125] However, in our view, the right to the safeguard of their dignity is a different matter.

2.2 The Right to the Safeguard of One's Dignity

[126] Section 4 of the *Quebec Charter* entrenches the right of every person “to the safeguard of his dignity.”

[127] The Supreme Court discussed the scope of that right in *Ward*.¹⁰¹ Wagner, C.J. and Côté, J., for the majority, noted that such right to the safeguard of dignity protects the humanity of every person in its most fundamental attributes.¹⁰² It allows a person to claim “protection from the denial of their worth as a human being.”¹⁰³ That being so, to be contrary to section 4 of the *Quebec Charter*, conduct must reach a high level of gravity that does not trivialize the concept of dignity. In finding such conduct, an objective analysis is required. Ultimately, it must be shown that “a person is stripped of their humanity by being subjected to treatment that debases, subjugates, objectifies, humiliates or degrades them, there is no question that their dignity is violated. In this sense, the right to the safeguard of dignity is a shield against this type of interference that does no less than outrage the conscience of society.”¹⁰⁴

[128] In the case at bar, after having heard transgender or non-binary people testify as to the difficulties that they experienced, the judge acknowledged that they [TRANSLATION] “are among the people who experience the highest levels of stigmatization, harassment, discrimination and violence, not only in the public sphere, but all too often within their own families.”¹⁰⁵ He noted that the non-concordance between the designations that appeared in their documents of civil status and their true identity contributes to that situation. Moreover, several transgender or non-binary people testified as to the difficulties that such non-concordance caused them in their everyday lives: every time that a transgender or non-binary person submits a document that does not correspond to their reality (for instance, to work, to register or register their child for school, to vote or to see a doctor), they disclose the fact that they are transgender or non-binary. According to the experts heard by the trial judge, all those activities consequently become distressing, which may

¹⁰¹ *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43, paras. 56-58.

¹⁰² *Id.*, para. 56, citing *Syndicat national des employés de l'hôpital St-Ferdinand*, 1996 CanLII 172 (SCC), [1996] 3 S.C.R. 211, para. 105.

¹⁰³ *Id.*, para. 58.

¹⁰⁴ *Id.*, para. 58.

¹⁰⁵ Judgment under appeal, *supra*, note 9, para. 122, citing the report of Dr. Françoise Susset, psychologist and family therapist.

lead a transgender or non-binary person to withdraw from many aspects of daily life in order to avoid these hardships. Indeed, the experts reported an elevated rate of suicidal ideation and suicide attempts among those people, and several fact witnesses also confirmed having had suicidal thoughts and committed suicidal acts.

[129] The judge summarized the situation as follows:

[16] These articles lead to the misidentification of transgender and non-binary people and create confusion about their true identity.

[16] Ces articles entraînent l'identification erronée des personnes transgenres ou non binaires et créent de la confusion à propos de leur identité réelle.

[17] Confusion, misunderstanding and intolerance of transgender and non-binary people can lead to persecution and violence, which some try to avoid by withdrawing from situations that require the presentation of a government-issued identity document, such as registering for school, applying for a job, or seeking medical help. Being under-educated, under-employed, and unhealthy can create new, exponential problems for transgender and non-binary people. They frequently turn to suicide to end the suffering caused by living in a world that does not acknowledge their identity and that fights their attempts to affirm it.

[17] La confusion, l'incompréhension et l'intolérance à l'égard des personnes transgenres ou non binaires peuvent entraîner de la persécution et de la violence, que certains tentent d'éviter en se retirant des situations qui exigent de présenter un document d'identité délivré par le gouvernement, par exemple s'inscrire à l'école, postuler un emploi ou demander de l'aide médicale. Le fait d'être sous-éduqué, sous-employé et en mauvaise santé peut causer des problèmes exponentiels aux personnes transgenres ou non binaires. Elles ont souvent recours au suicide pour mettre fin à leur souffrance de vivre dans un monde qui ne reconnaît pas leur identité et qui combat leurs tentatives d'affirmer celle-ci.

[130] In our view, the judge's findings are supported by the evidence and the AGQ has not shown that they are tainted by a palpable and overriding error. Indeed, based on those findings, the judge determined that being able to change the designation of sex that appears on their civil status documents is essential to allow transgender or non-binary people to participate fully in society¹⁰⁶ and the fact of not having an act of birth that reflects their reality leaves them without legal existence and prevents them from enjoying the fundamental attributes of a person.

[131] While article 71 C.C.Q. begins by allowing transgender or non-binary people the right to change the designation of sex that appears on their civil status documents and

¹⁰⁶ Judgment under appeal, *supra*, note 9, paras. 135, 139.

represents in that regard an important and undeniable advance in reducing the difficulties experienced by that group, the second paragraph of section 23.2 of the *Regulation*, for its part, limits that right in the case of minors, notably those aged fourteen or over.

[132] The judge concluded that this imposed on them an additional burden, which may prevent them from undertaking, or at least delay, the steps required to have their civil status documents changed.

[133] In his view, this results in a violation of the right to dignity that he describes as follows:

[140] Legislation that does not acknowledge transgender and non-binary identity leaves them without legal existence and denies their right to dignity. Their right to equal protection and benefit of the law is infringed because they cannot obtain an act of birth that identifies them and that makes it easier for them to prove their civil status. By contributing to their vulnerability to suicide, their rights to life, security, and inviolability are also engaged

[140] Une législation qui ne reconnaît pas l'identité des personnes transgenres ou non binaires les empêche d'avoir une existence légale et leur nie le droit à la dignité. Leur droit à la même protection et au même bénéfice de la loi est enfreint parce qu'elles ne peuvent obtenir un acte de naissance qui les identifie et qui rend plus facile la preuve de leur état civil. En raison de leur vulnérabilité accrue au suicide, leurs droits à la vie, à la sécurité et à l'inviolabilité sont aussi en jeu.

[134] To the extent that the second paragraph of section 23.2 of the *Regulation* limits access to the right to align the designation of their sex that appears in the acts of civil status with their gender identity, we find that it violates the right of transgender and non-binary youth to the safeguard of their dignity protected by section 4 of the *Quebec Charter*.

2.3 The Right to Life, Liberty and Security of the Person

[135] As the trial judge noted, there is a certain overlap between the concept of dignity and the concepts of life, security and inviolability appearing in section 1 of the *Quebec Charter* and section 7 of the *Canadian Charter*. Indeed, we have concluded in the preceding section that the act of birth goes to a person's fundamental attributes and to their legal existence and noted that the trial judge found on the evidence that the fact of not having an act of birth that reflects their gender identity can lead a person to suicide. To the extent that the requirement limits a person's ability to have their act of birth changed so as to reflect their gender identity, we conclude that it can place their life in danger, jeopardize their security and inviolability and limit their freedom.

[136] This could suffice to find an infringement of the rights guaranteed by section 1 of the *Quebec Charter*.

[137] However, section 7 of the *Canadian Charter* further requires that the infringement to the right to life, liberty and security of the person not be in accordance with the principles of fundamental justice.

[138] We need not pursue that analysis further in this case, however, because we have already found an infringement to the right to safeguard dignity guaranteed by section 4 of the *Quebec Charter*.

[139] Once an infringement to the right to dignity (and possibly the right to life, liberty and security of the person) guaranteed by the *Quebec Charter* is recognized, it must be determined whether that infringement is justified under the terms of section 9.1 of the *Quebec Charter*. That test is analogous to the test under section 1 of the *Canadian Charter*.¹⁰⁷ Indeed, as the majority noted in *Ward*, “[b]oth are intended to circumscribe the scope of rights and freedoms based on the requirements of a free and democratic society.”¹⁰⁸

2.4 Justification

[140] In the AGQ’s view, even if we were to find that a protected right was infringed, the infringement would be justified, contrary to what the judge found. Indeed, although the judge confirmed, at the first stage of the analysis, the existence of a pressing and substantive objective, i.e. assessing the seriousness of the minor’s undertaking, the judge erred, at the second stage, in finding no rational connection between that objective and requiring that a letter be provided from a professional confirming that the change requested is appropriate. The AGQ argues that professionals have the necessary skills to assess whether the minor who is requesting the change understands the seriousness of their undertaking, whether it is voluntary and whether their consent is free and informed. In its view, requiring such a letter is a reasonable solution that allows the legislator to achieve its objectives, whereas it is not required to retain least intrusive alternative.¹⁰⁹

[141] The AGQ adds that even if the respondents’ rights were infringed, the infringement would not be disproportionate with the legislator’s objectives in light of the criteria developed by the Supreme Court. Here, in its view, the requirement to provide a letter signed by a health professional ensures the stability of acts of civil status, which is a

¹⁰⁷ *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712, pp. 769-770; *Godbout v. Longueuil (City)*, 1997 CanLII 335 (SCC) [1997] 3 S.C.R. 844, p. 916; *Local 143 of the Communications, Energy and Paperworks Union of Canada v. Goodyear Canada Inc.*, 2007 QCCA 1686, para. 18; *Singh c. Montréal Gateway Terminal Partnerships*, 2019 QCCA 1494, para. 28.

¹⁰⁸ *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, *supra*, note 101, para. 70.

¹⁰⁹ *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, para. 101, *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, paras. 58, 59 and 62; *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, paras. 53-55.

salutary effect found to be laudable by the courts¹¹⁰ which, it notes, are also required to exercise restraint with regard to the approach chosen by the legislator to address an important social issue.¹¹¹

[142] The AGQ also points out that similar requirements exist in most other Canadian provinces and territories and that the respondents have not shown that the difficulties in obtaining access to designated professionals outside of urban areas were greater than those experienced by the general population to have access to specialized professional services.

[143] In its view, the obstacles facing the respondents are attributable to several other factors that have nothing to do with the requirement set out in paragraph 2 of section 23.2 of the *Regulation* and the evidence does not show that the difficulties in having access to a professional are related to the requirement provided in the *Regulation*. The AGQ argues that the inconveniences caused by the measure are proportionate to the benefits that it procures.

[144] In the respondents' view, the judge did not err in his analysis of the justification of the infringement of the right to equality. They argue that the AGQ moreover fails to explain why transgender or non-binary minors should not be subject to the same requirements as persons of full age and that it simply invites the Court to reweigh the evidence adduced, without pointing to any palpable and overriding error.

[145] *Egale Canada* adds to the respondents' submissions by noting that the designation of sex is no longer relevant when a person exercises their civil rights and that such designation in the register of civil status serves no substantive objective, so that the measures that prevent its amendment serve no pressing and substantial objective. In support of this, it provides a comparative analysis of the laws in force in several other Canadian provinces.

[146] It also argues that section 23.2 of the *Regulation* is not minimally impairing and that the fact that certain provinces provide for comparable requirements is not dispositive at this stage of the analysis because: 1) the pivotal role of the register of civil status in defining civil rights in Quebec is not comparable to that of the other provinces, so that the barriers to changing the designation of one's sex are more gravely and pervasively harmful;¹¹² and 2) several provinces have more permissive criteria.

¹¹⁰ *Montreuil c. Québec (Directeur de l'état civil)*, [1999] R.J.Q. 2819 (C.A.), pp. 2824-2825, 1999 CanLII 14648, pp. 11-14; *Montreuil c. Directeur de l'état civil*, 2002 CanLII 41257 (QC CA), p. 1.

¹¹¹ In particular, in *Saskatchewan (Human Rights Commission) v. Whatcott*, *supra*, note 109, para. 78.

¹¹² There is no "register of civil status" similar to the Quebec model in the other Canadian jurisdictions. They each work under a register compiling data which role is essentially statistical and which do not constitute conclusive proof of their content. This register is created by the *Vital Statistics Act*; see, in that regard: *British Columbia: Vital Statistics Act*, RSBC 1996, c. 479; *Vital Statistics Act*, SA 2007, c. V-4.1; *The Vital Statistics Act*, 2009, SS 2009, c. V-7.21; *The Vital Statistics Act*, CCSM c. V60; *Vital*

[147] For its part, the intervener GCK notes that the only possible explanation for limiting the list of persons able to provide the required letter is the notion that only a health professional can assess the appropriateness of an application, a notion that is contradicted by the evidence. Otherwise, if the *Regulation* is not aimed at assessing the application on the basis of medical or social criteria, limiting the list of authorized professionals to those who work in the health and social services field is not rationally connected to the stated objective.

[148] The judge aptly summarized the *Oakes* test,¹¹³ which must be applied to determine whether a law that violates the *Canadian Charter* is nevertheless justified under section 1 thereof:

[91] In the *Oakes* case, the Supreme Court of Canada designed a two-step test to determine whether a law's limits on guaranteed rights and freedoms will survive a *Charter* challenge. The test applies to the Quebec *Charter* and to the Canadian *Charter*. The Attorney General must first demonstrate that the legislative objective behind the impugned provision is pressing and substantial.

[92] Then, the Attorney General must prove that the limits placed on the plaintiffs' rights are proportionate to the legislative objective. This is achieved by determining whether there is:

a rational connection between the law's objective and the impugned provision;

minimum impairment of the protected right(s); and

proportionality between the impairment of the right and the legislative objective.

[91] Dans l'arrêt *Oakes*, la Cour suprême du Canada a conçu un test en deux étapes pour déterminer si les limites qu'une loi impose relativement aux droits et libertés peuvent résister à une contestation fondée sur la Charte. Ce test s'applique à la Charte québécoise et à la Charte canadienne¹¹⁴. Le procureur général doit d'abord démontrer que l'objectif législatif visé par la disposition contestée est urgent et réel.

[92] Le procureur général doit ensuite prouver que les limites imposées aux droits des demandeurs pour réaliser cet objectif sont proportionnelles en démontrant :

un lien rationnel entre l'objectif et la disposition contestée;

le caractère minimal de l'atteinte aux droits en question; et
la proportionnalité entre l'atteinte au droit et l'objectif législatif.

(References omitted)

Statistics Act, RSO 1990, c. V.4; *Vital Statistics Act*, SNB 1979, c. V-3; *Vital Statistics Act*, RSNS 1989, c. 494; *Vital Statistics Act*, RSPEI 1988, c. V-4.1; *Vital Statistics Act, 2009*, SNL 2009, c. V-6.01; *Vital Statistics Act*, SY 2002, c. 225; *Vital Statistics Act*, RSNWT 2011, c. 34 *Vital Statistics Act*, RSNWT (Nu) 1988, c. V-3.

¹¹³ *R. v. Oakes*, [1986] 1 S.C.R. 103, paras. 69, 70.

¹¹⁴ *Mouvement laïque québécois v. Saguenay (City)*, [2015] SCC 3, para. 90.

[149] That same test, as noted above, applies to the justification of an infringement of a right protected by the *Quebec Charter* under section 9.1.

[150] The first step, i.e. the demonstration of a pressing and substantial objective, does not raise any problem not here.

[151] Indeed, the respondents do not question the judge's finding in favour of the AGQ's argument that the objective behind section 23.2 of the *Regulation* is pressing and substantial in that it seeks to confirm the seriousness of the undertaking by the person filing an application to change the designation of sex that appears in their act of birth.¹¹⁵

[152] *Egale Canada*, however, argues that the designation of sex in the register of civil status does not pursue any substantive objective, so that assessing the seriousness of the application to change cannot be said to be a pressing and substantial objective.

[153] In our opinion, however, the question of whether the designation of sex in the register of civil status is useful or not is a complex social issue and, absent determinative evidence on the issue, courts must show deference and rely on the legislator's informed opinion.

[154] We are of the view that the debate must focus rather on the measure's proportionality on the basis of the three applicable criteria.

[155] As regards the first criterion, there is a prima facie appearance of a rational connection between the legislative objective, which is to ensure the seriousness of the application, and the requirement to provide a letter from a professional confirming that the change is appropriate. It must however be shown that "it is reasonable to suppose that the limit may further the goal."¹¹⁶

[156] The judge concluded that there is no such rational connection between the legislative objective of ensuring the seriousness of a youth's application and the requirement that they obtain from a health professional a declaration that the requested change is appropriate, on four grounds: 1) the health professional's declaration that the change is appropriate serves no useful purpose in achieving the legislative objective because only the person concerned by the application is able to affirm or confirm their gender identity;¹¹⁷ 2) the legislative provision denies the minor the power to make a decision which concerns them and entrusts it instead to the health profession who, in many instances, will only have a fleeting acquaintance with that person;¹¹⁸ 3) the provision contradicts its enabling legislation by imposing a medical treatment without regard to the

¹¹⁵ Respondent's Brief, para. 64.

¹¹⁶ *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, para. 48.

¹¹⁷ Judgment under appeal, *supra*, note 9, para. 267.

¹¹⁸ *Id.*, para. 267.

2013 legislative amendments,¹¹⁹ whereas nothing in the evidence suggests that being transgender is a health issue; and 4) the *Regulation* does not provide any guidance as to the content of the declaration, thereby showing its limited usefulness.¹²⁰

[157] The third ground should be rejected at the outset, since we have already found that obtaining a letter from a health professional declaring having evaluated or followed the child does not amount to a medical treatment, and that there is therefore no contradiction between the *Regulation* and article 71 *C.C.Q.*¹²¹

[158] As for the three remaining grounds, they are interrelated. In that regard, it should be recalled that the judge was of the view that the *Regulation* gives professionals the authority to decide for the minor if the change in the designation of sex is appropriate (ground 2); those professionals do not have the requisite skill to make that decision (ground 4) and, in fact, the applicant is the only person in a position to know whether their application is appropriate, (ground 1).

[159] How should the matter be resolved?

[160] As we have already noted, the judge erred as to the designated professional's role. The *Regulation* does not give the designated professional authority to decide for the minor if the change of the designation of sex is appropriate. The professional's task is limited to determining whether the change in the designation of sex is "appropriate", in light of the four conditions enumerated in s. 23.1 of the *Regulation*, i.e. 1) the designation of sex requested is the designation that best corresponds to the applicant's gender identity; 2) the applicant assumes and intends to continue to assume that gender identity; 3) the applicant understands the seriousness of the undertaking; and 4) the applicant's undertaking is voluntary and their consent is given in a free and enlightened manner. The professional does not have the authority to substitute their own criteria to those provided in the *Regulation* nor to decide what the minor's gender identity should be.

[161] Indeed, the conditions provided in the *Regulation* are internal to the applicant and are not objectively verifiable by any third party, except when it comes time to confirm that the applicant already assumes the gender identity that they wish to have designated. Consequently, the professional cannot objectively assess whether those conditions are met. They can only ask the applicant questions and assess their answers in determining whether they understand the seriousness of their undertaking, whether such undertaking is voluntary and whether their consent is given in a free and informed manner.

¹¹⁹ Judgment under appeal, *supra*, note 9, para. 268.

¹²⁰ *Id.*, paras. 272 -273.

¹²¹ *Id.*, paras. 72-82.

[162] Although circumscribed, the professional's role remains important in that it attests to the application's seriousness and, in that sense, it serves a useful purpose in achieving the legislative objective.

[163] The second criterion consists in ascertaining whether the rights guaranteed by the *Charters* are minimally impaired. Under that test, it is not required to show that the legislator has chosen the least detrimental means to achieve its legislative objective. Rather, it can choose from among a range of reasonable alternatives, provided that the measure retained is carefully tailored to the objective and allows its achievement.¹²² If that is the case, its choice is entitled to deference.

[164] Here, the judge found that the second paragraph of section 23.2 is not a minimal impairment of the rights of transgender or non-binary minors and he listed, based on the evidence, the practical and administrative hurdles facing a minor attempting to obtain a letter from a health professional: finding in the health and social services system a professional able to help them, getting out of school or work to go and meet them, travelling to the appointment and paying for the service when it is not funded by the state.

[165] He added that the AGQ had not explained why the requirements imposed upon adults would not suffice and concluded that the imposition of additional hurdles upon minors was not justified.

[166] Even if we were to accept, for the purposes of the analysis,¹²³ that by requiring that a professional confirms that the change is appropriate, the second paragraph of section 23.2 of the *Regulation* imposes an additional burden on minors, it should be considered whether that burden is unreasonable to the point of invalidating the provision.

[167] With respect to the trial judge, we find that this is not the case.

[168] Of course, the minor will have to consult a professional, possibly missing school to do so, and possibly having to incur costs, although not necessarily. It may also be more difficult, outside of urban areas, to find a professional with sufficient knowledge of transgender or non-binary reality to agree to provide such a letter. However, by including social workers in the list of designated professionals, the legislator alleviates several of these difficulties. That list also includes physicians, psychiatrists, sexologists and psychologists.

[169] The respondents and interveners note that in 2015, the obligation to provide a letter from a professional had been contemplated for persons of full age, before being rejected and that now, applicants are simply required to supply an affidavit from a third

¹²² *Frank v. Canada (Attorney General)*, [2019] 1 S.C.R. 3, para. 66.

¹²³ Some young people may find it preferable to provide such a letter rather than an affidavit from someone who knows them, but we accept, for the purposes of this analysis only, the premise that this requirement imposes an additional burden.

party who knows them. Yet, the fact that the requirement to provide such a letter has not been retained for people of full age does not mean that it is necessarily unreasonable as far as minors are concerned. Indeed, in our society, there are several situations where minors are not treated the same way as persons of full age.

[170] The AGQ, for its part, points out that one of the interveners as well as two of the respondents' witnesses supported the enactment of the second paragraph of section 23.2 of the *Regulation* in 2016. It should be noted that, at the time, extending to minors the right to request that the designation of sex appearing in civil status documents be changed was being contemplated and that, in that context, a letter from a health professional appeared to be an acceptable political compromise to achieve that. Françoise Susset, an expert witness called by the respondents, said then that the requirement of having to provide a letter from a professional [TRANSLATION] "could be an intermediate step before society catches up with the reality of those youths, which shows us, in fact, a reality that has always existed."¹²⁴

[171] At this stage, neither the parties nor these witnesses, let alone the Court, are bound by that political compromise. However, the fact remains that in the case at bar, the legislator undertook a public consultation process before the enactment of section 23.2 of the *Regulation*, experts in the field were consulted and the legislator weighed the political and social considerations before making the choice that it was up to it to make.

[172] The Court notes that courts must, in such circumstances, show deference to the choices made by the legislator in response to complex social issues, since the latter is best positioned to make those decisions.¹²⁵ That principle must apply here, unless it is shown that after having considered the vulnerability of minors aged 14 to 17 and the benefit that being accompanied by a professional may procure, the legislator made an ill-advised or unreasonable choice, of which we are not convinced.

[173] The parties also compared the Quebec provisions to those enacted by other Canadian provinces and territories. Even though the requirements vary from one province or territory to another and even though the decisions made by those jurisdictions do not allow us to establish what constitutes minimal impairment under section 1 of the *Canadian Charter* or section 9.1 of the *Quebec Charter*, a brief overview of the conditions set by each in order to change the designation of sex that appears in an act of birth supports the finding that the infringement stemming from the measure enacted by the Quebec legislator in the second paragraph of section 23.2 of the *Regulation* is minimal.

[174] Indeed, several provinces and territories require that any minor who requests that the designation of sex be changed provide a letter from one (as in Quebec) or even two

¹²⁴ Bill 103 – Journal des débats – Committee on Citizen Relations – Special Consultations – 7 June 2016 – Vol. 44 N° 59, p. 25.

¹²⁵ *Frank v. Canada (Attorney General)*, *supra*, note 122, at para. 66; *Alberta v. Hutterian Brethren of Wilson Colony*, *supra*, note 116, at para. 53.

professionals. Some even impose that same requirement on persons of full age, as is the case in Ontario and New Brunswick. In Nova Scotia, in Newfoundland and Labrador and in Yukon, a letter from a designated professional is only required for minors under the age of 16, whereas in Alberta and in British Columbia, it is only required for minors under the age of 12. These two latter provinces, as well as Prince Edward Island, require however that all minors obtain their parents' consent or, failing that, that the latter submit the application.

[175] The identity of the professionals authorized to provide the letter varies by province and territory, however. All allow that the letter be provided by a physician, a psychologist or a nurse. Some provinces and territories (including Quebec) also allow that it be provided by a social worker, whereas Yukon adds to this list lawyers, teachers, First Nation chiefs or councillors as well as school counsellors.

[176] The requirements as to the contents of the letter are similar across Canada. In Quebec, the professional must indicate that they are of the opinion that the change in the designation of sex is "appropriate", based on the four conditions enumerated in section 23.1 of the *Regulation*. Elsewhere in Canada, they must indicate that the stated gender does not correspond to "the person's [i.e. the person requesting the change] gender identity" or "the gender with which the applicant identifies". Certain provinces further refer to the notion of capacity or require that the professional simply affirm that the change is appropriate.

[177] A review of all of these requirements, which appears in the table appended to these reasons, shows that Quebec is among the most permissive provinces of the country.

[178] We therefore find that the rights guaranteed by the *Charters* are minimally impaired.

[179] The third criterion consists in determining whether the effects of the impugned provision on the applicants are disproportionate to its objective. The objective behind section 23.2 of the *Regulation* is to assess the seriousness of the undertaking by the person filing an application to change the designation of sex that appears in their act of birth. That requirement undoubtedly has an effect on the applicants, but that effect, ultimately, is limited.

[180] This leads us to conclude that the burden imposed on minors is reasonable under the circumstances. It takes into account their reality, the fact that they have not all reached their full maturity and that some, until they reach full age, may be more vulnerable on account of their age. We note in that regard that in *A.B. v. Bragg Communications Inc.*,¹²⁶ a case involving the sexualized cyberbullying of a 15-year-old minor, the Supreme Court

¹²⁶ *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, para. 17.

recognized that the inherent vulnerability of children remains deeply embedded in Canadian law.

[181] In our view, the impugned provision reflects the need to assess the seriousness of the minors' undertaking, considering the importance of the change requested and its consequences, and considering the importance of the principle of stability of acts of civil status.

[182] Consequently, we find that although the second paragraph of section 23.2 of the *Regulation* violates the right to dignity protected by section 4 and the right to life, security, inviolability and freedom protected by section 1 of the *Quebec Charter*, the limit resulting therefrom, correctly construed, is justified.

[183] To the extent that the test would be the same if one were to determine whether the infringement of a right protected by the *Canadian Charter* was justified under section 1 thereof, it is not useful to repeat that analysis and it is sufficient to apply the conclusion we have reached under section 9.1 of the *Quebec Charter* to the analysis to be carried out under section 1.

[184] We now turn to the issues raised by the incidental appeal.

B. Incidental Appeal

1. *Did the trial judge err in holding that article 62 C.C.Q. did not breach transgender minors' right to equality of guaranteed by section 15 of the Canadian Charter?*

[185] The incidental appellant argues that article 62 C.C.Q. breaches the rights of transgender minors 14 years of age or over to equality, dignity, security, privacy, freedom and inviolability to the extent that it is read, on the one hand, as requiring that they notify their parents or tutors when applying to the registrar of civil status for a change of the given name or names that appear on their act of birth and, on the other hand, as allowing their parents to object to that application. Consequently, they ask the Court to interpret article 62 C.C.Q. in a manner that respects their fundamental rights.

[186] To repeat, that article provides as follows:

62. Except for a compelling reason, no change of name of a minor child may be granted if, as the case may be, the father and mother or the parents of the minor child as legal tutors, the tutor, if any, or the minor, if 14 years of age or

62. À moins d'un motif impérieux, le changement de nom à l'égard d'un enfant mineur n'est pas accordé si, selon le cas, les père et mère ou les parents de l'enfant mineur à titre de tuteurs légaux, le tuteur, le cas

over, have not been notified of the application or if any of those persons object to it.

échéant, ou le mineur de 14 ans et plus n'ont pas été avisés de la demande ou si l'une de ces personnes s'y oppose.

The same applies in the case of an application for the addition to the surname of the minor of a part taken from the surname of the father or mother or of one of the parents, except with respect to the right to object reserved to the tutor of a minor under 14 years of age or to the minor 14 years of age or over.

Il en est de même lorsque l'on demande l'ajout au nom de famille du mineur d'une partie provenant du nom de famille de son père ou de sa mère ou de l'un de ses parents, sauf en ce qui concerne le droit d'opposition qui est réservé au tuteur du mineur de moins de 14 ans ou au mineur de 14 ans et plus.

[187] While acknowledging that an application for a change of given name motivated by a gender identity issue could constitute a compelling reason, the AGQ, as incidental respondent, suggests for its part that the lack of evidence that the registrar of civil status has refused to consent to such an application by a minor 14 years of age or over should settle the matter and lead the Court to decline to rule both on the proper interpretation of article 62 C.C.Q. and on its compliance with the rights protected by the *Charters*, leaving it for the registrar of civil status to exercise its discretion.

[188] We disagree and find, rather, that the incidental appellant has the requisite standing to request that article 62 C.C.Q. be interpreted. The rights of transgender youths will thus be clarified, and they will know what to expect without having to wait for one of them to have their application denied by the registrar of civil status. Indeed, the latter's representative has already indicated that the registrar of civil status interprets article 62 C.C.Q. as requiring that minors 14 years of age or over who simply wish to change their given name or names so that they correspond to their gender identity notify their parents or tutor. The registrar also opines that it cannot grant the application if the parents or tutor have not been notified or if they object thereto.

[189] On that point, we are of the view, rather, that article 62 C.C.Q. does not require minors 14 years of age or over to notify their parents or, as the case may be, their tutor, when they apply to have one or more of their given names changed so that they correspond to their gender identity, no more than it confers on the parents or tutor the right to object to their application.

[190] The reasons for this are as follows.

[191] Article 62 C.C.Q. is one of the several provisions of Chapter I, entitled NAME AND DESIGNATION OF SEX, which set out the rules for obtaining a change in the designation of sex or a name that appear in the registry and in the acts of civil status.

[192] As of 2016, an application for a change of name may be made by an adult, by a minor child's tutor or by the minor child alone if the child is 14 years of age or over (art. 60 C.C.Q.).

[193] In the case of an application for a change of name of a minor child, interested parties, that is their parents, their tutor or the child alone if they are at least 14 years of age, must have been duly notified of the application (in the manner prescribed by the *Regulation*) and must not object to it.

[194] Article 62 C.C.Q. provides that, where such a notice has not been given, or where the notified persons express their objection, the registrar of civil status does not have jurisdiction to grant the application, unless it determines that it is justified in doing so for a compelling reason. Consequently, absent a *compelling reason*, a notion to which we will return below, only the court has jurisdiction to allow the change of name where a minor child is involved.

[195] Moreover, the registrar of civil status must publish on its website the notice of the application for a change of name, unless such publication is not required.¹²⁷ That is the case, for instance, when the change requested only concerns a given name and when it is clear that it relates to a modification of the person's gender identity (art. 63 C.C.Q.).

[196] A person who wishes to apply for a change of name for a minor by way of administrative process, knowing that there will be an objection may, alternatively, submit the application to the court before even filing its application with the registrar of civil status (art. 66.1 C.C.Q.).

[197] Any decision of the registrar of civil status relating to a change of name may be reviewed by the court, on the application of an interested person (arts. 74 and 141 C.C.Q.).

[198] A notice of the decision rendered by the registrar of civil status or of the judicial decision rendered upon review must be published,¹²⁸ except in certain circumstances, for instance where the application only concerns a given name and it is clear that the change requested relates to a modification of the person's gender identity (art. 67, par. 2 C.C.Q.).

2. Change of the Designation of Sex

[199] As described above, article 71 C.C.Q. allows a person whose gender identity does not correspond to the designation of sex that appears in their act of birth to have that designation and, if necessary, their given names changed if they satisfy the statutory requirements. Pursuant to article 71.1 C.C.Q., a minor may, alone, make such an application if they are 14 years of age or over, which negates the obligation otherwise

¹²⁷ *Regulation respecting change of name and of other particulars of civil status*, *supra*, note 8, s. 5.

¹²⁸ *Id.*, s. 17.

imposed on them to obtain the authorization of the court before instituting alone an action relating to their status (art. 159 C.C.Q.).

[200] The application to have the designation of sex that appears in an act of birth changed is subject to the same procedure as an application for a change of name, except as to publication requirements (art. 73 C.C.Q.). In fact, the application for a change of designation of sex, and if necessary, of given name or names need not be published and nothing requires a minor 14 years of age or over to notify their parents or tutor.¹²⁹ The application must be supported by an affidavit¹³⁰, and the applicant must attach the documents set out in section 4 of the *Regulation* (art. 72 C.C.Q.) as well as a letter from a designated professional declaring having evaluated or followed the child and being of the opinion that the change of designation is appropriate.¹³¹

[201] These provisions show that the legislator was aware of the importance of protecting the dignity and privacy of people whose gender identity does not correspond to the designation of sex that appears in their act of birth¹³² and that it has chosen to grant them full autonomy once they are 14 years of age or over.

[202] Consequently, minors 14 years of age or over may act alone, without being required to inform their parents or tutor, if they wish to change the designation of sex that appears in their act of birth. They may, at the same time, request that their name be changed, by modifying one or several of their given names, to reflect their gender identity, with no further requirement than that of satisfying the conditions provided by the *Regulation* (which include neither the obligation to publish the application nor that of notifying their parents or tutor). In such circumstances, the legislator did not grant any right to object to the parents or tutor.

¹²⁹ Although s. 23 of the *Regulation* provides that ss. 12 to 16, 19 and 20 apply to a change of sex designation, with the necessary adaptations, the registrar of civil status recognizes that a minor who is 14 years of age or over and applies for both a change of sex and a change of name does not have to notify their parents or tutor. This interpretation is in line with the text of s. 71.1, para. 2, C.C.Q., which provides that, “in the latter case”, *i.e.*, when the application is made by the tutor of a minor who is under 14 years of age, the application is not granted if the other tutor has not been notified or objects to it. Nothing is provided for in terms of notice and opposition when the application is made by a minor who is 14 years of age or over.

¹³⁰ *Regulation respecting change of name and of other particulars of civil status, supra*, note 8, ss. 1, 23 and 23.1.

¹³¹ *Id.*, s 23.2, para. 2.

¹³² [TRANSLATION] “Refusing to adapt the legal gender to this appearance means forcing the transsexual to reveal their private life on a regular basis”, in Benoît Moore, *Le droit de la famille et les minorités, supra*, note 21, p. 256 and note 99; *Thompson c. Directeur de l'état civil*, [2002] R.D.F. 182 (C.S.).

3. **The Correlation Between the Change of Name and the Change of Designation of Sex**

[203] As mentioned, article 62 C.C.Q. provides that no change of name of a minor child may be granted by the registrar of civil status if the parents or tutor have not been notified of the application or if they object to it, unless there is a *compelling reason*.

[204] Consequently, absent a *compelling reason*, minors 14 years of age or over who wish to change their name must inform their parents of their application. In case of objection, they must resort to the change of name procedure by way of judicial process (arts. 66 and 66.1 C.C.Q).

[205] That being said, we are of the opinion that the legislator did not intend to require that minors 14 years of age or over notify their parents or tutor of their application for a change of one or several of their given names in cases where the application is motivated by the fact that they feel that their given names do not correspond to their gender identity, nor to grant to the parents or tutor the right to object to that application.

[206] Indeed, article 62 C.C.Q. should be read in light of the legislation as a whole and we must assume that the legislator introduced a coherent scheme.¹³³ Therefore, it is undeniable that the legislator grants to minors 14 years of age or over the necessary autonomy to have the designation of their sex changed and, if they wish, at the same time, the given name or names that appear on the acts of civil status that concern them if they do not correspond to their gender identity.

[207] Further, can it be said that the legislator intended otherwise in cases where a minor 14 years of age or over simply requests a change of their given name and not that of the designation of their sex? In our view, it cannot.

[208] We note first that article 62 C.C.Q. applies to any application for a change of “name” (whether it be one or several given names, the surname or both) of a minor child, regardless of the grounds of the application. That provision, like article 66 C.C.Q. which grants to minors 14 years of age or over the right to submit alone an application for a change of name, while requiring them to notify the person having parental authority, is thus very broad in scope and applies to a multitude of factual scenarios: that of a mother wishing to change the surname of her child 14 years of age or over, to substitute her own instead of that of the father; that of a minor 14 years of age or over who wishes to add their father’s surname to that of their mother, which they already have; that of a parent wishing to change their child’s given name because it does not correspond to the one that they wanted to give to the child; that of a minor wishing to change their name and given name because they correspond to those of a youth of their age who has committed a

¹³³ Stéphane Beaulac & Frédéric Bérard, *Précis d'interprétation législative*, 2nd Ed., Montreal, LexisNexis, 2014, pp. 147-148, 168-169; *Interpretation Act*, CQLR, c. I-16, s. 41.1.

horrific and publicized crime, etc.¹³⁴ Article 62 C.C.Q. also applies in cases where the application involves a minor, without distinguishing between children under 14 years of age and those 14 years of age or over.

[209] The legislator, knowing that applications for a change of name can be motivated by a host of reasons and recognizing that minors 14 years of age or over should be granted a different degree of autonomy, permitted the registrar of civil status to ignore the requirements of article 62 C.C.Q. (and the requirement that minors 14 years of age or over notify the person having parental authority of any application for a change of name pursuant to article 66 C.C.Q.), by expressly allowing the registrar to grant the application for a change of name by such minors in cases where the application is motivated by a *compelling reason* (without however indicating what it means by *compelling reason*).¹³⁵

[210] In our opinion, there is no doubt that when a minor 14 years of age or over wants their given name or names to correspond to their gender identity, this constitutes a *compelling reason* within the meaning of article 62 C.C.Q., and therefore the registrar of civil status has jurisdiction to grant the change that they request even if their parents or tutor have not been notified or, if the minor chose to notify them, even if they object to their application.

[211] Indeed, the legislator has already given to minors 14 years of age or over the required autonomy to have the designation of their sex changed without having to notify anyone and, at the same time if they so wish, to have their given names changed where their application is motivated by the fact that such designations do not correspond to their gender identity.¹³⁶ Consequently, it seems to us that the legislator equally intended to give them their autonomy when they are requesting, for that same reason, only a change of their given name or names.

[212] Finding otherwise would lead to an absurdity, since that would mean that someone who is requesting less changes would be subjected to more stringent requirements than someone who is asking for more, even though the reason in support of their application for a change is the same. Such a proposition is unsustainable.

[213] The principle of consistency of the legislative scheme leads rather to the finding that minors 14 years of age or over may request and obtain that the registrar of civil status 1) change the designation of their sex; 2) change both the designation of their sex and one or several of their given names; or 3) only change one or several of their given names,

¹³⁴ C.C.Q., art. 58.

¹³⁵ The Superior Court already noted that what constitutes a “compelling reason” is better defined by a negative proposition, in the sense that it must be understood as meaning that it should not be superfluous or insignificant or the result of a whim or other capricious reason, see *Muratova c. Director of Civil Status*, 2015 QCCS 2109.

¹³⁶ C.C.Q., arts. 71 and 71.1; *Regulation respecting change of name and of other particulars of civil status*, *supra*, note 8, s. 24, *a contrario*.

as long as their application is motivated by the fact that those names or that designation do not correspond to their gender identity. In such a case, the registrar of civil status may grant the application even if the person having parental authority has not been notified and, if they were, even if they object to the application, provided however that the requirements set forth in the *Regulation* are met.

[214] Although this is in no way determinative, the preceding observations being sufficient to justify our interpretation of article 62 C.C.Q. and the notion of *compelling reason* that it contains, it is useful to point out that that interpretation is also consistent with the legislator's choice to grant to minors 14 years of age or over great autonomy as regards their health care.¹³⁷ Of course, a change of one or several given names is not health care, but the evidence shows that the obligation of having one or several given names that do not correspond to our gender identity can lead to numerous difficulties from which may stem physical or mental health problems. It would therefore be incongruous that the legislator grant to minors 14 years of age or over the right to consent to health care, while not granting them the requisite autonomy to change a situation that may jeopardize their health.

[215] Considering the interpretation given to the notion of "compelling reason" contained in article 62 C.C.Q., it is neither useful nor apposite to discuss the impact that a different interpretation would have had on the rights of transgender or non-binary youths protected by the *Charters*. A declaration that the gender identity that motivates an application for a change of given name for a minor 14 years of age or over constitutes a compelling reason within the meaning of article 62 C.C.Q. is, however, appropriate.

GENEVIÈVE MARCOTTE, J.A.

MARIE-JOSÉE HOGUE, J.A.

¹³⁷ C.C.Q., art. 14, para. 2, and art. 17.

REASONS OF HAMILTON, J.A.

[216] I have had the benefit of reading the reasons of my colleagues Marcotte and Hogue, J.J.A. I am in agreement with them as to the whole of the judgment, including its conclusions, save for one specific point.

[217] My colleagues find that the second paragraph of section 23.2 of the *Regulation* creates a distinction based on age, a finding with which I agree, but they reject the argument that the distinction is also based on gender identity. They explain that subjecting the change of designation of sex to certain conditions, even though they apply only to transgender and non-binary persons, is not *per se* discriminatory. In their opinion, the *Regulation* does not thereby create a distinction with cisgender persons, since it does not impose more stringent conditions on transgender and non-binary persons than those that apply to cisgender persons. I disagree.

[218] In my view, what is at stake in the present case goes beyond the sole issue of discrimination on the basis of age.

[219] The impugned provision's effect, in light of the specific needs of the protected groups, must also be considered.¹³⁸ The Supreme Court recognizes that identical or facially neutral treatment can be discriminatory because it fails to take into account "the true characteristics of [a] group which act as headwinds to the enjoyment of society's benefits."¹³⁹

[220] To begin with, I find that transgender and non-binary persons are a protected group. Gender identity is not listed in section 15 of the *Canadian Charter*. However, under the test articulated by the Supreme Court in *Corbiere*,¹⁴⁰ gender identity is analogous to the grounds enumerated in that section in that it is a personal characteristic "that is immutable or changeable only at unacceptable cost to personal identity."¹⁴¹ The witnesses heard at trial were unanimous¹⁴² and the trial judge reached that conclusion,¹⁴³

¹³⁸ *Fraser v. Canada (Attorney General)*, *supra*, note 91, paras. 42-46.

¹³⁹ *Eaton v. Brant County Board of Education*, 1997 CanLII 366 (SCC), [1997] 1 S.C.R. 241, para. 67; *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624, para. 65; *Fraser v. Canada (Attorney General)*, *supra*, note 91, para. 47.

¹⁴⁰ *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 S.C.R. 203.

¹⁴¹ *Id.*, para. 13.

¹⁴² Judgment under appeal, *supra*, note 9, paras. 106-108.

¹⁴³ *Id.*, para. 111.

which should be adopted here. As for the *Quebec Charter*, gender identity is one of the grounds of discrimination expressly prohibited by section 10.

[221] The *Regulation* is, on its face, a “neutral” legislative measure. It does not expressly distinguish transgender or non-binary persons from cisgender persons, but it does not have to do so. The section dealing with the change of the designation of sex can apply only to those who want to change the designation of sex that appears in their documents of civil status. As a practical matter, the *Regulation* applies *in fact* only to transgender or non-binary persons who consider that the change is essential to their full participation in society.

[222] Considered in their historical context, article 71 *C.C.Q.*, as well as the *Regulation*, were intended to allow transgender or non-binary persons to change the designation of sex in their civil status documents and thus represented an important advance in reducing the difficulties experienced by that group. However, section 23.2 of the *Regulation* imposes conditions that effectively limit that right. The respondents submit that those conditions are too onerous.

[223] The *Regulation* subjects the right to change the designation of sex to certain conditions that apply only to transgender or non-binary persons, and not to cisgender persons. Should those conditions be too onerous, the *Regulation* creates, in fact, a distinction based on a protected ground. An apparently neutral legislative measure would thus create effects that are not.

[224] I would make an analogy with measures aimed at accommodating persons with a physical or mental disability. The Supreme Court recognizes that an apparently neutral measure can have an adverse effect on that group stemming “from a failure to ensure that they benefit equally from a service offered to everyone.”¹⁴⁴ It is necessary “to take into account the true characteristics of this group which act as headwinds to the enjoyment of society’s benefits” and “to accommodate them.”¹⁴⁵ The Supreme Court summarizes the situation as follows:¹⁴⁶

The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society’s benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based solely on “mainstream” attributes to which disabled persons will never be able to gain access. [...] The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. [...] It is recognition

¹⁴⁴ *Eldridge, supra*, note 139, para. 66.

¹⁴⁵ *Eaton, supra*, note 139, para. 67.

¹⁴⁶ *Ibid.*

of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability.

[225] In those cases, the starting point of the analysis is the principle that everyone is entitled to access public services. Persons who do not have any physical or mental disability may not require any special measure enabling them to exercise that right, but absent any such measure, persons with a physical or mental disability cannot do so. Any measure enacted to accommodate them represents an advance, but where such measures do not allow them to fully participate in society, there may be discrimination.

[226] These propositions can be transposed to the situation of transgender or non-binary persons. I am in no way suggesting that being transgender or non-binary is a physical or mental disability. That is obviously not the case. But the fact remains that it is difficult for transgender or non-binary persons to fully participate in society precisely because they are transgender or non-binary. In the trial judge's view, the evidence established that the inconsistency between civil status documents and true gender identity contributes to that problem. Persons whose documents of civil status do not match their gender identity therefore require special measures allowing them to modify their documents, whereas persons whose civil status documents are consistent with their gender identity have no need whatsoever for such measures. Article 71 *C.C.Q.* and the *Regulation* represent an important advance, but the conditions imposed by section 23.2 of the *Regulation*, if they prevent them from amending their documents and fully participating in society, can constitute discrimination against transgender or non-binary persons.

[227] Section 23.2 of the *Regulation* also creates a distinction among transgender or non-binary persons on the basis of their age. The legislator enacted a rule for transgender or non-binary persons of full age – in the first paragraph of section 23.2 – the validity of which is not questioned. The rule is different for minors. There is clearly a distinction based on age. The fact that the requirement imposed in cases where the application is made by a person of full age may be seen as reasonable does not have the effect of limiting the discrimination created by the second paragraph of section 23.2 of the *Regulation* to discrimination based on age only. Even if the first paragraph of section 23.2 did not exist and the second paragraph applied to all persons, whether of full age or minor, it would nevertheless remain potentially discriminatory toward transgender or non-binary persons. Indeed, the second paragraph of section 23.2 of the *Regulation* creates a distinction for a doubly protected group, i.e, transgender or non-binary minors. These represent two distinct grounds of discrimination, which can intersect (as is the case here).

[228] I now turn to the second branch of the analysis which consists of determining whether that double distinction “perpetuates, reinforces or exacerbates disadvantage.” In my opinion, it does. Indeed, the evidence adduced at trial and summarized by my colleagues clearly establishes that transgender or non-binary persons are a disadvantaged group and that the discordance between the designations appearing on their civil status documents and their true identity perpetuates, reinforces or exacerbates

that disadvantage. The second paragraph of section 23.2 of the *Regulation* imposes upon transgender or non-binary minors an additional burden that can prevent them from undertaking or, at the very least, can delay or slow the necessary steps to have their civil status documents changed, which has the effect of perpetuating, reinforcing or exacerbating the disadvantages that they are already experiencing.

[229] I am therefore of the opinion that the second paragraph of section 23.2 of the *Regulation* should have been held to be discriminatory, within the meaning of section 15 of the *Canadian Charter* and section 10 of the *Quebec Charter*, towards transgender or non-binary minors.

[230] My colleagues reach essentially the same result in finding that the second paragraph of section 23.2 of the *Regulation* violates the right of transgender and non-binary persons to the safeguard of their dignity. In my view, however, it is important to emphasize the element of discrimination for a future case where dignity will not be engaged.

[231] I agree with my colleagues as to their analysis in determining whether such a violation is nevertheless justified under section 1 of the *Canadian Charter* or section 9.1 of the *Quebec Charter*. Although my colleagues conduct that analysis in a somewhat different context (violation of the right to dignity and justification under section 9.1 of the *Quebec Charter*), the analysis is transposable to the violation of section 15 of the *Canadian Charter* and to the justification under section 1 and reaches the same result, i.e., that the violation is justified.

[232] For this reason, and notwithstanding my differing opinion on that specific issue, I am in agreement with my colleagues' conclusions.

STEPHEN W. HAMILTON, J.A.

APPENDIX

	Affidavit from the applicant	Letter from a professional	Minor¹⁴⁷: parents' consent
Alberta ¹⁴⁸	Yes	Only if the applicant is less than 12 years old (physician, psychologist, nurse, social worker)	Yes (request submitted by the parent, minor's consent required if aged 12 and over), unless widowed, divorced, married or an adult independent partner
British Columbia ¹⁴⁹	Yes	Only if the applicant is less than 12 years old (physician, psychologist) <i>"confirm[ing] that the sex designation on the applicant's birth registration does not correspond with the applicant's gender identity"</i>	Yes
Prince Edward Island ¹⁵⁰	Yes	Yes (physician, nurse) <i>"confirming that the sex recorded on the person's registration of birth does not correspond with the person's gender identity"</i>	Yes (request submitted by a parent, minor's consent required if aged 12 or over)

¹⁴⁷ The age of majority is 18 in Alberta, Prince Edward Island, Manitoba, Ontario and Saskatchewan and it is 19 in British Columbia, New-Brunswick, Nova Scotia, Nunavut, Newfoundland and Labrador, Northwest Territories and Yukon.

¹⁴⁸ *Vital Statistics Act*, SA 2007, c. V-4.1, s. 30, <https://canlii.ca/t/55tpz>.
Vital Statistics Information Regulation, Alta Reg 108/2018, ss. 17-19, <https://canlii.ca/t/55pbd>.
Forms: <https://www.alberta.ca/birth-record-sex-amendment.aspx>.

¹⁴⁹ *Vital Statistics Act*, RSBC 1996, c. 479, ss 27, 48, <https://canlii.ca/t/565hf>:
48 *The registrar general may establish the forms to be used for the purposes of this Act and, unless specified by this Act, the particulars to be included in a certificate issued under this Act.*
Forms: <https://www2.gov.bc.ca/gov/content/life-events/birth-adoptio/births/birth-certificates/change-of-gender-designation-on-birth-certificates>.

¹⁵⁰ *Vital Statistics Act*, RSPEI 1988, c. V-4.1, s. 12, <https://canlii.ca/t/564jd>.
Forms: <https://www.princeedwardisland.ca/fr/information/justice-et-securite-publique/change-gender-designation>.

Manitoba ¹⁵¹	Yes	Yes (physician, psychologist, nurse) <i>“the sex designation on the applicant’s birth registration [...] is, in the health care professional’s opinion, inconsistent with the sex designation with which the applicant identifies”</i> and, in the case of a minor, <i>“a statement that the health care professional is of the opinion that the minor has the capacity to make health care decisions”</i>	No
New Brunswick ¹⁵²	Yes (the written declaration does not need to be under oath)	Yes (physician, psychologist) <i>“confirms that the sex designation of the applicant is inconsistent with the gender with which the applicant identifies and, as a result, the sex designation should be changed”</i>	Yes, if aged 15 or under (request submitted by a parent, minor’s consent required if aged 12 or over)
Nova Scotia ¹⁵³	Yes	Only if the applicant is under the age of 16 (physician, psychologist) <i>“the person has treated or evaluated the applicant and that, in the person’s opinion, (C) the sex indicator</i>	Only if under the age of 16

¹⁵¹ *The Vital Statistics Act*, CCSM c. V60, s. 25, <https://canlii.ca/t/55gcz>.

Forms: https://vitalstats.gov.mb.ca/change_of_sex_designation.html.

¹⁵² *Vital Statistics Act*, SNB 1979, c. V-3, ss. 34, 34.1, <https://canlii.ca/t/564v6>.

Forms: [Change of Sex Designation \(qnb.ca\)](https://beta.novascotia.ca/change-your-sex-designation).

¹⁵³ *Vital Statistics Act*, RSNS 1989, c. 494, s. 25, <https://canlii.ca/t/542vd>.

Forms: <https://beta.novascotia.ca/change-your-sex-indicator-if-youre-16-or-older>
<https://beta.novascotia.ca/change-your-sex-indicator-if-youre-15-or-younger>.

		<i>on the applicant's birth registration, whether the birth was registered in the Province or elsewhere, does not correspond with the applicant's gender identity, and (D) the applicant has the capacity to make an informed decision about whether to make an application under this Section"</i>	
Nunavut ¹⁵⁴	Yes	Yes – two letters (physician, psychologist, nurse) <i>"a statement that the health care professional is of the opinion (i) that the sex designation on the applicant's registration of birth is inconsistent with the sex designation with which the applicant identifies and (ii) that the sex designation requested by the applicant is consistent with the sex designation with which the applicant identifies; [...] a statement that the health care professional is of the opinion that the minor has the capacity to make health care decisions"</i>	No

¹⁵⁴ *Vital Statistics Act*, RSNWT (Nu) 1988, c. V-3, s. 11.1., <https://canlii.ca/t/52qpm>. Amendments into force: <https://www.nunavutlegislation.ca/en/media/1674>.

Ontario ¹⁵⁵	Yes	Yes (physician, psychologist) “confirm that the applicant’s gender identity does not accord with the sex designation on the child’s birth registration; and are of the opinion that the change of sex designation on the birth registration is appropriate”	Yes, if aged 15 or under (request submitted by a parent, minor’s consent required)
Saskatchewan ¹⁵⁶	Yes	Yes (physician, psychologist) « in the health care professional’s opinion, the applicant has assumed, identifies with and is maintaining the gender identity that corresponds with the	No

¹⁵⁵ In Ontario, there is a dichotomy between the requirements of the *Act* and those of the forms, because s. 36 of the *Vital Statistics Act*, which dates from 1990 and has never been amended, requires a change in the anatomical sex structure of the person in order to apply for a change of the sex designation. *Vital Statistics Act*, RSO 1990, c. V.4, s. 36; <https://canlii.ca/t/55qmw>; General, R.R.O. 1990, Reg 1094, <https://canlii.ca/t/55gks>, s. 49:

49 (1) An application under section 36 of the Act to have the designation of sex on the registration of birth changed shall be in the form approved by the Registrar General. <https://canlii.ca/t/6dhp4>;

Forms: [Changing your sex designation on your birth registration and birth certificate | ontario.ca](https://www.ontario.ca/gov/services/change-sex-designation)

However, in April 2012, in *XY v. Ontario (Government and Consumer Services)*, [2012 HRTO 726](https://www.hrtco.org/cases/2012-HRTO-726), the Human Rights Tribunal of Ontario made the following order:

[300] *The Tribunal makes the following orders:*

- 1) *The respondent [Ontario] shall cease requiring transgendered persons to have “transsexual surgery” in order to obtain a change in sex designation on their registration of birth.*
- 2) *Within 180 days of the date of this Decision, the respondent shall revise the criteria for changing sex designation on a birth registration, up to the point of undue hardship, so as to remove the discriminatory effect of the current system on transgendered persons. The revision of the criteria for changing sex designation on a birth registration should be in accordance with the reasoning in this Decision.*
- 3) *Within a further 30 days, the respondent shall take reasonable steps to publicize the revised criteria for changing sex designation on a birth registration so that transgendered persons are aware of them.*

[...]

¹⁵⁶ *The Vital Statistics Act*, 2009, SS 2009, c. V-7.21, s. 31, <https://canlii.ca/t/5636t>;
The Vital Statistics Regulations, 2010, RRS c. V-7.21, Reg 1, s. 11.1., <https://canlii.ca/t/543jw>;
Forms: <https://www.ehealthsask.ca/residents/Pages/Sex-Designation.aspx>.

		<i>requested amendment to the designation of sex on the applicant's statement; and [...] in the health care professional's opinion, the change of sex designation on the applicant's statement is appropriate" and "in the health care professional's opinion, the applicant has the capacity to make health care decisions"</i>	
Newfoundland and Labrador ¹⁵⁷	Yes	Only if the applicant is under the age of 16 (physician, psychologist, nurse, social worker) – a second statement is required if aged under 12 " <i>confirms that the sex designation requested by the applicant is consistent with the sex designation with which the child identifies</i> "	Only if under the age of 16 (request submitted by a parent, minor's consent is required if aged 12 and over)
Northwest Territories ¹⁵⁸	Yes	Yes (physician, psychologist, nurse, social worker) " <i>in the professional opinion of the designated professional, the requested amendment to the</i>	Yes (request submitted by a parent), unless aged 16 and over and living independently

¹⁵⁷ *Vital Statistics Act*, 2009, SNL 2009, c. V-6.01, art.26 and 26.1, <https://canlii.ca/t/5647p>; *Vital Statistics Regulations*, NLR 58/21 <https://canlii.ca/t/bb5b>;

Forms: <https://www.gov.nl.ca/dgsnl/birth/changing-your-sex-designation/>

¹⁵⁸ *Vital Statistics Act*, SNWT 2011, c. 34, s. 41, <https://canlii.ca/t/564qj>.
Vital Statistics Regulations, NWT Reg 086-2012, ss. 3.1, 3.2., <https://canlii.ca/t/564r9>.
 Forms: [Changing Your Sex Designation | Health and Social Services \(gov.nt.ca\)](https://www.gov.nt.ca/health-social-services/changing-your-sex-designation).

		<i>designation of sex corresponds with the gender identity with which the minor identifies"</i>	
Yukon ¹⁵⁹	Yes (the declaration does not need to be under oath)	Only if under 16 (physician, psychologist, nurse, social worker, lawyer, chief or councillor of a Yukon First Nation, teacher or school counselor) " <i>in their opinion, the young person would like the notation of change</i> "	Yes, if under 16 years of age (request submitted by a parent, minor's consent required if aged 12 and over)

¹⁵⁹ *Vital Statistics Act*, RSY 2002, c. 225, s. 12, <https://canlii.ca/t/5556d>.
Vital Statistics Regulation, YOIC 1987/188, ss. 3.01, 3.02., <https://canlii.ca/t/530th>.
Forms: [Change sex on a birth registration | Government of Yukon](#).