

**IN THE HIGH COURT OF THE DOMINION OF CANADA
(ON APPEAL FROM THE ONTARIO COURT OF APPEAL)**

B E T W E E N:

ALEX LAUREN GHORBANI

Appellant

-AND-

ONTARIO (ATTORNEY GENERAL)

Respondent

FACTUM OF THE APPELLANT

COUNSEL FOR THE APPELLANT

TEAM 3

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PART I – OVERVIEW

[1] Ontario’s regulation of transgender healthcare has trapped Ms. Ghorbani in a body that is not her own. This denies her a fundamental feature of her identity.

[2] The Schedule of Benefits of the Ontario Health Insurance Plan (OHIP) imposes special conditions on funding for sex-reassignment surgery (SRS) for transgender persons. These conditions (the “SRS Conditions”) would force Ms. Ghorbani to wait at least 34 months for a procedure that a well-respected specialist says she urgently needs. For Ms. Ghorbani, this is 34 months of being imprisoned in a body that is not her own, 34 months of grappling with debilitating anxiety, and 34 months of warding off thoughts of suicide.

Ontario, Ministry of Health and Long-Term Care, *Schedule of Benefits — Physician Services under the Health Insurance Act (October 1, 2005)*, (Toronto: Ministry of Health and Long-Term Care, 2015) at AD6 [SRS Conditions].
Official Problem, Wilson Moot 2016 at paras 15, 22, 23-24, 27 [Official Problem].

[3] The SRS Conditions infringe section 15 of the *Charter* because they exacerbate the disadvantage of transgender people, a group that already faces alarming rates of harassment, sexual violence, poverty, and exclusion. The inflexible 34-month delay imposed by the SRS Conditions is another barrier transgender people must overcome to live as their authentic selves.

Canadian Charter of Rights and Freedoms, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].
Official Problem, *supra* para 2 at para 27.

[4] This state-imposed delay also infringes section 7 of the *Charter* because it causes Ms. Ghorbani severe mental anguish, substantially increases her risk of suicide, and interferes with one of the most important personal decisions of her life.

[5] The SRS Conditions are contrary to the principles of fundamental justice and cannot be saved under section 1. It is unnecessary and excessive to force individuals like Ms. Ghorbani to wait nearly three years for a procedure they so urgently need.

PART II – STATEMENT OF FACTS

1. Factual background

[6] Ms. Ghorbani has struggled with her gender identity and expression for much of her life. Three years ago, the struggle became unbearable and Ms. Ghorbani tried to kill herself. She took a large number of sleeping pills and then fell asleep on a set of train tracks. Fortunately she was rescued.

Official Problem, *supra* para 2 at para 6.

[7] Shortly after her suicide attempt, Ms. Ghorbani was referred to the Gender Dysphoria Program (GDP) at the Carter Institute in Ottawa. However, the Carter Institute was out of her reach. Ms. Ghorbani had only ever held down a series of low-paying jobs in Toronto, and OHIP refused to cover any travel costs. Estranged from her family and friends at the time, Ms. Ghorbani had no one to support her financially or emotionally for the two-year duration of the program.

Official Problem, *supra* para 2 at paras 3, 5, 22.
Clarifications to the Official Problem at para 3.

[8] Ms. Ghorbani was then referred to Dr. Stella Kang, a well-respected Toronto-based physician who specializes in the treatment of transgender patients. Under Dr. Kang's counseling and supervision, Ms. Ghorbani began living life as a woman. She came out as transgender to her family, became closer to her mother and to her older sister, and entered into a relationship with the woman she now loves. Ms. Ghorbani made new friends through the transgender community and through her job as a caseworker at a non-profit that provides social services for homeless youth.

Official Problem, *supra* para 2 at paras 9, 10, 11, 15, 24.

[9] After 17 months of living as a woman under the counseling and supervision of Dr. Kang, Ms. Ghorbani decided that she had reached the “point of no return.” She became anxious to have SRS as soon as possible. Dr. Kang agreed that Ms. Ghorbani urgently needed SRS and referred her to a well-regarded surgeon in Montreal. The surgeon informed Ms. Ghorbani that, under the SRS Conditions, OHIP would not cover the \$45,000 cost of the surgery unless she had a referral from the Carter Institute. Ms. Ghorbani could not afford this sum. She was turned away.

Official Problem, *supra* para 2 at paras 13, 14, 27.

[10] The SRS Conditions force transgender persons to go through the Carter Institute to receive funding for SRS. Intersex persons who have congenitally-ambiguous genitalia are exempted from this condition. Transgender persons must wait at least 34 months to undergo SRS: 10 months for a first appointment with the Carter Institute plus two years of real-life experience (RLE) in the gender role that matches their gender identity. The entire RLE must be supervised by the Carter Institute, requiring patients to make at least 24 trips to Ottawa on average. The Carter Institute may still refuse to issue a referral at the end of the treatment period.

SRS Conditions, *supra* para 2.

Official Problem, *supra* para 2 at para 22.

Clarifications to the Official Problem, *supra* para 7.

[11] The two-year RLE requirement applies to all patients, regardless of their individual circumstances. The Carter Institute would refuse to count the 17 months of RLE that Ms. Ghorbani has already completed under Dr. Kang, even though the director of the GDP considers Dr. Kang “eminently qualified” to care for transgender patients and would “definitely” trust her opinion that Ms. Ghorbani needs SRS immediately.

Official Problem, *supra* para 2 at paras 22, 24, 27.

[12] The nearly three-year delay imposed by the SRS Conditions is particularly traumatic for Ms. Ghorbani. Dr. Kang testified that Ms. Ghorbani’s anxiety about not being able to undergo SRS is “detrimental to her psychological well-being.” Ms. Ghorbani cries at the sight of her own reflection. She finds herself unable to use a public restroom, wear a bathing suit, or go to the beach. Ms. Ghorbani cannot be truly intimate with the woman she loves and feels “trapped in a body that is not [her] own.”

Official Problem, *supra* para 2 at paras 15, 27.

[13] The 34-month delay could kill her. Transgender patients who are denied timely access to the treatment they need for their transition are “at a higher risk of suicide than any other known population.” Ms. Ghorbani has already attempted suicide once before.

Official Problem, *supra* para 2 at paras 6, 27.

2. Procedural history

[14] In March 2015, the Ontario Superior Court of Justice found that the SRS Conditions infringed sections 15 and 7 of the *Charter* because they discriminated against Ms. Ghorbani on the basis of her sex and arbitrarily deprived her of her right to security of the person. The Court held that the SRS Conditions could not be justified under section 1 because the deleterious effects on Ms. Ghorbani clearly outweighed any benefits the SRS Conditions might have.

Official Problem, *supra* para 2 at para 30.

[15] The Ontario Court of Appeal allowed the Attorney General’s appeal in September 2015. A majority of the Court held that Ms. Ghorbani’s security of the person was not engaged and that, even if the SRS Conditions created a distinction on an enumerated or analogous ground, that distinction would not be discriminatory.

Official Problem, *supra* para 2 at para 30.

PART III – STATEMENT OF POINTS IN ISSUE

[16] The present appeal raises the following constitutional questions:

1. Do the SRS Conditions infringe Ms. Ghorbani’s rights under section 15 of the *Charter*?

The SRS Conditions create a distinction on the enumerated grounds of sex and mental disability and the analogous grounds of gender identity and gender expression. The SRS Conditions discriminate against Ms. Ghorbani and infringe section 15(1) of the *Charter*. The SRS Conditions are not saved by section 15(2) because the means chosen by the government are not rationally connected to an ameliorative purpose.

2. Do the SRS Conditions infringe Ms. Ghorbani’s rights under section 7 of the *Charter*?

The SRS Conditions deprive Ms. Ghorbani of her rights to life, liberty, and security of the person in a manner that is overbroad, arbitrary, and grossly disproportionate.

3. If the answer to either of questions 1 or 2 is “yes,” is the infringement demonstrably justified in a free and democratic society under section 1 of the *Charter*?

The *Charter* infringements cannot be justified in a free and democratic society. The means adopted are not rationally connected to the objectives of the SRS Conditions, the SRS Conditions are not minimally impairing of the rights in question, and the deleterious effects of the SRS Conditions outweigh their salutary effects.

PART IV – ARGUMENT

Issue 1: The SRS Conditions infringe Ms. Ghorbani’s rights under section 15 of the Charter

[17] The SRS Conditions create a distinction based on the enumerated grounds of sex and mental disability and the proposed analogous grounds of gender identity and gender expression. The conditions fail to respond to the actual capacities and needs of transgender persons and instead impose burdens that reinforce their disadvantage. The SRS Conditions are discriminatory under the test outlined in *Quebec* and *Taypotat*. They are not ameliorative under section 15(2).

Quebec (AG) v A, 2013 SCC 5 at paras 331-332, [2013] 1 SCR 61, Abella J
[*Quebec*].

Kahkewistahaw First Nation v Taypotat, 2015 SCC 30 at paras 18-20, [2015] 2 SCR
548 [*Taypotat*].

1. The SRS Conditions create a distinction based on enumerated and analogous grounds

a) The SRS Conditions create a distinction based on the enumerated ground of sex

[18] Transgender persons fall within the enumerated ground of sex. The Alberta Court of Queen’s Bench has held that “[a] distinction drawn between a person with male genitalia who lives as a male and a person with male genitalia who lives as a female is beyond question a distinction made on the basis of sex” (*F(C)*). Although the SRS Conditions do not explicitly mention transgender persons, they target transgender persons by imposing special requirements that apply to people who are not intersex, have gender dysphoria, and need SRS. To reject transgender persons as falling under the category of sex would entrench the very gender binary that underlies the disadvantage faced by transgender persons.

F(C) v Alberta (Director of Vital Statistics), 2014 ABQB 237 at para 39, 100 Alta LR
(5th) 75 [*F(C)*].

[19] As a transgender woman, Ms. Ghorbani is treated differently than other OHIP members. The SRS Conditions prevent transgender persons like Ms. Ghorbani from accessing OHIP

coverage for a medically necessary service unless they receive counseling and treatment for at least 24 months at the Carter Institute. Intersex persons also face “severe negative psychological effects” as a result of genital reconstruction surgery if they do not receive proper treatment and psychosocial supports. Yet, under the SRS Conditions, there is no requirement that intersex persons be treated by the Carter Institute or receive counseling before they are eligible for insured services. Intersex persons may access SRS without any prior authorization.

SRS Conditions, *supra* para 2.

Official Problem, *supra* para 2 at paras 22, 25.

b) *The SRS Conditions create a distinction based on the enumerated ground of disability*

[20] The SRS Conditions subject patients to differential treatment because of their gender dysphoria. The SRS Conditions require that persons with gender dysphoria complete the GDP at the Carter Institute in order to receive coverage for medically necessary treatment. Ms. Ghorbani, who has gender dysphoria, must receive a referral from the Carter Institute to access SRS. Intersex persons without gender dysphoria may access insured genital reconstruction surgery without any prior authorization. Only transgender persons’ access to medically necessary treatment is limited as a result of their gender dysphoria.

SRS Conditions, *supra* para 2.

c) *The SRS Conditions create a distinction based on the analogous grounds of gender identity and gender expression*

[21] Gender identity and expression are analogous grounds of discrimination under section 15(1). They are immutable or changeable “only at an unacceptable cost to personal identity” (*Corbiere*). Ms. Ghorbani’s gender identity and expression go to the core of her personal identity. According to the Ontario Human Rights Commission, gender identity is “each person’s internal and individual experience of gender,” while gender expression is “how a person publicly

presents their gender.” Gender identity and expression are characteristics transgender persons cannot and should not be expected to change in order to receive equal treatment under the law.

Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203 at para 13, 173 DLR (4th) 1 [*Corbiere*].

Ontario Human Rights Commission, “Policy on preventing discrimination because of identity and gender expression,” April 14, 2014, online: <<http://www.ohrc.on.ca/en/policy-preventing-discrimination-because-gender-identity-and-gender-expression>>.

2. The distinctions created by the SRS Conditions discriminate against Ms. Ghorbani

[22] Under the second stage of the section 15(1) analysis, the government is “required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services” (*Eldridge*). Instead of taking special measures to ensure that transgender persons benefit equally from OHIP, the government has imposed requirements that prevent transgender persons from accessing medically necessary treatment. The SRS Conditions fail to respond to the actual capacities and needs of transgender persons and instead impose burdens that reinforce, perpetuate, and exacerbate their disadvantage (*Quebec, Taypotat*).

Eldridge v British Columbia (AG), [1997] 3 SCR 624 at para 77, 151 DLR (4th) 577 [*Eldridge*].

Quebec, supra para 17 at paras 324, 333.

Taypotat, supra para 17 at para 20.

[23] The requirements imposed by the SRS Conditions deny transgender persons the equal benefit of OHIP coverage for medically necessary services. For transgender persons, a referral from a qualified specialist is insufficient to access insured SRS. Instead, patients like Ms. Ghorbani are forced to travel to Ottawa for two years at their own expense and wait at least 34 months for a second referral. These requirements prevent transgender persons from accessing critical health care regardless of their individual circumstances and medical needs.

SRS Conditions, *supra* para 2.

Official Problem, *supra* para 2 at paras 22-23.

[24] Discrimination exists where the state conduct “widens rather than narrows the gap between a disadvantaged group and the rest of society” (*Quebec*). Once the state provides a benefit, “it is obliged to do so in a non-discriminatory manner” (*Eldridge*). Here, the state has chosen to provide SRS but has prevented transgender persons from accessing it by forcing them to endure unnecessary delays and travel costs. These barriers to health care widen the gap between transgender persons and the rest of society by jeopardizing their health and exposing them to a substantially increased risk of suicide.

Quebec, supra para 17 at para 327.

Eldridge, supra para 22 at para 73.

Official Problem, *supra* para 2 at para 27.

[25] Section 15(1) asks “how any member of the majority, reasonably informed, would feel in the shoes of the claimant, experiencing the effects of the legislation” (*Gosselin*). The barriers to health care imposed by the SRS Conditions have severe effects on Ms. Ghorbani. She feels like she is in limbo and “trapped in a body that is not [her] own.” Ms. Ghorbani encounters judgment and harassment on a daily basis in “the way people whisper and stare” and through other “painful reminder[s]” that she still does not “completely pass as a woman.”

Gosselin v Quebec (AG), 2002 SCC 84 at para 245, [2002] 4 SCR 429 [*Gosselin*].

Official Problem, *supra* para 2 at para 15.

a) *The SRS Conditions fail to respond to the actual circumstances of transgender persons*

[26] The SRS Conditions fail to reflect “the overall needs and circumstances” of transgender persons for three reasons. First, the SRS Conditions exacerbate existing barriers to health care. Second, the SRS Conditions fail to recognize the highly variable and individualized nature of gender dysphoria and instead impose strict, one-size-fits-all criteria for access to SRS. Third, the SRS Conditions are based in stereotypes about transgender persons.

Gosselin, supra para 25 at para 55.

[27] The SRS Conditions deny transgender persons substantive equality by exacerbating existing barriers to health care. In *Quebec*, Justice Abella noted that “substantive equality looks not only at the choices that are available to individuals, but at ‘the social and economic environments’” in which these choices play out. Transgender persons face disproportionately high rates of suicide, poverty, homelessness, sexual violence, and outright discrimination—all of which makes it harder for them to access critical health care. The minimum 34-month wait for an SRS referral and the requirement that patients travel to the easternmost part of the province for two years are additional barriers that transgender persons must overcome to access critical health care.

Quebec, supra para 17 at para 342.

Clarifications to the Official Problem, *supra* para 7 at para 3.

Official Problem, *supra* para 2 at para 27.

[28] The SRS Conditions fail to correspond to the highly variable and individualized nature of gender dysphoria by imposing uniform and inflexible eligibility criteria on transgender persons. Gender dysphoria relates to an individual’s identity and has a deeply personal impact on a person’s life, relationships with loved ones, and integration within the community. The evidence on the record shows that Ms. Ghorbani has benefited greatly from tailored, individualized treatment outside the Carter Institute. A one-size-fits-all approach is inappropriate in such circumstances.

Official Problem, *supra* para 2 at paras 8-12.

[29] The SRS Conditions are based in the stereotype that transgender persons are confused about their gender and should therefore be forced to wait extended periods to access SRS. Stereotyping is “a disadvantaging attitude” because it “attributes characteristics to members of a group regardless of their actual capacities” (*Quebec*). Although the claimant is not obliged to

demonstrate stereotyping under section 15(1), the stereotype that transgender persons are merely confused about their gender reinforces their disadvantage and does not correspond with their actual circumstances. In fact, “the medical literature demonstrates that very few patients regret having undergone SRS, even patients who have developed post-surgical complications.”

Quebec, supra para 17 at para 325
Official Problem, *supra* para 2 at para 27.

[30] Here, Ms. Ghorbani is certain that she needs SRS, and a well-respected specialist agrees. Although “perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required,” a benefit program cannot be founded on a stereotype that perpetuates the disadvantage of transgender persons.

Official Problem, *supra* para 2 at para 24.

b) The SRS Conditions impose burdens on transgender persons by impeding access to a statutory benefit

[31] The barriers imposed by the SRS Conditions “widen the gap” between transgender persons and the rest of society by preventing them from accessing urgently needed medical treatment in a timely manner.

Quebec, supra para 17 at para 332.

[32] Like deaf persons in *Eldridge*, transgender persons must “bear the burden of paying” in order to receive the same quality of care as others, “despite the fact that the system is intended to make ability to pay irrelevant.” The SRS Conditions require transgender persons to fund their own travel to Ottawa every month for at least two years. This added burden delays and in some circumstances prevents transgender persons from accessing critical health care. Those who, like Ms. Ghorbani, cannot afford to travel to Ottawa are effectively denied treatment, even when SRS is medically necessary for them.

Eldridge, supra para 22 at para 71.

Clarifications to the Official Problem, *supra* para 7 at para 3.

[33] The mandatory 34-month wait imposed by the SRS Conditions exacerbates Ms. Ghorbani's suffering as a pre-operative transgender woman. The delay has had severe and profound effects on Ms. Ghorbani, who continues to feel that she cannot pass as a woman or be intimate with her romantic partner. Ms. Ghorbani's anxiety about not being able to undergo SRS is detrimental to her psychological well-being and exposes her to a substantially increased risk of suicide.

Official Problem, *supra* para 2 at paras 15, 22-23.

[34] The wait times and travel requirements imposed by the SRS Conditions are more vividly felt by transgender persons because of their pre-existing disadvantage. As Justice L'Heureux-Dubé noted in *Egan*, "groups that are more socially vulnerable will experience the adverse effects of legislative distinction more vividly than if the same distinction were directed at a group which is not similarly socially vulnerable."

Egan v Canada, [1995] 2 SCR 513 at 520, 124 DLR (4th) 609, L'Heureux-Dubé J
[*Egan*].

[35] Transgender persons already face difficulty accessing health care, disproportionate poverty, a high suicide risk, and social exclusion. The travel costs and wait times imposed by the SRS Conditions are overwhelming obstacles in such circumstances. As the United States Supreme Court noted in *Griggs*, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo." The facially neutral burdens imposed by the SRS Conditions 'freeze' the status quo for transgender persons, since they impede rather than enable access to insured SRS.

Taypotat, supra para 17 at para 23, citing *Griggs v Duke Power Co*, 401 US 424 (1971)
at 430 [*Griggs*].

[36] The SRS Conditions “[perpetuate] arbitrary disadvantage based on an individual’s membership in an enumerated or analogous group” (*Quebec*). One of the stated purposes of the SRS Conditions is to ensure that OHIP members are provided with care that is medically necessary and beneficial. A well-respected specialist in the treatment of transgender patients has determined that SRS is both medically necessary and beneficial for Ms. Ghorbani and should happen as soon as possible. The director of the Carter Institute’s GDP unreservedly trusts the specialist’s opinion. Despite this, the SRS Conditions deny Ms. Ghorbani timely access to SRS, instead forcing her to wait at least 34 months for the procedure.

Official Problem, *supra* para 2 at paras 22-24, 27, 29.
Quebec, supra para 17 at para 331, cited in Taypotat *supra* para 17 at para 16.

3. The SRS Conditions are not ameliorative under section 15(2)

[37] The SRS Conditions are not an ameliorative program because they erect rather than remove barriers to critical health care. First, the means of implementation chosen by the state do not serve the ameliorative purpose of improving access to health care for a disadvantaged group. Second, section 15(2) does not protect the distinction made by the SRS Conditions between transgender and intersex persons because this distinction does not serve the object of the ameliorative program.

Alberta (Aboriginal Affairs and Northern Development) v Cunningham, 2011 SCC 37 at paras 71-72, [2011] 2 SCR 670 [*Cunningham*].

[38] The SRS Conditions create unnecessary delays, impose high travel costs, and prevent most transgender patients at the Carter Institute from accessing insured SRS. The government has not shown that it was “rational for the state to conclude that the means chosen...would contribute to [its ameliorative] purpose” (*Kapp*). It is not a rational choice to limit transgender persons who live throughout Ontario to a single health care provider at one corner of the

province for the most important treatment they may undergo in their lifetime. Physicians in the patient's own community are in the best position to assess the social supports available to a patient and the likelihood of a patient responding positively to SRS.

R v Kapp, 2008 SCC 41 at para 49, [2008] 2 SCR 483 [*Kapp*].

[39] Excluding transgender persons from what is generally available to intersex persons needing SRS shows that the state is denying transgender persons genuine ameliorative assistance. In *Cunningham*, the Court accepted a distinction because “without the distinction, achieving the object of the program would be more difficult.” Here, the distinction between transgender and intersex persons serves no remedial purpose and does not ameliorate the condition of transgender persons. The SRS conditions cannot be upheld under section 15(2) because the protection of section 15(2) only extends to distinctions drawn on enumerated and analogous grounds “that serve and are necessary to the ameliorative purpose” (*Kapp*).

Cunningham, *supra* para 37 at para 73.

Kapp, *supra* para 38 at para 52.

Issue 2: The SRS Conditions infringe Ms. Ghorbani's rights under section 7 of the Charter

[40] The SRS Conditions infringe section 7 of the *Charter* because they create unnecessary and excessive delays in accessing critical health care. These delays deprive Ms. Ghorbani of her rights to life, liberty, and security of the person by increasing her risk of suicide, by interfering with her autonomy to make decisions of fundamental personal importance, and by causing her serious psychological stress. These deprivations are not in accordance with the principles of fundamental justice because they are overbroad, arbitrary, and grossly disproportionate to the objectives of the SRS Conditions.

Canada (AG) v PHS Community Services Society, 2011 SCC 44 at para 84, [2011] 3 SCR 134 [*Insite*].

1. The SRS Conditions constitute a deprivation under section 7

[41] The SRS Conditions constitute a deprivation under section 7 because they create barriers to accessing critical health care (*Insite*, *Chaoulli*, *Morgentaler*, *Hitzig*). To constitute a deprivation, barriers to health care need not take the form of prohibitions on activity. They can encompass “any state action taken in enforcing and securing compliance with the law,” including the imposition of an “onerous application process” and “strict conditions for eligibility” (*Hitzig*). In the final analysis, the only question is whether there is a “real, as opposed to a speculative, link” between the SRS Conditions and the harms suffered by Ms. Ghorbani (*Bedford*).

Insite, *supra* para 40 at para 93.

Chaoulli v Quebec (AG), 2005 SCC 35 at paras 43, 118-119, [2005] 1 SCR 791 [*Chaoulli*].

R v Morgentaler, [1988] 1 SCR 30 at paras 31-32, 135, 44 DLR (4th) 385 [*Morgentaler*].

Hitzig v R, 231 DLR (4th) 104 at paras 76, 93-95, CRR (2d) 201, (Ont CA) [*Hitzig*].

Canada (AG) v Bedford, 2013 SCC 72 at para 76, [2013] 3 SCR 1101, [*Bedford*].

[42] As in *Morgentaler* and *Chaoulli*, the government has established a monopolistic scheme for accessing health care that creates harmful delays in treatment. Transgender persons seeking SRS must endure the 34-month wait imposed by the SRS Conditions unless they are wealthy enough to afford private care. As Chief Justice McLachlin explained in *Chaoulli*, the possibility of bypassing the state-imposed delay does not negate the deprivation:

In *Morgentaler* the result of the monopolistic scheme was delay in treatment with attendant physical risk and psychological suffering. In *Morgentaler*, as here, people in urgent need of care face the same prospect: unless they fall within the wealthy few who can pay for private care, typically outside the country, they have no choice but to accept the delays imposed by the legislative scheme and the adverse physical and psychological consequences this entails. As in *Morgentaler*, the result is interference with security of the person under s. 7 of the *Charter*.

Official Problem, *supra* para 2 at paras 22-23.

Chaoulli, *supra* para 41 at para 119 [emphasis added].

[43] Although SRS Conditions are restrictions on funding rather than prohibitions on activity, this does not change the analysis. *Chaoulli* and *Morgentaler* focused on the practical effects of the legislative scheme “taken from the perspective of the woman facing the health care system” (*Chaoulli*). In both cases, “the system left the individual facing a lack of critical care with no choice but to travel outside the country to obtain the required medical care at her own expense” (*Chaoulli*). Similarly, the SRS Conditions leave transgender patients who urgently need SRS with no choice but to obtain it at their own expense. This is no choice at all for many transgender people, as they are disproportionately likely to be living in poverty.

Chaoulli, supra para 41 at para 121.
Official Problem, *supra* para 2 at para 27.

[44] Regulatory barriers to accessing critical health care are sufficient to constitute a deprivation. In *Hitzig*, the Ontario Court of Appeal found that “the state had placed barriers between [the claimants] and the marihuana necessary for their health” by requiring them to apply for possession permits, acquire their medication in limited ways, and in some cases obtain a medical declaration from a second specialist. These barriers were sufficient to constitute a deprivation of security of the person “even without considering the criminal sanctions which support the regulatory structure.” The barriers created by the SRS Conditions are more severe than those in *Hitzig* because they force transgender persons to wait at least 34 months before accessing SRS, even if a specialist determines that such a wait would be detrimental to their psychological well-being.

Hitzig, supra para 41 at paras 83, 104, 54, 95.
Official Problem, *supra* para 2 at paras 22-23, 27.

[45] *Flora* should not be interpreted as holding that restrictions on OHIP coverage cannot constitute deprivations under section 7. The impugned regulation in that case “neither

[prescribed] nor [limited] the types of medical services available to Ontarians.” On the contrary, it entitled OHIP members “to receive funding for the same level of health care services abroad that they are entitled to receive in Ontario.” Moreover, the regulation concerned reimbursements for medically necessary health care that patients had already accessed. The SRS Conditions prevent Ms. Ghorbani from accessing medically necessary health care in the first place. She was turned away from SRS in Montreal because she did not meet the SRS Conditions and had no way of funding the surgery herself.

Flora v Ontario Health Insurance Plan, 2008 ONCA 538 at paras 101, 79, 91 O.R. (3d) 412 [*Flora*].
Official Problem, *supra* para 2 at paras 13-14, 27.

[46] The focus in *Chaoulli*, *Morgentaler*, and *Hitzig* on the effects rather than the form of the deprivation is consistent with the approach to causation established in *Bedford*. For the SRS Conditions to constitute a deprivation, all that is required is a “sufficient causal connection” or a “real, as opposed to a speculative, link” between the SRS Conditions and the harm suffered by Ms. Ghorbani. This is a “practical and pragmatic” standard of causation that is “sensitive to the context of the particular case.”

Bedford, *supra* para 41 at para 76.

[47] The causation requirement is satisfied in this case. Ms. Ghorbani’s financial circumstances are such that she cannot access SRS except by complying with the SRS Conditions. The conditions impose mandatory delays on treatment that have been shown to harm Ms. Ghorbani’s psychological well-being, increase her risk of suicide, and interfere with her ability to live as a woman. The SRS Conditions effectively deny Ms. Ghorbani access to SRS because she cannot endure the mandatory 34-month wait without unacceptable risks to her life and health.

Official Problem, *supra* para 2 at paras 14, 15, 22-23, 27.

2. The SRS Conditions deprive Ms. Ghorbani of her right to liberty

[48] The SRS Conditions deprive Ms. Ghorbani of her liberty by interfering with her “right to make fundamental personal choices free from state interference” (*Blencoe*). The scope of this right is very broad: it includes the autonomy to make important medical decisions in consultation with a physician even where “serious risks or consequences, including death, may flow from the patient’s decision” (*Carter*).

Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44 at para 54,
[2000] 2 SCR 307 [*Blencoe*].

Carter v Canada (AG), 2015 SCC 5 at para 67, [2015] 1 SCR 331 [*Carter*].

[49] Ms. Ghorbani’s decision to undergo SRS falls within this protected area of medical autonomy. The decision was made in consultation with a well-respected specialist who agrees that the procedure is medically necessary for Ms. Ghorbani and should happen as soon as possible. The specialist’s opinion is unreservedly trusted by the government’s own expert witness. Yet the government prevents Ms. Ghorbani from accessing SRS unless she meets criteria that are “unrelated to her own priorities and aspirations” and at odds with the opinion of her doctor (*Morgentaler*).

Official Problem, *supra* para 2 at paras 13-15, 23-24, 27.

Morgentaler, *supra* para 41 at para 27.

[50] Ms. Ghorbani’s decision to undergo SRS is not just a medical decision: it goes to the very heart of her identity and affects her most intimate personal relationships. Like the decision to undergo a therapeutic abortion in *Morgentaler*, the decision to undergo SRS “deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.”

Morgentaler, supra para 41 at para 300.

[51] The delays imposed by the SRS Conditions interfere with Ms. Ghorbani's autonomy to decide how and when to live as her authentic self. If SRS should not be available on demand, it also should not be subject to unnecessary conditions that thwart the priorities and aspirations of women like Ms. Ghorbani, women who simply want the freedom to be themselves.

3. The SRS Conditions deprive Ms. Ghorbani of her right to security of the person

[52] The SRS Conditions deprive Ms. Ghorbani of her security of the person because they “[create] a risk to health by preventing access to health care” (*Insite*). In particular, the conditions prevent Ms. Ghorbani from accessing medically necessary SRS in a timely manner, causing her serious psychological stress and threatening her very life.

Insite, supra para 40 at para 93.

a) The SRS Conditions cause Ms. Ghorbani serious psychological stress

[53] The SRS Conditions create delays in treatment that meet the threshold of “serious state-imposed psychological stress” established in *Morgentaler*. The stress “need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety” (*G(J)*).

Morgentaler, supra para 41 at paras 25, 304.

New Brunswick (Minister of Health and Community Services) v G(J), [1999] 3 SCR 46 at paras 58-60, 177 DLR (4th) 124, Lamer CJ [*G(J)*].

[54] The law already recognizes that delays in accessing critical health care can cause serious psychological stress. In *Morgentaler*, a majority of the Court found that unnecessary delays in accessing therapeutic abortions have serious and profound effects on women's psychological well-being, infringing their security of the person. In *Chaoulli*, all members of the Court held that encounters with waiting lists in the public health care system can have serious psychological

effects that engage security of the person. In *Parker*, the Court recognized that anxiety about an untreated medical condition can “be a cruel and unusual punishment in itself.”

Morgentaler, *supra* para 41 at paras 25, 135.

Chaoulli, *supra* para 41 at paras 45, 116, 204, [2005] 1 SCR 791 [*Chaoulli*].

R v Parker (2000), 49 OR (3d) 481 at para 67, 188 DLR (4th) 385 (Ont CA) [*Parker*].

[55] The delays imposed by the SRS Conditions have caused Ms. Ghorbani severe mental anguish. Expert evidence indicates that Ms. Ghorbani’s anxiety about not being able to undergo SRS in a timely manner is “detrimental to her psychological well-being.” This mental anguish is undoubtedly greater than ordinary stress or anxiety, as Ms. Ghorbani reports that she cries at the sight of her own reflection and feels “trapped in a body that is not [her] own.”

Official Problem, *supra* para 2 at paras 15, 22-23, 27.

b) *The SRS Conditions threaten Ms. Ghorbani’s life*

[56] The Supreme Court of Canada has unanimously held that “[w]here the law creates a risk not just to the health but also to the lives of the claimants, the deprivation [of the right to security of the person] is even clearer” (*Insite*).

Insite, *supra* para 40 at para 93.

[57] Transgender patients who are unable to access timely medical treatment to assist them with their transition are “at a higher risk of suicide than any other known population.” Ms. Ghorbani falls within this group, as expert evidence indicates that she urgently needs SRS to assist her with her transition. She has already attempted suicide once before.

Official Problem, *supra* para 2 at paras 6, 27.

4. *The SRS Conditions deprive Ms. Ghorbani of her right to life*

[58] The right to life is engaged “where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly” (*Carter*). In the health care context, the

right to life is engaged where “the lack of timely health care could result in death.” As discussed above, expert evidence indicates that the delays imposed by the SRS Conditions expose Ms. Ghorbani to a substantially increased risk of suicide, engaging her right to life.

Carter, supra para 48 at para 62.
Official Problem, *supra* para 2 at para 27.

5. The deprivations are not in accordance with the principles of fundamental justice

[59] The deprivations suffered by Ms. Ghorbani are overbroad, arbitrary, and grossly disproportionate to the purposes of the SRS Conditions. The purposes must be “taken at face value” at all stages of the principles of fundamental justice analysis (*Bedford*). The application judge accepted two purposes for the SRS Conditions: (1) to ensure that OHIP members are provided only with care that is medically necessary and beneficial; and (2) to control the costs of OHIP.

Bedford, supra para 41 at para 125.
Official Problem, *supra* para 2 at para 29.

[60] The principles of fundamental justice analysis focuses solely on the law’s effect on the specific claimant. An arbitrary, overbroad, or grossly disproportionate impact on one person suffices to establish a breach of section 7.

Bedford, supra para 41 at paras 122-123.

a) *The SRS Conditions are overbroad*

[61] The SRS Conditions are overbroad because there is no rational connection between the purposes of the conditions and their effects on patients like Ms. Ghorbani. The conditions impose strict, one-size-fits-all criteria that force all transgender persons to wait at least 34 months for SRS, regardless of their individual medical needs.

Bedford, supra para 41 at para 112.
Official Problem, *supra* para 2 at para 29.

[62] First, there is no rational connection between denying Ms. Ghorbani timely access to SRS and the purpose of ensuring that OHIP members are provided with care that is medically necessary and beneficial. On the contrary, a specialist in the treatment of transgender patients has determined that SRS is medically necessary and beneficial for Ms. Ghorbani. The specialist's opinion on such matters is unreservedly trusted by the government's own expert witness, the director of the Carter Institute's GDP.

Official Problem, *supra* para 2 at paras 13, 24, 27.

[63] Second, there is no rational connection between denying Ms. Ghorbani timely access to SRS and the purpose of controlling the costs of OHIP. There is no reason to believe that preventing Ms. Ghorbani from undergoing SRS when she needs it will reduce net costs to OHIP over Ms. Ghorbani's lifetime. On the contrary, expert evidence shows that forcing Ms. Ghorbani to wait to receive SRS has worsened her health. This could cause her to consume more health services over her lifetime, increasing net costs to OHIP.

Official Problem, *supra* para 2 at para 27.

b) *The SRS Conditions are arbitrary*

[64] The SRS Conditions are arbitrary because there is not "a direct connection between the purpose of the law and the impugned effect on the individual" (*Bedford*). There must be "a real connection on the facts," and the more serious the deprivation the clearer the connection must be (*Chaoulli*). The SRS Conditions are arbitrary for the same reasons they are overbroad with respect to Ms. Ghorbani.

Bedford, *supra* para 41 at para 111.

Chaoulli, *supra* para 41 at para 131.

[65] The arbitrariness in this case is analogous to that in *Morgentaler*. There, the majority found that the requirement that all therapeutic abortions take place in accredited hospitals was arbitrary because it “did not contribute to the objective of protecting women’s health and, in fact, caused delays that were detrimental to women’s health” (*Bedford*).

Bedford, supra para 41 at para 98.

[66] Similarly, the SRS Conditions cause delays that are detrimental to the health of transgender persons like Ms. Ghorbani who are unable to wait nearly three years for SRS. When assessing arbitrariness, “we should look to the evidence rather than to assumptions” (*Chaoulli*). There is no evidence that forcing long waiting periods upon people like Ms. Ghorbani either promotes their health or reduces net costs to OHIP. On the contrary, expert evidence indicates that Ms. Ghorbani’s health is being worsened by the wait, potentially increasing costs to OHIP.

Chaoulli, supra para 41 at para 152.

Official Problem, *supra* para 2 at paras 15, 27, 29.

c) *The SRS Conditions are grossly disproportionate*

[67] The effects of forcing Ms. Ghorbani to wait three years for SRS are “totally out of sync” with the objectives of the SRS Conditions (*Bedford*). The effects are extremely severe. The delay has caused Ms. Ghorbani intense anxiety that is “detrimental to her psychological well-being.” It has also exposed her to a substantially increased risk of suicide.

Bedford, supra para 41 at para 120.

Official Problem, *supra* para 2 at para 27.

[68] These life-threatening deprivations are totally out of sync with the objective of providing medically necessary and beneficial health care. Ms. Ghorbani’s mental anguish and possible suicide are grossly disproportionate to any benefit patients might derive from the imposition of strict, one-size-fits-all conditions on access to SRS.

[69] The deprivations suffered by Ms. Ghorbani are also totally out of sync with the cost-containment objective. Ms. Ghorbani's SRS would cost one ten-thousandth of a percent of Ontario's annual healthcare budget. It is not worth Ms. Ghorbani's mental anguish and possible suicide to save this small sum in one year. To suggest otherwise would be to undermine the "belief in the dignity and worth of every human person" that underpins the principles of fundamental justice (*Carter*).

Official Problem, *supra* para 2 at paras 14, 30.
Carter, *supra* para 48 at para 81.

Issue 3: The infringements of section 15 and section 7 are not justifiable under section 1 of the Charter

[70] The Respondent is unable to justify the rights infringements under section 1 because (1) the means adopted are not rationally connected to the objectives of the SRS Conditions; (2) the SRS Conditions are not minimally impairing of the rights in question; and (3) the deleterious effects of the SRS Conditions outweigh their salutary effects.

R v Oakes, [1986] 1 SCR 103 at paras 73-74, 26 DLR (4th) 200, Dickson CJ [*Oakes*].

1. The Respondent is entitled to little deference

[71] The remedy sought does not interfere with the government's policy-making discretion. Like the claimants in *Eldridge*, Ms. Ghorbani is not asking for the creation of a new public benefit; she is asking only that an already-existing benefit be provided in a way that does not infringe her constitutional rights. As in *Eldridge*, the benefit scheme at issue comprises a minuscule proportion of the provincial health care budget: less than three ten-thousandths of a percent. The small cost of remedying the *Charter* infringements significantly diminishes the degree of deference owed to the government (*NAPE*).

Official Problem, *supra* para 2 at para 30.
Eldridge, *supra* para 22 at paras 73, 92, 87.

Newfoundland (Treasury Board) v NAPE, 2004 SCC 66 at para 84, [2004] 3 SCR 381 [NAPE].

[72] Although the government has discretion to make health policy, “when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the *Charter*” (*Insite*). As in *Insite* and *Chaoulli*, the issue before the Court is not whether the government’s chosen approach to health policy is the best one. It is simply whether the government’s chosen approach has limited the rights of the claimant in a manner that does not comply with the *Charter*.

Insite, *supra* para 40 at para 105.

Chaoulli, *supra* para 41 at para 107.

2. The SRS Conditions fail the proportionality test

a) The SRS Conditions are not rationally connected to their objectives

[73] Assuming the SRS Conditions are prescribed by law and have a pressing and substantial objective, they fail the rational connection test because there is no “causal connection between the infringement and the benefit sought ‘on the basis of reason or logic’” (*RJR-MacDonald*).

RJR-MacDonald Inc v Canada (AG), [1995] 3 SCR 199 at para 153, DLR (4th) 1, McLachlin J [*RJR-MacDonald*].

[74] The concept of rational connection is closely related to the concepts of arbitrariness and overbreadth. For the same reasons that the SRS Conditions are arbitrary and overbroad, they lack a causal connection to the benefits sought. Preventing people from accessing SRS within the time they need it bears no logical relation to the goals of providing medically necessary and beneficial health care and reducing costs to OHIP.

Bedford, *supra* para 41 at paras 111-112.

b) *The SRS Conditions are not minimally impairing*

[75] The SRS Conditions are not minimally impairing because “there are less harmful means of achieving the legislative goal” (*Hutterian Brethren*). The Court “need not be satisfied that the alternative would satisfy the objective to *exactly* the same extent or degree as the impugned measure.” Rather, the burden is on the government to show the absence of less drastic means of achieving the objective “in a real and substantial manner.”

Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 at paras 53, 55, [2009] 2 SCR 567, McLachlin CJ [emphasis in original] [*Hutterian Brethren*].

[76] Giving the Carter Institute a monopoly on access to SRS is not the least drastic means of achieving the objectives of the SRS Conditions. This monopoly subjects all transgender persons, regardless of their individual medical needs, to a minimum 34-month wait for SRS. It also forces patients to travel to the easternmost part of the province for all appointments for two years.

Official Problem, *supra* para 2 at paras 7, 22-23.

[77] There are less drastic means by which the government could achieve its objectives. The government could accept the referrals of the other physicians in Ontario, including Dr. Kang, who are recognized as specialists in the treatment of transgender patients. These specialists, like all others in the province, would have to meet the Specialist Recognition Criteria established by the College of Physicians and Surgeons of Ontario. There is no evidence to suggest that allowing properly accredited specialists to use their professional judgement to determine what is in the best interests of each patient would result in unnecessary or unbeneficial referrals to SRS. Nor is there any reason to believe that this would impose any additional administrative costs on the government, as the specialists would work out of their current offices using their existing billing structures.

Official Problem, *supra* para 2 at para 8, 30.

The College of Physicians and Surgeons of Ontario, “Specialist Recognition Criteria in Ontario,” November 2011, online: CPSO <<http://www.cpso.on.ca/policies-publications/policy/specialist-recognition-criteria-in-ontario>>.

c) ***The deleterious effects of the SRS Conditions outweigh their salutary effects***

[78] Where there is controversy over the efficacy of the impugned measure, its actual salutary effects must be compared with its deleterious effects.

Dagenais v Canadian Broadcasting Corp, [1994] 3 SCR 835 at paras 96-97, 120 DLR (4th) 12 [*Dagenais*].

[79] There is no evidence that giving the Carter Institute a monopoly on access to SRS has actually improved health outcomes. The Carter Institute believes that longer periods of hormone therapy and RLE are in the best interests of all patients regardless of individual circumstances. However, this is a mere hypothesis—one that is contested by the ITHA, Dr. Kang, and the lived experience of Ms. Ghorbani. Even if the Carter Institute’s hypothesis were correct, there is no evidence that health outcomes are improved by requiring that the Carter Institute be the only one to supervise the extended RLE period. On the contrary, this monopoly on supervision has created a 10-month backlog for a first appointment that threatens the life and health of people like Ms. Ghorbani.

Official Problem, *supra* para 2 at para 23.

[80] In contrast to its hypothetical salutary effects, the deleterious effects of the SRS Conditions are real and profound. First, the mandatory travel requirements prevent patients like Ms. Ghorbani from accessing treatment. Ms. Ghorbani’s situation is not unique, as transgender persons are disproportionately likely to be living in poverty and therefore less likely to be able to afford monthly travel for two years. Second, there are potentially many others like Ms. Ghorbani, including those currently on the waiting list, who cannot endure the mandatory 34-month wait for SRS. The SRS Conditions put the very lives of these people at risk, as transgender persons

who are unable to gain timely access to the treatment they need for their transition are at a higher risk of suicide than any other known population.

Official Problem, *supra* para 2 at paras 15, 27.

Clarifications to the Official Problem, *supra* para 7 at para 3.

PART V – ORDER SOUGHT

[81] The Appellant requests that the appeal be allowed and seeks a declaration that the SRS Conditions violate sections 7 and 15 of the *Charter*. The Appellant also requests that OHIP be required to fund SRS for Ms. Ghorbani.

All of which is respectfully submitted this 28th day of January, 2016.

Team 3

Counsel for the Appellant

PART VI – LIST OF AUTHORITIES AND STATUTES

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<i>Alberta (Aboriginal Affairs and Northern Development) v Cunningham</i> , 2011 SCC 37, [2011] 2 SCR 670.	37, 39
<i>Alberta v Hutterian Brethren of Wilson Colony</i> , 2009 SCC 37, [2009] 2 SCR 567.	75
<i>Blencoe v British Columbia (Human Rights Commission)</i> , 2000 SCC 44, [2000] 2 SCR 307.	48
<i>Canada (AG) v Bedford</i> , 2013 SCC 72, [2013] 3 SCR 1101.	41, 46, 59, 60, 61, 64, 65, 67, 74
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<i>New Brunswick (Minister of Health and Community Services) v G(J)</i> , [1999] 3 SCR 46, 177 DLR (4th) 124.	53
<i>Newfoundland (Treasury Board) v NAPE</i> , 2004 SCC 66, [2004] 3 SCR 381.	71
<i>Quebec (AG) v A</i> , 2013 SCC 5, [2013] 1 SCR 61.	17, 22, 24, 27, 29, 31, 36
<i>R v Kapp</i> , 2008 SCC 41, [2008] 2 SCR 483.	38, 39
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<i>R v Oakes</i> , [1986] 1 SCR 103, 26 DLR (4th) 200.	70
<i>R v Parker</i> (2000), 49 OR (3d) 481, 188 DLR (4th) 385 (Ont CA).	54
<i>RJR-MacDonald Inc v Canada (AG)</i> , [1995] 3 SCR 199, DLR (4th) 1.	73

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<i>Canadian Charter of Rights and Freedoms</i> , Part I of the Constitution Act, 1982, being Schedule B to the <i>Canada Act 1982 (UK)</i> , 1982, c 11.	3

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