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

BETWEEN:

IRINA KOWALSKI

APPELLANT

-AND-

SASKATCHEWAN (ATTORNEY GENERAL)

RESPONDENT

FACTUM OF THE RESPONDENTS

Team Number: 9

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PART I—OVERVIEW

1. In July of 2016, Saskatchewan became one of only two provinces in Canada to fund assisted reproduction services. This new regulatory scheme enables the provincial government to improve the quality of life of countless people who have been precluded from any chance to conceive a child and have faced serious discrimination as a result.

2. Medical and financial considerations have primarily shaped the way the Fertility Program is facilitated. Relevant medical authority has informed the success rates of various types of fertility treatments, while the provincial healthcare budget has determined how to efficiently administer services. Legislatures are necessarily constrained by their resources, and the age distinction under section 600P ("eligibility criteria") is a product of this reality. The Respondent is upholding the principles that inform the Canadian healthcare system, and substantive equality more generally, by providing access of funded assisted reproduction services to those most likely to benefit. If this Court eliminates the age limitation, it would effectively order the Respondent to choose between providing a financially unstable program or eliminating the program entirely.

3. The eligibility criteria do not have a discriminatory effect, nor do they deprive the Appellant of her life, liberty or security of the person. The Fertility Program functions to ameliorate the conditions of those who have been precluded from any chance to have a child of their own. For this reason, it is protected under section 15(2).

Official Problem, the Wilson Moot 2019 [Official Problem].

PART II—STATEMENT OF FACTS

Factual Background

4. Saskatchewan created an ameliorative program that provides funding for a variety of fertility treatments for those who are unable to conceive, whether by virtue of being in a same-sex relationship or being single. Funding a non-medically required treatment allows the Respondent to target specific groups who have never had the opportunity to conceive, carry or have a biological child of their own.

Official Problem, *supra* para 3 at para 18(a).

5. The eligibility criteria for in-vitro fertilization ("IVF") encompass a range of factors in determining the suitability of potential candidates. Only those who have been recommended treatment by a physician and under the age of 40 are eligible to receive a maximum of two cycles. Such regulation ensures costs are kept within reason, and treatment is only administered to those who will benefit as an embryo recipient.

Official Problem, *supra* para 3 at para 14(m).
Saskatchewan Medical Care Insurance Act, RSS, 1978, S-29 [*SMCIA*].
Saskatchewan Medical Care Insurance Payment Regulations, 1994, S-29 Reg 19 [*Regulations*].
Saskatchewan Health Payment Schedule for Insured Services Provided by a Physician under S-29 Reg 19/2016 [*PPS*].

6. Expert medical evidence establishes the drastic decline in successful conception rates for women after age 40. The chance of conceiving naturally after age 40 drops to 5% per month with continual decline. Even with IVF specifically, the chance of conceiving at age 40 is only 15% and is even lower by age 43. Those who do conceive over the age of 40 "experience significantly higher rates of high-risk pregnancy, serious complications, and stillbirths."

Official Problem, *supra* para 3 at para 15.

7. Failing to enforce the age limit would cost the healthcare system an additional $1 million per year. The eligibility criteria not only help control the costs of the program but ensure that embryo recipients will benefit from the program and will not be burdened with unnecessary health complications. Imposing an age limit on funded IVF ensures the stability of this treatment as the resources are targeted at those who are less likely to face serious health risks. Remedial expenses associated with multiple birth complications will cost Saskatchewan taxpayers $22.75 million over the span of 10 years, which will be eliminated by the single-embryo transfer policy.

Official Problem, *supra* para 3 at para 18(e).

8. The Appellant remains eligible for IVF funding under the Fertility Program, subject to using a donor egg and surrogate. The exclusion of funded IVF for embryo recipients aged 40 and over does not preclude their access to funded treatment.

Official Problem, *supra* para 3 at para 20.

Social Context

9. The Fertility Program arises as a result of the changing values of Canadian society. As our acceptance of human relationships has evolved, so has our understanding of what constitutes a "normal" family. Although the most normative and institutionally recognized form of social interaction, marriage and family creation have been reserved for those individuals who adhere to the status quo. Consequently, having a child has been limited to heterosexual couples. The Fertility Program was enacted to include those unable to conceive naturally, namely same-sex couples and single individuals, within the scope of what Canadians call family.

Procedural History

10. In 2017, Justice Cairns allowed the Appellant's application and held that the eligibility criteria violated sections 15 and 7 of the *Charter*. Justice Cairns acknowledged that the

Respondent's purposes are pressing and substantial, but cannot be justified under section 1 of the *Charter*.

> Official Problem, *supra* para 3 at para 20.
> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

11. The Saskatchewan Court of Appeal overturned that decision. Justice Cope held that a distinction does exist on the basis of age but that it does not amount to discrimination because there is no perpetuation of historical disadvantage or stigmatization by age or other interrelated grounds. Rather, the criteria respond to the actual needs and circumstances of women aged 40 and over seeking fertility treatment, and is an ameliorative program. Justice Cope also found no infringement of section 7 interests. The need to consider section 1 was therefore unnecessary, however, her Honour noted that under section 1 "the government is entitled to significant deference in respect of complex policy decisions."

> Official Problem, *supra* para 3 at para 20.

PART III—STATEMENT OF POINTS IN ISSUE

12. There are 3 issues on appeal:

Issue 1. Do the eligibility criteria for funding under the Fertility Program infringe the Appellant's rights under section 15 of the *Charter*?

The eligibility criteria do not infringe the Appellant's section 15 *Charter* rights. The Fertility Program is an ameliorative program protected by section 15(2).

Issue 2. Do the eligibility criteria for funding under the Fertility Program infringe the Appellant's rights under section 7 of the *Charter*?

The eligibility criteria do not infringe the Appellant's section 7 *Charter* rights.

Issue 3. If the answers 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*?

If the eligibility criteria infringe sections 15 or 7, the infringement is demonstrably justified in a free and democratic society under section 1 of the *Charter*.

PART IV—ARGUMENT

ISSUE 1: The eligibility criteria do not infringe the Appellant's section 15 *Charter* rights

13. The eligibility criteria do not infringe section 15(1) of the *Charter*. Any distinction based on an enumerated or analogous ground is part of an ameliorative program protected under section 15(2). The eligibility criteria serve the objectives of the Fertility Program, which aim to provide medical fertility treatment to groups that historically faced significant barriers to accessing such treatment. Any differential treatment resulting from this distinction is not discriminatory under section 15(1).

> *R v Kapp*, 2008 SCC 41 at para 17, [2008] SCR 483 [*Kapp*].
> *Alberta v Cunningham*, 2011 SCC 37 at para 40, [2011] 2 SCR 670 [*Cunningham*].

Age is the only relevant distinction drawn by the eligibility criteria

14. The first step in the section 15(1) analysis is to determine whether the impugned provision creates an adverse distinction based on an enumerated or analogous ground. The enumerated ground of age is the only relevant distinction. The eligibility criteria do not have the effect of distinguishing on the basis of sex or family status.

> *Withler v Canada (AG)*, 2011 SCC 12 at para 67, [2011] SCR 39 [*Withler*].

The eligibility criteria do not distinguish on the basis of sex

15. The eligibility criteria do not create any distinction on the basis of sex because the impugned age limitation applies equally to men and to women. Men seeking IVF treatment must ensure that their embryo partner or surrogate meets the criteria in the same way as women seeking IVF treatment.

16. Although only women can serve as an embryo recipient, the Court in *Miron* found that "distinctions drawn on the basis of relevant biological differences between the sexes do not necessarily constitute discrimination." Distinctions made on the basis of "such a fundamental

biological reality" are important to make if principles of substantive equality are to be upheld. Since men cannot biologically carry a child, the fact that the age limitation only applies to women as the embryo recipient is relevant. As such, there is no differential treatment on the basis of sex.

Miron v Trudel, [1995] 2 SCR 418 at paras 20, 30, 124 DLR (4th) 693 [*Miron*].

The eligibility criteria do not distinguish on the basis of family status

17. The eligibility criteria apply equally to all Fertility Program applicants, regardless of family status. The only condition which precludes eligibility is age.

18. Individuals are not precluded from receiving funded IVF because they are childless, but because they or their embryo recipient is aged 40 or over. Family status is defined as "the status of being in a parent and child relationship". There is no distinction drawn on this basis because the age limitation applies equally to individuals, with or without children, who are seeking funded IVF.

Saskatchewan Human Rights Code, SS 1979, c S-24.2, s 2(1).

19. Moreover, the factual record does not establish that childless women are more likely to be precluded from receiving IVF. As there is no direct distinction on the face of the legislation, the claim will fail absent any evidence linking the eligibility criteria to an adverse impact on members of an enumerated or analogous group. The Supreme Court in *Symes* held that "if the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved." No evidence has been adduced to show that childless individuals suffer any higher burden than individuals with children.

Symes v Canada, [1993] 4 SCR 695 at 764–65, 110 DLR (4th) 470 [*Symes*].
Official Problem, *supra* para 3.

20. There is no differential treatment on the basis of family status. To extend the distinction analysis as far as the Appellant suggests would render it meaningless because any differential impact would then amount to a distinction within the meaning of section 15.

Cunningham, *supra* para 13 at para 49.

The eligibility criteria are part of an ameliorative program under section 15(2)

21. Any distinction resulting from the eligibility criteria is non-discriminatory because the Fertility Program, of which the criteria form an integral part, has an ameliorative purpose. A law, program, or activity will be protected by section 15(2) if it is:

(a) genuinely ameliorative and aimed at improving the situation of a group that is in need of ameliorative assistance to enhance substantive equality; and

(b) the distinctions drawn by the provision "serve and advance" the ameliorative purpose (*Kapp*).

In assessing ameliorative purpose, the "legislative goal" of the program as a whole, rather than its "actual effect", is paramount. Further, the ameliorative purpose need not be the sole purpose of the program.

Kapp, *supra* para 13 at paras 41, 47.
Cunningham, *supra* para 13 at paras 45, 59.

The Fertility Program is genuinely ameliorative for same-sex couples and single individuals

22. The Fertility Program is genuinely ameliorative because it provides insured access to fertility treatments for same-sex couples and individuals unable to conceive naturally. In crafting ameliorative programs, governments are permitted to target subsets of disadvantaged groups and are not required to help all members of a disadvantaged group at the same time. This ensures that governments are not precluded from achieving specific goals relating to specific groups because they are unable to provide identical treatment for all.

Cunningham, *supra* para 13 at paras 40–41.

23. The purpose of the Fertility Program is “to increase affordability and access to assisted reproductive services in Saskatchewan” for those who are having difficulty conceiving and who are unable to conceive naturally, particularly same-sex couples and single individuals. Consistent with the broader objectives of both the *SMCIA* and *CHA*, the Fertility Program provides "reasonable access to health services without financial or other barriers".

Official Problem, *supra* para 3 at para 18.
SMCIA, *supra* para 5.
Canada Health Act, RSC, 1985, c C-6, s 3 [*CHA*].

24. Enabling same-sex couples and single individuals’ access to insured fertility services reduces historical barriers and facilitates the full participation of these groups in society. Absent artificial reproductive technologies like those insured under the Fertility Program, same-sex couples and single individuals are excluded from the full participation in society that comes with having a family of one’s own.

Official Problem, *supra* para 3 at para 16(c).

25. The Respondent is permitted to set priorities in crafting ameliorative programs targeted at specific groups (*Cunningham*). The priority of the Fertility Program is to sustain a viable assisted reproduction program within the larger health care system to remedy the disadvantage suffered by those unable to conceive naturally. As the target group, same sex couples and single individuals are able to benefit most from the ameliorative program.

Cunningham, *supra* para 13 at para 41.
Official Problem, *supra* para 3 at para 18(c).

26. The substantial cost of providing publicly funded health care requires the Respondent to ensure that services are provided only where they are beneficial and cost effective. This necessarily requires the Respondent to engage in line-drawing exercises to tailor the benefits

provided (*Withler*). The Respondent would be unable to fund the Fertility Program if it were obliged to fund *every* treatment for *every* individual (*Cunningham*). The ameliorative objective of the Fertility Program would be lost if the Respondent was unable to target those most likely to benefit.

> *Withler*, *supra* para 14 at paras 67, 73.
> *Cunningham*, *supra* para 13 at paras 41, 49.

27. In pursuing this goal, the Respondent must necessarily engage in line-drawing exercises to ensure a viable and sustainable outcome (*Cunningham*, *Withler*). Under section 15(2) governments are permitted to tailor programs to enhance the benefits conferred (*Cunningham*). This ensures that governments are not "paralyzed by the necessity to assist all" when attempting to lessen the disadvantage and prejudice suffered by particular groups (*Cunningham*).

> *Cunningham*, *supra* para 13 at paras 41, 49.
> *Withler*, *supra* para 14 at para 71.

The distinction serves and advances the ameliorative purpose

28. A distinction is rationally connected to the ameliorative purpose where it makes a contribution to that purpose.

> *Cunningham*, *supra* para 13 at para 45.

29. Limiting funding for IVF on the basis of age allows the Respondent to target the groups of same-sex couples and individuals most likely to benefit from the treatment. This measured response targets a subset of people who have been excluded from any opportunity to have genetically related children.

30. In *Cunningham*, the Supreme Court recognized that "distinctions that might otherwise be claimed as discriminatory are permitted, to the extent that they go no further than is justified by the object of the ameliorative program." Limiting access to funded IVF to embryo recipients

under the age of 40 is supported by medical evidence relating to declining fertility and increasing complications. Complimented by the single-embryo transfer policy, which eliminates complications from multiple births, the eligibility criteria enable the Respondent to target those most likely to benefit from assisted reproductive services.

> *Cunningham*, *supra* para 13 at para 45.
> Official Problem, *supra* para 3 at para 15.

31. The Supreme Court has also recognized that enforcing uniform benefit programs runs contrary to the objective of substantive equality because such a requirement would preclude targeted government programs aimed at achieving specific goals relating to specific groups (*Cunningham*). Requiring the Respondent to fund the Fertility Program for every person could result in precluding the Respondent from funding it at all. Governments are afforded discretion in decision-making regarding funding limitations, especially where there are finite resources (*Withler*). The means chosen to ameliorate the circumstances of the target groups are rationally connected to the ameliorative purpose of the Fertility Program.

> *Cunningham*, *supra* para 13 at para 41.
> *Withler*, *supra* para 14 at para 73.

The eligibility criteria are not discriminatory

32. Even if the Respondent's ameliorative purpose is not accepted, the eligibility criteria are not discriminatory under section 15(1) as they do not perpetuate any "arbitrary disadvantage" (*Taypotat*, *Quebec v A, Law*). The eligibility criteria do not reinforce, perpetuate, or exacerbate existing disadvantage. Instead, they "respond to the actual capacities and needs of the members of the group" and facilitate substantive equality (*Taypotat*).

> *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 18, 20, [2015] 2 SCR 548 [*Taypotat*].
> *Quebec (AG) v A*, 2013 SCC 5 at para 331, [2013] 1 SCR 61 [*Quebec v A*].
> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 63, 170 DLR (4th) 1 [*Law v Canada*].

The eligibility criteria respond to actual capacities and needs

33. The distinction drawn by section 600P does not perpetuate or promote the view that individuals falling within its ambit are less capable or less worthy of respect and recognition. The Supreme Court has repeatedly recognized that, absent arbitrary stereotyping, the government is entitled to rely on informed general assumptions when crafting age-based limitations on benefits (*Gosselin*, *Law*, *Withler*). Distinctions based on age are regularly understood as "not [being] strongly associated with discrimination" because they are a "common and necessary way of ordering our society" (*Gosselin*). As such, age may "properly [be] used as a proxy for the abilities and circumstances of the group" (*Wynberg*).

> *Gosselin v Quebec (AG)*, 2002 SCC 84 at para 31, [2002] 4 SCR 429.
> *Law v Canada*, *supra* para 32 at para 106.
> *Withler*, supra para 14 at para 73.
> *Wynberg v Ontario*, [2006] OJ No 2732 at para 57, 269 DLR (4th) 435 [*Wynberg*].

34. The distinction drawn by section 600P does not rely on any stereotype. Rather, it is informed by biological reality. Restricting insured IVF to embryo recipients under the age of 40 is based on clear medical evidence establishing significant difficulty in conceiving and carrying a pregnancy to term beyond this age. Even those aged 40 and over who do conceive "experience significantly higher rates of high risk pregnancy, serious complications, and still births." Since age is a significant determinative factor in fertility, conception and pregnancy, the idea that older embryo recipients are far less likely to benefit from IVF than younger embryo recipients is not a stereotype: it is reality.

> Official Problem, *supra* para 3 at para 17.

35. Where "the age chosen is reasonably related to the legislative goal, the fact that some might prefer a different age" does not negate the "correlation between the distinction and the actual needs and circumstances" of the claimant (*Gosselin*). Where the government confers a

benefit, as it has with the Fertility Program, "perfect correspondence between [the] benefit program and the actual needs and circumstances of the claimant group is not required" (*Withler*). Government resource allocation and policy goals are also relevant (*Withler*).

> *Gosselin*, *supra* para 33 at para 57.
> *Withler*, *supra* para 14 at paras 67, 71.

36. Although some embryo recipients aged 40 and over may benefit from IVF, the biological reality is that most will not and those that do will suffer serious pregnancy complications. The Respondent must allocate limited health care resources in a responsible way (*Withler*).

> *Withler*, supra para 14 at para 67.

37. The Supreme Court has continued to recognize that governments must be permitted some leeway in making complex policy choices regarding competing interests (*Collins*). The decision of the Respondent to enforce the age limitation should be upheld, as the eligibility criteria do not promote the view that embryo recipients aged 40 and over are less worthy or deserving of funded services under the Fertility Program. Instead, the eligibility criteria correspond to the needs, capacities and circumstances of those individuals seeking assisted reproduction.

> *Collins v Canada*, [2002] 3 FC 320, 2002 FCA 82 at para 46, citing Peter Hogg, *Constitutional Law of Canada*, 3rd ed (1992) at 911–12 [*Collins*].

The eligibility criteria do not perpetuate arbitrary disadvantage

38. Although the nature of the interest in question is undoubtedly important in our society, the Fertility Program does not operate in a way that represents embryo recipients aged 40 and over as less worthy of receiving assisted reproduction. Instead, the legislation recognizes the importance of fertility treatment by removing barriers to those attempting to conceive in a way that is safe, practicable and cost-effective. In providing funded fertility treatment on a non-medically required basis, the Respondent has recognized the importance of conception for individuals who have historically been excluded from any chance of having their own child.

Official Problem, *supra* para 3 at para 18(c).

39. In order to administer the Fertility Program in a way that is beneficial, certain lines must be drawn, which means it "cannot be perfectly tailored to every individual's personal circumstance" (*Withler*). The legislative scheme as a whole is informed by the actual needs and capacities of claimants in a way that balances competing interests, and therefore does not perpetuate arbitrary disadvantage, prejudice or stereotyping. For this reason, the claim is not enough to amount to discrimination under section 15(1).

Withler, *supra* para 14 at para 73.

ISSUE 2: The eligibility criteria do not violate the Appellant's section 7 *Charter* rights

40. Section 7 is infringed only if the eligibility criteria deprive the Appellant of her right to life, liberty or security of the person in a manner that is not in accordance with the principles of fundamental justice. The burden is on the Appellant to establish all aspects of the alleged violation.

Charter, *supra* para 10 at s 7.
Canada (AG) v Bedford, 2013 SCC 72 at para 58, 127, [2013] 3 SCR 1101 [*Bedford*].
Carter v Canada (AG), 2015 SCC 5 at para 55, [2015] 1 SCR 331 [*Carter*].

The Appellant seeks a positive right to health care

41. Failing to provide a benefit to which there is otherwise no positive right cannot give rise to a deprivation under section 7. The Court in *Flora* stated that "where the government elects to provide a financial benefit that is not otherwise required by law, legislative limitations on the scope of the financial benefit provided do not violate section 7."

Flora v Ontario (Health Insurance Plan, General Manager), 2008 ONCA 538 at para 108, 91 OR (ed) 412 [*Flora*].

42. The Fertility Program provides a limited benefit in the form of funding for non-medically required fertility treatment. Provinces have no legal obligation to fund such treatment and

therefore the Respondent is afforded discretion in administering such a limited benefits scheme (*Flora*). The Fertility Program does not in any way prohibit the Appellant from accessing IVF or any other fertility treatment.

> *Flora*, *supra* para 41 at para 101.
> *CHA*, *supra* para 23.

43. In seeking to compel the Respondent to provide funded fertility treatments, the Appellant is seeking to impose an obligation on the Respondent to take steps to ensure her enjoyment of life, liberty, and security of the person. While the Supreme Court has left open the possibility that section 7 might one day "be interpreted to include positive obligations," the circumstances of this case do not warrant a novel application. As McLachlin CJ (as she then was) emphasized in *Gosselin*:

> [the question is] not whether s 7 has ever been – or will ever be – recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s 7 as the basis for a positive state obligation.

> *Gosselin*, *supra* para 33 at para 82.

44. Further, the circumstances envisioned by the Supreme Court in considering a novel application of section 7 are those basic resources necessary to sustain life (*Gosselin*). The Supreme Court has repeatedly and unequivocally rejected claims that section 7 confers a right to state-funded health care (*Canadian Doctors*, *Chaoulli*, *Flora*, *Wynberg*).

> *Gosselin*, *supra* para 33 at para 82.
> *Chaoulli v Quebec (AG)*, 2005 SCC 35 at para 104, [2005] 1 SCR 791 [*Chaoulli*].
> *Canadian Doctors for Refugee Care v Canada (AG)*, 2014 FC 651 at para 571, [2015] 2 FCR 267 [*Canadian Doctors*].
> *Flora*, *supra* para 41 at paras 104–09.
> *Wynberg*, *supra* para 33 at paras 218–25.

45. The nature and extent of health care funding is not a matter for the courts. In choosing to provide funding for health care, the Respondent must use limited resources to address a near-limitless demand (*Chaoulli*). As a result, decisions about the allocation of those resources

inevitably requires trade-offs and compromises. As the Ontario Court of Appeal stated in *Canadian Doctors*, “it has long been recognized that decisions as to the setting of priorities and the allocation of scarce resources are not matters for Courts, but for governments.” Only the government can authorize the spending of public funds (*Criminal Lawyers’ Association*, *Mikisew*). It would be inappropriate for this Court to circumvent the legislature’s decision-making process by mandating that certain treatments be funded in priority to others.

> *Chaoulli*, *supra* para 44 at para 221.
> *Canadian Doctors*, *supra* para 44 at para 535.
> *Ontario v Criminal Lawyers’ Association of Ontario*, 2013 SCC 43 at para 28, [2013] 3 SCR 3 [*Criminal Lawyers’ Association*].
> *Mikisew Cree First Nation v Canada*, 2018 SCC 40 at para 118, [2018] SCJ No 40 [*Mikisew*].

The eligibility criteria do not interfere with the Appellant’s right to security of the person

46. To give rise to a deprivation of security of the person, the state action complained of must be sufficiently causally connected to the deprivation suffered by the Appellant (*Bedford*). A sufficient causal connection is only established where there is a “real, as opposed to a speculative, link” (*Bedford*). This requires state interference with bodily integrity or serious state-imposed psychological stress (*Carter*, *G(J)*, *Morgentaler*). The eligibility criteria do not constitute state *interference* with bodily integrity, nor do they *impose* any psychological suffering on the Appellant.

> *Bedford*, *supra* para 40 at para 76.
> *Carter*, *supra* para 40 at para 64.
> *New Brunswick (Minister of Health and Community Services) v G.(J.)*, [1993] SCR 46 at para 59 per Lamer CJ, 177 DLR (4th) 124 [*G(J)*].
> *R v Morgentaler*, [1988] 1 SCR 20 at 56 per Dickson CJ, 44 DLR (4th) 385 [*Morgentaler*].

47. State interference with security of the person requires the imposition of prohibitions or obligations (*Carter*). For example, the prohibition on abortion, physician-assisted dying, bawdy-houses, and safe injection sites have all been recognized by the Supreme Court as

amounting to state interference (*Morgentaler*, *Carter*, *Bedford*, *PHS Community Services*). In contrast, by providing government funding for fertility treatment, the Fertility Program is fundamentally enabling, not prohibitory. The eligibility criteria do not have the effect of prohibiting or impeding the Appellant's access to any fertility treatment, including funded IVF, as she is able to use a surrogate.

> *Carter*, *supra* para 40 at paras 64, 68.
> *Morgentaler*, *supra* para 46 at 63.
> *Bedford*, *supra* para 40 at paras 91–92.
> *Canada (AG) v PHS Community Services Society*, 2011 SCC 44 at paras 93–94, [2011] 3 SCR 134 [*PHS Community Services*].
> Official Problem, *supra* para 3 at para 19.

48. The *Charter* "does not confer a freestanding constitutional right to healthcare", nor does it confer a positive obligation to provide social assistance (*Chaoulli*). Courts have further recognized that the imposition of conditions on publicly-funded services, including medical services, does not amount to deprivation (*Gosselin*). In *Flora,* the failure to fund life-saving and cost-prohibitive medical treatments was held not to violate section 7 because the eligibility criteria did not have the effect of prohibiting or impeding the claimant from seeking the medical treatment. Similarly, no violation of section 7 was found in *Wynberg*, where the government had limited the provision of medically necessary behavioural care for autistic children to those under the age of six.

> *Chaoulli*, *supra* para 44 at para 104 per McLachlin CJ and Major J.
> *Gosselin*, *supra* para 33 at paras 81–83.
> *Flora*, *supra* para 41 at paras 101–102.
> *Wynberg*, *supra* para 33 at para 220.

49. Like *Flora* and *Wynberg*, the eligibility criteria do not prohibit or impede the Appellant's access to any treatment or service. As such, the eligibility criteria cannot constitute state interference. The fact that the Appellant cannot afford private IVF treatment is irrelevant. An individual's financial circumstance does not create a causal connection where there otherwise is

none. To find such would hold the Respondent responsible for all pre-existing circumstances that may restrict opportunity on the basis of financial capability.

> *Flora*, *supra* para 41 at paras 101–02.
> *Wynberg*, *supra* para 33 at para 220.

The eligibility criteria do not interfere with the Appellant's physical or psychological integrity

50. The eligibility criteria neither compel nor prohibit any activity relating to the Appellant's physical person. The eligibility criteria do not prohibit the Appellant from receiving IVF safely. This can be distinguished from the circumstance in *Bedford*, where the impugned provisions prohibited bawdy-houses, thereby effectively prohibiting safe engagement in prostitution. In *Chaoulli*, legislative provisions hindered patients' ability to obtain private insurance which precluded them from accessing health care in a timely manner. The Respondent is not prohibiting anyone, including the Appellant, from obtaining any treatment and in the absence of treatment, the Appellant is not subject to possible death.

> *Bedford*, *supra* para 40 at paras 4–6.
> *Chaoulli*, *supra* para 44 at para 5.

51. The eligibility criteria are not the cause of the Appellant's emotional stresses. To constitute a deprivation under section 7, the Appellant must suffer serious state-imposed psychological stress (*Carter*, *G(J)*, *Morgentaler*). The emotional stress described by the Appellant is no more than the ordinary stress felt by women experiencing infertility issues. Importantly, the Appellant attributes her stress to the "whole fertility process." The Appellant would be in the same position even if the Respondent funded no fertility treatment. Extending security of the person to protect against this type of stress would "massively expand the scope of judicial review, and in the process, trivialize what it means for a right to be constitutionally protected" (*G(J)*).

> *Carter*, *supra* para 40 at para 64.
> *G(J)*, *supra* para 46 at para 59 per Lamer CJ.
> *Morgentaler*, *supra* para 46 at 56 per Dickson CJ.

Official Problem, *supra* para 3 at para 13.

The eligibility criteria do not deprive the Appellant of her liberty

52. Liberty is "the right to make fundamental choices free from state interference, [but] such personal autonomy is not synonymous with unconstrained freedom." Engagement of the liberty interest requires "state compulsions or prohibitions affect[ing] important and fundamental life choices." It does not extend to requiring the state to facilitate free choice in all aspects of a person's life.

Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44 at paras 54, 49, [2000] 2 SCR 307 [*Blencoe*].

53. The eligibility criteria do not implicate any fundamental choice of the Appellant. The Appellant's ineligibility for government funding does not in any way prohibit or interfere with her choice to pursue a pregnancy by any means available to her.

The eligibility criteria do not implicate a life interest

54. 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*). Not being able to access state funded fertility treatments in order to marginally increase one's chance at conception cannot be said to impose any increased risk of death, even if it is indirectly. Being precluded from IVF does not increase the risk of death. Although there is a risk of ectopic pregnancy associated with AI and IUI, any such risk for the Appellant arises from her underlying medical condition, not state action.

Carter, *supra* para 40 at para 62.
Official Problem, *supra* para 3 at para 17.

In the alternative, any interference with the Appellant's life, liberty or security interest is in accordance with the principles of fundamental justice

55. If the Court finds a deprivation of the Appellant's life, liberty or security of the person, any such deprivation is in accordance with the principles of fundamental justice. The eligibility criteria are not arbitrary, overbroad, or grossly disproportionate in achieving the Respondent's objective.

The objective of the eligibility criteria

56. The purpose of the Fertility Program is to increase affordability and access to assisted reproductive services for those individuals wanting to grow their families and are having trouble conceiving naturally, particularly same sex couples and single individuals. For those in same sex relationships and those who cannot conceive naturally, IVF may be their only option. The Fertility Program enables these individuals to access IVF under a safe, responsible, and sustainable framework. The eligibility criteria assure the financial sustainability of the program and ensure those accessing it are most likely to benefit.

Official Problem, *supra* para 3 at paras 18(a), 18(c), 14(i).

57. The fact that the costs of the Fertility Program comprise a small fraction of the estimated health budget does not diminish the importance of this purpose. The government makes budget-limiting decisions in the provision of all medical treatment. If the Respondent is unable to control the costs of each treatment, the health budget would balloon through piecemeal judicial decisions.

The eligibility criteria are not arbitrary

58. Arbitrariness "targets the situation where there is no rational connection between the object of the law and the limit it imposes on life, liberty, or security of the person" (*Carter*). A

limitation founded on expert evidence is rational (*Chaoulli* per Binnie and Le-Bel JJ). The medical evidence in this case establishes a significant decline in fertility in women aged 40 and over, coupled with a significant increase in the risk of high-risk pregnancies, complications and stillbirths.

> *Carter*, *supra* para 40 at para 83.
> *Chaoulli*, *supra* para 33 at para 242.
> Official Problem, *supra* para 3 at para 17.

59. Given the finite funding available for health care, the Respondent necessarily must engage in line drawing exercises. The age limit correlates with the biological reality of declining fertility in women from age 40 and the associated increased risk of pregnancy complications. The eligibility criteria are not arbitrary because the limitation targets those circumstances that are directly connected to the objective.

> Official Problem, *supra* para 3 at para 17.

The eligibility criteria are not overbroad

60. Overbreadth deals with a law that is so broad in scope that it includes some conduct that bears no relation to its purpose (*Bedford*). The relevant question for the Court is whether the chosen means infringe life, liberty, or security of the person in a way that has no connection with the benefit contemplated by the legislature (*Carter*). The eligibility criteria enable the Respondent to control the costs of the program and to ensure that those accessing the funding are most likely to benefit. Any limitation of the Appellant’s life, liberty, or security of the person is connected to these objectives.

> *Bedford*, *supra* para 40 at para 112.
> *Carter*, *supra* para 40 at para 85.

61. The Appellant’s primary submission is that the Fertility Program is underinclusive because it excludes her. It is illogical to suggest that an underinclusive benefit can be overbroad. Even if

the overbreadth analysis is restricted to the age limit itself, such a limitation is not overbroad. The objective of the age limitation is to ensure that the service is provided to those who will most benefit. After age 40, the likelihood of conception through IVF is less than 15%. Excluding individuals over the age of 40 is consistent with this objective. Further, the age limit also achieves the Respondent's financial sustainability objective because it limits the increased costs associated with providing antenatal care for the high-risk, complicated pregnancies of women over the age of 40. Therefore, the eligibility criteria do not have any effect that is unrelated to the objectives.

Official Problem, *supra* para 3 at para 15, 17.

The eligibility criteria are not grossly disproportionate

62. Gross disproportionality only applies "in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure" (*Bedford*). This is a high standard that recognizes that "the law's object and its impact may be incommensurate without reaching the standard for gross disproportionality" (*Carter*). The effects of restricting access to funded IVF are not "totally out of sync" with the Respondent's objective of ensuring access to those who are most likely to benefit.

Bedford, *supra* para 40 at para 120.
Carter, *supra* para 40 at para 89 citing *Bedford*, *supra* para 40 at para 120.

ISSUE 3: Any infringement is justified under section 1 of the *Charter*

63. If this Court finds an infringement of the Appellant's section 15 or section 7 *Charter* rights, any such infringement is justified under section 1 of the *Charter*.

64. The section 1 analysis asks "whether the broader public interest justifies the infringement of individual rights" (*Bedford*). This question is separate and distinct from section 7, which

"balances the negative effect of the individual purpose of the law, *not* against societal benefits that might flow from the law" (*Bedford* emphasis original). In *Michaud*, a law infringing an individual's section 7 rights was justified on the basis of the greater societal benefits flowing from the safety regulation at issue.

> *Bedford*, *supra* para 40 at para 126, 121.
> *R v Michaud*, 2015 ONCA 585 at para 144, 127 OR (3d) 81 [*Michaud*].

The eligibility criteria have a pressing and substantial objective

65. The Respondent's objective is to create an ameliorative program which provides insured fertility services; the age limitation operates to achieve this objective within a regulatory scheme which can be sustained under the provincial health care budget. The Supreme Court has recognized that, in broad schemes meant to cover the competing interests of various groups, the government "will inevitably be called upon to draw a line" (*Irwin Toy*), and that distinctions based on general criteria, including age, must be made (*Withler*).

> *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927 at 990, 58 DLR (4th) 577 [*Irwin Toy*].
> *Withler*, *supra* para 14 at para 73.

66. Controlling the cost of providing a health care benefit scheme is a pressing and substantial objective. In *McKinney*, the Supreme Court recognized that the government "must surely be permitted … to take into account the difficulties, whether social, economic or budgetary, that would arise if it attempted to deal with social and economic problems in their entirety." This practical reality was echoed in *Egan*, where Sopinka J confirmed that "it is not realistic for the Court to assume that there are unlimited funds to address the needs of all." In *Wynberg*, "allocating limited available resources in a manner that optimizes the program's benefits" was held to be a pressing and substantial objective. Similarly, the eligibility criteria reflect a balancing of the interests of those who wish to access funded IVF and the Respondent's need to allocate scarce resources where they will be most effective.

McKinney v University of Guelph, [1990] 3 SCR 229 at 317 [*McKinney*].
Egan v Canada, [1995] 2 SCR 513 at 572 per Sopinka J, 124 DLR (4th) 609 [*Egan*].
Wynberg, *supra* para 33 at para 163.

The eligibility criteria attract a high degree of deference

67. The Supreme Court has made clear that courts must not "second guess" legislative allocations of scarce resources where the legislature has engaged in a "reasonable assessment as to where the line is properly drawn" among competing interests (*Irwin Toy*). The courts are not equipped to balance the competing interests at stake in the determination of provincial health care funding. As noted in *Shulman*, the health care system is "vast and complex." The judiciary should be hesitant to intervene in funding decisions given the "institutional impediments to [the] design of a health care system by the judiciary" (*Shulman*).

Irwin Toy, *supra* para 65 at 990.
Shulman v Ontario (AG), (2001) 155 OAC 171 at para 43, 90 CRR (2d) 82 [*Shulman*].

68. Governments must be free to make policy-implementing choices, including through regulations (*Gosselin*). In the allocation of scarce financial resources, courts should defer to legislative policy and administrative expertise because courts lack the necessary technical expertise and resources to make those decisions (*Eldridge, Michaud*). Governments are better positioned than courts to choose from the range of suitable alternatives available to address complex social issues, like the provision of health care (*Hutterian*). The Respondent, therefore, "must be 'accorded some flexibility' in apportioning social benefits among the vast number of competing procedures and conditions of [the] patients that call for them" (*Cameron*).

Gosselin, *supra* para 33 at para 142.
Eldridge v British Columbia (AG), [1997] 3 SCR 624 at para 16, 151 DLR (4th) 577 [*Eldridge*].
Michaud, *supra* para 64 at para 81.
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 at para 53, [2009] 2 SCR 567 [*Hutterian*].
Cameron v Nova Scotia, 1999 NSCA 14 at para 235, 204 NSR (2d) 1 [*Cameron*].

The eligibility criteria are proportional to their objectives

The eligibility criteria are rationally connected to their objectives

69. The Supreme Court in *Bedford* stated that "[t]he rational connection branch of the section 1 analysis asks whether the law was a rational means for the legislature to pursue its objective." There must be a causal "connection between the infringement and the benefit sought on the basis of reason or logic" (*RJR-Macdonald*). This requires only a reasonable prospect that the limit will further the objective to some extent, not that it will do so necessarily (*Hutterian*).

> *Bedford*, *supra* para 40 at para 126.
> *RJR-Macdonald Inc v Canada (AG)*, [1995] 3 SCR 199 at para 153, 127 DLR (4th) 1 [*RJR-Macdonald*].
> *Hutterian*, *supra* para 68 at para 48.

70. The eligibility criteria are rationally connected to the goal of providing funded IVF to those who are most likely to benefit. Expert evidence shows a drastic decline in conception rates for women aged 40 and over. The eligibility criteria function as a rational means by which the Respondent ensures that those accessing the treatment are most likely to benefit and to control the costs of the Fertility Program.

> Official problem, *supra* para 3 at para 15.

The eligibility criteria are minimally impairing

71. The Supreme Court has held that "on complex social issues, the minimal impairment requirement is met if Parliament has chosen one of several reasonable alternatives" (*JTI-Macdonald*). The Respondent's Fertility Program interacts with a wide range of complex social issues including, but not limited to, public health and safety, discrimination and prejudice on the basis of sexual orientation and family status, and economic barriers to medical services. This is precisely the type of "complex social issue" where the government has the freedom to choose a solution from among the reasonable alternatives.

Canada (AG) v JTI-Macdonald Corp., 2007 SCC 30 at para 43, [2007] 2 SCR 610 [*JTI-Macdonald*].

72. In *Martin*, the Supreme Court looked to similar regulatory schemes in other provinces in order to determine if the one chosen in Nova Scotia was minimally impairing. Ontario is the only other province in Canada which currently publicly funds IVF. This funding is limited to women under the age of 43. Given that an unequivocal boundary between fertility and age-related infertility cannot be drawn, age 40 represents a reasonable line drawing exercise by the Respondent. The difference between age 40 and 43 is not the sort of difference that invites judicial intervention.

Nova Scotia (Workers' Compensation Board) v Martin, 2003 SCC 54 at para 113, [2003] 2 SCR 504 [*Martin*].
Ontario, Minister of Finance, *A Stronger and Healthier Ontario*, Chapter VII, Section A (Ontario: ServiceOntario, 2017) at 279.

73. The relevance of other provincial schemes is further informed by *Advanced Cutting* in that "[t]he principle of federalism means that the application of the *Charter* in fields of provincial jurisdiction does not amount to a call for legislative uniformity." The minimal impairment requirement under section 1 should not be interpreted so as to require Saskatchewan to conform to the approach taken in Ontario, as this would have the effect of imposing legislative uniformity among the two provinces who chose to insure IVF.

R v Advanced Cutting & Coring Ltd, 2001 SCC 70 at para 275 per LeBel J, [2001] 3 SCR 209 [*Advanced Cutting*].

74. The eligibility criteria fall within the range of possible alternatives. There is no less drastic measure that would be superior and warrant overriding the Respondent's policy decision-making. As the first province to fund IVF, Quebec offered full funding without restrictions. Unrestricted access resulted in depletion of resources, which led to the imposition of strict eligibility requirements, namely on the basis of age. Ultimately, the program was

unsustainable and required the province to cut all funding for IVF. Ontario began funding IVF in 2015 and the program has been sustained with the use of an age restriction. Limiting funding for IVF on the basis of age is within the range of possible alternatives, which demonstrates that the Respondent has pursued a reasonable alternative. Accordingly, the eligibility criteria are minimally impairing.

> *Act respecting clinical and research activities relating to assisted procreation*, CQLR, 2009, c A-5.01.
> Ontario, Minister of Finance, *A Stronger and Healthier Ontario*, Chapter VII, Section A (Ontario: ServiceOntario, 2017) at 279.

The benefits of the eligibility criteria outweigh any deleterious effects

75. The question for the Court with regard to proportionality is whether or not "the limit on the right [is] proportionate in effect to the public benefit conferred by the limit" (*Hutterian*). This entails a "broad assessment" (*Michaud*) of whether harms suffered by the Appellant "are out of proportion to the public good achieved by the infringing measure" (*Hutterian*).

> *Hutterian*, *supra* para 68 at paras 73, 78.
> *Michaud*, *supra* para 64 at para 137.

76. The public benefit conferred by the Fertility Program is increased access to fertility treatment through provincial funding. The program is intended to ameliorate the lives of otherwise-disadvantaged groups living in Saskatchewan by increasing affordability and access to fertility treatment. While the eligibility criteria have the effect of limiting access to funding for women aged 40 and over who refuse to use a surrogate, the criteria also have the effect of making this program financially viable. The value of being able to provide the funding, albeit in a slightly limited manner, far outweighs the negative impact of denying funding to a small percentage of the population.

PART V—ORDERS SOUGHT

77. The Respondent respectfully requests that the Appeal be dismissed.

PART VI – TABLE OF STATUTES AND AUTHORITIES

Legislation	Paragraphs
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