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 APPELLANT

COUNSEL FOR THE APPELLANT
TEAM 10

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PART I – OVERVIEW

[1] The Government of Saskatchewan is denying Ms. Irina Kowalski equal benefit of a service that impacts their fundamental decision of having a child. The line drawn by the Government also deprives Ms. Kowalski of her right to liberty and security. Rights accorded to individuals by the Charter are only meaningful if upheld in the face of such government action.

> *Canadian Charter of Rights and Freedoms*, ss 7, 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[2] The "Saskatchewan Health Payment Schedule for Insured Services Provided by a Physician" ("PPS") imposes an age restriction on recipients of government-funded In-vitro fertilization ("IVF"). This age restriction withholds equal benefit under the law from Ms. Kowalski, and other women over 40.

> Official Problem, Wilson Moot 2019, at 1-2 [Official Problem].

[3] The eligibility criteria on government-funded IVF infringes section 15 of the *Charter* on the basis of age and sex. The restriction denies a benefit to women over 40 in a manner that does not reflect their actual needs and capacities, and exacerbates the disadvantage faced by this group.

[4] The denial of IVF treatment also infringes section 7 of the *Charter* because it causes Ms. Kowalski heightened psychological stress, physical insecurity, and interferes with the fundamental decisions surrounding when and how to conceive.

[5] The eligibility criteria are not in accordance with the principles of fundamental justice and cannot be justified under section 1 of the *Charter*.

PART II – STATEMENT OF FACTS

Factual History

[6] The decision of whether, how, and when to attempt conceiving is a personal decision that is complicated for many Canadians experiencing infertility. To address this issue, the Government of Saskatchewan introduced funding for fertility treatments ("Fertility Program") under the *Saskatchewan Medical Care Insurance Act* ("SMCIA"). The PPS provides: Artificial Insemination ("AI"), Intra-uterine Insemination ("IUI"), and In-vitro Fertilization ("IVF").

> Official Problem, *supra* para 2, at 1.
> *Saskatchewan Medical Care Insurance Payment Regulations*, 1994, S-29 Reg 19 (as amended for the purposes of the Wilson Moot 2019) [Regulations].
> *Saskatchewan Medical Care Insurance Act*, RSS S-29 (as amended for the purposes of the Wilson Moot 2019) [SMCIA].

[7] 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 or cannot conceive naturally. Age has been shown to impact fertility rates. The chances of getting pregnant naturally are approximately 5% each month for women over 40. The rate of conception for women over the age of 40 per treatment of AI and IUI are 2% and 5%, whereas the success rate for conceiving with IVF for women between 40 and 43 is 15%.

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

[8] IVF is a process where fertilized embryos are developed for several days in the laboratory and then transferred into the uterus. IVF costs approximately $15,000 per cycle, not including the costs of the required medications. The treatment is recommended for individuals who have been unable to conceive after at least one year of trying, undergone previous treatments such as AI or IUI without success, are of advanced female age, or suffer from endometriosis.

> Official Problem, *supra* para 2 at 4, 6, 7.

[9] Two cycle of IVF funding is available upon physician recommendation. Section 600P requires that the recipient of the embryo must be under the age of 40. The age requirement for IVF set out in 600P of the PPS also applies to an individual who is undergoing egg retrieval or harvesting as part of IVF process. It does not apply to an individual contributing sperm to the IVF process. There is no age restriction on government funded AI or IUI.

Official Problem, *supra* para 2 at 2.
Clarifications, Wilson Moot 2019 at para 8 [Clarifications].

[10] The stated purpose of the age restriction is 1) to help control the costs of the program, an estimated saving of $1 million a year, and 2) to ensure those accessing it are most likely to benefit. The Saskatchewan Ministry of Health's budget for 2016 was $5.36 billion. The Fertility Program aims to reduce the chance of multiple births born through IVF by insuring single embryo transfers, making the treatment safer for mothers and children.

Official Problem, *supra* para 2 at 10.

[11] Ms. Kowalski is a 42-year-old woman currently living in Regina, Saskatchewan seeking government-funded IVF to fulfill her life-long desire to conceive a child. Various personal circumstances have prevented her from realizing this ambition. Since her father's passing, Ms. Kowalski has realized that continuing her family legacy is extremely important to her.

Official Problem, *supra* para 2 at 1, 4, 5.

[12] Ms. Kowalski consulted her physician, Dr. Burnett, who recommended IVF as the best course of fertility treatment due to Ms. Kowalski's age and the fact that she suffers from endometriosis. Patients with endometriosis may particularly benefit from IVF. The procedure improves rates of fertilization and implantation as compared to the rates of conceiving without medical assistance or through other fertility procedures, such as AI or IUI.

Official Problem, *supra* para 2 at 4, 7.

[13] However, Ms. Kowalski was told that she was ineligible for IVF funding. Following two unsuccessful rounds of IUI, Dr. Burnett informed Ms. Kowalski that IVF was likely her only option of conception.

Official Problem, *supra* para 2 at 4.

[14] Ms. Kowalski is unable to fund her own IVF treatments. Ms. Kowalski earns approximately $28,000 per year after taxes. She obtains no medical benefits through her job, and pays $1,000 per month for her apartment. Ms. Kowalski has used all of her savings for her father's medical care, and the out of pocket expenses associated with the IUI treatments.

Official Problem, *supra* para 2 at 4, 5.

[15] Generally, the earnings of women are much lower than those of men. According to Social Watch, it will take 70 years for the wages of Caucasian Canadian women to match those of men.

Official Problem, *supra* para 2 at 9.

[16] Ms. Kowalski has been seeing a counsellor to deal with feelings of depression, stigmatization, and isolation since learning that IVF is unavailable to her. She believes she is not seen as a productive member of society. The fact that Ms. Kowalski can see women only a few years younger than herself, wealthier women, and men over 40 access government-funded IVF leaves Ms. Kowalski feeling hurt. This has resulted in Ms. Kowalski staying home more than ever.

Official Problem, *supra* para 2 at 5.

[17] These feelings are not isolated to Ms. Kowalski. According to Dr. Wong, women experiencing fertility challenges are more likely to experience depression and severe anxiety as compared to other women of similar age and socio-economic status. The emotional stresses of women with infertility are comparable to those coping with serious illnesses such as cancer,

HIV, and chronic pain. Some women report feelings of inadequacy, emptiness or failure that interfere with their quality of life. Single women over 35 also experience social stigma about their age and single childless status.

Official Problem, *supra* para 2 at 8, 9.

Procedural History

[18] Justice Cairns of the Saskatchewan Court of Queen's Bench found that the eligibility criteria infringed sections 15 and 7 of the *Charter* since the restriction discriminated on the ground of age, and the interrelated grounds of sex and family status. Further, it arbitrarily deprived Ms. Kowalski of her liberty and security of the person. The infringements were not justified under section 1 of the *Charter* because they are not rationally connected to the Government's objectives.

Official Problem, *supra* para 2 at 11.

[19] The Saskatchewan Court of Appeal allowed the Attorney General's appeal. The majority found no infringements of sections 15 and 7 of the *Charter,* stating the age distinction was not discriminatory. The majority would have also found the program to be saved under section 15(2) of the *Charter*. In dissent, Goldstein JA adopted Cairns J's reasoning.

Official Problem, *supra* para 2 at 11.

PART III – STATEMENT OF POINTS IN ISSUE

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

[20] The eligibility criteria infringe Ms. Kowalski's rights under section 15(1) of the *Charter*. The criteria create an arbitrary distinction on the interrelated grounds of age and sex in a manner that exacerbates the disadvantage experienced by women over 40. The fertility program is not an ameliorative program under section 15(2) of the *Charter*.

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

[21] The eligibility criteria infringe Ms. Kowalski's rights under section 7 of the *Charter*, as the substantive effects of the criteria are to infringe Ms. Kowalski's liberty to make fundamental decisions surrounding when and how to conceive a child, as well as her security of person by imposing increased psychological harm. These deprivations are overbroad, grossly disproportionate, and thus not in accordance with the principles of fundamental justice.

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

[22] The infringements have not been demonstrably justified in a free and democratic society under section 1 of the *Charter*. Cost control is not a sufficiently pressing and substantial objective to justify the *Charter* infringements, the criteria are not minimally impairing, and any salutary effects of the eligibility criteria are outweighed by the severe deleterious effects on Ms. Kowalski's protected interests of equality, liberty, and security of the person.

PART IV – ARGUMENTS

Issue 1: The eligibility criteria for funding under the Fertility Program infringe Irina Kowalski's rights under section 15 of the *Charter*

[23] The eligibility criteria are discriminatory on the interrelated grounds of age and sex. The criteria fail to respond to the actual capacities and needs of women over 40. Instead, the age restriction in the eligibility criteria withholds a statutory benefit from women over 40 in a manner that reinforces and exacerbates disadvantage.

[24] The eligibility criteria cannot be characterized as ameliorative under section 15(2) of the *Charter*. Section 15(2) protects ameliorative programs from the claims of reverse discrimination (*Cunningham*) but Ms. Kowalski's claim is not a case of reverse discrimination. Alternatively, the denial of IVF funding to women over 40 does not serve or advance the ameliorative purpose of the Fertility Program.

> *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 at para 41 [*Cunningham*].

A. The eligibility criteria discriminate on the interrelated grounds of age and sex

[25] The section 15(1) analysis is focused on substantive equality (*Quebec v A, Withler*). The Supreme Court of Canada has adopted a "flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group" (*Taypotat*). In order to establish discrimination under section 15(1), the claimant must demonstrate that:

i. the challenged law on its face or in its impact draws a distinction based on an enumerated or analogous ground and,

ii. the distinction withholds or limits benefits available to other members of society in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage (*Quebec v A*).

Quebec(Attorney General) v A, 2013 SCC 5 at paras 325, 322 [Quebec v A].
Kahkewistahaw First Nation v Taypotat, 2015 SCC 30 at para 16 [Taypotat], citing *Quebec v A*, supra para 25 at para 331.
Withler v Canada (Attorney General), 2011 SCC 12 at para 43 [Withler].

[26] The eligibility criteria create a distinction on the interrelated grounds of age and sex. This distinction denies women over 40 equal benefit of the law in a manner that has the effect of reinforcing and exacerbating disadvantage.

i. The eligibility criteria create a distinction on the interrelated grounds of age and sex

[27] Recognizing discrimination claims on the basis of interrelated grounds accords with "the essential purposive and contextual nature of [the] equality analysis" (*Law*). Accordingly, "it is open to a claimant to articulate a discrimination claim under more than one of the enumerated…grounds" (*Law*). In *Withler*, the Court rejected mirror comparator groups because "an individual's…experience of discrimination may…only [be discernible] in reference to a conflux of factors, any one of which taken alone might not be sufficiently revelatory of how keenly the denial of a benefit is felt." The purpose of substantive equality is advanced through the recognition of interrelated grounds of discrimination in this case.

Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 at para 93, 1999 CanLII 675 [*Law*].
Withler, supra para 25 at para 58.

[28] According to the Supreme Court of Canada in *Law*, "where a party brings a discrimination claim on the basis of a combination of different grounds, [the first] part of the discrimination inquiry must focus upon the issue of whether and why a confluence of grounds is analogous." Analogous grounds are determined by their immutability (*Corbiere*). The

interrelated grounds of age and sex are analogous. Both these characteristics are immutable or constructively immutable and intersecting the grounds does not alter their immutability.

> *Law*, *supra* para 27 at para 93.
> *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13, 1999 CanLII 687 [*Corbiere*].

ii. The distinction withholds equal benefit of IVF funding available to others in society

[29] Pursuant to section 15(1) of the *Charter*, "every individual…has the right to…equal benefit of the law without discrimination…based on…sex, [or] age." The eligibility criteria explicitly deny two insured cycles of IVF to women over the age of 40. Both, the trial judge and the Court of Appeal found that the eligibility criteria create a distinction on the basis of age.

> *Charter*, *supra* para 1.
> Official Problem, supra para 2 at 2, 11.

[30] The eligibility criteria create a distinction on the interrelated grounds of age and sex. In referring to the "recipients of the embryo", the age restriction creates a distinction on the basis of sex. The recipients can only be females therefore the age restriction only applies to women.

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

[31] Women over 40 are also adversely impacted by the eligibility criteria. Women under 40 and men of any age can benefit from the IVF funding to conceive a biological child. Two cycles of IVF, including the process of egg retrieval and harvesting are insured for women under the age of 40. Men of any age can contribute their sperm and use a surrogate under the age of 40 to receive the IVF funding. Conversely, IVF treatments will only be insured for women over 40 if they use a donor egg and a surrogate under the age of 40. Women over 40 must fund their own egg retrieval and harvesting in order to receive the same benefit as others.

> Official Problem, *supra* para 2 at 2.
> Clarifications, *supra* para 9 at para 8.

iii. The eligibility criteria create an arbitrary disadvantage

[32] The age restriction withholds the statutory benefit of IVF funding to conceive from women over 40 in a discriminatory manner. When providing a statutory benefit, the state is "obliged to do so in a non-discriminatory manner" (*Eldridge*). The jurisprudence surrounding discrimination has evolved at the Supreme Court of Canada since *Andrews*. The current test for discrimination is a contextual and flexible inquiry into whether the distinction creates an arbitrary disadvantage (*Quebec v A*).

> *Eldridge v British Columbia (Attorney General),* [1997] 3 SCR 624 at para 77, 1997 CanLII 327 [*Eldridge*].
> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 1989 CanLII 2 [*Andrews* cited to SCR].
> *Quebec v A*, *supra* para 25 at para 331.

[33] Arbitrariness is determined by "whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage" (*Taypotat*). The eligibility criteria fail to respond to the actual needs and capacities of women over 40. The denial of the IVF funding to conceive reinforces and exacerbates the disadvantage of women over 40.

> *Taypotat*, *supra* para 25 at para 20.

(a) The eligibility criteria fail to respond to the actual needs and capacities of women over 40

[34] The section 15(1) analysis is viewed through the perspective of "the reasonable person… in circumstances similar to those of the claimant" (*Law*). A reasonable woman over the age of 40 experiencing infertility and hoping to access physician recommended IVF treatments through the Fertility Program would find the eligibility criteria to be arbitrary and discriminatory.

> *Law*, *supra* para 27 at para 61.

[35] Women over 40 have greater difficulty conceiving naturally than younger women. IVF is specifically recommended for women over 40 and can be their best reproductive technology option for conceiving a biological child. Women over 40 would specifically benefit from the funding of IVF treatments. The Government of Saskatchewan has chosen to deny equal benefit of the law to women over 40 without providing any options that respond to the actual needs of this group.

Official Problem, *supra* para 2 at 8, 7.

[36] The eligibility criteria fail to reflect the actual capacity of women over 40 to conceive with IVF treatments. This group has a 15% success rate of conception with IVF. Instead of reflecting this reality, the eligibility criteria do not extend IVF benefits to any woman over 40. The eligibility criteria alongside the lack of options provided by the Government perpetuate a stereotype that women over 40 cannot conceive successfully.

Official Problem, *supra* para 2 at 8.

[37] Further, the eligibility criteria "attribute characteristics to members of a group regardless of their actual capacities" (*Quebec v A*). Women meeting the criteria of physician recommendation are denied equal benefit without consideration of their actual capacities. In some circumstances, premising legislation upon statistical generalizations may not result in a section 15(1) violation, however, "a precise correspondence [is] important where the individual or group…excluded by the legislation is already disadvantaged or vulnerable within the Canadian society" (*Law*).

Quebec v A, *supra* para 25 at para 326.
Official Problem, *supra* para 2 at 2.
Law, *supra* para 27 at para 106.

(b) The eligibility criteria exacerbate and reinforce disadvantage

[38] Whether a law perpetuates disadvantage is determined by considering the "full context, including the situation of the claimant group…" and the "…actual impact of the impugned law" on the group (*Withler*). In the case of Ms. Kowalski and the denial of equal benefit of fertility treatments, the "full context" must include experiences of women with fertility challenges.

Withler, *supra* para 25 at paras 39, 40.

[39] Women experiencing fertility challenges are more likely to experience depression and severe anxiety as compared to other women. Some report feelings of inadequacy, emptiness or failure that interfere with their quality of life. Ms. Kowalski is already part of this vulnerable group because of her fertility challenges. Compounding the experience of Ms. Kowalski is the fact that single women over 35 who do not have children often experience social stigma. The denial of IVF to conceive a biological child to women over 40 exacerbates the existing experience of depression and social stigma of older women without children.

Official Problem, *supra* para 2 at 9, 8.

[40] The denial of equal benefit has exacerbated Ms. Kowalski's experience as an older woman experiencing infertility. Justice L'Heureux Dubé in *Egan* emphasized that "socially vulnerable [groups] will experience the adverse effects of legislative distinction more vividly." Since being denied IVF, Ms. Kowalski has been depressed and withdrawn. She does not feel valued in society like younger people or people with kids. Her experience has highlighted the persistence of stereotypes of older women without children. The state conduct has "widen[ed] the gap between the…disadvantaged and the rest of society" (*Quebec v A*).

Egan v Canada, [1995] 2 SCR 513 at 553, 1995 CanLII 98 [*Egan*].
Official Problem, *supra* para 2 at 5.
Quebec v A, *supra* para 25 at para 332.

[41] Substantive equality also considers the complainant's economic environment (*Quebec v A*). At the current growth rate of wages, Caucasian women will need 70 years before their wages match those of Caucasian Canadian men. Women's earnings in Canada are generally much lower than those of men. Placing the burden of funding their own egg retrieval and harvesting on women over 40 furthers the economic disadvantage experienced by women.

Quebec v A, supra para 25 at para 342.
Official Problem, *supra* para 2 at 9.

[42] In *Withler,* the Court considered the purpose of the larger scheme that included the impugned law in determining whether the law infringed section 15(1). The impugned age requirement in *Withler* was held to be in sync with the broader legislative purpose. The same result cannot be concluded with the eligibility criteria and the Fertility Program. The broad purpose of the Fertility program is to make it affordable and accessible to everyone experiencing fertility issues. This includes women over 40. The budgetary considerations and specific objectives of the age restriction should await section 1 analysis because Courts have found that "any justification, any consideration of reasonableness of the enactment…take place under section 1" (*Andrews*).

Withler, supra para 25 at paras 67, 71-79.
Official Problem, *supra* para 1 at 9, 10.
Andrews, supra para 32 at 182.

B. The eligibility criteria are not ameliorative under section 15(2) of the *Charter.*

[43] Section 15(2) saves "ameliorative programs from the charge of 'reverse discrimination'" (*Centrale des syndicats, Cunningham*). The majority in *Centrale des syndicats* found that section 15(2) cannot be used to "deprive the program's intended beneficiaries of the right to challenge the program's compliance with section 15(1)." The object of the Fertility Program is to "increase affordability and access to assisted reproductive services in Saskatchewan for those individuals

wanting to grow their families and are having trouble or cannot conceive naturally." The Program is aimed to help people experiencing fertility issues, including women over the age of 40. This group is an intended beneficiary of the Program since they are not restricted from the insured benefit of AI and IUI. Like in *Centrale des syndicats*, "this is not a case of reverse discrimination, it is a case of discrimination, period."

> *Centrale des syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18 at paras 38, 40 [*Centrale des syndicats*].
> *Cunningham, supra* para 24 at para 41.
> Official Problem, supra para 2 at 9, 2.

[44] Even if the Fertility Program is found to be an ameliorative program, the age restriction fails to serve the purpose of the legislation (*Cunningham, Kapp*). Women over 40 experience low natural fertility rates. IVF is the best option for conception for women over 40 and IVF is the most expensive of the common fertility treatments. There is no rational connection between the broad purpose of providing access to affordable assisted reproductive services to people experiencing infertility and denying women over 40 the benefit of IVF. The purpose of this legislation is impeded rather than advanced by denying the benefit to women over 40.

> *Cunningham, supra* para 24 at para 45.
> *R v Kapp*, 2008 SCC 41 at para 49 [*Kapp*].

Issue 2: The eligibility criteria for funding under the Fertility Program infringe Irina Kowalski's rights under section 7 of the *Charter*

[45] There are two elements which must be satisfied to establish a violation of the claimant's section 7 rights under the *Charter*: (1) the law must interfere with, or deprive the claimant of, their life, liberty or security of the person, and (2) the deprivation in question must not be in accordance with the principles of fundamental justice (*Carter*).

> *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 55 [*Carter*].

A. The eligibility criteria constitute a deprivation by the state

[46] Before considering life, liberty, and security of the person, it is necessary to determine whether the eligibility criteria constitute a deprivation by the state. In *Gosselin,* the Court left open the possibility that "deprivation" within the context of section 7 could one day be capable of imposing a positive obligation on the government to provide benefits or services. Despite this finding, courts have been reluctant to impose positive obligations in subsequent section 7 jurisprudence. Cases such as *PHS, Morgentaler,* and *Chaoulli* demonstrate the court's willingness to protect access to health services where government action has the effect of impeding that access in a manner which engages life, liberty, or security of the person. Case law has commented that what remains to be a major factor in denying positive rights claims in the access to heath services context is whether the courts are asking the government to expend resources in a particular way (*Refugee Care*, *Wynberg*).

> *Gosselin c Québec (Procureur général),* 2002 SCC 84 at para 82 [*Gosselin*].
> *PHS Community Services Society v Canada*, 2011 SCC 44 [*PHS*].
> *R v Morgentaler,* [1988] 1 SCR 30, 1988 CanLII 90 [*Morgentaler* cited to SCR].
> *Chaoulli c Québec (Procureur général),* 2005 SCC 35 [*Chaoulli*].
> *Canadian Doctors for Refugee Care v Canada (Attorney General),* 2014 FC 651 at para 538 [*Refugee Care*].
> *Wynberg v Ontario*, 269 DLR (4th) 435, 2006 CanLII 22919 at 222 [*Wynberg*].

[47] The distinction between positive and negative rights should be removed from the section 7 analysis. It is an artificial distinction which undermines a large and liberal interpretation of the rights section 7 was designed to protect. The positive-negative rights classification is artificial because, as suggested by the Federal Court and legal academics, the taxonomy is a fragile distinction (Cameron, *Refugee Care).*

> Jamie Cameron, "Positive Obligations Under Sections 7 and 15 of the Charter: A Comment on Gosselin v. Québec" (2003) 20 SCLR 65 at 71.
> *Refugee Care, supra* para 46 at paras 519-520.

[48] Professor Jamie Cameron states that from an entitlement perspective what matters is "substance" and that, "institutional considerations aside, claims that require the state to take action can be as compelling as those which prohibit it from doing so". She also states the the classification can often be grey and arbitrary. For example, Section 11(b) of the *Charter* protects a negative right not to be denied a trial within a reasonable time, while what it realistically does is impose a positive obligation on the state to provide such a trial. Due to the weaknesses in this distinction, it has been "long abandoned under human rights law and increasingly rejected by other constitutional democracies" (Young).

Cameron, *supra* para 47 at 71.
Margot Young, "The Other Section 7" (2013) 62 SCLR (2d) at 24.

[49] Further, treating this classification of rights as a factor in assessing section 7 claims is inconsistent with the large and liberal interpretation of *Charter* rights nor the approach taken to other aspects of section 7. The Court has repeatedly interpreted section 7 as capable of growth and expansion in order to provide the greatest protection to the interests of life, liberty, and security of the person. This is seen through the courts' evolution in the interpretation of "liberty" as incorporating fundamental personal decisions rather than simply freedom from physical restraint, and through their interpretation of "principles of fundamental justice" (*Blencoe*). Justice McIntyre stated in *Motor Vehicle Reference*, with regards to the principles of fundamental justice that a narrow interpretation of this phrase:

> "would strip the protected interests of much, if not most, of their content and leave the "right"...in a sorely emaciated state. Such a result would be <u>inconsistent with the broad, affirmative language in which those rights are expressed and equally inconsistent with the approach adopted by this Court</u>..."

Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44 at para 49 [*Blencoe*].
Reference re s 94(2) of the Motor Vehicle Act (British Columbia), [1985] 2 SCR 486 at 501-502, 1985 CanLII 81 [*Motor Vehicle Reference*].

[50] The section 7 analysis should focus on whether the effects of government action, and government line drawing around the provision of services engage life, liberty, and security of the person. This is in keeping with the generous approach to *Charter* rights (*Hunter v Southam*), the inquiry into legislative effects in *Bedford,* and the focus on "substance" as articulated by Professor Cameron. Justice Arbour suggests in *Gosselin* that any issues of deference, budgetary considerations, and reasonableness of line-drawing are best dealt with under the section 1 *Charter* analysis (Wilkie).

> *Canada (Director of Investigation & Research, Combines Investigation Branch) v Southam Inc,* [1984] 2 SCR 145, 1984 CanLII 33 at 156 [*Hunter v Southam*].
> *Bedford v Canada (Attorney General),* 2013 SCC 72 at paras 61-67 [*Bedford*].
> Cameron, *supra* para 47 at 71.
> Cara Wilkie & Meryl Zisman Gary, "Positive and Negative Rights Under the Charter: Closing the Divide to Advance Equality" (2011) 30:37 Windsor Rev Legal Soc Issues 37 at 46.
> *Gosselin, supra* para 46 at paras 385-387.

[51] This view is preferable because, as discussed above, a generous interpretation of "deprived of" is consistent with both the approach to *Charter* rights in general, and the evolving approach to section 7 specifically. Further, it is more analytically consistent with the jurisprudence to consider public policy issues within section 1. Analysis under section 7 focuses solely on a legislation's impact on the the individual, while section 1 focuses on competing social interests and public benefits (*Carter, Malmo-Levine*).

> *Carter, supra* para 45 at para 79.
> *R v Malmo-Levine,* 2003 SCC 74 at para 96 [*Malmo-Levine*].

[52] When looking at Ms. Kowalski's circumstances through this approach, the eligibility criteria engage her section 7 interests. The eligibility criteria make AI and IUI available to Ms. Kowalski, and IVF unavailable. The effect of this removal of options is to infringe on the

fundamental personal decision surrounding when and how to have a child, and to impose psychological insecurity upon Ms. Kowalski.

[53] In the alternative, the appellant submits that while the eligibility criteria do not explicitly prohibit women over age 40 from receiving IVF, the exorbitant cost of IVF is functionally a prohibition for women over age 40. In accordance with section 7 jurisprudence, this prohibition should be lifted. Some examples of this is the case of *Carter* where a prohibition on assisted suicide was found to violate section 7, or the case of *Chaoulli* where a prohibition on accessing private health insurance was also found to violate section 7.

Gosselin, supra para 46 at para 81.
Chaoulli, supra para 46.
Carter, supra para 45.

[54] Ms.Kowalski makes an estimated $28,000 per year after tax. She receives no medical benefits as a part of her employment, and pays $12,000 per year in rent. This leaves Ms. Kowalski with $16,000 to meet the rest of her needs for the entire year. IVF costs $15,000 per cycle. It is clear from these numbers that Ms. Kowalski cannot realistically afford privately-funded IVF.

Official Problem, *supra* para 2 at 4, 9.

[55] The Ontario Court of Appeal has taken judicial notice of this type of argument in the past. In the case of *Wynberg v Ontario,* the applicants sought to have a particular service for autistic children in the public school system under age 7, extended to include older children. The applicants argued that their children were essentially compelled to go to public school, rather than private school, where this limitation existed. This is because realistically, these parents would not be able to afford the costs associated with private schooling. The court accepted the fact that private schooling was functionally not an option for these parents due to it’s cost;

However, the section 7 claim failed without requiring this point to be explored further. Given that the alternative treatments in Ms. Kowalski's case have not proven to be viable alternatives, the time has come to consider this point in full.

Wynberg, supra para 46 at para 231.

B. The legislation engages Ms. Kowalski's rights to liberty and security of the person

[56] *Bedford* articulates that there must be a causal connection between the state-caused effect and prejudice suffered by the claimant. This "does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities" (*Bedford*). The effect of the age limitation is to remove IVF as an option for Ms. Kowalski, thus leaving AI and IUI as her only avenues to conceive. This effect of this decision is to impose psychological harm on Ms. Kowalski, and affect fundamental decisions surrounding conception. The appellant concedes that the eligibility criteria do not directly engage Ms. Kowalski's right to life.

Bedford, supra para 50 at para 76.

i. Liberty

[57] Ms. Kowalski's "liberty" interest is engaged pursuant to Wilson J's conception of liberty which includes "the right to make fundamental personal decisions without interference from the state" (*Morgentaler*). The fundamental personal decision Ms. Kowalski's case is the decision surrounding when and how to conceive a child. The "liberty" interest has been found to include the right to terminate a pregnancy. The decision to terminate a pregnancy involves several of the same considerations as the decision to have a child. As such, much of what is said in Wilson J's decision in *Morgentaler* applies to the "liberty" aspect of Ms. Kowalski's case:

> "This decision is one that will have profound <u>psychological, economic and social consequences</u>…the circumstances giving rise to it can be complex and varied and

there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large".

Morgentaler, supra para 46 at 37.

[58] A woman's decision about when and how she chooses to have a child is one of the most important and fundamental life choices a woman can make. It too has profound psychological, economic, and social impacts on a woman. These decisions permanently alter a woman's body and priorities for the rest of her life. Particularly, a woman's decision about when to conceive a child is a deeply personal choice which differs from woman to woman. This is especially true today, where women are increasingly seeking to thrive in both the professional and personal spheres, thus pushing plans to conceive a child later than what was once considered standard. Thus, the decision to have a child is similarly reflective of a woman's view of herself, her goals, and her relationship to society. These fundamental decisions are not among those the state should have any role in pressuring a woman to come to. Further, a woman's decision about what medical procedures she is comfortable undergoing in order to conceive is equally as fundamental a personal decision. This position is supported by the evidence of Dr. Kevin Wong which stated that decisions surrounding when and how to conceive are "very personal" and "unique to each individual family".

Official Problem, *supra* para 2 at 8.

ii. Security of the Person

[59] Ms. Kowalski's "security of the person" is engaged by the eligibility criteria, as they have had a serious impact on Ms. Kowalski's psychological integrity. Security of the person is engaged by "serious psychological incursions resulting from state interference with an individual interest of fundamental importance" (*Blencoe*). This is an objective test. The psychological

effects stemming from the state action must be assessed objectively on the basis of a person with reasonable sensibility (*Blencoe*). It does not require "nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety" (*GJ*).

> *Blencoe, supra* para 49 at paras 82, 90.
> *New Brunswick (Minister of Health & Community Services) v GJ*, [1999] 3 SCR 46, 1999 CanLII 653 at para 60 [*GJ*].

[60] As discussed with regards to Ms. Kowalski's liberty interest, the decisions of when and how to conceive a child are decisions of fundamental personal importance. In her affidavit, Ms. Kowalski stated that the infertility process had caused her extreme stress which required her to seek out counselling. Seeing women only a few years younger than her, men over 40, and wealthier women access government-funded IVF exacerbates her psychological distress, leaving her feeling hurt. Since becoming aware that IVF is not an option for her, Ms. Kowalski states she has been depressed, withdrawn, stigmatized, and has rarely been leaving her home. On the basis of these facts, her response rises beyond ordinary stress or anxiety.

> Official Problem, *supra* para 2 at 4-5.

[61] Ms. Kowalski's response is consistent with individuals of ordinary sensibility. Evidence provided by Dr. Wong suggests that women who are unable to conceive report feelings of "inadequacy, emptiness or failure". They also experience emotional stress equivalent to that of individuals facing "cancer, HIV, and chronic pain", as well as increased levels of depression and anxiety comparative to other similarly situated women. He also stated that women over age 35 who do not have children experience "social stigma". This confirms that Ms. Kowalski's response is not a hyper-sensitive response, but rather a response shared by many women in her position.

> Official Problem, *supra* para 2 at 4-5, 8-9.

C. The deprivation is not in accordance with the principles of fundamental justice because it is overbroad and grossly disproportionate

[62] The principles of fundamental justice have been interpreted as enshrining our basic values against arbitrariness, overbreath, and gross disproportionality (*Bedford*). The objectives of the infringing measure are: 1) to control the costs of the program and 2) to ensure those accessing IVF are most likely to benefit.

Bedford, supra para 50 at para 111.
Official Problem, *supra* para 2 at 10.

[63] Overbreadth "asks whether a law that takes away rights in a way that generally supports the object of the law, goes too far by denying the rights of some individuals in a way that bears no relation to the object" (*Carter*). The two objectives of the eligibility criteria work together. While wanting to cut costs, the Government seeks to do so in a way that ensures those accessing the program are most likely to benefit from it. The effect of the regulations is to bar women over age 40 who do stand to benefit, such as Ms. Kowalski.

Carter, supra para 45 at para 85.

[64] The evidence demonstrates that Ms. Kowalski is certainly someone who would benefit from IVF. IVF has been physician recommended to Ms. Kowalski by her physician as her only chance of conceiving a child. Further, Dr. Burnett states that women with endometriosis "particularly benefit" from IVF as it increases rates of fertilization and implantation compared to the other procedures. This evidence shows that women over age 40, and Ms. Kowalski in particular have the most to benefit from IVF while women under age 40 are more capable of benefiting from any of the three procedures offered. AI and IUI have success rates of only 2%-5% in women over age 40, but as high as 15% in women under 35.

Official Problem, *supra* para 2 at 4, 7.

[65] Further, while the regulations may have the effect of controlling costs to the healthcare system, the effect of the regulation is likely to have women over age 40 participate in multiple-embryo transfers of IVF, thus increasing costs associated with multiple births. As a result, eligibility criteria is overbroad as in circumstances where multiple embryo transfers are used, the eligibility criteria "bear no relation" to the objective of saving health costs (*Carter*).

Official Problem, *supra* para 2 at 10.
Carter, *supra* para 45 at para 85.

[66] Lastly, the age restriction on IVF is grossly disproportionate. This refers to the fact that the "law's effects on life, liberty, or security of the person are so grossly disproportionate to it's purpose that they cannot rationally be supported" (*Bedford*). The impacts of this regulation are severe. The impingement on Ms. Kowalski's fundamental personal decisions surrounding conception, and harm to her psychological well-being are disproportionate to any benefit that could be gained by cost control through limiting access to IVF.

Bedford, *supra* para 50 at para 120.

[67] The only evidence presented that suggests a benefit flowing from the eligibility criteria is the fact that the Government of Saskatchewan would save $1 million dollars per year on the fertility program. This cost is relatively small in comparison to the overall health care budget of $5.36 billion. This small saving cannot be justified as being worth the costs to Ms. Kowalski's liberty, and psychological well-being. To reduce Ms. Kowalski's rights to being worth less than a marginal increase in health costs is to undermine the "belief in the dignity and worth of every human person" (*Carter*), the values underlying the principles of fundamental justice.

Carter, *supra* para 45 at para 81.

Issue 3: The infringements are not demonstrably justified in a free and democratic society under section 1 of the *Charter*

[68] Any infringement of sections 7 and 15 cannot be properly justified under section 1 of the *Charter*. The eligibility criteria are prescribed by law under the PPS. The burden rests on the respondent to prove that: (1) there is a pressing and substantial objective behind the eligibility criteria; (2) there is a rational connection between the impugned law and the legislative objective; (3) the means chosen to achieve the legislative objective are minimally impairing; and (4) there is a proportionality between the effects of the legislation and its objectives. Section 1 imposes a "stringent standard of justification" on the party seeking to uphold the limitation.

R v Oakes, [1986] 1 SCR 103, 1986 CanLII 46 at paras 69-71 [*Oakes*].

A. Pressing and substantial objective

[69] The first stated objective of the eligibility criteria is to control the costs of the program. Controlling the costs of the program is not a sufficiently pressing and substantial objective. Budgetary considerations "in and of themselves cannot normally be invoked as a free-standing pressing and substantial objective…" (*Martin*). In the case of *NAPE*, the Court found that extraordinary budgetary considerations were a pressing and substantial objective. However, the Court was clear to note that this was not a "normal" time in the province, as they were facing an extreme recession which demanded budgetary cuts. There is no evidence to suggest that the Government of Saskatchewan is in a financial crisis. Therefore, cutting costs cannot be considered a pressing and substantial objective in this case.

Martin v Nova Scotia (Workers' Compensation Board), 2003 SCC 54 at para 109 [*Martin*].
Newfoundland (Treasury Board) v NAPE, 2004 SCC 66 at para 67 [*NAPE*].

[70] The second stated objective of "ensuring those accessing the program are most likely to benefit" is also not a sufficient pressing and substantial objective. According to Dickson CJ in

Oakes, the threshold for finding a pressing and substantial objective is "high in order to ensure that objectives which are...discordant with the principles integral to a free and democratic society do not gain s 1 protection." The onus is on the Government to prove that this stated objective is pressing and substantial. There has been no evidence adduced to demonstrate why limiting access to IVF is pressing and substantial on it's own. On the evidence, the potential $1 million saving is the only suggestion that might make limiting access to government-funded IVF pressing and substantial. This refers back to the first stated objective of "cost control" which has been addressed above and is not of sufficient importance.

Oakes, *supra* para 68 at 138.
Official Problem, *supra* para 2 at 10.

B. Minimally Impairing

[71] The means chosen to achieve the legislative objective do not impair the rights to equality, liberty and security "as little as possible". It is clear that there is a large level of deference to be paid to the government when considering minimal impairment. That being said, "deference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on the guaranteed rights are reasonable and justifiable" (*RJR-Macdonald*). The government has the burden of providing evidence to support the conclusion that the limitation is necessary to achieve the legislative objective (*Irwin Toy*).

RJR-Macdonald Inc v Canada, [1995] 3 SCR 199, 1995 CanLII 64 at para 136 [*RJR-Macdonald*].
Irwin Toy Ltd v Quebec (Attorney General), [1989] 1 SCR 927 at 992, 999, 1989 CanLII 87 [*Irwin Toy*].

[72] The Government has failed to adduce evidence to support why and how the age limitation is necessary to control costs and ensure access to those most likely to benefit. The nature of the

infringement is significant. Especially in light of evidence that IVF is specifically recommended for women over 37 and IVF is the most effective fertility treatment, relative to AI and IUI, for women over 40. Further, the Government has failed to demonstrate why a less intrusive and equally effective measure was not chosen. (*RJR-Macdonald)*. For example, the Government could have subsidized egg retrieval or harvesting for women over 40, or could fund a single cycle of IVF thereby addressing the government's objectives. These reasonable alternatives would better ensure that those capable of "benefitting" from IVF are accessing it, while continuing to control costs.

Official Problem, *supra* para 2 at 5.
RJR-Macdonald, *supra* para 71 at para 160.

[73] As in *Martin*, the outright denial of women over age 40 from receiving IVF funding is rationally connected to the objective of cost control. However, this same reasoning "makes it patently obvious that the challenged provisions do not minimally impair" the rights of the claimant (*Martin*). The Court held that the legislation was not minimally impairing because the legislation already "solve[d] the problem" through internal measures. The same is true in this case. Even without the age restriction, the eligibility criteria limit government-funded IVF to individuals who are "physician recommended". This achieves the goal of ensuring those accessing IVF are the most likely to benefit. The funding is also limited to a maximum of two cycles, thereby controlling the costs of the program. These measures indicate that the Government's objectives can be achieved without resorting to right infringements.

Martin, *supra* para 69 at paras 112, 113.
Official Problem, *supra* para 2 at 2.

C. Proportionality between legislative effect and objectives

[74] The final step in the section 1 *Charter* analysis is to weigh the deleterious effects of the legislation against the legislative objective and salutary effects of the program (*Dagenais*). As discussed above, the deleterious effects on Ms. Kowalski and other women with fertility issues who would particularly benefit from IVF are severe. These women are encouraged to undergo statistically less successful procedures thus exacerbating the psychological stress inherent with infertility. In addition, these women are pressured to make the fundamental personal decision of when to conceive a child before age 40 in order to fully access the statistically most successful procedure. The only way for women over 40 to conceive a biological child and receive the IVF funding is to pay out of pocket for the egg retrieval and harvesting. This differential treatment has the effect of making conception more difficult for women over 40. This exacerbates the disadvantage faced by this group, undermining their dignity and sense of self-worth.

> *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835 at 839, 1994 CanLII 39.
> Official Problem, *supra* para 2 at 5.

[75] The salutary effects of this legislation cannot justify the costs of the limitation on the rights in issue. The salutary effects of ensuring those accessing the program are most likely to benefit, as opposed to all individuals, are speculative. There is no evidence that the eligibility criteria have ensured that those accessing the program are more likely to benefit. Further, benefits of potentially saving $1 million in an annual health care budget of $5.36 billion cannot be reasonably justified given the deleterious effects. The severe deleterious effects outweigh the minimal salutary effects. The infringements on Ms. Kowalski's sections 7 and 15 rights cannot be demonstrably justified in a free and democratic society.

> Official Problem, *supra* note 2 at 10.

PART V - ORDER SOUGHT

[76] The Appellant respectfully requests that the appeal from the Saskatchewan Court of Appeal be allowed and the eligibility criteria be declared of no force or effect.

All of which is respectfully submitted this 24th of January, 2019.

Team 10
Appellant

PART VI – LIST OF AUTHORITIES AND STATUTES

JURISPRUDENCE	PARAGRAPHS
Alberta (Aboriginal Affairs and Northern Development) v Cunningham, 2011 SCC 37.	24, 44
Andrews v Law Society of British Columbia, [1989] 1 SCR 143, 1989 CanLII 2.	32, 42
Bedford v Canada (Attorney General), 2013 SCC 72.	50, 56, 62, 67
Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44.	49, 50
Canada (Director of Investigation & Research, Combines Investigation Branch) v Southam Inc, [1984] 2 SCR 145, 1984 CanLII 33.	50
Canadian Doctors for Refugee Care v Canada (Attorney General), 2014 FC 651.	46, 47
Carter v Canada (Attorney General), 2015 SCC 5.	45, 51, 53, 63, 65, 67
Centrale des Syndicats du Quebec v Quebec(Attorney General), 2018 SCC 18.	43
Chaoulli c Québec (Procureur général), 2005 SCC 35.	46, 53
Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203, 1999 CanLII 687.	28
Dagenais v Canadian Broadcasting Corporation, [1994] 3 SCR 835, 1994 CanLII 39.	74
Egan v Canada, [1995] 2 SCR 513, 1995 CanLII 98.	40
Eldridge v British Columbia (Attorney General), [1997] 3 SCR 624, 1997 CanLII 327.	32
Gosselin c Québec (Procureur général), 2002 SCC 84.	46, 50, 53
Irwin Toy Ltd v Quebec (Attorney General), [1989] 1 SCR 927, 1989 CanLII 87.	71
Kahkewistahaw First Nation v Taypotat, 2015 SCC 30.	25, 33
Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497, 1999 CanLII 675.	27, 27, 34, 37
Martin v Nova Scotia (Workers' Compensation Board), 2003 SCC 54.	69, 73
New Brunswick (Minister of Health & Community Services) v GJ, [1999] 3 SCR 46, 1999 CanLII 653.	59
Newfoundland (Treasury Board) v NAPE, 2004 SCC 66.	69
PHS Community Services Society v Canada, 2011 SCC 44.	46
Quebec v A, 2013 SCC 5.	25, 32, 37, 40, 41
R v Kapp, 2008 SCC 41.	44
R v Malmo-Levine, 2003 SCC 74.	51
R v Morgentaler, [1988] 1 SCR 30, 1988 CanLII 90.	46, 57
R v Oakes, [1986] 1 SCR 103, 1986 CanLII 46.	68, 70
Reference re s 94(2) of the Motor Vehicle Act (British Columbia), [1985] 2 SCR 486, 1985 CanLII 81.	49

RJR-Macdonald Inc v Canada, [1995] 3 SCR 199, 1995 CanLII 64.	71, 72
Withler v Canada (Attorney General), 2011 SCC 12.	25, 27, 38, 42
Wynberg v Ontario, 269 DLR (4th) 435, 2006 CanLII 22919.	46, 55

LEGISLATION	**PARAGRAPHS**
Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.	1, 29
Saskatchewan Medical Care Insurance Act, RSS S-29 (as amended for the purposes of the Wilson Moot 2019)	6
Saskatchewan Medical Care Insurance Payment Regulations, 1994, S-29 Reg 19 (as amended for the purposes of the Wilson Moot 2019).	6

SECONDARY SOURCES	**PARAGRAPHS**
Cara Wilkie & Meryl Zisman Gary, "Positive and Negative Rights Under the Charter: Closing the Divide to Advance Equality" (2011) 30:37 Windsor Rev Legal Soc Issues 37.	50
Jamie Cameron, "Positive Obligations Under Sections 7 and 15 of the Charter: A Comment on Gosselin v. Québec" (2003) 20 SCLR 65.	47, 48, 50
Margot Young, "The Other Section 7" (2013) 62 SCLR (2d).	48

OFFICIAL WILSON MOOT SOURCES	**PARAGRAPHS**
Clarifications, Wilson Moot 2019.	9, 31
Official Problem, Wilson Moot 2019.	2, 6-19, 29-31, 35-37, 39, 40-43, 54, 58, 60-62, 64-65, 70, 72-75