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 RESPONDENT

COUNSEL FOR THE RESPONDENT

TEAM 10

Table of Contents

PART I – OVERVIEW

[1] In exercise of its power to provide healthcare services to its residents, the Government of Saskatchewan has implemented a Fertility Program that offers a variety of fertility treatments regardless of medical necessity. As part of its commitment to ensure that these services remain affordable and accessible to all residents, the Fertility Program focuses on providing these services to those most likely to benefit. This is achieved using the evidence-based eligibility criteria set out under s. 600P(a) of the "Saskatchewan Health Payment Schedule for Insured Services Provided by a Physician" ("PPS") (Official Problem). These eligibility criteria function within a complex benefits scheme involving broad policy considerations that the legislature has been entrusted to make.

Official Problem, Wilson Moot 2019 at paras 18(a), (c); at 2 [Official Problem].

[2] The eligibility criteria cannot violate s. 7 of the *Charter*, as this would imply a positive obligation to healthcare, something that has been specifically rejected by the Supreme Court of Canada (*Chaoulli)*. The eligibility criteria do not violate s. 15 of the *Charter* because they employ evidence-based distinctions that account for the actual capacities and needs of those accessing the program. Finally, and in the alternative, the impact of these eligibility criteria on any protected interest is demonstrably justified in a free and democratic society in accordance with s. 1 of the *Charter*. The Government of Saskatchewan is entitled to deference in making decisions that attempt to balance diverse needs and limited resources.

Canadian Charter of Rights and Freedoms, ss 7, 15, 1, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
Chaoulli c Québec (Procureur général), 2005 SCC 35 at para 104 [*Chaoulli*].

PART II – STATEMENT OF FACTS

1. Factual Background

[3] The Government of Saskatchewan, under the *Saskatchewan Medical Care Insurance Act* (Official Problem), provides funding for fertility treatments to residents of Saskatchewan in accordance with the PPS. The PPS applies broadly to all residents of Saskatchewan and provides funding for artificial insemination (AI), intrauterine insemination (IUI) and, in-vitro fertilization (IVF) treatment.

Official Problem, *supra* para 1 at 1; at paras 2, 1.

[4] IVF is a procedure wherein eggs are harvested and fertilized in a laboratory, resulting in embryos that are then implanted in the uterus of an embryo recipient. One round of funded IVF costs the Government of Saskatchewan approximately $15,000. Comparatively, IUI costs approximately $1,225 per cycle and AI costs approximately $300 per cycle. As the most expensive and invasive fertility treatment, eligibility criteria are used to deliver IVF to ensure those accessing it are most likely to benefit. Every resident of Saskatchewan may receive two rounds of government-funded IVF. However, embryo recipients must be under the age of 40.

Official Problem, *supra* para 1 at paras 14(e), (i), (g), (h); at 2.

[5] According to the Appellant's physician, Dr. Christie Burnett, IVF success rates are approximately 55% per month for women under 35. This rate drops to 30% per month for women ages 35-40, 15% per month for women ages 40-43, and continues to decline thereafter. A 2015 Brigham & Women's Hospital study reports the rate of unassisted pregnancy for women over 40 is 5% per month. Obstetrician and gynaecologist Dr. Bonnie Kim reports that women over 40 who do successfully conceive are at significantly higher risk for serious complications.

Official Problem, *supra* para 1 at paras 15, 14(q), 17.

[6] The purpose of the Fertility Program as reported by the Deputy Minister of Health, Jim Lee, 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" (Official Problem). This expansion includes increased access to fertility treatments for individuals who may be single or in same-sex relationships. The purpose of the embryo recipient age requirement for IVF is to help control the costs of the Fertility Program and ensure that those accessing it are most likely to benefit. Removing the eligibility criteria for government-funded IVF would cost the Saskatchewan healthcare system at least an additional $1M per year.

Official Problem, *supra* para 1 at para 18.

[7] The Appellant is a single, 42-year-old resident of Saskatchewan. At 25, she was diagnosed with endometriosis, a condition that often leads to fertility issues. At 40, the Appellant started exploring fertility treatments under the care of her doctor. Dr. Burnett advised the Appellant that given her age and endometriosis diagnosis, IVF provided by the best chance of conception. However, she is ineligible to receive government-funded IVF treatments in order to conceive and carry her own child.

Official Problem, *supra* para 1 at 1; paras 5, 8-12, 13.

[8] The Appellant chose to undergo two rounds of IUI without success. As a result of this and a variety of other personal circumstances, the Appellant has been experiencing adverse emotional effects. Sociologist Dr. Kevin Wong reports that responses like this are common among women coping with infertility.

Official Problem, *supra* para 1 at paras 11, 13, 16(b).

2. Procedural History

[9] The Appellant has brought a claim against the Government of Saskatchewan asserting that the eligibility criteria for government-funded IVF treatment infringe her rights under sections 15 and 7 of the *Charter* and these infringements are not saved by section 1 of the *Charter*. Justice Cairns of the Saskatchewan Court of Queen's Bench allowed the application and held that the eligibility criteria were discriminatory on the grounds of age, sex and family status. He also held that the eligibility criteria had arbitrarily deprived the Appellant of her liberty and security of the person interests. Finally, Justice Cairns found the infringements were not saved under s. 1 of the *Charter* because the government's purposes were not rationally connected to its objectives.

Official Problem, *supra* para 1 at 3, 11.
Charter, *supra* para 2, ss 7, 15, 1.

[10] Justices Cope and Patel of the Saskatchewan Court of Appeal held the eligibility criteria were not discriminatory under s. 15, as they did not contribute to the perpetuation of historical disadvantage or stigmatisation. Additionally, the Court found the criteria responded to the actual needs and circumstances of women over 40 seeking fertility treatment. Justices Cope and Patel also found no infringement of section 7 of the *Charter* because the applicant's s. 7 rights were not engaged. The Justices emphasized that if a s. 1 analysis were to have occurred, substantial deference would be owed to government decisions regarding complex policy decisions. In dissent, Justice Goldstein adopted the reasoning of the Justice Cairns.

Official Problem, *supra* para 1 at 11.
Charter, *supra* para 2, s 7.

PART III – STATEMENT OF POINTS IN ISSUE

1. **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 deprive the Appellant of the right to life, liberty or security of the person because her section 7 rights are not engaged. Alternatively, any deprivation is in accordance with the principles of fundamental justice.

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

   The eligibility criteria create a distinction on the enumerated ground of age. This distinction is not discriminatory because it is the product of evidence-based eligibility criteria that account for the actual capacities and needs of embryo recipients over 40.

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

   Any infringement of the Appellant's rights is justified in a free and democratic society. The distinction uses rational means to advance a pressing and substantial objective. The limitation created by the distinction is minimally impairing of the Appellant's rights and proportionate to the public benefit created by the Fertility Program.

PART IV – ARGUMENT

Issue 1: The eligibility criteria do not violate section 7 of the *Charter*

1. The eligibility criteria do not deprive the Appellant of her section 7 Charter rights because section 7 does not impose a positive obligation in these circumstances

[11] Section 7 of the *Charter* states: "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 600P(a) of the PPS states that in order to receive government-funded IVF, the embryo must recipient must be under the age of 40 (Official Problem).

> *Charter*, *supra* para 2 at s 7.
> Official Problem, *supra* para 1 at p 2.

[12] There are two aspects of a s. 7 claim: (1) that a government action deprives an individual of their right to life, liberty or security of the person, and (2) that the deprivation is not in accordance with the principles of fundamental justice (*Gosselin*). A s. 7 violation must be established by the applicant on a balance of probabilities.

> *Gosselin c Québec (Procureur général)*, 2002 SCC 84 at para 75 [*Gosselin*].

[13] The Appellant has asked this court to find that she has a constitutional right to government-funded IVF treatment under s. 7 of the *Charter*. Finding this right would create an expansive positive right entitlement, something the Supreme Court of Canada has explicitly declined to do in far more compelling circumstances. As such, the Appellant's s. 7 claim should be dismissed.

(a) The appellant is asking this court to find a positive obligation under section 7

[14] In 2007, the Supreme Court of Canada articulated the difference between positive and negative rights. *Baier* dictates that a positive right exists where "the government must legislate or otherwise act to support or enable" that right. In contrast, a negative right entails "seeking

freedom from government legislation or action" (*Baier*). The legislation in question does not prohibit the Appellant from acting, nor does it intervene in her affairs. Rather, the Appellant asserts that the failure of the Government of Saskatchewan to provide her with funded IVF violates her s. 7 *Charter* interests. Thus, the Appellant is making a positive rights claim.

> *Baier v Alberta*, 2007 SCC 31 at para 35 [*Baier*].
> *Charter*, *supra* para 2 at s 7.

(b) Section 7 does not encompass positive socio-economic rights

[15] There is ongoing debate about whether s. 7 of the *Charter* protects positive rights as well as negative rights (*Canadian Doctors*). Section 7 claims which assert a positive right in the context of criminal liability are successful, as these claims necessarily encompass a negative right to be free from state interference. In *Gosselin*, the Court left open the possibility future cases where a novel socio-economic positive right could be found. Since that time, several arguments to find positive state obligations to provide things like housing, healthcare, and welfare have surfaced (Macfarlane). Every attempt has been unsuccessful (*Canadian Doctors*).

> *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at para 512, 571 [*Canadian Doctors*].
> *Gosselin*, *supra* para 12 at para 82.
> Emmett Macfarlane, "Positive Rights and Section 15 of the Charter: Addressing a Dilemma" (2018) 38(1) NJCL at 147.

[16] The Supreme Court of Canada has held that s. 7 does not encompass a positive economic right to adequate living standards (*Gosselin*). The British Columbia Court of Appeal recognized that finding a positive right to know one's biological origins could have unforeseen and far-reaching consequences, and accordingly declined to do so (*Pratten*). The Ontario Court of Appeal in *Tanudjaja* rejected an assertion of a positive right to adequate housing as non-justiciable, holding "[i]ssues of broad economic policy and priorities are unsuited to judicial review . . . [as these] tak[e] the court well beyond the limits of its institutional capacity." That

Court has also rejected the idea of an economic right under s. 7, holding that "legislative limitations on the scope of [a] financial benefit provided do not violate s. 7" (*Flora*).

> *Gosselin, supra* para 12 at para 83.
> *Pratten v British Columbia (Attorney General)*, 2012 BCCA 480 at para 51 [*Pratten*].
> *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 at paras 33-34 [*Tanudjaja*].
> *Flora v Ontario Health Insurance Plan*, 2008 ONCA 538 at para 108 [*Flora*].

[17] Courts have repeatedly rejected the invitation to find positive state obligations under s. 7 (*Canadian Doctors*) because doing so effectively forces courts to overrule socio-economic policy decisions delegated to the legislature (David). Overriding the intentions of an elected legislature in the case of complex regulatory schemes is not within the constitutional or institutional competence of courts (David) and subjects courts to claims of judicial activism. As the Supreme Court of Canada reaffirmed in *Insite*, "it is for the governments, not the courts to make health policy."

> *Canadian Doctors, supra* para 15 at para 571.
> Laurence David, "A Principled Approach to the Positive/Negative Rights Debate in Canadian Constitutional Adjudication" (2014) 23:1 Const Forum Const at 41.
> *PHS Community Services Society v Canada (Attorney General)*, 2011 SCC 44 at para 1 [*Insite*].

(c) Section 7 does not recognize a positive right to healthcare

[18] In *Chaoulli*, the Supreme Court unequivocally held that "a freestanding and general right to health care does not exist under s. 7." In that case, Quebec provincial legislation was found to violate s. 7 because it prevented residents from purchasing private health insurance. The provision of actual services by the provincial health care scheme was not at issue, the Court was simply recognizing the right of citizens to spend their own money on their own healthcare.

> *Chaoulli, supra* para 2 at para 104.

[19] In 2000, Adolfo Flora applied to the Ontario Health Insurance Plan for reimbursement of a life-saving liver transplant in England after he was deemed medically ineligible to receive the

procedure in Canada under Ontario legislation (*Flora*). Mr. Flora claimed this legislation violated his s. 7 rights to life, liberty and security of the person, which he asserted "imposes a positive obligation on the state to provide life-saving medical treatments." The Ontario Court of Appeal rejected this claim, finding the impugned legislation did not engage s. 7 as it did not impede anyone from seeking medical treatment – it "neither prescribe[d] nor limit[d] the types of medical services available to Ontarians" (*Flora*).

Flora, *supra* para 16 at paras 3, 4, 93, 101.

[20] In *Wynberg*, the exclusion of autistic children of a certain age from effective behavioural intervention programs was the subject of a s. 7 claim brought against the Government of Ontario. The Court characterized this as a positive rights claim, and rejected it, stating that the Government's failure to provide the programming does not "amount to depriving the [claimants] of a constitutionally protected right" (*Wynberg*). The Court further acknowledged that even though most families would not be able to independently afford effective behavioural interventions, this did not convert the failure of the Government to provide the service into a deprivation under s. 7.

Wynberg v Ontario (2006), 269 DLR (4th) 435 at paras 1, 208, 218, 220, 231 82 OR (3d) 561 [*Wynberg*].

[21] In *Canadian Doctors*, the Federal Government was subject to a s. 7 claim when it removed healthcare funding for refugees. After characterising the claim as one asserting a positive right, the Federal Court undertook an extensive review of the jurisprudence and concluded "the current state of the law in Canada is that section 7 . . . do[es] not include the positive right to state funding for health care" (*Canadian Doctors*). Again, the Court recognized that the financial reality of the refugees who would not be able to otherwise afford treatment did not create a s. 7 deprivation where one did not exist.

Canadian Doctors, supra para 15 at paras 510, 571, 567.

[22] In *Cameron*, a couple brought a claim against the Government of Nova Scotia for failing to fund their fertility treatments. The right to provincially funded fertility treatments under s. 7 was raised at trial, which the Nova Scotia Supreme Court rejected outright. The Court held "the public funding of particular medical services … [as] an element of the right to life, liberty or security of person would expand the parameters of judicial review, well beyond its present scope" (*Cameron* NSSC). On appeal, the Court of Appeal was not presented with the s. 7 claim (*Cameron* NSCA).

Cameron v Nova Scotia (Attorney General), [1999] NSJ No. 33 at para 155, 172 NSR (2d) 277 [*Cameron* NSSC].
Cameron v Nova Scotia (Attorney General), 1999 NSCA 14 at para 155 [*Cameron* NSCA].

[23] The Appellant is seeking a right to government-funded non-medically necessary fertility treatment under s. 7 of the *Charter*. Section 7 does not include a freestanding right to healthcare and therefore cannot guarantee a positive right to insured IVF treatment (*Chaoulli).* As illustrated above, Courts have found that life-saving liver transplants, effective treatment for autistic children, healthcare for refugees, and fertility treatments are not rights guaranteed under s. 7. Additionally, Courts have found that financial realities cannot convert state inaction into state deprivation (*Wynberg*). The Appellant's claim should not be an included right within s. 7.

Chaoulli, supra para 2 at para 104.
Wynberg, supra para 20 at para 231.

2. The eligibility criteria do not engage the Appellant's section 7 rights to life, liberty nor security of the person

[24] Section 7 of the *Charter* protects an individual's life, liberty and security of the person interests from undue state intervention, except where that intervention is in accordance with the principles of fundamental justice (*Carter*). For s. 7 to be engaged, there must be a causal

connection between the state action and the effect on an individual's s. 7 protected interests (*Bedford*).

> *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 71 [*Carter*].
> *Bedford v Canada (Attorney General)*, 2013 SCC 72 at para 78 [*Bedford*].

(a) The eligbility critera do not engage the Appellant's right to life

[25] In *Carter*, the Supreme Court of Canada reaffirmed that the right to life is only engaged when state action imposes death or increases the risk of death. In that case, patients suffering from terminal illnesses were unable to access physician assisted suicide due to a *Criminal Code* prohibition. The Court found that this prohibition increased the risk of premature death because individuals suffering from terminal illnesses would be forced to end their own lives before they might otherwise want to, while they were still physically capable of doing so independently. Conversely, any risk of death in this case is imposed by the Appellant's pre-existing endometriosis diagnosis, not by the eligibility criteria. The eligibility criteria do not impose death upon the Appellant, nor do they increase the risk of death.

> *Carter*, *supra* para 24 at para 62.
> Official Problem, *supra* para 1 at para 14(n).

(b) The eligbility critera do not engage the Appellant's right to liberty

[26] A person's liberty interest is engaged "where state *compulsions* or *prohibitions* affect important and fundamental life choices" (*Blencoe*), occurring when a person is under threat of imprisonment or incarceration (*Carter*). *Godbout* dictates that liberty interests are also triggered when the state interferes in fundamental life choices, particularly decisions that go to the "core of what it means to enjoy individual dignity and independence." This prohibits the state from intervening in a person's choice of where to live (*Godbout*) or whether to end their life (*Carter*).

> *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 49, [*Blencoe*] [emphasis added].

Carter, *supra* para 24 at para 68.
Godbout c Longueuil (Ville), [1997] 3 SCR 844 at para 66, 152 DLR (4th) 577 [*Godbout*].

[27] The Appellant is not at risk of incarceration, thus this aspect of her liberty interest is not engaged. Further, the Appellant's liberty interests are not engaged by the eligibility criteria because the state is not interfering with any fundamental life choice that has been recognized as protected under s. 7. In *Morgentaler*, Wilson J held in dissent that the decision to terminate a pregnancy is a fundamental life choice. This does not allow the court to infer that the decision to become a parent is a fundamental life choice of the kind contemplated under s.7. However, even if this right were to exist, it has not been violated in this case.

R v Morgentaler, [1988] 1 SCR 30 at 172, 44 DLR (4th) 385, Wilson J, dissenting [*Morgentaler*].

[28] If the decision to become a parent is a fundamental life choice under s. 7, this has not been deprived from the Appellant as the state has not intervened in that decision. The Appellant is currently ineligible to receive government-funded IVF in order to conceive and carry her own biological child. This in no way prohibits her from becoming a parent, which she may do through many other methods: adoption, surrogacy, using IUI or AI, or natural conception.

[29] The Appellant's liberty claim is better characterized as asserting that she has a constitutionally protected right to use a specific government-funded reproductive technology in order to become pregnant with her own biological child. This is simply not a fundamental life choice of the kind contemplated by s. 7. As its core, it is an economic rights claim of the kind that Courts have specifically refrained from finding under s. 7 (*Irwin Toy*). The consequences of recognizing the right asserted by the Appellant would be far-reaching, and doing so would stretch the provision too far beyond its purpose of protecting individuals from state interference (*Gosselin*). The eligibility criteria do not deprive the Appellant of her s. 7 liberty rights.

Irwin Toy Ltd v Quebec (Attorney General), [1989] 1 SCR 927 at 1003, 58 DLR (4th) 577 [*Irwin Toy*].
Gosselin, *supra* para 12 at para 206.

(c) The eligbility critera do not engage the Appellant's right to security of the person

[30] *Carter* dictates that security of the person is infringed when the state interferes with a person's bodily integrity or imposes severe psychological stress. Bodily integrity is engaged when an individual experiences physical pain resulting from state action (*Carter*). Serious, state-imposed psychological stress occurs when state action has a serious and profound impact on a person's mental wellbeing (*G(J)*). This has been found when legislation limited access to abortions (*Morgentaler*) or forced terminally ill persons to contemplate suicide (*Carter*).

Carter, *supra* para 24 at paras 64, 65.
New Brunswick (Minister of Health & Community Services) v G(J), [1999] 3 SCR 46 at para 60 and 59, 177 DLR (4th) 124 [*G(J)*].
Morgentaler, *supra* para 27 at 73.

[31] As the Appellant is not experiencing physical pain nor any physical force, her bodily integrity has not been interfered with by the state. Additionally, the Appellant is not experiencing serious psychological harm imposed by the state. As articulated by the Supreme Court of Canada in *Blencoe*, in order to find a security of the person violation as the result of psychological stress, the harm must be serious and state-imposed. In this regard, *G(J)* emphasizes that ordinary stress or anxiety will not constitute a security of the person violation.

Blencoe, *supra* para 26 at para 57.
G(J), *supra* para 30 at para 60.

[32] In *G(J)*, the court found the failure to provide legal aid funding for parents whose children had been removed from them by the state violated the security of the person interests of the parents, because the state intrusion interfered with "the psychological integrity of the parent *qua* parent." Conversely, in *Blencoe*, the Court found that though the claimant had experienced

significant psychological harm, this was not the result of state action and therefore could not form the foundation of a s. 7 claim. Rather, the harm was caused by an interaction of personal hardships, upon which the government inaction had no bearing.

G(J), *supra* para 30 at para 64.
Blencoe, *supra* para 26 at para 86.

[33] Similarly, the magnitude of the Appellant's adverse emotional effects should not be conflated with state-imposition. Rather, they are the aggregate result of several personal circumstances surrounding her attempts to become a parent. As entered into evidence by Dr. Wong, women experiencing infertility often report significant emotional stress. The experience of the Appellant, while personally unfortunate, is common among women who are seeking to become a parent and thus has not been imposed upon her by the state. The eligibility criteria do not deprive the Appellant of her security of the person because the state has not caused the psychological effect in question.

Official Problem, *supra* para 1 at paras 13, 16.

3. If the eligibility criteria do deprive the Appellant of her section 7 *Charter* rights, they do so in accordance with the principles of fundamental justice

[34] If the Appellant's right to life, liberty or security of the person is limited, that deprivation does not violate s. 7 because it is in accordance with the principles of fundamental justice. Some state intervention with these interests is necessary for proper functioning of a democratic society (*Carter*). The overall purpose 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."

Carter, *supra* para 24 at para 71.
Official Problem, *supra* para 1 at para 18(a).

(a) The eligbility criteria are not arbitary

[35] *Bedford* dictates arbitrariness exists where there is no rational connection between the purpose of a law and the effect of that law on the life, liberty and security of the person interests. Undertaking this analysis can be unpleasant where a law imposes individual limitations in order to further the public good. However, as Binne and LeBel JJ articulated in *Chaoulli*, "[a] legislative policy is not 'arbitrary' just because we may disagree with it." A law is only arbitrary where it cannot possibly achieve its objective (*Carter*).

> *Bedford*, *supra* para 24 at para 98.
> *Chaoulli*, *supra* para 2 at para 169, Binne and LeBel JJ, dissenting.
> *Carter*, *supra* para 24 at para 83.

[36] The purpose of the eligibility criteria is two-fold: to control the costs of the Fertility Program, and to ensure those accessing the Fertility Program are those who are most likely to benefit from it. Limiting the way in which people can access government-funded IVF is rationally connected to the purpose of controlling costs of the program. Using evidence-based eligibility criteria to limit access to only those who have higher statistical likelihoods of successful conception is rationally connected to ensuring those accessing IVF are most likely to benefit. Thus, the eligibility criteria are not arbitrary because there is a direct connection between the purpose of the eligibility criteria and the effect on the Appellant.

(b) The eligbility criteria are not overbroad

[37] *Heywood* dictates that a law will be overbroad when it captures some conduct that is unrelated to its purpose. Therefore, the means chosen by the government to achieve the purpose must be reasonably necessary. As held by the Supreme Court of Canada in *Carter*, "[t]he question is not whether Parliament has chosen the least restrictive means, but whether the chosen

means infringe life, liberty or security of the person in a way that has no connection with the mischief contemplated by the legislature."

> *R v Heywood*, [1994] 3 SCR 761 at para 51, 120 DLR (4th) 348 [*Heywood*].
> *Carter*, *supra* para 24 at para 85 [emphasis added].

[38] Evidence-based eligibility criteria are the means chosen by the government to structure access to the Fertility Program. Although IVF may be the most effective treatment for the Appellant personally, she is not within the group of people who are statistically most likely to benefit from the treatment. Women 35 years and younger have a 55% chance of successful conception using IVF. Naturally, their rate of conception is 20% per month. At the Appellant's age, the rate of natural pregnancy is 5% per month, and the rate of conception using IVF is 15% per month. A reasonable assessment of these statistics places the Appellant outside the group of persons most likely to benefit from certain forms of government-funded IVF treatment.

> Official Problem, *supra* para 1 at para 16.

[39] Although not all will agree with this decision, this does not mean it is unreasonable. *Withler* demonstrates that in dealing with the allocation of finite resources, in accordance with their institutional competence to do so, government is entitled to draw the lines somewhere. Indeed, "there will always have to be decisions about spending priorities, which are outside the purview of the constitution" (*Allen*). The Appellant's rights are limited only to the extent required by the eligibility criteria, thus they are not overbroad.

> *Allen v Alberta*, 2015 ABCA 277 at para 52 [*Allen*].
> *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 67 [*Withler*].

(c) The eligbility criteria are not grossly disproportionate

[40] When the effect of a deprivation is grossly disproportionate to the purpose of that deprivation, a s. 7 violation will have occurred (*Carter*). As McLachlin CJC held in *Bedford*,

"[t]he rule against gross disproportionality only applies in *extreme cases* where the seriousness of the deprivation is totally out of sync with the objective of the measure." In that case, a law aimed at reducing neighbourhood nuisances was grossly disproportionate as it had the effect of increasing the rates of homicide in sex workers (*Bedford*). A deprivation will not be grossly disproportionate if its effects, when weighed against its purpose, are not extreme (*Long*). This is a high threshold, and some disproportionality is acceptable (*Carter*).

> *Carter*, *supra* para 24 at para 89.
> *Bedford*, *supra* para 24 at para 120 [emphasis added].
> *R v Long*, 2018 ONCA 282 at paras 143-44 [*Long*].

[41] The eligibility criteria limit the Appellant from accessing government-funded IVF treatment as an embryo recipient in order to control the costs of the Fertility Program and to ensure those who are accessing it are most likely to benefit. In creating the eligibility criteria, the government was live to the fact that some people would be excluded from receiving government-funded IVF as embryo recipients. This is evidenced by the availability of the Fertility Program to all residents, regardless of medical necessity. Indeed, the program provides IVF funding for women over 40 with an embryo recipient under 40, as this is most likely to result in successful conception. The effect on the Appellant is not totally out of sync with the purpose of the eligibility criteria, and thus the criteria are not grossly disproportionate.

Issue 2: The eligibility criteria do not violate section 15 of the *Charter*

[42] The eligibility criteria under s. 600P(a) of the PPS create a distinction on the enumerated ground of age, but this distinction does not violate s. 15(1) of the *Charter*. The eligibility criteria are part of a larger benefits scheme that uses limited resources to respond to a variety of forms of social and biological infertility. The eligibility criteria are not arbitrary and affirm the dignity of embryo recipients over 40 by recognizing their actual capacities and needs.

1. The eligibility criteria draw a distinction on the enumerated ground of age

[43] The first step of the s. 15(1) analysis set out in *Taypotat* asks whether "the law, on its face or in its impact, create[s] a distinction on the basis of an enumerated or analogous ground." The Respondent concedes the eligibility criteria under s. 600P(a) of the PPS create a distinction on the enumerated ground of age by restricting access to government-funded IVF to embryo recipients under 40.

> *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 19 [*Taypotat*].
> Official Problem, *supra* para 1 at 2; para 8.

(a) The eligibility criteria do not create a distinction on the enumerated ground of sex

[44] Although only persons with female anatomies will have the biological capacity to act as embryo recipients, the eligibility criteria do not employ sex as a means of restricting access to government-funded IVF. With respect to potential adverse effect distinctions, *Symes* emphasizes that courts must distinguish between "individuals negatively affected by a provision" and a group or subgroup "suffering an adverse effect in law." The eligibility criteria allow women over 40 to access government-funded IVF through the use of a surrogate under 40 and a donor egg (Clarifications). Under these circumstances, men and women using surrogates will be subject to the same out-of-pocket costs. Dr. Wong has testified that women earn less relative to men, but this alone does not allow the Court to infer that as a group, women over 40 will be disproportionately affected by these out-of-pocket costs.

> Clarifications to the Official Problem, Wilson Moot 2019 at para 8 [Clarifications].
> Official Problem, *supra* para 1 at para 16(e).
> *Symes v Canada*, [1993] 4 SCR 695 at 764-765, 110 DLR (4th) 470.

(b) The eligibility criteria do not create a distinction on the basis of family status

[45] The Supreme Court of Canada has not recognized family status as an analogous ground under s. 15. In a recent human rights case, the Federal Court of Appeal has interpreted family

status as meaning "whether or not one is part of a family or has a particular family relationship." Even if this Court were to recognize family status as an analogous ground under s. 15, the eligibility criteria do not use a particular family arrangement as a means of restricting access to government-funded IVF. Instead, they are solely concerned with the age of the embryo recipient at the time services are sought.

Johnstone v Canada (Border Services Agency), 2014 FCA 110 at para 53.

2. The eligibility criteria are not discriminatory under section 15(1)

(a) The eligibility criteria are part of a larger benefits scheme

[46] *Withler* dictates "where the impugned law is part of a larger benefits scheme … the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis." As stated by Mr. Lee, the purpose of the eligibility criteria is to help control the costs of the Fertility Program and to ensure that those accessing the Fertility Program are most likely to benefit from it. In this way, the eligibility criteria contribute to the Fertility Program's broader purpose of increasing affordability and access to assisted reproductive services. The eligibility criteria represent an attempt to provide an ameliorative effect while balancing the multiplicity of interests implicated in the provision of assisted reproductive services to a diverse group of recipients with distinct capacities and needs.

Withler, *supra* para 39 at para 38.
Official Problem, *supra* para 1 at paras 18(c), 18(a).

(b) The eligibility criteria respond to the actual capacities and needs of embryo recipients over 40

[47] The second part of the s. 15(1) analysis set out in *Taypotat* asks whether "the law fail[s] 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." *Quebec v A* emphasizes that while prejudice and stereotyping

are indicia of discrimination, they are not essential elements of a s. 15(1) claim. Rather, the focus is on arbitrary disadvantage (*Quebec v A*).

> *Taypotat*, *supra* para 43 at para 20.
> *Quebec (Attorney General) v A*, 2013 SCC 5 at para 325 [*Quebec v A*].

[48] The eligibility criteria are consistent with the principles of substantive equality set out in *Andrews* because they recognize that the identical treatment of all people experiencing infertility does not advance the purpose of s. 15. This grounding in the promotion of substantive equality is what distinguishes the Appellant's circumstances from those in *Cameron*. Indeed, the s. 15 claim in *Cameron* centered on the denial of any form of coverage for IVF and was grounded in distinctions made between fertile and infertile persons. Conversely, the Fertility Program recognizes the disadvantage experienced by people suffering from social and/or biological infertility and offers a wide range of government-funded assisted reproductive services with minimal restriction. The eligibility criteria recognize that a woman over 40 may have the desire to become a parent and provides a government-funded means of fulfilling this desire that is reflective of her capacities.

> *Andrews v Law Society (British Columbia)*, 1989 1 SCR 143 at 144, 56 DLR (4th) 1 [*Andrews*].
> *Cameron* NSCA, *supra* para 22 at paras 111, 148-149.
> Official Problem, *supra* para 1 at para 15.

(c) The age cut-off created by the eligibility criteria is not arbitrary

[49] The eligibility criteria do not impose arbitrary disadvantage because they respond to the actual capacities and needs of embryo recipients over 40. Dr. Burnett's testimony indicates that IVF success rates drop to approximately 15% per month at 40 and continue to decrease thereafter. By comparison, women 35-40 experience success rates of approximately 30% per month and women under 35 experience success rates of approximately 55% per month.

Official Problem, *supra* para 1 at para 15.

[50] While any specific embryo recipient's experience may vary, these averages provide a practical framework for considering the categories of embryo recipients that may be most likely to benefit from receiving government-funded IVF. Indeed, *Gosselin* held that legislators may make use of "informed general assumptions" provided these assumptions are not borne out of arbitrary or demeaning stereotypes. The eligibility criteria are reflective of evidence demonstrating a connection between IVF success rates and the age of an embryo recipient.

Gosselin, *supra* para 12 at para 56.

[51] *Gosselin* further emphasizes that while all age-based legislative distinctions will demonstrate some degree of arbitrariness in a literal sense, such distinctions will not infringe s. 15 merely because some prefer a different age. The government is not obliged to demonstrate perfect correspondence between a distinction created by a benefits program and the actual needs and circumstances of a claimant. The eligibility criteria are reasonably related to the legislative goal of the Fertility Program because it allocates government-funded IVF to embryo recipients who are more likely to successfully conceive.

Official Problem, *supra* para 1 at paras 12, 18(c).
Gosselin, *supra* para 12 at paras 55, 57.

(d) The eligibility criteria do not undermine the Appellant's dignity or worth

[52] *Kapp* suggests that human dignity should not be conceptualized as a strict legal test and should instead be understood as one of several core values that underlie s. 15. *Law* dictates that human dignity is enhanced by laws that account for the capacities and needs of different groups. Therefore, when determining whether legislation has the effect of demeaning a claimant's dignity, it is necessary to consider the experience of the claimant in context (*Law*).

R v Kapp, 2008 SCC 41 at para 21 [*Kapp*].

Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 at paras 53, 60, 170 DLR (4th) 1 [*Law*].

[53] The Appellant's experience of the eligibility criteria is deeply personal and is influenced by the combined effect of many factors which exist independent of the age cut-off. The eligibility criteria only prevent the Appellant from receiving government-funded IVF to carry a biological child and do not constitute a "complete non-recognition" of embryo recipients over 40 (*Law*). Instead, they recognize the needs of embryo recipients over 40 and balance them with the needs of the other embryo recipients the Fertility Program serves.

Law, *supra* para 52 at para 74.

[54] This balancing provides embryo recipients over 40 with opportunities to become a parent, but as the Appellant's circumstances demonstrate, these opportunities may not be of the variety most desired. This does not mean that the eligibility criteria demean the Appellant's dignity or worth. Analogous to *Gosselin*, *Law* illustrates that legislation premised on "informed statistical generalizations" does not need to fulfill the needs of all members of particular group in order to affirm human dignity.

Law, *supra* para 52 at para 106.

Issue 3: If the answer to questions 1 or 2 is yes, that deprivation is demonstrably justified in a free and democratic society under section 1 of the *Charter*

[55] If the Appellant's rights under s. 7 or s. 15 of the *Charter* have been infringed, the infringement is demonstrably justified in a free and democratic society and is thus saved under s. 1 of the *Charter*. *Oakes* established that an infringement will be justified under s. 1 if it meets four requirements. First, the limit must advance a pressing and substantial objective. Second, the limit must be rationally connected to the objective. Third, the limit must impair the implicated

right as “little as possible”. Finally, “there must be a proportionality between the *effects* of the measures…and the objective.”

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

1. The eligibility criteria are prescribed by law

[56] As a preliminary step in justifying the limitation of a right under s. 1, *Greater Vancouver* dictates that a limitation must be prescribed by law. This means the limitation must not be vague, but precise and reasonably capable of understanding. As the age cut-off created by the eligibility criteria is expressly provided for in s. 600P(a) of the PPS, they are prescribed by law.

Canadian Federation of Students v Greater Vancouver Transportation Authority, 2009 SCC 31 at paras 51, 53 [*Greater Vancouver*].
Official Problem, *supra* para 1 at 2.

2. The eligibility criteria serve a pressing and substantial objective

[57] *RJR-MacDonald* dictates that the objective under scrutiny is that of the infringing distinction created by the eligibility criteria rather than the objective of the Fertility Program as a whole. Mr. Lee testified that the purpose of the age cut-off for government-funded IVF is controlling the costs of the Fertility Program and ensuring that those accessing the Fertility Program are most likely to benefit from it. At their core, the eligibility criteria are about allocating access to government-funded IVF in a manner that successfully serves the greatest number of people. *Cameron* demonstrates that the need to provide the best possible health coverage in the context of limited financial resources is a valid objective.

RJR-MacDonald Inc v Canada (Attorney General), [1995] 3 SCR 199 at para 144, 127 DLR (4th) 1 [*RJR-MacDonald*].
Official Problem, *supra* para 1 at para 18(c).
Cameron NSCA, *supra* para 22 at para 218.

3. There is a rational connection between the limitation imposed by the eligibility criteria and the objective sought through this limitation

[58] *Hutterian Brethren* dictates that the rational connection requirement will be satisfied if the government is able to demonstrate "it is reasonable to suppose that the limit may further the goal." The use of evidence-based eligibility criteria is rationally connected to the objective of controlling the costs of the Fertility Program. The eligibility criteria are also rationally connected to the objective of ensuring that those accessing the Fertility Program are most likely to benefit from it. In the absence of the eligibility criteria, the health care system would see a cost increase of at least an additional $1M per year.

> *Hutterian Brethren of Wilson Colony v Alberta*, 2009 SCC 37 at para 48 [*Hutterian Brethren*].
> Official Problem, *supra* para 1 at para 14(i).

4. The limitation imposed by the eligibility criteria is minimally impairing

[59] *Carter* affirms that the minimal impairment requirement is focused on "whether there are less harmful means of achieving the legislative goal." The eligibility criteria chosen by the government impair the Appellant's rights "as little as possible" (*Irwin Toy*) because they correspond with steady reductions in the effectiveness of IVF treatment among embryo recipients over 40 and do not altogether deny her the opportunity to become a parent.

> *Carter*, *supra* para 24 at para 102, citing *Hutterian Brethren*, *supra* para 58 at para 53.
> *Irwin Toy*, *supra* para 29 at para 79.
> Official Problem, *supra* para 1 at para 15.

[60] *JTI MacDonald* emphasizes considerable deference owed to legislators tasked with developing solutions to complex social problems, especially when the limitations created by these solutions constitute one of several reasonable alternatives. In this regard, *Cameron* illustrates that the existence of other government-funded procedures relevant to the claimant's condition will be indicative of a limit that is minimally impairing. While the eligibility criteria

may impart the hardship of preventing the Appellant from accessing government-funded IVF to conceive and carry a biological child, they do not impose the "undue hardship" of barring her from any form of parenthood.

> *JTI MacDonald Corp c Canada (Procureure générale)*, 2007 SCC 30 at para 43 [*JTI MacDonald*].
> *Cameron* NSCA, *supra* para 22 at paras 244-245.

[61] Although "less intrusive options, reflecting more modest objectives" are available to the government, such as modifying the eligibility criteria, *Irwin Toy* emphasizes that courts should allow a "margin of appreciation" for government decision-making that has a sound evidentiary basis. In particular, *Wynberg* dictates that policy action that mediates competing interests within a vulnerable group will warrant deference. In this case, the government has created and implemented a program that has the flexibility to respond to a variety of forms of infertility with minimal restriction. This is a far-reaching objective that uses evidence-based eligibility criteria to mediate competing ameliorative needs.

> *Irwin Toy*, *supra* para 29 at para 89.
> *Wynberg*, *supra* para 20 at para 185.

5. The effects of this limitation are proportionate

[62] *Hutterian Brethren* dictates that the proportionality analysis focuses on "whether the 'deleterious effects of a measure on individuals or groups' outweigh the public benefit that may be gained from the measure." *M v H* dictates that courts will owe deference to legislators when considering policy decisions legislators are best placed to make.

> *Hutterian Brethren*, *supra* para 58 at para 78.
> *M v H*, [1999] 2 SCR 3 at para 78, 171 DLR (4th) 577 [*M v H*].

[63] It is important to remember that IVF, AI and IUI are government-funded in an effort to respond to a variety of forms of infertility. The Fertility Program increases the affordability and accessibility of assisted reproductive services in part because it does not limit funding to

situations in which such services are medically required. By making assisted reproductive services available to single people and people in same sex relationships, the Fertility Program is able to respond to social infertility as well as biological infertility.

Official Problem, *supra* para 1 at para 18(a).

[64] The government is entitled to make spending decisions and has made an effort to ensure that those accessing the Fertility Program are most likely to benefit. *Cameron* recognizes "responsible decision makers must make trade offs in a constrained health care system" and the eligibility criteria represent one such trade off within a benefits scheme that has expanded government-funded assisted reproductive services to serve a wide range of people. Thus, the trade off necessitated by the eligibility criteria places a reasonable limit on the rights of embryo recipients over 40 and are a proportionate limit of the Appellant's rights.

Official Problem, *supra* para 1 at para 18(f).
Cameron NSCA, *supra* para 22 at para 239.

PART V – ORDERS SOUGHT

[65] The Respondent respectfully submits this dismiss the appeal.

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

_____

Team 10
Counsel for the Respondent

PART VI – LIST OF AUTHORITIES AND STATUTES

JURISPRUDENCE	PARAGRAPHS
Allen v Alberta, 2015 ABCA 277.	39
Andrews v Law Society (British Columbia), 1989 1 SCR 143, 56 DLR (4th) 1.	48
Baier v Alberta, 2007 SCC 31.	14
Bedford v Canada (Attorney General), 2013 SCC 72.	24, 35, 40
Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44.	26, 31, 32
Cameron v Nova Scotia (Attorney General), [1999] NSJ No. 33, 172 NSR (2d) 277.	22
Cameron v Nova Scotia (Attorney General), 1999 NSCA 14.	22, 48, 57, 60, 64
Canadian Doctors for Refugee Care v Canada (Attorney General), 2014 FC 651.	15, 17, 21
Canadian Federation of Students v Greater Vancouver Transportation Authority, 2009 SCC 31.	56
Carter v Canada (Attorney General), 2015 SCC 5.	24-26, 30, 34-35, 37, 40, 59
Chaoulli c Québec (Procureur général), 2005 SCC 35.	2, 18, 23, 35
Flora v Ontario Health Insurance Plan, 2008 ONCA 538.	16, 19
Godbout c Longueuil (Ville), [1997] 3 SCR 844, 152 DLR (4th) 577.	26
Gosselin c Québec (Procureur général), 2002 SCC 84.	29, 59, 61
R v Heywood, [1994] 3 SCR 761, 120 DLR (4th) 348.	37
Hutterian Brethren of Wilson Colony v Alberta, 2009 SCC 37.	58, 59, 61
Irwin Toy Ltd v Quebec (Attorney General), [1989] 1 SCR 927, 58 DLR (4th) 577.	29, 59, 61
Johnstone v Canada (Border Services Agency), 2014 FCA 110.	45
JTI MacDonald Corp c Canada (Procureure générale), 2007 SCC 30.	60
Kahkewistahaw First Nation v Taypotat, 2015 SCC 30.	43, 47
Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497, 170 DLR (4th) 1.	52
R v Long, 2018 ONCA 282.	40
M v H, [1999] 2 SCR 3, 171 DLR (4th) 577.	62
New Brunswick (Minister of Health & Community Services) v G(J), [1999] 3 SCR 46, 177 DLR (4th) 124.	30, 31, 32
PHS Community Services Society v Canada (Attorney General), 2011 SCC 44.	17
Pratten v British Columbia (Attorney General), 2012 BCCA 480.	16
Quebec (Attorney General) v A, 2013 SCC 5.	47
R v Kapp, 2008 SCC 41.	52
R v Morgentaler, [1988] 1 SCR 30, 44 DLR (4th) 385.	27, 30

R v Oakes, [1986] 1 SCR 103, 26 DLR (4th) 200.	55
RJR Macdonald Inc v Canada (Attorney General), [1995] 3 SCR 199, 127 DLR (4th) 1.	57
Symes v Canada, [1993] 4 SCR 695, 110 DLR (4th) 470.	44
Tanudjaja v Canada (Attorney General), 2014 ONCA 852.	16
Withler v Canada (Attorney General), 2011 SCC .	39, 46
Wynberg v Ontario (2006), 269 DLR (4th) 435, 82 OR (3d) 561.	20, 23 61

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.	2, 9, 10, 11, 15

SECONDARY SOURCES	**PARAGRAPHS**
Emmett Macfarlane, "Positive Rights and Section 15 of the Charter: Addressing a Dilemma" (2018) 38(1) NJCL at 147.	15
Laurence David, "A Principled Approach to the Positive/Negative Rights Debate in Canadian Constitutional Adjudication" (2014) 23:1 Const Forum Const at 41.	17

OFFICIAL WILSON MOOT SOURCES	**PARAGRAPHS**
Clarifications to the Official Problem, Wilson Moot 2019	44
Official Problem, Wilson Moot 2019	1, 3-11, 25, 33-34, 38, 43-44, 46, 48-49, 51, 56-59, 63-64.