The 2016 Wilson Moot Problem
Alex Ghorbani v. Attorney General (Ontario)

Alex Ghorbani is a 28-year old trans woman living in Toronto, Ontario. She is currently seeking to undergo sex-reassignment surgery (SRS). Alex has been taking hormone therapy and living her life as a woman for some time; surgery would be the final step in her gender transition.

Many forms of SRS are insured services under the Ontario Provincial Health Insurance Plan (OHIP), if certain pre-conditions are met. The Schedule of Benefits under Regulation 552 of the Ontario *Health Insurance Act*, RSO 1990, c H.6, lists physician services that are insured under OHIP. The Schedule of Benefits provides, in part:

> **Sex-reassignment surgery**
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> Sex-reassignment surgical procedures are an insured service only if they are performed on patients who have completed the Gender Dysphoria Program (GDP) at the Elias Carter Institute for Mental Health Care in Ottawa (the "Carter Institute"). Claims are accepted for payment only for those patients for whom the Carter Institute has recommended that surgery take place. Once recommended by the Carter Institute, the surgery may take place anywhere in Canada and qualify for reimbursement at rates in accordance with the fee schedule set out in this Regulation.
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> For greater certainty, within the foregoing guidelines, reconstruction of genitalia, mastectomy, and mammoplasty are insured benefits. The following procedures are not, under any circumstances, insured benefits: electrolysis, tracheal shave, facial surgery, or voice training.
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> Genital reconstruction surgery is an insured service for persons with congenitally-ambiguous genitalia (i.e. intersex persons). No prior authorization is required.[1]

The above provisions are commonly referred to as the "SRS Conditions."

Although her own treating physician has referred her to a surgeon for SRS, Alex is not enrolled in the GDP at the Carter Institute, which applies its own criteria to decide whether to recommend that a patient undergo SRS. Her surgery will not qualify for OHIP funding without approval from the Carter Institute.

[1] The relevant provisions of the Schedule of Benefits have been modified for the purposes of the Wilson Moot. For the purposes of the moot, mooters should not refer to any other provisions of Appendix D of the current Schedule of Benefits. Mooters should also not make any reference to proposed changes to the Schedule of Benefits regarding SRS announced by the Ontario government in November 2015.

In December 2014, Alex brought an application before the Ontario Superior Court of Justice, seeking declarations that:

a) the SRS Conditions infringe Alex's rights under section 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*");

b) the SRS Conditions infringe Alex's rights under section 7 of the *Charter*;

c) the infringements of section 7 and 15 are not saved by section 1 of the *Charter*; and

d) OHIP is required to fund SRS for Alex.

Alex's application was heard in February 2015 by Justice Meyer Stern, who made the following findings of fact:

1. Alex was born Alexander Ghorbani. She grew up near Orangeville with her parents and older sister Sarah.

2. When Alex was young, she would sometimes dress up in her dresses and ballerina costumes, although her parents always scolded her for this behavior and told her they were not "boy clothes." In high school, she found that she preferred spending time with female friends and felt that she identified with them much more strongly than her male friends. Gradually, she began to feel like she was a girl trapped in a boy's body and started to fantasize about what it would be like to live life as a girl.

3. By the time she was an undergraduate at the University of Southwestern Ontario, Alex felt "instinctively, deeply, that my spirit was female," as she stated in her affidavit on the application. She did not feel like she could confide in anyone about these feelings, including her family. Alex soon grew depressed and withdrawn, and made few friends in university.

4. Throughout her adolescence and young adulthood, Alex has always been attracted to women. While she attempted to date from time to time, she was never able to have a lasting relationship. Among other things, she was very uncomfortable being physically intimate with another person because she felt uncomfortable in her male body.

5. Alex dropped out of the University of Southwestern Ontario without completing her degree, and moved to Toronto, where she held down a series of low-paying jobs. She continued to struggle with her gender identity, her depression worsened, and she began drinking excessively and abusing sleeping pills. She largely fell out of touch with her family.

6. In February 2013, Alex attempted to kill herself by taking a large quantity of pills and falling asleep on the train tracks near Union Station. She was discovered by a railway worker before the trains started running in the morning and hospitalized in the psychiatric ward of Stewart Memorial Hospital for nearly a month.

7. On her discharge from Stewart Memorial Hospital, Alex was referred to the GDP at the Carter Institute. However, she learned that there was a lengthy waiting list for a first appointment and that she would have to travel to Ottawa for all appointments, and she decided against seeking treatment there.

8. Alex was then referred to Dr. Stella Kang, a primary care physician in Toronto who specializes in treatment of transgender patients at the Downtown Rainbow Clinic. After seeing Dr. Kang several times and undergoing counselling at the clinic, Alex realized that she needed to embrace life as a trans woman if she was ever going to be happy.

9. In June 2013, Alex began transitioning to live her life as a woman. She began growing out her hair, wearing makeup, and dressing only in women's clothes. She also began taking feminizing hormone therapy, prescribed by Dr. Kang. The hormones caused her face and body to change shape, her breasts to grow, and her facial and body hair to thin out.

10. Since she began her transition, Alex has come out as transgender to her family. Her father has not been able to accept her transition, but Alex has become closer to her mother and to Sarah, and now speaks to them on a weekly basis. In September 2013, she began a new job as a caseworker with a not-for-profit organization that provides social services for homeless youth in Toronto. Although Alex had few friends prior to her transition due to her depression, she has made some new friends through the trans community and through her job.

11. Since April 2014, Alex has been involved in a relationship with a woman named Annie, to whom Alex is also out. Annie identifies as a lesbian and is attracted exclusively to women.

12. In June 2014, Alex legally changed her name to "Alex Lauren Ghorbani" and her gender to female.

13. By November 2014, Alex felt that she had reached the "point of no return" and became anxious to have SRS as soon as possible. Dr. Kang agreed that SRS would be beneficial for Alex and referred her to Dr. Ken Levac, a well-regarded surgeon in Montreal, for mammoplasty, orchiectomy, and vaginoplasty.

14. Dr. Levac advised Alex that OHIP would not reimburse the cost of SRS unless she had a referral from the Carter Institute. Otherwise, Alex would have to pay $45,000 for the surgeries she was seeking. It was common ground between the parties to the application that Alex does not have the means to fund the surgery herself.

15. In her affidavit filed in support of her application, Alex stated:

> My life has transformed since I began my transition. Before, I felt like I was hiding from everyone all of the time. Now, I am much happier and healthier living my life as a woman, and I feel lucky and grateful that my mother and my sister and others in my life have accepted me for who I am.
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> However, without surgery, I still feel like I am in limbo. I try to be positive, but there are still mornings that I cry when I see my body in the mirror as I am getting dressed. Every time I leave the house, the way people whisper and stare at me when I walk by is a painful reminder that I still do not completely pass as a woman. I feel like I can't use a public restroom or change room, that I can't wear a bathing suit and go swimming or to the beach like every other woman. I feel like I can't be truly intimate with the woman I love. These may be small things for some, but when you can't do them, they become everything. I am still trapped in a body that is not my own.
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> I don't understand why Dr. Kang's recommendation that I undergo SRS isn't good enough. Forcing me to go through the GDP at the Carter Institute feels like a pointless roadblock that is preventing me from completing my transition.

16. The parties agreed on the following facts prior to the hearing:

a. Gender dysphoria (in adults) is defined as "distress caused by a marked difference between an individual's expressed/experienced gender and the sex assigned to the individual at birth, which has continued for at least six months."

b. Depending on the extent of an individual's gender dysphoria, a number of interventions are indicated, including: psychotherapy or counseling to support gender transition, hormone therapy, and/or SRS.

c. "Sex-reassignment surgery" is not exhaustively defined in the SRS Conditions. SRS may involve a number of procedures. For the male-to-female (MtF) transition, surgeries may include mammoplasty (breast augmentation), orchiectomy (removal of the testes), and vaginoplasty (inversion of the penis and creation of a vagina). Some trans women also undergo facial feminization surgery, tracheal shave, or electrolysis, although these procedures are not covered by OHIP under any circumstances.

d. All forms of SRS carry risks of serious medical complications. For breast surgeries, the risks include infection and fibrosis. For genital surgeries, the risks include fistulas, stenosis of the urinary tract, necrosis, and sexual dysfunction.

e. “Intersex” is defined as a variation in sex (including but not limited to gonads or genitals) that do not allow an individual to be distinctly identified as male or female.

17. The International Transgender Health Association (ITHA) has published guidelines for the medical treatment of transgender patients, which include criteria for the indication of SRS.

18. For MtF patients seeking to undergo breast surgery, the ITHA criteria are:

- persistent, well-documented gender dysphoria;
- that the patient has reached the age of majority and is capable of giving informed consent to treatment; and
- that any significant medical or mental health concerns are reasonably well-controlled.

19. Where an MtF patient wishes to undergo genital surgery, the ITHA criteria also include:

- 12 months of continuous hormone therapy as appropriate to the patient’s gender goals (unless hormone therapy is contraindicated for the particular patient); and
- a real life experience (RLE) period, consisting of a period of 12 continuous months of living in a gender role that is congruent with the patient’s gender identity.

20. Per the ITHA guidelines, an RLE involves the patient “living and presenting consistently, at all times and across all settings of life, in their desired gender role, including coming out as transgender to intimate partners, family, friends, and others (e.g. co-workers, teachers).” The purpose of an RLE is to give the patient an opportunity to experience and socially adjust in their new gender role, and to ensure that they are aware of the social, economic, and legal challenges they are likely to face in their new gender role, before undergoing irreversible surgery.

21. The Carter Institute’s GDP is an internationally-renowned gender identity clinic that has received many public accolades. All program physicians specialize full-time in the treatment of transgender persons.

22. The GDP applies the following criteria to approve patients for any type of SRS:

- persistent, well-documented gender dysphoria in a patient who has attained the age of majority and is capable of giving informed consent to the procedure;
- 18 months of continuous hormone therapy as appropriate to the patient's gender goals (unless contraindicated for the particular patient);
- A minimum two-year RLE period, overseen by the Carter Institute (which may be concurrent with hormone therapy); and
- the physician in charge of the patient's care at the GDP must be satisfied that there are no physical, mental health, or psychosocial factors present that would prevent the patient from adjusting socially post-operation.

23. The Attorney General relied on an affidavit from Logan Forrester, the director of the GDP at the Carter Institute. Dr. Forrester's evidence was that:

a. Not all individuals with gender dysphoria require (from a medical perspective) or even desire SRS. For many patients, gender dysphoria can be managed by living in their chosen gender role, hormone treatment, and counselling.

b. The Carter Institute's criteria to recommend SRS are based on the ITHA guidelines, although they vary slightly. The Carter Institute's criteria are determined by a committee of physicians that oversees the GDP and are reviewed from time to time.

c. The committee's unanimous view is that longer periods of hormone therapy and RLE than are recommended by the ITHA are in the best interests of patients seeking SRS. The committee is concerned that with shorter RLEs, patients may experience a "halo effect" that prevents them from assessing whether they truly need and desire SRS to complete their transitions.

d. Of all of the patients who have entered the GDP, 15% ultimately receive a recommendation for SRS. The most common reasons that a recommendation is refused are concerns that instability in the patient's life—due to mental health issues, addiction, criminal involvement, or lack of employment prospects. Sometimes, even patients with "severe" gender dysphoria are refused a recommendation for SRS by the GDP.

e. Where a patient is not recommended from SRS, they may continue to be treated by the Carter Institute or another physician of their choosing. Ongoing treatment generally consists of counselling/psychotherapy and/or hormone therapy (where warranted).

f. SRS is not a "cure" for gender dysphoria. Many patients who have been approved by the Carter Institute and have undergone SRS continue to experience significant psychological distress as a result of gender dysphoria. Most also continue to experience some degree of prejudice as a result of being transgender.

g. Dr. Forrester is of the view that for at least some patients, SRS is medically necessary to treat gender dysphoria. He is aware, however, that there is still some controversy in the medical community as to whether such procedures are more aesthetic than medically necessary. Physicians who are opposed to SRS usually cite the "do no harm" principle, the risk of complications arising from SRS procedures, and the fact that they do not completely resolve the underlying gender dysphoria.

h. Due to the Carter Institute's RLE requirement, a patient must be in the GDP for a minimum of two years before he or she can be recommended for SRS. In practice, patients who are recommended for SRS by the Carter Institute have been in the GDP for an average of 38 months. There are cases where the patient will be in the GDP more than five years before being recommended for SRS, because the program physician is of the view that further treatment is required before the patient is ready for SRS.

i. As of the date of the hearing, there was a 10-month wait for a first appointment with the GDP.

24. On cross-examination on his affidavit, Dr. Forrester testified that he was familiar with Dr. Kang, that he considered her eminently qualified to care for transgender patients, and that he would "definitely" trust her opinion as to whether it was in a particular patient's best interest for them to undergo SRS.

25. Dr. Forrester also acknowledged that counseling would generally be indicated before any surgery is performed on the primary or secondary sexual organs of an intersexed adult. Dr. Forrester agreed that without proper pre- and post-operative treatment and appropriate

psychosocial supports, such surgeries can have severe negative psychological effects when performed on adults.

26. There was no dispute that as of the date of the hearing, Alex would not have qualified for a recommendation for SRS from the Carter Institute, as she had not met all of the GDP criteria. In particular, she had not yet completed the two-year RLE.

27. Dr. Kang swore an affidavit in support of Alex's application. Her evidence was that:

a. Transgender individuals in Canada continue face discrimination in many areas, including education, employment, housing, and the criminal justice system. Over 90% of transgender people report having experienced verbal or physical harassment in the past year. They are 175% more likely to be the victims of sexual violence than cisgender people. Approximately 18% of transgender people experience homelessness in their lifetimes, and they are four times more likely to be living below the poverty line than cisgender people.

b. In particular, many transgender people face considerable difficulties in accessing medical care. Aside from issues of outright discrimination, best practices for treatment of transgender patients are only beginning to be taught in Canadian medical schools. As a result, many physicians consider treating transgender patients to be outside their scope of practice. Based on her experience, Dr. Kang believes that there are a very small number of physicians in Ontario outside of the Carter Institute—fewer than 50—that would consider themselves qualified to make a referral for SRS.

c. Dr. Kang agrees with Dr. Forrester that there is clinical consensus in support of patients participating in a RLE before undergoing SRS. She agrees that all patients should do a minimum 12-month RLE before SRS as recommended in the ITHA guidelines. In Dr. Kang's view, this is all that is required for some patients. In other cases, she would require a longer RLE before she would feel comfortable making a recommendation for SRS.

d. The medical literature demonstrates that very few patients regret having undergone SRS, even patients who have developed post-surgical complications.

e. More than one third of transgender individuals will attempt suicide at some point in their lifetime. At least one study has suggested that transgender patients who are

unable to access timely medical treatment to assist them with transition are "at a higher risk of suicide than any other known population."

f. Dr. Kang's medical opinion is that SRS is indicated and medically necessary for Alex and that it should happen as soon as possible. She believes that Alex's anxiety about not being able to undergo SRS is detrimental to her psychological well-being.

28. On cross-examination, Dr. Kang acknowledged that there was no dispute in the medical community that SRS should not be available "on demand" and that screening is necessary to ensure that it is performed only on patients who will benefit from it. She agreed that there are circumstances where she would not recommend SRS for a patient even where all of the ITHA criteria are met, although she felt that such situations would be relatively rare. Dr. Kang agreed that she would not recommend SRS for a patient who had no meaningful social supports for their transition.

29. The Attorney General offered two explanations for the purpose of the SRS Conditions: 1) to ensure that Plan members are provided only with care that is medically necessary and beneficial; and 2) to control the costs of OHIP.

30. On average, over the five years before the hearing of the application, six individuals per year were approved by the Carter Institute for SRS. The total cost of those surgeries to OHIP was, on average, $125,000 annually. The average total budget of the Ontario Ministry of Health and Long Term Care during that period of time was $45 billion annually.

Justice Stern allowed Alex's application in March 2015, writing in part:

> I find that the SRS Conditions discriminate against Ms. Ghorbani on the basis of her sex. While the government is permitted a degree of latitude in how it administers the province's health insurance plan, it cannot provide insured services in a discriminatory manner. I find that this is the effect of the SRS Conditions and in turn, the criteria applied by the Carter Institute. These criteria are overly stringent when compared to the ITHA standards, to an extent that I cannot find any correspondence between the criteria and the actual needs and circumstances of transgender people seeking SRS. This is compounded by the delays faced by those seeking treatment at the Carter Institute, the only clinic authorized to recommend SRS.
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> I also conclude that the SRS Conditions have deprived Ms. Ghorbani of her security of the person in a manner that is arbitrary and therefore not in accordance with the principles of fundamental justice.

> The government's stated objectives are pressing and substantial. Nonetheless, the infringements I have found cannot be justified under section 1 of the *Charter*. One need only look at the deleterious effects visited upon Ms. Ghorbani to see that they clearly outweigh any minimal protection that may be afforded to those few patients who seek but are truly not appropriate candidates for SRS.

In September 2015, the Ontario Court of Appeal allowed the Attorney General's appeal. Writing for himself and Justice Gloria Jefferson, Justice Paul Gadomski wrote:

> Assuming without deciding that the SRS Conditions draw a distinction on an enumerated or analogous ground, I fail to see how they are discriminatory. The Carter Institute's criteria are based on widely-accepted international standards of care for the treatment of transgender patients. The law does not require that the government adopt the ITHA standards *holus bolus* to avoid a charge of discrimination. I also cannot accede to Ms. Ghorbani's arguments that the SRS Conditions are arbitrary, overbroad, or grossly disproportionate to a state interest, even if I did accept that her security of the person interest is engaged.
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> In light of these conclusions, I need not consider section 1 of the *Charter*. However, I note that the provision of publicly-funded health insurance scheme is a complex policy area that requires the Legislature to balance competing needs, science, and budgetary constraints. The courts should be slow to interfere in that balancing. The surgery for which Ms. Ghorbani seeks public funding is both expensive and potentially risky. The SRS Conditions require only that she be screened for these procedures by qualified professionals. Even if I had found that the SRS Conditions infringe Ms. Ghorbani's *Charter* rights, I would consider such infringement to be both minimally impairing and proportionate.

In dissent, Justice Farida Bacchus largely adopted the reasoning of Justice Stern in the court below.

Alex has been granted leave to appeal the Ontario Court of Appeal's judgment to the High Court of the Dominion of Canada, which has stated the following constitutional questions:

1. Do the SRS Conditions infringe Alex Ghorbani's rights under section 15 of the *Charter*?
2. Do the SRS Conditions infringe Alex Ghorbani's rights under section 7 of the *Charter*?
3. If the answer to either of questions 1 or 2 is "yes," is the infringement demonstrably justified in a free and democratic society under section 1 of the *Charter*?[2]

[2] Note that the High Court of the Dominion of Canada will not consider any facts other than those found by Justice Stern.