

The 2019 Wilson Moot Problem
Irina Kowalski v. Saskatchewan (Attorney General)

Irina Kowalski is a 42 year-old woman living in Regina, Saskatchewan. She is currently single, and seeking to undergo in vitro fertilization in order to become pregnant and have a child.

In the spring of 2016, Saskatchewan's provincial government announced funding for certain fertility treatments for Saskatchewan residents (the "Fertility Program"). In July 2016, the government amended the *Saskatchewan Medical Care Insurance Payment Regulations*, 1994, S-29 Reg 19 ("Regulations") and the "Saskatchewan Health Payment Schedule for Insured Services Provided by a Physician" ("PPS") to include new fertility treatments that would be funded by the government as insured services under the *Saskatchewan Medical Care Insurance Act*, RSS S-29 ("SMCIA").¹ Prior to the amendments, these treatments were not funded through the provincial health care regime.

The SMCIA provides as follows:

Services

14 (1) Subject to sections 15 and 24, services that are medically required services provided in Saskatchewan by a physician are insured services.

(2) Subject to sections 15 and 24, the following services that are prescribed in the regulations and provided in Saskatchewan are insured services:

- (a) services of an optometrist;
- (b) services of a dentist;
- (c) services of a chiropractor;
- (d) other services (whether provided by a physician or not) that are prescribed in the regulations.²

The Regulations, as amended, set out a mechanism for the payment for insured services under the provincial healthcare scheme. Under the Regulations, only those services provided by a physician that are listed in the PPS will be available as insured services under the SMCIA and paid for by the province.

¹ The wording of the Regulations and the PPS have been modified for the purposes of the Wilson Moot.

² Sections 15 and 24 of the SMCIA set out services that are not insured under the Act. Fertility treatments are not listed under either of these sections.

The PPS, as amended, provides for the following fertility services:

Section P – Obstetrics and Gynecology

Fertility

600P In-vitro fertilization (IVF) – the process of manually fertilizing eggs with sperm in a laboratory and then transferring the embryo into the uterus.

- a) Eligibility: resident of Saskatchewan – valid Saskatchewan health card – recipient of embryo must be under the age of 40 (39 years, 364 days) – maximum of 2 cycles – available upon physician recommendation
- b) “cycle” is defined as including evaluation, scheduling of treatment, orientation, cycle monitoring for that month, surgical and anesthetic procedures and fees, lab fees, fertilization and transfer of fresh or frozen embryo

601P Artificial insemination (AI) – transferring sperm into the vagina or cervix.

- a) Eligibility: resident of Saskatchewan – valid Saskatchewan health card – no age restriction
- b) Includes cycle scheduling, monitoring, and procedure

602P Intra-uterine insemination (IUI) – injecting washed concentrated sperm directly into the uterus

- a) Eligibility: resident of Saskatchewan – valid Saskatchewan health card – no age restriction
- b) Includes cycle scheduling and monitoring, procedure, and some lab fees – does not include sample processing fee

For greater certainty, pursuant to s. 14(2)(d) of the SMCIA, services listed at 600P through 602P are available regardless of whether they are medically required.

Regardless of the procedure required, the Fertility Program does not cover the costs of the following items, although some of these may be covered by an individual’s private health care benefits plan (if available):

- any fertility medications required for the treatment;
- genetic testing; and
- storing sperm, eggs and/or embryos.

Although Irina’s fertility specialist has recommended IVF as the best treatment for her to conceive, Irina is not eligible for government funding for her IVF treatment because she is over

40 years old. In December 2016, she brought an application before Saskatchewan Court of Queen's Bench seeking declarations that:

- a) her ineligibility for government funding for IVF treatment infringes her rights under section 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*");
- b) her ineligibility for government funding for IVF treatment infringes her rights under section 7 of the *Charter*;
- c) the infringements of sections 7 and 15 are not saved by section 1 of the *Charter*; and
- d) the Saskatchewan government is required to fund her IVF treatment.

Irina's application was heard before Justice Andrew Cairns in April 2017. Justice Cairns made the following findings of fact on the application:

1. Irina was 41 years old at the time of the hearing of the application. She was born in Warsaw, Poland in April of 1976. She is an only child. Her mother died when she was a young girl. She and her father, Aleksy, immigrated to Canada when she was 15. They settled in Regina, where a family friend of Aleksy's offered him a job as a maintenance worker. All of Irina's extended family members are still in Poland.
2. Irina worked hard to learn English and attained good grades in her last year of high school. After high school, she started working in a restaurant to save money for more schooling.
3. In 2000, Irina started studying esthetics at a private vocational school in Regina. Shortly after graduating, she got a job in a small salon and spa downtown. She enjoyed the work and developed a small following of loyal clients.
4. As a young adult, Irina dated but did not meet anyone she wanted to be in a relationship with for the long term. In 2008, Irina began a serious relationship with a man named James. Irina and James discussed having children and even attempted to conceive for a time, but the relationship ended in 2011.
5. When she was 25 years old, Irina was diagnosed with endometriosis, an often painful condition in which tissue similar to that which normally lines the inside of the uterus — the endometrium — grows outside the uterus. In many cases, endometriosis leads to fertility issues.

6. In 2012, Aleksy suffered a stroke, which resulted in severe and lasting disabilities. Irina moved back in with her father to care for him while also working full time. By 2015, Irina had saved enough to move Aleksy into a nursing home in Regina, where he lived until he passed away in 2016.

7. Irina makes approximately \$35,000 a year (including tips) from her job at the salon. After taxes, she takes home about \$28,000 a year. She has no medical benefits through her job. She currently pays \$1000 a month for her two bedroom apartment in Regina.

8. In the summer of 2016, at the age of 40, Irina visited a fertility clinic to determine how she could conceive a child as a single person. She decided to proceed by way of donated sperm from an anonymous donor. She visited a fertility clinic and underwent various fertility tests.

9. In light of her endometriosis diagnosis and age, Irina's doctor, Christie Burnett, recommended IVF as the best course of fertility treatment. It was Dr. Burnett's opinion that IVF posed the best chance of success. Irina was told that she could also try AI or IUI but that those procedures had lower success rates overall for older women, and her chances of conception would be lowered even further because of her endometriosis.

10. However, Dr. Burnett explained to her that because she was 40 years old, provincial health insurance would not cover the cost of IVF. Dr. Burnett told Irina that IVF would cost her approximately \$15,000 for one cycle (plus the cost of medications), and that she might require multiple cycles in order to conceive.

11. As she could not afford this treatment, Irina elected to undergo IUI (which is funded under the Fertility Program without any age restriction). Irina underwent two rounds of IUI. She used all of her savings to fund the out-of-pocket costs not covered by the Fertility Program (i.e. fees associated with obtaining donor sperm and medications), which were approximately \$1,500 total for both rounds. Unfortunately, these treatments were unsuccessful.

12. After the unsuccessful IUI treatments, Dr. Burnett advised Irina that if she wanted to conceive, IVF was likely her only option.

13. In her affidavit in support of her application, Irina stated, in part:

Having and carrying a child of my own is really important to me. It is something that I have always wanted but the circumstances haven't allowed. A long-term

partner and I separated unexpectedly when I was 35 years old. In the ensuing years I was consumed with caring for my ailing father. However, throughout this time, my desire never waned. Now that my father's gone, I realize more than ever this is what I want. My father worked all of his life to make a living for our family in Canada and wanted nothing more than to see our family grow and thrive here. Continuing his legacy is important to me, and one reason that I do not see adoption as an option. At any rate, I understand that adoption would be as much, or even more expensive, than IVF.

Without government funding I cannot afford IVF, which is really my last chance to realize my dream of having a biological child. I could likely save or borrow the money to pay for the medications, but the procedure itself is simply too expensive.

The fact that a single woman who is only a few years younger than me can have a chance at conceiving and carrying her own child really hurts. I know another single woman from the clinic who is over 40 and had a successful IVF procedure. She had enough money to pay for it herself. I also know a gay male couple from the clinic who are both over 40 and received funding because their surrogate, who was a friend of theirs, was under 40.

I can't imagine my life without a child. I've found this whole fertility process to be extremely stressful and upsetting and I am seeing a counsellor who is providing free services through the fertility clinic. I have been depressed and withdrawn since I learned that IVF is unavailable to me. I feel like there is still a stigma associated with being a single, unmarried woman in my 40s without children. I am not seen as a productive valuable member of society like younger people or people with kids. There remain stereotypes about the older woman without children being a "cat lady" or "spinster". I feel people looking at me this way when I am out and it makes me feel awful. I stay at home now more than ever.

14. An affidavit from Dr. Burnett was admitted into evidence. Dr. Burnett is an obstetrician/gynaecologist with a specialization in fertility. Her evidence included that:
 - a. Roughly 16% (or 1 in 6) couples in Canada experience infertility. This number has doubled since the 1980s.
 - b. For single patients or couples using donor sperm or a surrogate to conceive, the three main fertility treatments available are AI, IUI, and IVF, with AI being the least invasive and least expensive and IVF being the most invasive and the most expensive.
 - c. AI is a procedure whereby a physician inserts sperms into the vagina or cervix at the time of ovulation via a catheter.
 - d. IUI involves placing sperm directly inside the uterus to facilitate fertilization. The goal of IUI is to increase the number of sperm that reach the fallopian tubes and

subsequently increase the chance of fertilization. In advance of the procedure, medications may be used to stimulate ovulation and time the transfer of sperm accordingly.

e. IVF is a multiple-stage process. First, medication is used to stimulate ovulation. The patient's eggs are then collected, sorted, and prepared for fertilization. Fertilization is performed in a laboratory. After the fertilized embryos have developed for several days in the laboratory, they are transferred into the uterus using a catheter.

f. The younger the patient, the more flexibility there is in considering and escalating fertility procedures before resorting to IVF.

g. In Saskatchewan, a non-medicated cycle of AI costs approximately \$300.

h. IUI costs approximately \$1,225 per cycle, with approximately \$725 of that amount being covered by the province under the Fertility Program and \$500 (which is referred to as a sample processing fee) being paid for directly by the patient. The cost of oral medications used in IUI procedures are fairly modest compared to medications required for IVF, and on average are \$200 per cycle.

i. IVF costs approximately \$15,000 per cycle, not including the cost of the required medications (which can be as high as \$5,000 per cycle). Under the Fertility Program, the medications must be paid for by the patient directly or by their private insurance plan.

j. AI is recommended for individuals without any known fertility issues who need assistance in conceiving, such as a single or partnered woman who chooses to use donor sperm during her reproductive cycle.

k. IUI is recommended as a first step for those who have unexplained infertility or male factor infertility (such as low sperm counts or poor sperm movement).

l. AI and IUI are popular fertility treatment options due to their relatively lower cost, fewer side effects and fewer health risks than more invasive treatments like IVF. AI and IUI are less invasive because critical steps necessary for conception still happen inside the uterus and without any medical assistance. However, IUI can often involve the use of medications to assist with the stimulation and timing of ovulation.

m. IVF is recommended for individuals who have been unable to conceive after at least one year of trying, who have undergone previous treatments such as AI or IUI without success, or who have one or more of the following fertility issues:

- i. Blocked fallopian tubes or pelvic adhesions with distorted pelvic anatomy;
- ii. Severe male factor infertility (low sperm count or poor sperm movement);
- iii. Failed 2-4 cycles of ovarian stimulation with IUI;
- iv. Advanced female age (i.e. over 37 years old);
- v. Reduced ovarian reserve, which means having a low egg supply; or
- vi. Endometriosis.

n. Recent medical literature provides that approximately 40% of patients with endometriosis are likely to experience some degree of infertility. Endometriosis can result in the formation of scar tissue and adhesions throughout the pelvis and can interfere with the mechanics of fertilization and implantation. Persons with endometriosis are also at greater risk for ectopic pregnancies, which occur when a fertilized egg gets caught in a fallopian tube and does not implant in the uterus and can be life-threatening.

o. Patients with endometriosis may particularly benefit from IVF. By removing eggs from the ovaries prior to ovulation, fertilizing them outside of the body, and then transferring the resulting embryo to the uterus, 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.

p. A 2015 study by Brigham & Women's Hospital showed that success rates for conceiving using the various fertility treatments were:

- i. 10-15% chance per month of getting pregnant per treatment of AI in cases where patients have no known fertility issues and are under 35;
- ii. 8%-12% chance per month of getting pregnant per treatment of IUI, with the use of oral fertility medication, for patients under 35; and
- iii. 55% chance of getting pregnant after one cycle of IVF treatment for patients under 35.

q. The Brigham & Women's study compared the rates of natural pregnancy in women aged 20 to 50 with the rates in women undergoing fertility treatments. The research found that women under 30 have about a 25% chance of getting pregnant naturally each cycle, with that chance dropping to 20% for women over 30. By 40, the chance of getting pregnant naturally is approximately 5% each month.

r. While the success rates of all fertility treatments decline with age, the figures in the Brigham & Women's study were based on statistical averages and do not in any way determine the potential outcome for any particular woman who may be over the age of 40, and in particular, women between 40 and 43.

s. Reproductive technology is a very rapidly expanding field and changes in reproductive technologies are happening with such speed that as each year goes by, some information contained in even recent research is already out of date.

15. On cross-examination, Dr. Burnett conceded that while success rates of IVF are approximately 55% for women under 35, success rates drop to approximately 30% for women aged 35-40, and approximately 15% per month for women between 40 and 43, and are even lower after age 43. Dr. Burnett also acknowledged that AI and IUI success rates drop to approximately 2% to 5% per month for women over 40 years old.

16. An expert affidavit from Dr. Kevin Wong, a sociologist specializing in gender studies, was admitted into evidence. Dr. Wong's evidence was that:

a. The decision whether to have a child, and how and when to go about attempting to conceive, is a very personal decision unique to each individual and family.

b. Many women feel social pressure to have children or feel judgment from well-meaning friends, family members, or even strangers when they cannot conceive "naturally". Some report feelings of inadequacy, emptiness, or failure that interfere with both their quality of life and the quality of their relationships if they cannot have children.

c. A study published in the *Journal of Social Issues* found that single women over 35 who do not have children often experience social stigma and invasive questioning from family members and friends about their age and single childless status.

d. A 2015 study conducted by researchers at the University of British Columbia found that the emotional stresses women with infertility face are similar to those coping

with illnesses such as cancer, HIV, and chronic pain. Those experiencing fertility challenges are also more likely to experience depression and severe anxiety as compared to other women of similar age and socio-economic status.

e. Caucasian Canadian women earned 87 cents an hour for every dollar made by Caucasian Canadian men in 2015. A report released in 2017 by Social Watch, an NGO dedicated to poverty eradication and gender justice, indicates that at current growth rates, it would take Caucasian Canadian women another 70 years to see their wages catch up to those of men. The wage gap disproportionately affects racialized Canadians, with racialized and Indigenous women faring worst of all.

f. As of 2010, more than 60% of women did not have private workplace pensions, and their earnings from the CPP were generally much lower than those of men.

g. Being married, or having children, can lower an individual's tax rate and may render them eligible to receive additional tax benefits not available to those who are single or who do not have children. In addition, as of 2014 single parents in Saskatchewan were eligible for a tax credit of over \$5000 per child under 18 years of age.

h. The concepts of the nuclear family and "middle class families" have traditionally been elevated by political parties and governments across parties, both in campaigns and policies, over those of single people and families without children.

17. The Attorney General relied on an affidavit admitted into evidence from Dr. Bonnie Kim, an obstetrician and gynaecologist with a specialization in fertility issues. Dr. Kim's evidence was, in part, that in addition to increased difficulties of women over 40 successfully conceiving, women over 40 who do successfully conceive (either through IVF, other fertility treatment, or naturally) experience significantly higher rates of high risk pregnancy, serious complications, and stillbirths.

18. The Honourable Jim Lee, Deputy Minister of Health, filed an affidavit on behalf of the Attorney General. Mr. Lee provided evidence that:

a. The 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. By not limiting the

funding to situations where the procedures are medically required, the government intended to increase access to fertility treatments for individuals who may be single or in same sex relationships.

b. When IVF is not funded, the costs of numerous cycles can be so prohibitive that women often seek to transfer multiple embryos at a time in order to increase their chances of conceiving. By implementing a single embryo transfer policy, the Fertility Program reduces the chance of multiple births (twins, triplets, etc.) born through IVF, making the treatment safer for mothers and their children.

c. The purpose of the age requirement for access to government funded IVF treatment, in particular, is: 1) to help control the costs of the program, and; 2) to ensure those accessing it are most likely to benefit.

d. The estimated cost to the health care system without the age cut-off for IVF was at least an additional \$1M a year.

e. As a result of the Program, the government expects to see a reduction in the rate of multiple births arising from IVF procedures as a result of the single embryo transfer policy. It is estimated that this policy will save Saskatchewan taxpayers up to \$22.75 million in associated health costs related to the complications associated with multiple births over the next ten years.

f. In the first several months of the Fertility Program, approximately 400 people received funding for IVF or other fertility treatments under the program. The total cost of the Fertility Program to the province is expected to be, on average, \$4.0 million annually. The Saskatchewan Ministry of Health's budget for 2016 was \$5.36 billion.

19. On cross examination on his affidavit, Mr. Lee conceded that the requirement that the recipient of the embryo transfer be under 40 creates a situation where, for example, a male couple of any age can access government funded IVF treatment through the use of a surrogate who is under 40.

20. Mr. Lee also acknowledged that women who have undergone an egg retrieval and have frozen embryos prior to age 40 are not eligible for IVF funding to implant those frozen embryos after they become 40 years old.

Justice Cairns allowed the application in September 2017, holding in part:

I find that the Fertility Program's restriction of funding for IVF to women under 40 is discriminatory on the ground of age, and the interrelated grounds of sex and family status. While the government has no obligation to provide funding for certain health care services, once funding is provided the government cannot administer it in a discriminatory manner and instead must do so in furtherance of substantive equality. The presumption that most, or even the vast majority of women over 40 would not benefit from funding for this treatment when it has been recommended by their doctor is unconvincing on the evidence before me, and perpetuates stereotypes and historical disadvantages experienced by older women without children. I reject the government's argument that the program can be saved under subsection 15(2) of the *Charter*.

I also conclude that the eligibility criteria have deprived Ms. Kowalski of her liberty and security of the person in a manner that is arbitrary and therefore not in accordance with the principles of fundamental justice. The provincial government has not demonstrated that women over 40 cannot benefit from IVF. To the contrary, evidence shows that as a woman ages, IVF may become her only chance to conceive.

I am prepared to agree that the government's stated purposes are pressing and substantial. Nevertheless, the infringements I have found cannot be justified under section 1 of the *Charter* because they are not rationally connected to the government's objectives. Based on the evidence before me, it is unreasonable to assume that the age requirement will fulfill the goal of ensuring treatment will be provided to those who will benefit most.

In March 2018, the Saskatchewan Court of Appeal allowed the Attorney General's appeal. Writing for herself and Justice Rizwan Patel, Justice Ashley Cope wrote:

While I agree with the Court below that the Fertility Program creates a distinction on the ground of age, I cannot accept that such a distinction amounts to discrimination in the circumstances. The applicant has failed to demonstrate that the Program perpetuates historical disadvantage and stigmatisation on the basis of age, or any interrelated grounds. Moreover, the evidence indicates that the purpose of the challenged distinction, far from being stereotypical or arbitrary, more or less corresponds to the actual needs and circumstances of women over 40 who are seeking fertility treatment. Even if I am wrong, I would find that the program is the type contemplated by subsection 15(2) of the *Charter*.

I also find that there is no infringement of section 7 of the *Charter* in the circumstances. The applicant's disappointment that her IVF treatment will not be paid for by the government is not sufficient to engage her section 7 interests.

In light of the above findings, there is no need for me to consider the arguments on section 1 of the *Charter*. However, I will note that the government is entitled to significant deference in respect of complex policy decisions such as who may benefit from health care funding.

In dissent, Justice Joseph Goldstein largely adopted the reasoning of Justice Cairns in the court below.

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

1. Do the eligibility criteria for funding under the Fertility Program infringe Irina Kowalski's rights under section 15 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*?
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*?³

The High Court has not asked the parties to make submissions on the issue of remedy. In the Court of Queen's Bench, the Attorney General agreed that if the application were allowed, the government would fund Irina's IVF treatment regardless of the eligibility criteria.

³ Note that the High Court of the Dominion of Canada will not consider any legislative or adjudicative facts other than those found by Justice Cairns.