IN THE HIGH COURT OF THE DOMINION OF CANADA

(ON APPEAL FROM THE ONTARIO COURT OF APPEAL)

B E T W E E N

ALEX LAUREN GHORBANI

Appellant

-AND-

ONTARIO (ATTORNEY GENERAL)

Respondent

FACTUM OF THE RESPONDENT

Counsel for the Respondent

Team 3

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PART I – OVERVIEW

[1] Sexual reassignment surgery (SRS) is a risky, invasive, and irreversible procedure. Despite this, the Government has decided to fund SRS because of its importance to the health of transgender persons. The SRS Conditions attempt to balance the benefits and risks of SRS by ensuring that the Ontario Health Insurance Plan (OHIP) provides the surgery only when it is reasonably certain that SRS is medically necessary and beneficial. The Government has entrusted this determination to the Elias Carter Institute for Mental Health Care's (Carter Institute) Gender Dysphoria Program (GDP), an internationally renowned gender identity clinic that unanimously recommended the Criteria underlying this dispute. Deference should be given to this policy decision.

> Ontario, Ministry of Health and Long-Term Care, *Schedule of Benefits – Physician Services under the* Health Insurance Act (*October 1, 2005*), (Toronto: Ministry of Health and Long-Term Care, 2015) at Appendix D 6 [SRS Conditions].
> Official Problem Wilson Moot 2016 at paras 21, 29 [Official Problem].

[2] The SRS Conditions do not infringe either s. 15 or s. 7 of the *Charter* because they do not discriminate against or cause harm to transgender persons. Rather, the SRS Conditions are an ameliorative program; it is their inclusion in the Schedule of Benefits that makes SRS a publicly insured service in Ontario. The SRS Conditions promote the health of transgender persons by providing funding for SRS in a responsible manner. They are designed to protect vulnerable persons from irreversible harm while ensuring that scarce health care resources are distributed in a cost-effective manner.

> Ontario, Ministry of Health and Long-Term Care, *Schedule of Benefits – Physician Services under the* Health Insurance Act (*October 1, 2005*), (Toronto: Ministry of Health and Long-Term Care, 2015) at General Preamble 6 [Schedule of Benefits].
> *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, s 7, s 15 [*Charter*].

PART II – STATEMENT OF FACTS

1. Factual background

[3] SRS is a drastic, irreversible, and invasive response to a psychological condition. The surgery carries a significant risk of medical complications. Further, SRS is not a cure for gender dysphoria. In some cases, a patient's well-being could be significantly diminished by undergoing SRS. This risk is compounded by the fact that individuals with gender dysphoria are disproportionately likely to experience significant levels of depression, social instability, and prejudice, which could prevent patients from adjusting post-surgery. This distinctive nexus of factors demands unique vigilance before recommending an inherently dangerous procedure.

Official Problem, *supra* para 1 at paras 16, 23, 27.

[4] Given these risks, the Government created a framework to provide funding for SRS in a responsible manner. The Government has tasked the internationally renowned gender identity clinic at the Carter Institute with the oversight of these treatment and screening procedures. According to the SRS Conditions, SRS procedures are an insured service only if they are performed on patients who have completed the GDP at the Carter Institute. With a recommendation from the Carter Institute, the surgery may take place anywhere in Canada and qualify for reimbursement in accordance with the Schedule of Benefits.

Official Problem, *supra* para 1 at para 21.
SRS Conditions, *supra* para 1.

[5] There is a consensus in the medical community that SRS should not be available "on demand." Some doctors believe that the risks associated with SRS are so great that it should never be administered. Screening is necessary to ensure that SRS is performed only on patients for whom it is medically necessary and beneficial. The Carter Institute reviewed the assessment guidelines of the International Transgender Health Association (ITHA) and determined they

were insufficient to assure the best interests of patients. The ITHA criteria require that patients seeking SRS have persistent and well-documented gender dysphoria, 12 months of continuous hormone therapy as appropriate to the patient's gender goals, and a real life experience (RLE) period consisting of 12 continuous months of living in a gender role that is congruent with the patient's gender identity.

Official Problem, *supra* para 1 at paras 19, 23, 28, 29.

[6] The eminently qualified physicians at the Carter Institute unanimously agree that the ITHA criteria are inadequate in two respects. First, longer periods of hormone therapy and RLE are in the best interests of patients seeking SRS. With shorter RLE periods, patients are more likely to experience a "halo effect" that biases their assessment of whether a complex and irreversible surgery is necessary for their transition.

Official Problem, *supra* para 1 at para 23.

[7] Second, the ITHA criteria do not explicitly account for the psychosocial factors that would prevent the patient from adjusting post-operation. Dr. Kang, the Appellant's physician, agrees that the ITHA criteria are deficient in this regard. She states that she would not recommended SRS for a patient who had no meaningful social supports for their transition. Given that transgender individuals continue to face significant discrimination in Canada, even after undergoing SRS, there is good reason to consider the social supports available to patients to ensure that SRS enhances rather than diminishes their well-being.

Official Problem, *supra* para 1 at paras 18-19, 22, 28.

[8] The Government acknowledges that transgender patients who are unable to access timely medical treatment are at an increased risk of suicide. In response to this concern, the Government provides counseling and psychotherapy and oversees the provision of hormone therapy to

individuals with gender dysphoria. These services do not require prior authorization. For some patients with gender dysphoria, these services are the best course of treatment. The Appellant herself has experienced significant improvements in her health and quality of life as a result of accessing counseling and hormone therapy. Moreover, patients who are not recommended for SRS may continue to be treated under OHIP by the Carter Institute or another physician of their choosing.

Official Problem, *supra* para 1 at paras 23, 27.

2. Procedural history

[9] In March 2015, Justice Stern allowed the Appellant's application and found that the SRS Conditions violated ss. 15 and 7 of the *Charter*. Justice Stern recognized that the Government's stated objectives are pressing and substantial, but found that the infringements could not be justified under s. 1 of the *Charter*.

Official Problem, *supra* para 1 at para 30.

[10] The Ontario Court of Appeal overturned Justice Stern's decision. The Court did not decide whether the SRS conditions draw a distinction on an enumerated or analogous ground but found that even if they do, that distinction is not discriminatory. In Justice Gadomski's words, "the law does not require that the Government adopt the ITHA standards *holus bolus* to avoid a charge of discrimination." The Court further found that any possible deprivation of security of the person by the SRS Conditions is not arbitrary, overbroad, or grossly disproportionate to a state interest. While a s. 1 analysis was not required, Justice Gadomski found that the Court should be loathe to intervene in complex regulatory schemes that require the balancing of interests, science, and budgetary constraints.

Official Problem, *supra* para 1 at para 30.

PART III – STATEMENT OF POINTS IN ISSUE

[11] The present appeal raises the following constitutional questions:

1. **Do the SRS Conditions infringe the Appellant's rights under s. 15 of the *Charter*?**

   The SRS Conditions do not create a distinction on an enumerated or analogous ground. Were a distinction to be found it, would not be discriminatory because the SRS Conditions are part of an ameliorative program under s. 15(2). In the alternative, the distinction is not discriminatory under s. 15(1).

2. **Do the SRS Conditions infringe the Appellant's rights under s. 7 of the *Charter*?**

   The SRS Conditions do not deprive the Appellant of her right to life, liberty, or security of the person. Any deprivation is in accordance with the principles of fundamental justice.

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 s. 1 of the *Charter*?**

   Any infringements are justified in a free and democratic society. The means adopted are rationally connected to the objectives of the SRS Conditions, the SRS Conditions are minimally impairing of the rights in question, and the salutary effects of the SRS Conditions outweigh their deleterious effects.

PART IV – ARGUMENT

Issue 1: The SRS Conditions do not infringe the Appellant's rights under s. 15 of the *Charter*

[12] The SRS Conditions do not violate s. 15(1) of the *Charter* because any distinction made is not on the basis of an enumerated or analogous ground. In the alternative, any distinction based on an enumerated or analogous ground is part of an ameliorative program under s. 15(2) and accordingly not subject to s. 15(1) scrutiny. The SRS Conditions are part of a genuinely ameliorative program targeted at providing necessary and beneficial medical care to a group that has historically faced significant barriers in accessing medical care. Any distinctions found are not discriminatory under s. 15(1).

1. The SRS Conditions do not draw a distinction on the basis of an enumerated or analogous ground

[13] The first step of the s. 15(1) analysis is to determine whether "the impugned law makes a distinction that denies equal benefit or imposes an unequal burden" (*Corbiere*). The purpose is to identify "a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality." This stage of the analysis ensures that "courts address only those distinctions that were intended to be prohibited by the *Charter*" (*Withler*).

> *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at paras 4, 8, 173 DLR (4th) 1 [*Corbiere*].
> *Withler v Canada (AG)*, 2011 SCC 12 at para 33, [2011] 1 SCR 39 [*Withler*].

[14] Following *Auton*, the appropriate question to ask in the medical context is not merely whether different medical conditions receive different medical treatment, but whether the claimant is "[singled] out for less advantageous treatment on the basis of an enumerated or analogous ground" as compared with other similar groups. The fact that different medical conditions require different medical treatment does not, on its own, deny equal benefit or impose

unequal burdens. In *Auton* the Court found there was insufficient evidence that the funding of behavioural therapy for autistic children was treated differently than funding for other similar therapies. No distinction was found.

> *Auton (Guardian Ad Litem of) v British Columbia (AG)*, 2004 SCC 78 at paras 57, 62, [2004] 3 SCR 657 [*Auton*].

[15] There is no evidence suggesting that the Government's approach to SRS is different than its approach to other comparable procedures for other medical conditions. While it is true that intersex individuals may undergo genital reconstructive surgery (GRS) without prior authorization, the procedure is fundamentally different in kind. GRS is performed in response to an anatomical abnormality and is not equivalent to SRS. SRS is an invasive surgical procedure performed because of a psychological condition.

> *Auton*, *supra* para 14 at para 62.
> SRS Conditions, *supra* para 1.
> Official Problem, *supra* para 1 at para 16.

[16] Moreover, there are other similar procedures that require extensive screening before funding will be provided. Bariatric surgeries are only funded with approval from a multidisciplinary team at a Bariatric Regional Assessment and Treatment Centre. Patients must have persistent morbid obesity for at least two years, must have attempted weight loss in the past without successful long-term weight reduction, and must have at least one among a list of severe co-morbidities.

> Ontario, Ministry of Health and Long-Term Care, *Schedule of Benefits — Physician Services under the* Health Insurance Act *(October 1, 2005)*, (Toronto: Ministry of Health and Long-Term Care, 2015) at Surgical Preamble 6.

[17] A distinction is not made out on the basis of one's transgender status just because transgender individuals have differential access to SRS. Direction can be taken from the Court's decision in *Morgentaler*. While dissenting on the issue of s. 7, Justice McIntyre was the only

justice to address s. 15. He affirmed the reasoning of the Ontario Court of Appeal on the equality question. The Ontario Court of Appeal found that there was no equality infringement even though "not all persons affected by [the law] may find it feasible because of geographical or economic considerations" to take advantage of the benefit offered.

R v Morgentaler, [1988] 1 SCR 30 at 156, 44 DLR (4th) 385 McIntyre J dissenting [*Morgentaler*].
R v Morgentaler, Smoling and Scott (1985), 52 OR (2d) 353 at para 110, 22 DLR (4^{th}) 641 [*Morgentaler* ONCA].

[18] Courts have declined to identify place of residence and economic status as analogous grounds (*Corbiere, Gosselin*). In their approach to s. 15 courts have not "provided an interpretation that protects economic rights" (Essert). In *Ponteix*, the Court found that a "physical and economic impossibility" would result from recognizing an entitlement to the same standard of medical care regardless of where one chooses to reside. The particular barriers identified by the Appellant in this case for access to SRS screening relate to her place of residence and financial situation, not to her identity as a transgender woman. Recognizing a distinction on this basis would do indirectly what Canadian courts have consistently refused to do directly.

Corbiere, supra para 13 at para 15.
Gosselin v Quebec (Attorney General), 2002 SCC 84, [2002] 4 SCR 429 [*Gosselin*].
Christopher Essert, "Dignity and Membersship, Equality and Egalitarianism: Economic Rights and Section 15" (2006) 19 Can J L & Jurisprudence 407 at 409.
Ponteix (Town) v Saskatchewan, 1994 CarswellSask 258 at para 42, [1995] 1 WWR 400 [*Ponteix*].
Official Problem, *supra* para 1 at paras 7, 14.

2. The SRS Conditions are part of an ameliorative program under s. 15(2)

[19] Even if the Court were to find a distinction, that distinction would not give rise to an infringement of s. 15 because the law has an ameliorative purpose. The SRS Conditions are not discriminatory under s. 15(2) because they satisfy the two-part test enunciated in *Kapp*. The

provision is a genuinely ameliorative program directed at improving the situation of a group that is in need of ameliorative assistance in order to enhance substantive equality. The distinctions drawn by the provision "serve and are necessary to" the ameliorative purpose.

R v Kapp, 2008 SCC 41 at para 41, [2008] 2 SCR 483 [*Kapp*].

a) The SRS Conditions are genuinely ameliorative for individuals with gender dysphoria

[20] The SRS Conditions are genuinely ameliorative because they are directed at improving the situation of individuals with gender dysphoria. The purpose of the SRS Conditions is to provide SRS to a historically disadvantaged group. Transgender individuals have experienced difficulty accessing medical care, and there are still doctors who believe that SRS is a merely an aesthetic choice. By offering funding for SRS, the Government affirms the real impact of gender dysphoria on a transgender individual's health and recognizes that SRS can be medically necessary.

Official Problem, *supra* para 1 at paras 23, 27.

[21] Due to the irreversible, invasive, and dangerous nature of SRS, it is important that it be provided in a responsible manner that is sensitive to the particular difficulties and disadvantages faced by transgender individuals. The SRS Conditions ensure that transgender individuals are in a position to cope with and adjust to their new gender role, and that patients are aware of the significant social, economic, and legal risks associated with this surgery. Many patients who have undergone SRS continue to experience psychological distress as a result of their gender dysphoria. Most continue to experience considerable prejudice as a result of being transgender.

Official Problem, *supra* para 1 at paras 20, 23.

[22] Ameliorative purposes are genuine if there is "a real nexus between the object of the program as declared by the government and its form and implementation" (*Apsit*). The means

chosen to achieve the program's object must be rationally connected to the ameliorative purpose (*Kapp*). The Government has chosen two principal means: the criteria employed by the Carter Institute for the screening of transgender patients, and the selection of the Carter Institute as the body responsible for screening transgender patients for SRS. Both are "rationally related to the ameliorative purpose" of providing funding for SRS in a responsible manner.

Apsit v Manitoba (Human Rights Commission) (1987), 50 Man R (2d) 92 at para 54, 7 ACWS (3d) 179 (MBQB) [*Apsit*].
Kapp, *supra* para 19 at para 49.
Official Problem, *supra* para 1 at paras 21, 22.

b) The Carter Criteria are rationally connected to the ameliorative purpose

[23] Because SRS is not always medically necessary, it is undisputed that screening is required to ensure that SRS is only performed on transgender patients who will benefit from it. The Government turned to the Carter Institute, preeminent experts in the field of transgender patient care, to design the criteria to be used in this screening process.

Official Problem, *supra* para 1 at paras 21, 23, 27, 28.

[24] The Carter Criteria require patients to have experienced a minimum period of RLE and hormone therapy to ensure that those seeking SRS have the opportunity to adjust to a new gender role. These requirements were designed in response to the particular psychosocial factors that can complicate this medical decision. Many transgender individuals experience a "halo effect" that prevents them from assessing whether they truly need and desire SRS to complete their transitions. The Government has a unique responsibility not to harm individuals through the provision of its services.

Official Problem, *supra* para 1 at para 23.

c) The selection of the Carter Institute as the screening body is rationally connected to the ameliorative purpose

[25] The selection of the Carter Institute as the appropriate institution to oversee SRS is a rational means of achieving the Government's ameliorative purpose for two reasons.

[26] First, there is a concentration of expertise and specialization that ensures quality care. The specialization and expertise in the treatment of transgender patients is unique to the Carter Institute in Ontario. Dr. Kang estimates that outside the Carter Institute fewer than 50 physicians in Ontario would consider themselves qualified to make a referral for SRS. In strong contrast, all program physicians at the Carter Institute specialize full-time in the treatment of transgender persons. Screening at the Carter Institute enables multiple qualified doctors to provide medical opinions regarding the treatment of an individual patient.

Official Problem, *supra* para 1 at paras 21, 27.

[27] Second, screening at the Carter Institute guarantees consistent application of criteria across patients with gender dysphoria. This ensures both that individuals are referred for SRS only when it is medically necessary and beneficial and that patients are not arbitrarily denied treatment. Given that there is still controversy in the medical community regarding the medical necessity of SRS, it is important that SRS screening be completed by doctors who understand how and when SRS can be an appropriate medical response to gender dysphoria.

Official Problem, *supra* para 1 at para 23.

d) The distinctions drawn by the SRS Conditions serve and advance the ameliorative purpose

[28] It is rational to conclude that the distinction employed by the Government contributes to achieving its ameliorative goal, as the distinction serves or advances the object of the program. The distinction drawn by the SRS Conditions between individuals with gender dysphoria and the

rest of society goes no "further than is justified by the object of the ameliorative program," which is to provide funding for SRS to those struggling with gender dysphoria. The Conditions apply directly to those struggling with this difficult psychological condition.

Kapp, *supra* para 19 at para 49.
Alberta (Aboriginal Affairs and Northern Development) v Cunningham, 2011 SCC 37 at para 45, [2011] 2 SCR 670. [*Cunningham*].
SRS Conditions, *supra* para 1.

3. The SRS Conditions are not discriminatory under s. 15(1)

[29] Even if the government's ameliorative purpose is not accepted, the SRS Conditions are not discriminatory. The SRS Conditions do not perpetuate "arbitrary disadvantage on [the Appellant] because of [her] membership in an enumerated or analogous group." In *Taypotat*, Justice Abella equated "arbitrary disadvantage" with discrimination. A law is arbitrary according to s. 15(1) to the extent that "it fails to respond to the actual capacities and needs of the members of the group" and instead reinforces, perpetuates, or exacerbates their disadvantage.

Quebec (AG) v A, 2013 SCC 5 at para 331, [2013] 1 SCR 61, Abella J, [*Quebec*].
Kahkewistahaw First Nation v Taypotat, 2015 SCC 30 at paras 18, 20, [2015] 2 SCR 548 [*Taypotat*].

a) The SRS Conditions respond to the actual capacities and needs of transgender patients

[30] Implementing comprehensive screening and assessment procedures for the funding of SRS responds to the reality and needs of transgender individuals. For groups with different needs, "it is the recognition of these actual characteristics, and reasonable accommodation of these characteristics, which is the central purpose of s. 15(1)" (*Eaton*).

Eaton v Brant County Board of Educaton, [1997] 1 SCR 241 at para 35, [1996] SCJ No 98 (QL) [*Eaton*].

[31] Absent invidious stereotyping, the Government is "entitled to proceed on informed general assumptions without running afoul of s. 15." SRS is an irreversible, invasive and risky

procedure. Its medical necessity is not indicated anatomically, but by the nature of a psychological condition. Demanding a high standard of care and thorough screening by world-renowned doctors is reasonable in these circumstances. It exemplifies the appropriate degree of caution for such a life-altering procedure.

Gosselin, *supra* para 18 at para 56.
Official Problem, *supra* para 1 at paras 16, 23.

[32] In *Martin*, the Court found that the denial of disability benefits was discriminatory because it was based on the "indefensible assumption" that the needs of those suffering from chronic pain were identical. The SRS Conditions do not treat transgender individuals as if they are all the same. They set out minimum requirements for the screening of transgender patients. Evaluation beyond these minimums is done on a case-by-case basis, according to the best interests of individual patients. In contrast to the benefits policy in *Martin*, the individual evaluation of transgender patients "is the antithesis of the logic of the stereotype, the evil of which lies in prejudging the individual's actual situation and needs on the basis of the group to which he or she is assigned" (*Winko*).

Nova Scotia (Workers' Compensation Board) v Martin, 2003 SCC 54 at para 99, [2003] 2 SCR 504 [*Martin*].
Official Problem, *supra* para 1 at paras 22, 23.
Winko v British Columbia (Forensic Psychiatric Institute) [1999] 2 SCR 625 at para 88, 175 DLR (4th) 193 [*Winko*].

b) Differential access to the Carter Institute among patients does not demonstrate that the SRS Conditions fail to respond to the actual needs and capacities of transgender persons

[33] The fact that there are some individuals who may have difficulty accessing gender dysphoria treatment does not demonstrate that the SRS Conditions are discriminatory. As the court found in *Withler*, "perfect correspondence is not required." The strategy adopted by the legislature does not need to be ideal. The inability of a social program to perfectly meet the needs

of each individual does not warrant the conclusion that "the program failed to correspond to the actual needs and circumstances of the affected group" (*Gosselin*).

Withler, *supra* para 13 at para 71.
Gosselin, *supra* para 18 at para 55.

[34] Following *Eldridge*, "once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner." This principle requires that individuals not be excluded from generally available benefits on the basis of an enumerated or analogous ground. In *Eldridge,* the failure of the state to provide interpretive services to deaf patients infringed s. 15. Deaf patients were unable to access the "same quality of medical care as the hearing population." The same principle was applied in *Brooks*, a case in which pregnancy barred female employees from accessing disability benefits. In *Miron*, the exclusion of unmarried partners from accidents benefits available to married partners infringed s. 15.

Eldridge v British Columbia (AG), [1997] 2 SCR 624 at para 73, 71, 151 DLR (4th) 577 [*Eldridge*].
Brooks v Canada Safeway Ltd, [1989] 1 SCR 1219, 59 DLR (4th) 321 [*Brooks*].
Miron v Trudel, [1995] 2 SCR 418, 124 DLR (4th) 693 [*Miron*].

[35] Courts have consistently distinguished between "(1) ensuring reasonable accommodation so as to allow access for disabled persons to the general health care system and (2) recognizing the legislature's authority to determine the precise scope of the services offered" (Cousins). *Eldridge*, *Miron*, and *Brooks* are readily distinguishable from the case at hand. The Appellant does not allege differential access to a service that is generally available. Rather, she asks the court to interfere with the determination of the medical necessity of a particular medical treatment.

Mel Cousins, "Health Care and Human Rights after *Auton* and *Chaoulli*" (2009) 54 McGill LJ 717 at 728 [Cousins].
Eldridge, *supra* para 34.
Miron, *supra* para 34.

Brooks, *supra* para 34.

c) Comprehensive medical evaluation does not reinforce, perpetuate, or exacerbate the disadvantage of transgender individuals

[36] Although transgender individuals have historically faced difficulties accessing medical care, the SRS Conditions do not reinforce, perpetuate, or exacerbate this disadvantage. The SRS Conditions do not prohibit or bar transgender individuals from receiving funding for SRS. Indeed, the Conditions are the mechanism through which access to SRS is enabled. It is undisputed that conditions are necessary for the responsible treatment of transgender patients and the provision of SRS.

Taypotat, *supra* para 29 at para 20.
Official Problem, *supra* para 1 at para 27.

[37] The SRS Conditions provide a period of medical treatment and screening necessary for the responsible referral of patients for SRS. It is not a mere delay. This period of treatment ensures that patients are not still experiencing the "halo effect" when they undergo surgery and that there has been adequate counseling and therapy. Some individuals who begin treatment at the Carter Institute also decide that they do not need SRS in order to live as their preferred gender. The decision to avoid life-altering and irreversible surgery is not insignificant.

Official Problem, *supra* para 1 at para 23.

[38] Any delays experienced by individuals waiting to be evaluated by the Carter Institute are mitigated by the availability of other timely medical treatment. In *Withler* the Court found that perceived disadvantages must be considered in light of other benefits to the claimants in order to avoid an "artificial understanding" of the impact of the law. The Conditions must be considered in the context of the provision of other health care services to transgender individuals that assist

in their transition. SRS is only one of the treatment options that improve the conditions of transgender individuals.

Withler, *supra* para 13 at para 74.

[39] Individuals with gender dysphoria have access to hormone therapy and counseling services. These services significantly improve the physical and mental well-being of transgender patients. This is illustrated by the Appellant's case. After accessing OHIP-covered medical care, she has stable employment, healthy social relationships, and has reconnected with her family.

Official Problem, *supra* para 1 at paras 8-11.

d) The concomitants of universal health care do not undermine the dignity or worth of transgender individuals

[40] Although human dignity is no longer a discrete element that a claimant must prove it remains an important aspect of "the conceptual underpinnings of substantive equality" (*Kapp*). Laws that uphold rather than demean an individual's dignity are not discriminatory.

Kapp, *supra* para 19 at para 20.

[41] In *Withler*, the Court held that even where an ameliorative purpose is not accepted under s. 15(2), "the ameliorative effect of the law on <u>others</u> and the multiplicity of interests it attempts to balance will also colour the discrimination analysis." The inquiry into the discriminatory nature of the distinction must be contextual. Where the distinction operates as part of a larger statutory benefit scheme, "the discrimination assessment must focus on the object of the measure alleged to be discriminatory in the context of the broader legislative scheme, taking into account the universe of potential beneficiaries" (*Withler*).

Withler, *supra* para 13 at paras 38, 3 [emphasis added].

[42] In this case, the wait times for referral are not discriminatory. Wait times are an inevitable result of limited health care resources and unlimited demand. The SRS Conditions are

part of a larger benefit scheme to ensure the provision of a wide variety of medically necessary services to Ontario residents, many of whom are members of similarly disadvantaged groups. In this context, delays experienced as a result of providing comprehensive treatment do not suggest that the individual is to be regarded as less valuable or worthy. On the contrary, they suggest that her needs were considered as part of a complex scheme to allocate limited resources.

> *Chaoulli v Quebec (AG)*, 2005 SCC 35 at paras 39, 210, [2005] 1 SCR 791 [*Chaouilli*].

Issue 2: The SRS Conditions do not infringe the Appellant's rights under s. 7 of the *Charter*

[43] In order to demonstrate that the SRS Conditions infringe s. 7, the Appellant must first show that they deprive her of life, liberty, or security of the person. Once she has established that s. 7 is engaged, she must then show that the deprivation is not in accordance with the principles of fundamental justice. The burden is on the claimant to prove every aspect of a s. 7 violation.

> *Carter v Canada (AG)*, 2015 SCC 5 at para 55, [2015] 1 SCR 331 [*Carter*].
> *Canada (AG) v Bedford*, 2013 SCC 72 at para 127, [2013] 3 SCR 1101 [*Bedford*].

1. The SRS Conditions do not deprive the Appellant of life, liberty, or security of the person

[44] Providing a limited positive benefit cannot give rise to a deprivation under s. 7. In the alternative, if this Court finds that a positive benefit can create a deprivation, no deprivation is established in this case.

a) The Appellant must rely on a positive obligation

[45] In *Baier*, the Supreme Court of Canada stated that:

> The distinction between positive and negative rights does not rest on whether expression or activity is unregulated by statute, but rather on whether what is sought is positive government legislation or action as opposed to freedom from government restrictions on activity in which people could otherwise freely engage without government enablement.
>
> *Baier v Alberta*, 2007 SCC 31 at para 41, [2007] 2 SCR 673 [*Baier*].

[46] The Appellant must rely on a positive rights claim to be able to engage s. 7 because the SRS Conditions do not prohibit any activity. Only services listed in the Schedule of Benefits are insured by OHIP. As part of the Schedule of Benefits, the SRS Conditions make SRS an insurable service at the same time that they limit when it will be insured. The SRS Conditions are thus a government enablement of medical treatment. They do not prohibit or impede any activity.

Schedule of Benefits, *supra* para 2 at General Preamble 6.

b) Section 7 does not include a positive right to health care

[47] In *Gosselin*, the Court left open the possibility that "one day s. 7 may be interpreted to include positive obligations." However, the majority refused to follow that interpretation. As Chief Justice McLachlin stated:

> [N]othing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these.

Gosselin, *supra* para 18 at paras 82, 81.

[48] This appeal does not provide a compelling reason to upset the stable interpretation of s. 7 outlined in *Gosselin*. The Appellant's claim relies on a positive right to health care that was directly rejected in, where Chief Justice McLachlin and Justice Major stated: "[t]he *Charter* does not confer a freestanding constitutional right to health care." In *Chaoulli*, s. 7 was only engaged because of the prohibition on private insurance.

Chaoulli, *supra* para 42 at para 104.

[49] The nature of health care funding should not be a matter for the courts. As recognized in *Chaoulli*, health care resources are limited whereas the demand f is almost limitless. This means that health care funding decisions are about the "setting of priorities and the allocation of scarce resources" which under s. 7 are "matters not for the courts, but for governments" (*Canadian*

Doctors). The provision of benefits is about negotiation, and compromise. The courts are ill-suited to that type of decision-making (Naier). The adversarial process is not the correct method for deciding whether SRS should be prioritized over heart bypasses or whether both should be more important than bariatric surgery.

> *Chaoulli*, *supra* para 42 at paras 39, 210.
> *Canadian Doctors for Refugee Care*, 2014 FC 651 at para 535, 458 FTR 1 [*Canadian Doctors*].
> Aryeh Naier, "Social and Economic Rights: A Critique" (2005) 13 Hum Rts Brief 1 at 2 [Naier].

[50] A wide range of cases have decided that the reach of s. 7 does not extend to the imposition of a positive constitutional obligation on government to fund particular treatments (*Canadian Doctors, Flora, Wynberg*). The Court in *Flora* stated the underlying reasoning when it said, "where the government elects to provide a financial benefit that is not otherwise required by law, legislative limitations on the scope of the financial benefit provided do not violate s. 7."

> *Canadian Doctors*, *supra* para 49 at para 571.
> *Flora v Ontario Health Insurance Plan*, 2008 ONCA 538 at para 108, 91 OR (3d) 412 [*Flora*].
> *Wynberg v Ontario*, 82 OR (3d) 561 at para 220, 269 DLR (4th) 435 [*Wynberg*].

c) The SRS Conditions do not deprive the Appellant of life

[51] The right to life is engaged "where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly" (*Carter*).

> *Carter*, *supra* para 43 at para 62.

[52] There is no evidence that having to wait for SRS while receiving other treatments leads to an increased risk of death. The only evidence before the Court is that transgender persons "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'." Patients who are on the waiting list for the Carter Institute receive treatment to assist them with transition, such as counseling and hormone

therapy. That is precisely the kind of treatment the Appellant received from Dr. Kang and which has helped to drastically improve her life after her hospitalization in 2013. There is no evidence that people waiting for SRS are any more likely to commit suicide than any other transgender persons.

Official Problem, *supra* para 1 at paras 8, 9, 22, 27

d) The SRS Conditions do not deprive the Appellant of liberty

[53] Liberty is "the right to make fundamental personal choices free from state interference" (*Blencoe*). It is "engaged where state compulsions or prohibitions affect important and fundamental life choices." This definition of liberty should not be stretched to require that the Government facilitate all "important and fundamental life choices."

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

[54] The Appellant has not been deprived of her liberty interest because the SRS Conditions are fundamentally enabling and not prohibitory.

e) The SRS Conditions are not a sufficient cause of the Appellant's security of the person claims

[55] A deprivation of the security of the person requires a "sufficient causal connection" between the state action and any deprivations suffered by the Appellant (*Bedford*). For there to be a sufficient causal connection there must be "a real, as opposed to a speculative, link." *Carter* clarifies the nature of this real link; there must be either "state interference with bodily integrity" or "serious state-imposed psychological stress."

Bedford, *supra* para 43 at para 76.
Carter, *supra* para 43 at para 64 [emphasis added].

[56] Even though the Appellant suffers from severe anxiety, there is no causal link between the SRS Conditions and the Appellant's condition. The negative psychological experiences cited

by the Appellant would exist in an aggravated form in the absence of government action. There is no evidence that any of the psychological harms the Appellant has suffered are caused by her wait for a determination of her eligibility for SRS. The SRS Conditions are an attempt to ameliorate the Appellant's conditions. They are neither an interference nor an imposition, so security of the person is not engaged.

Official Problem, *supra* para 1 at para 27.

f) The Appellant's economic conditions cannot be the source of a "sufficient causal connection"

[57] The Appellant's economic circumstances cannot create a causal link where there is none. The Government does not become the cause of pre-existing circumstances because the individual lacks the resources to change them.

[58] In *Wynberg*, no s. 7 violation was found when public schools did not provide medically necessary behavioural care for autistic children. There was no deprivation because parents were not compelled to send their children to public school. This was despite the parents' limited financial resources and inability to pay for such care elsewhere. The lives of the children were worse off than if public schools had provided the service, but no worse off than they would have been if no public schools had existed. On this basis no causal link was found.

Wynberg, *supra* para **x** at para 231.

[59] Like a public school system, the SRS Conditions, provide limited government funding, in an attempt to help the Appellant overcome the barriers presented by her economic circumstances. If she does not access the public funding, her condition is no worse off than it would have been if the Government had not acted in the first place.

2. Any deprivation is in accordance with the principles of fundamental justice

[60] If a deprivation of life, liberty, or security of the person is caused by the SRS Conditions that deprivation does not violate the principles of fundamental justice. The SRS Conditions are not arbitrary, overbroad, or grossly disproportionate.

a) The purposes of the SRS Conditions

[61] The purposes of the SRS Conditions are twofold: first, to ensure that plan members are provided only with care that is medically necessary and beneficial; and second, to control the costs of OHIP.

Official Problem, *supra* para 1 at para 29.

[62] The principle that medical care must be both necessary and beneficial flows from the idea that doctors should do no harm and that patients should not subjected to needless or potentially dangerous treatment. This is a vital purpose in the context of SRS. The surgery has the potential to lead to a host of dangerous complications and severe negative psychological effects.

Official Problem, *supra* para 1 at paras 16, 25.

[63] The societal pressures to undergo SRS necessitate safeguards to ensure that the surgery is in the best interests of the patient. In *XY*, the Ontario Human Rights Commission recognized that there is a societal bias "that, unless and until a transgender person has 'transsexual surgery', we as a society are entitled to disregard their felt and expressed gender identity and treat them as if they are 'really' the sex assigned at birth." This pressure to have SRS creates a danger that patients may be pushed to have SRS against their best interests. The screening criteria are essential in ensuring that does not occur.

XY v The Ministry of Government and Consumer Services (Ontario), 2012 HRTO 726 at para 172, [2012] OHRTD No 715 [*XY*].

[64] Controlling the costs of OHIP is a pressing concern. If benefit schemes are to be covered by s. 7, it is essential that courts respect the challenging decisions governments must make to allocate limited resources among competing interests. Regulating the provision of services is the only way Ontario can control health care spending and provide the rest of its governmental services.

[65] The fact that the costs of SRS comprise a small fraction of the OHIP budget does not diminish the importance of this purpose. The Government makes budget-limiting decisions in the provision of millions of medically important treatments. If it is unable to control the costs of each treatment the OHIP budget would balloon through piecemeal judicial decisions.

b) The SRS Conditions are not arbitrary

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

Carter, *supra* para 43 at para 83 [emphasis added].

[67] 'No rational connection' sets a very high bar that is not met in this case. Concentrating the treatment of gender dysphoria in the hands of an internationally renowned centre is rationally connected to ensuring the provision of only medically necessary and beneficial care.

Official Problem, *supra* para 1 at para 21.

c) The SRS Conditions are not overbroad

[68] For overbreadth "the 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."

Carter, *supra* para 43 at para 85.

[69] The SRS Conditions' purpose of ensuring that patients only receive medically necessary and beneficial care applies to everyone who seeks SRS. Dr. Kang's recommendation that the Appellant should get SRS does not alter the concerns about determinations of medical necessity that animate the SRS Conditions. Dr. Kang may be eminently qualified, but the SRS Conditions are not only concerned only with preventing unqualified diagnoses.

[70] Diagnoses by independent specialists lack consistency and do not benefit from the multiple expert perspectives available at the Carter Institute. This is important for two reasons. First, there is disagreement in the medical community about when the surgery is necessary. Second, a range of physical, psychological and social factors will influence the long-term outcome of the surgery. Further, the Carter Criteria ensure that patients will not suffer from the "halo effect." Dr. Kang does not believe that concerns about the "halo effect" justify a minimum of two years of RLE. That is a personal opinion that Dr. Forrester did not comment on and which this Court lacks adequate evidence to assess.

Official Problem, *supra* para 1 at paras 23, 27.

d) The SRS Conditions are not grossly disproportionate

[71] Gross disproportionality only applies in "extreme cases" (*Bedford*). For a law to be grossly disproportionate its negative effects must be "completely out of sync with the object of the law." *Carter* established that this "standard is high: the law's object and its impact may be incommensurate without reaching the standard for gross disproportionality."

Bedford, *supra* para 43 at paras 120, 125.
Carter, *supra* para 43 at para 89.

[72] The SRS Conditions' effects are not 'completely out of sync with the object of the law.' SRS is irreversible, invasive, and risky, and individuals suffering from gender dysphoria are a vulnerable group. Ensuring that SRS is carried out only when it is medically necessary and

beneficial is therefore an essential purpose. It is commensurate with a 10-month waiting period and 24 months of world-class pre-surgery treatment. The Appellant may be anxious that her SRS not be delayed, but that anxiety must be weighed against the negative impacts of unnecessary SRS, which are severe and irreversible.

Official Problem, *supra* para 1 at paras 20, 23.

Issue 3: Any infringements are justified under s. 1 of the *Charter*

1. The s. 1 analysis is integral to a s. 7 infringement after *Bedford*

[73] Section 1 has always had an important role in relation to s. 15. Following *Bedford*, it also has an important role in analyzing "whether the broader public interest justifies the infringement of individual rights" in relation to s. 7.

Bedford, *supra* para 43 at para 126.

[74] The need for a s.1 analysis in this context was recognized in *Michaud*. That decision upheld a regulation requiring speed limiters on commercial trucks. Although the Court found that s. 7 was engaged because the speed limiter could increase the risk of an accident, the regulation was upheld under s. 1 because the speed limiters would usually increase safety.

R v Michaud, 2015 ONCA 585 at paras 59-79, 145, 127 OR (3d) 81 [*Michaud*].

2. The SRS Conditions have pressing and substantial objectives

[75] The Court in *Malmo-Levine* recognized the important interest of guarding against self-harm among members of society. The SRS Conditions ensure that the Government does not contribute to such harm by providing care that is not medically necessary or beneficial. The importance of the Conditions is underscored by the risky, invasive, and irreversible nature of the procedure.

R v Malmo-Levine, 2003 SCC 74 at para 130, [2003] 3 SCR 571 [*Malmo-Levine*].

[76] The objective to control the expansion of costs under OHIP is pressing. As Justice Sopinka commented in *Egan*: "[I]t is not realistic for the Court to assume that there are unlimited funds to address the needs of all." Like in *NAPE*, this is a case of "rights versus hospital beds." Every time a new medical benefit is found to be required by the *Charter*, some other treatment will be threatened. SRS is one of many important treatments that are currently limited under OHIP because of budgetary constraints.

Egan v Canada, [1995] 2 SCR 513 at para 104, [124] DLR (4th) 609 [*Egan*].
NAPE v Newfoundland (Green Bay Health Care Centre), [1996] 2 SCR 3 at para 75, [1996] SCJ No 54 (QL) [*NAPE*].

3. The SRS Conditions attract a high degree of deference

[77] Ontario's creative solution to a complex policy problem should be given deference. A "'complex regulatory response' to a social ill will garner a high degree of deference" from the courts (*Carter*). As stated in *Hutterian Brethren*, "[t]he bar of constitutionality must not be set so high that responsible, creative solutions to difficult problems would be threatened."

Carter, *supra* para 43 at para 97.
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 at para 37, [2009] 2 SCR 567 [*Hutterian Brethren*].

[78] OHIP is a complex regulatory system and should be treated with deference under s. 1. As noted in *Shulman*, the health care system is "vast and complex." The judiciary should be hesitant to intervene in funding decisions given the "institutional impediments to design of a health care system by the judiciary."

Shulman v Ontario (Attorney General) (2001), 155 OAC 171 at para 43, 90 CRR (2d) 82, [*Shulman*].

[79] The courts are not equipped to balance the competing interests at stake in the determination of provincial health care funding. Administrators of provincial health care regimes

should not be second-guessed except in "clear cases of failure on their part to properly balance the Charter rights of individuals against the overall pressing objective of the scheme."

Cameron v Nova Scotia, 1999 NSCA 14 at para 236, 204 NSR (2d) 1 [*Cameron*].

[81] Courts are deferential to decisions that are based on technical expertise because the judiciary lacks the experience and resources necessary for determining policy (*Michaud, Dunsmuir*). The SRS Conditions are a decision by the Government to rely on the opinion of an "internationally renowned gender identity clinic" as to when someone should undergo SRS.

Michaud, *supra* para 74 at para 109
Dunsmuir, 2008 SCC 9 at para 54, [2008] 1 SCR 190 [*Dunsmuir*].
Offical Problem, *supra* para 1 at para 21.

4. The SRS Conditions are rationally connected to their objectives

[82] There must be a rational "connection between the infringement and the benefit sought on the basis of reason or logic" (*RJR-MacDonald*). This requires only a reasonable prospect that the limit will further the objective, to some extent, not that it will do so (*Hutterian Brethren*).

RJR-MacDonald Inc v Canada (Attorney General), [1995] 2 SCR 199 at para 153, DLR (4th) 1 [*RJR-MacDonald*].
Hutterian Brethren, *supra* para 77 at 48.

[83] A screening system designed by internationally renowned experts in the field of gender dysphoria is rationally connected to the goal of only providing treatment that is medically necessary and beneficial. Moreover, funding one centre for screening SRS and controlling how many people are able to access the surgery is rationally connected to controlling the costs of OHIP.

5. The SRS Conditions are minimally impairing

[84] The test for minimal impairment is "whether there are less harmful means of achieving the legislative goal" (*Hutterian Brethren*).

Hutterian Brethren, *supra* para 77 at para 53.

[85] None of the possible alternative approaches for determining when SRS is appropriate adequately achieve the legislative goals. Leaving the decision up to individual practitioners or following the ITHA guidelines would not have the benefits of the Carter Institute's expertise and would not adequately address the concerns associated with the "halo effect." They would also increase costs through raising the number of surgeries and demand for long-term care to help patients deal with unnecessary surgeries and complications.

[86] The Government is justified in selecting a cautious approach from the available options. As in *Michaud*, "[t]here is good reason to favour *ex ante* rules where human life or safety is at stake and where there is scientific uncertainty as to the precise magnitude of the possible harms." This "precautionary principle" has been applied by Canadian courts in relation to speed limiters on trucks in *Michaud* and the banning of pesticides in *Spraytech*.

Michaud, *supra* para 74 at para 102.
114957 Canada Ltee (Spraytech, Société d'arrosage) v Hudson (Town), 2001 SCC 40, [2001] 2 SCR 241 [*Spraytech*].

[87] The precautionary principle supports the SRS Conditions because there is scientific uncertainty as to when SRS is medically necessary and beneficial. The Government has decided that the Carter Institute and its Criteria are the safest approach to this controversial treatment.

Official Problem, *supra* para 1 at paras 17-23.

6. The effects of the SRS Conditions are proportionate

[88] The Court must consider whether the limit on the right is proportionate in effect to the public benefit conferred by its limitation. This involves determining whether any harms done to the Appellant's and other transgender person's s. 7 and s. 15 rights "are out of proportion with the public good achieved by the infringing measure" (*Hutterian*).

Hutterian Brethren, *supra* para 77 at paras 73, 78.

[89] It is proportionate to limit spending on one area of health in order to spend it on another. Any determination of proportionality must take into consideration the 'either/or' nature of OHIP funding. The money currently spent on the surgeries themselves is not indicative of total OHIP spending on treatment within the Carter Centre and for post-surgical care. Moreover, if every member of the GDP program were recommended for SRS, the costs for just the surgery alone would grow beyond $5 million.

Official Problem, *supra* para 1 at para 30.

[90] The Government has responded proportionately to the risks associated with a controversial medical procedure while balancing the twin goals of providing only medically necessary and beneficial treatment and controlling OHIP's costs. The Government's cautious approach to a complex problem is reasonable and justified.

Official Problem, *supra* para 1 at para 29.

PART V – ORDER SOUGHT

[91] The Respondent requests that this appeal be dismissed.

All of which is respectfully submitted this 27th day of January, 2016.

Team 3

Counsel for the Respondent

PART VI – LIST OF AUTHORITIES AND STATUTES

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