

**IN THE HIGH COURT OF THE DOMINION OF CANADA  
(ON APPEAL FROM THE ONTARIO COURT OF APPEAL)**

**BETWEEN:**

Alex Ghorbani

APPELLANT

- and -

Attorney General of Ontario

RESPONDENT

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**FACTUM OF THE APPELLANT**

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COUNSEL FOR THE APPELLANT

TEAM 7

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## PART I: OVERVIEW

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[1] Alex Ghorbani is a transgender woman living in Toronto, Ontario. She requires sex-reassignment surgery (SRS), but is currently unable to obtain the procedure. Dr. Stella Kang, a primary care physician specializing in transgender patient care, submits that SRS is “medically necessary” for Ms. Ghorbani and “should happen as soon as possible.” Transgender patients seeking insured SRS in Ontario are required to meet extensive conditions even when surgery is of immediate medical necessity. The Elias Carter Institute for Mental Health Care in Ottawa (the “Carter Institute”) imposes these conditions. The Carter Institute is the only location in Ontario authorized by the Ontario Health Insurance Plan (OHIP) to issue recommendations for insured SRS. Ms. Ghorbani cannot access insured SRS because she has not completed the conditions overseen by the Carter Institute.

Official Moot Problem, Wilson Moot 2016 at paras 27(f) [“Official Moot Problem”].

[2] The SRS Conditions violate Ms. Ghorbani’s Section 15 rights under the *Canadian Charter of Rights and Freedoms* (*Charter*), because they deny her access to publicly available and insured health care enjoyed by the rest of OHIP members. The SRS Conditions also violate Ms. Ghorbani’s Section 7 rights to liberty and security of the person. The infringements of Ms. Ghorbani’s rights are not justified under Section 1 of the *Charter*.

*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 ss 1, 7, 15 [“*Charter*”].

[3] The Appellant requests the Court issue a declaration of invalidity and suspend the provision from the Schedule of Benefits under Section 552 of the Ontario *Health Insurance Act* for 12 months. The Appellant also asks the Court to grant an exemption for Ms. Ghorbani so that she can receive insured SRS immediately.

Ontario *Health Insurance Act*, RSO 1990, c H.6 [“*Ontario HIA*”].

## PART II: STATEMENT OF FACTS

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### 1. Factual Background

[4] The only institution in Ontario approved to issue recommendations to patients for insured SRS is the Carter Institute. Instead of seeking treatment at the Carter Institute, Ms. Ghorbani sought treatment with Dr. Kang, a specialist in transgender care at the Downtown Rainbow Clinic in Toronto. Ms. Ghorbani was deterred from seeking care at the Carter Institute due to the lengthy waitlist for a first appointment, and because she would have to travel to Ottawa approximately once a month for all future appointments.

*Ontario HIA, supra* para 3.

Official Moot Problem, *supra* para 1 at para 7.

Clarification for Official Moot Problem, Wilson Moot 2016 at 3 [“Clarifications”].

[5] The SRS Conditions require patients seeking to undergo SRS to complete hormone therapy and a Real Life Experience (RLE) period. Ms. Ghorbani began her hormone therapy and the RLE period in June 2013 under the supervision of Dr. Kang, completing 20 months of treatment by February 2016.

Official Moot Problem, *supra* para 1 at para 9.

#### (I) Sex-Reassignment Surgery: Medical Reality

[6] SRS can have significant psychological benefits for transgender individuals. Dr. Forrester, a physician with the Carter Institute, acknowledges that, “at least for some patients, SRS is medically necessary to treat gender dysphoria.” As a transgender woman, Ms. Ghorbani does “not...feel like [she] can[...] use a public restroom or change room,” differentiating her from cisgender (or non-transgender individuals), and negatively impacting her daily life. SRS would allow Ms. Ghorbani to complete her transition. Medical literature indicates that even

patients who experience post-surgical complications typically do not regret having undergone SRS.

Official Moot Problem, *supra* para 1 at paras 23(g), 15, 27(d).

#### (II) Purpose of the RLE

[7] The RLE includes presenting at all times in an individual's desired gender role. The purpose of the RLE is to provide patients the opportunity to adjust to the gender role before undergoing surgery. Although the Carter Institute requires two years of RLE, the International Transgender Health Association (ITHA) and Dr. Kang have both recognized that a shorter RLE period is in the best interest of some patients. According to Dr. Kang, a shorter RLE period is in the best interest for Ms. Ghorbani.

Official Moot Problem, *supra* para 1 at paras 20, 19, 27(c).

#### (III) Standards for SRS Outside of the Carter Institute

[8] The ITHA provides guidelines to assess whether SRS is appropriate for a transgender patient. One difference between the international and the Carter Institute's criteria is the requisite months of hormone therapy. The international guidelines recommend 12 months, 6 months less than the Carter Institute's 18-month requirement. The second difference is that the international guidelines include a 1-year RLE period, as opposed to a minimum 2-year RLE period imposed by the Carter Institute.

Official Moot Problem, *supra* para 1 at paras 19, 22.

[9] Based on Dr. Kang's experience, patients should abide by the ITHA guidelines and complete a minimum one-year RLE period before receiving a recommendation for SRS.

Official Moot Problem, *supra* para 1 at para 27(c).

#### (IV) Carter Institute Considerations

[10] The wait time to enter the Gender Dysphoria Program (GDP) at the Carter Institute is ten months. A patient must then remain in the program for a minimum of two years, and is eligible to receive a recommendation for SRS only after completing this term. The Attorney General of Ontario (AG) stated, on record, that the SRS conditions exist “to ensure that OHIP members are provided only with care that is medically necessary and to control the costs of OHIP.”

Ninety percent of patients who enrol in the GDP seek a referral for SRS, but only fifteen percent ultimately receive a recommendation from the Carter Institute’s physicians.

Official Moot Problem, *supra* para 1 at paras 23(i), (h), (d), 29.  
Clarification, *supra* note 4 at 4.

#### (V) Alex Ghorbani’s Medical Need for SRS

[11] Ms. Ghorbani meets the ITHA guidelines for both the RLE period and hormone therapy. She is above the required age of majority and has a recommendation from an Ontario physician for SRS. Ms. Ghorbani’s socio-economic status makes it impossible for her to have SRS without it being insured by OHIP. Dr. Kang’s medical opinion is that Ms. Ghorbani’s anxiety about not being able to undergo SRS will be detrimental to her psychological well-being. Ms. Ghorbani herself states that without SRS she “feels like [she] is in limbo” and is “trapped in a body that is not [her] own.”

Official Moot Problem, *supra* para 1 at paras 14, 27(f), 15.

## **2. Procedural History**

[12] Justice Stern, for the Ontario Superior Court of Justice, found that the conditions imposed by the Carter Institute were unconstitutional because they infringed Ms. Ghorbani's Section 15 and 7 *Charter* rights and were not justified under Section 1. Justice Stern found that the conditions discriminated against Ms. Ghorbani and caused the OHIP service to be allocated in a discriminatory manner. Moreover, the conditions imposed were arbitrary and grossly disproportionate to their objective. Justice Stern found that although the conditions seek to protect some patients, their effect in practice prevents some individuals from accessing the surgery even when it is medically necessary.

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

[13] The Ontario Court of Appeal, in a split-decision, allowed the appeal. In dissent, Justice Bacchus adopted the reasoning of Justice Stern.

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

### PART III: STATEMENT OF THE POINTS IN ISSUE

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[14] The appeal raises the following three issues:

**Issue 1: Do the SRS Conditions infringe Alex Ghorbani’s rights under Section 15 of the *Charter*?**

The SRS Conditions at the Carter Institute infringe Ms. Ghorbani’s Section 15 rights by creating a distinction on the enumerated ground “sex” and the analogous ground “gender identity.” This distinction perpetuates arbitrary disadvantage upon transgender persons.

**Issue 2: Do the SRS Conditions infringe Alex Ghorbani’s rights under Section 7 of the *Charter*?**

The SRS Conditions infringe Ms. Ghorbani’s liberty and security of the person by preventing her from accessing an insured surgery and causing her psychological stress and suffering. The infringement does not accord with the principles of fundamental justice, because the violation is arbitrary, overbroad, and grossly disproportionate to the purpose of the SRS conditions outlined by the AG on record.

**Issue 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*?**

The infringements of Ms. Ghorbani’s Section 15 and Section 7 rights are not justified by Section 1. The SRS Conditions are not rationally connected to their objective. They are not minimally impairing, nor are the negative effects outweighed by the benefits.

## PART IV: ARGUMENT

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### **Issue 1: The SRS Conditions infringe Alex Ghorbani's rights under Section 15 of the Charter**

[15] Section 15 of *Charter* guarantees that:

1. Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

2. Subsection 15(1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

*Charter*, *supra* para 2, s 15.

[16] The SRS Conditions are discriminatory and infringe Ms. Ghorbani's Section 15 right to equality. Justice La Forest in *Eldridge v British Columbia* states that when the state provides a benefit, it is obliged to do so in a non-discriminatory manner. The Section 15(1) test derives from *Quebec v A* and was most recently considered in *Kahkewistahaw First Nation v Taypotat*. To establish a Section 15(1) claim, the law in question must draw a distinction based on an enumerated or analogous ground, and that distinction must have the effect of perpetuating arbitrary disadvantage on a claimant. The law affords a flexible contextual analysis, considered on a case-by-case basis, in determining that a distinction has the effect of perpetuating arbitrary disadvantage. The SRS conditions, encompassing psychosocial factors that already constitute barriers faced by transgender people, perpetuate arbitrary disadvantage upon the transgender community.

*Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 73, 151 DLR (4th) 577 [*"Eldridge"*].

*Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 16, [2015] 2 SCR 548 [*"Taypotat"*].

*R v Kapp*, 2008 SCC 41 at para 37, 294 DLR (4th) 1 [“*Kapp*”].  
*Quebec (Attorney General) v A*, 2013 SCC 5 at para 331, 182 354 DLR (4th) 191  
[“*Quebec v A*”].

[17] The SRS Conditions draw a discriminatory distinction that is not justified under Section 15(2), because the GDP is not ameliorative. In order to be an ameliorative program, the government must establish that a program is directed at improving the situation of a disadvantaged group, and it must serve or advance its ameliorative purpose. Rather than being ameliorative in nature, the SRS Conditions are discriminatory and perpetuate prejudice and stereotyping.

*Kapp*, *supra* para 16 at para 40.  
*Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 at  
paras 44, 72, 334 DLR (4th) 4 [“*Cunningham*”].  
*Quebec v A*, *supra* para 16 at para 177.

#### **A. The SRS Conditions draw a distinction between transgender and other Ontarians**

[18] *Withler v Canada* states that identifying “comparator groups” is no longer required for an equality claim; however, the SRS Conditions do draw a distinction between transgender patients and other Ontarians. The SRS Conditions only apply to transgender patients, as does the GDP at the Carter Institute. The nature of the conditions with their focus on psychosocial factors, along with oversight for treatment and recommendation for surgery available at only one institute in Ontario, distinguishes transgender patients from cisgender Ontarians who seek an insured and medically necessary procedure.

*Withler v Canada (Attorney General)*, 2011 SCC 12 para 60, [2011] 1 SCR 396.  
*Law Society of British Columbia v Andrews* [1989], 1 SCR 143 at para 37, 56 DLR (4th)  
[“*Andrews*”].

**B. The SRS Conditions draw a distinction based on Alex Ghorbani’s enumerated ground of sex or analogous ground of gender identity**

[19] The Appellant submits that gender identity, and thereby transgender status, is an analogous ground protected under Section 15. The lower court has held that transgender status is a protected ground under the *Charter*. Interpreted broadly, gender identity is covered under the enumerated ground of “sex.” Interpreted narrowly, gender identity is an analogous ground to “sex.” In *CF v Alberta*, Justice Burrows stated that:

a distinction drawn between a person with male genitalia who lives as a male and a person with male genitalia who lives as a female is beyond question a distinction made on the basis of sex. Alternatively if “sex” is interpreted so narrowly as to exclude the characteristics of transgendered persons that make them transgendered, then, at the very least, the distinction is made on a ground analogous to sex.

*CF v Alberta (Vital Statistics)*, 2014 ABQB 237 at para 39, 9 WWR 168 [*CF v Alberta*].

[20] Gender identity is deeply entrenched and inherent to an individual’s being. Justice McLachlin (as she then was) and Justice Bastarache in *Corbière v Canada*, conclude that Section 15 applies to cases where equal benefit of the law is denied based on grounds that are immutable, meaning they are “...based on characteristics that [people] cannot change or that the government has no legitimate interest in expecting [people] to change to receive equal treatment under the law.” Ms. Ghorbani identifies with the female gender. Her identity is immutable for her. She testified that since she began living her life as a woman, she feels more comfortable, happier, and healthier.

*Corbière v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13, 173 DLR (4th) 1 [*Corbière*].  
Official Moot Problem, *supra* para 1 at paras 9, 15.

[21] The strict application of the SRS Conditions prevents Ms. Ghorbani from completing her gender transition, keeping her in “limbo” and from living the life she desires. Dr. Kang contends in her affidavit that Ms. Ghorbani’s anxiety, which stems from her not being able to undergo

SRS, is detrimental to her well-being. The government has no legitimate interest in Ms. Ghorbani's gender, nor should it expect her to remain as the gender she does not identify with to receive equal treatment under the law.

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

### **C. The GDP is not Ameliorative and saved by Section 15(2)**

[22] The GDP is not saved by Section 15(2), because it does not have an ameliorative purpose. Even if its purpose were ameliorative, the SRS Conditions are not remedial in nature.

#### (I) The GDP does not have an Ameliorative Purpose

[23] The GDP aims to make medical decisions for transgender patients and is not directed at improving the healthcare of a group that has been historically discriminated against in the medical field. In order for a program to be ameliorative, it must be directed at improving the situation of a disadvantaged group. There must also be a correlation between the disadvantage suffered by the group and the program in question. There is no correlation between the SRS Conditions and the disadvantages transgender individuals face in accessing medical care, because the conditions at the Carter Institute limit accessibility to a treatment, even when a qualified physician has recommended it. There is no ameliorative purpose, because the Carter Institute is unnecessarily limiting the number of transgender individuals who can access surgery.

*Cunningham, supra* para 18 at para 59.

#### (II) The GDP does not advance an Ameliorative Purpose

[24] The SRS Conditions, rather than advancing transgender patients' access to medical service, bars them from accessing an insured surgery when it is immediately necessary. Only fifteen percent of the patients who enter the GDP are recommended and ultimately insured for SRS. The majority of patients who undergo the program are denied SRS, even though medical

literature indicates that few transgender patients regret undergoing SRS even where post-surgical complications exist.

Official Moot Problem, *supra* para 1 at paras 23(d), 27(d).

[25] Since the GDP fails to be ameliorative, the distinction drawn upon transgender patients through the SRS Conditions is discriminatory.

**D. The SRS Conditions draw a distinction that is discriminatory and perpetuates an arbitrary disadvantage**

[26] The SRS Conditions prevent transgender patients from receiving equal benefit under the law, because they perpetuate a disadvantage that is unfair or objectionable. A disadvantage is likely to be discriminatory if it perpetuates prejudice or stereotype.

*Quebec v A*, *supra* para 17 at para 180.

[27] The distinction disadvantages transgender people because, as per Dr. Forrester, “at least for some patients, SRS is medically necessary to treat gender dysphoria.” Through a state-induced burden, the SRS Conditions impose a nearly three-year wait on transgender patients before they can receive a recommendation for SRS. This is due to the combination of the lengthy wait periods for a first appointment with the GDP, the mandatory two-year RLE period, and the mandatory 18-month hormone therapy period. The burden of meeting these conditions is discriminatory because there is medical opinion that for some transgender patients, less time is sufficient to establish that they are prepared for SRS. Dr. Kang has determined that for Ms. Ghorbani, one year of hormone therapy and a 20-month RLE period is sufficient for her to undergo SRS.

Official Moot Problem, *supra* para 1 at paras 23(g), 7, 18, 19, 22, 27(c).

### (I) The SRS Conditions compound upon a Pre-Existing Disadvantage

[28] The SRS Conditions compound upon a pre-existing disadvantage faced by transgender people in Canadian society. A pre-existing disadvantage is a contextual factor outlined in *Law v Canada* that may be considered to determine whether a law is discriminatory. In Canada, transgender individuals face discrimination in areas such as employment, housing, education and the criminal justice system. Transgender people are also limited in their access to health care, are much more likely to experience homelessness, and are more likely to live below the poverty line in comparison to cisgender people. The Carter Institute takes into consideration a patient's mental health issues, criminal involvement, addiction, and lack of employment prospects before issuing a recommendation. This perpetuates disadvantage for transgender individuals in Ontario, because it forces them to comply with criteria by which they are already disadvantaged. In *Kavanagh v Canada*, a psychiatrist with expertise in Gender Identity Disorder supports that "...policies which emphasize lifestyle, social acceptability and mental stability discriminate against [transgender individuals] who are not middle class, employed, financially secure, free of concurrent psychiatric disorders or behaviourally compliant."

Official Moot Problem, *supra* para 1 at paras 27(a), 27(b), 27(f), 27 (d).

*Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 63, 170 DLR (4th) 1.

*Kavanagh v Canada (Attorney General)* 2001 CanLII 8496 (CHRT) at para 69, 41 CHRR 119.

### (II) The SRS Conditions perpetuate Prejudice and Stereotype

[29] The SRS Conditions perpetuate the stereotype and prejudice of transgender people in Ontario, because they categorize transgender patients as incapable of consenting to surgery that has been recommended by a physician. The conditions prefer patients who have a stable social support system and meet other psychosocial factors, as appropriate candidates for the insured

surgery. This prevents individuals from consenting to the surgery themselves. Dr. Forester asserts that not having social support systems is a common reason for denying patients SRS. Notwithstanding the relevance of these factors, Ms. Ghorbani has a steady job, a strong support system comprising of friends and family, and is in a romantic relationship. Ms. Ghorbani is of the age of consent, has completed RLE and hormone therapy under the supervision of Dr. Kang, has a medical opinion that SRS is necessary, and wishes to undergo the procedure as soon as possible. Despite these factors, Ms. Ghorbani is unable to consent to the procedure without redundantly repeating treatment under the supervision of the Carter Institute.

Official Moot Problem, *supra* para 1 at paras 23(d), 10, 11, 9.

(III) The SRS Conditions restrains the field of medical care for transgender patients

[30] Medical care for transgender persons is a growing field, and medical opinion provided by specialists and international bureaus outside of the Carter Institute should not be dismissed. The Schedule of Benefits under Regulation 552 of the Ontario *Health Insurance Act* indicates that SRS is an insured service under OHIP only if it is performed on patients who have undergone the GDP and have met the conditions imposed by the Carter Institute. Imposing the same strict conditions on every transgender patient disadvantages them, because it prevents them from having their personal medical needs assessed on a case-by-case basis, the type of treatment that is available to cisgender patients. The conditions also prevent medical experts outside the Carter Institute from recommending a patient for the insured surgery. While the government is permitted to regulate and administer Ontario's health insurance plan, it is not permitted to do so in a discriminatory manner. The SRS Conditions are not ameliorative; rather they have a discriminatory effect that infringes Ms. Ghorbani's Section 15 right.

Official Moot Problem, *supra* para 1 at para 27(b).  
*Ontario HIA, supra* para 3.

**Issue 2: Do the SRS Conditions infringe Alex Ghorbani’s rights under Section 7 of the Charter?**

[31] Section 7 of the *Charter* guarantees:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

*Charter, supra* para 2, s 7.

Ms. Ghorbani’s Section 7 rights to liberty and security of the person are infringed by the SRS Conditions. The infringements do not accord with the principles of fundamental justice, as the SRS Conditions are arbitrary, overbroad and grossly disproportionate to their intended objective.

**A. The SRS Conditions Infringe Alex Ghorbani’s Security of the Person**

[32] Ms. Ghorbani’s right to security is violated because she is denied access to an insured surgery after a physician has deemed it medically necessary. Security of the person is engaged when there is “state interference with an individual’s physical or psychological integrity including state action causing physical or serious psychological suffering.” In this case, the SRS conditions constitute state action, which cause Ms. Ghorbani psychological suffering.

*Carter v Canada (Attorney General)*, 2015 SCC 5 at para 64, [2015] 1 SCR 331 [“*Carter*”].

*New Brunswick (Minister of Health and Community Services) v G(J)* (1999) 3 SCR 46 at para 58, 1999 CanLII 653 (SCC) [“*G(J)*”].

*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras 55-57, [2000] 2 SCR 307 [“*Blencoe*”].

*Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at paras 43, 119, 191, 200, [2005] 1 SCR 791 [“*Chaoulli*”].

**(I) The SRS Conditions are State Imposed**

[33] The SRS Conditions impose a “one-size-fits-all” approach to ensure that transgender OHIP members receive medically necessary care; however, their effect excludes qualified candidates from insured surgery. State interference relates to how the state “enforc[es] and

secur[es] compliance with the law.” In this case, the effect of the SRS Conditions deprives individuals, like Ms. Ghorbani, from her right to security of the person.

*G(J)*, *supra* para 32 at para 65.

[34] The SRS Conditions prevent individuals from receiving an insured surgery even when it has been declared immediately and medically necessary by a physician. Chief Justice McLachlin and Justice Major in *Chaoulli v Quebec* recognize that there is “no freestanding constitutional right to healthcare. However, where the government puts in place a scheme to provide healthcare, that scheme must comply with the *Charter*.” Ms. Ghorbani is not seeking an insured surgery that is currently unavailable under OHIP. Rather, she seeks to have surgery provided in a manner that is applied fairly, equally and in compliance with the *Charter*.

*Chaoulli*, *supra* para 32 at para 104.

## (II) The SRS Conditions Cause Alex Ghorbani Psychological Stress

[35] Ms. Ghorbani’s inability to access an insured service, even after a qualified physician has deemed it medically necessary, jeopardizes her mental health and engages her security of the person. Dr. Kang states that Ms. Ghorbani’s anxiety about not being able to undergo SRS is detrimental to her psychological well-being.

*Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at 93,  
[2011] 2 SCR 134 [“*Insite*”].  
Official Moot Problem, *supra* para 1 at para 27(f).

[36] The AG indicates on record that one of the purposes of the conditions is to provide care that is medically necessary and beneficial. However, the effect of the SRS conditions is to exclude patients, like Ms. Ghorbani, from immediately receiving surgery when it is medically necessary and appropriate.

Official Moot Problem, *supra* para 1 at paras 29, 27(f).

*Canada (Attorney General) v Bedford* 2013 SCC 72 at 60, [2013] 3 SCR 1101 [“*Bedford*”].

[37] There is no evidence to conclude that Ms. Ghorbani suffers from an idealized or “halo effect” in her desire to undergo SRS. Ms. Ghorbani has been adjusting to life as a woman since June 2013. The transition process has made her “much happier and healthier living [her] life as a woman” and since November 2014, she has been “anxious to have SRS as soon as possible.” Ms. Ghorbani has already spent time adjusting and living in her desired gender role, in accordance with the objectives of the RLE period. Forcing her to begin the RLE period again under the observation of the Carter Institute and extend the time until she can potentially receive SRS, prevents her from exercising control over her body, causing her psychological suffering.

Official Moot Problem, *supra* para 1 at paras 15, 13.

[38] Ms. Ghorbani remains in a state of limbo that is detrimental to her psychological well-being. In November 2014, Ms. Ghorbani indicated that she had reached a “point of no return” in her hormone treatment and was anxious to have the surgery to complete her transition as soon as possible. Based on Ms. Ghorbani’s strong desire to receive the surgery, there is no indication that she would regret the decision to undergo SRS. Medical literature also demonstrates that very few patients regret having undergone SRS. Ms. Ghorbani’s transition is currently at a standstill provided that without a recommendation from the Carter Institute, the surgery will not be covered by OHIP.

Official Moot Problem, *supra* para 1 at paras 13, 27(f), 27(d).

[39] For Ms. Ghorbani to enter the GDP at the Carter Institute and undergo a minimum two-year RLE and hormone treatment period again is redundant. Moreover, the physicians at the Carter Institute might not provide a recommendation for Ms. Ghorbani, given that only fifteen percent of patients who enter the GDP ultimately receive a recommendation for SRS. Dr.

Forrester provided evidence that the most common reasons why recommendations for SRS are refused are “mental health issues, addiction, criminal involvement or lack of employment prospects.” However, denying vulnerable patients from receiving surgery based on social factors in which they already face disadvantage could end up perpetuating the psychosocial issues these patients face. Dr. Kang has provided a medical opinion that not being able to undergo SRS is making Ms. Ghorbani anxious. Justice Lamer (as he then was) in *Mills v The Queen* concludes that “uncertainty as to the outcome” contributes to a restriction of an individual’s security of the person. Waiting in the balance, undergoing a similar treatment program, only to have a limited chance of receiving a recommendation for surgery is detrimental to Ms. Ghorbani’s psychological well-being.

Official Moot Problem, *supra* para 1 at paras 23(d), 27(a).

*GJ*, *supra* para 32 at para 62 citing *Mills v The Queen*, [1986] 1 SCR 863 at pp 919-920.

## **B. The SRS Conditions infringe Alex Ghorbani’s liberty**

[40] Liberty is the right to make fundamental personal decisions without state interference. As stated by Justice Wilson, liberty can be considered “a condition of human self-respect and of that contentment which resides in the ability to pursue one’s own conception of a full and rewarding life.”

*R v Morgentaler*, [1988] 1 SCR 30, at page 166 and 164, 63 OR (2d) 281

[“*Morgentaler*”].

[41] SRS is an inherently personal matter because it affects an individual’s dignity and independence. SRS would improve Ms. Ghorbani’s self-esteem and personal integrity by allowing her to make a critical decision related to her body. Ms. Ghorbani contends that she currently feels “trapped in a body that is not [her] own.” SRS would assist Ms. Ghorbani in living a full and rewarding life in a body that she can identify as her “own.”

*Godbout v Longueuil (City)* [1997] 3 SCR 844, at para 66, 152 DLR (4th) 577.

*Carter, supra* para 32 at para 68.  
Official Moot Problem, *supra* para 1 at para 15.

[42] Favouring the government's position that only those physicians at the Carter Institute can recommend the insured procedure ignores the immediate medical necessity of SRS in Ms. Ghorbani's case, as determined by Dr. Kang. An assessment of the patient's best interest should be based on the "nature, purpose and utility of the recommended medical treatment." The government's assumption is that only physicians at the Carter Institute can determine what is in the patient's best interest. However, Dr. Kang has been treating Ms. Ghorbani since the summer of 2013 and is in an appropriate position to determine what is, or is not, in her patient's best interest.

*AC v Manitoba*, 2009 SCC 30 at para 96, [2009] 2 SCR 191 ["*AC v Manitoba*"].  
Official Moot Problem, *supra* para 1 at para 9.

[43] Ms. Ghorbani, as a "competent adult" free to make decisions about her "own moral destiny," is able to decide whether the risks of surgery outweigh the benefits. However, the Carter Institute's conditions make it very onerous for Ms. Ghorbani to exercise a personal choice that is also supported by a specialized medical opinion. Similar to Justice Wilson's reasoning in *R v Morgentaler*, the SRS Conditions prevent Ms. Ghorbani from exercising the decision to undergo surgery, and instead rely on a committee of physicians. The Supreme Court in a unanimous decision noted, even if the risks rise to the possibility of death, this will not vitiate the right to be able to consent to the medical procedure. Following this ruling, Ms. Ghorbani should be able to consent to the surgery, even if there are risks associated with the procedure.

*AC v Manitoba, supra* 42 at 81 citing Giles Scofield article.  
*Carter, supra* para 32 at 64 and 67 citing *Blencoe, supra* para 35 at para 54.  
*Morgentaler, supra* para 40 at pg 172.

[44] The Carter Institute’s conditions require an additional extended review by physicians from the Institute before a recommendation for SRS is provided and the patient can consent to the surgery. The SRS Conditions at the Carter Institute prevent Ms. Ghorbani from consenting to surgery that has already been recommended by Dr. Kang. This prevents her from exercising her right to make a fundamentally personal decision and receive an insured and medically necessary procedure.

**C. The infringements of Alex Ghorbani’s right to liberty and security of the person do not accord with the principles of fundamental justice**

[45] The SRS Conditions do not accord with the principles of fundamental justice. Once the state has interfered with an individual’s security of the person, the *Charter* requires that the interference conform with the principles of fundamental justice. In this case, the conditions at the Carter Institute are arbitrary because they prevent patients in need of surgery from receiving SRS. The conditions are also overbroad because they disregard recommendations made by outside physicians that specialize in transgender care. Finally, the conditions are grossly disproportionate to their purpose because they prevent patients, like Ms. Ghorbani, who medically and immediately require the surgery from receiving it.

*Morgentaler, supra* para 40 at para 53.

(I) The SRS Conditions are arbitrary

[46] The SRS Conditions are arbitrary because they are “not capable of fulfilling [their] objectives.” The SRS Conditions infringe Ms. Ghorbani’s Section 7 rights and prevent her from receiving the surgery. The SRS Conditions do not further the greater public good because they prohibit certain individuals from receiving insured surgery, instead of protecting them. In this way they are “manifestly unfair.”

*Carter, supra* para 32 at para 83.  
*Chaoulli, supra* at para 32 at paras 130-31.

[47] A law is arbitrary where it is inconsistent with its objective, or is “not capable of fulfilling its objectives.” Not only are the SRS Conditions inconsistent with the goals of the government, they also undermine the goals set out by the government.

*Carter supra* para 32 at para 83.

*(i) The SRS Conditions are inconsistent with their objectives*

[48] One of the purposes of the SRS Conditions, according to the AG’s statement on record, is to ensure that OHIP members are provided with care that is medically necessary and beneficial. Another arbitrary effect of the conditions is that surgery deemed “medically necessary” by a specialist in transgender care is not insured under OHIP. Not only is this inconsistent with the intended purpose of the conditions, it also causes significant harm to patients like Ms. Ghorbani, for whom the benefit of insured surgery is not provided. It is in Ms. Ghorbani’s best interest to have the surgery immediately.

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

*(ii) The SRS are inconsistent with international standards*

[49] The ITHA guidelines for SRS can substitute the criteria set by the Carter Institute to enable improved access to SRS. Two distinguishing features exist between the ITHA and the Carter Institute’s conditions. First, the ITHA criteria are used as “guidelines” as opposed to a stringent checklist. Second, the recommended RLE period of living in a gender role consistent with the patient's gender identity is only one year as opposed to a minimum of two years imposed by the Carter Institute.

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

[50] The existence of the ITHA guidelines suggests that there are less stringent methods to ensure that patients receive the care that they require. The ITHA standards demonstrate that there are less stringent conditions in place, including a shorter RLE period. Having one institute use strict conditions to determine patient suitability for surgery while ignoring any other recommendations from qualified physicians is both arbitrary and unfair.

*AC v Manitoba, supra* para 42 at paras 81-83, 108.

(II) The SRS Conditions are overbroad

[51] The SRS Conditions are overbroad in that they make it possible to deny Ms. Ghorbani from receiving a medically necessary surgery after it has been recommended by a specialist. Overbreadth is triggered when the law “goes too far by denying the rights of some individuals in a way that bears no relation to the object.” The SRS conditions are broader than necessary to accomplish the purpose set out by the AG on record and limit Ms. Ghorbani’s rights for no reason.

*Carter, supra* para 32 at para 85.

*R v Heywood*, [1994] 3 SCR 761 at para 49, 120 DLR (4th) 348 [“*Heywood*”].

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

[52] Chief Justice McLachlin in *Canada v Bedford* recognized that when a law exists “to make enforcement more practical” but affects an individual in a manner that is not rationally connected to its purpose, such law may be considered overbroad. In this case, the Carter Institute controls the individuals in the GDP and who proceed to receive a recommendation for SRS. In enforcing the objectives outlined by the AG on record, the Carter Institute’s conditions exclude individuals from receiving a recommendation for SRS. This is done without ample consideration for individuals, like Ms. Ghorbani, who are being excluded from receiving insured SRS when it has been declared both medically necessary and beneficial.

*Bedford, supra* para 36 at para 113.  
Official Moot Problem, *supra* para 1 at paras 18, 19, 22.

[53] The effect of the SRS Conditions prohibits individuals, like Ms. Ghorbani, from receiving the insured surgery. The SRS Conditions also deny Ms. Ghorbani any alternative option than seeking and completing the entire treatment program at the Carter Institute. The Carter Institute does not have any method in place to distinguish individuals like Ms. Ghorbani from people who have not yet begun any form of treatment. This imposes a significant burden on patients.

[54] To be eligible to receive a recommendation for SRS, Ms. Ghorbani would have to repeat the treatment process under the oversight of the Carter Institute, which is redundant. The SRS Conditions provide no deference to the fact that she has a qualified physician's recommendation to undergo SRS, or that she has already completed over 20 months of hormone therapy and RLE. In this way, the program is overbroad.

Official Moot Problem, *supra* para 1 at para 9.

(III) The SRS Conditions are grossly disproportionate to their objectives

[55] The principle of gross disproportionality is infringed if the conditions restrict the individual's life, liberty, or security of the person in a way that is "completely out of sync with the object of the law." The SRS Conditions are inconsistent with the purpose outlined by the AG, since they prevent individuals who require the surgery from receiving it, infringing their liberty and security of the person.

*Carter, supra* para 32 at para 89 citing *Bedford, supra* para 39 at para 125.  
*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 1 SCR 3 [2002] at 47,  
1 SCR 3 at 47 [*"Suresh"*].

[56] The refusal to exempt individuals who require SRS from the stringent conditions imposed by the Carter Institute effectively denies them access to an insured health service and impacts

their psychological well-being. This is grossly disproportionate to one of the purposes of the SRS Conditions, which is to provide care that is medically necessary and beneficial, and does not fall within the broader interests of Ontario’s healthcare system. Similarly to the Court’s reasoning in *Carter* the impact of the SRS Conditions “imposes unnecessary suffering on affected individuals, [and] deprives them of the ability to determine what to do with their bodies.”

*Insite*, *supra* para 35 at para 99.  
Official Moot Problem, *supra* para 1 at para 27(e).  
*Carter*, *supra* para 32 at para 90.

[57] Depriving Ms. Ghorbani the right to liberty or security of the person based on the stringent application of the SRS Conditions violates her Section 7 right to liberty and security of the person and is not in accordance with the principles of fundamental justice.

**Issue 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*?**

[58] Section 1 of the *Charter* guarantees:

“... the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

*Charter*, *supra* 2 at s 1.

[59] The SRS Conditions are not a reasonable limit on an individual's Section 15 and Section 7 rights. Justice Iacobucci’s framework from *Egan* will be used to establish that the SRS Conditions are not saved under Section 1. In *Egan*, Justice Iacobucci held:

First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right.

*Egan v Canada* [1995] 2 SCR 513 at para 182, 124 DLR (4th) 609 [“*Egan*”].

[60] Assessing the impact of the conditions per Section 1 is not a narrow analysis of their effects on one person, rather a broader analysis of whether the impact is justified “on the basis of an overarching public goal.” While the purpose of the conditions is pressing and substantial, the SRS Conditions are not reasonably and demonstrably justified in a free and democratic society. They are not proportionate to their objective, and they are not rationally connected to the aim of providing OHIP members with care that is medically necessary and beneficial. They do not minimally impair the rights of transgender patients. Finally, the deleterious effects of the SRS Conditions far outweigh the benefits, because they exclude patients from receiving SRS even when it is deemed to be medically necessary.

*Bedford, supra* para 36 at para 125.

*Insite, supra* para 35 at para 137.

*Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras 38-104, [2009] 2 SCR 567 [“*Hutterian Brethren*”].

*RJR-MacDonald Inc v. Canada*, [1995] 3 SCR 199 at para 61, 127 DLR (4th) 1 [“*RJR-MacDonald*”].

[61] While deference to the government when assessing legislative provisions is warranted, the government cannot provide services in a way that completely disregards an individual’s *Charter* rights. The SRS Conditions function in an exclusionary manner since they threaten individuals’ liberty, security, and equality rights. Justice Cory in *Vriend v Alberta* acknowledges that, “the notion of judicial deference to legislative choices, should not be used to completely immunize certain kinds of legislative decisions from *Charter* scrutiny.” While specialized treatment of transgender patients is important and the SRS Conditions instituted by the government attempt to address this issue, they are an inappropriate way to provide insured healthcare. Instead of providing medically necessary surgery, they prevent some individuals

from being able to receive insured SRS. The SRS Conditions disregard transgender patients' *Charter* rights under the pretence that they are attempting to ameliorate their position. Deference to the government in this case is therefore not warranted.

*Vriend v Alberta*, [1998] 1 SCR 493, at para 126, 54 156 DLR (4th) 385 [“*Vriend*”].  
*Hutterian Brethren*, *supra* para 60 at para 37.

#### **A. The SRS Conditions are prescribed by law**

[62] The SRS Conditions are prescribed by law since they are part of the Schedule of Benefits under Regulation 552 of the Ontario *Health Insurance Act*. The SRS Conditions establish that the only way an individual will be eligible for surgery is if they are accepted into and complete the GDP at the Carter Institute.

Ontario *HIA*, *supra* para 3.

#### **B. The SRS Conditions are pressing and substantial in nature**

[63] The Appellant concedes that the SRS Conditions attempt to serve a pressing and substantial objective. According to the AG on record, the SRS Conditions are part of a larger goal to ensure the safety of all Ontario patients and control the costs of OHIP. Controlling health care expenditures and providing patients with safe access to surgery are significant goals and important for the Canadian government to meet.

Official Moot Problem, *supra* para 1 at para 29.  
*Hutterian Brethren*, *supra* para 60 at para 41.

#### **C. The SRS Conditions are not reasonably and demonstrably justified**

[64] The SRS Conditions are not reasonably and demonstrably justified. They violate transgender patients' Section 15 rights, because they are not rationally connected to providing health care access that is medically necessary for patients in Ontario. They do not minimally impair Ms. Ghorbani's rights to equality under the law, because they do not fall within a

reasonable range of alternatives, such as deferring to qualified physicians outside of the Carter Institute or the ITHA guidelines that can also meet their objective. The deleterious effects of the SRS Conditions in omitting patients for whom the surgery is medically and immediately necessary outweigh any benefits they provide.

[65] The SRS Conditions also violate Ms. Ghorbani's Section 7 *Charter* rights, which is rarely justified by the public or social interests under Section 1. In *Re BC Motor Vehicle Act*, Justice Lamer (as he then was) concluded that Section 1 justifies the violation of an individual's Section 7 right only "in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like." The purpose that the government seeks by implementing the SRS Conditions would not fall into these exceptional cases. The objectives of the SRS Conditions are thus not important enough to "overrid[e] a constitutionally protected right or freedom."

*R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at pg 352 [*"Big M Drug Mart"*].  
*Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at pg 85, 24 DLR (4th) 536 [*"BC Motor Vehicle"*].  
*G(J)*, *supra* para 32 at para 99.  
Official Moot Problem, *supra* para 1 at para 29.

(I) The SRS Conditions are not rationally connected to their objective

[66] To be rationally connected to the objective the SRS Conditions must not be arbitrary, unfair, or based on irrational considerations; however, this is their effect. Establishing a rational connection may not be "particularly onerous" for the government. However, there must be a reasonable inference that the method chosen by the government will assist in bringing about the their objectives. The conditions serve as a screening process that prevents patients from accessing SRS. This screening process prevents the government from achieving their objective of providing OHIP members with care that is medically necessary and beneficial. Although the

screening process may minimize expenditure for OHIP, courts are reluctant to “justify infringements of *Charter* rights on the basis of budgetary constraints.” Therefore, the SRS Conditions are not rationally connected to their purposes indicated by the AG on record.

*R v Oakes* [1986] 1 SCR 103 at paras 69-70, 1986 CanLII 46 (SCC) [“*Oakes*”].

*Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at para 228 [2000] 2 SCR 1120.

*Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30 at para 40, [2007] 2 SCR 610.

*Newfoundland (Treasury Board) v N.A.P.E.*, 2004 SCC 66 at para 72, [2004] 3 SCR 381 [“*Nape*”].

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

(II) The SRS Conditions do not minimally impair Ms. Ghorbani’s Section 15 and Section 7 rights

[67] Strict application of the SRS Conditions deny transgender patients the right to receive equal access to insured medical procedures. Insured health care is available to Canadian citizens who require a surgical procedure recommended by a physician and considered “medically necessary.”

Official Moot Problem, *supra* para 1 at para 27(f).

[68] Strict application of the SRS Conditions also prevents individuals in need of the surgery from being able to receive it, which fundamentally opposes the right to liberty and security of the person.

[69] There are less harmful means of achieving the legislative goal. To be minimally impairing, the government must “show that the measures at issue impair the right ... as little as reasonably possible in order to achieve the legislative objective.”

*Hutterian Bretheren*, *supra* para 60 at para 54.

[70] It would be minimally impairing from a Section 15 and Section 7 perspective for the SRS Conditions to be applied as guidelines instead of a strict checklist. For some individuals, twelve

months of RLE and a shorter hormone therapy period is all that is necessary; this is recognized by both Dr. Kang and the ITHA. Medical procedures provided to transgendered persons is an emerging medical field; therefore, it is too soon to entirely discredit opinions by other specialists in the field and rigidly apply only the conditions of the Carter Institute.

Official Moot Problem, *supra* para 1 at paras 19, 27(c).

(III) The negative effects of the SRS Conditions far outweigh any benefit

[71] Assessing “the justification of the law imposing the limit will often turn on whether the deleterious effects are out of proportion to the public good achieved by the infringing measure.” The SRS Conditions violate Section 15 rights by limiting access to insured medical services provided for transgender people in a way that does not occur for cisgender Ontarians. In this case, preventing access to surgeries when a transgender patient requires them is an unreasonable outcome and does not accord with the public good.

*Hutterian Brethren, supra* para 60 at para 78.

[72] The deleterious effect of the SRS Conditions amounts to an infringement of Ms. Ghorbani’s Section 7 rights by impeding her from being able to make fundamental personal decisions and causing her significant psychological distress. The conditions prevent Ms. Ghorbani, and others in a similar position to her, from receiving a medically necessary surgery. The SRS Conditions are disproportionate to the objectives of the law since the law prevents a medically necessary surgery from being provided to a patient.

Official Moot Problem, *supra* para 1 at para 27(f).

[73] Serving the public good, which lies at the heart of the Section 1 analysis, is not achieved with the SRS Conditions. The conditions leave transgender individuals seeking insured SRS no choice but to obtain entry into the GDP at the Carter Institute. Because only fifteen percent of

patients are provided a recommendation, those excluded may be appropriate candidates, and may ultimately be denied surgery due to the SRS Conditions. Prohibiting recommendations from other qualified specialists will lead to transgender patients suffering discrimination and psychological stress that is detrimental to their well-being.

*Bedford, supra* para 36 at para 125.

Official Moot Problem, *supra* para 1 at para 27(d).

## **PART V: ORDER SOUGHT**

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[74] The Appellant respectfully requests the court issue a declaration of invalidity and suspend the provision from the Schedule of Benefits under Section 552 of the Ontario *Health Insurance Act* for twelve months. The Appellant also asks the Court to grant an exemption for Ms. Ghorbani so that she can receive the insured surgery immediately.

Ontario *HIA*, *supra* para 3.

## PART VI: TABLE OF AUTHORITIES

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### 6.1 LEGISLATION

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