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

FACTUM OF THE RESPONDENT

COUNSEL FOR THE RESPONDENT

TEAM 7

TABLE OF CONTENTS

PART I – OVERVIEW

[1] This case is about the Ontario government taking steps to better serve transgender patients' medical needs. The Gender Dysphoria Program (GDP) at the Elias Carter Institute for Mental Health Care in Ottawa (the "Carter Institute") is an internationally-renowned gender identity clinic. The GDP has received many public accolades, and all program physicians are full-time specialists in the treatment of transgender individuals. The Ontario Provincial Health Insurance Plan (OHIP) covers many forms of treatment for gender dysphoria, including sex-reassignment surgery (SRS). Under the Ontario *Health Insurance Act*, to be eligible for SRS coverage, a patient must first complete the GDP at the Carter Institute. After receiving a referral from a Carter Institute physician, a patient can obtain OHIP-funded SRS anywhere in Canada. The above provisions are known as the "SRS Conditions."

> Official Problem, Wilson Moot 2016 at para 21 [Official Problem].
> *Health Insurance Act*, RSO 1990 cH6, Schedule of Benefits under Regulation 552 [SRS Conditions].

[2] Eligibility for SRS depends on a patient's individual gender dysphoria. Treatment for gender dysphoria can take many forms, including hormone treatment, counselling, and surgery. Since SRS is a complex treatment, among less intrusive treatment options, the GDP's physicians established criteria to determine the most appropriate care for transgender patients. These criteria are modeled on guidelines published by the International Transgender Health Association (ITHA). The Carter Institute's SRS referral criteria are:

(1) Persistent, well-documented gender dysphoria;

(2) Age of majority and capability of giving informed consent;

(3) 18 months of continuous hormone therapy;

(4) A minimum two-year real life experience (RLE) period, overseen by the Carter Institute;

(5) The patient's physician at the GDP must be satisfied that there are no physical, mental health, or psychosocial factors present that would prevent the patient from adjusting socially post-operation.

Official Problem, *supra* para 1 at paras 22–23a–b.

[3] The question in this appeal is whether the SRS Conditions violate the Appellant's constitutional rights under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11, ss 7, 15 [*Charter*].

[4] The SRS Conditions do not infringe Ms. Ghorbani's equality rights. They fail to make a distinction based on an enumerated or analogous ground. The SRS Conditions, just as with other medical procedures, are requirements through which the government ensures patients receive the most appropriate care. The GDP is ameliorative in nature. It narrows the discrimination transgender individuals face by providing health care that facilitates transgender patients' best interests. Even if the SRS Conditions violated Ms. Ghorbani's equality rights, they are reasonably justified in a free and democratic society.

Charter, *supra* para 3, ss 1, 15.

[5] The SRS Conditions do not deprive Ms. Ghorbani of her right to life, liberty, or security of the person ("security"). The SRS Conditions ensure the physical and psychological well-being of transgender patients and do not constitute state interference. The government has an obligation to set appropriate standards for the medical services that it provides, particularly with respect to a complex treatment option. In the alternative, any deprivation to Ms. Ghorbani's life, liberty, or security rights is in accordance with the principles of fundamental justice.

Charter, *supra* para 3, s 7.

PART II – STATEMENT OF FACTS

1. Factual Background

[6] The Carter Institute's criteria to recommend SRS are determined by a committee of physicians that oversees the GDP. Several factors, outlined below, impact the complexity of SRS as a treatment option.

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

i. Medical Risks:

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

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

ii. Emerging Medical Field:

[8] Best practices for transgender patients are only beginning to be taught in Canadian medical schools. Very few physicians in Ontario outside the Carter Institute consider themselves qualified to make a referral for SRS. Many physicians consider treating transgender patients to be outside their scope of practice.

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

iii. Availability of Other Treatment Options:

[9] Dr. Logan Forrester, the Director of the GDP at the Carter Institute, testified that not all individuals with gender dysphoria medically require or desire SRS. For many patients, gender dysphoria can be managed by living in their chosen gender role, hormone treatment, and counselling.

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

iv. Emphasis on the Real Life Experience Period:

[10] The RLE period's purpose is to give patients the opportunity to experience and socially adjust to their new gender role. It ensures that patients are aware of the social, economic, and legal challenges they are likely to face, before undergoing irreversible surgery. The RLE period involves the patient "living and presenting consistently, at all times and across all settings of life, in their desired gender role, including coming out as transgender to intimate partners, family, friends, and others (e.g. co-workers, teachers)." The GDP committee is concerned that RLE periods shorter than two years may cause patients to experience a "halo effect" preventing them from assessing whether they truly need and desire SRS.

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

v. Social Considerations:

[11] Dr. Stella Kang, in evidence for the appellants, testified she would not recommend SRS for patients who have no meaningful social supports for their transition. Similarly, Dr. Forrester testified that without proper pre- and post-operative treatment and psychosocial supports, SRS can have severe negative psychological effects when performed on adults.

Official Problem, *supra* para 1 at paras 25, 28.

vi. Competing Medical Interests:

[12] In Dr. Forrester's view, at least some patients medically require SRS to treat gender dysphoria. However, some physicians in the medical community believe that such procedures are more aesthetic than medically necessary. Opposition to SRS is usually based on competing medical interests, including the "do not harm" principle, the risk of complications from SRS procedures, and the fact that SRS is not a "cure" for gender dysphoria.

Official Problem, *supra* para 1 at paras 23f–g.

2. Procedural History

[13] Ms. Ghorbani, a transgender woman seeking SRS, brought an application to the Ontario Superior Court of Justice, asking for a declaration that the SRS Conditions infringe upon her section 7 and 15 *Charter* rights. Justice Stern allowed her application in whole.

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

[14] The Ontario Court of Appeal reversed the trial judge's finding. Justice Gadomski found that the SRS Conditions are not discriminatory and do not infringe Ms. Ghorbani's security right. Even if the SRS Conditions had infringed Ms. Ghorbani's *Charter* rights, they would have been justified under section 1 as minimally impairing and proportionate.

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

[15] Ms. Ghorbani has been granted leave to appeal the Ontario Court of Appeal's judgment to the High Court of the Dominion of Canada.

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

PART III – STATEMENT OF POINTS IN ISSUE

[16] The issues in this appeal are as follows:

Issue 1: **Do the SRS Conditions infringe Ms. Ghorbani's rights under section 15 of the *Charter*?**

The SRS Conditions do not infringe upon Ms. Ghorbani's section 15 rights. They serve an ameliorative purpose protected under section 15(2). Moreover, the SRS Conditions do not infringe section 15(1). They do not make a distinction based on an enumerated or analogous ground, or lead to discrimination in the form of disadvantages, prejudice or stereotyping.

Issue 2: **If the SRS Conditions infringe Ms. Ghorbani's rights under section 15, is the infringement justified under section 1 of the *Charter*?**

The SRS Conditions are rationally connected to a pressing and substantial objective. They are minimally impairing and are not outweighed by any deleterious effects.

Issue 3: **Do the SRS Conditions infringe Ms. Ghorbani's rights under section 7 of the *Charter*?**

The SRS Conditions do not deprive Ms. Ghorbani of her right to life, liberty, or security. Because the SRS Conditions are not arbitrary, overbroad, or grossly disproportional, any deprivation caused by them is in accordance with the principles of fundamental justice.

PART IV – ARGUMENT

Issue 1: The SRS Conditions do not infringe Ms. Ghorbani's equality rights under section 15 of the *Charter*

[17] Section 15 of the *Charter* reads:

> (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 (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 3, s 15.

1. The SRS Conditions do not infringe section 15 of the *Charter*

[18] The jurisprudence establishes a two-part test for assessing whether a law breaches section 15 of the *Charter*. First, the Appellant must prove that the law creates an adverse distinction based on an enumerated or analogous ground. Even if the first step is met, the government can justify a law as an affirmative program if it is remedial in nature. Second, the Appellant must show that the distinction perpetuates arbitrary disadvantages, stereotypes, or prejudice.

> *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at paras 17, 40 [*Kapp*].
> *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, [2015] 2 SCR 548 at paras 19–20 [*Taypotat*].
> *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61 at para 349 [*Quebec v A*].

[19] The SRS Conditions do not draw a distinction based on an enumerated or analogous ground. Even if they did draw a distinction based on patients' gender identity, they are justified under section 15(2) of the *Charter* as an ameliorative program.

Regardless of whether they are justified under section 15(2), the SRS Conditions do not perpetuate disadvantages, stereotypes, or prejudice, and thus do not infringe section 15(1) of the *Charter*.

2. The SRS Conditions do not draw a distinction based on an enumerated or analogous ground

[20] Gender identity and gender expression are protected grounds under section 15 of the *Charter*. The SRS Conditions do not create a distinction based on Ms. Ghorbani's gender identity, but rather, on necessary medical requirements.

i. Gender identity and gender expression are protected grounds under section 15

[21] The Respondent concedes that gender identity and gender expression are protected grounds under section 15. The absence of gender identity and gender expression in section 15 of the *Charter* does not mean that they are not protected by the equality guarantee. In *CF v Alberta*, Justice B.R. Burrows concluded that the:

> [d]istinction 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" in *Charter* s. 15(1) is interpreted so narrowly as to exclude the characteristics of transgendered persons that make them transgendered, then, at very least, the distinction is made on a ground analogous to sex.

If gender identity and gender expression are not protected under the enumerated ground of sex, then they are protected as an analogous ground. This reasoning is consistent with Justice McLachlin (as she then was) and Justice Bastarache's ruling in *Corbière*, that section 15 targets the "denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion." The GDP's existence is proof that the government does not have a

"legitimate interest in expecting" transgender individuals to change in order to receive equal treatment under the law.

> *CF v Alberta (Vital Statistics)*, 2014 ABQB 237 at para 39 [*CF v Alberta*].
> *Corbière v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13 [*Corbière*].

ii. The SRS Conditions do not draw a distinction based on gender identity

[22] The SRS Conditions are focused on transgender patients' best health interests, not gender identity. They distinguish between necessary and appropriate qualifications, including a patient's psychological well-being, social supports, physical health, and overall ability to adjust socially post-operation. SRS, like other surgeries covered by OHIP, requires patients to meet appropriate qualifications to undergo treatment. Such conditions protect patients, by ensuring that the government only provides medically necessary care.

[23] The SRS Conditions do not impose additional "burdens, obligations, or disadvantages" on transgender individuals that are not imposed upon others members of society. Conditions on medical treatments are common. For example, in *Flora*, Justice Cronk upheld the constitutionality of the "Milan Criteria" standards, which OHIP used to determine adult patient eligibility for cadaveric liver transplants. Based on the Milan Criteria, a decision to perform a liver transplant surgery considered organ supplies, the patient's survival prospects, and ethical concerns relating to the risks to donors. By imposing such conditions, the government meets its obligation to only provide care that is best-suited for patients' medical needs.

> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at pages 174–75 [*Andrews*].
> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 26 [*Law*].
> *Flora v Ontario Health Insurance Plan*, 2008 ONCA 538 at paras 9, 74 [*Flora*].

3. If the SRS Conditions create a distinction based on gender identity, the distinction meets the purpose of section 15(2) to ameliorate the position of transgender individuals in society

[24] Substantive equality often requires differential treatment. Differential treatment based on an enumerated or analogous ground is upheld when the impugned law aims to improve the condition of disadvantaged individuals or groups. Once a distinction has been made based on an enumerated or analogous ground, it "is open to the government to show that the impugned law, program or activity is ameliorative and, thus, constitutional."

> *Kapp*, *supra* para 18 at paras 32, 40.
> *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, [2011] 2 SCR 670 at para 44 [*Cunningham*].

i. The SRS Conditions meet the goal of section 15 to combat discrimination and ameliorate the position of disadvantaged groups within society

[25] The SRS Conditions are designed to remedy disadvantages and obstacles faced by the transgender community by providing access to needed medical care. Very few physicians in Ontario are qualified to care for transgender individuals. Best practices for treating transgender patients are only beginning to be taught in medical schools across Canada. Responding to the transgender community's need for appropriate medical care, the government established the GDP. As a result, Ontario patients can access an internationally-renowned gender identity clinic and benefit from the experience of physicians working full-time in the treatment of transgender individuals.

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

[26] The aim of the Carter Institute's GDP and the SRS Conditions is to protect transgender patients from under-qualified physicians and to meet the government's obligation to provide an exceptional standard of health care to all Ontarians. Given the limited expertise among Ontario's physicians, substantive equality—ensuring that the standard of care is of equal quality for all

Ontario residents—is only possible through a program designed specifically for transgender patients. Staffed with physicians specializing full-time in the treatment of transgender patients, the GDP ensures that Ontario's transgender community benefits from the same standard of care received by other members of society.

> *Kapp*, *supra* para 18 at paras 33, 41, 49.
> *Cunningham*, *supra* para 24 at para 44.
> Official Problem, *supra* para 1 at paras 23c, 29.

ii. The SRS Conditions advance the government's ameliorative objective

[27] The GDP and SRS Conditions are necessary to meet the government's obligation to provide medical care that meets the best interests of transgender individuals. By administering SRS treatment only through the GDP, the government protects transgender patients from receiving care from unqualified physicians. Moreover, transgender patients' interests are best served by the longer RLE time, which protects patients from making ill-informed assessments of whether they truly need and desire the treatment. By taking into consideration the specific needs and best interests of transgender patients, the SRS Conditions are sufficiently connected to the government's ameliorative objective.

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

[28] The fact that controlling the cost of healthcare is one objective among others for the SRS Conditions does not diminish their importance to achieving the government's goal. Recognizing the unlikelihood that "a single purpose will motivate any particular program," the government must only prove that the state's action will contribute to the law's ameliorative purpose.

> *Kapp*, *supra* para 18 at paras 49, 51–52.
> *Cunningham*, *supra* para 24 at para 74.

[29] The GDP and the SRS Conditions advance the government's ameliorative purpose. The GDP achieves the government's goal to ensure patients receive appropriate medical care, as a

program administered by physicians specializing full-time in the treatment of SRS for transgender patients. The SRS Conditions safeguard patients from ill-advised surgery by requiring a twenty-four month RLE period. Given the many difficulties of transitioning, from "coming out," to the physical changes resulting from continuous hormone therapy, the SRS Conditions provide patients the necessary time to truly experience and socially adjust to living in their chosen gender role.

Kapp, *supra* para 18 at para 52.
Cunningham, *supra* para 24 at para 45.
Official Problem, *supra* para 1 at paras 20, 22, 23c.

4. The SRS Conditions do not perpetuate arbitrary disadvantages based on Ms. Ghorbani's gender identity

[30] To infringe section 15(1), the government's actions must perpetuate disadvantages, stereotypes, or prejudice, based on the claimant's membership to a protected group. Not only do the SRS Conditions not exacerbate disadvantages experienced by transgender individuals, they do not create or perpetuate prejudice or stereotypes.

Quebec v A, *supra* para 18 at para 349.
Taypotat, *supra* para 18 at paras 19–20.

i. The SRS Conditions do not perpetuate arbitrary disadvantages

[31] A distinction based on an enumerated or analogous ground under section 15(1) will not be discriminatory in all circumstances. The focus of the section 15(1) inquiry is the actual effects of a challenged law or practice on the individual or groups to whom it applies, or to those excluded from its application.

Andrews, *supra* para 23 at page 165.
Law, *supra* para 23 at para 28.
Withler v Canada (Attorney General), 2011 SCC 12, [2011] 1 SCR 396 at para 31.
Quebec v A, *supra* para 18 at para 233.

[32] Rather than disadvantaging patients, the SRS Conditions take into consideration the specific needs of transgender patients. Whereas most surgeries respond to patients' physical health needs, SRS is recommended based on a patient's psychological condition, experience with hormone therapy, and real life experience living in the gender role congruent with their gender identity. By ensuring transgender patients receive appropriate medical care, the SRS Conditions narrow the gap between transgender individuals and the rest of society.

ii. The SRS Conditions do not perpetuate prejudice against transgender individuals

[33] The SRS Conditions do no perpetuate prejudicial views about transgender individuals. In *Quebec v A*, Justice Abella described prejudice as "the holding of pejorative attitudes based on strongly held views about the appropriate capacities or limits of individuals or the groups of which they are a member." Rather than perpetuating prejudice, the SRS Conditions are modeled to meet the needs and circumstances of transgender patients. They are derived from international guidelines, which are accepted within the medical community as necessary means to screen patients and to ensure that the surgery is provided only for those who will benefit from it.

> *Quebec v A*, *supra* para 18 at para 327.
> Official Problem, *supra* para 1 at paras 17, 23b, 28.

iii. The SRS Conditions do not perpetuate stereotypes based on gender identity

[34] The SRS Conditions do not perpetuate stereotypes about transgender individuals. They do not "[reflect] and [reinforce] existing inaccurate understandings of the merits, capabilities and worth" of transgender individuals, resulting in further stigmatization or unfair treatment. Nor do they attribute "characteristics to members of a group regardless of their actual capacities." By providing GDP physicians with the minimum necessary time to make an informed assessment,

the SRS Conditions ensure that the specific needs and capacities of individual patients are reflected in their treatment.

Law, *supra* para 23 at para 70.
Quebec v A, *supra* para 18 at para 327.

Issue 2: If the SRS Conditions infringed Ms. Ghorbani's section 15 *Charter* right, the infringement is justified pursuant to section 1 of the *Charter*

[35] Section 1 of the *Charter* reads:

> The Canadian Charter of Rights and Freedoms 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* para 3, s 1.

[36] Should the Court find that the SRS Conditions infringe Ms. Ghorbani's section 15(1) *Charter* rights, the infringement is demonstrably justified in a free and democratic society, pursuant to section 1 of the *Charter*.

[37] The purpose of the SRS Conditions is pressing and substantial. Their aim is to protect the best interests of transgender patients, when choosing a complex and irreversible treatment option. The SRS Conditions are rationally connected to the goal of providing appropriate care to transgender patients. The SRS Conditions minimally impair a patient's right to SRS, while meeting the government's goal to ensure that care is provided only to those patients for whom treatment would be beneficial. Although the SRS Conditions are more burdensome for some candidates, the benefits of the GDP and its requirements outweigh any deleterious effects.

R v Oakes, [1986] 1 SCR 103 at paras 69–70 [*Oakes*].
Egan v Canada [1995] 2 SCR 513 at para 182, 124 DLR (4th) 609.

1. The SRS Conditions warrant deference as a response to a complex social problem

[38] When assessing whether a law or act is a reasonable limit under section 1, the Supreme Court of Canada has recognized that a measure of leeway must be accorded to a government to balance competing interests. If the limit falls within a range of reasonable alternatives, courts must show deference to the legislature. Deference is especially important where the impugned scheme is complex, touches on overlapping and conflicting interests, and involves the expenditure of government funds. The court must show deference when the government establishes that the proper weight was given to each of the competing interests.

> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 at para 35 [*Hutterian Brethren*].
> *Chaoulli v Québec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791 at para 94 [*Chaoulli*].

[39] The SRS Conditions balance transgender patients' access to SRS with the objective to provide a high standard of medical care that ensures patients receive best-suited treatment. The decision to impose more stringent standards than the international guidelines reflects the GDP committee's unanimous belief that patients are best served by longer RLE periods and hormone treatment.

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

[40] The GDP committee's response to the health needs of transgender patients represents the type of decision for which the "bar of constitutionality must not be set so high." The GDP is an internationally-renowned gender identity clinic, with physicians specializing full-time in the care of transgender patients. The GDP is best situated to determine appropriate medical conditions for SRS. It is not the role of the judiciary to override the GDP committee's expertise. By second-guessing the GDP's medical decision-making, the judiciary would be overstepping its role and

threatening future "creative solutions to difficult problems."

Hutterian Brethren, *supra* para 38 at para 37.
Official Problem, *supra* para 1 at para 21.

[41] The SRS Conditions do not infringe the purpose of section 15(1). Section 1 of the *Charter* "does not demand that the limit on the right be perfectly calibrated." Instead, any limit ought to be "reasonable" and "demonstrably justified." Although the SRS Conditions are more burdensome to some applicants than others, the program falls within an acceptable range of policy choices that the government may use to achieve its goals.

Hutterian Brethren, *supra* para 38 at para 37.

2. The SRS Conditions are prescribed by law

[42] A limit is prescribed by law if it is authorized by statute and is clearly intelligible and accessible to those to whom it applies. The Schedule of Benefits under Regulation 552 was made pursuant to the Ontario *Health Insurance Act*. It is a valid use of regulatory power and thus satisfies the prescribed by law requirement.

SRS Conditions, *supra* para 1.
R v Oakes, *supra* 37 at para 62.
Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component, 2009 SCC 31, [2009] 2 SCR 295 at para 50.

3. The SRS Conditions serve a pressing and substantial objective

[43] A limit on a *Charter* right must serve a "pressing and substantial" purpose. The SRS Conditions' purpose is to protect the best interests of transgender patients, when choosing a complex and irreversible treatment option. Through the SRS Conditions, the Carter Institute's physicians assess patients' individual needs and risks associated with SRS treatment.

Oakes, *supra* para 38 at para 69.

4. The SRS Conditions are rationally connected to the law's objective

[44] To avoid limits being imposed on *Charter* rights arbitrarily, the government must "show a causal connection between the infringement and the benefit sought on the basis of reason or logic." To establish a rational connection between the SRS Conditions and the objective to provide appropriate care to transgender patients, the government need not show that the limitations imposed will achieve the goal in every case. Rather, the government must show that it is reasonable to suppose that the SRS Conditions may further the objective.

> *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 153 [*RJR-MacDonald*].
> *Hutterian Brethren*, *supra* para 38 at para 48.

[45] The SRS Conditions are rationally connected to the government's goal of serving transgender patients' best interests. The Carter Institute's referral criteria are enacted by the GDP's committee of physicians, through their collective specialized expertise in the treatment of transgender patients. These physicians unanimously agree that longer hormone therapy and RLE periods than suggested in the international guidelines are in transgender patients' best medical interests.

> Official Problem, *supra* para 1 at paras 21, 23b–c.

5. The SRS Conditions are minimally impairing

[46] The test at the minimum impairment stage is whether there is an alternative, less drastic means of achieving the government's objective. If the law falls within a range of reasonable alternatives, courts will not find it overbroad. The test does not require "identifying the Canadian province that has adopted the "preferable" approach to a social issue and requiring that all other

provinces follow suit." Rather, the question is "whether the limit imposed by the law goes too far *in relation to the goal the legislature seeks to achieve*."

Hutterian Brethren, *supra* para 38 at paras 54–55.
Quebec v A, *supra* at para 18 at paras 440–42 [emphasis in original].

[47] The Carter Institute's policies balance patients' access to SRS with the objective to provide the most appropriate care to each individual's specific needs. Less stringent conditions would not meet the GDP's objective to protect patients from unnecessary health risks or complications.

[48] Recommendations from physicians outside of the Carter Institute go against the government's objective to ensure transgender individuals enjoy the same standard of care given to other members of society. Requiring that a SRS recommendation be given only from the Carter Institute protects individuals from physicians across the province with insufficient experience providing medical care to transgender patients.

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

[49] The SRS Conditions are not unreasonable, they are "appropriately tailored" to ensure the well-being, stability and susceptibility of patients to treatment.

RJR-MacDonald, *supra* para 44 at para 96.

6. The benefits from the SRS Conditions outweigh any deleterious effects

[50] At the final balancing stage, a limit to a *Charter* right will only fall if the "deleterious effects are out of proportion to the public good achieved by the infringing measure."

Hutterian Brethren, *supra* para 38 at para 78.

[51] The beneficial effects from the SRS Conditions include the assurance that transgender Ontarians have access to qualified, experienced physicians, which ensures that the most appropriate treatment options are prescribed to patients. Although some other physicians may

possess the necessary qualifications to recommend SRS to transgender patients, the risk of exposure to under-qualified physicians or irregular medical standards would compromise the integrity of Ontario's health care system.

Issue 3: The SRS Conditions do not infringe Ms. Ghorbani's life, liberty, and security of the person rights under section 7 of the *Charter*

[52] Section 7 of the *Charter* states that:

> 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 3, s 7.

[53] The SRS Conditions do not violate Ms. Ghorbani's section 7 rights. The SRS Conditions do not interfere with Ms. Ghorbani's right to security, as they do not constitute state interference. The SRS Conditions protect transgender patients' physical and psychological well-being. The SRS Conditions do not interfere with Ms. Ghorbani's right to liberty, as they do not encompass her fundamental decision-making. The SRS Conditions do not engage Ms. Ghorbani's right to life, as there is no evidence that they place Ms. Ghorbani at risk of death. In the alternative, any interference to Ms. Ghorbani's section 7 rights is in accordance with the principles of fundamental justice.

> *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 at para 55 [*Carter*].

1. The SRS Conditions do not interfere with Ms. Ghorbani's right to security of the person

[54] The SRS Conditions do not interfere with Ms. Ghorbani's right to security. They enhance, rather than reduce, transgender patients' physical and psychological integrity. The Supreme Court of Canada held in *Carter*, that the security right "is engaged by state interference

with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering." The SRS Conditions do not constitute state interference nor cause physical or serious psychological suffering to transgender patients.

Carter, *supra* para 53 at para 64.

i. The SRS Conditions do not fall under the ambit of prohibitive action

[55] The SRS Conditions do not fall under the usual ambit of section 7, because they are not prohibitive in nature. The jurisprudence shows that state interference to a person's security typically encompasses a prohibition or outright unavailability caused by government action. For example, in *Carter*, a criminal prohibition on physician-assisted dying violated patients' security rights. In *Morgentaler*, a criminal prohibition on performing abortions, except by exemption, violated women's security rights. In *Bedford*, a criminal prohibition on bawdy-houses and living on the avails of prostitution violated sex workers' security rights. In *PHS Insite*, a prohibition on safe injection sites violated drug users' security rights. In contrast, the SRS Conditions do not prohibit SRS; the government is providing a medical service to transgender individuals.

Carter, *supra* para 53 at para 68.
R v Morgentaler, [1988] 1 SCR 30 at page 63 [*Morgentaler*].
Canada (Attorney General) v Bedford, 2013 SCC 72, [2013] 3 SCR 1101 at paras 91–92 [*Bedford*].
Canada (Attorney General) v PHS Community Services Society, 2011 SCC 44, [2011] 3 SCR 134 at paras 93–94 [*PHS Insite*].

[56] The government of Ontario does not have an obligation to provide SRS. As Chief Justice McLachlin held in *Gosselin*, a government does not have a positive obligation to provide social assistance. Similarly in *Chaoulli*, Chief Justice McLachlin and Justice Major held that "[the] *Charter* does not confer a freestanding constitutional right to healthcare." The SRS Conditions'

constitutionality must be interpreted in light of the government giving a service, rather than restricting a right.

> *Gosselin v Québec*, 2002 SCR 429, [2002] 4 SCR 429 at paras 81–83 [*Gosselin*].
> *Chaoulli*, *supra* para 38 at para 104.

ii. The SRS Conditions do not constitute state interference

[57] Courts have recognized that conditions on publicly-funded medical services do not constitute state interference, even when there are serious consequences for the well-being of some patients. In *Flora*, an Ontarian patient with liver cancer could not undergo an OHIP-covered liver transplant, because he did not satisfy the "Milan Criteria." He privately obtained treatment in England, where liver transplant criteria were applied more flexibly. Justice Cronk found that the Ontario government's decision not to reimburse Mr. Flora's life-saving surgery did not violate his security right. The Milan Criteria did not constitute state interference, because the government was providing a service and had not restricted Mr. Flora from receiving the treatment privately. Likewise in *Wynberg*, the Court found in providing assistance to pre-school autistic children under the age of six, but not older, the Ontario government did not violate the children's right to security. The government was not obligated to provide the service to every school-age autistic child, and it had not prevented the children's parents from obtaining the service privately.

> *Flora*, *supra* para 23 at paras 9, 23, 101, 107.
> *Wynberg v Ontario*, [2006] OJ No 2732 at paras 218, 220, 231 [*Wynberg*].

[58] *Flora* and *Wynberg* show that the SRS Conditions do not embody state interference. So-long as a government's regulations are not prohibitive in nature, courts give the legislature considerable discretion to determine the standards of medical services that it provides. The government has not prevented transgender patients from obtaining SRS privately. Instead, the

GDP is an ameliorative program to better serve the medical needs of transgender patients. As in *Flora*, the SRS Conditions require that patients fulfill certain medical conditions before obtaining a serious procedure. Because the Ontario government has an obligation to determine medical standards for the services that it provides, the SRS Conditions do not reach the level of deprivation that constitutes state interference with a person's security right.

iii. The SRS Conditions prevent physical and psychological harm

[59] Even if the SRS Conditions constitute state interference, they prevent, rather than cause, physical and serious psychological harm. The GDP is internationally-renowned, with full-time expert physicians in the treatment of transgender individuals. Its purpose is to act in the best interest of transgender patients. In light of SRS's complexity as a treatment option, the GDP committee imposes longer hormone therapy and RLE times than the ITHA guidelines. This is not done arbitrarily—it is based on the physicians' unanimous concern that the "halo effect" will impede patient decision-making with respect to other viable treatment options.

> *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at paras 59–60.
> Official Problem, *supra* para 1 at paras 21, 23a, 23c.

[60] The Respondent recognizes that in some cases, such as Ms. Ghorbani's, abiding by the SRS Conditions may cause a patient some psychological distress. However, for the security of patients, it is necessary that expert physicians carefully balance all aspects of patients' psychological well-being when determining referral criteria. In leaving this assessment to the GDP's expert physicians, the SRS Conditions do the exact opposite of interfering with transgender patients' security—they protect it.

2. The SRS Conditions do not interfere with Ms. Ghorbani's right to liberty

[61] The SRS Conditions do not affect Ms. Ghorbani's ability to make fundamental personal choices. As held by Justice Bastarache in *Blencoe*, "[although] an individual has the right to make fundamental personal choices free from state interference, such personal autonomy is not synonymous with unconstrained freedom." Ms. Ghorbani does not have a free-standing right to SRS, since it is not an appropriate treatment option for all transgender patients. Dr. Kang acknowledged that there is "no dispute in the medical community that SRS should not be available 'on demand' and that screening is necessary to ensure that it is performed only on patients who will benefit from it." Dr. Kang has also agreed that SRS should not be recommended for patients who do not have meaningful social supports for their transition. Because SRS is a treatment that requires patients to fulfill certain medical conditions, the GDP's criteria do not touch upon Ms. Ghorbani's liberty rights.

Blencoe v British Columbia (Human Rights Commission), [2000] 2 SCR 307 at para 54 [*Blencoe*].
Official Problem, *supra* para 1 at para 28.

3. The SRS Conditions do not engage Ms. Ghorbani's right to life

[62] There is no evidence that the SRS Conditions impose a risk of death upon Ms. Ghorbani. The Supreme Court of Canada held that "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, *supra* para 53 at para 62.
Official Problem, *supra* para 1.

4. In the alternative, any interferences with Ms. Ghorbani's rights to life, liberty, or security of the person are in accordance with the principles of fundamental justice

[63] Because the SRS Conditions are not arbitrary, overbroad, or grossly disproportional, any deprivation caused by them is in accordance with the principles of fundamental justice. If the

SRS Conditions do violate any of the principles of fundamental justice, the Respondent concedes that they would not be saved under section 1 of the *Charter*.

Carter, *supra* para 53 at para 55.

i. The SRS Conditions must be assessed purposively

[64] The SRS Conditions' purpose is to protect the best interests of transgender patients, when choosing a complex and irreversible treatment option. The principles of fundamental justice must be assessed in light of this purpose.

Carter, *supra* para 53 at para 78.

ii. The SRS Conditions are not arbitrary

[65] The SRS Conditions are rationally connected to the purpose of protecting transgender patients' best interests. The GDP is an internationally-renowned clinic that specializes in treating transgender patients. The standard it employs is closely related to the ITHA guidelines. Where the standards diverge, it is because of the GDP committee's unanimous view that longer hormone therapy and RLE periods are in the best interests of patients seeking SRS. With shorter RLEs, patients may experience a "halo effect" that prevents them from assessing whether they truly need and desire SRS, in light of other treatment options. The SRS Conditions are connected to their purpose of giving transgender patients the best medical care.

Chaoulli, *supra* para 38 at para 130.
Official Problem, *supra* para 1 at paras 23a, 23c.

iii. The SRS Conditions are not overbroad

[66] The SRS Conditions are not overbroad. They ensure a uniform standard of care for transgender patients. A law is overbroad if it goes so far as to deny the rights of some individuals in a way that bears no relation to its object. The purpose of the SRS Conditions is to ensure the

well-being of all transgender patients who wish to benefit from OHIP-funded SRS. The standards created by the GDP Committee are determined with the patient's best interests in mind—ensuring that patients meet these standards is not overbroad.

Carter, *supra* para 53 at para 85.
Official Problem, *supra* para 1 at paras 24, 27c.

[67] Uniform standards are particularly important in emerging medical fields to ensure patients' best interests are met. Best practices for transgender patients are only beginning to be taught in Canadian medical schools. Few physicians in Ontario outside the Carter Institute consider themselves qualified to make a referral for SRS. Moreover, many physicians consider treating transgender patients to be outside the scope of their practice. Transgender patients face discrimination from the medical field itself. It is not overbroad for a government to respond to this medical uncertainty by supporting a specialized clinic for the treatment of transgender patients—with minimum standards regulating SRS, supervised by a team of qualified professionals.

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

iv. The SRS Conditions are not grossly disproportional

[68] The SRS Conditions are not grossly disproportional. Their negative effects on Ms. Ghorbani are not out of sync with the objective of protecting transgender patients' best interests. As Chief Justice McLachlin held in *Bedford*, a law is only grossly disproportional if its negative impact on a claimant is "totally out of sync" with the law's purpose. The Supreme Court of Canada recognized in *Carter* that "[this] standard is high: the law's object and its impact may be incommensurate without reaching the standard of *gross* disproportionality."

Bedford, *supra* para 55 at para 120.
Carter, *supra* para 53 at para 89 [emphasis in original].

[69] The Respondent recognizes that with the SRS Conditions, Ms. Ghorbani will have to wait a long time before undergoing SRS. However, Ms. Ghorbani was referred to the Carter Institute, but elected to seek treatment from Dr. Kang, in light of its waiting list and location in Ottawa. Neither the delay nor the location affect Ms. Ghorbani in a grossly disproportionate manner.

Official Problem, *supra* para 1 at paras 7, 23i.

[70] With limited resources, delays are inevitable in the public healthcare system. This is exacerbated by the limited number of doctors who are qualified to treat transgender patients. In *Morgentaler* and *Chaoulli*, the Supreme Court of Canada recognized that significant delays may infringe upon security rights; however, both cases can be distinguished.

Morgentaler, *supra* para 55 at page 33.
Chaoulli, *supra* para 38 at para 43.

[71] The waiting times for abortions in *Morgentaler* are different than the experience of waiting for SRS. Given average 9-month gestation periods, the maximum timeline for an abortion is fixed. A woman does not have alternative treatment options to remedy her situation in the interim. In contrast, the timeline for SRS is not fixed for transgender patients—there is no set time by which SRS must or should happen, and it will vary depending on the patient's circumstances. Patients can undergo several treatment options in the interim, such as hormone therapy. Seeking care outside the Carter Institute is precisely what Ms. Ghorbani did, and the evidence indicates that her well-being improved in the meantime. The delay for treatment at the Carter Institute, while unfortunate, is a reality that all patients face in the public healthcare system.

Morgentaler, *supra* para 55 at page 33.
Official Problem, *supra* para 1 at paras 8–12.

[72] In *Chaoulli*, the ban on private healthcare infringed on Quebec residents' security rights, because of delays in the public system. However, *Chaoulli* can be distinguished because there was no question whether the medical standards in the private sector were different than those in the public system. In the present case, the key difference is that the SRS requirements employed by physicians at the GDP are different than those by non-GDP physicians. It is not grossly disproportionate for a government to impose standards for medical procedures that it funds.

Chaoulli, *supra* para 38 at para 43.

[73] The SRS Conditions are not grossly disproportionate compared to the ITHA guidelines. The GDP's hormone treatment time is six months longer than the international guidelines, and the RLE time by twelve months. The GDP's reason for the longer periods is not arbitrary: it is based on the committee's unanimous concern regarding the "halo effect." The ITHA guidelines are merely that—guidelines. The Ontario government is not required to mimic international guidelines when choosing how to best serve the medical needs of Ontario residents.

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

PART V – ORDER SOUGHT

[74] The Respondent Attorney General of Ontario requests that this Appeal be dismissed.

All of which is respectfully submitted this 28th day of January, 2016.

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Team 7
Counsel for the Respondent

PART VI – LIST OF AUTHORITIES AND STATUTES

LEGISLATION	PARAGRAPHS
Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11	3–5, 17, 35, 52
Health Insurance Act, RSO 1990 cH6, Schedule of Benefits under Regulation 552	1, 42

JURISPRUDENCE	PARAGRAPHS
Alberta (Aboriginal Affairs and Northern Development) v Cunningham, 2011 SCC 37, [2011] 2 SCR 670	24, 26, 28–29
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567	38, 40–41, 44, 46, 50
Andrews v Law Society of British Columbia, [1989] 1 SCR 143	23, 31
Blencoe v British Columbia (Human Rights Commission), [2000] 2 SCR 307	61
Canada (Attorney General) v Bedford, 2013 SCC 72, [2013] 3 SCR 1101	55, 68
Canada (Attorney General) v PHS Community Services Society, 2011 SCC 44, [2011] 3 SCR 134	55
Carter v Canada (Attorney General), 2015 SCC 5, [2015] 1 SCR 331	53–55, 62–64, 66, 68
CF v Alberta (Vital Statistics), 2014 ABQB 237	21
Chaoulli v Québec (Attorney General), 2005 SCC 35, [2005] 1 SCR 791	38, 56, 65, 70, 72
Corbière v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203	21
Flora v Ontario Health Insurance Plan, 2008 ONCA 538	23, 57
Gosselin v Québec, 2002 SCR 429, [2002] 4 SCR 429	56
Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component, 2009 SCC 31, [2009] 2 SCR 295	42
Kahkewistahaw First Nation v Taypotat, 2015 SCC 30, [2015] 2 SCR 548	18, 30
Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497	23, 31, 34
New Brunswick (Minister of Health and Community Services) v G(J), [1999] 3 SCR 46	59
Quebec (Attorney General) v A, 2013 SCC 5, [2013] 1 SCR 61	18, 30–31, 33–34, 46
R v Kapp, 2008 SCC 41, [2008] 2 SCR 483	18, 24, 26, 28–29
R v Morgentaler, [1988] 1 SCR 30	55, 70–71
R v Oakes, [1986] 1 SCR 103	37, 42–43
RJR-MacDonald Inc v Canada (Attorney General), [1995] 3	44, 49

SCR 199	
Withler v Canada (Attorney General), 2011 SCC 12, [2011] 1 SCR 396	31
Wynberg v Ontario, [2006] OJ No 2732	57

OFFICIAL WILSON MOOT SOURCES	**PARAGRAPHS**
Official Problem, Wilson Moot 2016.	1–2, 6-15, 25–27, 29, 33, 39–40, 45, 48, 59, 61–62, 65–67, 69, 71, 73