

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

BETWEEN:

ALEX GHORBANI

Appellant

– AND –

ONTARIO (ATTORNEY GENERAL)

Respondent

FACTUM OF THE APPELLANTS

COUNSEL FOR THE APPELLANTS:

TEAM 10

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PART I – OVERVIEW

[1] Canadians have the right to determine their self-identity and to access public health care. However, transgender (“trans”) people have difficulties accessing these rights. Instead, they experience discrimination, harassment, violence, and have an increased risk of suicide. For trans individuals living with gender dysphoria, their struggle to realize their true gender identity is psychologically stressful. There are a variety of treatments for gender dysphoria; for some, only including gender confirmation surgery (“Surgery”) is sufficient. Ontario, however, imposes certain preconditions for Surgery to be an insured benefit.

[2] Alex Ghorbani is a trans woman who seeks Surgery to complete her gender transition. However, the Schedule of Benefits under Regulation 552 of the Ontario *Health Insurance Act* (the “Conditions”) require trans patients to complete the Gender Dysphoria Program (“GDP”) at the Elias Carter Institute for Mental Health Care in Ottawa (the “Institute”) before the Ontario Provincial Health Insurance Plan (“OHIP”) will insure their Surgery, irrespective of a particular individual’s circumstances.

Schedule of Benefits under Regulation 552 of the Ontario *Health Insurance Act*, RSO 1990, c H.6 [Conditions].

[3] Ms. Ghorbani’s constitutional rights to equality, life, liberty and security of the person are infringed by the mandatory Conditions. The Conditions infringe s.15 of the *Charter* by acting as an arbitrary barrier to Ms. Ghorbani’s meaningful access to insured Surgery, which discriminates against Ms. Ghorbani by perpetuating and exacerbating historical disadvantage. The Conditions infringe s. 7 of the *Charter* by severely limiting trans patients’ ability to access timely, medically necessary, and beneficial health care.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 s 1, 7, 15 [*Charter*].

PART II – STATEMENT OF FACTS

Factual Background

[4] Trans people in Canada face discrimination in many areas, including education, employment, etc. In particular, many trans people face considerable difficulties in accessing medical care. Medical evidence indicates that trans patients who are unable to access timely medical treatment for gender transition are “at a higher risk of suicide than any other known population.” More than 33% of trans individuals will attempt suicide during their lifetime.

Official Moot Problem, Wilson Moot 2016, at 8 – 9 [Official Problem].

[5] Alex Ghorbani is a trans woman living in Toronto. Throughout her life, Ms. Ghorbani has struggled with the conflict between her gender identity and her biological sex. After a suicide attempt, Ms. Ghorbani began treatment with Dr. Kang, a physician in Toronto who specialises in treatment of trans patients. Ms. Ghorbani declined a referral to the GDP upon learning there was a lengthy waitlist for a first appointment and that she would have to travel to Ottawa for all appointments.

Official Problem, *supra* para 4 at 2 – 3.

[6] At the time of Ms. Ghorbani’s application to the Ontario Superior Court of Justice, she had been undergoing treatment with Dr. Kang and living her life as a woman for 18 months. According to Dr. Kang, Surgery is medically necessary for Ms. Ghorbani, and should happen as soon as possible. The Director of the GDP for the Institute, Dr. Forrester, testified that Dr. Kang is qualified to care for trans patients, and that he would trust her opinion regarding a Surgery recommendation.

Official Problem, *supra* para 4 at 2 – 3, 7.

[7] However, according to the Conditions, OHIP only funds Surgery for trans patients who

receive a recommendation from the Institute. Ms. Ghorbani does not have the means to pay \$45,000 for the Surgery. In contrast, OHIP insures genital reconstruction surgery for people born with ambiguous genitalia (generally referred to as “intersex”) without requiring prior authorization such as an Institute recommendation.

Official Problem, *supra* para 4 at 1, 4.

[8] Gender dysphoria in adults is defined as “distress caused by a marked difference between an individual’s expressed/experienced gender and the sex assigned to the individual at birth, which has continued for at least six months.” Dr. Forrester noted that not all individuals with gender dysphoria require or seek Surgery. However, Dr. Forrester conceded that the Surgery is medically necessary for some patients to treat gender dysphoria. Although all forms of Surgery carry risks of complications and can have negative psychological effects, Dr. Kang testified that the medical literature demonstrates that very few patients regret having undergone Surgery, even patients who develop post-surgical complications. Without Surgery, Ms. Ghorbani continues to struggle with her gender identity and experiences related psychological distress. Dr. Kang believes that Ms. Ghorbani’s anxiety over her inability to completely transition is detrimental to her psychological well-being.

Official Problem, *supra* para 4 at 4, 6 – 9.

Legislative Background

[9] The Attorney General of Ontario offers two purposes for the Conditions: (1) to ensure only medically necessary and beneficial care is provided; and (2) to control the costs of OHIP. The Conditions require that trans individuals seeking OHIP funding for Surgery must first satisfy the GDP criteria. The Institute physicians control the GDP criteria.

Official Problem, *supra* 4 at 1, 6, 9.

[10] The International Transgender Health Association (“ITHA”) has published criteria to

guide recommendations for the Surgery. The ITHA places importance on evidence of persistent gender dysphoria, informed consent of adult patients, and reasonable control of any significant medical or mental health concerns. The ITHA recommends that a trans woman seeking genital surgery undergo 12 continuous months of appropriate hormone therapy, and 12 continuous months living as a woman. During this “real life experience”, the trans woman “liv[es] and present[s] consistently, at all times and across all settings of life, in [her] desired gender role, including coming out as transgender to intimate partners, family, friends, and others.”

Official Problem, *supra* para 4 at 5.

[11] The Institute’s criteria for recommending Surgery, while based on the ITHA guidelines, are more stringent. In addition to documented persistent gender dysphoria and informed consent from an adult patient, the Institute requires trans patients in the GDP to complete 18 continuous months of appropriate hormone therapy, and live in their chosen gender role for a minimum of 24 continuous months. Even if these requirements are met, the Institute will refuse to refer a trans patient for Surgery if the physician has concerns about instability in the patient’s life, such as mental health issues, addiction, criminal involvement, or lack of employment prospects.

Official Problem, *supra* para 4 at 6.

[12] The Institute physicians defend their decision to extend the required minimum real life experience by citing concern over a possible “halo effect.” According to the Institute physicians, the halo effect clouds whether the Surgery is truly necessary or beneficial for a trans patient. On the other hand, Dr. Kang noted that a 12-month real life experience is all that is required in some cases. For Dr. Kang, the presence of meaningful social support is an important factor in her decision to recommend Surgery.

Official Problem, *supra* para 4 at 6, 8.

[13] Significantly, when determining whether to recommend a trans patient for Surgery, the Institute will not consider any period of real life experience or hormone therapy undergone by the patient prior to admission to the GDP. In practice, after enduring a 10-month wait for a first appointment, the average trans patients will attend the GDP for 38 months before receiving a recommendation for Surgery. Some patients will wait more than five years. During this time, patients pay their own travel costs to attend monthly appointments at the Institute.

Official Problem, *supra* para 4 at 7.

Clarifications to the Official Problem, Wilson Moot 2016 at paras 3, 4 [Clarifications].

Procedural History

[14] In February 2015, Justice Stern of the Ontario Superior Court of Justice found that the Conditions discriminated against Ms. Ghorbani on the basis of sex. Justice Stern also concluded that the Conditions arbitrarily deprived Ms. Ghorbani of her security of the person, contrary to the principles of fundamental justice. Justice Stern held that the Conditions could not be saved by s. 1 of the *Charter*, as the deleterious effects that Ms. Ghorbani suffered outweighed any minimal protection to the few patients who are not appropriate candidates for Surgery.

Official Problem, *supra* para 4 at 10.

[15] The majority of the Ontario Court of Appeal allowed the appeal. In his reasons, Justice Gadowski held, without deciding whether there was a distinction on enumerated or analogous grounds, that the Conditions were not discriminatory. Justice Gadowski did not decide whether Ms. Ghorbani's security of the person was engaged, but found that the Conditions did not offend the principles of fundamental justice. Justice Bacchus in dissent adopted Stern J.'s reasoning.

Official Problem, *supra* para 4 at 10.

PART III – STATEMENT OF ISSUES

[16] This appeal presents the following issues:

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

The Conditions create a distinction on the enumerated grounds of mental disability, biological sex, and gender identity, and are discriminatory against Ms. Ghorbani.

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

By requiring trans patients who seek insured Surgery to obtain a recommendation from the Institute, the Conditions infringe Ms. Ghorbani’s rights to security of the person, life, and liberty. These deprivations are contrary to the principles of fundamental justice; they are arbitrary, overbroad and grossly disproportionate.

Issue 3: If the answer to either of these questions is yes, is the infringement demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

The infringements to ss. 7 and 15 are not demonstrably justifiable in a free and democratic society. There is no rational connection to the Conditions’ purpose, they do not minimally impair Ms. Ghorbani’s *Charter* rights, and the deleterious effects outweigh the benefits.

PART IV – STATEMENT OF ARGUMENT

I The Conditions infringe Ms. Ghorbani’s section 15 equality rights by mandating an assessment for trans patients and not to intersex patients

[17] The Supreme Court of Canada has noted that the purposes of s.15 are to “ensure equality in the formulation and application of the law” (*Andrews*) and to “eliminate exclusionary barriers faced by individuals in the enumerated or analogous groups in gaining meaningful access to what is generally available” (*Quebec v A*). Insured Surgery is a benefit provided by OHIP, and the Supreme Court has held “that once the state does provide a benefit, it is obligated to do so in a

non-discriminatory manner” (*Eldridge*). The Conditions infringe s. 15 of the *Charter* by providing insured Surgery in a discriminatory manner. The Conditions fail to assess Ms. Ghorbani’s individual circumstances, restrict her meaningful access to medical treatment, and arbitrarily exacerbates the disadvantage of trans patients.

Andrews v Law Society of British Columbia, [1989] 1 SCR 143 at 171, 56 DLR (4th) 1 [Andrews].

Quebec (AG) v A, 2013 SCC 5 at para 319, [2013] 1 SCR 61 [*Quebec v A*].

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

[18] The Supreme Court recently affirmed the two-step *Kapp* test for s. 15(1) in *Quebec v A*. A law or state action will infringe a claimant’s s. 15(1) equality right where: (1) the law creates a distinction based on an enumerated or analogous ground; and (2) that distinction creates a disadvantage by perpetuating prejudice or stereotyping (*Kapp*). The Court has further emphasized that “[a]t the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?” (*Withler*). In this case, the Conditions deny Ms. Ghorbani substantive equality and infringe s. 15(1).

R v Kapp, 2008 SCC 41 at para 17, [2008] 2 SCR 483 [*Kapp*].

Quebec v A, *supra* para 17 at paras 324 – 325.

Withler v Canada (AG), 2001 SCC 13 at para 2, [2011] 1 SCR 396 [*Withler*].

A. *The Conditions draw a distinction on based on grounds of mental disability and the intersection of biological sex and gender identity*

i) The Conditions create a distinction based on mental disability

[19] Mental disability is an enumerated ground under s. 15. Ms. Ghorbani suffers from gender dysphoria, previously known as gender identity disorder. The ground of mental disability includes mental illnesses, generally (*Winko*), and gender dysphoria, particularly (*Hogan*). By definition, only trans patients, and not intersex patients, can suffer from gender dysphoria. Not all trans individuals with gender dysphoria require Surgery, but, for those that do, the Conditions

impose a distinction based on their gender dysphoria. The Conditions apply differential treatment to trans patients requiring genital reconstruction surgery compared to intersex patients.

Winko v British Columbia (Forensic Psychiatric Institute), [1999] 2 SCR 625, 175 DLR (4th) 193 [*Winko*].

Hogan v Ontario (Minister of Health & Long-Term Care), 2006 HRTO 32 at paras 117 – 118, [2006] OHRTD No 34 [*Hogan*].

ii) *The Conditions create a distinction based on biological sex and gender identity*

[20] Sex is an enumerated ground under s. 15. Biological sex refers to genitalia. Gender identity refers to an individual's experience on the gender spectrum. Sexual identity or gender identity is included in the ground of sex (*FC*). Alternatively, if gender identity is not included in the definition of sex, it is an analogous ground, as a “personal characteristic that is immutable or changeable only at unacceptable costs to personal identity” (*Corbiere*). Gender identity has been recognized as an enumerated ground, or as included in provincial and federal human rights codes, including the Ontario *Human Rights Code* (*Vancouver, Hogan, Ontario Code*).

FC v Alberta (Director of Vital Statistics), 2014 ABQB 237 at para 39, 100 Alta LR (5th) 75 [*FC*].

Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203 at paras 13, 60, 173 DLR (4th) 1 [*Corbiere*].

Vancouver Rape Relief Society v British Columbia (Human Rights Commission), 2000 BCSC 889 at para 59, 23 Admin LR (3d) 91 [*Vancouver*].

Hogan, supra para 18 at paras 122, 125.

Human Rights Code, RSO 1990, c H.19, ss 1 – 7.

[21] The Conditions apply differential treatment to trans patients requiring genital reconstruction surgery compared to intersex patients. Consequently, those born with an assigned sex contrary to their gender identity have to complete the GDP before OHIP will insure their gender confirmation surgery. In contrast, those born without an assigned sex can realize their gender identity through Surgery without prior authorization such as Institute recommendation.

[22] Therefore, the Conditions impose a distinction on Ms. Ghorbani based on her mental

disability, her biological sex, and her gender identity.

B. The Conditions are not protected by s. 15(2) as there is no genuinely ameliorative purpose, or portions of the Conditions are beyond the scope of s. 15(2) protection

[23] If a distinction exists, it is open to government to establish that the law is ameliorative under s. 15(2) such that it precludes the second step of the s. 15(1) analysis (*Kapp*). *Kapp* left open the possibility of refinement to the s. 15(2) test. The Conditions are under-inclusive as they exclude trans patients from the benefit intersex patients receive of insured Surgery without prior authorization. Given the purpose of section 15, where the claim is one of under-inclusiveness, a consideration of the effects should be required before the protection of s. 15(2) applies (*Equality, Help Hurts*). Even if s. 15(2) applies, it does not insulate the Conditions because there is insufficient evidence of a genuinely ameliorative or remedial purpose directed at improving the disadvantage of a target group. There is no evidence that intersex individuals constitute a disadvantaged group. Therefore, the government fails to establish a correlation between the Conditions and the amelioration of the disadvantage of intersex individuals.

Kapp, supra para 18 at paras 40, 41, 49, 55.

The Honourable Lynn Smith & William Black, "The Equality Rights" (2013) 62 SCLR (2d) 301 - 378 at paras 198 - 202 [*Equality*].

Joseph Marcus, "Sometimes Help Hurts: Imagining a New Approach to Section 15(2)", (2013) 18 Appeal 121 - 138 at paras 3, 22 - 36 [*Help Hurts*].

[24] Alternatively, the protective scope of s. 15(2) does not apply, as the distinction does not "serve or advance, and is not necessary to the ameliorative purpose" (*Kapp, Cunningham*). If the genuinely ameliorative object is to provide insured Surgery to intersex patients, the arbitrary requirement that trans patients must complete the GDP does not, in a general sense, rationally contribute to the amelioration of intersex patients (*Cunningham*). The distinction is not justified.

Kapp, supra para 18 at para 52.

Alberta (Aboriginal Affairs and Northern Development) v Cunningham, 2011 SCC 37 at paras 45, 46, [2011] 2 SCR 670 [*Cunningham*].

C. The distinction created by the Conditions discriminates against Ms. Ghorbani by providing a benefit in a manner that perpetuates and exacerbates arbitrary disadvantage

[25] The Supreme Court has repeatedly confirmed that s. 15 of the *Charter* deals with substantive equality (*Andrews, Taypotat*). The focus of the substantive equality inquiry is on the actual *impact* on the claimant to determine “whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage” (*Taypotat*). This flexible and contextual analysis takes into account social, political, economic, and historical factors concerning the claimant group by considering some or all of the non-exhaustive factors developed in *Law*. These factors include: pre-existing disadvantage; correspondence with actual characteristics; impact on other groups; and the nature of the interests affected (*Withler*). A comparator group is not required in the analysis (*Withler*).

Andrews, supra para 17 at 165-71.

Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 at paras 63 – 75, 170 DLR (4th) 1 [*Law*].

Kahkewistahaw First Nation v Taypotat, 2015 SCC 30 at paras 16, 17, [2015] 2 SCR 548 [*Taypotat*].

Withler, supra para 18 at paras 38, 65 – 66.

[26] The majority of the Ontario Court of Appeal erred in determining the Conditions were not discriminatory. The Conditions perpetuate and exacerbate the pre-existing disadvantage of trans patients requiring Surgery, and affect matters that are profound and fundamental to them. The Conditions restrict timely and meaningful access to necessary medical treatment by failing to assess Ms. Ghorbani’s individual circumstances, and by arbitrarily requiring assessment by physicians at the Institute. Therefore, the Conditions are discriminatory.

i) Pre-existing disadvantage of the trans people and lack of an ameliorative effect

[27] Pre-existing disadvantage is “probably the most compelling factor” in determining

whether a provision is discriminatory (*Law*). There is no disagreement that trans people are a historically disadvantaged group. They face discrimination in many areas, such as education, employment, housing, and the criminal justice system; they are more likely to be victims of verbal or physical harassment and sexual assault. The Conditions directly perpetuate these disadvantages, as the Institute commonly denies a referral where these disadvantages are evident.

Law, supra para 25 at para 63.

Official Problem, *supra* para 4 at 6, 8.

[28] Trans patients face particular disadvantage in accessing timely medical care. There is direct and systemic discrimination in the medical system, as many physicians have not received education on the treatment of trans patients. Lack of access to timely medical treatment places trans patients seeking to transition “at a higher risk of suicide than any other known population.” Rather than having any ameliorative effect, the Conditions exacerbate this problem, both in legal and practical effect, by limiting access and increasing delay. The Institute does not credit any non-Institute treatment towards the assessment period. This limits treatment options and access. Furthermore, in addition to requiring a minimum two year assessment period at the Institute, GDP patients must wait 10-months for a first appointment, and then an average of 38 months before receiving a potential recommendation. In practice, this can result in patients waiting more than five years for a referral. Depriving access and increasing delay to trans patients who require timely and necessary Surgery contributes to their continued marginalization in the health care system and perpetuates their gender dysphoria and identity struggles.

Official Problem, *supra* para 4 at 7, 8.

Clarifications, *supra* para 13 at para 4.

ii) *The nature of the interest affected is profound and fundamental*

[29] Considering the nature of the interests affected “requires an evaluation of both economic and non-economic elements” (*Egan*). Regarding economic interest, Justice L’Heureux-Dube

stated, “the more severe and localized the economic consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the *Charter*” (*Egan, Law*). Historically, trans individuals experience discrimination in employment. Additionally, enrolment in the GDP itself has economic consequences. Patients must pay to travel to Ottawa to attend the Institute on average once per month. As such, the Conditions effectively bar meaningful access to the Surgery since trans people are four times more likely to be living in poverty. Further, the Conditions create a substantial economic burden on Ms. Ghorbani specifically, as she is unable to pay \$45,000 for private Surgery. Thus, the economic nature of Ms. Ghorbani’s affected interest is profound.

Egan v Canada, [1995] 2 SCR 513 at 62 – 63, 124 DLR (4th) 609 [*Egan*].
Law, supra para 25 at para 74.

[30] The Conditions also severely affect Ms. Ghorbani’s non-economic interests. The ability to realize one’s gender identity is fundamental to personhood (*Corbiere*), and access to timely public health care is fundamental to full membership in Canadian society. Barriers to the realization of one’s gender identity are contrary to substantial equality, personal autonomy, and self-determination, which underlie s. 15 (*Law, Gosselin*). The Conditions impede Ms. Ghorbani’s ability to access timely health care and impede her “freedom to develop [her] body and spirit as...she desires, subject to such limitations as may be justified by the interests of the community as a whole” (*Miron*).

Corbiere, supra para 20 at para 62.
Miron v Trudel, [1995] 2 SCR 418 at para 145, 23 OR (3d) 160 [*Miron*].
Law, supra para 25 at para 53.
Gosselin v Quebec (AG), 2002 SCC 84 at para 65, [2002] 4 SCR 429 [*Gosselin*].

[31] Whether a “distinction restricts access to a fundamental social institution or affects a basic aspect of full membership in Canadian society” is also relevant to this analysis (*Egan*,

Law). The Schedule of Benefits is a cornerstone of the Canadian medical system, a cherished and fundamental institution in our society. The access to timely insured medical care without discrimination is a fundamental interest from a societal context. Given the marginalized position of trans people in society, creating any barrier to such an important social institution sends the message that society considers such individuals to be less worthy of respect and concern than other Canadians. The Conditions detrimentally affect trans individuals' fundamental interest in access to timely insured medical care without discrimination.

Egan, supra para 29 at para 64.

Law, supra para 25 at para 75.

iii) *Lack of correspondence between the differential treatment and the circumstances of trans people requiring Surgery*

[32] The Court has noted that where the grounds of discrimination are disability or sex, correspondence will likely be considered (*Law*). Considering correspondence with respect to disability, “the avoidance of discrimination will frequently require that distinctions be made to take into account the actual personal characteristics of disabled persons” (*Eldridge*). The Conditions create an arbitrary barrier to timely medical care for trans patients as they fail to take into account their actual circumstances. Dr. Kang has determined that Surgery is medically necessary for Ms. Ghorbani. Even though Dr. Forrester trusts Dr. Kang’s medical opinion, the Conditions deem Dr. Kang’s diagnosis and Ms. Ghorbani’s medical need for Surgery irrelevant.

Eldridge, supra para 17 at para 65.

Law, supra para 25 at para 69, 88.

[33] At the time of her initial application, Ms. Ghorbani had received continuous hormone therapy and been living as a woman for 18 months under the care of Dr. Kang. However, physicians at the Institute will not consider any time that the patient has undergone hormone therapy or real life experience under the care of a non-Institute specialist. Therefore, even if Ms.

Ghorbani began treatment at the Institute, she would have to wait approximately three more years before she could receive a referral for Surgery. This arbitrary restriction limiting access to timely medical care and creating unnecessary delay exacerbates the systemic discrimination in the medical system faced by trans patients. The delay has a disproportionately adverse effect on trans patients that have commenced treatment outside the GDP (*Andrews, Taypotat*). The Conditions “widen the gap” between trans patients requiring Surgery and the rest of society seeking medically necessary treatment and is therefore discriminatory (*Quebec v A*). The Conditions fail to draw a rational distinction based on the actual needs and characteristics of Ms. Ghorbani. They perpetuate and exacerbate disadvantage based on a categorical classification.

Andrews, supra para 17 at para 34.
Taypotat, supra para 25 at para 20.
Quebec v A, supra para 17 at para 332.

[34] In conclusion, the Conditions draw a distinction based on mental disability, sex, and gender identity. The distinction perpetuates and exacerbates the pre-existing disadvantage of trans individuals seeking access to meaningful and timely medical treatment: it affects profound economic interests, the fundamental societal interests of self-identity, and access to a primary social institution. The Conditions fail to take into account Ms. Ghorbani’s actual circumstances and arbitrarily requires assessment at the Institute before insuring Surgery. On a contextual analysis, the Conditions deny substantive equality, are discriminatory, and thus infringe Ms. Ghorbani’s s. 15 rights.

II The requirement in the Conditions that trans patients must complete the GDP at the Institute infringes Ms. Ghorbani’s section 7 Charter rights

[35] Requiring trans patients who need insured Surgery to attend and complete the GDP at the Institute infringes s. 7 of the *Charter*. Section 7 provides that “[e]veryone 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.” To establish an infringement of s. 7, the claimant must satisfy a two-part test. First, she must establish a violation of her right to life, liberty or security of the person. Second, she must establish that the violation is not in accordance with the principles of fundamental justice. According to the Court, consideration of a claimant’s s. 7 rights under the *Charter* must be given a broad, liberal interpretation.

Charter, *supra* para 3 at s 7.
Carter v Canada (AG), 2015 SCC 5 at paras 54 – 55, 384 DLR (4th) 14 [*Carter*].
Reference re Motor Vehicle Act (British Columbia), [1985] 2 SCR 486 at para 104,
24 DLR (4th) 536 [*Motor Vehicle*].

[36] The majority of the Ontario Court of Appeal erred in deciding that the Conditions do not infringe Ms. Ghorbani’s s. 7 *Charter* rights. Withholding OHIP funding for Surgery unless Ms. Ghorbani completes the GDP at the Institute effectively prevents her from accessing medically necessary and beneficial health care. This not only infringes Ms. Ghorbani’s s. 15 right to equality; it also plays a sufficient contributory role in causing serious psychological distress to Ms. Ghorbani, thereby depriving her of her right to security of the person. The requirement also deprives Ms. Ghorbani of her right to life, as the serious psychological harm it increases her risk of suicide. In addition, the Conditions limit Ms. Ghorbani’s ability to choose and access medical treatment, violating her right to liberty. These deprivations are not in accordance with the principles of fundamental justice, as they are arbitrary, overbroad and grossly disproportionate. There is a clear discrepancy between the intended purpose of the legislated requirement and its practical effect.

A. *The Conditions interfere with Ms. Ghorbani’s psychological integrity and deprive her of her right to security of the person*

[37] The Conditions dictate where a trans patient seeking insured Surgery must receive treatment. In effect, this requirement impacts Ms. Ghorbani’s security of the person by delaying access to essential medical treatment because of the waiting list for the Institute, and its practice

of ignoring patients' prior hormone therapy and real life experience. This delay significantly contributes to Ms. Ghorbani's serious psychological distress because of the stress inherent in being unable to access needed medical care and because of her incomplete transition.

[38] State action that contributes to serious psychological distress or has a "serious and profound effect on a person's psychological integrity" trenches upon a claimant's right to security of the person (*Carter, Bedford, G(J)*). The state action does not have to be the sole cause of the psychological harm. In *Bedford*, the Court agreed with Justice Himel's reasoning at the Ontario Superior Court of Justice that causation is flexible. It is not negated even when the law is not the direct, immediate cause of harm (*Bedford*). It is enough if the law "plays a sufficient contributory role" in preventing an individual from taking steps to reduce the risk of the harm (*Bedford*).

Carter, supra para 35 at para 64.

Canada (AG) v Bedford, 2013 SCC 72 at para 18, [2013] 3 SCR 1101 [*Bedford*].

New Brunswick (Minister of Health and Community Services) v G(J), [1999] 3 SCR 46 at paras 58-60, 216 NBR (2d) 25 [*G(J)*].

[39] By limiting insured Surgery to trans patients who are able to complete the GDP at the Institute, the State has sufficiently contributed to Ms. Ghorbani's serious psychological distress. In considering *Morgentaler*, Chief Justice McLachlin in *Chaoulli* noted that, "people in urgent need of care face the same prospect: unless they fall within the wealthy few who can pay for private care...they have no choice but to accept the delays imposed by the legislative scheme and the adverse physical and psychological consequences this entails"; giving an individual access to a waiting list is not giving them access to health care (*Chaoulli*). The parties agree that Ms. Ghorbani is not one of the "wealthy few" who could pay for private Surgery. Therefore, in order to obtain medically necessary treatment she is forced to comply with the Condition that she

complete the GDP at the Institute, and all of the ensuing hardships.

R v Morgentaler, [1988] 1 SCR 30, 44 DLR (4th) 385 at 60 [*Morgentaler*].
Chaoulli v Quebec (AG), 2005 SCC 35 at paras 119, 122 - 123, [2005] 1 SCR 791
[*Chaoulli*].
Official Problem, *supra* para 4 at 4.

[40] By giving the Institute a monopoly over insured Surgery referrals, the State has created unnecessary delay. The Conditions prevent qualified non-Institute physicians from providing referrals. This results in a bottleneck of trans patients waiting for treatment, as the Institute cannot accommodate all of them. There is then further delay because under the GDP criteria, it does not acknowledge any hormone treatment or real life experience completed with a non-Institute physician. Trans patients suffering from gender dysphoria who do not have access to \$45,000 have no choice but to accept a delay, sometimes of five years or more, that leaves them in a stage of incomplete transition.

Official Problem, *supra* para 4 at 7.

[41] This delay caused by the Conditions has harmed Ms. Ghorbani's psychological well-being beyond ordinary stress. For a proper understanding of the true impact caused by this delay, this Court needs to consider Ms. Ghorbani's background and history. Ms. Ghorbani has a history of depression, substance abuse, and a past suicide attempt, all of which she attributes to her struggle to transition to her true gender identity. As Ms. Ghorbani remains "in limbo" and unable to access the Surgery she needs, she continues to experience serious ongoing and increasing psychological distress. In this regard, Ms. Ghorbani stated:

...without surgery, I still feel like I am in limbo. I try to be positive, but there are still mornings that I cry when I see my body in the mirror as I am getting dressed. Every time I leave the house, the way people whisper and stare at me when I walk by is a painful reminder that I still do not completely pass as a woman. I feel like I can't use a public restroom or change room, that I can't wear a bathing suit and go swimming or to the beach like every other woman. I feel like I can't be truly intimate with the woman I love. These may be small

things for some, but when you can't do them, they become everything. I am still trapped in a body that is not my own.

Official Problem, *supra* para 4 at 4, 9.

[42] As Ms. Ghorbani makes clear, the inability to move forward with her transition contributes significantly to her psychological suffering. At this stage, Ms. Ghorbani's incomplete transition causes her to feel acutely the conflict between her expressed and experienced gender, and the sex assigned to her at birth. As she is uncomfortable with her biological sex, Ms. Ghorbani's serious psychological distress continues to grow every day she is unable to realize her true gender identity because of the State's requirement that she attend the Institute. Dr. Forrester conceded in his affidavit that, while Surgery is not a "cure" for the psychological distress caused by gender dysphoria *per se*, it is a medically necessary procedure for at least some trans patients. According to Dr. Kang, Ms. Ghorbani is one of those patients. Dr. Kang testified that Ms. Ghorbani should receive the Surgery as soon as possible, and noted that Ms. Ghorbani's anxiety about not being able to undergo the Surgery is detrimental to her psychological well-being. Therefore, although the Conditions are not the root cause of Ms. Ghorbani's gender dysphoria, they play a sufficient contributory role to her serious psychological suffering and deprive her of her right to security of the person (*Carter*).

Official Problem, *supra* para 4 at 4, 9.

Carter, *supra* para 35 at para 68.

B. Requiring Ms. Ghorbani to complete the GDP at the Institute for access to insured Surgery increases her risk of suicide and deprives her of her right to life

[43] If this Court accepts that the impugned Conditions have sufficiently contributed to Ms. Ghorbani's serious psychological harm, then it also rises to the level of sufficient to deprive her of her right to life. The consequences of the requirement increase Ms. Ghorbani's psychological

suffering, which in turn increases her risk of suicide.

Official Problem, *supra* para 4 at 6.

[44] The right to life is engaged when a law or state action imposes a threat of death, including any increased risk of death to a person. In *Chaoulli*, three of the seven judges of the Supreme Court accepted that, if the length of time an individual has to wait for a medically necessary procedure increases the risk of death, this violates the right to life under s. 7 of the *Charter* (*Chaoulli*). Recently, a unanimous Court affirmed that the right to life was engaged where the prohibition on physician-assisted dying forced some individuals to prematurely take their own lives (*Carter*). Therefore, where the State restricts access to a medically necessary procedure thereby causing increased risk psychological distress, the correlative increased risk of suicide engages the right to life.

Carter, supra para 35 at para 62.

See *Chaoulli supra* para 39.

See also Peter W Hogg, *Constitutional Law of Canada*, vol 2, 5th ed (Toronto: Thomson Reuters, 2007) (loose-leaf 2015 Rel 1), ch 47 at 47.6-47.7 [*Hogg*].

[45] The delay to timely, meaningful access to Surgery caused by the Institute having a monopoly over Surgery referrals has exacerbated Ms. Ghorbani's psychological distress and has made her more likely to commit suicide. According to Dr. Kang, trans individuals are already at risk of suicide; this risk increases when a trans patient cannot access timely medical treatment. The Conditions preventing existing qualified non-Institute physicians, such as Dr. Kang, from making referrals force trans patients, like Ms. Ghorbani, to deal with lengthy delays in receiving Surgery, if they are even financially capable of the numerous trips required to the Institute. Consequently, the requirement at issue can create the same risks a blanket prohibition would.

Official Problem, *supra* para 4 at 8 – 9.

C. The requirement to complete treatment at the Institute interferes with Ms. Ghorbani's ability to make a fundamental and personal choice and deprives her of her right to liberty

[46] The right to liberty goes beyond freedom from physical restraint (*Blencoe*). By forcing Ms. Ghorbani to seek treatment at the Institute in order to receive insured Surgery, the Conditions restrict her ability to seek out other qualified physicians. This interferes with Ms. Ghorbani's ability to make a fundamental and personal choice regarding the process of her transition, and it impacts her control over her body, thus depriving her of the right to liberty.

Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44 at paras 49 – 51, [2000] 2 SCR 307 [*“Blencoe”*].

[47] In *Blencoe*, Justice Bastarache asserted that the liberty interest applies if the impugned provision or state action prevents a person from making “fundamental personal choices.” In considering what makes something a “fundamental personal choice,” Justice Bastarache cited with approval Justice La Forest's explanation in *Godbout* that it “encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence” (*Blencoe, Godbout*). In *Godbout*, although the remainder of the justices declined to decide s. 7, La Forest J., writing for L'Heureux Dubé and McLachlin JJ. (as she then was), held that a person's ability to choose where to establish her home fell within this “narrow sphere of inherently personal decision-making deserving of the law's protection” (*Godbout*).

Blencoe, supra para 46 at paras 49 – 51.
Godbout v Logueuil (City), [1997] 3 SCR 844 at para 66, 152 DLR (4th) 577 [*“Godbout”*].

[48] The Conditions require Ms. Ghorbani to obtain a recommendation from the Institute in order to receive funding for Surgery. In effect, this requirement prevents her from choosing another qualified physician. The inherent restriction imposed by the Conditions interferes with

Ms. Ghorbani's fundamentally personal choice over *how* she transitions. Ms. Ghorbani is not asserting the right to have access to a *specific doctor*. However, by forcing Ms. Ghorbani to attend the Institute for treatment, the government is ignoring the fact that there are other, qualified physicians by forcing Ms. Ghorbani to attend the Institute for treatment. At its core, Ms. Ghorbani's liberty interest is engaged because the Conditions severely restrict her ability to select from an already small field of available qualified physicians.

[49] The impact of this interference is especially evident for a trans patient who cannot afford to travel to Ottawa for treatment at the Institute. Some trans patients will not be able to travel to Ottawa as the Conditions require, since trans people are four times more likely to live in poverty. For these trans patients, the requirement denies them the ability to control their transition, and therefore to control their bodies. As in *Morgentaler*, "[t]his decision is one that will have profound psychological, economic and social consequences...[i]t is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large" (*Morgentaler*).

Official Problem, *supra* para 4 at 9.
Morgentaler, *supra* para 39 at 171.

[50] Therefore, with respect to the first part of the s. 7 test, by requiring Ms. Ghorbani to complete the GDP at the Institute before she can receive insured Surgery, the Conditions violate her rights to security of the person, life, and liberty. Denying Ms. Ghorbani insured Surgery unless she receives a recommendation from the Institute exacerbates her serious psychological suffering by interfering with her ability to complete her transition. By forcing Ms. Ghorbani to endure the delay the Conditions cause, despite Dr. Kang's medical opinion that she requires the Surgery as soon as possible, and the consequent increasing psychological suffering, the Conditions have increased Ms. Ghorbani's risk of suicide.. Finally, the requirement limits Ms.

Ghorbani's freedom to choose the manner of her transition.

D. The infringements to Ms. Ghorbani's section 7 rights to security of the person, life, and liberty are contrary to the principles of fundamental justice

[51] The requirement to complete the GDP at the Institute deprives Ms. Ghorbani of her section 7 rights to life, liberty, and security of the person. Therefore, the Court must consider whether those deprivations are in accordance with the principles of fundamental justice. The Court of Appeal erred in deciding that any deprivation to Ms. Ghorbani's s. 7 rights would be in accordance with the principles of fundamental justice. The requirement is arbitrary, overbroad, and grossly disproportionate.

[52] In the context of s. 7 deprivations, as Chief Justice McLachlin stated in *Carter*, "laws that impinge on life, liberty or security of the person must not be arbitrary, overbroad, or have consequences that are grossly disproportionate to their objective". The court must identify the objective of the impugned provision, and then compare that objective to the effects of the State's interference with life, liberty, or security of the person. In *Bedford*, the Court acknowledged the "significant overlap" of these principles of fundamental justice and explained they "compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness" (*Bedford*).

Carter, supra para 35 at para 72.

Bedford, supra para 38 at paras 107 – 123.

See also Hogg, *supra* para 44 at 47 – 21.

i) The requirement to complete the GDP at the Institute is arbitrary

[53] A law or state action is arbitrary where its effects lack a real connection to its purpose (*Bedford*). In *Morgentaler*, Justice Beetz held that laws that endangered health were "manifestly unfair" and therefore arbitrary. In *Chaoulli*, Chief Justice McLachlin affirmed that there is "no real connection in fact between prohibition of health insurance and the goal of a quality public

health system”. The requirement restricting insured Surgery to trans patients that obtain a referral from the Institute arbitrarily excludes recommendation for Surgery made by qualified non-Institute physicians, endangers health, and contravenes both stated purposes.

Bedford, supra para 38 at para 98.

Morgentaler, supra para 39 at 120.

Chaoulli, supra para 39 at paras 132 – 133, 139.

[54] There is no rational connection between the Conditions and their purpose of providing only medically necessary and beneficial care. The government has not adduced any evidence that a qualified physician, who specializes in treatment of trans patients but does not work at the Institute, would recommend a patient for unnecessary and non-beneficial surgeries. In fact, Dr. Forrester acknowledged that Dr. Kang is “eminently qualified”, and that he would wholly trust her assessment regarding whether Surgery was in a trans patient’s best interest. There is no reason that Dr. Kang’s recommendation should be given less validity than that of an Institute-physician. If the purpose of the Conditions is to ensure that only medically necessary and beneficial Surgery will be funded by OHIP, the impugned requirement draws an arbitrary distinction that is based on employment location, rather than expertise. As noted above, this restriction increases delay, limits access to medically necessary treatment, and endangers health.

Official Problem, *supra* para 4 at 7.

[55] Furthermore, given the criteria that the Institute physicians enforce, limiting trans patients seeking insured Surgery to treatment at the Institute bears no real connection to the purpose of controlling OHIP costs. The government has not provided any evidence that recognizing referrals from a qualified non-Institute physician would result in misuse of taxpayer funds. Rather, the requirement may cost OHIP more. Should Ms. Ghorbani enter the GDP at the Institute, this will not be considered, since the GDP criteria only credits Institute-supervised

hormone therapy and real life experience towards a recommendation for Surgery. Consequently, OHIP will be “doubling up” on treatment costs, as the assessment clock restarts once the trans individual begins treatment at the Institute.

Official Problem, *supra* para 4 at 7.
Clarifications, *supra* para 13 at para 4.

[56] The effects of the requirement contradict the purposes of the Conditions. Therefore, the requirement is arbitrary, and is contrary to the principles of fundamental justice.

ii) *The requirement to complete the GDP at the Institute is overbroad*

[57] Overbreadth considers whether the means employed are necessary to achieve the state objective (*Heywood*). In *Carter*, Chief Justice McLachlin explained that this analysis focuses not on a law’s broad societal interests, but on its effect on those individuals whose life, liberty or security interests are infringed. If the State chooses to pursue its legitimate objective in a manner that is broader than necessary to accomplish its objective, “the individual’s rights will have been limited for no reason” (*Heywood*).

Carter, *supra* para 35 at paras 85-87.
R v Heywood, [1994] 3 SCR 761 at 792 – 793, 120 DLR (4th) 348 [*Heywood*].

[58] If the primary intended purpose of the Conditions are to prevent trans patients from receiving insured Surgery when it is not medically necessary or beneficial, requiring these patients to complete the GDP at the Institute is overbroad for two reasons. First, the requirement is overbroad in its exclusion of trans patients who require Surgery to treat their gender dysphoria. The requirement denies access to insured Surgery for trans patients who do not live in Ottawa and are unable to afford the time and expense to travel there to attend the Institute, even where the Surgery would be medically necessary and beneficial. The requirement also forces trans patients to abide by the GDP criteria, increasing delay at the expense of their timely access to

medically necessary treatment. Second, the effects of the requirement extend beyond the stated purposes by grouping unqualified physicians who do not have specialize in treatment of trans patients with qualified non-Institute physicians who have the expertise to make referrals for Surgery. The Conditions do not give non-Institute physicians the opportunity to establish that they are qualified, despite the lack of evidence that they would inappropriately recommend a patient. Therefore, it exceeds its ambit, and is overbroad.

Official Problem, *supra* para 4 at 3 – 4, 7.

Clarifications, *supra* para 13 at paras 3 – 4.

iii) *The requirement to complete the GDP at the Institute is grossly disproportionate*

[59] A law is gross disproportionate if the negative impact on the individual's life, liberty, or security of the person is completely out of sync with the object of the law (*Bedford, Carter*). The impact of the requirement to complete the GDP at the Institute is severe. As established above, it exacerbates the unnecessary psychological suffering of affected individuals and increases the risk of suicide. In contrast, the medical literature demonstrates that very few trans patients regret having undergone Surgery, even in cases where patients develop post-surgical complications. Although there are risks involved in the Surgery, there are none as great as the current risk of death she faces because of the government withholding the insured Surgery from her. The significantly exacerbated psychological distress and increased risk of death are completely out of sync with the objectives of providing only medically necessary and beneficial medical care and limiting OHIP costs. Therefore, the effects are grossly disproportionate to the Conditions' objectives.

Carter, supra para 35 at para 89.

Bedford, supra para 38 at para 125.

III The infringements of sections 15 and 7 are not demonstrably justified in a free and democratic society under section 1 of the Charter

[60] Section 1 of the *Charter* provides that the rights granted under the *Charter* are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Although the Conditions are prescribed by law, the infringements to Ms. Ghorbani’s ss. 15 and 7 rights are not demonstrably justifiable in a free and democratic society.

Charter, supra para 3, ss 1, 7, 15.

[61] The Attorney General bears the burden of proving that the infringements of Ms. Ghorbani’s ss. 7 and 15 rights are demonstrably justifiable (*Oakes*). Demonstrably justifiable infringements must have a pressing and substantial objective that is rationally connected to the limitation on the claimant’s rights (*Oakes*). The infringement on the claimant’s rights must also be minimally impairing, and the Conditions’ deleterious effects must be proportional to their salutary benefits (*Oakes*).

R v Oakes, [1986] 1 SCR 103 at paras 63, 70 – 72, 53 OR (2d) 719 [*Oakes*].

A. The purposes of the Conditions (and of OHIP generally) do not justify the infringements of Ms. Ghorbani’s ss. 7 and 15 rights

[62] The Appellant acknowledges that the stated purposes of the Conditions, and of OHIP generally – to only provide necessary and beneficial medical treatment and to control OHIP costs – would be pressing and substantial. However, the Conditions (namely the arbitrary distinction made between intersex individuals and trans patients, and the restriction to where trans patients may seek treatment if they need insured Surgery) are not rationally connected to these purposes, are not minimally impairing, and have deleterious effects that outweigh any salutary benefits. In particular, the effects of both of the impugned Conditions contravene the purposes of the legislation, while ignoring a reasonable approach. In doing so, the Conditions negatively impact

individual trans patients, as well as the broader trans community, and these negative impacts outweigh any benefits to society at large.

Official Problem, *supra* para 4 at 9.

i) *The stated purposes of the Conditions are not rationally connected to their effect*

[63] To satisfy the rational connection requirement under the section 1 *Oakes* analysis, the Attorney General must show that the limits to Ms. Ghorbani's *Charter* rights further the legislative objectives of the Conditions. According to *Oakes*, where the deprivation of *Charter* rights is arbitrary, unfair or irrational, the infringement cannot be justified under s. 1. The focus at this stage of the analysis is "whether there is a rational link between the infringing measure and the government goal" (*Hutterian*).

Oakes, supra para 61 at para 70.

Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 at para 51, [2009] 2 SCR 567 [*Hutterian*].

[64] The Appellant acknowledges that some restrictions to funding for Surgery would be rationally connected to the Conditions' stated purposes. For instance, imposing some prior period of hormone therapy and real life experience would be rationally connected. However, when the pressing and substantial purposes are to restrict insured Surgery to cases where it is medically necessary and beneficial, and to control the costs of OHIP, the Conditions as legislated contravene those purposes. In particular, the government has not provided any evidence that a qualified non-Institute physician, including Dr. Kang specifically, would make inappropriate referrals for Surgery. Similarly, the government has provided no evidence to establish that allowing a qualified non-Institute physician to recommend Surgery, where appropriate, would be a misuse of OHIP funds. Instead, as previously explained, the Conditions may actually detrimentally impact the OHIP budget and increase costs. Therefore, the government has not established a rational link between requiring trans patients to attend the Institute and the purpose

of restricting funding of unnecessary and non-beneficial Surgery.

Official Problem, *supra* para 4 at 7, 9.

Clarifications, *supra* para 13 at para 4.

ii) *The Conditions are not minimally impairing*

[65] The test for minimal impairment requires that there must not be “an alternative, less drastic means of achieving the objective in a real and substantial manner” (*Hutterian*). If a reasonable substitute can achieve the stated purpose, that reasonable substitute must be used. Requiring trans patients to receive treatment at the Institute if they seek insured Surgery is not minimally impairing, as it unnecessarily restricts treatment from an already small field of available qualified physicians.

Hutterian, *supra* para 63 at paras 53-55.

[66] If the purpose is to ensure that OHIP provides only medically necessary and beneficial Surgery, then giving the Institute sole control over assessing who requires the Surgery is not minimally impairing. There is an alternative, less drastic way of achieving this purpose: permitting trans patients to obtain recommendations from qualified non-Institute physicians. There is no evidentiary basis suggesting qualified physicians would make unnecessary referrals for Surgery. Not only does the requirement create an arbitrary distinction between Institute physicians and non-Institute physicians, but also between trans patients and intersex patients. The requirement unnecessarily excludes qualified physicians and trans patients who need the Surgery. As in *Heywood*, for the same reasons that the Conditions are overly broad, it also fails the minimal impairment test.

Official Problem, *supra* para 4 at 9.

Heywood, *supra* para 57 at 802 – 803.

iii) *The deleterious effects are disproportionate to their benefits*

[67] The final step in the s. 1 proportionality analysis considers the deleterious and salutary

effects of the impugned law. According to *Dagenais*, this means that the *Charter* infringements must be proportional to the benefits of the provision. Where the negative impacts are greater than the public benefit of the disputed law, the law is not demonstrably justifiable (*Hutterian*).

Dagenais v Canadian Broadcasting Corp, [1994] 3 SCR 835 at 889, 20 OR (3d) 816
[*Dagenais*].
Hutterian, *supra* para 63 at para 78.

[68] The negative impacts created by the Conditions are severe. Requiring trans individuals to seek a recommendation from the Institute for insured Surgery forces them to endure long wait times and the correlative adverse psychological impact, including an increased risk of suicide. Ms. Ghorbani has no choice, but to remain in a state of “limbo” and continue to feel trapped within her body, as she continuously suffers the distress that defines gender dysphoria. Dr. Kang testified that the State’s interference in Ms. Ghorbani’s ability to complete her transition detrimentally impacts her psychological well-being.

Official Problem, *supra* para 4 at 9.

[69] The deleterious effects of the Conditions are also evident on a broader scale. The increased risk of suicide is not isolated to Ms. Ghorbani. According to Dr. Kang, trans patients who are unable to access the medical treatment they need to assist them in their transition experience “a higher risk of suicide than any other known population.” In addition, many trans people face considerable difficulties and discrimination in many areas of society, such as the increased likelihood of experiencing sexual violence, homelessness and poverty. Some of these difficulties could be alleviated through receiving Surgery when needed. Even without the Conditions, trans people experience significant barriers to accessing health care. The requirement to attend the Institute exacerbates the difficulties that trans people face in obtaining timely access

to medically necessary and beneficial health care.

Official Problem, *supra* para 4 at 8, 9.

[70] If the main benefits of the Conditions are to restrict funding to medically necessary and beneficial treatment for trans individuals, and to control OHIP costs, these benefits are outweighed by the many negative impacts described above. The negative effects impact both individuals and broader society. Any concerns over ensuring only those who require the Surgery receive it would be more appropriately addressed by any qualified physician through a case-by-case analysis, taking into account a patient's personal history, circumstances, and needs. Denying trans patients the ability to seek treatment from non-Institute physicians with the expertise to make Surgery recommendations perpetuates the significant difficulties that trans patients already experience when they interact with the health care system. The benefits claimed cannot justify the violation of Ms. Ghorbani's ss. 7 and 15 rights.

Official Problem, *supra* para 4 at 7, 8.

PART V – ORDER SOUGHT

[71] Reading in is an appropriate remedy for an unjustifiable Charter infringement where the remedy furthers the obvious legislative objective, does not constitute an unacceptable intrusion into the legislative domain, and does not require a substantial change in the nature of the legislative enterprise (Sharpe). The proposed remedy satisfies all three requirements.

R v Sharpe, 2001 SCC 2 at para 121, [2001] 1 SCR 45 [*Sharpe*].

[72] The Appellant seeks an order granting the appeal and, where the Conditions require completion of the GDP or an Institute recommendation, the words “or with any other qualified physician” be read into the Conditions.

PART VI – LIST OF AUTHORITIES AND STATUTES

LEGISLATION	PARAGRAPHS
<i>Canadian Charter of Rights and Freedoms</i> , Part I of the <i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982 (UK)</i> , 1982, c 11.	3, 35, 60
<i>Human Rights Code</i> , RSO 1990, c H.19.	20
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<i>Alberta (Aboriginal Affairs and Northern Development) v Cunningham</i> , 2011 SCC 37, [2011] 2 SCR 670.	24
<i>Alberta v Hutterian Brethren of Wilson Colony</i> , 2009 SCC 37, [2009] 2 SCR 567.	63, 65, 67
<i>Andrews v Law Society (British Columbia)</i> , [1989] 1 SCR 143, 56 DLR (4th) 1.	17, 25, 33
<i>Blencoe v British Columbia (Human Rights Commission)</i> , 2000 SCC 44, [2000] 2 SCR 307.	46, 47
<i>Canada (AG) v Bedford</i> , 2013 SCC 72, [2013] 3 SCR 1101.	38, 52, 53, 59
<i>Carter v Canada (AG)</i> , 2015 SCC 5, 384 DLR (4th) 14.	35, 38, 42, 44, 52, 57, 59
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<i>Dagenais v Canadian Broadcasting Corp</i> , [1994] 3 SCR 835, 20 OR (3d) 816.	67
<i>Egan v Canada</i> , [1995] 2 SCR 513, 124 DLR (4th) 609.	29, 31
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<i>Kahkewistahaw First Nation v Taypotat</i> , 2015 SCC 30, [2015] 2 SCR 548.	25, 33
<i>Law v Canada (Minister of Employment and Immigration)</i> , [1999] 1 SCR 497, 170 DLR (4th) 1.	25, 27, 29 – 32
<i>Miron v Trudel</i> , [1995] 2 SCR 418, 23 OR (3d) 160.	30
<i>New Brunswick (Minister of Health and Community Services) v G(J)</i> , [1999] 3 SCR 46, 216 NBR (2d) 25.	38
<i>Quebec (AG) v A</i> , 2013 SCC 5, [2013] 1 SCR 61.	17, 18, 33
<i>R v Heywood</i> , [1994] 3 SCR 761, 120 DLR (4th) 348.	57, 66
<i>R v Kapp</i> , 2008 SCC 41, [2008] 2 SCR 483.	18, 23, 24,
<i>R v Morgentaler</i> , [1988] 1 SCR 30, 44 DLR (4th) 385.	39, 49, 53
<i>R v Oakes</i> , [1986] 1 SCR, 53 OR (2d) 719.	61, 63
<i>R v Sharpe</i> , 2001 SCC 2, [2001] 1 SCR 45	71

<i>Reference re Motor Vehicle Act (British Columbia)</i> , [1985] 2 SCR 486, 24 DLR (4th) 536.	35
<i>Vancouver Rape Relief Society v British Columbia (Human Rights Commission)</i> , 2000 BCSC 889, 23 Admin LR (3d) 91	20
<i>Winko v British Columbia (Forensic Psychiatric Institute)</i> , [1999] 2 SCR 625, 175 DLR (4th) 193.	19
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Joseph Marcus, "Sometimes Help Hurts: Imagining a New Approach to Section 15(2)", (2013) 18 Appeal 121 – 138.	23
Peter W Hogg, <i>Constitutional Law of Canada</i> , vol 2, 5th ed (Toronto: Thomson Reuters, 2007) (loose-leaf 2015 Rel 1).	44, 52
The Honourable Lynn Smith & William Black, "The Equality Rights" (2013) 62 SCLR (2d) 301 – 378.	23
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<i>Schedule of Benefits</i> , O Reg 552/15.	2
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