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 RESPONDENTS

COUNSEL FOR THE RESPONDENTS:

TEAM 10

Table of Contents

PART I – OVERVIEW

[1] The question to be determined on this appeal is the extent to which the Province of Ontario may require individuals seeking to undergo sex-reassignment surgery (SRS) to meet certain criteria designed to ensure that only medically necessary and beneficial treatment is publicly funded. Ontario has created an ameliorative program that provides access to publicly funded SRS for those suffering from gender dysphoria on the condition that they receive a referral from the Elias Carter institute – a world renowned treatment centre specializing in gender dysphoria care. As with all healthcare issues, the provision of public funds for SRS engages an area of public policy that requires government to balance competing interests, allocate limited funding, and carefully manage risk. This area of medicine is complex and developing, and debate remains in the medical community as to whether SRS is an appropriate treatment for gender dysphoria.

Official Problem, the Wilson Moot 2016 at 1, 8 and 9 [Official Problem].

[2] The Schedule of Benefits under Regulation 552 of the Ontario *Health Insurance Act*, RSO 1990, c H.6 governs the requirements for publicly funded SRS for intersex and transgender people. These provisions, known as the "SRS Conditions," operate to ensure that patients are only provided with medically necessary and beneficial care.

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

[3] The issue before this court is whether the Appellant may apply sections 15 or 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") to strike down this ameliorative program. The Appellant's claim does not satisfy the burden under these sections.

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

[4] The SRS Conditions further the legislative purpose of only providing publicly funded care

that is medically necessary and beneficial. The legislation is protected under s. 15(2) of the *Charter* as an ameliorative program, and does not discriminate under s. 15(1). This program does not engage s. 7 of the *Charter*, and any alleged infringement is permissible under the principles of fundamental justice. Finally, any infringement of the Appellant's rights is demonstrably justified in a free and democratic society under s.1.

Charter, *supra* para 3, ss. 1, 7, and 15.
Official Problem, *supra* para 1 at 9.

PART II – STATEMENT OF FACTS

A. Factual Context

[5] Gender dysphoria 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." Many transgender people transition to their chosen gender without requiring SRS. However, for some individuals, SRS may be medically necessary and beneficial. SRS is a risky treatment. Complications from SRS may include infection, fibrosis, fistulas, stenosis of the urinary tract, necrosis, and sexual dysfunction.

Official Problem, *supra* para 1 at 4 and 5.

[6] The Province of Ontario has entrusted the Carter Institute, an internationally renowned and acclaimed treatment centre, to provide referrals for SRS. All of its Gender Dysphoria Program (GDP) physicians specialize in the medical treatment of transgender people. An individual seeking publicly-funded SRS for gender dysphoria is required to complete the GDP and receive a referral from the Carter Institute. The Institute bases its SRS approval criteria on the International Transgender Health Association Guidelines (ITHA). Like the ITHA guidelines, the Committee requires an individual live in their chosen gender for a period of time before

undergoing SRS. This period of time is referred to as a "real life experience" (RLE). In contrast to the ITHA guidelines which recommend a 1-year minimum RLE period, the committee is unanimous in its opinion that a longer RLE is in the best interests of patients seeking SRS. Patients who do not receive a referral for SRS may continue to receive treatment from the Carter Institute, or from a doctor of their choice.

Official Problem, *supra* para 1 at 6.

[7] Dr. Logan Forrester, the director of the Carter Institute's GDP, establishes that SRS is neither necessary nor desired for everyone with gender dysphoria. For many patients, gender dysphoria can be treated with hormone treatment and counselling, and living in their gender role. Further, SRS is not a panacea for gender dysphoria. Many patients who undergo SRS continue to experience psychological distress caused by gender dysphoria, which is exacerbated by societal prejudice. As this is a developing field of medicine, there exists some controversy amongst the medical community concerning whether SRS is ever appropriate for treating gender dysphoria.

Official Problem, *supra* para 1 at 6 and 7.

[8] Dr. Kang confirmed that "best practices for treatment of transgender patients are only beginning to be taught in Canadian medical schools." Consequently, many physicians do not feel that they can adequately treat transgender patients. Dr. Kang agreed that it is necessary to screen patients seeking SRS to ensure that it is provided only when beneficial.

Official Problem, *supra* para 1 at 9.

[9] The Appellant, Ms. Alex Ghorbani, seeks publicly funded SRS. The Ontario Health Insurance Plan (OHIP) provides coverage for SRS as treatment for gender dysphoria once and individual has received a referral from the Carter Institute. There is no doubt that Ms. Ghorbani has struggled with her gender identity. As a result of her gender dysphoria, she was admitted to a

psychiatric ward in 2013. Upon discharge, she was referred to the Carter Institute, but opted against pursuing treatment. Ms. Ghorbani is not now and has never been enrolled at the Carter Institute. However, she is currently receiving hormone therapy and counselling from Dr. Kang.

Official Problem, *supra* para 1 at 1 and 3.

B. Procedural History

[10] At trial, Justice Stern held that the SRS Conditions infringed both ss. 15 and 7 of the *Charter*. According to Stern J., the effects of the SRS Conditions discriminated against Ms. Ghorbani on the basis of sex. With respect to section 7, Justice Stern held that the SRS Conditions arbitrarily breached Ms. Ghorbani's security of the person and were not saved by section 1 of the *Charter*.

Official Problem, *supra* para 1 at 9.

[11] A majority of the Ontario Court of Appeal overturned Justice Stern's decision, and found that the SRS Conditions were not discriminatory under s. 15 and did not breach s. 7 of the *Charter*. The majority held that, if the SRS did infringe sections 7 or 15, the infringement was justified under s. 1 of the *Charter*. The dissent agreed with the decision of Justice Stern at trial.

Official Problem, *supra* para 1 at 10.

C. Legislative Context

[12] The Schedule of Benefits under Regulation 552 of the Ontario *Health Insurance Act*, RSO 1990, c H.6, (the Act) lists physician services that are publicly funded under OHIP. The following provisions under the Schedule of Benefits are known as the "SRS Conditions":

> **Sex-reassignment surgery**
>
> Sex-reassignment surgical procedures are a publicly funded service only if they are performed on patients who have completed the Gender Dysphoria Program (GDP) at the Elias Carter Institute for Mental Health Care in Ottawa (the "Carter Institute"). Claims are accepted for payment only for those patients for whom the Carter Institute has recommended that surgery take place. Once recommended by the Carter Institute, the

surgery may take place anywhere in Canada and qualify for reimbursement at rates in accordance with the fee schedule set out in the Regulation.

For greater certainty, within the foregoing guidelines, reconstruction of genitalia, mastectomy, and mammoplasty are publicly funded benefits. The following procedures are not, under any circumstances, publicly funded benefits: electrolysis, tracheal shave, facial surgery, or voice training.

Genital reconstruction surgery is a publicly funded service for people with congenitally-ambiguous genitalia (i.e. intersex people). No prior authorization is required.

Official Problem, *supra* para 1 at 1.

PART III – STATEMENT OF ISSUES BEFORE THE COURT

Issue 1: Do the SRS Conditions infringe s. 15 of the *Charter*?

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

Issue 2: Do the SRS Conditions infringe s. 7 of the *Charter*?

The SRS Conditions do not infringe life, liberty, or security of the person and do not breach the principles of fundamental justice under s. 7 of the *Charter*.

Issue 3: If the answer to either of issues 1 or 2 is 'yes', is the infringement demonstrably justified in a free and democratic society under section 1 of the *Charter*?

If the SRS Conditions infringe sections 7 or 15, the infringement is demonstrably justifiable in a free and democratic society under s. 1 of the *Charter*.

PART IV – ARGUMENT

Issue 1: The SRS Conditions are not discriminatory under s. 15 of the *Charter*

[13] The SRS Conditions do not breach the Appellant's s. 15 *Charter* rights. The legislation does not create a distinction based on an enumerated or analogous ground. Alternatively, should the Court find a distinction based on an enumerated or analogous ground, the SRS Conditions constitute an ameliorative program and are protected under s. 15(2) of the *Charter*. If s. 15(2)

does not apply, the SRS Conditions are not discriminatory under s. 15(1).

1. There is no distinction based on an enumerated or analogous ground

[14] The SRS Conditions create a distinction based on the provision of medically necessary and beneficial healthcare, and "arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice (*Hutterian*)." The scheme draws one distinction. That distinction is between the availability publicly funded medical treatment for intersex and transgender people. The legislation grants funding for congenital reconstruction surgery for intersex people without prior authorization. However, transgender people seeking publicly funded SRS treatment must receive a referral from the Carter Institute. This distinction is not based on sex, disability, gender, or any other enumerated or analogous ground – it is based on providing medically necessary and beneficial treatment.

> Official Problem, *supra* para 1 at 1.
> *Alberta v Hutterian Brethern of Wilson Colony*, 2009 SCC at para 108, [2009] 2 SCR 567 [*Hutterian*].

[15] Undergoing SRS is not medically necessary or beneficial for every individual suffering from gender dysphoria. To the contrary, transgender people suffering from gender dysphoria can be cared for with less intrusive and effective forms of treatment such as psychotherapy, counselling, hormone therapy, and assuming one's gender role. SRS is not a panacea for gender dysphoria –transgender people who undergo surgical transition continue to experience psychological distress from the condition. All forms of SRS carry significant risks of medical complications. Further, there remains controversy amongst the medical community as to whether SRS is ever necessary in treating gender dysphoria.

> Official Problem, *supra* para 1 at 5, 6 and 7.

[16] Conversely, genital reconstruction surgery is medically necessary and beneficial for intersex

people. Surgery is the only means of remedying congenitally-ambiguous genitalia. Further, the legislation recognizes that gender dysphoria and congenitally-ambiguous genitalia are not mutually exclusive – intersex people seeking additional SRS must still receive a referral from the Carter Institute to ensure that publicly funded treatment is only provided where medically necessary and beneficial.

Official Problem, *supra* para 1 at 1.

2. The SRS Conditions are ameliorative and protected under s. 15(2)

[17] Should the Court find that the SRS Conditions create a distinction based on an enumerated or analogous ground, the legislation is nevertheless protected by s. 15(2) of the *Charter*. Section 15(2) operates to enhance substantive equality by permitting governments to establish targeted ameliorative programs aimed at combatting the disadvantage of particular groups. The government is permitted "to assist one group without being paralyzed by the necessity to assist all, and to tailor programs in a way that will enhance the benefits they confer" without drawing discrimination claims (*Cunningham*).

Alberta (Aboriginal Affairs and Northern Development) v Cunningham, 2011 SCC 37 at para 49 [2011] 2 SCR 670 [*Cunningham*].

[18] The SRS Conditions meet the two part test espoused in *Kapp* and *Cunningham,* namely:

(1) The SRS Conditions are a genuinely ameliorative program directed at improving the situation of a group that is in need of ameliorative assistance in order to enhance substantive equality and;

(2) The distinctions based on enumerated or analogous grounds "serve and are necessary to" the ameliorative purpose.

R v Kapp, 2008 SCC 41 at para 41, [2008] 2 SCR 483 [*Kapp*].
Cunningham, supra para 17 at paras 44-5.

A. The SRS Conditions have an ameliorative purpose for intersex people

[19] The Court has interpreted s. 15(2) as giving paramount consideration to the "legislative goal" rather than the "actual effect" of the legislation in determining whether the section applies

(*Kapp*). Thus, where a law creates a distinction based on enumerated or analogous grounds, the legislation is protected so long as the Legislature drew the distinction to ameliorate the circumstances of a disadvantaged group. The ameliorative purpose need not be the sole purpose of the program – the Court has recognized that this would be too stringent a requirement and would only discourage governments from promoting substantive equality. Further, it is necessary to determine the purpose of the program as a whole rather than simply the impugned provision.

Kapp, supra para 18 at paras 44, 48 and 51.

[20] The purpose of the Ontario *Health Insurance Act* and the provision of healthcare in Ontario as a whole are to ensure that patients are provided only with treatment that is determined by qualified physicians to be medically necessary and beneficial. This is supported by s. 11.2(1) of the Act, which holds that publicly funded services for the purposes of the Act include prescribed medically necessary services. This is consistent with the *Canada Health Act*, RSC 1985, c C-6, which governs the requirements of provincial healthcare for federal funding. Hospital services under the *Canada Health Act* are defined as those services which are "medically necessary for the purpose of maintaining health, preventing disease or diagnosing or treating an injury, illness or disability…"

Canada Health Act, RSC 1985, c C-6, s. 2.
Health Insurance Act, RSO 1990, c H.6 (Ontario), s. 11.2(1).

[21] In light of the substantial costs of providing publicly funded healthcare, it is a reasonable legislative purpose to ensure that medical procedures are only provided where they are necessary and beneficial. The average annual cost to the province of providing healthcare in Ontario has been $45 billion. The requirement that publicly funded treatment must be medically necessary and beneficial helps to control the cost of OHIP and consequently ensures that publicly funded care is provided to as many people as possible.

Official Problem, *supra* para 1 at 9.

[22] Finally, the SRS Conditions enhance the substantive equality of intersex people by providing publicly funded genital reconstruction surgery. Intersex people are a disadvantaged group. By not having a clearly distinguishable sex, intersex people are vulnerable to prejudice and stereotype from the public.

Official Problem, *supra* para 1 at 9.

B. The distinction furthers the ameliorative purpose

[23] To determine whether the distinction is rationally connected to the ameliorative purpose of the legislation, the government is not required to establish that the impugned distinction is "essential to realizing the object of the program (*Cunningham*)." Rather, "all the government need show is that it was rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to [its ameliorative] purpose (*Cunningham*)."

Cunningham, *supra* para 17 at paras 45 and 74.

[24] The legislative distinction drawn by the Conditions are rationally connected to the ameliorative purpose. The SRS Conditions only distinguishes the provision of publicly funded genital reconstruction surgery without prior authorization on the basis of congenitally ambiguous genitalia. Congenitally ambiguous genitalia can only be remedied by genital reconstruction surgery. Conversely, the evidence establishes that SRS is not a panacea for gender dysphoria and can be risky. Safe and effective forms of treatment include psychotherapy, counselling, hormone therapy, and assuming one's gender role. Depending on the individual, these treatments may be more desirable given the serious risks associated with all forms of SRS.

Official Problem, *supra* para 1 at 4, 5 and 7.

[25] It is important to observe that intersex people seeking SRS above and beyond genital reconstruction surgery still require referral from the Carter Institute. The distinction drawn by the

legislation is rationally connected to the ameliorative purpose given the serious risks of medical complication arising from SRS procedures.

Official Problem, *supra* para 1 at 5.

[26] The SRS Conditions are rationally connected to the ameliorative purpose by ensuring that only medical treatment which is necessary and beneficial is provided. The legislation defers to the specialized expertise of the Carter Institute's physicians in crafting appropriate criteria before recommending SRS for treating gender dysphoria. This is sensible given the acclaim of the Carter Institute and the expertise of its GDP physicians. Best practices for transgender treatment are a newly emerging area in medical schools and consequently there are few physicians in the province who consider themselves qualified to recommend SRS.

Official Problem, *supra* para 1 at 1, 5 and 8.

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

[27] Even if the Court finds that the SRS Conditions are not protected under s. 15(2), they are not discriminatory under s. 15(1). The SRS Conditions do not perpetuate prejudice, stereotype, or arbitrary disadvantage.

Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 at para 51, 170 DLR (4th) 1 [*Law*].

Kahkewistahaw First Nation v Taypotat, 2015 SCC 30 at para 20, [2015] 2 SCR 548 [*Taypotat*].

[28] Not every legislative distinction based on an enumerated or analogous ground is discriminatory. The object of s. 15 is to promote substantive equality by protecting people against the perpetuation of discrimination, prejudice and stereotype. Thus, s. 15 does not guarantee identical treatment for all parties – the Court has recognized that this can exacerbate rather than ameliorate inequality. Legislative distinctions can be necessary and sensible to suit the varying needs of distinct groups of people. As the Court in *Kapp* held, "[b]y their very

nature, programs designed to ameliorate disadvantage of one group will inevitably exclude individuals from other groups."

Kapp, supra para 17 at paras 27 and 28.

[29] The Court has adopted a flexible and contextual approach in determining whether a distinction is discriminatory. While the relevant factors will differ accordingly in each case, the framework developed in *Law* is still useful in this analysis. These factors include: pre-existing disadvantage; correspondence; the nature of the interest affected; and ameliorative effects.

Quebec (Attorney General) v A, 2013 SCC 5 at para 331, [2013] 1 SCR 61 [*Quebec*].
Law, *supra* para 27 at paras 62-75.

A. Pre-existing Disadvantage

[30] While transgender people are a historically disadvantaged group, the Court has held that there is no "presumption that differential treatment for historically disadvantaged people is discriminatory (*Law*)." Further, the existence of pre-existing disadvantage can be persuasive but it is not determinative of discrimination. In this instance, the distinction between intersex and transgender people within the SRS Conditions is a rationally defensible policy choice as it is based on medical necessity and not prejudice or stereotypes.

Law, *supra* para 27 at para 65.
Official Problem, *supra* para 1 at 3 and 8.

B. Correspondence

[31] The SRS Conditions properly take into account the actual needs and circumstances of transgender people. The legislation provides publicly funded treatment at a world class facility specializing in transgender medical care. There are few doctors outside the Carter Institute qualified to recommend SRS and best practices for transgender treatment are only beginning to be taught in medical schools. Given the serious risks associated with SRS, the Carter Institute's expert physicians are in the best position to develop criteria that appropriately respond to the needs and circumstances of patients.

Official Problem, *supra* para 1 at 5 and 8.

[32] It is clear that experts agree screening is necessary prior to recommended SRS. This is due to the fact that not all transgender persons require SRS to manage their gender dysphoria and that there are other safer and effective forms of treatment. The criteria seek to ensure that only those individuals that require SRS undertake its attendant risks. This is, in essence, and individualistic assessment.

Official Problem, *supra* para 1 at 4, 5 and 8.

[33] On this point, Justice Stern erred in finding discrimination under s. 15(1) by placing undue emphasis on the ITHA guidelines. International guidelines are not binding on jurisdictions in Canada. To hold otherwise would improperly fetter the discretion of the Ontario Legislature. The province has reasonably deferred to the Carter Institute's expertise in crafting appropriate SRS criteria. The GDP committee was unanimous that departure from the ITHA was in the best interests of patients. This alone indicates that the ITHA guidelines do not command consensus among medical experts in the field of transgender treatment. Further, the ITHA guidelines establish that SRS should only proceed where "any significant medical or mental health concerns are reasonably well-controlled." The ITHA provision themselves recognize that departure is reasonable where medically necessary according to the needs and circumstances of the patient seeking SRS.

Official Problem, *supra* para 1 at 1, 5, 6 and 9.

C. Nature of the Interest Affected

[34] The distinction created by the SRS Conditions does not perpetuate prejudice, stereotype, or arbitrary disadvantage – it rationally corresponds to the nature of the different needs of intersex and transgender people. The legislation creates a distinction of treatment based on the presence or absence of congenitally-ambiguous genitalia. Intersex people do not require authorization

before surgery because congenitally-ambiguous genitalia can only be remedied by genital reconstruction surgery. However, gender dysphoria can be successfully cared for with less invasive and safer forms of treatment. Thus, it is reasonable to establish criteria to ensure that SRS will only be recommended where medically necessary and beneficial for a patient.

Official Problem, *supra* para 1 at 1 and 5.

D. Ameliorative Effects

[35] The SRS Conditions have the ameliorative purpose and effect of enhancing the substantive equality of intersex and transgender people. Intersex people are a disadvantaged group susceptible to prejudice and stereotype by not having a distinct sex. The SRS Conditions provide publicly funded genital reconstruction surgery without prior authorization for this disadvantaged group. Further, the legislation also provides publicly funded treatment for transgender people at the Carter Institute. This is significant given that best practices for treating transgender people are only now beginning to be taught in medical schools, and the relatively few physicians in the province qualified to recommend SRS.

Official Problem, *supra* para 1 at 5 and 8.

[36] A contextual analysis reveals that the SRS Conditions do not perpetuate prejudice, stereotype, or arbitrary disadvantage. The Court has held that "the discrimination assessment must focus on the object of the measure alleged to be discriminatory in the context of the broader legislative scheme… (*Withler*)." In this case, the SRS Conditions are part of a broad statutory scheme with the purpose of providing publicly funded care that is medically necessary and beneficial to all Ontarians. In fulfilling this mandate, the government must rely on the expertise of medical professionals in developing appropriate criteria to assess whether treatment will be medically necessary and beneficial for a patient.

Withler v Canada (Attorney General), 2011 SCC 12 at para 3, [2011] 1 SCR 396

[*Withler*].

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

[37] To establish a violation under s. 7 of the *Charter*, the Appellant must show that (1) the SRS Conditions deprive the Appellant of their right to life, liberty or security of the person, and (2) that the deprivation is not in accordance with the principles of fundamental justice. The Appellant has not established a state-caused deprivation in this case.

> *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 54-55, [2015] 1 SCR 331 [*Carter*].
> *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 60, [2000] 2 SCR 307 [*Blencoe*].

1. The SRS Conditions do not deprive the Appellant of her s. 7 rights.

[38] The SRS Conditions require that an individual with gender dysphoria must receive a referral from the Carter Institute in order to receive funding for SRS. Ms. Ghorbani's claim is not in response to a prohibition against SRS– this is a claim for a positive right to funding for a specific treatment.

[39] The Supreme Court of Canada has stated that s. 7 does not provide a positive right to claimants. The majority in *Gosselin* noted that:

> Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these.

The majority found that the circumstances of that case did not warrant a novel application of s. 7 to impose a positive obligation on the state to guarantee adequate living standards.

> *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at para 81, [2002] 4 SCR 429 [*Gosselin*].

[40] The case law has not extended s.7 to include a state obligation to fund any specific healthcare treatment. Leading decisions of the Supreme Court of Canada have consistently found

that s. 7 does not provide a right to healthcare or to specific healthcare treatment. The Supreme Court of Canada has stated that the question of what the public health system should provide as benefits is a decision reserved for the legislature, not the courts.

> *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78 at para 2, [2004] 3 SCR 657 [*Auton*].
> *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 104, [2005] 1 SCR 791 [*Chaoulli*]

[41] Lower courts have also declined to include a positive right to funding for healthcare within the ambit of s. 7. The Ontario Court of Appeal in *Flora* reasoned that where "the government elects to provide a financial benefit that is not otherwise required by law, legislative limitations on the scope of the financial benefit provided do not violate s. 7." The Court distinguished the issue at bar from the *Chaoulli* and *Morgentaler* cases by highlighting that the regulation in that case, while providing funding if certain conditions were met, did "not prohibit or impede anyone from seeking medical treatment." Similarly, the Federal Court in *Canadian Doctors* rejected the argument that a Minister's decision to discontinue the provision of healthcare to refugee claimants was unconstitutional because there was no law prohibiting refugees from spending their own money to access healthcare, and thus s. 7 was not engaged.

> *Flora v Ontario Health Insurance Plan*, 2008 ONCA 538, at paras 101, 108 and 238, OAC 319 [*Flora*].
> *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651, paras 511 – 567, 28 Imm LR (4th) 1.

[42] A finding that Ms. Ghorbani is owed a positive right to SRS would have serious implications for *Charter* jurisprudence and the role of the government in Canada. The risk inherent in extending s. 7 to include positive rights was discussed by the BC Court of Appeal in *Pratten v British Columbia (Attorney General)*. In that case, a complainant argued that the effect of a positive right to know the identity of her biological father was minimal because it would

cost the state few resources. In rejecting this argument, the Court acknowledged that because s. 7 rights are guaranteed to "everyone", recognizing a positive right "'to know one's past' would have implications reaching well beyond adoptees and donor offspring." Recognizing a positive right to funding for SRS would not only create a constitutional right to a specific healthcare treatment, but it would also open the door to a number of other positive rights claims, which would have burdensome financial consequences.

> *Pratten v British Columbia (Attorney General)*, 2011 BCCA 480 at para 48, [2012] B.C.J. No. 2460, leave to appeal refused, 35191 (May 30, 2013) [*Pratten*].

A. The Appellant has not shown that a sufficient causal connection exists between the SRS Conditions and a threat to the life, liberty or security of her person.

[43] The Supreme Court of Canada has confirmed that there must be a sufficient level of causation between the actions of the state and the deprivation of s. 7 rights before a *Charter* violation is made out. Causation was mostly recently commented on by the Supreme Court in *Bedford*. The Court confirmed the "sufficient causal connection" standard applied by the majority in *Blencoe* and explained that the standard "does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant". The Court noted that a "sufficient causal connection is sensitive to the context of the particular case and insists on a real, as opposed to a speculative, link."

> *Blencoe*, *supra* para 37, at para 75.
> *Canada (AG) v Bedford*, 2013 SCC 72 at paras 75-6, [2013] 3 SCR 1101 [*Bedford*].

[44] As was the case in *Blencoe*, a number of factors have affected the psychological wellbeing of Ms. Ghorbani. Where multiple sources may be affecting a complainant, care must be taken to separate the effect of the state action from other causes in order to determine whether the law itself is sufficiently contributing to the alleged deprivation. In this case, both Ms. Ghorbani's gender dysphoria and the resulting discrimination, misunderstanding, and harassment she may

face from her family, friends, employers, and others are undoubtedly sources outside of the state. The fact that these sources may cause Ms. Ghorbani a great amount of personal distress cannot be considered when establishing a s. 7 violation.

[45] While the Court has acknowledged that the state does not have to be the sole cause of the *Charter* infringing effects, there must be a causal connection between the impugned state law and the alleged infringing effects. The Supreme Court in *Suresh* noted that the state will not be implicated by s. 7 where third parties may affect the claimant's rights unless the state's actions are a "necessary precondition for the deprivation", and the deprivation is "an entirely foreseeable consequence" of the state's action. Similarly, according to the Federal Court of Appeal in *Toussaint*, causation requires that a complainant show that the impugned state action is the "operative cause of the injury to her rights" under s. 7 of the *Charter*.

> *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 54, [2002] 1 SCR 3 [*Suresh*].
> *Toussaint v Canada (Attorney General)*, 2011 FCA 213 at para 68, [2013] 1 FCR 374, leave to appeal refused, 34446 (April 5, 2012) [*Toussaint*].

[46] Ms. Ghorbani has not shown that the SRS Conditions are a "necessary precondition" or an "operative cause of the injury" to any of her s. 7 rights. Undoubtedly, the SRS Conditions may cause some stress to Ms. Ghorbani. However, as will be explained below, this stress, does not rise to the requisite level to deprive Ms. Ghorbani of her s. 7 rights. The true causes of the serious distress that Ms. Ghorbani is experiencing are her gender dysphoria, and the resulting harassment and discrimination she suffers.

[47] Furthermore, the risk to Ms. Ghorbani's s. 7 rights is not an "entirely foreseeable consequence" of the SRS Conditions. While the SRS Conditions do limit public funding of SRS, they are also meant to provide funding for SRS where it is medically necessary. The SRS Conditions in fact increase access to this treatment. It is unforeseeable that the stress caused by

compliance with these Conditions would rise to the level of a s. 7 infringement.

B. The SRS Conditions do not affect the liberty of the Appellant

[48] The Court in *Blencoe* declared that the s. 7 right to liberty is "no longer restricted to mere freedom from physical restraint" and it will apply whenever the state prevents a person from making "fundamental personal choices." Justice La Forest in *Children's Aid Society* explains that "[i]n a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and make decisions that are of fundamental personal importance." The liberty interest protected by s. 7 was most recently discussed by the Court in *Carter*. In that case, the Court found that restricting an individual's response to an irremediable medical condition offended their s. 7 right to liberty, because it interfered "with their ability to make decisions concerning their bodily integrity and medical care."

> *Blencoe*, *supra* para 37, at para 49.
> *B. (R.) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at para 80, 1995 CanLII 115 (SCC) [*Children's Aid Society*].
> *Carter*, *supra* para 37 at para 66.

[49] The SRS Conditions have not imposed a restraint on individuals seeking SRS. Unlike the case in *Carter* where individuals were prohibited from seeking treatment for assisted suicide, individuals in Ontario are free to pursue SRS if they wish to. The state has only imposed conditions if an individual wishes to receive public funding for the SRS; they are free to pursue the surgery without this funding.

C. The SRS Conditions do not deprive Ms. Ghorbani of her right to life

[50] The Supreme Court of Canada in *Carter* considered the most recent case law on the right to life, and noted that "the case law suggests 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." The SRS Conditions imposed by the government on an individual who wishes to receive public

funding for SRS do not cause a deprivation of the Appellant's life.

Carter, *supra* para 37 at para 63.

[51] In *Chaoulli*, McLachlin C.J. and Major J. held that excessive waiting times for healthcare treatment in the public system increased the risk of death, and thus engaged the right to life. SRS, however, is not of the type of treatment that was contemplated as "life-saving" by the justices in *Chaoulli*. In *Chaoulli*, the Court was considering delay in treatment that was medically necessary because it was the only treatment available to prevent death. The Court considered situations such as delay in cardiovascular surgery where the effect was potential heart failure; or delay in surgery for hip fractures where the effect was an increased risk of post-operative death. In this case, surgery is not medically required to prevent death. Suicide risk can be managed by other treatment options that are available to transgendered individuals, such as those that Ms. Ghorbani is receiving from Dr. Kang. Ms. Ghorbani has acknowledged that since receiving treatment, she is "much happier and healthier."

Chaoulli, *supra*, para 40 at paras 112-3.
Official problem, *supra* para 1 at 4.

D. The SRS Conditions do not infringe Ms. Ghorbani's security of the person

[52] The right to security of the person includes the right to be free of state interference with respect to both bodily and psychological integrity (*New Brunswick v G. (J.)*).

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

[53] The Court most recently confirmed in *Carter* that security of the person "encompasses 'a notion of personal autonomy involving...control over one's bodily integrity free from state interference'".

Carter, *supra* para 37 at paras 64 - 66.
See also: *R v Morgentaler* [1988] 1 SCR 30 at 55-56, 1988 CanLII 90 (SCC) [*Morgentaler*].

[54] In this case, the state is not interfering with the Appellant's security of the person by depriving her of control over her bodily integrity. As observed with respect to the right to life, the SRS Conditions do not result in a threat to Ms. Ghorbani's physical person or to her ability to control her physical person.

[55] Security of the person may also be threatened where state action interferes with the psychological integrity of the individual. Chief Justice Dickson and Lamer J. in *Morgentaler* described the level of requisite stress as "serious state-imposed psychological stress" (emphasis added). The Supreme Court in *New Brunswick v G.J.* explained that s. 7 does not protect individuals from "ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action." In order to meet the level of psychological stress required to engage s. 7, the effects of the impugned state action do not have to "rise to the level of nervous shock or psychiatric illness", but they must still "have a serious and profound effect on a person's psychological integrity" (*New Brunswick v G. J.*). The effects of the state interference are to be "assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility" (*New Brunswick v G. J.).*

> *Morgentaler*, *supra* para 53 at p 56.
> *New Brunswick v G.J.*, *supra* para 52 at paras 59-60.

[56] Canadian courts have previously considered serious psychological stress in the context of delay in receiving healthcare. In *Morgentaler*, beyond the obvious time-sensitive nature of the procedure, the delay in access to abortion increased the risk of mortality and complications, and could result in a significantly more stressful and invasive procedure. In *Chaoulli*, the delayed treatments in issue increased the risk of death for patients, increased the risk that their condition would become irreparable, or was necessary to address pain that the patient was experiencing. In

both these cases, the seriousness of the consequences that the patients would experience due to the delay greatly increased their stress to the point that the delay imposed serious psychological stress.

> *Morgentaler*, *supra* para 53 at 57 – 63.
> *Chaoulli*, *supra* para 40 at paras 111 -123.

[57] The level of stress imposed by the delay in receiving SRS, the required travel to the Institute, and the uncertainty about a referral and consequently funding for treatment, do not impose serious psychological stress on Ms. Ghorbani. The Appellant has expressed that she feels in "limbo" as a result of the SRS Conditions – however, a feeling of "limbo" is not sufficient to engage s. 7.While delay and uncertainty understandably may cause stress to individuals who desire SRS, the surgery is not immediately required to prevent death, permanent disability, or to treat pain as the surgeries were in *Morgentaler* and *Chaoulli*, and they do not impose a level of stress commensurate to that which patients bear while waiting for treatment that is immediately required.

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

[58] As previously mentioned, it is important to separate any stress caused by the state due to delayed treatment from the more serious psychological stress caused by Ms. Ghorbani's gender dysphoria and general experience as a transgendered individual in Ontario. Unlike other s. 7 healthcare cases like *Morgentaler* and *Chaoulli*, any stress caused by the SRS Conditions does not exacerbate the prejudice that she experiences as a result of her gender dysphoria. Ms. Ghorbani could still experience psychological distress if the SRS Conditions were not in place – SRS is not a cure for gender dysphoria, and many people who receive it still suffer prejudice and stereotype and psychological distress from the condition.

2. If the SRS Conditions deprive the Appellant of her life, liberty or security of the person, this deprivation is in accordance with the principles of fundamental justice

[59] The Supreme Court of Canada has confirmed a number of factors that weigh towards offending principles of fundamental justice. The Court in *Bedford* notes:

> The overarching lesson that emerges from the case law is that laws run afoul of our basic values when the means by which the state seeks to attain its objective is fundamentally flawed, in the sense of being arbitrary, overbroad, or having effects that are grossly disproportionate to the legislative goal.
>
> *Bedford*, *supra* para 43 at para 105.

A. The SRS Conditions are not arbitrary

[60] The Court in *Bedford* explained that arbitrariness is "used to describe the situation where there is no connection between the effect and the object of the law". In *Chaoulli*, McLachlin C.J. and Major J. clarified that "[t]he question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair".

> *Bedford*, *supra* para 43 at para 98.
> *Chaoulli*, *supra* para 40 at para 131.

[61] In this case, the objective of the law is two-fold. First, the SRS Conditions are meant to ensure that only medically necessary and beneficial treatment is funded. This is tied to the second objective, which is to control costs of OHIP. There is a clear relationship between requiring a referral from the Carter Institute and the objective of ensuring only medically necessary and beneficial treatment is funded. The Institute is a renowned treatment centre specializing in gender dysphoria capable of accurately referring SRS and assessing whether less intrusive treatments are sufficient. By limiting funding to individuals with referrals from the Institute, only medically required and beneficial SRS will be funded.

B. The SRS Conditions are not overly broad

[62] In *R v Heywood*, the Supreme Court of Canada established "overbreadth" as offensive to

principles of fundamental justice. The Court in *Bedford* recently described overbreadth as where "the law goes too far and interferes with some conduct that bears no connection to its objective" and clarified that "[a]t its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts." The Court in *Carter* noted that "[t]he question is not whether Parliament has chosen the least restrictive means, but whether the chosen means infringe life, liberty or security of the person in a way that has no connection with the mischief contemplated by the legislature."

> *R v Heywood*, [1994] 3 SCR 761, 1994 CanLII 34 [*R v Heywood*].
> *Bedford*, *supra* para 43 at paras 101, 112.
> *Carter*, *supra* para 37 at para 85.

[63] The SRS Conditions are not overbroad. The "mischief" contemplated by the legislation is the public funding for SRS that is not medically required. The conduct that the law interferes with is an individual's receipt of funding for SRS. The SRS Conditions apply only to those who wish to receive funding. If this results in an infringement of Ms. Ghorbani's s. 7 rights, it does so in a way that is connected to ensuring that SRS will be medically necessary and beneficial for her. Thus, the SRS Conditions are not overbroad.

C. The effects of the SRS Conditions are not grossly disproportionate to the legislative objective of ensuring that only medically necessary and beneficial treatment is funded

[64] A law which has effects that are grossly disproportionate to a legitimate state interest or objective will offend the principles of fundamental justice. The Court in *Carter* explained that the inquiry into gross disproportionality compares "the law's purpose, 'taken at face value', with its negative effects on the rights of the claimant" to determine whether the effect on the individual claimant is "completely out of sync with the objects of the law". The individual impact is permitted to be incommensurate with the purpose of the law, as long as the impact does

not reach the level of gross proportionality. The Court in *Bedford* noted that in order for a law to be grossly disproportionate, the "connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society."

> *Carter*, *supra* para 37 at para 89.
> *Bedford*, *supra* para 43 at para 120.

[65] In the case at bar, the effects of the SRS Conditions on Ms. Ghorbani cannot be said to be grossly disproportionate to their purpose. The effects arise from the need for the public healthcare system to be assured that publicly funded treatment is medically necessary and beneficial. A referral from the Carter Institute assures OHIP of the necessity of the surgery. While individuals may be burdened with the need to travel to the Centre, and the associated costs for travel, this effect is not grossly disproportionate to the object of the law, which is, in part, to provide those same individuals with medically necessary and beneficial care. The imposition of costs and related stress on an individual seeking public funding for a specific treatment is not "draconian" or "outside the norms accepted in our free and democratic society".

Issue 3: In the alternative, any infringements are justified under section 1 of the *Charter*

[66] If the SRS Conditions deprive the Appellant of her s. 15 or s. 7 rights, the deprivation is demonstrably justified in a free and democratic society. The government must show that the law pursues a pressing and substantial objective; the law is rationally connected to its objective; the law is minimally impairing of the impugned *Charter* right; and the law's deleterious effects are not disproportionate to its salutary benefits.

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

[67] The Supreme Court in *Bedford* recently rebuffed the popular idea that a law that violates s. 7 cannot be justified under s. 1. In doing so, the Court highlighted that, while analytically similar, the s. 7 inquiry into the principles of fundamental justice and the s. 1 inquiry ask two

different questions. The focus of the s. 7 inquiry is whether the impact on the individual "is not connected to the law's object" while the s. 1 inquiry looks at whether the impact of the law on the individual is justified given its beneficial impact "in terms of achieving its goal for the greater public good." Due to the differing natures of the s. 7 and s. 1 inquiries, the Court clarified that "the possibility that the government could establish that a s. 7 violation is justified under s. 1 of the *Charter* cannot be discounted." This is such a case.

Bedford, *supra* para 43 at paras 126 – 127.

1. The SRS Conditions are the result of a pressing and substantial legislative objective

[68] The purpose or objective of the SRS Conditions is two-fold: first, the Conditions ensure that OHIP Plan members are only provided with medically necessary and beneficial care; and second, the Conditions help control the costs of OHIP. These objectives are derived from the overall policy behind the administration of the public healthcare system. Similar to the case in *Cameron*, the overall objective is "to provide the best possible health care coverage...in the context of limited financial resources."

Cameron v Nova Scotia (Attorney General), 1999 CanLII 7243 (NSCA) at para 218, [1999] NSJ No. 297, leave to appeal refused, 27584 (November 15, 2001) [*Cameron*].

Official Problem, *supra* para 1 at 9.

[69] Ontario, as a state provider of healthcare, must be concerned with ensuring that OHIP plan members only receive the care that is medically necessary and beneficial. The importance of ensuring that individuals receive the best care and assessment before receiving SRS cannot be overstated – the surgery is irreversible, and has significant risks. As both parties have agreed, "all forms of SRS carry risks of serious medical complications".

Official Problem, *supra* para 1 at 4.

[70] Gender dysphoria also engages a new area of medicine and there is no clear agreement in

the medical community that SRS is medically necessary to treat the condition. Best practices for treating gender dysphoria are only now beginning to be taught to Canadian medical students. Outside of the Carter Institute there are few doctors who consider themselves qualified to make a referral for SRS. Dr. Forrester's evidence establishes that "there is still controversy in the medical community as to whether such procedures are more aesthetic than medically necessary." He acknowledges that physicians opposed to SRS often "cite the 'do not harm' principle, the risk of complications arising from SRS procedures, and the fact that they do not completely resolve the underlying gender dysphoria." The medical community *is* in consensus, however, that individuals with gender dysphoria do not always medically require or desire SRS. For many patients, gender dysphoria can be managed by living in their chosen gender role, undergoing hormone treatment, and attending counseling.

Official Problem, *supra* para 1 at 6 and 8.

[71] Requiring a referral from the Carter Institute provides the most accurate referrals for SRS in the context of a still-emerging field of medicine. Because of the serious risks associated with the surgery, the still developing understanding of whether SRS is appropriate treatment for gender dysphoria, and the lack of expertise prevalent in the medical community in Ontario, the government has chosen a leading gender dysphoria treatment centre to provide pre-SRS care and referral.

[72] The second objective of the SRS Conditions, to control costs of OHIP, is important given a limited budget that provides care to millions of Ontarians with a full range of medical conditions. Providing medically unnecessary care to any individual removes potential resources that may be needed for others who require medical treatment. Although the annual total cost of SRS seems small in comparison to the overall annual budget of the healthcare program, it must be

considered within the context of a healthcare program that covers a full ambit of treatment. All types of medical treatment must be limited to treatment that is medically necessary and beneficial in order to control the costs of OHIP - including SRS.

2. The SRS Conditions are rationally connected to the state's objective

[73] The second stage of the *Oakes* analysis requires that there be a rational connection between the state's beneficial objective and the infringing law. As the Court in *Carter* confirmed, the means adopted must be "a rational way for the legislature to pursue its objective". To establish a rational connection, "the government need only show that there is a causal connection between the infringement and the benefit sought 'on the basis of reason or logic'".

> *Oakes*, *supra* para 66.
> *Carter*, *supra* para 37 at para 99.
> *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 at para 153, 1995 CanLII 64 (SCC) [*RJR-MacDonald*].

[74] In this case, there is a logical connection between the SRS Conditions and the state's objectives of providing only medically necessary and beneficial care and limiting costs. Requiring individuals who want public funding for SRS to obtain a referral from the Carter Institute is a logical way of ensuring that the surgery is a medically necessary procedure. As noted above, the Carter Institute specializes in the treatment of gender dysphoria and makes accurate referrals for SRS to ensure that the surgery is medically required and the individual's gender dysphoria cannot be managed by less intrusive means. Limiting funding to those surgeries referred by the Institute ensures that only medically necessary surgeries are funded.

3. The SRS Conditions minimally impairs the Appellants rights

[75] The second part of the *Oakes* test requires that the law limit the right as little as reasonably possible. Courts recognize that legislators must be afforded flexibility in tailoring legislative responses and cannot be held to a standard of perfection. The Court in *R v Bryan* confirmed the

principle articulated in *RJR-MacDonald* that "if the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement".

> *Oakes*, *supra* para 66.
> *R v Bryan*, 2007 SCC 12 at para 42, [2007] SCR 527 [*R v Bryan*].
> See also: *RJR-MacDonald*, *supra* para 73 at para 160, 1994.

A high level of deference is owed to the legislature in this case because it involves complex social policy decisions involving the balancing of competing interests

[76] Deference is owed to the legislature's decision where an individual's right is infringed in the context of complex social policy decisions involving competing interests. The majority in *Irwin Toy* highlighted the difference between cases where the state is striking "a balance between the claims of competing groups" and cases where the government is "the singular antagonist of the individual whose right has been infringed." The majority noted that cases involving balancing competing interests involve difficult decisions, and that "[d]emocratic institutions are meant to let us all share in the responsibility for these difficult choices" (*Irwin Toy*). A court assessing a state decision made in the context of competing rights "must be mindful of the legislature's representative function".

> *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927 at paras 79-80, 1989 CanLII 87 (SCC) [*Irwin Toy*].

[77] The Nova Scotia Court of Appeal confirmed a deferential approach to complex healthcare decisions in *Cameron*. In *Cameron*, the state's denial of funding for forms of fertility treatment that had been previously covered under the healthcare plan was found to be discriminatory under s. 15, but was saved by s. 1. The majority decision acknowledged "the complexity of the health care system and the extremely difficult task confronting those who must allocate the resources among a vast array of competing claims." The majority reasoned that policy makers "must be

'accorded some flexibility' in apportioning social benefits among the vast number of competing procedures and conditions of patients that call for them" and that courts "are simply not equipped to sort out the priorities."

Cameron, *supra* para 68, at paras 235 – 236.

[78] The choice made by the legislature to require referral by the Carter Institute is minimally impairing of Ms. Ghorbani's s. 15 and s. 7 rights because it falls within a range of reasonable alternatives. The SRS Conditions represent a government decision made in the context of the distribution of limited state resources to provide for the full range of medical care required by everyone in Ontario. This choice is one engaging complex social policy decisions and wide deference should be granted. Given the uncertainty and lack of broad expertise in this area of medicine, the best policy choice is to require referral from the Carter Institute – it is the leading centre for gender dysphoria treatment in Ontario, and is best placed to refer individuals for SRS.

[79] Furthermore, the SRS Conditions do not prohibit the surgery. They only require an individual with gender dysphoria seeking public funding to receive a referral from the Carter Institute. This burden on the Appellant is balanced against the need to ensure that the public health system only funds medically necessary treatment in an effort to fairly distribute limited public funding to millions of Ontarians who need medical treatment for innumerable conditions.

[80] Finally, the state's refusal to fund one type of treatment for gender dysphoric individuals does not mean that they are effectively denied adequate healthcare, as was the case in *Eldridge*. In *Eldridge*, the lack of interpretation services meant that hearing-impaired individuals were limited in their access to every kind of healthcare. Similar to the reasoning of the majority in *Cameron*, the decision to require assessment before funding will be granted is minimally impairing, because all medical services available to Ontarians are still available to transgender individuals, and these services include specific treatment options for gender dysphoria.

Eldridge v British Columbia (Attorney General), [1997] 3 SCR 624, 1997 CanLII 327 (SCC) [*Eldrdige*].
Cameron, supra para 68, at paras 243 to 245.

4. The SRS Conditions alleged deleterious effects are proportional to their salutary benefits

[81] The final part of the *Oakes* test asks whether the impact of the law on the infringed rights is so drastic that it is not worth the law's beneficial social impacts.

Hutterian, supra para 14 at para 78.

[82] The salutary effects of the SRS Conditions outweigh their deleterious effects in this case. The deleterious effects of the SRS Conditions on the individual include delay in funding for and access to the surgery, potential costs associated with travel to the clinic, and uncertainty about referral. The benefits of the SRS Conditions outweigh these deleterious effects. The benefits of the SRS Conditions are that intersex people receive funding for medically necessary treatment, and that transgender individuals who medically require and will benefit from SRS will also receive public funding. The SRS Conditions limit the costs of administering OHIP, thereby ensuring that limited public funds are fairly distributed to those in Ontario who need it, and also allows transgender Ontarians the ability to realize their gender identity.

PART V – ORDER SOUGHT

[83] The Respondents request that the appeal be dismissed.

All of which is respectfully submitted this 28th day of January, 2015.

_____

Team 10
Counsel for the Respondents

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, c 11.	3, 4
Canada Health Act, RSC 1985, c C-6.	20
Health Insurance Act, RSO 1990, c H. 6 (Ontario).	20
JURISPRUDENCE	**PARAGRAPHS**
Alberta (Aboriginal Affairs and Northern Development) v Cunningham, 2011 SCC 37, [2011] 2 SCR 670.	17
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567.	14, 81
Auton (Guardian ad litem of) v British Columbia (Attorney General), 2004 SCC 78, [2004] 3 SCR 657.	40
B. (R.) v Children's Aid Society of Metropolitan Toronto, [1995] 1 SCR 315, 1995 CanLII 115 (SCC)	48
Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44, [2000] 2 SCR 307.	37, 43, 48
Cameron v Nova Scotia (Attorney General), 1999 CanLII 7243 (NSCA), [1999] NSJ No. 297, leave to appeal refused, 27584 (November 15, 2001).	68, 77, 80
Canada (AG) v Bedford, 2013 SCC 72, [2013] 3 SCR 1101.	43, 59-60, 62, 64, 67
Canadian Doctors for Refugee Care v Canada (Attorney General), 2014 FC 651, 28 Imm LR (4^{th}) 1.	41
Carter v Canada (AG), 2015 SCC 5, 384 DLR (4th) 14.	37, 48, 50, 53, 62, 64, 73
Chaoulli v Quebec (AG), 2005 SCC 35, [2005] 1 SCR 791.	40, 51, 56, 60
Eldridge v British Columbia (AG), [1997] 3 SCR 624, 1997 CanLII 327 (SCC).	80
Flora v Ontario Health Insurance Plan, 2008 ONCA 538, 238 OAC 319.	41
Gosselin v Quebec (AG), 2002 SCC 84, [2002] 4 SCR 429.	38
Irwin Toy Ltd. v Quebec (Attorney General), [1989] 1 SCR 927, 1989 CanLII 87 (SCC).	76
Kahkewistahaw First Nation v Taypotat, 2015 SCC 30, [2015] 2 SCR 548.	27
Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497, 170 DLR (4th) 1.	27, 29-30
New Brunswick (Minister of Health and Community Services) v G. (J.), [1999] 3 SCR 46, 1999 CanLII 653.	52, 55
Pratten v British Columbia (Attorney General), 2011 BCCA 480, [2012] B.C.J. No. 2460, leave to appeal refused, 35191 (May 30, 2013).	42
Quebec (Attorney General) v A, 2013 SCC 5, [2013] 1 SCR 61.	29