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

BETWEEN:

IRINA KOWALSKI

APPELLANT

-AND-

SASKATCHEWAN (ATTORNEY GENERAL)

RESPONDENT

FACTUM OF THE APPELLANTS

Team Number: 9

TABLE OF CONTENTS

PART I—OVERVIEW

1. Irina Kowalski has always wanted to be a mother – to have and to carry a child of her own. By imposing arbitrary and discriminatory limits on access to insured IVF, the Respondent has denied Ms. Kowalski this life-fulfilling opportunity.

Official Problem, Wilson Moot 2019 at para 13 [Official Problem].

2. The amendments to the Saskatchewan Health Payment Schedule for Insured Services Provided by a Physician (PPS) impose age limits (the "eligibility criteria") on funding for in-vitro fertilization (IVF) treatments. As a consequence of the eligibility criteria, Ms. Kowalski is prevented from accessing insured IVF, even though her physician has recommended it as her best treatment option.

Saskatchewan Health Payment Schedule for Insured Services Provided by a Physician under S-29 Reg 19/2016 (modified for the purposes of the Wilson Moot) [PPS].
Official Problem, *supra* para 1 at paras 9, 12.

3. The eligibility criteria infringe section 15(1) of the *Charter* by excluding women who are aged 39 and 364 days from receiving insured IVF, while providing funding for unlimited access to the procedure for every man, as well as for every woman younger than the prescribed age. The unequal provision of insured IVF treatment also infringes Ms. Kowalski's section 7 rights by delegitimizing and devaluing one of her most fundamental rights and by causing her psychological as a result.

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ss 7, 15 [*Charter*].
Official Problem, *supra* para 1 at para 19.
Official Clarifications, Wilson Moot 2019 at para 8 [Official Clarifications].

4. The infringement of Ms. Kowalski's rights cannot be justified in a free and democratic society.

PART II—STATEMENT OF FACTS

Factual Background

5. Irina Kowalski's ultimate wish is to carry and raise a child of her own. This is something she has always wanted.

Official Problem, *supra* para 1 at para 13.

6. Ms. Kowalski was born in Poland and immigrated to Canada with her father when she was 15, following the death of her mother. Ms. Kowalski is an only child and her father worked hard to build a good life for them in a new country, far away from their family back in Europe. After finishing school, Ms. Kowalski worked hard to support herself and build her career. She made sacrifices in her personal life to achieve this. Her dream of having a child never waned and become even more important after the death of her father.

Official Problem, *supra* para 1 at paras 1–4, 13.

7. Ms. Kowalski's chance to have a child arose during a long-term relationship, during which time she and her partner attempted to conceive. Unfortunately, their efforts were unsuccessful and the relationship ended unexpectedly when she was 35. Soon after, her father suffered a disabling stroke and Ms. Kowalski moved back in to care for him, while continuing to work full time. Ms. Kowalski's father passed away in 2016, leaving her completely alone.

Official Problem, *supra* para 1 at paras 4, 6, 13.

8. Following her father's passing, just months after turning 40 years old, Ms. Kowalski attended a fertility clinic and underwent various fertility tests to determine how she could conceive a child as a single person. Dr. Christie Burnett, her doctor, recommended IVF as the best course of treatment based on her age and the fact that she has endometriosis. Other available fertility treatments do not present any real chance of success for Ms. Kowalski.

Official Problem, *supra* para 1 at paras 1, 8, 9.

9. The Respondent has created a scheme for insured fertility treatment (the "Fertility Program") in order to increase affordability and access for individuals who want to grow their family or who are having difficulty conceiving naturally. The eligibility criteria provide insured IVF for embryo recipients who are under 40 years of age. The eligibility criteria were imposed to control costs and ensure that those who accessed the program were most likely to benefit.

Official Problem, *supra* para 1 at paras 18(a), (c).
PPS, *supra* para 2 s 600P(a).

10. Had Ms. Kowalski arrived at the clinic just months earlier, she would have been eligible for insured IVF. Instead, she is precluded from accessing the procedure from which she is very likely to benefit. Ms. Kowalski earns an honest but relatively meagre income, and does not have the luxury of private health insurance. In contrast, men, who do not suffer from the financial disadvantages imposed by the wage gap, are capable of receiving unlimited funding for IVF at any age. Women just slightly younger than Ms. Kowalski do not face this financial hurdle either.

PPS, *supra* para 2 s 600P(a).
Official Problem, *supra* para 1 at paras 7, 8, 10, 16(e), 19.

11. The denial of funded IVF has caused Ms. Kowalski to become depressed and withdrawn, leading her to stay at home now more than ever. She feels that she has been devalued in the eyes of society. Her experience has been extremely stressful and upsetting and she has been seeing a counsellor as a result.

Official Problem, *supra* para 1 at para 13.

Medical Facts

12. Roughly 1 in 6 couples in Canada face infertility. Women with infertility face similar stresses to those coping with illnesses such as cancer, HIV and chronic pain. Different types of fertility treatments exist, including artificial insemination (AI) and intra-uterine insemination (IUI),

however the effectiveness of these additional methods is drastically reduced with age. A younger patient will have more flexibility in considering fertility procedures before resorting to IVF.

Official Problem, *supra* para 1 at paras 14, 16(d).

13. IVF is recommended in a wide range of circumstances, including where an individual has undergone previous fertility treatments without success, where an individual is of advanced age, and where an individual has endometriosis. Approximately 40% of patients with endometriosis face infertility, and the condition presents a greater risk of a life-threatening ectopic pregnancy. IVF eliminates this danger by directly implanting the embryo into the uterus.

Official Problem, *supra* para 1 at paras 14(m), (n), (o).

14. Although there is evidence of a general decline in fertility in women over age 37, this data is based on statistical averages and is in no way determinative of the potential outcome on an individual basis. The field of reproductive technology is very rapidly expanding and changes in reproductive technology are taking place faster than the statistics are able to convey.

Official Problem, *supra* para 1 at paras 14(r), (s).

Social Context

15. Progress in achieving gender equality has been slow. A significant wage gap persists between men and women, and a recent report indicated that it will take another 70 years for women's wages in Canada to catch up with those of men. As of 2010, more than 60% of women did not have workplace pensions.

Official Problem, *supra* para 1 at paras 16 (e), (f).

16. Single and childless women face further systemic challenges and discrimination. This is a reflection of the fact that governments have traditionally used policy to elevate the concept of a "middle class" nuclear family while disregarding single people and families without children. As an example, significant tax credits are afforded to people who are married or who have children.

The expert evidence of Dr. Wong establishes that women aged 35 and over, who have difficulty conceiving or who are single, experience invasive questioning, social pressure and higher risks of depression and severe anxiety. Women with fertility issues are subject to prolonged emotional stress and feelings of inadequacy. These women face ongoing stereotypes and stigma surrounding their age and single, childless status.

Official Problem, *supra* para 1 at paras 16(b), (c).

17. Ms. Kowalski's experience is illustrative of these facts. The denial of funding has left her depressed and withdrawn. She is all-too aware of the continued prevalence of stereotypes about older women without children and, as a result, she feels as though she is seen as a less productive and valuable member of society.

Official Problem, *supra* para 1 at para 13.

Procedural History

18. In September 2017, Justice Cairns found that the eligibility restrictions were 'discriminatory on the ground of age, and the interrelated grounds of sex and family status', contrary to section 15 of the *Canadian Charter of Rights and Freedoms* (*Charter*). Justice Cairns also found that the eligibility restrictions deprived Ms. Kowalski of her rights to liberty and security of the person in a manner not in accordance with the principles of fundamental justice. In her judgement, Justice Cairns found that the Saskatchewan government had not adduced evidence to show that women over 40 could not benefit from IVF, and that the *Charter* infringements were not rationally connected to their objectives; accordingly, the eligibility restrictions could not be saved under section 1 of the *Charter*.

Official Problem, *supra* para 1 at 11.

19. A majority of the Saskatchewan Court of Appeal agreed that the Fertility Program created a distinction based on age, but held that there was no discrimination on the basis of age or any interrelated grounds. The majority also allowed the appeal on section 7, holding that Ms. Kowalski's section 7 interests were not sufficiently engaged. In dissent, Justice Goldstein largely adopted the reasoning of Justice Cairns.

Official Problem, *supra* para 1 at p 11.

PART III—STATEMENT OF POINTS IN ISSUE

20. There are 3 issues on appeal:

Issue 1. Do the eligibility criteria for funding under the Fertility Program infringe Ms. Kowalski's rights under section 15 of the *Charter*? Yes.

The eligibility criteria infringe Ms. Kowalski's section 15(1) rights. Section 15(2) does not apply.

Issue 2. Do the eligibility criteria for funding under the Fertility Program infringe Ms. Kowalski's rights under section 7 of the *Charter*? Yes.

The eligibility criteria deprive Ms. Kowalski of her rights to liberty and security of the person and are not in accordance with the principles of fundamental justice.

Issue 3. If the answer to either questions 1 or 2 is "yes", is the infringement demonstrably justified in a free and democratic society under section 1 of the *Charter*? No.

The *Charter* infringements cannot be justified in a free and democratic society under section 1.

PART IV—ARGUMENT

ISSUE 1: The eligibility criteria infringe Ms. Kowalski's rights under section 15 of the *Charter*

21. The eligibility criteria infringe section 15(1) of the *Charter* by imposing differential treatment that perpetuates disadvantage, prejudice and stereotyping of middle-aged women, like Ms. Kowalski.

22. Section 15 of the *Charter* protects substantive and not merely formal equality (*Andrews*). The focus of the inquiry, therefore, is on the effect, not the purpose of the law (*Alliance*). A provision is discriminatory when it creates a distinction, based on an enumerated or analogous ground, that has the effect of perpetuating disadvantage, prejudice or stereotype (*Taypotat*). By precluding embryo recipients over age 39, the eligibility criteria for insured IVF create a direct distinction based on age, an indirect distinction based on sex, and an adverse effects-based distinction on the intersecting grounds of marital and family status. These distinctions are discriminatory.

> *Law Society of British Columbia v Andrews*, [1989] 1 SCR 143 at 165-71, 56 DLR (4th) 1 [*Andrews*].
> *Québec (AG) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 60, 421 DLR (4th) 1 [*Alliance*].
> *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 19-21, [2015] 2 SCR 548 [*Taypotat*].

23. When the government provides a benefit, like insured health care, it must do so in a non-discriminatory way (*Auton*, *Eldridge*). The Supreme Court has long recognized that state inaction, by under-inclusiveness, may be a backhanded way of permitting discrimination (*Brooks*). In many circumstances, remedying such discrimination will "require governments to take positive action" by "extending the scope of a benefit to a previously excluded class of persons" to ensure that disadvantaged groups benefit equally from services offered to the general public (*Eldridge*).

Auton (Guardian Ad Litem of) v British Columbia (AG), 2004 SCC 78 at para 41, [2004] 3 SCR 657 [*Auton*].
Eldridge v British Columbia (AG), [1997] 3 SCR 624 at paras 73, 77, 151 DLR (4th) 577 [*Eldridge*].
Brooks v Canada Safeway Ltd, [1989] 1 SCR 1219 at 1240, 59 DLR (4th) 321 [*Brooks*].

The eligibility criteria create impermissible distinctions

24. A law is discriminatory if, in its effect, it creates a disproportionate impact on a group identified by enumerated or analogous grounds (*Withler*). Substantive equality does not require a direct or intended distinction at the first stage of the analysis; "the mere fact that the law [has a] disproportionately adverse effect is enough" (Hogg). The creation of obstacles or limitations which are disproportionately borne by members of an enumerated or analogous group constitutes a distinction for the purposes of section 15 of the *Charter*.

Withler v Canada (AG), 2011 SCC 12 at para 40, [2011] 1 SCR 39 [*Withler*].
Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2016) (loose-leaf updated 2018) at 55.11(a).

25. Further, a distinction may be found to contravene section 15(1) even if only a subset of the relevant group is disadvantaged (*Martin*). The Supreme Court recognised in *Martin* that "differential treatment can occur on the basis of an enumerated or analogous ground despite the fact that not all persons belonging to the relevant group are equally mistreated."

Nova Scotia (Workers' Compensation Board) v Martin, 2003 SCC 54 at paras 77–81, 76, [2003] 2 SCR 504 [*Martin*].

26. The eligibility criteria draw impermissible distinctions on the basis of age, sex, and the intersecting grounds of marital and family status.

The eligibility criteria draw a distinction on the enumerated ground of age

27. Section 600P(a) draws a clear distinction on the enumerated ground of age by requiring that an embryo recipient be under age 40. This is not contested by the Respondent.

PPS, *supra* para 2 s 600P(a).

The eligibility criteria create a distinction on the enumerated ground of sex

28. In *Brooks* the Supreme Court held that distinctions based on pregnancy unquestionably amount to distinctions on the basis of sex. It should be equally incontrovertible that distinctions related to embryo recipients amount to distinctions on the basis of sex. As with pregnancy, it is a biological reality that only women can ever be embryo recipients. In effect, the eligibility criteria enable a man to have a biological child at any age, whereas a woman is denied this ability once she reaches age 40.

> *Brooks*, *supra* para 23 at 1243-44.
> Official Problem, *supra* para 1 at para 19.

The eligibility criteria create an adverse-effect distinction on the intersecting grounds of age, sex and marital and family status

29. To fully account for the numerous ways in which women experience discrimination related to reproduction, it is necessary to consider multiple intersecting grounds (*Inglis*). An intersecting grounds analysis recognizes that "a claimant may be impacted by many interwoven grounds of discrimination" (*Withler*).

> *Inglis v British Columbia (Minister for Public Safety)*, 2013 BCSC 2309 at paras 518, 545, 558, [2013] BCJ No 2708 [*Inglis*].
> *Withler*, *supra* para 24 at paras 58, 63.

30. Women in particular experience complex discrimination on the basis of multiple grounds (*Weatherall*). The Supreme Court has recognized that marital status (*Quebec v A*) and reproduction (*Brooks*) are just some of the contributing factors to the pre-existing disadvantage of women. Middle-aged, single, childless women, such as Ms. Kowalski, face specific social exclusion and disadvantage. Women also suffer economic disadvantages when compared to men. As such, Ms. Kowalski's economic circumstances are relevant because she is excluded from IVF entirely due to financial constraints.

Official Problem, *supra* para 1 at paras 16(b), (c), (e).
Weatherall v Canada (AG), [1993] 2 SCR 872 at 877, 105 DLR (4th) 210 [*Weatherall*].
Brooks, *supra* para 23, at 1243-44.
Quebec (AG) v A, 2013 SCC 5 at para 241, [2013] 1 SCR 61 [*Quebec v A*].

31. The Supreme Court has made clear that discriminatory treatment need not be "perfectly inclusive" of an entire group to establish the necessary nexus between grounds and discrimination (*Janzen*). The fact that some single women and some childless women may qualify for insured IVF under section 600P(a) is irrelevant. Group heterogeneity is not a barrier to discrimination (*Quebec v A*).

Janzen v Platy Enterprises Ltd, [1989] 1 SCR 1252 at 1288-89, 59 DLR (4th) 352 [*Janzen*].
Quebec v A, *supra* para 30 at para 354.

32. By targeting the Fertility Program at single individuals specifically, the Respondent recognizes the disadvantages faced by single and childless individuals. This disadvantage is compounded for single women, who are less likely to have the financial security and workplace benefits to afford private IVF. Further, women earn less than 87% of the income of their male counterparts and are unlikely to have private workplace pensions. This means that women must work longer before accruing the necessary financial security to consider starting a family.

Official Problem, *supra* para 1 at paras 16(e), (f), 19(a).

33. Although Ms. Kowalski's exclusion from insured IVF is superficially based on her age, this exclusion has a disparate adverse effect on her as a single, childless woman. The effect of excluding embryo recipients over age 39 is to deny single, childless women like Ms. Kowalski the ability to ever have a child. Given the already disadvantaged position that single women face both economically and socially, and the social stigma faced by childless women, the eligibility criteria impact them more severely by creating additional barriers to having a family and participating fully in society (*Brooks*).

Brooks, *supra* para 23 at 1238.

The distinctions drawn by the eligibility criteria are discriminatory

34. A law is discriminatory if it widens the gap between a historically disadvantaged group and the rest of society (*Quebec v A*). The eligibility criteria widen the gap between women over age 39, and the rest of society, by exacerbating their disadvantage and codifying their prejudicial treatment.

Quebec v A, *supra* para 30 at para 332.

35. A distinction will amount to discrimination where it perpetuates arbitrary disadvantage (*Taypotat*). Pre-existing disadvantages have been recognized as "probably the most compelling factor" in determining whether a provision is discriminatory (*Law*). There can be no question that women constitute a historically disadvantaged group (*Weatherall*), particularly in relation to reproduction (*Brooks*). The eligibility criteria perpetuate these historical disadvantages by depriving a subset of women from access to a program that was designed, in part, to ameliorate their disadvantaged position.

Taypotat, *supra* para 22 at para 20.
Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 at paras 72-73, 170 DLR (4th) 1 [*Law*].
Weatherall, *supra* para 30 at 877.
Brooks, *supra* para 23 at 1238.

The distinctions drawn by the eligibility do not correspond with actual needs and capacities

36. Distinctions on the basis of enumerated or analogous grounds are discriminatory where they fail to "respond to the actual capacities and needs of the member group [and] instead impose a burden or deny a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage" (*Alliance*). IVF is specifically recommended for women over age 37, and those who have failed to conceive using other methods. With her compounding condition of endometriosis and pelvic adhesions, Ms. Kowalski belongs even more precisely to the group for

whom IVF is recommended. The exclusion of all women over age 39 from insured IVF does not correspond with their actual needs and circumstances, and has the effect of excluding most of those women for whom IVF is most beneficial.

Alliance, *supra* para 22 at para 94.
Official Problem, *supra* para 1 at paras 14(m), (n).

37. The age limitation imposed by the Respondent represents, at best, an assumption based on statistical averages that do not in any way determine the potential outcomes for women between the ages of 40 and 43. By ignoring the individualized assessment already required for funded IVF, the eligibility criteria disproportionately exclude those most likely to benefit; namely, women aged 40 and over with fertility issues. This cannot in any way be said to correspond to the actual needs and circumstances of the excluded women.

Official Problem, *supra* para 1 at para 14(r).

The distinctions drawn by the eligibility criteria perpetuate disadvantage, prejudice and stereotyping

38. Prejudice and stereotyping are two central concepts that guide the discrimination analysis within section 15(1) (*Quebec v A*). These indicia of discrimination capture the idea that laws that do not draw obvious distinctions may nevertheless treat individuals like second-class citizens whose aspirations are not equally deserving of consideration (*Auton*, *Law*). Where government action "designed to benefit the population in general…excludes historically disadvantaged claimants" it will rarely escape the charge of discrimination (*Law*).

Quebec v A, *supra* para 30 at para 329.
Auton, *supra* para 23 at para 63.
Law, *supra* para 35 at paras 99, 72.

39. The eligibility restrictions have the effect of discriminating on the basis of age, sex and family status because they reinforce historical and sociological disadvantages imposed on older, single women, which are not imposed on others (*Quebec v A*). This type of adverse impact based

on enumerated grounds is precisely the kind of discrimination against which section 15(1) of the *Charter* is intended to protect (*Alliance*). LeBel J explained in *Quebec v A* that:

> [A] government might make laws that unintentionally convey a negative social image of certain members of society. This situation could arise if the government favours certain individuals at the expense of others because the others share an enumerated or analogous characteristic. Such laws would express or perpetuate prejudice against certain individuals by establishing a hierarchy of worth based on prohibited grounds of discrimination.

Quebec v A, supra para 30 at paras 333, 197.
Alliance, supra para 22 at para 55.

40. Single, childless, women aged 40 and older suffer unequally under the social judgement associated with infertility. The government has effectively precluded these women from having control over their 'family status' by impeding their only chance to have a child. These exclusions codify a discriminatory moral hierarchy of worth; they favour the young, the married and the men. The effect of this is to further entrench the marginalized status of single, childless women (*Alliance*).

Official Problem, *supra* para 1 at paras 16 (b), (c).
Alliance, supra para 22 at para 40.

41. Single women, like Ms. Kowalski, do not have the support of a second income and continue to suffer from the gender wage gap; they face systemic discrimination in matters of compensation (*Alliance*). Current Saskatchewan law already denies financial benefits to single, childless women. By imposing the cost of IVF only on women who have reached 40 years of age, the government subjects these disadvantaged women to a cost never borne by men. The disparate impact of the eligibility restrictions perpetuates the insidious stereotype that a woman who is single or who is 40 years or older does not deserve, and cannot start, a family of her own. Such assumptions perpetuate the stereotype that women over the age of 39 are less worthy of concern and fail to

recognize their social, practical and economic reality (*Law*). Ms. Kowalski is currently suffering under this stereotype and will continue to be subject to social stigma due to the eligibility criteria.

Alliance, *supra* para 22 at para 99.
Official Problem, *supra* para 1 at para 16(g).
Law, *supra* para 35 at para 74.

42. The effect of the eligibility criteria, therefore, is to codify sexist and socially biased generalizations about single women who do not have families by the time they reach age 40. Single women without kids are seen as less valuable as they age but single men without kids suffer no comparable judgement (*Quebec v A*). These societal attitudes promote the idea that women cannot have a family without a man; the unlimited provision of funding exclusively to men acts to confirm this stereotype on the part of the government.

Quebec v A, supra para 30 at para 300.

43. By codifying the denial of benefits to women which are enjoyed by men, the Respondent is sanctioning the continuation of discriminatory treatment of women. This form of systemic discrimination goes against the "normatively central" value of equality which underlies the *Charter* (*Rosenberg*), and disregards the fundamental importance that the framers of the *Charter* placed on of gender equality when they drafted provisions such as sections 15 and 28 (Froc)**.**

Rosenberg v Canada (AG), [1998] 38 OR (3d) 577 at para 49, 158 DLR (4th) 664 [*Rosenberg*], citing Wilson J in *Andrews*, *supra* para 22 at para 10.
Charter, *supra* para 3 s 28.
Kerri Froc, "Is Originalism Bad for Women? The Curious Case of Canada's 'Equal Rights Amendment'" (2015) 18:2 Rev Const Stud 237 at 245-47 (Froc).

The eligibility criteria do not fall within section 15(2) of the *Charter*

44. Laws that enhance substantive equality by providing ameliorative assistance to a particular disadvantaged group are not discriminatory under section 15(1), if the government can prove that the distinctions "serve and are necessary to the ameliorative purpose" (*Kapp*). To succeed under section 15(2), the government must demonstrate that "(1) the program has an ameliorative or

remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds" (*Kapp*). The Fertility Program fails to meet these criteria.

R v Kapp, 2008 SCC 41 at paras 52, 41, [2008] 2 SCR 483 [*Kapp*].

45. Section 15(2) was specifically intended to protect affirmative action programs from claims of "reverse discrimination" (*Cunningham*). It does not protect broad social assistance programs designed to ameliorate general disadvantage (*Kapp*). In both *Kapp* and *Cunningham*, the Supreme Court emphasized the requirement for targeted amelioration of groups disadvantaged on enumerated or analogous grounds in order to engage section 15(2).

Alberta (Aboriginal Affairs and Northern Development) v Cunningham, 2011 SCC 37 at paras 41, 44, [2011] 2 SCR 670 [*Cunningham*].
Kapp, *supra* para 43 at paras 55, 49.

46. The Fertility Program does not fall within the scope of section 15(2) because it is not targeted at the amelioration of a particular enumerated or analogous group. However, even if the Court were to find the Fertility Program to be so targeted, it still falls outside the protection of section 15(2) because it discriminates against the very groups it is alleged to be ameliorating.

Kapp, *supra* para 43 at para 49.
Alliance, *supra* para 22 at para 37.

The Fertility Program does not target a group disadvantaged on enumerated or analogous grounds

47. As part of the general provision of health care in the province, the Fertility Program falls under the rubric of board social assistance. The stated purpose of the Fertility Program is to increase affordability and access to fertility treatments for several groups "wanting to grow their families and [who] are having trouble or cannot conceive naturally." As its overarching and central purpose is not the pro-active amelioration of existing discrimination, but rather the provision of broad social assistance in the form of medical insurance for certain treatments, section 15(2) *prima facie* does not apply (*Kapp*).

Official Problem, *supra* para 1 at para 18(a).
Kapp, *supra* para 43 at para 55.

48. In the alternative, if section 15(2) is found to apply, the Fertility Program nevertheless fails to meet the requirements for protection. Section 15(2) protects only those government programs which target the "conditions of a specific and identifiable disadvantaged group" (*Kapp*). The only identified groups within the overarching program purpose are individuals "wanting to grow their families" or individuals who "are having difficulty or cannot conceive naturally." These target groups are not defined by enumerated nor analogous grounds under section 15(1) of the *Charter*.

Kapp, *supra* para 43 at para 55.
Official Problem, *supra* para 1 at para 18(a).

49. Even accepting that same sex couples and single individuals may constitute groups identified on enumerated or analogous grounds, the Respondent's purpose in adopting the Fertility Program cannot be said to be the specific amelioration of these groups. Defining the object of the program for the purposes of section 15(2) requires the Court to look beyond the bald assertions of the government as to purpose (*Cunningham*). The Appellant acknowledges that same sex couples and single individuals are among the groups to benefit from the Fertility Program. However, the amelioration of specific disadvantage faced by these particular groups is not the object of the Fertility Program. Rather, the object is more generally to provide a benefit, in the form of insured fertility services, to all couples and individuals who wish to grow their families and who have difficulty conceiving. To extend the reach of section 15(2) to such broad programs would permit governments to discriminate under the guise of tenuous amelioration claims.

Cunningham, *supra* para 44 at para 44.

The Fertility Program is not genuinely ameliorative

50. Even if the Fertility Program is found to sufficiently target groups disadvantaged on enumerated or analogous grounds, it is not genuinely ameliorative. The program must "serve or

advance" the ameliorative goal (*Cunningham*). The effect of the eligibility criteria is to further disadvantage single women and women without children. If the Respondent seeks to establish that the Fertility Program is aimed at targeting these individuals, this precludes the application of section 15(2), because they are the very individuals most disadvantaged by its operation. As Abella J held in *Alliance*, "[s]ection 15(2) cannot bar s. 15(1) claims by the very group the legislation seeks to protect."

> *Cunningham*, *supra* para 44 at para 46.
> *Alliance*, supra para 22 at paras 40, 37, 32.

51. Although the Fertility Program purports to address historical disadvantage, it in fact codifies and perpetuates the denial of benefits to single, childless and older women. Accordingly, it cannot be upheld as an ameliorative program under section 15(2) and the distinctions created by the eligibility criteria are discriminatory. Rather than being ameliorative, the Fertility Program perpetuates the disadvantage suffered by single, older women.

ISSUE 2: The eligibility criteria infringe Ms Kowalski's rights under section 7 of the *Charter*

52. The PPS eligibility criteria infringe Ms. Kowalski's section 7 rights to liberty and security of the person. The infringements do not conform to the principles of fundamental justice because they are arbitrary, overbroad, and grossly disproportionate.

The Respondent must comply with the Charter when implementing benefits programs

53. When the government puts in place a scheme to provide health care, that scheme must comply with the *Charter* (*Chaoulli*). The Supreme Court has held that under-inclusive laws can "substantially impact the exercise of a constitutional freedom" (*Dunmore*). The "mere failure of the state to exercise its legislative choice in connection with the protected interests of some societal group, while exercising it in connection with those of others" can constitute an "affirmative interference" with an individual's *Charter* rights (*Gosselin*).

> *Chaoulli v Quebec (AG)*, 2005 SCC 35 at para 104, [2005] 1 SCR 791 [*Chaoulli*].
> *Dunmore v Ontario (AG)*, 2001 SCC 94 at para 22, [2001] 3 SCR 1016 [*Dunmore*].
> *Gosselin v Quebec (AG)*, 2002 SCC 84 at para 327, [2002] 4 SCR 429 [*Gosselin*], citing *Dunmore* at para 22.

54. The case at bar raises issues of gender equality. As such, the section 7 rights at issue "must be interpreted through the lens of ss 15 and 28" in order to ensure that their interpretation "responds to the realities and needs of all members of society" (*G.(J.)*). The equality provisions "mandate a constitutional inquiry that recognizes and accounts for the impact upon women of [a] narrow construction of s. 7" (*Seaboyer*). The exclusion of women over age 39 from insured IVF delegitimizes and devalues their reproductive capacities and strips them of the autonomy and dignity that section 7 is meant to protect.

> *New Brunswick (Minister of Health and Community Services) v G.(J.)*, [1999] 3 SCR 46 at para 115, 177 DLR (4th) 124 [*G.(J.)*].
> *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577 at para 243, 83 DLR (4th) 193 [*Seaboyer*].

The eligibility criteria infringe Ms. Kowalski's rights to liberty and security of the person

55. Although they are distinct concepts, the Supreme Court has recognized that liberty and security of the person share an underlying concern for the protection of individual autonomy and dignity. In circumstances where autonomy, dignity and fundamental decision-making overlap, it is therefore appropriate to consider infringements of liberty and security of the person collectively.

Carter v Canada, 2015 SCC 5 at para 64, [2015] 1 SCR 331 [*Carter*].

56. In *Carter*, after canvassing the breadth of the jurisprudence, a unanimous Supreme Court described the collection of interests protected by liberty and security of the person as follows:

> Underlying both of these rights is a concern for the protection of individual autonomy and dignity. Liberty protects "the right to make fundamental personal choices free from state interference": *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 54. Security of the person encompasses "a notion of personal autonomy involving . . . control over one's bodily integrity free from state interference" (*Rodriguez*, at pp. 587-88, per Sopinka J., referring to *R. v. Morgentaler*, [1988] 1 S.C.R. 30) and it is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 58; *Blencoe*, at paras. 55-57; *Chaoulli*, at para. 43, per Deschamps J.; para. 119, per McLachlin C.J. and Major J.; and paras. 191 and 200, per Binnie and LeBel JJ.).

Carter, *supra* para 54 at para 64.

57. The totality of the jurisprudence establishes that decisions of fundamental importance affecting autonomy and dignity must be able to be made free from state interference. Autonomous, fundamental personal choice, free from state interference, is at the heart of the case at bar. Nothing can be more intimately and fundamentally connected to a woman's autonomy and dignity than her decisions in matters of reproduction. As Wilson J stated in *Morgentaler*, a woman's right "to reproduce or not to reproduce" is a right which implicates a "deeply personal" decision that has "profound, psychological, economic and social consequences."

R v Morgentaler, [1988] 1 SCR 30 at paras 241–42, 135 DLR (4th) 385 [*Morgentaler*].

58. For Ms. Kowalski, conceiving, carrying, nurturing, and caring for a child is fundamental to her conception of a full and meaningful life. By excluding women over age 39 from insured IVF, the Respondent has "interfered" with Ms. Kowalski's fundamental human dignity and autonomy.

Official Problem, *supra* para 1 at paras 13, 20.
PPS, *supra* para 2 s 600P(a).

59. This interference has further caused Ms. Kowalski to suffer serious psychological stress. To constitute a deprivation of psychological integrity, the state interference need not rise to the level of nervous shock or psychiatric illness. It is sufficient that the impact be "greater than ordinary stress or anxiety" (*G.(J.), Chaoulli*).

G.(J.), supra para 55 at para 60.
Chaoulli, *supra* para 54 at para 116.

60. Since learning that IVF is unavailable to her, Ms. Kowalski has been "depressed and withdrawn." As a recognized psychiatric illness, depression surely meets the seriousness threshold (*DSM-5*). Further, expert evidence equates the severity of emotional stress suffered by women in Ms. Kowalski's position to that of individuals coping with cancer, HIV, and chronic pain. For Ms. Kowalski, the suffering is compounded by the knowledge that the eligibility criteria deny to her what is made available to every man, and to women just a few years younger.

Official Problem, *supra* para 1 at paras 13, 16(d).
American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, 5th ed (Arlington, VA: American Psychiatric Association, 2013) at 296.99 (F34.8) [*DSM-5*].

61. The causal connection between the eligibility criteria and the deprivation of Ms. Kowalski's liberty and security of the person is not negated merely because the law is not the immediate cause of the harm (*Bedford*). It is enough that the eligibility criteria play a "sufficient contributory role" in causing the deprivation. By excluding women over age 39 from insured IVF, while providing it

to all others, the eligibility criteria constitute an "affirmative interference" with Ms. Kowalski's liberty and security of the person.

Canada (AG) v Bedford, 2013 SCC 72 at paras 89, 18, [2013] 3 SCR 1101 [*Bedford*].

The deprivations of liberty and security of the person are not in accordance with the principles of fundamental justice

62. The principles of fundamental justice analysis focuses solely on the law's effect on the claimant; its effectiveness or benefit to others is irrelevant. An arbitrary, overbroad, or grossly disproportionate impact on a single person suffices to establish a breach of section 7 (*Bedford*). In this analysis, the law's purpose must be "taken at face value" (*Bedford*). The stated purpose of the eligibility criteria is to "control the costs of the program and to ensure those accessing it are most likely to benefit."

Bedford, *supra* para 62 at paras 122–3, 125.
Official Problem, *supra* para 1 at para 18(c).

The eligibility criteria are arbitrary

63. A law is arbitrary where there is no "direct" or "rational" connection between the purpose of the law and the impugned effect on the individual, or where the impugned effect undermines the objectives of the law (*Bedford, Michaud*). Evidence, not assumptions, will guide the arbitrariness inquiry (*Chaoulli*).

Bedford, *supra* para 62 at para 111.
R v Michaud, 2015 ONCA 585 at para 69, 127 OR (3d) 81 [*Michaud*].
Chaoulli, *supra* para 54 at para 152.

64. The age limit imposed by the eligibility criteria is arbitrary for several reasons. First, the enumerated age is itself arbitrary. There is no evidence demonstrating government consultation with experts or other jurisdictions in selecting age 39 and 364 days. Further, the age chosen is not rationally connected to the objective of providing services to those who will most benefit. Reproductive technology is a rapidly evolving field. The evidence establishes no consensus within

the medical community that age 39 and 364 days represents a bright line after which a woman will not benefit from IVF. In fact, the evidence demonstrates that women over age 37 who have not fallen pregnant using other methods may benefit *most* from IVF. The effect of the age limit, therefore, is to ensure that those women over age 39 most likely to benefit are *certain not to* benefit.

Official Problem, *supra* para 1 at para 14(m).

65. The age limit is also arbitrary because it is inconsistent with the objective of controlling the costs of the program. There is no limit on the number of surrogates a male 'sperm donor' may impregnate through IVF. There is no limit on the number of cycles of state-funded AI or IUI an individual may access. There is no age limit on privately-funded IVF. By excluding the women most likely to benefit from insured IVF, the eligibility criteria leave those women to seek private treatment, where multiple embryo transfers are commonly employed to reduce the cost associated with multiple cycles. The resulting multiple pregnancies impose extensive additional costs on the public health care system. The age limit on insured IVF therefore fails to contribute to achieving the law's purpose of controlling costs, and may actually serve to increase the cost overall.

PPS, *supra* para 2 ss 601P, 602P.
Official Problem, *supra* para 1 at paras 18(b), 19.

The eligibility criteria are overbroad

66. Overbreadth exists "where there is no rational connection between the purposes of the law and some, but not all of its impacts" (*Bedford*). 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*).

Bedford, *supra* para 62 at para 112.
R v Heywood, [1994] 3 SCR 761 at para 49, 120 DLR (4th) 133 [*Heywood*].

67. The age restriction operates in an overbroad manner. The limit excludes a large number of the very women most likely to benefit from IVF, including Ms. Kowalski. This limitation operates

without regard to the actual circumstances of the excluded women, and contrary to physician recommendation. While some women over age 39 may not benefit from IVF, the bright line exclusion captures those women over the age limit for whom IVF is recommend and may result in uncomplicated pregnancy. The age limit is therefore overbroad because it captures more women than is necessary to achieve the Respondent's objective.

The eligibility criteria are grossly disproportionate

68. A law is grossly disproportionate if "the law's effect on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported" (*Bedford*).

Bedford, supra para 62 at para 120.

69. The effect of the law on Ms. Kowalski is a deprivation of her most fundamental rights to liberty and autonomy. These rights are not only of deep importance to Ms. Kowalski — they reflect "an aspect of the respect for human dignity on which the *Charter* is founded" (*Morgentaler*). The Saskatchewan government is, at best, trying to control access to a rights-affirming program, and, at worst, trying to control costs which relate to that program. Neither of these purposes can be said to be remotely proportionate to the deprivation of such a fundamental right.

Morgentaler, supra para 58 at para 230.

ISSUE 3: The infringements of s 7 and s 15 are not justified under s 1

70. The infringements of sections 15 and 7 cannot be saved under section 1 of the *Charter*. The "normative centrality of equality" imposes an onerous burden on the Respondent that will only be discharged in exceptional circumstances (*Rosenberg*). Similarly, violations of section 7 rights will be incapable of justification except in exceptional circumstances (*Re BC Motor Vehicle Act*). There are no exceptional circumstances here.

Rosenberg, supra para 43 at para 49, 158 DLR (4th) 664 [*Rosenberg*], citing Wilson J in *Andrews,* at para 10.

Reference Re BC Motor Vehicle Act, [1985] 2 SCR 46 at para 83, 24 DLR (4th) 536 [*Re BC Motor Vehicle Act*].

71. In the case of sex discrimination, section 28 of the *Charter* amplifies the justification burden. Section 28 mandates equality between the sexes, and should be interpreted as precluding the government from creating new sources of women's inequality (Froc). Further, Canada's international law commitments under the Convention on the Elimination of All Forms of Discrimination Against Women oblige the Respondent to "take all appropriate measures to eliminate discrimination against women." Therefore, the Appellant urges this Court to find that sex discrimination is incapable of justification except in the most exigent of circumstances, if ever, and to find that no such circumstances exist in this case.

Charter, *supra* para 3 s 28.
Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 UNTS 13, CAN TS 1982 No 31 (entered into force 3 September 1981, ratification by Canada 10 December 1981) art 16(1)(e).
Froc, *supra* para 43 at 245–47.

The objectives of the eligibility criteria are not pressing and substantial

72. The stated purposes of the age limitation are to "help control costs of the program" and to "ensure those accessing it are most likely to benefit." These are two sides of the same budgetary coin. Absent "an exceptional financial crisis", budgetary concerns cannot justify the violation of a *Charter* right (*N.A.P.E*, *Martin*). The Respondent is not facing an "exceptional financial crisis", nor is there any evidence that the additional costs would prohibit the program from being sustainable. The projected savings represent roughly one ten-thousandth of the Respondent's 2016 annual health budget. The Respondent has failed to establish a pressing and substantial objective sufficient to warrant overriding *Charter* rights.

Newfoundland (Treasury Board) v N.A.P.E., 2004 SCC 66 at para 97, [2004] 3 SCR 381 [*N.A.P.E*].
Martin, *supra* para 25 at para 109, citing *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at para 28, 150 DLR (4th) 577.

Official Problem, *supra* para 1 at paras 18(c), (d), (f).

The limits imposed by the eligibility criteria are not proportional

73. Alternatively, if the Court characterises the objective of the age limitation as ensuring IVF is provided to those who are most likely to benefit, this objective cannot justify the serious rights infringements it produces: the limitation is not rationally connected to its objective, it is not minimally impairing, and its deleterious effects far outweigh any hypothesised benefit (*Oakes*).

R v Oakes, [1986] 1 SCR 103 at paras 69–71, 26 DLR (4th) 200 [*Oakes*].

The restrictions imposed by the eligibility criteria are not rationally connected to the objective

74. The age limitation on embryo recipients is not causally connected to the stated benefit on the basis of reason or logic (*Hutterian Brethren*). The question at this stage is whether the Respondent's exclusion of women over age 39 from IVF funding is "carefully tailored to meet its stated objectives" (*Dunmore*). The answer to this question is no.

Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 at para 48, [2009] 2 SCR 567 [*Hutterian Brethren*], citing *RJR-MacDonald Inc. v Canada (AG)*, [1995] 3 SCR 199 at para 153, 127 DLR (4th) 1.
Dunmore, *supra* para 53 at para 54.

75. The age limitation effectively works against the government's objective of controlling costs and ensuring access for those who are most likely to benefit. As discussed in paragraphs 64–5, the eligibility criteria are, therefore, arbitrary. A law that violates section 7 because it is arbitrary is unlikely to be capable of justification (*Carter*). A limitation that is arbitrary is, by definition, not causally connected to its objective on the basis of reason and logic.

Carter, *supra* para 55 at para 95.

The eligibility criteria are not minimally impairing

76. The test for minimal impairment is "whether there are less harmful means of achieving the legislative goal" (*Hutterian Brethren*). The age limit is a blunt tool which "makes no attempt whatsoever to determine who might genuinely" benefit from IVF (*Martin*). It excludes all women over age 39 from insured IVF, regardless of their individual medical circumstances.

Hutterian Brethren, *supra* para 74 at para 53.
PPS, *supra* para 1 s 600P(a).
Martin, *supra* para 25 at paras 6, 112.

77. There are less harmful means of achieving the government's objective. The government could rely on the existing requirement of a physician's recommendation under section 600P(a) to determine who has access to the program. A physician who provides individualized care is inarguably better positioned to assess the likely success and risks of fertility treatment than government policy writers. The age limit overrules the expert assessment provided by a physician and infringes on *Charter* rights in a way that cannot be said to be minimally impairing. The harms which flow from the complete exclusion of women over 40 from funded IVF could be avoided while still achieving the legislative goals by removing the age requirement in favour of reliance on the expertise of licensed physicians.

PPS, *supra* para 1 s 600P(a).

The deleterious effects of the eligibility restrictions outweigh any hypothetical benefit

78. At this stage of the section 1 analysis, the question is whether the "deleterious effects" of the measure "outweigh the public benefits that may be gained from the measure" (*Hutterian Brethren*).

Hutterian Brethren, *supra* para 74 at para 78.

79. The deleterious effect of the measure is severe. Excluding women over 40 from the benefit of insured IVF funding devalues and delegitimizes an interest that is of fundamental importance to their dignity and self-determination. By controlling costs with an age limit that only affects

women, the government has once again made women “the economy’s ordained shock absorbers” (*Alliance*). This deprivation vastly outweighs any meagre benefits which may flow from the imposition of the eligibility criteria.

Alliance, *supra* para 22 at para 8.

PART V—ORDERS SOUGHT

80. The Appellant’s respectfully request that the Appeal be allowed, and that the Respondent be required to fund her IVF treatment.

PART VI – TABLE OF STATUTES AND AUTHORITIES

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, 43

Jurisprudence	Paragraphs
Alberta (Aboriginal Affairs and Northern Development) v Cunningham, 2011 SCC 37, [2011] 2 SCR 670.	45, 49, 50
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567.	74, 76
Auton (Guardian Ad Litem of) v British Columbia (AG), 2004 SCC 78, [2004] 3 SCR 657.	23, 38
Brooks v Canada Safeway Ltd, [1989] 1 SCR 1219, 59 DLR (4th) 321.	23,28, 30, 33, 35
Canada (AG) v Bedford, 2013 SCC 72, [2013] 3 SCR 1101.	61, 62, 63, 66, 68
Carter v Canada (AG), 2015 SCC 5 [2015] 1 SCR 331.	55, 56
Chaoulli v Quebec (AG), 2005 SCC 35 [2005], 1 SCR 791.	53, 59, 63
Dunmore v Ontario (AG), 2001 SCC 94 [2001], 3 SCR 1016.	53, 74
Eldridge v British Columbia (AG), [1997] 3 SCR 624, 151 DLR (4th) 577.	23
Gosselin v Quebec (AG), 2002 SCC 84 [2002], 4 SCR 429.	53
Inglis v British Columbia (Minister for Public Safety), 2013 BCSC 2309, BCJ No 2708.	29
Janzen v Platy Enterprises Ltd, [1989] 1 SCR 1252, 59 DLR (4th) 352.	31
Kahkewistahaw First Nation v Taypotat, 2015 SCC 30, [2015] 2 SCR 548.	22, 35
Law Society of British Columbia v Andrews, [1989] 1 SCR 143, 56 DLR (4th) 1.	2
Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497, 170 DLR (4th) 1.	35, 38, 41
New Brunswick (Minister of Health and Community Services) v G.(J.), [1999] 3 SCR 46, 177 DLR (4th) 124.	54, 59
Newfoundland (Treasury Board) v N.A.P.E., 2004 SCC 66, [2004] 3 SCR 381.	72
Nova Scotia (Workers' Compensation Board) v Martin, 2003 SCC 54, [2003] 2 SCR 504.	25, 72, 76
Quebec (AG) v A, 2013 SCC 5, [2013] 1 SCR 61.	30, 31, 34, 38, 39, 42

Quebec (AG) v Alliance du personnel professionnel et technique de la santé et des services sociaux, 2018 SCC 17, [2018] 1 SCR 464.	22, 36, 39, 40, 41, 46, 49, 50
Reference Re BC Motor Vehicle Act, [1985] 2 SCR 46, 24 CLR (4th) 536.	70
Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 SCR 3, 150 DLR (4th) 577.	72
Rosenberg v Canada (AG), [1998] 38 OR (3d) 577, 158 DLR (4th) 664.	43, 70
R v Heywood, [1994] 3 SCR 761, 120 DLR (4th) 133.	66
R v Kapp, 2008 SCC 41, [2008] 2 SCR 483.	44, 45, 46, 47, 48
R v Michaud, 2015 ONCA 585, 127 OR (3d) 81.	63
R v Morgentaler, [1988] 1 SCR 30, 135 DLR (4th) 385.	57, 69
R v Oakes, [1986] 1 SCR 103, 26 DLR (4th) 200.	73
R v Seaboyer; R v Gayme, [1991] 2 SCR 577, 83 DLR (4th) 193.	54
Weatherall v Canada (AG), [1993] 2 SCR 872, 105 DLR (4th) 210.	30, 35
Withler v Canada (AG), 2011 SCC 12, [2011] 1 SCR 39.	24, 29

Secondary Material	**Paragraphs**
American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, 5th ed (Arlington, VA: American Psychiatric Association, 2013).	60
Kerri Froc,	
Peter W Hogg, *Constitutional Law of Canada*, 5th ed	24
Froc	43, 71

International Materials	**Paragraphs**
Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 UNTS 13, CAN TS 1982 No 31 (entered into force 3 September 1981, ratification by Canada 10 December 1981) art 16(1)(e).	71

Official Wilson Moot Sources	**Paragraphs**
Official Problem, Wilson Moot 2019.	1, 3, 5–19, 28, 30, 32, 36, 37, 40, 41, 47, 48, 58, 60, 62, 64, 65, 72
Clarification to the Official Problem, Wilson Moot 2019.	3
Saskatchewan Health Payment Schedule for Insured Services Provided by a Physician under S-29 Reg 19/2016 (modified for the purposes of the Wilson Moot).	2, 9, 10, 27, 58, 65, 76, 77