

**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

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**FACTUM OF THE APPELLANT**

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**COUNSEL FOR THE APPELLANT**

TEAM 6

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## PART I – OVERVIEW

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[1] For many women, becoming a mother is an essential feature of their identity. However, infertility rates are rising in Canada. For women who experience infertility, medical assistance is required to conceive a child.

[2] The Appellant, Irina Kowalski, has always wanted to be a mother, but her life circumstances have forced her to delay this goal until recently. As a single woman facing fertility challenges, Ms. Kowalski requires medical assistance to conceive.

[3] A decision by the Saskatchewan government denies Ms. Kowalski her only opportunity to conceive a child. The procedure that offers Ms. Kowalski the best chance to conceive, in vitro fertilization (“IVF”), is expensive. Ms. Kowalski cannot afford the treatment, yet because she is a woman age 40 or older (the “Age Cut-off”), the Saskatchewan government has refused to provide funding for the treatment she needs.

*Official Problem*, Wilson Moot 2019 at 1, 3, 4 [*Official Problem*].

[4] This exclusion on the basis of age infringes Ms. Kowalski’s *Charter* rights. The Age Cut-off infringes Ms. Kowalski’s section 15 rights by denying her the opportunity to become a mother in a discriminatory manner. The Age Cut-off also infringes Ms. Kowalski’s rights to life, liberty, and security of the person under section 7 of the *Charter*. It prevents her from making fundamental life choices relating to reproduction, imposes significant emotional stress, and threatens her physical integrity in violation of the principles of fundamental justice.

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

[5] These infringements are not justified under section 1. The government cannot demonstrate a rational connection between the Age Cut-off and its objects. It does not minimally impair Ms. Kowalski’s rights, and the deleterious effects outweigh the few salutary benefits.

## PART II – STATEMENT OF FACTS

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### 1. Factual Background

[6] Irina Kowalski is a 42-year-old woman who has always wanted to have a child. Unfortunately, her life circumstances have required her to put this goal on hold until recently.

#### A. Ms. Kowalski's efforts to become a mother

[7] When Ms. Kowalski was 25, she was diagnosed with endometriosis, a painful condition that often causes fertility issues. This diagnosis did not dissuade her from her plans to become a mother. Between 2008 and 2011, Ms. Kowalski and her former long-term partner attempted to conceive a child. These attempts were unsuccessful.

*Official Problem, supra* para 3 at 3.

[8] After separating from her former long-term partner, Ms. Kowalski's father suffered a stroke in 2012. She was forced to put her dream to have a child on hold while acting as her father's primary caregiver and working full-time. By 2015, she finally saved enough to fund her father's place in a nursing home, where he passed away in 2016.

*Official Problem, supra* para 3 at 4.

[9] Soon after her father's passing, Ms. Kowalski visited a fertility clinic to pursue her dream of starting a family. At that time, she was 40 years old. Ms. Kowalski's fertility specialist recommended IVF as the best course of treatment, given her advanced age and endometriosis.

*Official Problem, supra* para 3 at 4.

#### B. Saskatchewan limits funding for IVF on the basis of age

[10] The government of Saskatchewan introduced the Fertility Program in spring 2016. The purpose of this program is to increase affordability and access to assisted reproductive services. The Fertility Program funds three different forms of fertility treatments: IVF, artificial insemination ("AI"), and intrauterine insemination ("IUI").

*Official Problem, supra* para 3 at 1, 10, 2.

[11] IVF is recommended for individuals who are older than 37, have undergone at least 2 rounds of unsuccessful IUI, or have pre-existing medical conditions including endometriosis. AI and IUI are ineffective in these circumstances.

*Official Problem, supra* para 3 at 7, 8.

[12] Funding for the treatments covered by the Fertility Program is subject to various eligibility requirements. Funding for AI and IUI is unlimited, and provided to women of any age. However, funding for IVF is restricted to women under the age of 40 upon physician recommendation. For eligible women, the Fertility Program funds two cycles of IVF treatments. For individuals like Ms. Kowalski, self-funding IVF is their only option.

*Official Problem, supra* para 3 at 2.

### **C. Impacts of the Age Cut-off on Ms. Kowalski**

[13] Ms. Kowalski is ineligible for IVF funding through the Fertility Program because she exceeds the Age Cut-off. She cannot afford IVF, which costs \$20,000 per cycle including required medications. She has no private medical benefits, and her income after paying taxes and rent is only \$16,000.

*Official Problem, supra* para 3 at 1, 6, 4.

[14] Ms. Kowalski was unable to afford IVF, so she underwent two rounds of funded IUI. This treatment is not recommended for her and is far less effective than IVF. Ms. Kowalski exhausted her savings to pay for the required medications not funded by the Fertility Program. IUI did not succeed, and she was told by her physician that IVF is her only option to conceive.

*Official Problem, supra* para 3 at 4.

[15] This experience has been devastating for Ms. Kowalski. Since learning that she is ineligible for IVF funding, Ms. Kowalski has become depressed and withdrawn, and has sought counselling services. She faces stigma associated with being a childless, unmarried woman in her 40s. She fears going out in public and facing these disparaging views.

*Official Problem, supra* para 3 at 5.

## **2. Procedural History**

[16] In September 2017, the Saskatchewan Court of Queen’s Bench found that the Age Cut-off was discriminatory under section 15(1) of the *Charter*. Justice Cairns reasoned that “once funding is provided the government cannot administer it in a discriminatory manner and instead must do so in furtherance of substantive equality.” The Court also found that the Age Cut-off infringed Ms. Kowalski’s section 7 rights by arbitrarily depriving her of her liberty and security of the person. Justice Cairns held that these infringements were not justified under section 1 of the *Charter*.

*Official Problem, supra* para 3 at 11.

[17] A majority of the Saskatchewan Court of Appeal allowed the Attorney General’s appeal in March 2018. The Court held that the Age Cut-off was not discriminatory under section 15(1), and that in any event the Fertility Program was ameliorative under section 15(2). The Court found no infringement of section 7.

*Official Problem, supra* para 3 at 11.

### PART III – STATEMENT OF POINTS IN ISSUE

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[18] This appeal raises the following three issues:

**1. Does the Age Cut-off infringe Ms. Kowalski’s section 15 *Charter* rights?**

The Age Cut-off infringes Ms. Kowalski’s section 15 rights by creating a distinction on the enumerated ground of age. This distinction is discriminatory because it fails to respond to the actual needs and capacities of women 40 and older, while instead compounding their disadvantage. The Age Cut-off is not ameliorative under section 15(2). It is not targeted at a disadvantaged group, and the means chosen by the government of Saskatchewan do not advance an ameliorative purpose.

**2. Does the Age Cut-off infringe Ms. Kowalski’s section 7 *Charter* rights?**

The Age Cut-off deprives Ms. Kowalski of her rights to life, liberty, and security of the person in a manner that is not in accordance with the principles of fundamental justice. The Age Cut-off is arbitrary, overbroad, and grossly disproportionate to its purpose.

**3. If the answer to either of questions 1 or 2 is “yes”, is the infringement demonstrably justified under section 1 of the *Charter*?**

The infringements on Ms. Kowalski’s rights are not demonstrably justified. The Age Cut-off is prescribed by law, and its objects are pressing and substantial. However, the means adopted are not rationally connected to the objects of the Age Cut-off. Further, the Age Cut-off is not minimally impairing of Ms. Kowalski’s rights, and the deleterious effects of the Age Cut-off outweigh its minimal salutary benefits.

## PART IV – ARGUMENT

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### **Issue 1: The Age Cut-off infringes section 15 of the *Charter***

[19] The Age Cut-off infringes Ms. Kowalski’s section 15 rights. It draws a distinction on the enumerated ground of age by denying IVF funding to women 40 and older. This distinction is discriminatory because it fails to respond to the reproductive needs and capacities of women 40 and older, and has the effect of reinforcing, perpetuating, and exacerbating their disadvantage. It is not ameliorative under section 15(2).

#### **A. The Age Cut-off infringes Ms. Kowalski’s section 15(1) rights**

[20] Section 15(1) of the *Charter* is infringed when: (1) a law, in purpose or effect, creates a distinction based on an enumerated or analogous ground; and (2) that distinction is discriminatory because it perpetuates disadvantage (*Syndicats*).

*Centrale des syndicats du Québec v Québec (Attorney General)*, 2018 SCC 18 at para 30 [*Syndicats*].

##### ***i) The Age Cut-off draws a distinction based on the enumerated ground of age***

[21] The Age Cut-off draws a formal legislative distinction on the basis of age. It provides funding for IVF to women under 40, and denies it to women 40 and older.

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

##### ***ii) The distinction created by the Age Cut-off is discriminatory***

[22] A distinction is discriminatory where: (1) it “fails to respond to the actual capacities and needs of the members of the group”; or (2) it “has the effect of reinforcing, perpetuating or exacerbating their disadvantage” (*Taypotat, Québec, Syndicats*).

*Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 20 [*Taypotat*].  
*Québec (Attorney General) v A*, 2013 SCC 5 at para 201 (Abella J) [*Québec*].  
*Syndicats*, *supra* para 20 at para 30.

[23] The Age Cut-off is discriminatory for two reasons. First, it fails to respond to the actual reproductive needs and capacities of women 40 and older. Second, it has the effect of compounding the pre-existing disadvantage faced by women who wish to have children but who experience fertility problems and have been unable to conceive before the age of 40.

***a) The Age Cut-off fails to respond to the actual needs and capacities of the members of the group***

[24] A law that fails to respond to the actual needs and capacities of the claimant's group is discriminatory (*Taypotat, Quebec*).

*Taypotat, supra* para 22 at para 20.  
*Quebec, supra* para 22 at para 201 (Abella J).

[25] The Age Cut-off fails to respond to the actual needs of women 40 and older seeking IVF. For women 40 and older like Ms. Kowalski, IVF is their only realistic chance at conceiving. The Fertility Program provides funding for AI and IUI, treatments which are ineffective for women like Ms. Kowalski, while the Age Cut-off denies them funding for the physician-recommended treatment that they actually need. This fails to respond to the actual needs of women like Ms. Kowalski who wish to grow their families.

*Official Problem, supra* para 3 at 2, 6–7.

[26] The Age Cut-off does not reflect the actual reproductive capacities of women 40 and older. By imposing the Age Cut-off, women 40 and older are presumed by the government to “lack abilities they may in fact possess” (*Gosselin*). While statistical averages demonstrate that IVF effectiveness declines with age, they do not determine the potential outcome for any particular woman between the ages of 40 and 43 (*Official Problem*). Each individual's health circumstance is unique, and requires a closely and personally tailored medical regime. By relying on statistical

averages, the Age Cut-off does not properly capture women's capacity to conceive, and therefore denies them access to physician-recommended treatment in a discriminatory manner.

*Gosselin v Québec (Attorney General)*, 2002 SCC 84 at para 32 [*Gosselin*].  
*Official Problem*, *supra* para 3 at 8.

***b) The Age Cut-off reinforces, perpetuates, and exacerbates Ms. Kowalski's pre-existing disadvantage***

[27] A distinction is discriminatory where it imposes “burdens [and denies] a benefit in a manner that has the effect of reinforcing, perpetuating [and] exacerbating . . . disadvantage’, including ‘historical’ disadvantage” (*Syndicats*).

*Syndicats*, *supra* para 20 at para 22.

[28] Ms. Kowalski experiences pre-existing disadvantage based on four interrelated features of her identity. First, Ms. Kowalski experiences disadvantage based on her sex. Women are disadvantaged in the workplace (*Syndicats*) and evidence accepted at trial demonstrates that Canadian women earn \$0.87 per hour for every \$1 earned by men. Second, Ms. Kowalski is disadvantaged because of her age. Individuals of advanced age face discrimination because they are presumed to lack abilities they may in fact possess, and thus have a “history of being undervalued” (*Gosselin*). Third, Ms. Kowalski experiences pre-existing disadvantage as a result of her infertility, which the Court of Appeal for Nova Scotia has characterized as a disability (*Cameron*). The Supreme Court has stated that “the history of disabled persons in Canada is largely one of exclusion and marginalization” (*Eldridge*). Finally, Ms. Kowalski faces social marginalization due to her single, childless status. The “nuclear” and “middle class family” has been elevated by government at the expense of individuals who do not choose or are unable to have a traditional family (*Official Problem*).

*Syndicats*, *supra* para 20 at para 8.  
*Official Problem*, *supra* para 3 at 9.

*Gosselin*, supra para 26 at para 32.  
*Cameron v Nova Scotia (Attorney General)*, 1999 NSCA 14 at para 175 [*Cameron*].  
*Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 56, 151 DLR  
(4th) 577 [*Eldridge*].

[29] By denying Ms. Kowalski funding for physician-recommended treatment, the Age Cut-off reinforces a negative social image of childless women 40 and older. As stated by Justice Abella in *Quebec*, “the very exclusion of the disadvantaged group . . . fosters the belief, both within and outside the group, that the exclusion is the result of ‘natural’ forces, for example, that women ‘just can’t do the job’”. The exclusion of women such as Ms. Kowalski from the Fertility Program has precisely this effect. It sends the message that women 40 and older are unproductive “spinsters” who are not worthy of government support.

*Quebec*, supra para 22 at para 326 (Abella J).  
*Official Problem*, supra para 3 at 5.

[30] This negative social image has the effect of disadvantaging women like Ms. Kowalski by creating a “hierarchy of worth”, contrary to the idea of substantive equality (*Quebec*). As stated by Justice McIntyre in *Andrews*, “[t]he promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are . . . equally deserving of concern, respect and consideration.” The government demonstrates a high level of concern for women under 40 by funding their AI, IUI, and IVF treatments. By providing funding only for ineffective AI and IUI treatments to women 40 and older, the government sends a clear message about its lack of consideration and concern for this group.

*Quebec*, supra para 22 at paras 197, 266.  
*Andrews v Law Society of British Columbia*, [1989] SCR 143 at 15 (McIntyre J), 56 DLR  
(4th) 1 [*Andrews*].

[31] Further, the Age Cut-off exacerbates the pre-existing disadvantage faced by women 40 and older by widening the social and economic gap between them and the rest of society. As stated by

Justice Abella in *Quebec*, if state conduct “widens the gap between the historically disadvantaged group and the rest of society . . . then it is discriminatory” (*Quebec*).

*Quebec, supra* para 22 at para 332 (Abella J).

[32] The Age Cut-off widens the gap between Ms. Kowalski and the rest of society by exacerbating her social disadvantage. Her exclusion from IVF funding affirms her feelings that she is unworthy of a family, which has exacerbated her mental health challenges. She has become depressed and withdrawn since learning she is ineligible for IVF funding, to the point that she has sought counselling services. Ms. Kowalski feels stigmatized and prejudiced when in public, and fears leaving her house. This further excludes Ms. Kowalski from mainstream society, in breach of substantive equality (*Eaton*).

*Official Problem, supra* para 3 at 5.

*Eaton v Brant County Board of Education*, [1997] 1 SCR 241 at paras 66–67, 142 DLR (4th) 385 [*Eaton*].

[33] The Age Cut-off widens the economic gap between Ms. Kowalski and younger women who “do not face a similar history of being undervalued” (*Gosselin*). Women 40 and older are more likely to experience economic disadvantage than women under 40. The Supreme Court has acknowledged that “the increasing difficulty with which one can find and maintain employment as one grows older is a matter of which a court may appropriately take judicial notice” (*Law*). IVF is only available to women 40 and older who can afford the \$20,000 cost. This imposes a significant economic burden not faced by women under 40, which widens the economic gap between the two groups and indicates discrimination. This economic disadvantage is compounded for single women like Ms. Kowalski, who do not have the benefit of a spouse’s second income.

*Gosselin, supra* para 26 at para 32.

*Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 101, 170 DLR (4th) 1 [*Law*].

*Official Problem, supra* note 3 at 2.

**B. The Age Cut-off is not ameliorative under section 15(2) of the *Charter***

[34] If a distinction on an enumerated or analogous ground is established, it is open to the government to demonstrate that the law is ameliorative under section 15(2) of the *Charter*. The government must show that: (a) the legislative scheme has an ameliorative purpose; and (b) the impugned distinction advances the ameliorative purpose (*Kapp*).

*R v Kapp*, 2008 SCC 41 at paras 40–41 [*Kapp*].

***i) The Fertility Program does not target a disadvantaged group***

[35] The purpose of section 15(2) is to “improve the situation of members of disadvantaged groups that have suffered discrimination in the past” (*Cunningham*). Accordingly, if an ameliorative program does not target a disadvantaged group, then it cannot be saved under section 15(2).

*Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 at para 40 [emphasis omitted] [*Cunningham*].

[36] The Fertility Program does not target a disadvantaged group. It is intended to increase the affordability of and access to reproductive treatments for those wanting to grow their families, indicating a broad class of potential beneficiaries. Anyone with a valid Saskatchewan health card, who is below age forty, and receives a physician’s recommendation may receive IVF funding. The requirements are even less stringent for AI and IUI. There is no evidence that those eligible for funding under the Fertility Program are disadvantaged as a group. As a result, it does not attract section 15(2) protection.

*Official Problem*, *supra* para 3 at 9, 2.

***ii) The Fertility Program does not advance an ameliorative purpose***

[37] Where a law possesses an ameliorative purpose, the government must demonstrate that its chosen means serve or are necessary to this purpose to receive protection under section 15(2).

*Kapp, supra* para 34 at para 52.

[38] The Age Cut-off does not advance the Fertility Program's ameliorative purpose of increasing affordability and access to fertility treatments.

[39] The Age Cut-off has a discriminatory effect on some of the Fertility Program's intended beneficiaries: infertile women 40 and older who seek to grow their families. These women are prevented from accessing physician-recommended treatment based on their age. As stated by Justice Abella in *Syndicats*, a law that has a discriminatory impact on a scheme's intended beneficiaries is inconsistent with the purpose of section 15(2). Such a distinction cannot serve or be necessary to an ameliorative purpose.

*Official Problem, supra* para 3 at 9.

*Syndicats, supra* para 20 at para 38.

[40] Rather than advance an ameliorative purpose, the Age Cut-off undermines both the purposes of the Canadian healthcare scheme generally, and the Fertility Program specifically. A distinction in a benefit scheme that excludes a particular group "in a way that undercuts the overall purpose of the program" violates section 15 (*Auton*).

*Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78 at para 42 [*Auton*].

[41] The Canadian healthcare scheme and the Fertility Program have the related goal of ensuring access to healthcare services regardless of financial means. The "primary purpose" of the Canadian healthcare scheme is to "protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers" (*Canada Health Act*). The purpose of the Fertility Program is to increase affordability and access to assisted reproductive services for those wanting to grow their families.

*Canada Health Act*, RSC 1985, c C-6, s 3 [*Canada Health Act*].

*Official Problem, supra* para 3 at 9.

[42] The Age Cut-off undercuts both the overall purpose of the Canadian healthcare system and the purpose of the Fertility Program. Similar to the exclusion from healthcare funding at issue in *Eldridge*, which the Supreme Court held violated section 15, infertile women 40 and older must “bear the burden of paying” in order to receive the same treatment as others, “despite the fact that the system is intended to make ability to pay irrelevant.” The Fertility Program is designed to increase affordability, but fails to do so for those who surpass the Age Cut-off. The Canadian healthcare system has a similar purpose of removing financial barriers. As the Age Cut-off frustrates the overall purpose of both schemes, it cannot be said to advance the ameliorative purpose.

*Eldridge, supra* para 28 at para 71.  
*Official Problem, supra* para 3 at 9, 2.  
*Canada Health Act, supra* para 41, s 3.

[43] It is not the case that “without the distinction, achieving the object of the program would be more difficult” (*Cunningham*). There was no evidence accepted at trial that the cost of removing the Age Cut-off would make achieving the object of the Fertility Program more challenging. It would be less difficult to achieve the objects of increasing affordability of and access to fertility treatments without the Age Cut-off, because the Fertility Program would provide more funding and greater accessibility. Accordingly, because the Age Cut-off does not advance an ameliorative purpose, it cannot be saved under section 15(2).

*Cunningham, supra* para 35 at para 73.

## **Issue 2: The Age Cut-off infringes Ms. Kowalski’s section 7 Charter rights**

[44] To demonstrate a violation of section 7, a claimant must establish: (1) that the government action deprives them of their life, liberty or security of the person; and (2) that the deprivation is not in accordance with the principles of fundamental justice (*Carter*).

*Charter, supra* para 4, s 7.

*Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 54–55 [*Carter*].

[45] The Age Cut-off infringes Ms. Kowalski’s section 7 rights. By denying her funding for IVF, the Age Cut-off restricts Ms. Kowalski’s liberty to make several fundamental life choices. Further, it engages her rights to life and security of the person by threatening her physical well-being and causing her significant psychological harm. These deprivations are not in accordance with the principles of fundamental justice because they are arbitrary, overbroad, and grossly disproportionate to the two purposes of the Age Cut-off.

**A. Under-inclusive funding schemes can engage life, liberty, and security of the person**

[46] An infringement of section 7 can arise from any state action, not merely state intrusions or prohibitions. This can include a restrictive condition in a benefit scheme, like an age cut-off.

*Hitzig v R*, 177 OAC 321, 231 DLR (4th) 104 (CA) at para 76 [*Hitzig*].

[47] The Supreme Court has deliberately left open the possibility that section 7 may one day impose funding obligations on the government. In *Gosselin*, the Court held that “it would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases.” The analysis should turn on a case’s particular circumstances and “evidence of actual hardship” (*Gosselin*).

*Gosselin, supra* para 26 at paras 81, 83.

[48] In this case, there is evidence that the Age Cut-off causes actual hardship. The Age Cut-off restricts Ms. Kowalski from accessing funding for IVF in a way that deprives her of her rights to life, liberty, and security of the person.

## **B. The Age Cut-off deprives Ms. Kowalski of her right to liberty**

[49] The section 7 liberty interest captures more than “freedom from physical restraint” (*B(R)*). It also protects an individual’s “personal autonomy to live his or her own life and make decisions that are of fundamental personal importance” (*B(R)*, *Morgentaler*).

*B(R) v Children’s Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at 368, 122 DLR (4th) 1 [*B(R)*].  
*R v Morgentaler*, [1998] 1 SCR 30 at 166, 44 DLR (4th) 385 [*Morgentaler*].

[50] The Age Cut-off deprives Ms. Kowalski of her ability to make several fundamental life choices by denying her funding in circumstances where she cannot otherwise afford it. Ms. Kowalski has no medical benefits, and used a large portion of her life savings to fund professional care for her father. Ms. Kowalski has approximately \$16,000 left annually after paying taxes and rent. IVF costs approximately \$20,000 for just one cycle, including required medications. The Court has recognized that part of the right to liberty includes the right to make fundamental life choices. Insofar as Ms. Kowalski is substantially unable to make these choices, there is a clear deprivation of her liberty.

*Official Problem*, *supra* para 3 at 4, 6.

[51] In *Morgentaler*, Justice Wilson found that a law effectively taking away women’s rights to make reproductive and family decisions with disregard for “their own priorities and aspirations” infringed their right to liberty. By denying Ms. Kowalski funding for IVF, the Age Cut-off prevents her from both choosing to start a family and the manner in which she chooses to start her family.

*Morgentaler*, *supra* para 49 at 63, 73 (SCR).

[52] The Age Cut-off denies Ms. Kowalski the fundamental personal choice to start her own family. Becoming a mother is fundamental to a woman’s personal identity. In *Morgentaler*, Justice Wilson characterized the decision to terminate a pregnancy and not have a child as one that “deeply

reflects the way the woman thinks about herself and her relationship to others and to society at large”. It follows that, in the converse, the decision to have a child has similar effects. It is both a profound lifestyle change, and affects how a woman sees herself.

*New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at para 61, 177 DLR (4th) 124 [G(J)].  
*Morgentaler*, *supra* para 49 at 37.

[53] More specifically, the Age Cut-off restricts Ms. Kowalski’s fundamental personal choice of conceiving and carrying a child herself. The choice to become pregnant, as affirmed by Justice Wilson in *Morgentaler*, is a decision that must be made by each woman individually. For many women, pregnancy is not just a means to an end, but is a valuable lived experience in itself. It is an opportunity for a woman to bond with her baby in an intimate and nonreplicable way. Ms. Kowalski has been clear that carrying her own biological child is very important to her. Although Ms. Kowalski might have a better chance at having a child through adoption or surrogacy, the manner in which she builds her family is a fundamental life choice that she is entitled to make.

*Morgentaler*, *supra* para 49 at 56–57  
*Official Problem*, *supra* para 3 at 4.

[54] Restricting Ms. Kowalski’s ability to become pregnant necessarily denies her capacity to make fundamentally personal decisions about her child’s development. Carrying a child maximizes a woman’s control over her child’s development. Decisions as simple as what a pregnant mother eats, how much she sleeps, and how attentive she is to her prenatal care all deeply affect fetal health. Further, choosing the birth method and whether or not to breastfeed can impact the child in crucial ways, yet are only choices that the woman carrying the child can make. Accordingly, by denying her funding for IVF in circumstances where she is substantially unable to access that treatment without public funding, the Age Cut-off restricts Ms. Kowalski’s liberty to make choices that are central to her reproductive autonomy and her future child’s development.

### **C. The Age Cut-off deprives Ms. Kowalski of her right to security of the person**

#### ***i) The Age Cut-off causes Ms. Kowalski significant psychological harm***

[55] Section 7 protects against state-imposed, non-trivial psychological harm. This harm need not be proven by psychiatric evidence.

*G(J)*, *supra* para 52 at para 60.

[56] The Age Cut-off has caused Ms. Kowalski significant psychological harm. She has been forced to subject herself to fertility treatments that are ineffective for a person in her condition, in order to pursue her goal of starting a family. During her IUI treatments, Ms. Kowalski has had to repeatedly undergo invasive and intimate procedures. She had to self-fund a range of medications not covered by the Fertility Program, placing further pressure on her already difficult financial circumstances. Undergoing ineffective IUI treatments has wasted precious time and resources during a window in which fertility is known to decline rapidly. This arduous process has strained Ms. Kowalski's mental health, as it would for any person in her circumstances.

*Official Problem*, *supra* para 3 at 4–5.

[57] By denying Ms. Kowalski her best chance to conceive, the Age Cut-off has exacerbated the psychological harm she experiences due to her single, childless status. Ms. Kowalski has lived a life with little family. Her mother died when she was young, she has no siblings, and she recently lost her father. Ms. Kowalski's reaction to her lack of familial companionship is entirely consistent with the social science evidence presented by Dr. Wong, who testified that women often experience depression when they are unable to start a family. The Age Cut-off effectively closes her window of opportunity to conceive a child, confirming her feelings of inadequacy by sending the message that she is not worthy of familial relationships.

*Official Problem*, *supra* para 3 at 3–5, 8.

[58] The feelings of “inadequacy, emptiness, [and] failure” that have caused Ms. Kowalski’s depression are evidenced by her testimony and corroborated by social science evidence (*Official Problem*). They well surpass the ordinary stress or anxiety a person of “reasonable sensibility” should need to withstand (*G(J)*). She has been affected to the extent that she is seeking counselling, and is withdrawn from the public and unable to leave her house. The harm caused by the Age Cut-off materially interferes with her ability to live normally, and thus engages her security of the person.

*Official Problem, supra* para 3 at 5, 8.

*G(J), supra* para 52 at para 60.

**ii) *The Age Cut-off compromises Ms. Kowalski’s physical integrity***

[59] Security of the person is engaged where state action “prevent[s] [the claimant] from taking steps to reduce the risks they face” (*Bedford*).

*Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 66–67 [*Bedford*].

[60] The inability to pursue IVF poses a significant health risk to Ms. Kowalski. Unlike IVF, where the egg is fertilized outside the body and the embryo is transplanted directly in the uterus, AI and IUI entail risk of ectopic pregnancy for women with endometriosis. Ms. Kowalski is determined to have a child. By effectively forcing her to only use AI or IUI, the state prevents Ms. Kowalski from pursuing a less risky option to conceive.

*Official Problem, supra* para 3 at 5–6.

**D. The Age Cut-off deprives Ms. Kowalski of her right to life**

[61] The right to life is engaged when a law or state action imposes an increased risk of death on a person, either directly or indirectly (*Carter*). Ectopic pregnancy is life-threatening. By only funding AI and IUI and denying access to a safer treatment, the government is imposing an increased risk of ectopic pregnancy and thereby threatening Ms. Kowalski’s life.

*Carter, supra* para 44 at para 62.  
*Official Problem, supra* para 3 at 7.

**E. The deprivation of Ms. Kowalski’s rights to life, liberty, and security of the person is caused by state action**

[62] To engage section 7, there must be a “sufficient causal connection between the state-caused [effect] and the prejudice suffered by the [claimant]” (*Bedford, Blencoe*). This connection can be established on a balance of probabilities by reasonable inference and should be sensitive to the context of the case (*Bedford*).

*Bedford, supra* para 59 at paras 75–76.  
*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 60  
[*Blencoe*].

[63] There is a sufficient causal connection between the Age Cut-off and the engagement of Ms. Kowalski’s section 7 interests. Due to her financial limitations, the Age Cut-off for IVF funding effectively precludes Ms. Kowalski from accessing the only treatment that will give her the chance to make numerous fundamental life choices. The restricted access has also caused harm to her psychological and physical integrity and risks her life.

[64] Causation is not negated by choice when an individual has no meaningful choice. Ms. Kowalski’s financial situation makes it impossible for her to pursue IVF on her own. However, IVF is not something she can forgo in favour of other options without sacrificing the fundamental life choices protected by section 7. Therefore, although Ms. Kowalski could pursue surrogacy or adoption, this does not negate causation as these choices cannot be characterized as meaningful.

*Bedford, supra* para 59 at para 86.

[65] Causation is also not negated by the fact that some deprivation results from third parties, such as pressure or stigma coming from friends and family. Government action does not need to be the only or dominant cause of the prejudice to an individual’s section 7 interests. While the

stigma would exist even if Ms. Kowalski tried IVF and failed, the opportunity to exhaust all available options to conceive would make a material difference. The Age Cut-off effectively prevents Ms. Kowalski from pursuing her best option to circumvent the societal pressures that she faces.

*Bedford, supra* para 59 at paras 89, 76.

**F. These deprivations are not in accordance with the principles of fundamental justice**

[66] The deprivations to Ms. Kowalski's liberty, security of the person, and life are not in accordance with the principles of fundamental justice because they are arbitrary, overbroad, and grossly disproportionate.

[67] The principles of fundamental justice analysis is narrowly focused on infringements of an individual's rights to life, liberty, or security of the person as they compare to the purpose of the government action. A grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of section 7. Consideration of the public interest is not permitted at this stage of the analysis.

*Bedford, supra* para 59 at paras 123, 125.

[68] The purpose of the Age Cut-off is to ensure those accessing IVF are most likely to benefit, and thereby control costs. This suggests that the Program intends to fund those who are having trouble conceiving, but not so much trouble that IVF may not be effective.

*Official Problem, supra* para 3 at 10.

***i) The Age Cut-off is arbitrary***

[69] Arbitrariness arises where a state action imposes limits on life, liberty, or security of the person in a manner that bears no connection to its objective. A connection between the deprivation and the purpose must be demonstrated by evidence, rather than being merely theoretical.

*Bedford, supra* para 59 at para 111.

*Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 131 [*Chaoulli*].

[70] The Age Cut-off is arbitrary because it does not properly capture women's declining capacity to conceive. There is no absolute threshold for when a woman's fertility suddenly reaches a point where IVF can no longer help her conceive. Evidence demonstrates that success rates of IVF drop by nearly half from women below age 35 to women aged 35 to 40, and then half again for women aged 40 to 43. As effectiveness continuously declines during a woman's adult life, there is no definitive evidence that a threshold of 40 years old is a reasonable cut-off.

*Official Problem, supra* para 3 at 8.

[71] Statistical averages cannot establish a clear age threshold for when IVF effectiveness becomes too low to justify funding. Effectiveness varies from person to person, and age is neither the sole nor the most significant determinant of a woman's fertility. Rather, it is affected by a range of factors that might arise at any point in a woman's life. Accordingly, physician recommendation is the only accurate metric for how effective IVF may or may not be. A blanket, absolute cut-off has no connection to the objective of assisting those most likely to benefit, because that group of people is not identifiable through any age threshold.

*Official Problem, supra* para 3 at 7.

[72] Further, the Age Cut-off is arbitrary because it applies only to IVF treatments and not to AI and IUI, which are ineffective for women 40 and older. Under the funding regime, there is no restriction on the number of AI or IUI treatment cycles, and thus women 40 and older receive access to unlimited funding for treatments that are ineffective. This drain on government resources would be reduced if women 40 and older could access the treatment that is most likely to benefit them: IVF.

**ii) *The Age Cut-off is overbroad***

[73] State action is overbroad where it is “so broad in scope that it includes some conduct that bears no relation to its purpose” (*Bedford*).

*Bedford, supra* para 59 at paras 112–113.

[74] The Age Cut-off is overbroad in relation to its objectives because declining fertility does not correlate with age. As such, the Age Cut-off may deny some women who are 40 and older from accessing funding even if they do in fact have a better chance at benefitting from IVF than some women under 40. For example, there may be a 40-year-old woman who has a better chance at conceiving through IVF than a 35-year-old woman born with a particularly low egg supply, yet is not privy to the Program’s funding. Accordingly, restricting by age rather than physician recommendation alone is overbroad.

**iii) *The Age Cut-off is grossly disproportionate***

[75] Gross disproportionality arises “in extreme cases where the seriousness of the deprivation” on an individual is “totally out of sync with the objective of the measure” (*Bedford*).

*Bedford, supra* para 59 at para 120.

[76] The objectives of the Age Cut-off are insubstantial when weighed against its impact on Ms. Kowalski’s life, liberty, and security of the person. Any increase in efficacy and cost-saving achieved by the Age Cut-off must be set off against the cost incurred by funding ineffective IUI treatments, and is therefore minimal.

[77] The impact of the Age Cut-off on Ms. Kowalski is extreme, and is therefore grossly disproportionate to its objectives. As discussed above, the Age Cut-off limits Ms. Kowalski’s ability to make fundamental personal choices integral to her reproductive autonomy, impacting her mental health in a way that limits her ability to function as a member of society. Further, the

Age Cut-off threatens her physical security and life by placing her at risk of ectopic pregnancy. These effects are grossly disproportionate to any efficacy gains and cost-savings associated with the Age Cut-off.

**Issue 3: The infringements are not demonstrably justified under section 1 of the *Charter***

[78] Once a claimant has demonstrated an infringement of their *Charter*-protected rights, the government bears the onus to demonstrate that the infringement is justified under section 1. This requires a proportionality test.

*R v Oakes*, [1986] 1 SCR 103 at para 70, 26 DLR (4th) 200 [*Oakes*].

[79] The Age Cut-off does not meet the section 1 test. The government is entitled to minimal deference in these circumstances. While Ms. Kowalski acknowledges that the Age Cut-off is prescribed by law and its objective is pressing and substantial, the Age Cut-off is not rationally connected to its legislative goal. Further, the Age Cut-off does not minimally impair the rights of women 40 and older because a system of physician recommendation would accomplish the legislative goals while not impairing the *Charter* rights of women 40 and older. Finally, the deleterious effects of the Age Cut-off outweigh its salutary benefits because of the profound impact on claimants like Ms. Kowalski in exchange for minimal public cost savings.

*Oakes*, *supra* para 78 at paras 73–74.

**A. The government is entitled to minimal deference**

[80] The government is entitled to minimal deference in these circumstances. Courts have acknowledged that government is entitled to deference when crafting complex policy schemes in response to social problems. At the same time, the Supreme Court has warned that deference must not be taken too far. As stated by the Supreme Court in *Chaoulli*, “deference cannot lead the judicial branch to abdicate its role in favour of the legislative branch”. Although the Saskatchewan

government has discretion when making health policy, it must craft laws in accordance with the *Charter*.

*Chaoulli, supra* para 69 at para 87.

*RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199, 127 DLR (4th) 1 [RJR-MacDonald].

[81] Further, the minimal cost of rectifying the *Charter* infringements diminishes the level of deference owed to the government. Eliminating the Age Cut-off would only cost the government approximately \$1 million, while the Ministry of Health's 2016 budget was \$5.36 billion. These factors militate towards minimal deference.

*Newfoundland v NAPE*, 2004 SCC 66 at para 84.

[82] Finally, it would be inappropriate to afford the government deference because Ms. Kowalski's section 7 rights are violated. Such a violation has never been justified under section 1. In *Re BC Motor Vehicle Act*, Justice Lamer established that section 1 only justifies the violation of an individual's section 7 rights "in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like". Outside of these circumstances, deference is inappropriate when a section 7 right is engaged.

*Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at para 85, 24 DLR (4th) 536 [Re BC Motor Vehicle Act].

#### **B. The Age Cut-off is prescribed by law and its objective is pressing and substantial**

[83] The Appellant acknowledges that the Age Cut-off is prescribed by law, and relates to a goal that is pressing and substantial in nature.

[84] The Age Cut-off is part of the Saskatchewan "Health Payment Schedule for Insured Services Provided by a Physician", which is part of the greater legislative scheme that structures the Fertility Program. It is therefore prescribed by law.

*Official Problem, supra* para 3 at 1.

[85] Additionally, the Age Cut-off is aimed at the pressing and substantial objective of ensuring that Fertility Program funding is allocated efficiently. Ensuring that funding is allocated in a manner that allows those in need access to healthcare services is a pressing and substantial objective in a free and democratic society.

**C. The Age Cut-off is not rationally connected to its objective**

[86] A law that is not rationally connected to its object fails the section 1 test. There is no rational connection where there is an “absence of evidence” that an impugned distinction will promote the objectives of the law, and no “reasonable inference” can be made to this effect (*Chaoulli, Mounted Police*).

*Chaoulli, supra* para 69 at para 155.  
*Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at para 143 [*Mounted Police*].

[87] The Age Cut-off is not rationally connected to the objective of ensuring recipients of IVF funding are those most likely to benefit. No reasonable inference can be made that women under 40 will be more likely to benefit from IVF funding than women over 40. There is an “absence of evidence” because although the efficacy of fertility treatments declines with age, this is not determinative of any particular individual’s circumstances (*Chaoulli, Official Problem*).

*Chaoulli, supra* para 69 at para 155.  
*Official Problem, supra* para 3 at 8.

[88] The Age Cut-off is not rationally connected to the objective of controlling the costs of the Fertility Program. Women over 40 have access to unlimited funding for IUI and AI, even though these treatments do not benefit them. Accordingly, women over 40 will use unrecommended procedures to a degree that could even outweigh the costs of providing IVF funding. This increases the government’s costs without benefiting Fertility Program targets.

*Official Problem, supra* para 3 at 2, 6–7.

**D. The Age Cut-off does not minimally impair Ms. Kowalski’s section 15 and 7 rights**

[89] To satisfy the minimal impairment stage of the section 1 proportionality test, the government must demonstrate that there are no less impairing means of achieving the legislative goal.

*RJR-MacDonald, supra* para 80 at para 160.

[90] The Age Cut-off is not minimally impairing. There are less rights-impairing means of achieving both its objectives. Physician referral alone would guarantee the most efficient allocation of Fertility Program funding. It would ensure that only those likely to benefit from IVF receive funding, as physicians are best situated to evaluate an individual’s capacity to conceive via IVF. This approach would also prevent excessive funding of AI and IUI where those treatments would be ineffective. Physician recommendation provides a tailored approach to the goals of efficacy and cost savings, rendering the Age Cut-off a superfluous requirement that is not minimally impairing of Ms. Kowalski’s rights.

**E. The deleterious effects of the Age Cut-off outweigh its salutary benefits**

[91] The final stage of the section 1 proportionality test requires the Court to balance the salutary and deleterious effects of the impugned provision. This involves weighing the impact of the law on protected rights against its beneficial effect on the greater public good.

*Carter, supra* para 44 at para 122.

[92] The purpose of the Age Cut-off is in essence to ensure efficient funding allocation to save costs. This salutary benefit should be given minimal weight at the final balancing stage. As stated by Justice Wilson in *Singh*, “the guarantees of the Charter would be illusory” if their infringements could be easily justified by budgetary concerns. To allow cost-saving concerns to justify the infringement of a *Charter* right “misses the point of the exercise under s. 1” (*Singh*). This is

especially true in these circumstances, where there is no evidence that the Saskatchewan healthcare budget would be strained in the absence of the Age Cut-off.

*Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 at 64, 17 DLR (4th) 422 [*Singh*].

[93] Beyond cost savings, the salutary effects of the eligibility criteria are minimal. The Age Cut-off may not actually provide IVF to those who would benefit most because age is not determinative of who is most likely to benefit. Rather, effective allocation could be better realized by prioritizing physician recommendation.

[94] The Age Cut-off's minimal benefits are overwhelmed by a number of disproportionate impacts on an already disadvantaged group. The Age Cut-off affects women in particular, who already have a lower capacity than men to pay for costly fertility treatments due to lower earning potential. It forces women to either self-fund IVF or use ineffective treatments that are associated with substantial non-funded medical costs. Ms. Kowalski herself spent all of her savings on the medications required for IUI despite it not being effective for a woman in her circumstances.

*Official Problem*, *supra* para 3 at 9, 4.

[95] The impact on women who are denied funding for these arbitrary reasons is devastating. This infringement goes to the core of a woman's identity by denying her the ability to experience pregnancy, parenthood, and family. The Age Cut-off exacerbates the feelings of inadequacy often experienced by infertile women by sending the message that they are not worthy of funding. Evidence presented by Dr. Burnett demonstrates that the psychological impacts are severe, equating the emotional toll of infertility to those suffering from terminal illness and chronic pain. This pain affects women's ability to work, socialize, and participate as a full member of society.

*Official Problem*, *supra* para 3 at 8–9.

[96] Given that the Age Cut-off has few salutary benefits and has numerous deleterious effects on women who are denied funding, it fails the overall balancing stage of the proportionality test. Therefore, it cannot be justified under section 1 of the *Charter*.

**PART V – ORDER SOUGHT**

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[97] The Appellant respectfully requests that the appeal be allowed, and that the Age Cut-off be declared invalid as a violation of Ms. Kowalski's *Charter* rights. The Appellant also requests that Ms. Kowalski be granted funding for IVF through the Fertility Program.

All of which is respectfully submitted this 24<sup>th</sup> day of January, 2019.

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Team 6

Counsel for the Appellant

## PART VI – LIST OF AUTHORITIES AND STATUTES

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### JURISPRUDENCE

<i>Alberta (Aboriginal Affairs and Northern Development) v Cunningham</i> , 2011 SCC 37.
<i>Andrews v The Law Society of British Columbia</i> , [1989] 1 SCR 143, 56 DLR (4th) 1.
<i>Auton (Guardian ad litem of) v British Columbia (Attorney General)</i> , 2004 SCC 78.
<i>Blencoe v British Columbia (Human Rights Commission)</i> , 2000 SCC 44.
<i>B(R) v Children’s Aid Society of Metropolitan Toronto</i> , [1995] 1 SCR 315, 122 DLR (4th) 1.
<i>Canada (Attorney General) v Bedford</i> , 2013 SCC 72.
<i>Canada (Attorney General) v PHS Community Services Society</i> , 2011 SCC 44.
<i>Cameron v Nova Scotia (Attorney General)</i> , 1999 NSCA 14, 177 DLR (4th) 611.
<i>Carter v Canada (Attorney General)</i> , 2015 SCC 5.
<i>Centrale des syndicats du Québec v Québec (Attorney General)</i> , 2018 SCC 18.
<i>Chaoulli v Québec (Attorney General)</i> , 2005 SCC 35.
<i>Eaton v Brant County Board of Education</i> , [1997] 1 SCR 241, 142 DLR (4th) 385.
<i>Eldridge v British Columbia (Attorney General)</i> , [1997] 3 SCR 624, 151 DLR (4th) 577.
<i>Gosselin v Québec (Attorney General)</i> , 2002 SCC 84.
<i>Hitzig v R</i> , 177 OAC 321, 231 DLR (4th) 104 (CA).
<i>Kahkewistahaw First Nation v Taypotat</i> , 2015 SCC 30.
<i>Law v Canada (Minister of Employment and Immigration)</i> , [1999] 1 SCR 497, 170 DLR (4th) 1.
<i>Mounted Police Association of Ontario v Canada (Attorney General)</i> , 2015 SCC 1.
<i>New Brunswick (Minister of Health and Community Services) v G(J)</i> , [1999] 3 SCR 46, 177 DLR (4th) 124.
<i>Newfoundland (Treasury Board) v NAPE</i> , 2004 SCC 66.
<i>Québec (Attorney General) v A</i> , 2013 SCC 5.
<i>R v Kapp</i> , 2008 SCC 41.
<i>R v Morgentaler</i> , [1988] 1 SCR 30, 44 DLR (4th) 385.
<i>R v Oakes</i> , [1986] 1 SCR 103, 26 DLR (4th) 200.
<i>Re BC Motor Vehicle Act</i> , [1985] 2 SCR 486, 24 DLR (4th) 536.
<i>RJR-MacDonald Inc v Canada (Attorney General)</i> , [1995] 3 SCR 199, 127 DLR (4th) 1.
<i>Singh v Minister of Employment and Immigration</i> , [1985] 1 SCR 177, 17 DLR (4th) 422.

<b>LEGISLATION</b>
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<i>Canada Health Act</i> , RSC 1985, c C-6.
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<i>Canadian Charter of Rights and Freedoms</i> , Part I of the Constitution Act, 1982, being Schedule B to the <i>Canada Act 1982</i> (UK), 1982, c 11.
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<b>OFFICIAL WILSON MOOT SOURCES</b>
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<i>Official Problem</i> , Wilson Moot 2019.
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