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 RESPONDENT

COUNSEL FOR THE RESPONDENT
TEAM 6

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PART I—OVERVIEW

[1] Reproductive health is a complex policy space. Developing benefits schemes that provide access to fertility treatments requires government to balance competing interests and appraise a wide body of scientific evidence. This undertaking is complicated by the rapidly changing field of reproductive technology, which becomes more sophisticated every year.

[2] In 2016, the government of Saskatchewan provided public funding for fertility treatments for the first time. Saskatchewan aimed to balance competing interests by allocating funding in a fiscally responsible way that maximizes the potential for successful pregnancies.

The 2019 Wilson Moot Problem at page 1 [*Official Problem*].

[3] In keeping with this aim, Saskatchewan chose to make funding for fertility treatments subject to certain eligibility criteria. At issue in this appeal is the requirement that a woman be under the age of 40 to receive funding for in vitro fertilization. This policy choice reflects the scientific evidence showing that a woman's chances of safely and successfully bringing a fetus to term decline with age.

[4] The eligibility criteria do not infringe the Appellant's rights under s. 7 or s. 15 of the *Charter*. Rather than perpetuate arbitrary disadvantage, the eligibility criteria are integral components of an ameliorative scheme aimed at ensuring access to safe and effective fertility treatments. Furthermore, the eligibility criteria do not infringe on the liberty of women 40 and older or cause them harm. Even if the Appellant establishes that the eligibility criteria infringe her *Charter* rights, these infringements are demonstrably justified in a free and democratic society.

PART II—STATEMENT OF FACTS

Factual Background

1. The Statutory Scheme

[5] Fertility is a growing concern in Canada. Recognizing this problem, the Saskatchewan government launched the Fertility Program in July 2016. The Fertility Program aims to help Saskatchewan residents have families when they are unable to conceive naturally. The government of Saskatchewan sought to accomplish their goal by funding fertility treatments for the first time.

Official Problem, *supra* para 2 at pages 1, 2, 5, 9, 10.

[6] The Fertility Program is a complex social benefits scheme. In designing it, the government carefully balanced the need for fertility treatments against fiscal restraints and reproductive technology's current potential for success.

Official Problem, *supra* para 2 at page 8.

[7] The Fertility Program funds three fertility treatments: in vitro fertilization (IVF), intrauterine insemination (IUI), and artificial insemination (AI). Each treatment included in the Fertility Program increases the chance of pregnancy compared to natural conception. IVF is the most effective treatment. However, it is also the most invasive and expensive treatment. IVF costs approximately $15,000 per cycle, whereas IUI and AI cost $1,225 and $300 per cycle, respectively.

Official Problem, *supra* para 2 at pages 2, 6, 7, 8.

[8] The eligibility criteria ensure that funding is provided to those most likely to benefit from IVF. Under the Fertility Program, IVF funding is available if the recipient of the embryo is under age 40. This age cut-off reflects the likelihood of success known at the time the Fertility Program was implemented. For women under 40, IVF has a 55% rate of success per cycle. The success rate drops to only 15% per month for women ages 40 to 43, and continues to decline thereafter. Furthermore, pregnant women 40 and over are significantly more likely to experience high-risk

pregnancy, serious complications, and stillbirths. Unfortunately, IVF cannot resolve these health risks.

Official Problem, *supra* para 2 at pages 2, 7, 8, 9, 10.

[9] Given the government's fixed healthcare budget, it is imperative to control the Fertility Program's costs and allocate funds efficiently. The Fertility Program will cost an estimated $4 million annually. As IVF is the most expensive fertility treatment included in the Fertility Program, the government imposed more stringent eligibility criteria for IVF funding to help control costs. Imposing these eligibility criteria allows the government to save at least an additional $1 million annually that can be used to fund other treatments.

Official Problem, *supra* para 2 at page 10.

2. The Appellant's unsuccessful attempts to conceive

[10] The Appellant, Ms. Kowalski, was diagnosed with endometriosis at age 25. Endometriosis causes infertility in 40% of cases. The Appellant unsuccessfully attempted to conceive naturally between the ages of 32 and 35. At age 40, the Appellant visited a fertility clinic. She received funding for and underwent two rounds of IUI, both of which were unsuccessful. The Appellant now wants to try conceiving through IVF.

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

[11] The Appellant is now 42 years and 9 months old. Her age and endometriosis mean her chances of conceiving a child are minimal, even with the assistance of IVF. Due to her age, the Appellant is ineligible for publicly funded IVF and she cannot afford to pay for this fertility treatment herself. However, the Appellant can receive publicly funded IVF if she uses an egg donor and surrogate under 40, an option substantially more likely to result in a successful pregnancy.

Clarifications to the 2019 Wilson Moot Problem, para 8 [Clarifications].

Official Problem, *supra* para 2 at pages 2, 4.

Procedural History

[12] In 2016, the Appellant brought an application before the Saskatchewan Court of Queen's Bench challenging the constitutionality of the eligibility criteria. The Court allowed the application. Justice Cairns found the eligibility criteria violated s. 15; it discriminated against older women by perpetuating stereotypes and historical disadvantage, and was not protected by s. 15(2). Justice Cairns also found the eligibility criteria violated s. 7; it arbitrarily deprived the Appellant of her rights to liberty and security of the person. Although these infringements were not upheld under s. 1, Justice Cairns recognized that governments are not obligated to fund healthcare services, and that the eligibility criteria have a pressing and substantial objective.

Official Problem, *supra* para 2 at pages 3, 11.

[13] The Saskatchewan Court of Appeal overturned Justice Cairn's decision and upheld the constitutionality of the eligibility criteria. For the Court, Justice Cope decided that the age distinction did not discriminate against women 40 and over. Rather, the eligibility criteria correspond with the "actual needs and circumstances of women 40 and over who are seeking fertility treatment" (*Official Problem*), and do not perpetuate any historical disadvantage or stereotyping they may suffer.

Official Problem, *supra* para 2 at page 11.

[14] Justice Cope also found the Appellant's disappointment in not receiving IVF funding was insufficient to engage s. 7. Therefore, a s. 1 analysis was not required. Nevertheless, Justice Cope held that "the government is entitled to significant deference in respect of complex policy decisions such as who may benefit from health care funding" (*Official Problem*).

Official Problem, *supra* para 2 at page 11.

PART III—STATEMENT OF POINTS IN ISSUE

[15] This appeal raises the following constitutional questions:

1. Do the eligibility criteria infringe s. 15 of the *Charter*?

The eligibility criteria for IVF funding draw a distinction on the enumerated ground of age. However, the distinction is not discriminatory. The eligibility criteria are part of an ameliorative program under s. 15(2). In the alternative, the eligibility criteria are not discriminatory under s. 15(1) because they do not arbitrarily perpetuate or exacerbate the Appellant's disadvantage.

2. Do the eligibility criteria infringe s. 7 of the *Charter*?

S. 7 does not protect a positive right to healthcare funding. Further, the eligibility criteria do not deprive the Appellant of life, liberty or security of the person. Any deprivation of the Appellant's rights to life, liberty or security of the person accords with the principles of fundamental justice.

3. If either of the foregoing questions are answered in the affirmative, is the infringement demonstrably justified under s. 1 of the *Charter*?

Any infringements are justified in a free and democratic society. The government's choices in crafting this complex legislative scheme are entitled to deference. The eligibility criteria are rationally connected to the government's pressing and substantial objective of controlling costs and maximizing the efficacy of IVF funding; the eligibility criteria minimally impair the Appellant's rights; and the salutary effects of the eligibility criteria outweigh any deleterious effects.

PART IV—STATEMENT OF ARGUMENT

Issue 1: The eligibility criteria do not infringe the Appellant's rights under s. 15 of the *Charter*

[16] S. 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 arbitrary disadvantage.

> *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 20, [2015] 2 SCR 548 [*Taypotat*].
> *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61 [*Quebec*].

[17] A law is insulated from s. 15(1) scrutiny if: (1) it has a genuinely ameliorative purpose directed at improving the situation of a disadvantaged group; and (2) the government has employed rational means to achieve the ameliorative goal.

> *R v Kapp*, 2008 SCC 41 at para 41, [2008] 2 SCR 483 [*Kapp*].
> *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 at para 45, [2011] 2 SCR 670 [*Cunningham*].

[18] The eligibility criteria distinguish based on the enumerated ground of age. However, the distinction is not discriminatory. The eligibility criteria are constituent elements of an ameliorative program benefitting Saskatchewan residents who cannot conceive naturally. The Fertility Program's ameliorative nature insulates it from s. 15(1) scrutiny.

[19] If the Fertility Program does not satisfy the requirements under s. 15(2), it nevertheless does not infringe the Appellant's s. 15(1) rights. Rather than perpetuate arbitrary disadvantage, the eligibility criteria respond to the actual capacities and needs of women 40 and over. In addition, the age-based distinction does not reinforce, perpetuate or exacerbate the Appellant's disadvantage.

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

[20] Public funding for IVF will only be provided if the recipient of the embryo is under 40. Thus, the eligibility criteria draw a distinction on the enumerated ground of age.

2. The eligibility criteria are part of an ameliorative program under s. 15(2)

[21] When faced with a s. 15(1) claim, the government may establish that a distinction on an enumerated or analogous ground is insulated from s. 15(1) scrutiny by s. 15(2), and is thereby constitutional. Here, the age requirement is not discriminatory because the eligibility criteria are part of an ameliorative program aimed at improving the position of Saskatchewan residents who are unable to grow their families naturally.

Kapp, supra para 17 at para 40.

[22] The eligibility criteria satisfy the two elements of the s. 15(2) test set out in *Kapp*. First, the eligibility criteria have the genuinely ameliorative purpose of improving the position of a disadvantaged group. Second, the age requirement furthers the government's ameliorative purpose. Accordingly, the eligibility criteria are immunized from s. 15(1) scrutiny.

Kapp, supra para 17 at para 41.

a) The Fertility Program has the genuinely ameliorative purpose of helping Saskatchewan residents have children

[23] To attract protection under s. 15(2), the government must demonstrate that the program has a genuinely ameliorative purpose directed at improving the position of a disadvantaged group.

Cunningham, supra para 17 at para 44.

[24] The Fertility Program has the ameliorative purpose of increasing affordability and access to assisted reproductive services in Saskatchewan for those individuals wanting to grow their families and are having trouble or cannot conceive naturally. By not limiting funding to medically

necessary procedures, the Fertility Program is intended to increase access to fertility treatments for individuals who may be single or in same-sex relationships.

Official Problem, *supra* para 2 at pages 9, 10.

[25] In *Cameron*, the Court of Appeal for Nova Scotia characterized infertility as a disability. The inability to conceive naturally has significantly impacted the lives of Saskatchewan residents. Infertile women feel inadequate and empty because they face barriers to growing their families. As a result, infertile women are more likely to suffer from depression and anxiety than fertile women of a similar age and socio-economic status. The Fertility Program strives to address these problems by providing access to reproductive technologies that will help Saskatchewan residents have children.

Cameron v Nova Scotia (Attorney General), 1999 NSCA 14 at para 175 [*Cameron*].
Official Problem, *supra* para 2 at pages 8, 9.

[26] The fact that the Fertility Program includes costs savings measures does not defeat its ameliorative purpose. A program does not need to be exclusively ameliorative to attract s. 15(2) protection, as "any number of goals are likely to be subsumed within a single scheme" (*Kapp*).

Kapp, *supra* para 17 at para 51.

b) The means chosen by the government further the ameliorative purpose of helping Saskatchewan residents have children

[27] To be protected under s. 15(2), the government's means must be rationally connected to the ameliorative purpose. In other words, it must be "at least plausible that the program may indeed advance the stated goal of combatting disadvantage" (*Kapp*).

Kapp, *supra* para 17 at para 48.

[28] The eligibility criteria advance the Fertility Program's ameliorative purpose by funding IVF for individuals who are most likely to benefit. Here, 'benefit' refers to achieving a safe and

successful pregnancy. In this way, the eligibility criteria contribute to the Fertility Program's larger legislative objective of helping Saskatchewan residents have children.

[29] Limiting publicly funded IVF to women under 40 is rationally connected to the government's ameliorative purpose. The age requirement corresponds with the actual likelihood of conception, which declines as the recipient of the embryo ages. To the extent that the distinction drawn by the eligibility criteria adheres to the actual likelihood of conception, the age cut-off is rationally connected to the government's ameliorative goal.

Cunningham, supra para 17 at para 45.

[30] Women 40 and over are at significantly greater risk of experiencing high-risk pregnancy, serious complications, and stillbirths. The eligibility criteria preclude public funding for IVF where pregnancy poses grave health risks to both mother and child. This advances the government's ameliorative goal by funding fertility treatments that are likely to result in safe and successful pregnancies.

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

[31] The facts of this case parallel *Wynberg*, where the Court of Appeal for Ontario held that a benefits scheme for preschool-aged autistic children was an ameliorative program, notwithstanding that it drew a distinction based on age. In *Wynberg*, the benefits scheme provided intensive behavioural intervention for autistic children ages 2 to 5. The Court held that the age requirements did not defeat the program's ameliorative nature because autistic children over age 5 did not fall within the same "window of opportunity" as autistic children age 5 and under (*Wynberg*). The same analysis applies here, as women 40 and over do not fall within the same window of opportunity for conception as women under 40.

Wynberg v Ontario, 82 OR (3d) 561 at para 59 DLR (4th) 435 [*Wynberg*].

3. The eligibility criteria are not discriminatory under s. 15(1)

[32] Even if the Court does not accept that the eligibility criteria are saved under s. 15(2), the eligibility criteria are not discriminatory. Therefore, they do not infringe s. 15(1) of the *Charter*. Distinctions are discriminatory where they perpetuate arbitrary disadvantage. A distinction perpetuates arbitrary disadvantage where it "fails to respond to the actual capacities and needs of the members of the group" and instead "has the effect of reinforcing, perpetuating or exacerbating their disadvantage" (*Taypotat*).

Taypotat, supra para 16 at para 20.

[33] The eligibility criteria do not perpetuate arbitrary disadvantage. Instead, they respond to the actual capacities and needs of women 40 and over. Further, the eligibility criteria do not reinforce, perpetuate or exacerbate the Appellant's disadvantage.

a) The eligibility criteria respond to the actual capacities and needs of women 40 and over

[34] Distinctions on enumerated or analogous grounds are not discriminatory if they respond to a group's actual needs and capacities.

Taypotat, supra para 16 at para 20.

[35] Distinctions on the enumerated ground of age stand apart from distinctions on other enumerated or analogous grounds because "age is not strongly associated with discrimination" (*Gosselin*). Instead, age-based distinctions often correspond with the actual need, capacity, or circumstances of a group.

Gosselin v Quebec (Attorney General), 2002 SCC 84 at para 31, [2002] 4 SCR 429 [*Gosselin*].
Andrews v Law Society of British Columbia, [1989] 1 SCR 143 at para 69, 56 DLR (4th) 1 [*Law*].

[36] The eligibility criteria correspond with the limited reproductive capacities of women 40 and over. Women 40 and over are unlikely to conceive, even with the assistance of the most

advanced fertility treatments. At best, they have a 15% chance of conception per IVF cycle. Even if conception occurs, women 40 and over are more likely to experience high-risk pregnancy, serious complications, and stillbirths than their younger counterparts. The age cut-off prevents public funding from encouraging these risks.

Official Problem, *supra* para 2 at pages 8, 9.

[37] Distinctions that function as a "device of stereotype" are discriminatory (*Law*). Here, the age requirement "arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice" (*Hutterian*). The notion that IVF is less likely to benefit women 40 and over is not informed by invidious stereotypes; it is based on empirical data that a woman's age is inversely correlated with her ability to conceive and have a safe pregnancy.

Law, supra at para 35 at para 102.
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 at para 108, [2009] 2 SCR 567 [*Hutterian*].
Official Problem, *supra* para 2 at pages 7, 8.

[38] A benefits scheme does not need to align perfectly with social reality to be *Charter* compliant (*Law*). In *Gosselin,* the Supreme Court confirmed that requiring perfect alignment is too stringent because "there will always be some individuals for whom a different set of measures might have been preferable" (*Gosselin*). Thus, the fact that a benefits scheme does not meet the needs of every individual does not mean that it failed to respond a group's actual capacities and needs.

Gosselin, supra para 35 at para 55.
Law, supra para 35 at para 34.

[39] Pursuant to the Supreme Court's decision in *Gosselin,* requiring the Fertility Program to meet the needs of every individual seeking fertility treatment would be too stringent. Accordingly, the fact that some women 40 and over may benefit from IVF does not render the eligibility criteria

discriminatory. Instead, the age cut-off is an appropriate response to complex statistical data about rapidly developing reproductive technologies.

Gosselin, supra para 35 at para 57.

b) The eligibility criteria do not reinforce, perpetuate or exacerbate the disadvantage of women 40 and over

[40] The eligibility criteria cannot be deemed discriminatory merely because the Appellant is disadvantaged by her inability to conceive naturally. "There is no principle or evidentiary presumption that differential treatment for historically disadvantaged persons is discriminatory" (*Law*). Pre-existing disadvantage is only one factor to be considered in the equality inquiry; it is not determinative of discrimination.

Official Problem, *supra* para 2 at page 8.
Law, supra para 35 at para 67.

[41] The Appellant is disadvantaged because of society's negative view of single, childless, women 40 and over. However, the eligibility criteria do not perpetuate any invidious stereotypes about these women. They do not irrationally suggest that the Appellant is a 'spinster' or otherwise underserving of kinship. Instead, the exclusion of women 40 and over simply reflects their relative inability to benefit from IVF.

Official Problem, *supra* para 2 at pages 5, 8, 9.

[42] Rather than exacerbate disadvantage, the eligibility criteria provide the Appellant with her best chance of having a child by funding IVF for a surrogate under 40. Without a surrogate, the Appellant is substantially unlikely to conceive a child due to her age and endometriosis. There is no reproductive technology that would meaningfully improve her ability to conceive. With a surrogate, the Appellant effectively has a 55% chance of conception per cycle.

Issue 2: The eligibility criteria do not infringe the Appellant's s. 7 rights

[43] To succeed in a s. 7 claim, the claimant must prove that: (1) the government action deprives them of their rights to life, liberty or security of the person; and that (2) the deprivation does not accord with the principles of fundamental justice.

> *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 127, [2013] 3 SCR 1101 [*Bedford*].
> *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 55, [2015] 1 SCR 331 [*Carter*].

[44] The Appellant's s. 7 claim must fail. S. 7 does not include positive rights, and the facts of this case do not justify recognizing a novel right. Furthermore, the Appellant's s. 7 interests are not engaged. The eligibility criteria do not prevent the Appellant from making a fundamentally personal decision, nor do they cause her harm, or threaten her life. To the contrary, the eligibility criteria protect her physical health. Even if her s. 7 interests are engaged, any deprivation accords with the principles of fundamental justice.

1. S. 7 does not include a positive right to healthcare funding

[45] To succeed in her s. 7 claim, the Appellant must demonstrate that s. 7 includes a positive right to healthcare funding. However, no such right has ever been recognized.

[46] Courts have consistently rejected claims for positive rights under s. 7. In *Gosselin*, the Supreme Court rejected the notion that s. 7 protects positive rights. Instead, the Court held that s. 7 protects individuals from government action that deprives them of life, liberty or security of the person.

> *Gosselin, supra* para 35 at para 81.

[47] Courts have similarly rejected a positive right to healthcare funding. In *Chaoulli*, the Court held that "the *Charter* does not confer a freestanding constitutional right to healthcare". Appellate courts have followed this trend; in *Wynberg, Canadian Doctors* and *Flora*, courts rejected the

claimants' s. 7 arguments on the basis that s. 7 does not include a positive right to healthcare funding.

Canadian Doctors for Refugee Care v Canada, 2014 FC 651 at paras 8, 571, [2014] FCJ No 679 [*Canadian Doctors*].
Chaoulli v Quebec (Attorney General), 2005 SCC 35 at para 104, [2005] 1 SCR 791 [*Chaoulli*].
Flora v Ontario Health Insurance Plan, 2008 ONCA 538 at para 108, 91 OR (3d) 412 [*Flora*].
Wynberg, *supra* para 31 at paras 219, 220, 231.

a) This is not the case where a novel positive right to healthcare funding should be recognized

[48] This Court should tread lightly in declaring a new constitutional right. In *Gosselin*, the Supreme Court held that s. 7 could one day impose positive obligations on government, but that such an obligation should only be recognized in "special circumstances". The circumstances in this appeal are not special enough to warrant recognizing a novel positive right to healthcare funding.

Gosselin, *supra* para 35 at paras 82-83.

i. Courts have refused to recognize positive rights in much more extreme circumstances

[49] Courts have refused to recognize positive rights to healthcare funding in circumstances much graver than the Appellant's. In *Canadian Doctors*, refugees were denied public funding for life-saving medications. The Federal Court of Appeal rejected the claimant's s. 7 claim on the ground that s. 7 does not "include a positive right to state funding for healthcare" (*Canadian Doctors*). Similarly, the claimant in *Flora* was denied funding for life-saving medical treatment he received outside of Canada.

Canadian Doctors, *supra* para 47 at paras 2, 8, 555, 564.
Flora, *supra* para 47 at paras 93, 101, 108.

[50] The facts of this case are much less dire than those in *Canadian Doctors* and *Flora*. Therefore, recognizing a positive right to healthcare funding in these circumstances would be

inappropriate. Unlike the claimants in *Canadian Doctors* and *Flora*, the Appellant's life does not hang in the balance. IVF itself is not a life-saving medical treatment, nor is it medically required. It may actually increase the Appellant's risks of serious pregnancy complications. Furthermore, current IVF technology does not guarantee conception; IVF is no more than 15% effective in women 40 and over.

Official Problem, *supra* para 2 at pages 8, 10.

ii. Economic grounds are not a compelling reason to recognize a novel positive right

[51] Purely economic grounds are not a compelling reason to recognize a positive right to healthcare funding. In *Canadian Doctors, Flora* and *Wynberg*, the courts rejected s. 7 claims because the claimants sought purely economic rights. Further, the Court in *Wynberg* determined that funding medical treatment for one group did not "create a constitutional obligation on the [government] to provide the same or similar [treatment] on a more widespread basis".

Canadian Doctors, supra para 47 at paras 532, 555, 563, 564.
Flora, supra para 47 at paras 106, 107, 108.
Wynberg, supra para 31 at paras 220, 223.

[52] The Appellant's economic grounds in this appeal are similarly unpersuasive. Simply because Saskatchewan has chosen to fund IVF for women under 40 does not mean it is required to fund it for all women. As was the case in *Canadian Doctors, Flora* and *Wynberg*, the Appellant claims that the government is required to pay for her desired fertility treatment. This purely economic request should not ground a novel constitutional right.

Official Problem, *supra* para 2 at pages 2, 5.

iii. Recognizing a novel positive right in these circumstances would be imprudent

[53] It would be imprudent for the Court to deviate from precedent by recognizing a novel positive right to healthcare funding in these circumstances.

[54] Recognizing such a right would be fiscally irresponsible. In *Pratten,* the claimant argued the *Adoption Act*'s failure to provide people born through sperm donation with their donor's personal information violated their s. 7 right to "know one's past" (*Pratten*). The Court refused to recognize the right because the budgetary ramifications of recognizing such a broad right would be significant.

> *Pratten v British Columbia (Attorney General)*, 2012 BCCA 480 at paras 7, 48, 50, 357 DLR (4th) 660.

[55] Similar to *Pratten*, recognizing a positive right to healthcare funding in this appeal would profoundly impact government expenditures. Such a general right would extend beyond the Fertility Program; provincial governments would be obligated to fund healthcare to an indeterminate degree. Recognizing this far-reaching right would require increased healthcare expenditure, notwithstanding the fact that provinces do not have "unlimited funds to address the needs of all" (*Egan*).

> *Egan v Canada*, [1995] 2 SCR 513 at para 104, 124 DLR (4th) 609.

[56] Furthermore, it would be unwise to impose a novel right to healthcare funding in the context of rapidly evolving technology. Medical and scientific understanding of reproductive technology changes quickly and substantially each year. At this rate of change, it is impossible for governments to predict the future of reproductive technology. Governments should not be required to fund fertility treatments that the experts themselves do not fully understand.

> Official Problem, *supra* para 2 at page 8.

[57] Not only is reproductive technology complex, but the resulting pregnancy may be dangerous for some. Women 40 and over are especially vulnerable to high-risk pregnancy, complications, and stillbirths. Funding IVF for this age cohort would encourage women to undergo this treatment when they may not have otherwise. As a result, publicly funded IVF would increase their exposure

to unsafe pregnancies. It would be unwise for courts to force provinces to fund elective treatments that endanger their recipients.

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

2. The eligibility criteria do not deny the Appellant of her rights to life, liberty or security of the person

[58] Even if this Court is inclined to consider recognizing a novel positive right in these circumstances, the Appellant's rights to life, liberty and security of the person are not at stake.

a) The Appellant has the liberty to make fundamentally personal decisions

[59] Liberty protects the "right to make fundamental personal decisions without state interference" (*Morgentaler*). Courts have consistently recognized that decisions about procreation are fundamentally personal; this includes the decision to have an abortion (*Morgentaler*) and the decision to conceive a child with whom one chooses (*Susan Doe*). The Appellant's decision about whether to conceive and carry a child is rightfully classified as fundamentally personal.

R v Morgentaler, [1988] 1 SCR 30 at para 289, 44 DLR (4th) 385 [*Morgentaler*].
Susan Doe v Canada (Attorney General), 2007 ONCA 11 at para 32, 84 OR (3d) 81.

[60] To violate the right to liberty, the government action must prevent the claimant from making a choice that is fundamentally personal by prohibiting or compelling particular behaviour. Where the law "does not prohibit or impede anyone from seeking medical treatment" (*Flora*), the claimant's liberty remains intact.

Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44 at para 49, [2000] 2 SCR 307 [*Blencoe*].
Flora, *supra* para 47 at para 101.
Morgentaler, *supra* para 59 at para 302.

[61] The eligibility criteria do not prevent the Appellant from making a fundamentally personal life choice. IVF itself is never prohibited under the scheme. The Fertility Program does not mandate which fertility treatment to undergo or how to proceed with a desired fertility treatment.

The eligibility criteria do not affect the Appellant's freedom to choose to conceive and carry the child or not. The eligibility criteria merely preclude the Appellant from receiving publicly funded IVF in a discrete and specific scenario.

Clarifications, *supra* para 11 at para 4.
Official Problem, *supra* para 2 at page 2.

[62] The eligibility criteria do not deprive the Appellant of her liberty merely because she is unable to pay for IVF. The courts in *Wynberg* and *Canadian Doctors* both confirmed that the inability to pay for a desired treatment does not "engage section 7 rights that were not otherwise engaged, nor [does] it convert a non-section 7 deprivation into a deprivation of section 7 rights" (*Wynberg*).

Canadian Doctors, supra para 47 at paras 564, 567.
Wynberg, supra para 31 at para 231.

b) There is no risk to the Appellant's security of the person

[63] Security of the person encompasses the right to have "control over one's bodily integrity free from state interference" (*Rodriguez*). It includes both physical and psychological well-being.

Carter, supra para 43 at para 64.
Rodriguez v British Columbia (Attorney General), [1993] 3 SCR 519 at para 21, 107 DLR (4th) 342.

i. The eligibility criteria protect the Appellant's physical health

[64] Government action interferes with physical integrity when it physically harms an individual or places their health at risk.

Carter, supra para 43 at para 64.

[65] Rather than posing a risk to the Appellant's health, the eligibility criteria protect it. Unlike *PHS*, where the law endangered health by removing a safeguard, the eligibility criteria implicitly impose one. Women 40 and over are likely to experience serious complications from pregnancy. By only funding IVF for women 40 and over if they use a surrogate, the eligibility criteria

implicitly encourage a fertility treatment that protects women 40 and over from the serious health risks they would face during pregnancy.

Official Problem, *supra* para 2 at pages 2, 10.
PHS Community Services Society v Canada (Attorney General), 2011 SCC 44 at para 93, [2011] 3 SCR 134.

ii. The eligibility criteria do not cause psychological harm

[66] Establishing that government conduct caused psychological harm is a two-step test. The claimant must show: (1) that they have suffered serious psychological harm; and (2) that there is a sufficient causal connection between the impugned government action and the psychological harm, in the form of a direct causal effect.

Bedford, *supra* para 43 at paras 75, 76, 78.
Blencoe, *supra* para 60 at para 78.
New Brunswick (Minister of Health & Community Services) v G(J), [1999] 3 SCR 46 at para 60, 177 DLR (4th) 124.

[67] The eligibility criteria did not cause the Appellant's psychological harm. Any psychological effects are indirect and mediated through the Appellant's infertility.

[68] The eligibility criteria have not caused the Appellant to suffer psychological harm that she would not have otherwise suffered. Dr. Kevin Wong explained the serious psychological effects that fertility problems and childlessness have on women. Infertile women are "more likely to experience depression and severe anxiety as compared to other women" and their "quality of life and the quality of their relationships" often suffer (*Official Problem*). The Appellant's depression and reclusiveness are products of her infertility.

Official Problem, *supra* para 2 at pages 8, 9.

[69] Funding the Appellant's IVF would not have prevented her psychological harm. Funding IVF does not guarantee conception or significantly increase chances of conception; only technological advances can do that. Current reproductive technologies only offer a minimal chance

of pregnancy through IVF and funding itself does not fix the health risks pregnancy poses. In other words, funding for IVF would not remedy the psychological harm the Appellant has experienced.

[70] Any potential causal connection between the eligibility criteria and the Appellant's psychological harm is purely speculative. The only evidence of this causal link is the Appellant's opinion in her testimony. A sufficient causal connection demands a real link, not a speculative one. Without more definitive evidence bolstering it, it is impossible to say with any certainty that it was the eligibility criteria, and not the Appellant's infertility, that caused her psychological harm.

Bedford, *supra* para 43 at para 76.
Official Problem, *supra* para 2 at page 5.

3. Any s. 7 violation accords with the principles of fundamental justice

[71] The Appellant has the onus of proving that the alleged violations of her s. 7 interests do not accord with the principles of fundamental justice. The principles of fundamental justice analysis focuses on the relationship between the law's purpose "taken at face value" and the law's effect on the claimant (*Bedford*).

Bedford, *supra* para 43 at para 125.
Carter, *supra* para 43 at para 71.

[72] The Appellant has failed to discharge her burden. The eligibility criteria deny publicly funded IVF to individuals when a woman aged 40 and over will carry the child. This effect is not arbitrary, overbroad or grossly disproportionate to the purposes of controlling the Fertility Program's costs and ensuring that funding goes to those most likely to benefit.

Official Problem *supra* para 2 at page 10.

a) The eligibility criteria are not arbitrary

[73] A law is arbitrary when there is "no connection between the effect and the object of the law" (*Bedford*).

Bedford, *supra* para 43 at para 98.

[74] The eligibility criteria are not arbitrary. There is a clear connection between the eligibility criteria's objectives and the effect of denying publicly funded IVF for women 40 and over.

[75] The eligibility criteria ensure that those receiving publicly funded IVF are the most likely to benefit from this fertility treatment. Individuals with greater chances of a successful pregnancy are the most likely to benefit from IVF. Statistics show that those are women under 40 because IVF success rates drop significantly for women 40 and over. This includes the Appellant. Limiting funding to women who have a greater chance of conceiving is related to the objective of allocating funds to those most likely to benefit from IVF.

Official Problem, *supra* para 2 at page 8.

[76] The eligibility criteria control the Fertility Program's costs. Costs rise every time someone receives funding through the Fertility Program. Removing the eligibility criteria would increase costs even further; *at least* an additional $1 million annually. The eligibility criteria are a rational way of restricting the number of people who can access funding, thereby limiting the Fertility Program's costs.

Official Problem, *supra* para 2 at page 10.

b) The eligibility criteria are not overbroad

[77] Laws are overbroad "where there is no rational connection between the purposes of the law and some, but not all, of its impacts" (*Bedford*). The onus is on the Appellant to prove the eligibility criteria are overbroad.

Bedford, *supra* para 43 at para 112.

[78] The eligibility criteria correspond with the scientific evidence on fertility, and therefore they are not overbroad. When crafting complex policy schemes, governments must be given leeway to make judgment calls based on a reasonable appraisal of scientific evidence. While the statistical data does not reflect each individual's potential for success, statistical averages provide

insight into the approximate success rate for women of different ages. These rates significantly decline after a woman reaches the age of 40.

Official Problem, *supra* para 2 at pages 4, 8.

[79] Furthermore, the Appellant has not discharged her burden of demonstrating that the eligibility criteria are overbroad as she has not adduced any evidence that women 40 and over are likely to benefit from IVF. The Appellant's assertion that a woman over 40 at her fertility clinic conceived through IVF is insufficient to prove that the eligibility criteria are overbroad. While that woman conceived through IVF, her statistical likelihood of conception was not provided. It is impossible to know whether she conceived because her chances were in fact much higher, or whether she had a 15% chance and luck was on her side.

Official Problem, *supra* para 2 at page 5.

[80] The Court needs more than a mere possibility to conclude that a law is overbroad. Without evidence that women 40 and over have been inappropriately denied funding, the Appellant has failed to prove the eligibility criteria are overbroad.

c) The effects of the eligibility criteria are not grossly disproportionate to their objectives

[81] Gross disproportionality is a high threshold. This high threshold will only be met in "extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure" and "the impact is so severe that it violates our fundamental norms" (*Bedford*).

Bedford, *supra* para 43 at paras 109, 120.

[82] The eligibility criteria's effect is not grossly disproportionate to its objectives. IVF is expensive and invasive, with widely differing success rates. Given her age and endometriosis, the Appellant is unlikely to benefit from IVF. Understandably, the Appellant is upset that she cannot receive public funding for her preferred fertility treatment. However, denying funding for that

specific option, while funding more promising options like surrogacy and leaving the choice entirely up to the Appellant, is proportionate to the associated objectives.

Official Problem, *supra* para 2 at pages 6, 8.

[83] The effect is not contrary to fundamental societal norms; instead, it safeguards them. S. 7 is grounded in the norm that governments should not actively harm their citizens. The eligibility criteria effectively protect the Appellant from harm. Funding the Appellant's IVF would risk exposing her to the complications that often stem from pregnancy after the age of 40. The effect on the Appellant is appropriately weighed against the importance of allocating resources in a safe, efficient and responsible manner.

Bedford, supra para 43 at para 120.
Official Problem, *supra* para 2 at page 9.

Issue 3: Any infringements are justified under s. 1 of the *Charter*

[84] If the claimant demonstrates an infringement of their *Charter* rights, the government may demonstrate that the infringement is justified under s. 1. To do so, the government bears the burden of demonstrating that the law passes a proportionality test.

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

[85] The proportionality analysis determines "whether the *Charter* infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular claimant could be envisioned" (*Hutterian).*

Hutterian, supra para 37 at para 69.

1. A deferential application of the s. 1 test is appropriate

[86] Courts should defer to the legislature when the impugned legislation is a complex social benefits scheme that allocates government resources to many potential beneficiaries. Courts have consistently recognized that the government is in a better position to discern how to allocate scarce

resources. Their elected status, knowledge of citizens' competing needs, and ability to appraise large bodies of research gives them unique insight and perspective.

> *Cameron, supra* para 25 at para 236.
> *Canadian Doctors, supra* para 47 at para 535.
> *RJR-MacDonald Inc v Canada*, [1995] 3 SCR 199 at para 68, [1995] SCJ No 68 [*RJR*].
> *Schachter v Canada*, [1992] 2 SCR 679 at para 99, 93 DLR (4th) 1 [*Schachter*].
> *Wynberg, supra* para 31 at para 184.

[87] This Court should defer to the government of Saskatchewan's decision to enact a complex benefits scheme. The government was faced with research showing a pressing need for fertility treatments, vastly different success rates, health risks, and affordability issues. They had to balance these factors in creating a program that efficiently and responsibly allocates resources in a way that creates the best chance of safe and successful pregnancy.

> *Cameron, supra* para 25 at paras 234, 236, 237.
> Official Problem, *supra* para 2 at pages 9, 10.
> *RJR, supra* para 86 at para 70.
> *Schachter, supra* para 86 at para 99.

[88] The government should be entitled to fund fertility treatments incrementally. The Fertility Program and funding scheme reflect the current capabilities of reproductive technologies. At the same time, these technologies are rapidly evolving. The government must be able to take steps alongside technological advancements in a way that coincides with social and economic realities.

> *McKinney v University of Guelph*, [1990] 3 SCR 229 at para 129, 2 OR (3d) 319.
> Official Problem, *supra* para 2 at page 8.

2. The eligibility criteria have pressing and substantial objectives

[89] The eligibility criteria are part of a social benefits scheme and "it will be a rare occasion when a benefit conferring scheme is found to have an unconstitutional purpose" (*Schachter*). Justice Cairns of the Saskatchewan Court of Queen's Bench determined that the eligibility criteria's objectives are pressing and substantial.

> Official Problem, *supra* para 2 at page 11.

Schachter, *supra* para 86 at para 93.

[90] Controlling the Fertility Program's costs prevents the redirection of healthcare resources from other important medical services. While Saskatchewan has a large healthcare budget, it is not unlimited. Providing publicly funded IVF to women 40 and over when healthcare budgets are fixed could result in a "financial shake-up". As a result, "other benefits to other disadvantaged groups would have to be done away with to pay" for the Appellant's IVF (*Schachter*).

Official Problem, *supra* para 2 at page 10.
Schachter, *supra* para 86 at paras 93, 99, 100.

[91] Given these budgetary realities, "allocat[ing] limited available resources in a manner that optimizes the program's benefits and maximizes the potential outcomes" is pressing and substantial (*Wynberg*). Allocating IVF funding to those most likely to benefit ensures that the government's limited resources are used efficiently and responsibly.

Wynberg, *supra* para 31 at para 160.

3. The eligibility criteria are rationally connected to the government's pressing and substantial objectives

[92] To establish a rational connection, the government must only show they had a "reasonable basis for believing such a rational connection exists" (*RJR*).

RJR, *supra* para 86 at para 82.

[93] The eligibility criteria are rationally connected to the government's first purpose: controlling the Fertility Program's costs. In *RJR*, the rational connection between reducing a product's price and increasing consumption was "self-evident". Here, it is self-evident that drastically reducing the cost of, and thereby increasing accessibility to, a more effective fertility treatment would increase demand for IVF.

Official Problem, *supra* para 2 at pages 6, 7, 8.
RJR, *supra* para 86 at para 83.

[94] The more people who access publicly funded fertility treatments under the Fertility Program, the greater the government's expenditures. Removing the eligibility criteria would cost the government *at least* an additional $1 million. Therefore, there is a rational connection between the eligibility criteria and the objective of controlling costs.

Official Problem, *supra* para 2 at page 10.

[95] The eligibility criteria are also rationally connected to the government's second purpose: allocating funding to those most likely to benefit. Women under 40, and individuals who use a surrogate under 40, have the greatest chance of a successful pregnancy through IVF. It would undermine this pressing objective to fund IVF for women 40 and over because their statistical chances of conceiving are significantly lower and because they face complications which threaten the pregnancy itself.

Official Problem, *supra* para 2 at pages 7, 8.

4. The eligibility criteria minimally impair the *Charter* rights of women 40 and over

[96] A *Charter* infringement is minimally impairing where the government's selected means fall within "a range of reasonable alternatives" (*Hutterian*). Given medical and scientific experts' rapidly changing understanding of fertility treatments, it is possible that a more advantageous arrangement is conceivable. However, the inquiry into minimal impairment is not concerned with whether there is an alternative scheme the claimant group would prefer.

Hutterian, *supra* para 37 at para 62.

[97] The eligibility criteria do not prohibit women 40 and over from receiving IVF. Instead, the government does not fund this expensive and invasive treatment for women 40 and over. Additionally, women 40 and over are not entirely excluded from the Fertility Program; they are entitled to publicly funded AI and IUI.

[98] In *Cameron,* the Court of Appeal for Nova Scotia determined that the government's failure to fund IVF and intracytoplasmic sperm injection (ICSI) was minimally impairing because "it denie[d] the infertile funding for only two procedures, leaving [the claimant] not only the full panoply of medical services available to all, but a number of specific procedures available for their condition" (*Cameron*). The same analysis applies here. The Appellant's preferred fertility treatment is available if she pays for it. If she chooses not to, she is entitled to access every other publicly funded fertility treatment.

Cameron, supra para 25 at para 244.

5. There is proportionality between the salutary and deleterious effects of the eligibility criteria

[99] At the final stage of the s. 1 analysis, the government must demonstrate that the *Charter* infringement is proportional, meaning that the infringing measure's salutary effects outweigh its deleterious effects. Here, the eligibility criteria's salutary effects outweigh any deleterious effects on the Appellant and other women 40 and over.

[100] The eligibility criteria's deleterious effects are minimal. As a result of the eligibility criteria, women 40 and over cannot receive IVF unless they pay for the treatment themselves. This may place financial strain on a woman, or preclude her from accessing IVF if she is unable to fund the treatment herself. However, the eligibility criteria's salutary effects far outweigh these negative effects.

Official Problem, *supra* para 2 at pages 8, 9

[101] The eligibility criteria have several salutary effects. First, the eligibility criteria ensure effective resource allocation. In *Cameron,* the Court of Appeal for Nova Scotia determined that the government's decision to not fund IVF was proportionate. The Court recognized that the decision to not fund the claimant's desired fertility treatment allowed funding to be allocated to

other procedures. The same analysis applies here. The decision to not fund IVF for women 40 and over allows funding to be allocated to more beneficial fertility treatments.

Cameron, supra para 25 at para 245.

[102] Second, the eligibility criteria safeguard the health of women and their children. In the unlikely event that a woman over 40 conceives, she will be especially vulnerable to a high-risk pregnancy, serious complications, and stillbirth. By imposing an age cut-off commensurate with these risks, the eligibility criteria ensure that public funding will not encourage unsafe and unsuccessful pregnancies.

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

[103] Third, the eligibility criteria provide Saskatchewan residents with their best chance to have a child. They ensure efficacy by imposing an age cut-off that coincides with women's reproductive capacities, as women under 40 are significantly more likely to conceive through IVF than their older counterparts. Thus, the eligibility criteria provide the undisputable benefit of procreation.

Brooks v Canada Safeway [1989] 1 SCR 1219 at para 32, 59 DLR (4th) 321.

[104] As the deleterious effects of the eligibility criteria are few, while the salutary effects are numerous, the effects are more than proportional—they are beneficial on an overall balance. Accordingly, any infringement of the Appellant's rights is demonstrably justified in a free and democratic society.

PART V – ORDER SOUGHT

[105] The Respondent requests that this appeal be dismissed.

All of which is respectfully submitted this 24th day of January 2019.

Team 6

Counsel for the Respondent

PART VI—LIST OF AUTHORITIES AND STATUTES

JURISPRUDENCE

Alberta (Aboriginal Affairs and Northern Development) v Cunningham, 2011 SCC 37, [2011] 2 SCR 670.
Andrews v Law Society of British Columbia, [1989] 1 SCR 143 at para 69, 56 DLR (4th) 1.
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Brooks v Canada Safeway [1989] 1 SCR 1219, 59 DLR (4th) 321.
Cameron v Nova Scotia, 1999 NSCA 14, 204 NSR (2d) 1.
Canada (Attorney General) v Bedford, 2013 SCC 72, [2013] 3 SCR 1101.
Canadian Doctors for Refugee Care v Canada, 2014 FC 651, [2014] FCJ No 679.
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McKinney v University of Guelph, [1990] 3 SCR 229, 2 OR (3d) 319.
New Brunswick (Minister of Health & Community Services) v G(J), [1999] 3 SCR 46, 177 DLR (4th) 124.
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Pratten v British Columbia (Attorney General), 2012 BCCA 480, 357 DLR (4th) 660.
Quebec (Attorney General) v A, 2013 SCC 5, [2013] 1 SCR 61.
R v Kapp, 2008 SCC 41, [2008] 2 SCR 483.
R v Morgentaler, [1988] 1 SCR 30, 44 DLR (4th) 385.
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Rodriguez v British Columbia (Attorney General), [1993] 3 SCR 519, 107 DLR (4th) 342.
Schachter v Canada, [1992] 2 SCR 679, 93 DLR (4th) 1.
Susan Doe v Canada (Attorney General), 2007 ONCA 11, 84 OR (3d) 81.
Wynberg v Ontario, 82 OR (3d) 561, [2006] OJ No 2732.

OFFICIAL PROBLEM

Clarifications to the 2019 Wilson Moot Problem.
The 2019 Wilson Moot Problem