Positive Rights and Section 15 of the *Charter*: Addressing a Dilemma

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Normative arguments in favour of interpreting the Charter *as containing positive rights to programs like health care, housing, and welfare run into significant questions concerning institutional roles and competence, as well as judicial overreach in the absence of formal constitutional amendment. However, a number of cases pose a challenge for the conceptual distinction between positive and negative rights, particularly when they are situated in a negative rights frame but have obvious implications for a right of access to particular services. In cases implicating access to abortion, assisted dying, and supervised drug injection, federalism plays a key structuring role, as provinces — which have jurisdiction over health care — do not subsequently act on obligations to provide services following decisions involving federal criminal laws. This article examines how s. 15's equality rights offers a path forward for dealing with this dilemma. A substantive conception of equality, something articulated by the Supreme Court from its first s. 15 decision onward, may require recognition of positive constitutional obligations on government. Recognizing circumscribed positive rights under s. 15 does not require a radical departure from past cases or a break from s. 15's central focus on discrimination, nor does it present the same institutional or amendment-related concerns that would arise in the context of judicial recognition of positive rights under s. 7's right to life, liberty and security of the person.*

Les arguments de nature normative faisant valoir que la Charte *devrait être interprétée comme garantissant des droits positifs à l'égard de programmes comme les soins de santé, le logement et le bien-être soulèvent des questions importantes concernant les rôles institutionnels et les compétences, ainsi que l'excès judiciaire en l'absence d'amendement constitutionnel formel. Cependant, un certain nombre de cas posent un défi à la distinction conceptuelle entre droits positifs et négatifs, en particulier lorsqu'ils se situent dans un cadre de droits négatifs, mais ont des implications évidentes pour un droit d'accès à des services spécifiques. Dans les cas concernant l'accès à l'avortement, à l'aide médicale à mourir et à l'injection supervisée, le fédéralisme joue un rôle structurant clé, car les provinces, qui ont compétence en matière de soins de santé, n'assurent pas de suivi relativement aux obligations de fournir des services lorsque des décisions impliquant des lois criminelles fédérales sont rendues. Dans cet article, l'auteur examine comment les*

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droits à l'égalité garantis à l'article 15 ouvrent la voie à ce dilemme. Une conception substantielle de l'égalité, énoncée par la Cour suprême dans sa première décision en vertu de l'article 15, peut exiger la reconnaissance d'obligations constitutionnelles positives de la part du gouvernement. Reconnaître les droits positifs circonscrits en vertu de l'article 15 n'exige pas de s'écarter radicalement des cas antérieurs, ni de rompre avec l'accent mis sur la discrimination par l'article 15, ni de présenter les mêmes préoccupations institutionnelles ou d'amendement que celles qui surgiraient dans le contexte de la reconnaissance juridique des droits positifs en vertu du droit à la vie, à la liberté et à la sécurité de la personne de l'article 7.

INTRODUCTION

The extent to which the *Charter of Rights and Freedoms*[1] includes, or ought to include, protection for social and economic rights has been the subject of much commentary. Outside of specific provisions (s. 23's minority language education rights, for example), the Charter is largely interpreted as a negative rights document; that is, it generally protects against government interference with rights rather than requiring governments to take action to provide particular programs or services. Normative arguments in favour of interpreting the Charter as containing free-standing positive rights[2] to programs or services like health care, housing, and welfare run into significant questions concerning institutional roles and competence, as well as judicial overreach in the absence of formal constitutional amendment. However, a number of cases pose a challenge for the conceptual distinction between positive and negative rights, and for the Charter generally, particularly when they are situated in a negative rights frame but have obvious implications for a right of access to particular services.

In this article I argue that s. 15's equality rights offer a path forward for dealing with this dilemma. More specifically, a circumscribed role for positive rights under the ambit of s. 15 may be necessary to deal with problems emanating from Supreme Court jurisprudence in cases involving access to health care. In Part 1, I briefly examine the normative debate over whether the Charter's provisions — particularly s. 7's right to life, liberty and security of the person — ought to be interpreted as including positive rights. I argue that institutional concerns and principles relating to the normative requirements of constitutional amendment weigh heavily against the notion that judges ought to find or apply free-standing positive rights under s. 7.

Part 2 complicates the debate by presenting a dilemma: a number of s. 7 cases implicating health care have focused on negative rights claims but have obvious

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1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

2 For conceptual clarity, I consider social or economic rights to be specific kinds of positive rights, with positive rights being a general umbrella term. In this article, I will refer to positive rights in relation to the basic distinction from negative rights, but the article's specific focus is on social rights like health care.

implications for a positive right of access to services. These cases include issues relating to abortion, assisted dying, and supervised drug injection. Despite claimants' success at the Supreme Court in these cases, serious barriers to access persist because the federal criminal laws at stake have been challenged from a negative rights perspective. Federalism plays a key structuring role, as provinces — which have jurisdiction over health care — do not subsequently act on any constitutional obligation to provide services following these decisions.

In Part 3, I argue that s. 15 offers a path forward for dealing with this problem. Following a brief examination of the relevant equality rights jurisprudence, I argue that a substantive conception of equality, something articulated by the Supreme Court from its first s. 15 decision[3] onward, may require recognition of positive constitutional obligations on government. Recognizing circumscribed positive rights under s. 15 does not require a radical departure from past cases or a break from s. 15's central focus on discrimination, nor does it present the same institutional or amendment-related concerns that would arise in the context of judicial recognition of positive rights under s. 7.

I conclude in Part 4 by explaining how this approach would address both the particular dilemma arising in these health policy cases as well as the constraints on health access that have been allowed to crop up via federalism. Moreover, I argue that this approach would revitalize s. 15 in a context where s. 7 has seemingly become a default avenue for what are properly considered equality rights challenges.

1. SOCIAL RIGHTS AND THE CHARTER

The question of social and economic rights, particularly under ss. 7 and 15 of the Charter, has received a significant amount of normative advocacy[4] and empirical attention.[5] In this section, I will briefly outline the contours of the

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3 *Andrews v. Law Society (British Columbia)*, 1989 CarswellBC 16, 1989 CarswellBC 701, [1989] 1 S.C.R. 143 (S.C.C.).

4 Martha Jackman, "The Protection of Welfare Rights under the Charter," (1988) 20(2) *Ottawa Law Review* 257; Martha Jackman, "Poor Rights: Using the Charter to Support Social Welfare Claims," (1993) 19 *Queen's Law Journal* 65; Margot Young, "Section 7 and the Politics of Social Justice," (2005) 38 *University of British Columbia Law Review* 539; Cara Wilkie and Meryl Zisman Gary, "Positive and Negative Rights under the Charter: Closing the Divide to Advance Equality," (2011) 30 *Windsor Review of Legal and Social Issues* 37.

5 Jamie Cameron, "Positive Obligations under Sections 15 and 7 of the Charter: A Comment on *Gosselin v. Québec*," (2003) 20 *Supreme Court Law Review* 65; Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004); Barbara Billingsley and Peter Carver, "Sections 7 and 15(1) of the Charter and Access to the Public Purse: Evolution in the Law?" (2007) 36 *Supreme Court Law Review* 221; Judy Fudge, "Substantive Equality, the Supreme Court of Canada, and the Limits of Redistribution," (2007) 23 *South African Journal of Human Rights* 235; Mel Cousins, "Health Care and Human Rights

normative debate about whether these Charter rights ought to be interpreted to include free-standing positive rights. My goal is not to settle this question here, it is only to highlight why there are fundamental institutional and legitimacy-related reasons for judicial caution in the area of social rights.[6]

Advocates for interpreting the Charter as including social rights maintain that such a reading is consistent with a broad, liberal understanding of the rights themselves. They argue that recognizing social rights would reflect Canadian values pertaining to the welfare state.[7] They contend that nothing in the existing jurisprudence of s. 7, for example, prevents such a reading.[8] Indeed, how can someone enjoy their right to life, liberty and security of the person without protections for health, housing and welfare? Further, recognition of social rights in the Charter would reflect Canada's international human rights obligations, particularly as a signatory to the International Covenant on Economic, Social and Cultural Rights.[9] These normative appeals also include the assertion that critics of judicially-mandated positive rights are "ideological" or generally hold a neo-liberal bias.[10]

For critics of this view, a central concern pertaining to reading positive rights into the Charter involves both the legitimacy and public policy capacity of courts. While many of the democratic objections to judicial review apply generally to both negative and positive rights contexts,[11] judicial enforcement of social rights are more pronounced in part because redistribution and public spending are regarded as innately political matters. Incentives for managing and allocating resources in a society become warped in a context where the body that dictates spending is not the same as the body that collects public funds. For critics of positive interpretation of Charter rights, then, basic democratic principles of accountability and legitimacy are reflected in judicial decisions that recognize judicial deference in the context of significant spending.[12]

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after *Auton* and *Chaoulli*," (2009) 54 *McGill Law Journal* 717; Matthew Rottier Voell, "*PHS Community Services Society v. Canada (Attorney General)*," (2011) 31 *Windsor Review of Legal and Social Issues* 41.

6 For a more in-depth examination of the discussion in this section, see: Emmett Macfarlane, "The Dilemma of Positive Rights: Access to Health Care and the Canadian Charter of Rights and Freedoms," (2014) 48(3) *Journal of Canadian Studies* 49.

7 Jackman (1988), *supra,* footnote 4, at 279.

8 Young, *supra*, footnote 4, at 541; Wilke and Gary, *supra*, footnote 4, at 46.

9 Jackman (1988), *supra*, footnote 4, at 289; Gwen Brodsky and Shelagh Day, "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty," (2002) 14 *Canadian Journal of Women and the Law* 185.

10 Young, *supra* footnote 4, at 557-8; Fudge, *supra*, footnote 5, at 252.

11 F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000); Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (Don Mills: Oxford University Press, 2001); Jeremy Waldron, "The Core of the Case Against Judicial Review," (2006) 115 *The Yale Law Journal* 1346; Macfarlane, *supra*, footnote 6.

Moreover, critics assert that elected legislatures enjoy a significant comparative advantage over courts when it comes to capacity and resources in the realm of public policy analysis, including access to the bureaucracy, researchers who are members of legislative staff, and an ability to account for "public and expert opinion, cost of the public treasury, administrative feasibility" and other issues more readily than courts.[13] While courts are free to take notice of "social facts," their ability to analyze them in a competent manner has been criticized.[14] Given the weight legislatures afford to electoral politics, partisanship, public opinion, and ideology, it would be wrong to suggest that elected bodies routinely live up to the ideals of evidence-based policy-making; nevertheless, the relative institutional resources and competencies clearly make the non-judicial branches a more appropriate forum for assessing the type of evidence associated with, and weighing the impact of, social policy.[15]

A more fundamental problem is that judicial recognition of free-standing positive rights under provisions like s. 7 disregards the basic requirement for entrenching new rights in the Charter via formal constitutional amendment. It is well established that the framers intended for s. 7 to apply only to matters of procedure,[16] something the Supreme Court abandoned in favour of a substantive reading in the first major s. 7 case.[17] Nevertheless, the Court has generally limited s. 7's application to the criminal law context, if not the administration of justice.[18] It was not until the 2002 case of *Gosselin v. Quebec (A.G.)* that the Court directly addressed the question of whether s. 7 included positive rights.[19]

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[12] See, for example, *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, 2004 CarswellNfld 322, 2004 CarswellNfld 323, [2004] 3 S.C.R. 381 (S.C.C.).

[13] Donald Smiley, "Courts, legislatures, and the protection of human rights," In *Courts and Trials: A Multi-Disciplinary Approach* F.L. Friedland ed. (Toronto: University of Toronto Press, 1975) at 98.

[14] See: Danielle Pinard, "Institutional Boundaries and Judicial Review — Some Thoughts on How the Court is Going About Its Business: Desperately Seeking Coherence," (2004) 25 *Supreme Court Law Review* 213; Mahmud Jamal, "Legislative Facts in Charter Litigation: Where Are We Now?" (2005) 17 *National Journal of Constitutional Law* 1; Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: UBC Press, 2013) at 150-4.

[15] For a partial counter-argument that contends judges have tended to underestimate their own competence to adjudicate poverty-related claims, see: David Wiseman, "Taking Competence Seriously," in Margot Young, Susan B. Boyd, Gwen Brodsky, and Shelagh Day eds., *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007).

[16] Peter Hogg, "The Brilliant Career of Section 7 of the Charter," (2012) 58 *Supreme Court Law Review* 195 at 195-6.

[17] *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, 1985 CarswellBC 398, 1985 CarswellBC 816, [1985] 2 S.C.R. 486 (S.C.C.).

[18] See: Hogg, *supra*, footnote 16; Cameron, *supra*, footnote 5.

[19] *Gosselin c. Québec (Procureur général)*, 2002 SCC 84, 2002 CarswellQue 2706, 2002 CarswellQue 2707, (*sub nom.* Gosselin v. Quebec (Attorney General)) [2002] 4 S.C.R. 429 (S.C.C.).

In *Gosselin,* the Court was asked to determine whether the right to security of the person includes the right to an adequate level of state-funded social assistance to meet basic needs. A majority of the Court recognized that s. 7 had traditionally been limited to matters relating to the administration of justice but noted that its meaning "should be allowed to develop incrementally."[20] In effect, the Court refused to rule out the possibility that one day the circumstances of a case might permit a positive reading of s. 7 rights, something the majority supported by citing the "living tree" metaphor.[21] Since then, courts have continued to approach s. 7 as necessitating state action in order for an infringement to be recognized.[22]

To an extent, the majority's logic in *Gosselin* presents a radical version of the living tree metaphor, which, properly understood, recognizes that Charter rights ought to be interpreted so as to apply and adapt to new circumstances. For example, a constitution that would not permit freedom of expression to apply to government regulation of digital social media could be said to be frozen in time, and impoverished as a result. Yet when the living tree is cited to justify judicial application of *new* rights in the Charter it is no longer appropriate to speak of judicial interpretation; instead, the courts will have effectively amended the constitution in spite of the requirements of the amending formula.[23]

The distinction between judicial interpretation and judicial amendment is fraught with uncertainty, but an interpretation of s. 7 that includes positive rights would constitute judicial amendment for two significant reasons in addition to framer's intent (which, despite the appropriateness of eschewing framer's intent as a general approach to constitutional interpretation, remains relevant in the context of whether additions to the constitution require formal amendment). First, despite advocates' claims that nothing in the text prevents such an interpretation, reading in social rights would mark a clear and obvious departure from a provision that is explicitly entrenched as a legal right (indeed, in the "Legal Rights" section of the Charter).[24] Neither the text nor the *purpose* of s. 7 contemplates positive rights. Second, there is a significant and recognized political consensus that the addition of social rights requires recourse to formal amendment. This was reflected in the inclusion of a "social charter" in the 1992

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[20] *Ibid*., at para. 79.

[21] *Ibid*., at para. 82.

[22] See, for example, *Barbra Schlifer Commemorative Clinic v. Canada (Attorney General)*, 2014 ONSC 5140, 2014 CarswellOnt 12297 (Ont. S.C.J.).

[23] Part V of the *Constitution Act, 1982*.

[24] In her dissenting reasons in *Gosselin,* Justice Arbour argues against an interpretation of the Charter that would allow the subheading "Legal Rights" (under which ss. 7 through 14 appear) to constrain the scope of specific rights because this would contradict the living tree approach, at para. 317. This reasoning is unpersuasive because it would allow for interpretations so divorced from the constitutional text that it effectively serves as a justification for judicial amendment of the constitution.

Charlottetown Accord, which would have imposed a number of obligations on governments but which, notably, would not have been justiciable.[25]

This brief discussion is not intended to settle the debate about whether social rights should be included in the Charter. Instead, the goal has been to establish that there is at least a normative case for why judges should approach judicial interpretation of positive rights, particularly in the s. 7 context, with caution.[26] In the next section, however, I examine cases where the Court's analysis, while entrenched in a negative rights frame, nonetheless raises obvious implications for a positive right of access to particular health services.

2. THE DILEMMA: ACCESS TO HEALTH SERVICES

Despite the institutional and legitimacy-related concerns with judicial interpretation and application of social rights under the Charter, the conceptual distinction between negative and positive rights is far from straightforward. As advocates for positive rights point out, the enforcement of negative rights frequently requires governments to take action or spend money. Even legal rights such as the right to a fair trial require the expenditure of significant funds (no less an outlay of capital to create courts and administer them!). Moreover, negative rights cases can also involve courts in complex matters of public policy.[27]

While it is still generally reasonable to distinguish social rights from the broader spectrum of rights obligations governments normally face, this section explores cases where the negative and positive rights distinction effectively collapses into itself. Specifically, a set of cases relating to health care services — including abortion,[28] supervised drug injection services,[29] a physician-assisted dying[30] — are ostensibly about negative rights infringements but the outcomes and the reasoning articulated by the Supreme Court have obvious positive rights implications. Federal criminal restrictions or prohibition on access to these services were ultimately invalidated on s. 7 grounds. Central to the Court's assessment was that the federal laws resulted in harm deriving directly from a

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[25] Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (Toronto: University of Toronto Press, 2004) at 185.

[26] For an examination of the arguments for and against social rights, and reasons for judicial restraint and incrementalism in interpreting and applying them, see: Jeff King, *Judging Social Rights*, (Cambridge: Cambridge University Press, 2012).

[27] Young, *supra*, footnote 4, at 553-4.

[28] *R. v. Morgentaler*, 1988 CarswellOnt 954, 1988 CarswellOnt 45, (*sub nom.* R. v. Morgentaler (No. 2)) [1988] 1 S.C.R. 30 (S.C.C.).

[29] *PHS Community Services Society v. Canada (Attorney General)*, 2011 SCC 44, 2011 CarswellBC 2443, 2011 CarswellBC 2444, [2011] 3 S.C.R. 134 (S.C.C.).

[30] *Carter v. Canada (Attorney General)*, 2015 SCC 5, 2015 CarswellBC 227, 2015 CarswellBC 228, [2015] 1 S.C.R. 331 (S.C.C.).

lack of access to the impugned services. Yet in the aftermath of these decisions serious barriers to access persist as a direct result of state inaction.

Following the 1988 *Morgentaler* decision, in which the Supreme Court struck down provisions in the *Criminal Code* requiring women who sought abortions to obtain approval from "therapeutic abortion committees" at accredited hospitals, Parliament was famously unable to pass replacement legislation, leaving a vacuum in federal criminal law. Provinces were left with effective authority to regulate access to abortion services under their jurisdiction over health care matters. In the immediate aftermath of the Court's decision, most provinces, with the exception of Ontario and Quebec, implemented laws or regulations designed to limit access.[31] Although some of these would be struck down as *ultra vires* provincial authority,[32] and many provinces would slowly liberalize access and provide coverage for the procedure, wide disparities in access persisted across the country.[33] Until 2015, New Brunswick maintained uniquely onerous (and medically unnecessary) restrictions, including a requirement for written approval by two doctors stating an abortion was "medically necessary."[34] And while the government of Prince Edward Island announced in 2016 that it would provide abortion services through a new clinic at a hospital in Summerside, the procedure had not been available anywhere in that province.

This long-term policy status quo of unequal access across the country persisted in part because provincial decisions regarding access were not a direct contravention of the Court's 1988 ruling. The reasons of the two judgments comprising the plurality judgment in *Morgentaler* refrained from even determining whether there was a right to abortion grounded in privacy, personal autonomy or "interests unrelated to criminal justice."[35] Instead, the focus of Chief Justice Dickson's analysis was on "state interference with bodily integrity" and state-imposed harms, particularly psychological stress resulting from delays and unequal levels of access attributable to the *Criminal Code* provisions that constituted an infringement of security of the person.[36] The

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[31] Joanna N. Erdman, "In the back alleys of health care: abortion, equality, and community in Canada," (2007) 56 *Emory Law Journal* 1093 at 1094.

[32] *R. v. Morgentaler*, 1993 CarswellNS 19, 1993 CarswellNS 272, [1993] 3 S.C.R. 463 (S.C.C.); *Morgentaler v. New Brunswick (Attorney General)*, 1994 CarswellNB 56, [1994] N.B.J. No. 342 (N.B. Q.B.), affirmed 1995 CarswellNB 316 (N.B. C.A.), leave to appeal refused (1995), 164 N.B.R. (2d) 320 (note) (S.C.C.).

[33] See: Erdman, *supra,* footnote 31; Howard A. Palley, "Canadian Abortion Policy: National Policy and the Impact of Federalism and Political Implementation on Access to Services," (2006) 34 *Publius* 565; Linda White, "Federalism and Equality Rights in Canada," (2014) *Publius* 157; Rachael Johnstone and Emmett Macfarlane, "Public Policy, Rights, and Abortion Access in Canada," (2015) 51 *International Journal of Canadian Studies* 97.

[34] Johnstone and Macfarlane, *supra,* footnote 33 at 109.

[35] *Morgentaler*, *supra*, footnote 28 at p. 56.

[36] *Ibid.*

reasons by Justice Beetz explicitly stated that there "must be state intervention for 'security of the person' in s. 7 to be violated."[37]

As a consequence, and despite the federal law being found contrary to the Charter on the basis of creating physical and psychological harm in the form of delays and unequal access, decades of provincial policy inaction creating the same harms have been permitted to stand.[38] Yet from the perspective of rights claimants, why should it matter whether delays or even absolute barriers to access derive from criminal law or provincial inaction? Indeed, the entire proposition of delays and unequal access constituting a Charter infringement presupposes that there is a right of access in the first place.

A similar issue arises as a result of the reasoning employed by the Court in *PHS Community Services Society*. In *PHS*, the Court's unanimous decision found that the federal minister of health's refusal to renew an exemption under the Controlled Drugs and Substance Act (CDSA) for Insite, a supervised drug injection facility in downtown Vancouver, violated its clients' s. 7 rights. Insite is the product of a multilevel governance agreement to deal with the endemic problems of addiction and related social ills in Vancouver's downtown eastside neighbourhood. The federal Liberal government granted an exemption under the CDSA in 2003 in order to permit the facility to operate (otherwise Insite's clients could be subject to criminal penalties for possession under the Act, rendering the facility effectively inoperable). Although the Conservative government granted a two-year renewal for the exemption after taking power in 2006, the federal health minister decided to shut down the facility in 2008.

In finding the decision contrary to the Charter, the Supreme Court placed significant emphasis on the evidence adduced at the trial level that access to the facility saved lives and helped to reduce the spread of disease.[39] In her judgment for the unanimous Court, Chief Justice McLachlin upheld the CDSA itself as well as the provision providing the minister with discretion to provide exemptions. However, she determined that the minister's decision to refuse to renew the exemption in this instance was itself "arbitrary and grossly disproportionate in its effects."[40] Importantly, McLachlin noted that the Court's decision "does not fetter the Minister's discretion with respect to future applications for exemptions" but that the Minister must exercise discretion in a manner consistent with the Charter.[41]

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[37] *Ibid*., at page 90. Only Justice Wilson, the only woman on the Court at the time, determined that the decision of whether to carry a foetus to term was itself protected by s. 7.

[38] Litigation to pursue a positive right to abortion access has ultimately been unsuccessful. For a review of this post-*Morgentaler* jurisprudence in Canada, see Johnstone and Macfarlane, *supra*, footnote 33.

[39] *PHS*, *supra,* footnote 29, at para. 133.

[40] *Ibid*., at para. 127.

[41] *Ibid*., at para. 151.

The government responded to the decision with the passage of the *Respect for Communities Act*,[42] which outlined conditions for the minister of health to follow for determining future exemptions for new proposed facilities across the country. Provinces, municipalities and non-profit organizations seeking to open a new supervised injection clinic would have to meet set criteria and provide dozens of pieces of supporting documentation, including: scientific and medical evidence demonstrating existing need and benefits; letters from provincial ministers of health and public safety; letters from local government, the head of the local police authority, and local health officials; data on local drug use, crime rates, and associated overdose deaths and diseases in the area; a report of consultations with community groups and responses to any concerns expressed.

Critics of the bill, including the Canadian Medical Association, have argued the new requirements create unnecessary obstacles and were designed by the government to deter the creation of new facilities.[43] Nevertheless, the legislation appears relatively consistent with the factors outlined by the Court itself:

> [The Minister's] discretion must be exercised in accordance with the *Charter*. This requires the Minister to consider whether denying an exemption would cause deprivations of life and security of the person that are not in accordance with the principles of fundamental justice. The factors considered in making the decision on an exemption must include evidence, if any, on the impact of such a facility on crime rates, the local conditions indicating a need for such a supervised injection site, the regulatory structure in place to support the facility, the resources available to support its maintenance, and expressions of community support or opposition.[44]

Yet it is not apparent why "expressions of community support or opposition" should be a relevant consideration for the provision of an exemption in a context where, in some sense, rights are implicated, particularly given the Court's stated appreciation of the evidence that facilities like Insite can save lives.

The policy environment that results from the Court's decision is one in which, in effect, addicts in Vancouver have Charter-protected access to a service that addicts across the rest of the country do not.[45] And yet, the only way the

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42 S.C. 2015, c. 22.

43 CTV News, "CMA 'Deeply Concerned' about Tighter Rules for Safe Injection Sites," (2013) 6 June at <http://www.ctvnews.ca/health/healt-headlines/cma-deeply-concerned-about-tighter-rules-for-safe-injection-sites-1.1313766>.

44 *PHS*, *supra*, footnote 29 at para. 153.

45 The federal minister of health provided an exemption for a second site in Vancouver in early 2016. See: Andrea Woo, "Ottawa approves second supervised injection site," (2016) 15 January at <http://www.theglobeandmail.com/news/british-columbia/vancouver-facility-becomes-canadas-second-approved-supervised-injection-site/article28216557/>. At the time of writing, more than a dozen facilities have since been approved in several cities in Ontario, Quebec, and British Columbia, with authorities pursuing sites in Nova Scotia and Alberta.

Insite case is accurately described as protecting a negative right and not a positive one is if forcing a government to maintain a service marks a serious distinction from requiring governments to provide one in the first instance. It is noteworthy that the basis for the Court's logic does not apply only to the federal government: if a new provincial government in British Columbia wanted to close Insite, it would not be able to unless it could evince a rationale that somehow overcame the grossly disproportionate effects such a decision would have on Insite's clients. The Court's reasoning is understandable, to the extent that it preferred to limit the impact of its decision to this one facility. However, the outcome provides little coherence when examined from a negative versus positive rights perspective.

Similar questions of access have already been raised following the Court's decision in *Carter v. Canada (Attorney General)*, which in 2015 found the *Criminal Code*'s prohibition on assisted suicide an unconstitutional violation of the right to life, liberty and security of the person. In their unanimous decision, the justices describe the choice forced upon patients suffering irremediable medical illness by the prohibition in stark terms: "A person facing this prospect has two options: she can take her own life prematurely, often by violent or dangerous means, or she can suffer until she dies from natural causes. The choice is cruel."[46] The justices found that the law was overbroad to the extent that it applies to competent, fully informed adults capable of making the decision about their end of life care.[47] The Court thus declared provisions implicating assisted suicide "void insofar as they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition."[48]

In response, in June of 2016 the government passed Bill C-14, which lays out eligibility requirements for legal access and safeguards to prevent against potential abuse. Notably, the legislation is narrower than both the Court's guidelines and recommendations made by a parliamentary joint committee, as it restricts access to people with medical conditions "in an advanced state of irreversible decline in capability" and whose "natural death has become reasonably foreseeable." Without using the word "terminal," the new law arguably limits access to people with terminal conditions.

As with the policy environment surrounding abortion, nothing emanating from the Court's decision in *Carter* compels provinces to act to ensure widespread access to medical aid in dying. To date, only Quebec has passed comprehensive legislation to regulate access,[49] and it requires all medical

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[46] *Carter*, *supra*, footnote 30, at para. 1.

[47] *Ibid.*, at para. 86. The Court declined to determine whether the prohibition also violated the principle of gross disproportionality, although the trial judge determined that it had, at para. 90.

[48] *Ibid.*, at para. 127.

[49] *An Act Respecting End-of-Life Care*, S-32.0001.

institutions to provide end-of-life care. Any individual physician who refuses to provide medical aid in dying must immediately inform the executive director of the institution, who in turn is required to take all "necessary steps to find, as soon as possible, another physician willing to deal with the request."[50]

It is not yet clear that all provinces will take action to regulate access to medical aid in dying. Even if they do, there is little guarantee that they will act to ensure the service is available through all points in the system, or at every institution, as Quebec has done. As with abortion, the detrimental impact of a lack of access due to provincial inaction will be equivalent to the harms associated with regulation under criminal law. For low income people especially, who cannot afford to pay out of pocket to travel to a jurisdiction that provides services, provinces that impose significant barriers to access or who do not ensure readily available service could cause significant and unnecessary suffering. Even regardless of ability to pay to go to other provinces, people might not be able to gain access if, as in Quebec's case, provinces limit access to people insured under that province's public health insurance scheme.

The cases of abortion, supervised drug injection, and assisted dying share fundamental implications for the distinction between negative and positive rights in the context of federal criminal laws that are challenged under s. 7 of the Charter in the health policy context. The nature of the Court's approach to s. 7 means that its reasoning in these cases falls firmly within the nexus of negative rights; that is, a prerequisite of state action or interference with the rights being claimed, and specifically the imposition of the criminal justice system on rights holders. But the underlying logic the Court employs is fundamentally about *access to* health services, and the harms associated with limits or prohibitions on that access. When the resulting policy landscapes remain rife with significant barriers to access (along with the attendant harms), not because of criminal law but because of state inaction, the conceptual distinction between negative and positive rights seems non-existent from the perspective of rights holders. This dilemma reflects poorly on both the Court and governments; the former for paying little heed to the implications of its reasoning, the latter for failing to attend to obvious rights obligations,[51] or what Linda White has referred to as a failure of rights implementation.[52]

The next section offers an examination of how s. 15 might offer a path forward for dealing with this dilemma.

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[50] *Ibid*., s. 31.

[51] See also: Macfarlane, *supra,* footnote 6; Johnstone and Macfarlane, *supra,* footnote 33.

[52] Linda White, "Federalism and Equality Rights in Canada," (2014) 44.1 *Publius* 157.

3. EQUALITY RIGHTS AND ACCESS TO HEALTH CARE

Section 15 Jurisprudence: A Muddled Approach?

While many of the institutional and legitimacy-related reasons for supporting judicial caution in interpreting and applying social rights are as relevant to s. 15 as they are to s. 7, this part of the article sets out an argument for a circumscribed role for imposing positive constitutional obligations on government in order to address the dilemma described above. Fundamentally, recourse to a substantive conception of equality — as articulated by the Court in its very first s. 15 case[53] — provides a textually-grounded and coherent pathway for positive obligations in contexts where systemic discrimination exists. An important consequence of this analysis is that, unlike in the s. 7 context, recognition and application of social rights under s. 15 is less likely to constitute inappropriate judicial amendment of the constitution. In other words, I argue that problems arising from the cases examined above can be addressed under s. 15, and in a manner that does not depart from the text or purposes of the Charter. Further, to the extent that institutional concerns relating to policy capacity remain firmly entrenched in such cases, the proper arena for addressing uncertainty in this regard remains s. 1's reasonable limits analysis.

The Court's equality rights jurisprudence has remained a source of difficulty. Over time, the justices have frequently disagreed on the basic approach, including how to identify discrimination, whether to incorporate concepts like human dignity, and the use of comparator groups. This thirty-year record of contested jurisprudence continues to receive considerable critical attention.[54] In the 1989 *Andrews* case, the justices unanimously agreed with Justice McIntyre's articulation of equality and his discussion on identifying discrimination. McIntyre eschewed a formalistic approach in recognition of a substantive one (without using that term), writing that "[c]onsideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application."[55]

Despite this starting point, in subsequent cases the justices split on the appropriate approach to identifying discrimination.[56] An attempt to redress this

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[53] *Andrews, supra,* footnote 3.

[54] For recent analyses, see: Margot Young, "Social Justice and the Charter: Comparison and Choice," (2013) 50 *Osgoode Hall Law Journal* 669; Jennifer Koshan and Jonnette Watson Hamilton, "The Continual Reinvention of Section 15 of the Charter," (2013) 64 *U.N.B. L.J.* 19; Jennifer Koshan, "Under the Influence: Discrimination Under Human Rights Legislation and Section 15 of the Charter," (2014) 3(1) *Canadian Journal of Human Rights* 115; Mel Cousins, "Pregnancy as a 'Personal Circumstance'?" *Miceli-Riggins* and Canadian Equality Jurisprudence," (2015) 4(2) *Canadian Journal of Human Rights* 237; Jonnette Watson Hamilton and Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter," (2015) 19(2) *Review of Constitutional Studies* 191.

[55] *Andrews, supra,* footnote 3.

disagreement came in the 1999 case *Law v. Canada*,[57] where the Court incorporated the concept of "human dignity" as an element of analysis in identifying discrimination. Justice Iacobucci, writing for the unanimous Court, noted that "[h]uman dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment."[58] Accordingly, human dignity would infuse all aspects of the discrimination analysis,[59] which would be guided by four "contextual factors": 1) pre-existing disadvantage of the claimant group; 2) the degree of correspondence between the differential treatment and the claimant group's reality; 3) whether the impugned law or program has an ameliorative purpose or effect; and 4) the nature of the interest affected.[60]

Critics soon argued that the approach raised the bar on discrimination claims, making it more difficult for claimants to succeed because they had to demonstrate that laws served to undermine or impair their self-worth.[61] The Court would come to acknowledge this criticism less than a decade later in *R. v. Kapp*, noting that "as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be."[62] The Court also acknowledged its approach has "allowed the formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike," something *Andrews* had specifically warned against.[63] Referring back to *Andrews*, the Court articulated a two-part test for showing discrimination under s. 15(1): "(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?"[64]

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[56] See: *Egan v. Canada*, 1995 CarswellNat 6, 1995 CarswellNat 703, [1995] 2 S.C.R. 513 (S.C.C.); *Miron v. Trudel*, 1995 CarswellOnt 93, 1995 CarswellOnt 526, [1995] 2 S.C.R. 418 (S.C.C.).

[57] *Law v. Canada (Minister of Employment & Immigration)*, 1999 CarswellNat 359, 1999 CarswellNat 360, [1999] 1 S.C.R. 497 (S.C.C.).

[58] *Ibid.*, at para. 53.

[59] *Ibid.*, at para. 54.

[60] *Ibid.*, at paras. 62-75.

[61] Debra M. McAllister, "Section 15: The Unpredictability of the *Law* Test," (2003) 15 *National Journal of Constitutional Law* 35; Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham: LexisNexis Canada, 2006).

[62] *R. v. Kapp*, 2008 SCC 41, 2008 CarswellBC 1312, 2008 CarswellBC 1313, [2008] 2 S.C.R. 483 (S.C.C.) at para. 22 [emphasis in original].

[63] *Ibid.*

[64] *Ibid.*, at para. 17.

In the 2011 *Withler* case, which involved a challenge to federal supplementary death benefits that lowered as survivors' spouses got older, the unanimous Court explicitly warned against a "formalistic" comparator analysis.[65] As Chief Justice McLachlin and Justice Abella wrote, a "formal equality analysis based on mirror comparator groups can be detrimental to the analysis. Care must be taken to avoid converting the inquiry into substantive equality into a formalistic and arbitrary search for the 'proper' comparator group."[66]

If these recent developments in equality rights jurisprudence seem promising for those hoping for a more robust approach to substantive equality, they have not escaped criticism. The *Kapp* approach has been criticized for making it more difficult for certain forms of systemic or adverse effects discrimination to be recognized, given the focus on distinctions "created by law."[67] Further, *Kapp* arguably narrows the definition of discrimination by focusing on prejudice or stereotyping, "whereas *Andrews* had emphasized disadvantage and *Law* had emphasized human dignity," potentially leaving contexts out where harms associated with discrimination nevertheless exist in the absence of direct prejudice or stereotyping.[68] The recent jurisprudence has also been criticized for causing confusion among lower courts, as justices conflate the *Andrews*, *Law*, and *Kapp* approaches.[69] Disagreement has also emerged at the Supreme Court in *Droit de la famille - 091768*, which dealt with spousal support schemes in Quebec's Civil Code that applies to married and civil union spouses but excluded cohabitating (or *de facto*) spouses.[70] According to Cousins, the "uncertainty at the highest court has arguably led to a situation where lower courts and tribunals have simply replaced the term 'human dignity' with 'perpetuating prejudice or stereotyping' in their analyses and are applying their own sense of what is appropriate to the facts before them, leading to precisely the same results as under the *Law* test."[71] Critics charge that these developments are particularly burdensome for claimants in social benefit cases because the effect is to emphasize judicial deference or restraint in the face of legislative policy choices.[72]

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65 *Withler v. Canada (Attorney General)*, 2011 SCC 12, 2011 CarswellBC 379, 2011 CarswellBC 380, [2011] 1 S.C.R. 396 (S.C.C.).

66 *Ibid.*, at para. 2.

67 Hamilton and Koshan, *supra,* footnote 54, at 212.

68 *Ibid.*, at 213.

69 See: Cousins, *supra,* footnote 54.

70 *Droit de la famille - 091768*, 2013 SCC 5, 2013 CarswellQue 113, 2013 CarswellQue 114, (*sub nom.* Quebec (Attorney General) v. A.) [2013] 1 S.C.R. 61 (S.C.C.).

71 Cousins, *supra*, footnote 54, at 250.

72 See: *Ibid.,* at 251; Hamilton and Koshan, *supra,* footnote 54, at 213.

Dealing with the Dilemma: Section 15 and Positive Obligations

Despite the complex and arguably convoluted evolution of s. 15 jurisprudence, there have been cases where the Court has appropriately recognized the effects of systemic discrimination. The most relevant case as it relates to positive obligations is *Eldridge v. British Columbia (Attorney General)*, which involved whether deaf hospital patients suffered from adverse discrimination due to the failure of the province's Medical Services Commission to provide sign language interpretation.[73] The Court's unanimous decision determined that the failure to provide sign language interpretation services infringed s. 15(1). Importantly, Justice LaForest's decision noted that "the adverse effects suffered by deaf persons stem not from the imposition of a burden not faced by the mainstream population, but rather from a failure to ensure that they benefit equally from a service offered to everyone."[74]

LaForest acknowledged that both the trial court and the court of appeal had upheld the policy decision as constitutional, on the assumption "that there is a categorical distinction to be made between state-imposed burdens and benefits, and that the government is not obliged to ameliorate disadvantage that it has not helped to create or exacerbate."[75] However, while noting that "this approach has a certain formal, logical coherence," LaForest criticized the lower courts' approach: "it seriously mischaracterizes the practical reality of health care delivery" and the necessity of effective communication to ensure full and equal access to health care.[76] Importantly, LaForest explained that "to receive the same quality of care, deaf persons must bear the burden of paying for the means to communicate with their health care providers, despite the fact that the system is intended to make ability to pay irrelevant."[77]

In addressing the positive rights dimensions of the decision, LaForest warned against "a thin and impoverished vision" of equality rights: "This Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner . . . In many circumstances, this will require governments to take positive action; for example, by extending the scope of a benefit to a previously excluded class of persons."[78]

This is precisely the approach that would ground equality rights claims to abortion, supervised drug injection, and assisted dying services. Feminist scholars have previously argued in favour of a positive right of access to abortion, linking women's reproductive rights to a substantive conception of equality.[79] Some of these arguments engage in deep and broad analyses of

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[73] *Eldridge v. British Columbia (Attorney General)*, 1997 CarswellBC 1939, 1997 CarswellBC 1940, [1997] 3 S.C.R. 624 (S.C.C.).

[74] *Ibid.*, at para. 66.

[75] *Ibid.*

[76] *Ibid.*, at para. 69.

[77] *Ibid.*, at para. 71.

[78] *Ibid.*, at para. 73.

systemic inequality and oppression concerning social reproduction, sexual violence, and women's autonomy over their bodies.[80] These points are, of course, fundamental. A more specific argument pertaining to adverse discrimination in the abortion context, however, pertains to the obviously gendered nature of abortion as a medical service. Along the lines of *Eldridge*, the failure of some provinces to ensure ready access to abortion services is a form of sex-based discrimination in the context of a state-funded health care system operating on the principle of ensuring the provision of core medically-necessary services regardless of the ability to pay.

Some might argue that the policy at stake in *Eldridge* is not equivalent to abortion because it involved the failure of the state to ensure full and equal access to deaf patients to a benefit enjoyed by everyone — the health care system generally — something not true of abortion services specifically. However, the decision by provinces not to ensure full access to abortion services is similarly discriminatory in the context of the general delivery of state-funded health care. While provinces can and do enjoy discretion regarding what services ought to be listed as core or deemed medically necessary under their respective public health insurance schemes, a substantive approach to equality rights mandates that those decisions themselves not result in discrimination under s. 15(1)'s enumerated or analogous grounds.

All provinces recognize abortion as medically necessary care.[81] Further, there is no medical evidence as to why cost, complexity of procedure, or availability of expertise would justify limiting abortion services compared to similar procedures. Indeed, the history of provincial laws or regulations relating to abortion in the post-*Morgentaler* context strongly suggests little more than moral-based considerations on the part of governments refusing to provide full access, purposes which are unlikely to survive Charter scrutiny.[82] An argument along these lines appears in the 2016 draft notice of application for a constitutional challenge to PEI's long-standing refusal to provide abortion services, by Abortion Access Now PEI, Inc.[83] In a recent announcement that PEI would provide on-island services by the end of 2016, Premier Wade MacLauchlan cited the likelihood of losing the legal challenge as one reason for the policy change.[84]

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[79] Sanda Rodgers, "Abortion Denied: Bearing the Limits of Law," in Colleen Flood ed., *Just Medicare: What's In, What's Out, How We Decide* (Toronto: University of Toronto Press, 2006); Sanda Rodgers, "Women's Reproductive Equality and the Supreme Court of Canada," in Jocelyn Downie and Elaine Gibson, eds., *Health Law at the Supreme Court of Canada* (Toronto: Irwin Law, 2007); White, *supra,* footnote 33; Johnstone and Macfarlane, *supra,* footnote 33.

[80] See, for example, Rodgers (2007), *supra,* footnote 79, at 212-3.

[81] Rodgers (2006), *supra*, footnote 79, at 115.

[82] See Johnstone and Macfarlane, *supra*, footnote 33.

[83] Abortion Access Now PEI Inc., Notice of Application, (2016) ss. 78-125.

[84] Sara Fraser and Jesara Sinclair, "Abortion services coming to P.E.I., province

A similar line of reasoning applies to the context of physician assisted-dying. As David Lepofsky argues, "*Carter* is, first and foremost, a disability equality case" where the principal claim was one of "a right of access to disability accommodation."[85] By relying on s. 7 and failing to address the s. 15(1) arguments, the Court's reasoning fails to provide meaningful guidance to governments about their equality rights obligations, including implementation to ensure access at the provincial level.

Moreover, failing to ensure full and meaningful access to assisted dying services within the context of providing end of life care arguably constitutes adverse effects discrimination, for it can negatively and disproportionately affect persons with particular disabilities. It remains to be seen whether the provinces will, individually or in cooperation with the federal government, meet the standards articulated by the Court to ensure access to medical aid in dying.[86] Certainly any unnecessary or arbitrary regulation or barriers that make it more difficult for patients to obtain access would fail on the constitutional grounds already articulated by the Court. The argument here is that, as in *Eldridge*, there is a positive obligation on governments to ensure access by virtue of the fact that the broad panoply of end of life care services constitute a health care benefit available to everyone, and that medical aid in dying ensures that this benefit extends to those suffering irremediable medical conditions in a non-discriminatory manner. Failure to ensure access to medical aid in dying as a component of end of life care results in precisely the harms the Court attributed to the criminal laws at stake in *Carter*.

A similar case can be made that *PHS* ought to have been decided on equality rights grounds instead of s. 7. Drug addiction is widely viewed as a disability. As described above, the Court's decision has effectively provided addicts in Vancouver with a right to supervised injection while addicts in other parts of the country are not afforded the same. Yet the evidence the Court accepted in *PHS* that Insite saves lives is equally applicable to anyone who might benefit from the service. Does this imply a positive obligation on other provinces to provide supervised injection facilities? Critics might reply that the case and resultant policy outcome — as framed in a negative rights context — is simply a product of a multilevel governance agreement where the federal, provincial, and

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announces" (March 31, 2016) CBC News: <http://www.cbc.ca/news/canada/prince-edward-island/pei-abortion-reproductive-rights-1.3514334>.

[85] David Lepofsky, "*Carter v A.G. Canada* and the Constitutional Attack on Canada's Ban on Assisted Dying: The Supreme Court Misses an Obvious Chance to Rule on the Charter's Disability Equality Guarantee," (2016) paper presented at Osgoode Hall Law School's Annual Constitutional Cases Conference, Toronto, Ontario Canada, at p.2.

[86] In June of 2016, Parliament passed Bill C-14, which laid out eligibility criteria for access to assisted dying which included the requirement that death be "reasonably foreseeable." As a result, the new criminal law guidelines are considerably more narrow than the baseline threshold for access articulated by the Court in *Carter*. It remains to be seen whether the new law will withstand constitutional challenge.

local governments decided to offer a service in Vancouver (and, in response to a particular crisis in the downtown east side neighbourhood). Where other provinces have not chosen to provide the service, the Charter does not require it. Yet as already noted, this defense of the new policy status quo is predicated on a distinction between a positive obligation on the state to keep an existing facility open versus a positive obligation on other provinces to open new ones, one that is meaningless from the perspective of the rights claimant.

The Section 15 Solution: **Auton** *as a Stumbling Block?*

Critics might argue that *Eldridge* does not provide a strong case for a rationale to impose positive obligations on governments to deliver particular health services. Instead, the most relevant precedent might be 2004's *Auton v. British Columbia*, in which the Court unanimously rejected a s. 15(1) claim that the province's refusal to fund an intensive behavioural therapy for children with autism violated equality rights.[87] As Chief Justice McLachlin's reasons for the Court explained, the issue the justices were faced with "is not what the public health system should provide, which is a matter for Parliament and the legislature. The issue is rather whether the British Columbia Government's failure to fund these services under the health plan amounted to an unequal and discriminatory denial of benefits under that plan."[88]

Notably, both the trial court and the Court of Appeal judgments ruled in favour of the *Auton* claimants, finding that the denial of treatment constituted discrimination and, according to the appellate court, "a statement that their mental disability is less worthy of assistance than the transitory medical problems of others."[89] In overturning those decisions, the Court determined that the behavioural therapy at stake fell outside of the "core" set of medical services provided under the provincial health scheme. Thus, where "*Eldridge* was concerned with unequal access to a benefit that the law conferred and with applying a benefit-granting law in a non-discriminatory fashion," the claimants in *Auton* were seeking "access to a benefit that the law has not conferred."[90]

The Court acknowledged that this "core" vs "non-core" distinction alone was not fatal to the claimants' case, noting that there is a "broader issue of whether the legislative scheme is discriminatory, since it provides non-core services to some groups while denying funding for ABA/IBI therapy to autistic children. The allegation is that the scheme is itself discriminatory, by funding some non-core therapies while denying equally necessary ABA/IBI therapy."[91]

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87 *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, 2004 CarswellBC 2675, 2004 CarswellBC 2676, [2004] 3 S.C.R. 657 (S.C.C.).

88 *Ibid.*, at para. 2.

89 *Ibid.*, at para. 16, citing *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2002 BCCA 538, 2002 CarswellBC 2392, 220 D.L.R. (4th) 411 (B.C. C.A.) at para. 51, reversed 2004 CarswellBC 2675, 2004 CarswellBC 2676, [2004] 3 S.C.R. 657 (S.C.C.).

90 *Ibid.*, at para. 38 [emphasis in original].

Importantly, the Court noted that it is "not open to Parliament or a legislature to enact a law whose policy objectives and provisions single out a disadvantaged group for inferior treatment."[92] Thus, as the analysis throughout this article has suggested, although legislatures are under no obligation to provide particular benefits, they cannot provide a benefit in a discriminatory manner.[93]

Nevertheless, the Supreme Court relied primarily on two factors to decide against the claimants. First, the Court looked to the purpose of the legislative scheme to determine whether the scheme is undermined by excluding a particular group. If so, then the scheme is likely to be discriminatory, but if the exclusion is "consistent with the overarching purpose and scheme of the legislation, it is unlikely to be discriminatory."[94] The Chief Justice then described BC's health plan and the discretion over excluding "non-core" services as "by its very terms, a partial health plan. It follows that the exclusion of particular non-core services cannot, without more, be viewed as an adverse distinction based on an enumerated ground."[95] This is a logic that comes dangerously close to suggesting that if the purpose of the scheme provides for adverse effects discrimination, then it is not discriminatory.[96] It certainly does not accord much deference to the findings of the trial judge, something the Court is usually careful to do.[97]

Second, the Court proceeded to examine whether the claim would be successful had the claimants established that the behavioural therapy was a benefit provided by law, "by being designated as a non-core benefit."[98] Here, the assessment of whether the therapy was excluded on a discriminatory basis focused on applying the appropriate comparator group. As the Court noted, the claimants' basis of comparison was to non-disabled children and their parents. By contrast, the Chief Justice framed the comparator narrowly, as "a non-disabled person or a person suffering a disability other than a mental disability (here autism) seeking or receiving funding for a non-core therapy important for his or her present and future health, which is emergent and only recently becoming recognized as medically required."[99]

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91 *Ibid.*, at para. 39.

92 *Ibid.*, at para. 41, citing *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, 1999 CarswellNat 663, 1999 CarswellNat 664, [1999] 2 S.C.R. 203 (S.C.C.), reconsideration / rehearing refused 2000 CarswellNat 2393, 2000 CarswellNat 2394 (S.C.C.).

93 *Ibid.*

94 *Ibid.*, at para. 42.

95 *Ibid.*, at para. 43.

96 I acknowledge that the Chief Justice's point is effectively that the claimants did not do enough to demonstrate that the exercise of discretion expressly provided for in law constituted adverse effects discrimination.

97 The Court has recently emphasized the importance of deference to the findings of trial courts as it relates to social and legislative facts in *Bedford v. Canada (Attorney General)*, 2013 SCC 72, 2013 CarswellOnt 17681, 2013 CarswellOnt 17682, [2013] 3 S.C.R. 1101 (S.C.C.).

98 *Auton, supra,* footnote 89 at para. 47.

The Court's narrow and formalistic application of the comparator group has received significant criticism.[100] *Auton* specifically has been criticized for a less-than-robust analysis of discrimination and for its formalistic distinguishing from *Eldridge*. Christopher Manfredi and Antonia Maioni note that the Court painted "a relatively benign picture of the pre-*Auton* status quo" by focusing on the emergent nature of the treatment and a narrow comparator analysis rather than "the tragic impact of autism, bureaucratic intransigence, personal economic sacrifice, or individual progress under [the treatment sought]."[101] Moreover, the narrow comparator group makes it "virtually impossible" for a finding of discrimination, and allowed the Court to avoid a s. 1 analysis in a context where the government was unable to defend the law at the trial and appellate levels.[102]

It is significant, then, that the Court has more recently warned against a formalistic comparator group approach in assessing discrimination under s. 15(1). It is unclear to what extent the *Auton* claimants would have an easier time demonstrating adverse effects discrimination under the new guidance provided by *Withler*. The post-*Auton* (or even post-*Kapp*) jurisprudence does not make it clear that claims relating to access to abortion, supervised injection, or assisted dying would succeed under s. 15(1), but it certainly clouds the extent to which *Auton* itself remains a useful precedent.

4. IMPLICATIONS AND CONCLUSION

The preceding argument for a positive right to health care with respect to certain services is conditional in several important respects. First, the approach I advocate would not provide Charter claimants with new free-standing social rights. For example, it would be difficult, though perhaps not impossible, to argue for a right to housing using this approach. Adverse effects discrimination in the context of the cases discussed here remains rooted in state action to the degree that it is about assessing the constitutionality of government-provided benefits and decisions regarding service provision.

Further, my argument has not addressed how the Court ought to address reasonable limits analysis. Like any Charter claims implicating the law, those focused on adverse effects discrimination and that seek the extension of benefits are subject to s. 1. As noted above, courts have been traditionally wary of imposing costs on governments, and for good reason. But the question of costs should not impact the s. 15(1) stage of analysis. In some contexts, governments might be able to defend decisions to exclude particular services on the basis that they are so costly as to impact the entire benefit scheme. Thus, my argument

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[99] *Ibid*., at para. 55.

[100] Young, *supra,* footnote 54; Hamilton and Koshan, *supra,* footnote 54.

[101] Christopher P. Manfredi and Antonio Maioni, "Reveral of Fortune: Litigating Health Care Reform in *Auton v. British Columbia*," (2005) 29 *Supreme Court Law Review* 111 at 130.

[102] *Ibid.*

should not assume that all claims that fall into the circumstances described here will or should be successful.

Cost is not the only factor that arises in such cases, however, and courts must be cautious about importing s. 1 considerations into s. 15(1) analysis. The fact that the behavioural treatment at stake in *Auton* was described as emergent and that there was not yet comprehensive evidence about its efficacy, for example, influenced the Supreme Court's analysis at the rights stage when it would arguably have been more fittingly addressed as a s. 1 justification. Similarly, the Court's caution in *Withler* that when impugned laws are part of a larger benefits scheme "the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis" also risks inappropriately importing s. 1 considerations into the rights stage (although in particular contexts it may be appropriate when considering s. 15(2)).[103] The effect of importing s. 1 considerations into the s. 15(1) analysis is to unfairly burden claimants by adding unnecessary complexity to the analysis of discrimination, as well as to let governments off the hook by not requiring them to justify the reasonableness of their choices.

Despite these constraints, the approach advocated here helps to address the dilemma posed in the set of s. 7 cases dealing with access to health services. Analysis and application of s. 7 has dominated such cases, thereby exacerbating the effects of federalism: despite the fact that the reasoning in these cases raises obvious "right of access" implications, provincial governments, responsible for health care delivery, get away with paying little heed to decisions that ostensibly focus on the negative infringements of the right to life, liberty, and security of the person. Had the same cases received a full and forthright analysis of their obvious equality rights implications, then provinces might be given more explicit notice of their rights obligations when it comes to decisions about the delivery of health services.

Given the success of the claimants in these cases in getting criminal laws invalidated on Charter grounds, it will be tempting for them to continue to vigorously pursue access to health care via s. 7. Yet the resulting policy outcomes suggest that these victories are perhaps more limited than they seem. Section 15 offers a path forward for a circumscribed but robust recognition of provincial rights obligations when it comes to ensuring disadvantaged groups have access to particular services.

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[103] This is also a point raised by Jennifer Koshan, "Redressing The Harms of Government (In) Action: A Section 7 Versus Section 15 Charter Showdown," (2013) 22(1) *Constitutional Forum* 31 at 33.