EQUALITY RIGHTS, ABORTION ACCESS, AND NEW BRUNSWICK'S REGULATION 84-20

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A. Introduction

The Supreme Court of Canada (SCC) has assessed the constitutionality of both federal[1] and provincial[2] restrictions on abortion on multiple occasions. Although most of these cases were heard after the enactment of the C*harter of Rights and Freedoms* (*Charter*) in 1982, Canada's highest court only considered *Charter* rights substantively in one case—*R v Morgentaler* (1988)—and the majority opted not to engage with section 15 of the *Charter*, which protects equality rights, in its decision.[3] While a number of provincial court cases[4] and one intent to file suit[5] seemed poised to bring equality rights to bear on provincial abortion regulations, none of these cases were pursued as far as the SCC.[6] Thus, an important constitutional question remains: Does section 15 of the *Charter* require provincial governments to ensure a certain level of abortion access? Abortion is, after all, an inherently gendered service, and a substantive conception of equality rights suggests the possibility of a decisive case for a positive right to abortion access.

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[1] *Morgentaler v the Queen*, [1976] 1 SCR 616, [1975] 53 DLR (3d) 161; *R v Morgentaler*, [1988] 1 SCR 30, [1998] 63 OR (2d) 281 [*Morgentaller 1998*]; *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, [1989] 57 DLR (4th) 231 [*Borowski*]. Note that *Borowski* was rendered moot by *Morgentaler 1998* before it was heard.

[2] *Tremblay v Daigle*, [1989] 2 SCR 530, [1989] 62 DLR (4th) 634; *R v Morgentaler*, [1993] 3 SCR 463, [1993] 107 DLR (4th) 537 [*Morgentaller III*].

[3] Justice McIntyre's dissent (Justice LaForest concurring) did address s 15, finding "no merit in the argument" that s 251 of the Criminal Code violated women's equality rights; *Morgentaler 1998, supra* note 1 at 156.

[4] See *Jane Doe et al v Manitoba*, 2005 MBCA 109; *Province of New Brunswick v Morgentaler*, 2009 NBCA 26 [*Morgentaler 2009*].

[5] "Abortion Access Now PEI Challenges PEI's Abortion Policy" (7 January 2016), online: *Abortion Rights Network Prince Edward Island, Canada* <www.abortionrightspei.com/content/page/front_news/article/43>.

[6] In most instances, the cases never made it to the Supreme Court because preemptive provincial policy changes to abortion regulations rendered the cases moot, although, in the case of New Brunswick, Dr. Morgentaler's ill health and subsequent death was responsible for one case not being pursued beyond Dr. Morgentaler's successful standing application.

This paper will address this question by looking at a live case study: New Brunswick, a province with a long history of policies restricting abortion access.[7] Although all but one of these restrictions were lifted in 2015,[8] the province still prohibits funding for private abortion clinics,[9] a reality with dire implications given the province's lack of public service points and its rural landscape. New Brunswick is now the only province in Canada that does not fund abortion services outside of hospitals.[10] The province has only ever had a single private abortion clinic, located in the capital city of Fredericton. The clinic, previously run by Dr. Henry Morgentaler, was purchased and transformed into Clinic 554 after Morgentaler's death.[11] Unfortunately, after years of financial struggles because of the government's refusal to fund abortion services there, the clinic was threatened with closure in 2019 and is currently up for sale.[12]

We begin with a brief overview of the history of abortion regulation in Canada, which moved from a near prohibition on abortion after Confederation to restricted access as of 1969, to the 1988 *Morgentaler* decision, which left Canada with no criminal law restrictions on abortion. Here, we show the paradoxical nature of this shift in jurisdiction over abortion from the federal government as a criminal matter to the provinces as a question of healthcare. Although Canada's abortion law was struck down for violating section 7's right to life, liberty, and security of the person, by both profoundly interfering with "a woman's physical and bodily integrity," and by delaying access to services,[13] provincial jurisdiction over abortion reproduced many of these same infringements.[14] We then situate our case study by exploring New Brunswick's past regulation of abortion, especially its attempts to avoid and resist litigation challenging its approach. This section concludes with an overview of the

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[7] See Katrina Ackerman, ""Not in the Atlantic Provinces": The Abortion Debate in New Brunswick, 1980-1987" (2012) 41:1 Acadiensis 75; Rachael Johnstone, "The Politics of Abortion in New Brunswick" (2014) 36:2 Atlantis: Critical Studies in Gender, Culture & Society 73; Rachael Johnstone, *After Morgentaler: The Politics of Abortion in Canada* (Vancouver: UBC Press, 2017) [Johnstone, *After Morgentaler*].

[8] "New Brunswick abortion restriction lifted by Premier Brian Gallant" (26 November 2014), online: *CBC News* <www.cbc.ca/news/canada/new-brunswick/new-brunswick-abortion-restriction-lifted-by-premier-brian-gallant-1.2850474> ["Abortion restriction lifted"].

[9] NB Reg 1984-20, s a.1.

[10] Karla Renic, "Letter sent to NB health minister calls for support of Clinic 554" (10 September 2020), online: *Global News* < globalnews.ca/news/7325002/letter-sent-to-n-b-health-minister-calls-for-support-of-clinic-554/>.

[11] "Morgentaler's old Fredericton clinic to reopen as private abortion facility" (16 January 2015), online: *CBC News* <www.cbc.ca/news/canada/new-brunswick/morgentaler-s-old-fredericton-clinic-to-reopen-as-private-abortion-facility-1.2912283>.

[12] "Abortion Clinic in Fredericton for sale, set to close without medicare funding" (10 October 2019), online: *CBC News* <www.cbc.ca/news/canada/new-brunswick/abortion-clinic-554-closing-fredericton-1.5316000> ["Abortion Clinic in Fredericton for sale"].

[13] *Morgentaler 1998*, *supra* note 1 at 32–33.

[14] Rachael Johnstone & Emmett Macfarlane, "Public Policy, Rights, and Abortion Access in Canada" (2015) 51 Intl J of Can Studies 97.

latest legal challenge to abortion access in the province, brought forward by the Canadian Civil Liberties Association (CCLA) in 2021.[15] Next, we question the implications of precedent in a number of recent SCC decisions, which raise the prospects of a positive conception of equality rights. Finally, we look at the implications of these core cases for a potential section 15 challenge to Regulation 84-20. We conclude that this Regulation cannot withstand *Charter* scrutiny.

B. A brief history of abortion regulation in Canada

In 1969, Canada moved from a near prohibition on abortion to limited access to services when an omnibus bill led to the creation of section 251 of the *Criminal Code*. This provision created an exemption to the criminal prohibition on abortions provided three conditions were met: 1) the abortion was performed in an approved hospital; 2) the abortion was approved by a therapeutic abortion committee (TAC) of three or more doctors from that hospital;[16] and 3) the TAC deemed the abortion necessary to protect the woman's life or health.[17] The *Criminal Code* did not require hospitals to form TACs, nor did it offer any substantive guidance on how these committees should adjudicate their decisions.[18] The former provision was not surprising, as the administration of healthcare is provincial; the federal government only regulates healthcare indirectly through the *Canada Health Act.*[19] The result, as testified by both social activists and a 1977 Royal Commission, was the inequitable operation of the law across Canada.[20]

Section 251 of the *Criminal Code* was eventually struck down in the landmark decision *R v Morgentaler* (1988), the first and only SCC case to bring the *Charter* to bear on abortion in Canada. The case was brought forward by Drs. Henry

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[15] "Civil liberties group launches legal action against NB for greater abortion access" (30 October 2020), online: *Global News* <globalnews.ca/news/7432254/legal-action-against-n-b-abortion-access/>.

[16] Note that any doctor who performed abortions was excluded from TACs by the *Criminal Code*, meaning the doctor who actually performed the procedure at a given hospital could not sit on the committee.

[17] *Morgentaler 1998*, *supra* note 1 at 33.

[18] Medical necessity is not a term defined by the Canada Health Act or other medical body, making it difficult to operationalize. For more on the challenges of this terminology on reproductive health, see Alana Cattapan, "Medical Necessity and the Politics of In Vitro Fertilization in Ontario" (2020) 53:1 Can J of Political Science 61 at 63; Rachael Johnstone, *Is that really necessary?: The Regulation of Abortion in Canada and the Framework of Medical Necessity* in *No Place for the State: The Origins and Legacies of the 1969 Omnibus Bill*, Christopher Dummit & Christabelle Sethna, eds. (Vancouver: UBC Press, 2020) at 259–280.

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

[20] In Prince Edward Island, for example, there was no access to surgical abortions at all after 1982, when the local TAC was forced to disband. See Sara Fraser & Jesara Sinclair, "Abortion services coming to PEI, province announces" (31 March 2016), online: *CBC News* <www.cbc.ca/news/canada/prince-edward-island/pei-abortion-reproductive-rights-1.3514334>; Canada, Ministry of Supplies and Services, *Report of the Committee on the Operation of the Abortion*, (1977) at 17 (Chair: Robin F Badgley), online: <library.law.utoronto.ca/whrr/Badgley_Report>.

Morgentaler, Leslie Smoling, and Robert Scott, who claimed that section 251 infringed on sections 2 (fundamental freedoms), 7 (life, liberty and security of person), and 12 (cruel and unusual treatment or punishment) of the *Charter*.[21] The majority's ruling, which was split 5-2 in favour of Morgentaler and delivered in 4 separate decisions, only dealt with section 7 of the *Charter*. Specifically, the two decisions comprising the majority position focused on issues of "state interference with bodily integrity" and the resulting harms borne by women due to the unequal services afforded by section 251.[22] The majority found that these harms constituted a violation of section 7 of the *Charter* that were not saved under section 1.[23] Although she did not engage directly with the equality provision in her solo concurring judgment, the subtext of Justice Wilson's judgment went further, suggesting that equality considerations could not be separated from procedural access questions, explaining that abortion is "not just a medical decision; it is a profound social and ethical one as well."[24] The SCC struck down section 251 of the *Criminal Code* and, notwithstanding one failed attempt by the federal government to enact a new law after the fact,[25] the absence of a federal abortion law in Canada has been the status quo ever since.

With criminal restrictions on the procedure gone, the provinces took the lead in shaping access to abortion services under the auspices of healthcare. Although abortion could now be treated like any other service, it was not. Most provinces, with the exception of Ontario and Quebec, immediately moved to create some restrictions on the procedure by withdrawing funding or restricting abortions to facilities.[26] Although many of these restrictions have since been successfully challenged in court, others remain, often in altered forms.[27] The irony is that the responses by provincial governments to their jurisdiction over abortion, specifically the focus on creating barriers to access, mimic the access issues the SCC deemed unconstitutional in 1988.[28] In many instances, provincial governments were found to have enacted these barriers by unconstitutionally legislating in the area of criminal law, under the guise of provincial jurisdiction.[29] This highlights an area of confusion regarding the interpretation of positive rights in the *Charter*. As Emmett Macfarlane notes, "the

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[21] *Morgentaler 1998*, *supra* note 1 at 31.

[22] Emmett Macfarlane, "Positive Rights and Section 15 of the Charter: Addressing a Dilemma" (2018) 38:1 NJCL 147 at 154.

[23] *Morgentaler 1998*, *supra* note 1 at 32–34.

[24] *Ibid* at 37.

[25] Janine Brodie, "Choice and No Choice in the House" in Janine Brodie et al, eds, *The Politics of Abortion* (Toronto: Oxford University Press, 1992) 57.

[26] Joanna Erdman, "In the Back Alleys of Health Care: Abortion, Equality, and Community in Canada" (2007) 56:4 Emory LJ 1093 at 1094.

[27] *Ibid*.

[28] Johnstone, *After Morgentaler*, *supra* note 7 at 3.

[29] *Morgentaler 1993*, *supra* note 1; *Morgentaler v New Brunswick (Attorney-General) et al,* [1995] 156 NBR (2d) 205, [1995] 121 DLR (4th) 431 (NBCA) [*Morgentaler 1995*].

entire proposition of delays and unequal access constituting a Charter infringement presupposes that there is a right of access in the first place."[30]

C. New Brunswick

One of the provinces in which it is still difficult to access an abortion is New Brunswick. Even as the government has changed hands over the years between the Progressive Conservative and Liberal parties, a bi-partisan, anti-abortion consensus hangs over the province. Only three hospitals, servicing around 10 percent of the population, provide access to abortion care, and no funding is available for private clinics.[31] What is more, the presence of even this small amount of coverage represents the concerted efforts of advocates in the province to improve access.[32] New Brunswick has spent over 30 years in and out of court attempting to subvert any critique of its regulations without engaging with the criticisms levied against it.[33] To date, it has been largely successful in this endeavour, but it is once again facing a legal battle that may force it to confront the constitutionality of its regulations on abortion access.[34]

Morgentaler first took the government of New Brunswick to court in 1989, alleging that New Brunswick's refusal to pay for abortions performed on New Brunswick women in his Montreal clinic was ultra vires provincial jurisdiction.[35] The province had not yet created any legislation dictating how it would reimburse abortion services outside the province. Even so, then-Minister of Health and Community Services, Raymond Frenette, said that the province did have a policy in place that only allowed public funding for abortion after "it is determined by two doctors to be medically required and is performed by a specialist in an approved hospital."[36] Ultimately, however, the government was unable to demonstrate that such a policy had ever been enacted, and the court ruled that "whether such a regulation would be valid cannot be determined unless and until it is made."[37] Morgentaler won his case.[38]

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[30] Macfarlane, *supra* note 22 at 155.

[31] "CCLA will sue New Brunswick over abortion restrictions" (15 October 2020), online: *Canadian Civil Liberties Association* <ccla.org/sue-new-brunswick/> [CCLA].

[32] Johnstone, *After Morgentaler*, *supra* note 7 at 90–92.

[33] *Ibid* at 87–90.

[34] Hadeel Ibrahim, "Judge gives civil liberties group green light to sue N.B. over abortion access" (1 June 2021), online: *CBC News* <www.cbc.ca/news/canada/new-brunswick/ccla-abortion-access-new-brunswick-1.6048563>.

[35] *Morgentaler v New Brunswick (Attorney General)*, [1989] 98 NBR (2d) 45 at para 5, [1989] 248 APR 45 (NBQB).

[36] *Ibid* at para 4.

[37] *Ibid* at para 9.

[38] *Ibid* at para 19.

Instead of appealing the decision, the McKenna government moved quickly to officially implement the policy they had described to the court. The provincial Medical Services Payment Act was amended in 1989 to include Regulation 84-20, which declared abortion an unentitled service, except if the abortion was "performed by a specialist in the field of obstetrics and gynecology in a hospital facility approved by the jurisdiction in which the hospital facility is located and two medical practitioners certify in writing that the abortion was medically required."[39] The realities of this regulation for women in need of services in the province were grave, including significant expense, travel, wait times, fear of stigma, and concerns about privacy, often because they had to disclose an unwanted pregnancy to friends and family to get enough money for transportation and accommodations just to access provincially funded services.[40]

In 1994, Morgentaler opened an abortion clinic in the capital city of Fredericton.[41] Regulation 84-20 meant that no procedures performed at the clinic were provincially funded, so women paid out of pocket to access services in Fredericton, although insiders reveal that Morgentaler subsidized the Fredericton clinic with funds from his Toronto clinic.[42] The clinic, which was only open on Tuesday mornings, performed the majority of the abortions in the province every year.[43] After eight years without government support, Morgentaler announced his intent to take the Government of New Brunswick back to court in 2002.[44] He publicly called on the government for "victimizing and oppressing women" by failing to provide them with basic abortion services.[45] He officially filed to sue the government in 2003, on the grounds that Regulation 84-20 was unconstitutional because it "erects a barrier to abortion services that violates rights guaranteed to women under s. 7 ('Life, Liberty and Security of Person') and s. 15 ('Equality') of the *Canadian Charter of Rights and Freedoms*" as well as violating the *Canada Health Act*.[46] Despite outward expressions

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[39] "Access to Abortion in New Brunswick and Across Canada Must be Protected and Improved" (undated), online: *Women's Legal Education & Action Fund* <www.leaf.ca/news/access-to-abortion-in-new-brunswick-and-across-canada-must-be-protected-and-improved/>.

[40] See Angel Foster et al, "'If I ever did have a daughter, I wouldn't raise her in New Brunswick'": exploring women's experiences obtaining abortion care before and after policy reform" (2017) 95:5 Contraception 477.

[41] When Morgentaler opened his Fredericton clinic in 1994 the government of New Brunswick invoked a 1985 amendment to the *Medical Act* which made performing an abortion outside of a registered hospital an act of professional misconduct and had his license to practice suspended. Drawing on precedent from the recent *Morgentaler 1993* case, the amendment was subsequently overturned because its substance was deemed to fall outside of provincial jurisdiction: *Morgentaler 1995*, *supra* note 29.

[42] Johnstone, *After Morgentaler*, *supra* note 7 at 187.

[43] Rachael Johnstone, "Explaining Abortion Policy Developments in New Brunswick and Prince Edward Island" (2018) 52:3 J of Can Studies 765 at 774, 776.

[44] "Morgentaler to sue N.B. over abortion costs" (24 October 2002), online: *CBC News* <www.cbc.ca/news/canada/morgentaler-to-sue-n-b-over-abortion-costs-1.324229>.

[45] *Ibid*.

[46] *Morgentaler 2009*, *supra* note 4 at para 1.

of confidence in their position, the government "did everything in its power to avoid engaging with Morgentaler's claims, either in court or in the legislature."[47]

Instead of preparing a defence against Morgentaler's claims, the government, alongside a local anti-abortion group (The Coalition for Life and Health), worked to stall Morgentaler.[48] The Coalition attempted to get intervenor status on the case in 2004 but were unsuccessful; the court found that they had no special interest or expertise to contribute to the case.[49] The Coalition appealed the decision in 2005 but lost and were subsequently denied leave to appeal to the SCC.[50] Shortly thereafter, in 2007, the Government of New Brunswick challenged Morgentaler's standing to launch the case, suggesting that it would be more appropriate for a woman who had difficulty accessing a publicly funded abortion to bring the case forward.[51] The province lost their case when the court found that it would be difficult for a woman to bring the case forward because of the stigma surrounding abortion, making Dr. Morgentaler "a suitable alternative person to do so."[52] The ruling concerning Morgentaler's standing was upheld on appeal in 2009.[53]

In the years that followed, the case did not progress, "likely owing to Morgentaler's advanced age and failing health."[54] Morgentaler died in 2013 at the age of 90, and the case has since been officially dropped.[55]

In 2015, facing significant pressure from both social activists and the federal Liberal Party, the newly elected provincial Liberal government, under Premier Brian Gallant, amended Regulation 84-20.[56] Specifically, the government removed the requirement that women receive permission from two doctors confirming that an abortion is medically necessary, and the provision that required an abortion to be provided by a specialist.[57] The requirement that an abortion be performed in a registered hospital in order to be covered by government funds, however, remains in

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[47] Johnstone, *After Morgentaler*, *supra* note 7 at 87.

[48] *Ibid*.

[49] *Morgentaler v NB,* 2004 NBQB 139 at para 16.

[50] *The Coalition for Life and Health v Dr Henry Morgentaler and the Province of New Brunswick,* 2005 NBCA 3 at para 7.

[51] *Morgentaler v The Province of New Brunswick*, 2008 NBQB 258 at para 18 [*Morgentaler 2008*].

[52] *Ibid* at para 26.

[53] *Morgentaler 2009*, *supra* note 4.

[54] Johnstone, *After Morgentaler*, *supra* note 7 at 88.

[55] *Ibid.*

[56] Abortion restriction lifted, *supra* note 8.

[57] For a detailed explanation of the catalysts for these changes, see Johnstone, *After Morgentaler*, *supra* note 7.

force.[58] This has allowed the Fredericton clinic to provide abortions, though because these procedures are not covered under Medicare, they come at an out-of-pocket cost of $700-850.[59]

The government has remained staunch in their refusal to fund the clinic, despite the federal government docking the province $140,000 in transfer payments for this policy in 2020—an amount equivalent to what New Brunswickers paid out of pocket for abortion services in the clinic in 2017—for violating the *Canada Health Act*.[60] However, Ottawa gave the funds back to the province as the COVID-19 pandemic took hold.[61] Even so, not long after, the 2021 federal budget signaled Ottawa's willingness to double down on their position, stressing that

> The Government is committed to collaboration with provinces and territories to strengthen our health care system, ensuring equitable and appropriate access to a full suite of reproductive and sexual health services, in any upcoming Canada Health Transfer funding discussions. [62]

Indeed, the budget makes specific reference to the Fredericton-based clinic, saying: "examples like Clinic 554—New Brunswick's only private abortion clinic—show us that lack of funding puts access to sexual and reproductive health care at risk."[63] In response, New Brunswick Premier Blaine Higgs said that if the federal government feels that his government is not respecting the *Canada Health Act*, they can "take it to court".[64]

Though the federal government has not taken legal action at this time, the New Brunswick government has found itself in court on the matter all the same. In October 2020, the CCLA sent an open letter to the Government of New Brunswick, informing them of their intent to launch legal proceedings challenging Regulation 84-20 for its violation of the *Charter* rights of New Brunswickers.[65] The letter suggests that the province's restrictions are "insidious and create undue hardship on women, girls and trans individuals," pointing out that "90% of New Brunswickers do not have

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[58] NB Reg 84-20, *supra* note 9.

[59] Tim Roszell, "Push to save Clinic 554 intensifies during NB election campaign" (21 August 2020), online: *Global News* <globalnews.ca/news/7291672/save-clinic-554-new-brunswick-election/>.

[60] *Ibid.*

[61] *Ibid*.

[62] "A Recovery Plan for Jobs, Growth, and Resilience" (19 April 2021) at 238, online: *Government of Canada* <www.budget.gc.ca/2021/home-accueil-en.html>.

[63] *Ibid*.

[64] Catharine Tunney, "Budget puts abortion access on the table in future health funding talks with provinces" (20 April 2021), online: *CBC News* <www.cbc.ca/news/politics/abortion-access-budget-1.5994678>.

[65] CCLA, *supra* note 31.

adequate abortion services in their local community."[66] In January 2021, the CCLA officially filed a suit against the province, claiming that Regulation 84-20 stands in violation of the *Canada Health Act* and sections 7 and 15 of the *Charter*, thereby setting up the province for an equality rights case.[67] Their statement of claim also challenges Regulation 84-20 on federalism grounds.[68]

In what follows, and without disputing the validity of the arguments around federalism or section 7 of the *Charter*, we elaborate on the section 15 analysis that the courts should undertake as the most viable avenue to find Regulation 84-20 unconstitutional.

D. The Evolving judicial disagreement over section 15

It may seem that a *Charter* challenge to Regulation 84-20 would fit broadly with other notable *Charter* challenges implicating access to health services, such as the 1988 *Morgentaler* case described above, as well as cases implicating access to InSite, Vancouver's supervised-injection facility,[69] or *Carter v Canada*,[70] which involved a prohibition on medical assistance in dying. Each of these cases was resolved on the basis of the section 7 right to life, liberty and security of the person. Each also involved harms imposed by laws that were directly connected to the threat of criminal sanction by the state. The cases thus neatly fall into the traditional negative rights sphere; that is, they involve state-imposed barriers which infringe section 7 rights in an arbitrary manner or which impose harms that are grossly disproportionate to the purported benefits at stake.

By contrast, Regulation 84-20 implicates a funding decision. A meaningful remedy would thus require not only the elimination of a state-imposed barrier to access, but also require the state to provide public funding for abortion services conducted at private clinics. In order for a challenge to succeed, litigants must argue that the *Charter*, at least in effect, includes a positive right to abortion services. Positive rights are distinguished from traditional negative rights, which emphasize freedom *from* government interference with rights; positive rights require some direct action by governments to deliver or ensure access *to* the right in question.[71] While the distinction is not always clear cut—for example, the protection of negative rights can

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[66] *Ibid*.

[67] "Canadian Civil Liberties Association v The Province of New Brunswick Notice of Action with Statement of Claim Attached" (2021) at paras 1(a), 1(c), online: *Canadian Civil Liberties Association* <ccla.org/cclanewsite/wp-content/uploads/2021/01/2021-01-06-Statement-of-Claim-CCLA-v.-New-Brunswick-served-on-Jan-6th1.pdf>

[68] *Ibid* at para 1(b).

[69] *Canada (Attorney General) v PHS Community Services Society,* 2011 SCC 44.

[70] *Carter v Canada (Attorney General)*, 2015 SCC 5.

[71] Johnstone & Macfarlane, *supra* note 14 at 99.

require state funding, such as in the context of the right against cruel and unusual punishment or treatment, and the need to ensure just and proper conditions for individuals subject to state sanction—the prerequisite for many *Charter* infringements usually requires some form of state action to have occurred.[72] Further, while the *Charter* does include positive rights, like the right to minority language education in section 23, the *Charter* has generally not been found to protect social and economic rights like a right to welfare,[73] housing, or healthcare.

In the context of section 7, litigation to recognize a positive right to abortion services outside of the context under which legislation provides them (in hospitals) is at best an uphill battle. This is both due to section 7's grounding in the Legal Rights section of the *Charter*, and the fact that the vast majority of successful section 7 claims have either implicated the threat of criminal sanction or one's treatment by the justice system, broadly construed.[74] While a considerable academic debate continues about whether section 7 ought to be interpreted to include positive rights,[75] the courts have thus far avoided such an interpretation, even though the SCC left the door open to the possibility back in the 2002 *Gosselin* case.[76]

We argue that any challenge against Regulation 84-20 should instead make use of the equality rights guarantee in section 15. Unlike section 7, the interpretation of section 15 as mandating a substantive conception of equality[77] provides a textually-grounded pathway demonstrating that a refusal to fund abortion services in the context of private clinics in New Brunswick amounts to discrimination in the delivery of healthcare. Fundamental to this is understanding the nature of discrimination at stake, specifically the way the Regulation singles out an inherently gendered medical service for disparate treatment. In what follows, we briefly explore the evolving section 15 jurisprudence, and note the difficulties the SCC has encountered in developing a coherent approach to identifying discrimination. The next section then applies these recent developments in order to assess the New Brunswick policy.

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[72] Emmett Macfarlane, "The Dilemma of Positive Rights: Access to Health Care and the Canadian Charter of Rights and Freedoms" (2014) 48:3 J of Can Studies 49 at 54.

[73] *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 [*Gosselin*].

[74] For an example of a section 7 claim not implicating the criminal law, but one's treatment by the justice system, see *New Brunswick (Minister of Health and Community Services) v G(J),* [1999] 3 SCR 46, [1993] 216 NBR (2d) 25.

[75] Martha Jackman, "The Protection of Welfare Rights Under the Charter" (1988) 20:2 Ottawa L Rev 257; Martha Jackman, "Poor Rights: Using the Charter to Support Social Welfare Claims" (1993) 19 Queen's LJ 65; Margot Young, "Section 7 and the Politics of Social Justice" (2005) 38:2 UBC L Rev 539; Cara Wilkie & Meryl Zisman Gary, "Positive and Negative Rights Under the Charter: Closing the Divide to Advance Equality" (2011) 30 Windsor Rev Legal Soc Issues 37; Jamie Cameron, "Positive Obligations under Sections 15 and 7 of the Charter: A Comment on Gosselin v Quebec" (2003) 20 SCLR 65; Johnstone & Macfarlane, *supra* note 14.

[76] *Gosselin*, *supra* note 73.

[77] *Andrews v Law Society of British Columbia,* [1989] 1 SCR 143, [1989] 56 DLR (4th) 1.

In the SCC's very first section 15 decision, there was unanimous agreement that the courts should eschew a formalistic understanding of equality and that attention must be paid 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."[78] In other words, the Court agreed on a substantive rather than narrow understanding of equality. Joanna Erdman points out that the Court's interpretation of "[e]quality rights have long embraced a citizenship ideal, promoting not merely tolerance, but a sense of belonging as full and equal members of a political community".[79] Yet the SCC soon divided on an overall approach to identifying discrimination,[80] and efforts to bridge disagreements—including the short-lived incorporation of human dignity as a discrete factor in the analysis[81]—proved too difficult to apply, were detrimental to the chances of equality claimants succeeding, and were eventually abandoned in *R v Kapp*.[82] In *Kapp*, the Court articulated a two-part test for identifying discrimination: "(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?"[83] This approach was criticized by some commentators for narrowing the forms of discrimination that might be recognized, particularly in relation to systemic or adverse effects discrimination.[84] A few years later in *Withler v Canada*, the SCC sought to create more flexibility in the comparator analysis courts engage in, warning that "formalistic" analysis can distract from substantive equality assessments by threatening an "arbitrary search for the 'proper' comparator group."[85]

The oscillating evolution of the SCC's section 15 jurisprudence has been evaluated and criticized at length.[86] The Court itself reviewed these developments in *Quebec v A*.[87] In that case, the majority endorsed Justice Abella's approach to section

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[78] *Ibid* at 168.

[79] Joanna N Erdman, "A Constitutional Future for Abortion Rights in Canada" (2017) 54:3 Alta L Rev 727 at 749.

[80] *Egan v Canada,* [1995] 2 SCR 513, [1995] 96 FTR 80; *Miron v Trudel,* [1995] 2 SCR 418, [1995] 124 DLR (4th) 693.

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

[82] *R v Kapp,* 2008 SCC 41.

[83] *Ibid* at para 17.

[84] Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter" (2015) 19:2 Rev Constitutional Studies 191 at 212–213 [Hamilton & Koshan, "Adverse Impact"].

[85] *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 2 [*Withler*].

[86] See for example Margot Young, ''Social Justice and the Charter: Comparison and Choice" (2013) 50:3 Osgoode Hall LJ 669; Jennifer Koshan & Jonnette Watson Hamilton, ''The Continual Reinvention of Section 15 of the Charter," (2013) 64 UNBLJ 19; Jennifer Koshan, ''Under the Influence: Discrimination Under Human Rights Legislation and Section 15 of the Charter" (2014) 3:1 Can J Human Rights 115; Mel Cousins, ''Pregnancy as a 'Personal Circumstance'?" *Miceli-Riggins* and Canadian Equality Jurisprudence" (2015) 4:2 Can J Human Rights 237; Hamilton & Koshan, "Adverse Impact", *supra* note 84.

[87] *Quebec (Attorney General) v A,* 2013 SCC 5 at paras 142–184 [*Quebec v A*].

15(1), rejecting the idea that *Kapp* created a new test (despite its wording and framing) that limited discrimination to instances of prejudice or stereotyping.[88] Instead, the majority endorsed "a flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group."[89] This has basically been the approach articulated by the majority of the SCC in each section 15 case since (although in recent cases the majority has dropped the 'arbitrary').[90] Nevertheless, many lower court decisions continue to use the *Kapp* test.[91]

Also worth noting from *Quebec v A* was Justice Abella's comment that a focus on "whether the claimant group's exclusion was well motivated or reasonable is inconsistent with this substantive equality approach to section 15(1) since it redirects the analysis from the *impact* of the distinction on the affected individual or group to the legislature's *intent* or *purpose*."[92] She said that this issue is more appropriately left to the section 1 stage of analysis.[93]

A handful of important cases since are pertinent to our analysis of Regulation 84-20's constitutionality. In 2015, the SCC rejected a challenge against an educational requirement for elections in the Kahkewistahaw First Nation in *Kahkewistahaw First Nation v Taypotat*.[94] In that case, the Court noted that there was a lack of evidence that the educational requirement had a disproportionate impact on members on the basis of grounds like age or residency on a reserve.[95] While the lack of evidence led the Court to reject the challenge in that case, their unanimous decision did caution that the presence of statistical evidence would not always be necessary to establish that a facially neutral law infringes section 15, stating that in some cases "the disparate impact on an enumerated or analogous group will be apparent and immediate."[96]

In two pay equity cases in 2018, the SCC divided over whether the impugned provisions amounted to discrimination under section 15(1), and seemed to divide once

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[88] *Ibid* at para 325.

[89] *Ibid* at para 331.

[90] Prior to the recent cases discussed below, Jena McGill and Daphne Gilbert suggest that, since *Kapp* (2008), we are seeing "the emergence of a new era in equality rights at the Supreme Court characterized by a distinct turning away from section 15 arguments," where possible, in favour of other sections of the Charter: See Jena McGill & Daphne Gilbert, "Of Promise and Peril: The Court and Equality Rights" (2017) 78 SCLR 235 at 236.

[91] Jonnette Watson Hamilton & Jennifer Koshan, "Equality Rights and Pay Equity: Déja Vu in the Supreme Court of Canada" (2019) 15 JL & Equality 1 at 5 [Hamilton & Koshan, "Déja vu in the Supreme Court"].

[92] *Quebec v A*, *supra* note 87 at para 333.

[93] *Ibid.*

[94] *Kahkewistahaw First Nation v Taypotat,* 2015 SCC 30.

[95] *Ibid* at para 33.

[96] *Ibid*.

again on the fundamental understanding of substantive equality.[97] In *Quebec (Attorney General) v Alliance due personnel professionnel et technique de la santé et des services sociaux*, the Court examined amendments to Quebec's pay equity scheme that established periodic audits that did not require retroactive payments for pay inequities that emerged in the period between audits.[98] A majority of the Court determined that the impugned provisions "perpetuate the pre-existing disadvantage of women," whose relative pay the legislative scheme is designed to ameliorate.[99] The effect of the amendments is to give "an amnesty to the employer for discrimination between audits."[100]

Justices Côté, Brown, and Rowe's dissent, however, asserted that the effect of the majority's logic "is that any attempt at amelioration whose objectives are not achieved in their entirety would infringe section 15(1)."[101] The dissent accuses the majority of attempting to constitutionalize a right to pay equity that the *Charter* does not confer.[102] In their view, Quebec's legislature sought to enact a legislative scheme to improve the compensation of a disadvantaged group; that it did so imperfectly is not the perpetuation of a pre-existing disadvantage.[103] The dissent also suggests that the approach of the majority punishes Quebec for being a pioneer in the area of pay equity by comparing amendments to the legislation with its previous iteration, noting that "a province that does not yet have similar legislation applicable to the private sector, such as Prince Edward Island, would be able to enact the Act at issue here word for word without having the constitutionality of its legislation questioned."[104] Moreover, the dissent points to provisions of the legislation that provide mechanisms to avoid the gap in payments that are at issue, leading them to conclude the majority is "mistaken in concluding that the cumulative effect of the sections in issue is to give employers an 'amnesty' in respect of compensation adjustments that would be required between the periodic audits."[105]

The majority, for its part, notes that the effect of its decision is *not* "to impose a freestanding positive obligation on the state to enact benefit schemes to redress social inequalities. Nor does it undermine the state's ability to act incrementally in addressing systemic inequality. But section 15 does require the state to ensure that whatever

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[97] We eschew a discussion in these cases about the appropriate approach to section 15(2) which, while important, is less relevant for our purposes in this paper.

[98] *Quebec (Attorney General) v Alliance due personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17.

[99] *Ibid* at para 33.

[100] *Ibid.*

[101] *Ibid* at para 83.

[102] *Ibid* at para 84.

[103] *Ibid* at para 85.

[104] *Ibid* at para 85.

[105] *Ibid* at para 90.

actions it *does* take do not have a discriminatory impact."[106] The majority found that the relevant provisions could not be justified under section 1.[107]

The SCC also divided on the application of section 15(1) in a sister pay equity case, *Centrale des syndicats du Québec v Quebec (Attorney General)*, a case involving a six-year legislated delay in implementing a scheme for workplaces lacking male comparator job classifications.[108] In an 8-1 decision, the Court found that the delay constituted a violation of section 15(1), but upheld the impugned provision.[109] A primary source of disagreement in the section 15(1) analysis in this case was whether the distinction provided for in law was based on sex or based on the absence of male comparator groups in the specific enterprises covered by the legislative scheme. Justice Abella, writing for the majority on the section 15(1) issue, notes that the latter approach "is difficult to distinguish from the paradigmatic example of formalism in *Bliss v Attorney General of Canada*", a 1979 case where the Court concluded that an unemployment benefits scheme excluding women did so not on the basis of sex but on the basis of pregnancy.[110] She noted that such an analysis "falls into precisely the same error as *Bliss* by holding, in effect, that the distinction created by [the provision] is not based on sex because not *all* women are denied timely access to the scheme, only those in certain workplaces."[111]

In her dissenting opinion, Justice Côté contends that while Justice Abella "focuses her reasons on the basis for the distinction drawn by the Act as a whole," the actual distinction at issue rests on one made in the provision of the Act dealing with different workplace categories.[112] In her view, Justice Abella's "reasoning can lead to only one conclusion: that every distinction in a pay equity statute is necessarily based on sex."[113] According to Justice Côté, "we cannot conclude that every distinction drawn by a pay equity statute is necessarily based on sex. Such a conclusion would deprive trial judges of any discretion in their assessment of the evidence and would make the first step in the section 15(1) analysis irrelevant."[114]

This disagreement over the nature of the distinction at stake underlines how the framing of particular objectives and the design of particular policies can impact one's application of substantive equality and understanding of systemic

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[106] *Ibid* at para 42.

[107] *Ibid* at para 56.

[108] *Centrale des syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18.

[109] *Ibid* at para 55.

[110] *Ibid* at para 26, citing *Bliss v Attorney General of Canada,* [1979] 1 SCR 183, [1979] 92 DLR (3d) 417.

[111] *Ibid* at para 28.

[112] *Ibid* at para 126.

[113] *Ibid.*

[114] *Ibid* at para 128.

discrimination. In our view, Justice Abella's approach better understands the systemic nature of the disadvantage at stake, and while different remedies for different workplace contexts may be necessary (and thus certain distinctions necessarily drawn within the design of pay equity regimes), the fact that the legislative delay in implementing the policy for one group of women causes disadvantage seems sufficiently clear. Whether this delay was reasonable was the subject of the section 1 analysis. Indeed, Justice Côté's recognition that more time was needed to implement what was "an undeniably ameliorative effect on the employees"[115] seems like the importation of a section 1 consideration into the section 15(1) analysis. This approach risks taking a 'systemic' understanding of systemic discrimination out of the equation. Hamilton and Koshan correctly note that by "comparing the claimants to other women within the *Pay Equity Act*, and finding there was no distinction for the purposes of section 15(1), the dissent suggested that once the government enacts a positive, equality-enhancing piece of legislation such as this, any distinctions within the act are non-discriminatory."[116]

In the 2020 case *Fraser v Canada (Attorney General)*, the SCC dealt with a job-sharing program of the RCMP which permitted two or three members to split the duties and responsibilities of a single full-time position.[117] Most of the participants to the program were women with children, and the job-sharing program did not allow the members to 'buy back' pension contributions (as full-time members with other gaps in service, such as unpaid leave, could).[118] Justice Abella, writing for the majority, determined that this policy constituted discrimination on the basis of sex, as it amounted to adverse impact discrimination (when a "seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground"[119]). The effect of the rules were such that "a full-time RCMP member's temporary reduction in working hours results in their losing out on potential pension benefits."[120] Moreover, the majority emphasized that the fact that the disproportionate impact resulted from the 'choice' of entering the job sharing program does not mean that the rules are not discriminatory.[121] The majority noted that the program "was introduced precisely because some members required access to an alternative to taking leave without pay 'due to [their] personal or family circumstances'."[122]

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[115] *Ibid* at paras 144.

[116] Hamilton & Koshan, "Déja vu in the Supreme Court", *supra* note 91 at 15.

[117] *Fraser v Canada (Attorney General),* 2020 SCC 28 [*Fraser*].

[118] *Ibid* at paras 3, 7.

[119] *Ibid* at para 30.

[120] *Ibid* at para 84.

[121] *Ibid* at paras 86–92.

[122] *Ibid* at para 91.

In a sharply-worded dissent, Justices Brown and Rowe suggest that the majority has declared unconstitutional an ameliorative program designed to improve conditions for a disadvantaged group on the basis that it failed to remove all disadvantage. They raise the question of whether "the next extension of our colleague's line of reasoning that governments (federal and provincial) have a positive duty under section 15(1) to initiate measures that will remove all effects of historic disadvantage, *and* that they are constitutionally barred from repealing or even amending such measures? These are profoundly complex matters of public policy that no Canadian court is institutionally competent to deal with."[123] They suggest further that the "gauge of 'substantive equality' by which this Court has measured section 15(1) claims of right, not having been defined (except by reference to what it is *not*—e.g. 'formal equality'), has become an open-ended and undisciplined rhetorical device by which courts may privilege, without making explicit, their own policy preferences."[124]

The dissent notes that the majority refer to job-sharing employees as full-time employees temporarily working part-time hours, and that this is contrary to the findings of the Federal Court, which classified job sharing as part-time employment.[125] They also suggest the majority elides the design of the pension plan at issue, in that job sharers "are seeking to obtain a *full-time* pension benefit in respect of a period where they have worked part-time hours. To be clear, *no other members are entitled to such a benefit.* … The appellants are, in this sense, asking to be put in a *better* position than everyone else under the Plan, and, indeed, under any of the other 10 public sector pension plans."[126] The dissenting opinion offers criticisms similar to those made in the pay equity cases, noting, for example, that the program itself was not a source of ongoing systemic disadvantage for women because it was ameliorative in nature.[127]

The majority and dissent, as well as a separate dissent by Justice Côté also disagree on different bases of comparison. Justices Brown and Rowe assert that the majority rejects a comparison to workers on leave without pay as "formalistic" but their ability to buy back pension contributions is "the very reason [Justice Abella] finds a breach; absent that basis for comparison, the alleged breach disappears."[128] For her part, Justice Côté notes that the distinction created by the policy is not merely one of sex but one of people caregiving responsibilities. She argues that the "effect of the impugned provisions of the pension plan is to create a distinction not on the basis of

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[123] *Ibid* at para 144.

[124] *Ibid* at para 146.

[125] *Ibid* at paras 149–151.

[126] *Ibid* at para 160.

[127] *Ibid* at para 168.

[128] *Ibid* at para 174.

being a *woman*, but being a woman *with children*."[129] As neither caregiving nor family status constitute an analogous ground under section 15(1), Justice Côté would uphold the policy on that basis. Here, Justice Côté seems to abandon a substantive understanding of equality entirely, given the well-established evidence that child-rearing responsibilities disproportionately fall on women.

As with the pay equity cases, the SCC in *Fraser* was divided on a fundamental understanding of systemic discrimination and substantive equality in relation to ameliorative programs with rules that created gaps in benefits, resulting in disproportionate impact. In *Fraser*, as in those cases, the dissenting judges raise the spectre of the majority inviting an interpretation that leads to a "freestanding positive obligation to remedy social inequities,"[130] and a chilling effect on incremental changes to redress inequities. For the majority, the primary concern, in our view, is whether in providing benefits the schemes enacted contain discriminatory elements that perpetuate disadvantage. For the majority, such discriminatory elements run impermissibly contrary to section 15; for those dissenting, since the constitution does not require governments to take action to remedy social inequities that are not the product of government action, the majority's approach imposes unjustifiable positive obligations on government by invalidating policies that fail to fully remedy them.

One of the key issues of section 15 decisions is that the SCC is not sufficiently explicit when it shifts between "tests, rules, principles, and holdings".[131] As Koshan and Hamilton note in the aftermath of *Fraser,* such an approach to the jurisprudence sends "mixed signals" to lower courts (not to mention governments) about how to understand and apply section 15.[132] Thus Justice Abella in *Fraser* accuses her dissenting colleagues of tugging "at the strands of a prior decision they disagree with in search of the occasional phrase or paragraph by which they can unravel the precedent."[133] Moreover, Justice Abella asserts that her colleagues "continue their insistent attack on the foundational premise of this Court's section 15 jurisprudence—substantive equality—in favour of a formalistic approach."[134] Regardless of one's perspective on the specific jurisprudential disagreements in *Fraser*, it is worth noting that the SCC's approach to equality rights remains unsettled and tenuous. Fay Faraday calls the Court's interpretation of equality rights over the years "extremely unpredictable," a reality which invites debate and "undermines social discourse about

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[129] *Ibid* at para 234.

[130] *Ibid* at para 209.

[131] Jennifer Koshan & Jonnette Watson Hamilton, "Tugging at the Strands: Adverse Effects Discrimination and the Supreme Court Decision in *Fraser*" (9 November 2020), online: *University of Calgary Faculty of Law* <ablawg.ca/2020/11/09/tugging-at-the-strands-adverse-effects-discrimination-and-the-supreme-court-decision-in-fraser/>.

[132] *Ibid*.

[133] *Fraser*, *supra* note 117 at para 133.

[134] *Ibid* at para 134.

and commitment to equality as a fundamental right."[135] Even amidst continued disputes about equality rights, however, the rise in recent years of those favouring a more substantive approach to equality is noticeable.

This is the fundamental jurisprudential disagreement over section 15 that confronts any challenge to New Brunswick's Resolution 84-20. In the next section, we first revisit two important cases implicating, at least indirectly, a positive right of access to health care, and analyze them in light of recent jurisprudential developments. We then apply our analysis to Regulation 84-20.

D. Regulation 84-20 and Section 15

At first glance, a section 15 challenge against Regulation 84-20 appears straightforward, or even "easy", as compared to *Fraser* or the pay equity cases described above. Regulation 84-20 is not an ameliorative policy, and thus it is not wrapped up in a context in which the government's objectives are to benefit a historically disadvantaged group. Nor is the ongoing disagreement within the legal community about the nature of gaps in state action to make incremental improvements within a broader system of system discrimination as relevant. Abortion is an inherently gendered medical service, and Regulation 84-20 targets abortion services in clinics by lumping it into a category largely comprised of cosmetic procedures.[136] In a context where every province recognizes abortion as a medically necessary service, we argue that the nature of the distinction being made is inherently discriminatory, even under the more 'formalistic' approach of the dissenting judges described above.

However, two older section 15 cases arguably cloud the waters given their more direct relevance as 'access to health care' cases. Perhaps the most relevant of these is *Eldridge v British Columbia,*[137] in which the SCC unanimously determined that the failure to provide deaf hospital patients with sign language interpretation violated section 15(1), noting 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."[138] In other words, while the Court's decision obviously entailed the granting of a positive entitlement under section 15, their discrimination analysis did not reflect an approach of granting a free-standing right to the particular service (sign language interpretation), rather that the provision of the broader service at stake (health care) absent the capacity to communicate was discriminatory. In doing so, the Court explicitly rejected the

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[135] Fay Faraday, "One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Canada" (2020) 94:2 SCLR 1 at 4.

[136] Among the only other therapeutic procedures are the reversal of vasectomies and tubal ligations. See note 143 for the complete list.

[137] *Eldridge v British Columbia (Attorney General),* [1997] 3 SCR 624, [1997] 151 DLR (4th) 577 [*Eldridge*].

[138] *Ibid* at para 66.

analysis of the lower courts at the time that because the government did not create the disadvantage at stake (hearing impairment), it was not obliged to ameliorate that burden.[139] In the words of Justice LaForest, who authored the decision, such a logic "seriously mischaracterizes the practical reality of health care delivery" in a context where "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."[140]

In our view, this approach should be mapped directly onto any section 15 challenge of Regulation 84-20. As Macfarlane writes, "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 ability to pay."[141] Moreover, he notes that 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 section 15(1)'s enumerated or analogous grounds."[142]

Regulation 84-20 in fact singles out abortion, lumping it in with a set of cosmetic procedures[143] or services that are generally not found to be core medically-necessary services in provincial health insurance schemes elsewhere in the country.[144]

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[139] *Ibid*.

[140] *Ibid* at para 71.

[141] Macfarlane, *supra* note 22, at 163.

[142] *Ibid*.

[143] Schedule 2, listing services deemed not to be entitled, lists abortion services not performed in a hospital facility, along with: "(a) elective plastic surgery or other services for cosmetic purposes; (a.01) correction of inverted nipple; (a. 02) breast augmentation; (a. 03) otoplasty for persons over the age of eighteen; (a. 04) removal of minor skin lesions, except where the lesions are or are suspected to be pre-cancerous."

[144] The full remaining list of services under Schedule 2 are as follows: "(b) medicines, drugs, materials, surgical supplies or prosthetic devices; (c) Repealed: 2016-33; (d) advice or prescription renewal by telephone which is not specifically provided for in the Schedule of Fees; (e) examinations of medical records or certificates at the request of a third party, or other services required by hospital regulations or medical by-laws; (f) dental services provided by a medical practitioner or an oral and maxillofacial surgeon; (f.1) services that are generally accepted within New Brunswick as experimental or that are provided as applied research; (f.2) services that are provided in conjunction with or in relation to the services referred to in paragraph (f.1); (g) Repealed: 96-111 (h) testimony in a court or before any other tribunal; (i) immunization, examinations or certificates for purpose of travel, employment, emigration, insurance, or at the request of any third party; (j) services provided by medical practitioners or oral and maxillofacial surgeons to members of their immediate family; (k) psychoanalysis; (l) electrocardiogram (E.C.G.) where not performed by a specialist in internal medicine or paediatrics; (m) laboratory procedures not included as part of an examination or consultation fee; (n) refractions; (n.1) services provided within the Province by medical practitioners, oral and maxillofacial surgeons or dental practitioners for which the fee exceeds the amount payable under this Regulation; (o) the fitting and supplying of eye glasses or contact lenses; (p) Repealed: 2016-50 (p.1) radiology services provided in the Province by a private radiology clinic; (q) acupuncture; (r) complete medical examinations when performed for the purposes of a periodic check-up and not for medically necessary purposes; (s) circumcision of the newborn; (t) reversal of vasectomies;

Even among these procedures, abortion services are singled out as the only therapeutic procedure to be exempted from funding except where they are "performed in a hospital facility approved by the jurisdiction in which the hospital is located."[145] The province's choice ought to be seen as an imposed barrier given that all provinces and territories have long recognized abortion as medically necessary care.[146] Regulation 84-20 establishes an apparent and immediate discriminatory and adverse impact based on sex. It is difficult to see how such a policy could be upheld as reasonable given the obvious harms established in past cases relating to delayed and uneven levels of access to abortion services. Moreover, the fact that the regulatory scheme funds abortion services if they are conducted in hospitals does not save Regulation 84-20 from constitutional scrutiny. As we have already noted, only three hospitals in the province actually provide services, and none in Fredericton where Clinic 554 is located.

Scholars have not always been particularly optimistic about a reliance on *Eldridge* for advancing further positive obligations on governments under section 15. As Kerri Froc notes, the SCC refused to expand on the nature of the positive duty articulated in that case for over two decades.[147] The Court's decision in *Fraser* in 2020 was the first successful adverse effects discrimination claim in over 20 years, and the first ever successful case where the distinction was based on sex.[148]

One of the cases that may help to explain this gap is the SCC's unanimous decision in *Auton v British Columbia*, in which the Court rejected a section 15 claim that the province was obligated to fund an intensive behavioural therapy for children with autism.[149] In a reversal of fate relative to the *Eldridge* claimants, both the trial court and Court of Appeal ruled in favour of the *Auton* claimants, only to have their decisions overturned by Canada's highest court.

In dismissing the claim, Chief Justice McLachlin adopted what critics view as a narrow view of section 15's purpose, which it described as being to "prevent the perpetuation of pre-existing disadvantage through unequal treatment."[150] It is clear that

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(u) second and subsequent injections for impotence; (v) reversal of tubal ligations; (w) intrauterine insemination; (x) bariatric surgery unless the person has a body mass index (i) of 40 or greater, or (ii) of 35 or greater but less than 40, as well as obesity-related comorbid conditions; (y) venipuncture for the purposes of the taking of blood when performed as a stand-alone procedure in a facility that is not an approved hospital facility.

[145] Venipuncture for the purposes of taking blood is also exempted from funding unless performed in an hospital but this is a test, not a therapeutic procedure.

[146] Sandra Rodgers, "Abortion Denied: Bearing the Limits of Law" in Colleen M Flood, ed, *Just Medicare: What's In, What's Out, How We Decide,* (Toronto: University of Toronto Press, 2006), 107 at 115.

[147] Kerri A Froc, "A Prayer for Original Meaning: A History of Section 15 and What It Should Mean for Equality" (2018) 38:1 NJCL 35 at 47.

[148] Dale Smith, "An equitable outcome" (2 November 2020), online: *The Canadian Bar Association* <nationalmagazine.ca/en-ca/articles/law/in-depth/2020/an-equitable-outcome>.

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

[150] Froc, *supra* note 147.

this understanding of section 15 is no longer carried by the majority of the Court, as evidenced by the recent pay equity cases and the decision in *Fraser.* The majority in *Fraser* stated that section 15 "reflects a profound commitment to promote equality and prevent discrimination against disadvantaged groups."[151] In contrast, the Court in *Auton* applied section 15 to the facts as follows:

> (1) Is the claim for a benefit provided by law? If not, what relevant benefit is provided by law? (2) Was the relevant benefit denied to the claimants while being granted to a comparator group alike in all ways relevant to benefit, except for the personal characteristic associated with an enumerated or analogous ground? (3) If the claimants succeed on the first two issues, is discrimination established by showing that the distinction denied their equal human worth and human dignity?[152]

Two key factors influenced the SCC's attitude towards the section 15 claim in *Auton.* First, the Court accepted the argument that the treatment in question was not a "core" service under the purposes of the legislative scheme, which it described 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."[153] Second, the Court questioned whether the therapy was excluded on a discriminatory basis, and in doing so applied a comparator analysis in an exceptionally narrow and formalistic manner. Rather than a comparison to non-disabled children, the Court frames the comparator 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."[154]

The comparator analysis undertaken in *Auton* is precisely the sort of formalistic and narrow approach it would later caution against in *Withler*, as noted above.[155] The Court's pledge to avoid overly formalistic comparator analyses,[156] coupled with a change in the understanding and acceptance of the intensive behavioural treatment at issue in the case,[157] makes it far less likely that a claim along the lines of *Auton* would fail today.

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[151] *Fraser*, *supra* note 117 at para 27.

[152] *Auton, supra* note 149 at para 26.

[153] *Ibid* at para 43.

[154] *Ibid* at para 55.

[155] *Withler,* supra note 85.

[156] *Ibid* at para 2.

[157] Meta-studies demonstrate the effectiveness of the behavioural treatment for autism at issue in *Auton.* See e.g. Maria K Makrygianni et al, "The effectiveness of applied behavior analytic interventions for children with Autism Spectrum Disorder: A meta-analytic study," (2018) 51 Research in Autism Spectrum Disorders 18.

By the time *Fraser* was decided, the SCC had dropped the human dignity factor and emphasized a more flexible and cautious approach to comparator analysis. The majority in *Fraser* thus articulated that a finding of discrimination under section 15 requires that "the impugned law or state action: on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and imposed burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage."[158] This is a significantly more robust and substantive approach to adverse effects discrimination, and for the reasons we set out above, makes it clear that Regulation 84-20 does not withstand section 15 scrutiny, as it clearly constitutes adverse effects discrimination.

There are a number of other considerations the provincial government might invoke to justify Regulation 84-20, including costs, wait times for other health care procedures, and the fact that patients have to travel for other procedures (including diagnostics like MRIs or surgeries).[159] In our view, these constitute section 1 considerations, and should not be falsely imported into the section 15 analysis. While governments require flexibility to make decisions about the allocation of scarce resources, and courts should be deferential to this fact, it is unlikely these sort of policy justifications are sufficient to overcome the proportionality analysis established in the *Oakes* test.[160] Abortion services do not require expensive equipment or facilities akin to MRI machines or those necessary for more complex surgical procedures. Moreover, the fact that New Brunswick is the only jurisdiction in Canada limiting funding to abortion services in this manner militates against policy justifications that invoke costs. As the Court determined in *Eldridge*, a refusal to expend modest sums and extend services when not doing so is found to violate section 15 "cannot possibly constitute a minimum impairment" of the right.[161] The fact that a gendered, medically necessary service is effectively singled out by the Regulation is pertinent to any section 1 analysis.

E. Conclusion

Does section 15 of the *Charter* require provincial governments to ensure a certain level of abortion access? We believe that the answer is yes. Abortion is a medically necessary and inherently gendered service, and failure to provide adequate access to care constitutes a clear violation of women's section 15 rights. In the ongoing disputes over access to abortion in New Brunswick, specifically Regulation 84-20 and the government's refusal to fund services at Clinic 554, we have shown how the existing jurisprudence makes readily apparent that the Regulation cannot survive *Charter* scrutiny.

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[158] *Fraser, supra* note 117 at para 27.

[159] The authors thank an anonymous reviewer for suggesting the latter two examples.

[160] *R v Oakes*, [1986] 1 SCR 103 at paras 73–74, [1986] 53 OR (2d) 71.

[161] *Eldridge*, *supra* note 137 at para 87.

Significantly, we believe that this is the case regardless of whether one adopts the broader substantive approach of recent SCC majorities, or the more reserved conceptions of the dissenting justices. This is because a challenge to Regulation 84-20 escapes many of the complexities facing recent equality rights litigation. At issue is not an ameliorative program designed to benefit an historically disadvantaged group, but rather a barrier to access in the form of a targeted exemption for public funding of a medically necessary medical service. The principles articulated as far back as the very first section 15 case heard by the SCC support such a conclusion. Recent jurisprudence—including the nature of judicial disagreement over identifying discrimination—only serves to make any challenge against Regulation 84-20 a relatively 'easy' case. The only difficulty, in our view, is whether the Court will find it challenging to navigate the obvious positive dimensions of the rights claim at stake, which concerns a funding decision rather than a simple legal barrier. As our analysis here suggests, that positive dimension should not be regarded as a hindrance to a finding of discrimination given the broader purposes of provincially-administered and funded healthcare and the nature of Regulation 84-20's inherent discrimination, both in terms of the readily apparent and immediate nature of that discrimination and its obvious effects.