SUPREME CONFUSION

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Supreme Court rulings that prevent governments from infringing on individual rights have yet to be squared with how to ensure governments follow through with services that deliver on those rights. The result is a legal quagmire on controversial policies such as abortion and assisted suicide.

Pour être appliquées, les décisions de la Cour suprême empêchant les gouvernements d'enfreindre les droits individuels doivent pouvoir s'appuyer sur des services publics garantissant ces droits. Autrement, c'est l'imbroglio juridique assuré autour d'enjeux controversés comme l'avortement ou le suicide assisté.

In January, the Quebec government announced its intention to introduce "dying with dignity" legislation. The plan would effectively permit doctors, under stringent conditions, to engage in assisted suicide in circumstances where critically ill patients suffering from severe physical or psychological pain ask to expedite their death.

The legislation faces a number of obstacles, including strong opposition from some corners of the medical profession and, from a constitutional perspective, a long-standing *Criminal Code* prohibition on assisted suicide. A panel of legal experts issued a report to the provincial government that argued Quebec could circumvent application of the criminal law — a federal jurisdiction — by tailoring the legislation in a way that comports with provincial authority over health care and that avoids labelling end-of-life care as "suicide."

Quebec's announcement comes on the heels of a British Columbia Supreme Court decision last summer that struck down the criminal prohibition on assisted suicide on the basis of the equality rights and the right to life, liberty and security of the person in the Charter of Rights and Freedoms (the case is on appeal to the British Columbia Court of Appeal and will likely go to the Supreme Court of Canada). While the potential division-of-powers dispute over Quebec's proposed legislation is important and interesting, a successful Charter challenge at the Supreme Court is a far more likely pathway to euthanasia or assisted suicide in Canada.

Yet right-to-die advocates may be disappointed to learn that a Charter victory will not necessarily grant access to assisted suicide in their home province. This is because Charter rights, and judicial interpretation of those rights, are largely framed in a context of "negative rights," meaning the rights are viewed as preventing government action that infringes upon individual liberties. "Positive rights" are those that would impose obligations on the government to act to facilitate or provide benefits to rights holders.

Although certain elements of the Charter promote positive rights — section 23, for example, mandates provision of official minority-language education — the Supreme Court has for the most part shied away from imposing positive obligations on government under the Charter.

There are good reasons for this judicial caution. The first concerns issues of institutional legitimacy. The Court is reticent to tell elected legislatures how they must spend tax dollars. Making difficult choices about the distribution

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of scarce resources is properly regarded as an inherently political matter. It is not consistent with the appropriate role of courts to create new policy programs or write budgets.

And while there will always be some debate about how far judges should go when interpreting the Constitution, there is a significant difference, from a democratic and legitimacy perspective, between courts imposing limits on government action and courts imposing their will on what governments must do.

The second reason for making a distinction between negative and positive rights relates to institutional competence. Judges are specialists in the law; they do not tend to make good policy analysts, economists, scientists or health experts. Unlike the executive or legislatures, courts do not have the resources of a large bureaucracy at their disposal to provide them with the necessary tools to design good policy or the evidence and analysis to fully understand the range of available alternatives.

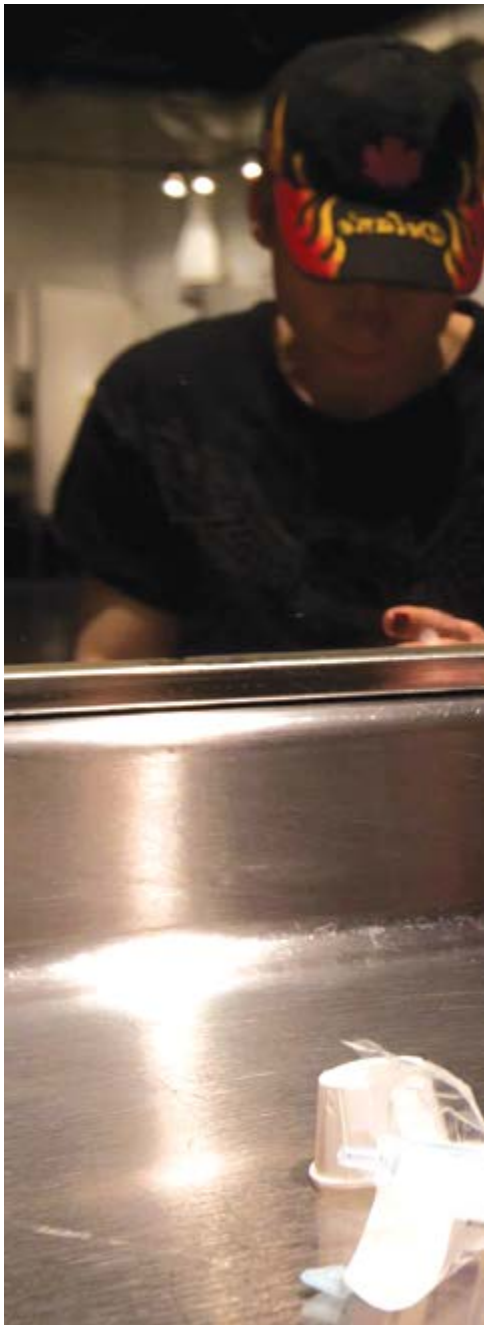
The Supreme Court routinely acknowledges this. Even when it declares some government activity unconstitutional, the Court often leaves it to the legislature to decide how to replace a given law or program. Furthermore, where the justices have delved into policy-intensive issues under the Charter and engaged in policy analysis, they have a mixed record of success with regard to their ability to demonstrate a full understanding of the issues.

In the matter of assisted suicide, a Charter decision striking down the criminal prohibition is unlikely to mandate a requirement that provinces provide assisted suicide as a medical option, as Quebec is considering. The more likely result would be a checkerboard smattering of policies across provincial lines, with unequal levels of access across Canada and no access in some provinces. We have seen this in a number of Charter cases implicating health policy, particularly the Court's well-known *Morgentaler* decision in 1988 on abortion and the *Insite* case in 2011, which pertained to the supervised injection facility in Vancouver.

Both of these cases demonstrate why a distinction between negative and positive interpretations of rights poses a fundamental problem: if you view access to certain health care programs or services as a rights issue — as proponents of assisted suicide, abortion or harm reduction do — the failure of courts to impose these positive obligations is every bit as significant a rights violation as government laws that prohibit them. The logic the Supreme Court has applied in these particular cases has thus far been unable to account for this contradiction.

In the *Morgentaler* case, a majority of the judges struck down the *Criminal Code* provisions that required women seeking an abortion to obtain approval from "therapeutic abortion committees" at accredited hospitals. Four of the judges determined that the delays and unequal levels of access that resulted from the law were unconstitutional, as they increased the potential for physical and psychological harm. Only Bertha Wilson (the sole female member of the Court at the time) found that access to abortion itself was a protected Charter right. But as Justice William McIntyre correctly noted in his dissent, the proposition that a delay in access to a service is unconstitutional would logically seem to depend on that service itself being a constitutional right.

The *Morgentaler* decision ultimately resulted in a vacuum in federal criminal law on abortion (the last significant attempt to regulate abortion famously failed in 1991 after a tie vote in the Senate). This left the regulation of abortion to the provincial sphere under health care, and to the medical profession itself. While the number of abortions performed in Canada increased dramatically following the defeat of the criminal law in 1988, access differs widely across the country. In Quebec



Legally injecting at Insite in Vancouver: it's unclear whether another province could open its own supervised facility.
PHOTO: CP PHOTO

and Ontario, abortion is generally covered under provincial health insurance plans and is available in hospitals and private clinics. By contrast, New Brunswick places considerable restrictions on access to abortion, and there are no abortion services available on Prince Edward Island at all.

In effect, the conditions the Court used for striking down the criminal law — delays and unequal levels of access — have been replaced by good access in some parts of the country and delays and unequal access in others. How is a woman from PEI, who must travel out of province (and pay out of pocket) to obtain access to the procedure, not burdened in the same unconstitutional fashion that some women were under the old therapeutic abortion committee regime? From the perspective of the courts, the difference is that the government has not erected legal prohibitions on abortion; rather, it has just not done anything to facilitate or provide access. For abortion rights advocates, this is a distinction with little meaning.

A similar logic arises in the Court's reasoning in the *Insite* case. Insite is a supervised injection facility put in place as part of a multilevel governance agreement by the federal government, the province of British Columbia and the city of Vancouver.

The federal Minister of Health provided for an exemption under the *Controlled Drugs and Substances Act* (*CDSA*) that would allow addicts to bring drugs to the facility in 2003. After the Conservative government took power in 2006 an extension was provided, but in 2008 the government announced another extension would not be forthcoming. The lack of an exemption would effectively criminalize activity at Insite and result in its closure.

In the resulting legal battle, the Supreme Court ruled that while it was within the federal government's authority under the *CDSA* to prohibit possession of illicit drugs, the decision by the minister to refuse a further exemption violated Insite users' right to life, liberty and security of the person under the Charter. The Court took into consideration evidence that the facility helped save lives and prevent the spread of disease. But in doing so, it expressly limited the scope of its ruling to Insite, leaving the *CDSA* and the provision granting ministerial discretion for providing exemptions intact. As a result, it is unclear whether the federal Minister of Health would be constitutionally obligated to provide an exemption under the Act if another province wanted to open its own supervised injection facility.

The *Insite* decision effectively means that no government can shut down this particular facility so long as drug addicts continue to use it. The Court's reasoning does not even attempt to address why the Charter prohibits the closure of a harm reduction facility in Vancouver but does not require the provision of similar facilities elsewhere. While it may be the case that the problems of drug abuse endemic to the downtown east side of Vancouver are particularly virulent, from a policy and rights perspective it is difficult to understand a constitutional standard that says Vancouver drug addicts have a right to this service but addicts in Regina or Toronto do not. This is the fruit of a distinction between negative and positive rights.

The Court's approach suggests there is little reason to expect that a Charter decision striking down the criminal prohibition on assisted suicide would produce a positive obligation to ensure it is available in all provinces. Where a province like Quebec would proceed under its health care jurisdiction to make the option available to critical patients, provinces like New Brunswick or PEI may not.

I am not sure there is a clear way out of this quagmire. Progressive legal scholars have long argued for an interpretation of life, liberty and security of the person that provides for positive social and economic rights. However, I have yet to see a convincing account of how going down that road is possible without running headlong into the democratic and institutional competence issues described above. The Supreme Court has addressed this matter in an incrementalist, piecemeal fashion, resisting a positive reading of the Charter for the most part, while leaving the door cracked open ever so slightly for such an approach in the future.

It is hard to see why addicts in Vancouver have rights that addicts in Regina don't.

To an extent, this approach is the by-product of a broader failure on the Court's part to articulate a basis for judicial review that might set definable limits for its role in policy-making. But the issue of positive rights is not going away. While there have been Charter cases launched in various provinces that sought to mandate the provision of abortion services, they have for various reasons failed to be appealed up the judicial hierarchy. So far. Whether it is in the next year or in the next decade, the Court will eventually have to confront the logical inconsistency of the negative versus positive distinction, as well as the practical and philosophical problems enforcing positive rights would pose. As, it is worth noting, will governments. ■