THE IMPLICATIONS OF SECTIONS 1, 15 AND 24 OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS ON HEALTH CARE ALLOCATION DECISIONS

by

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A thesis submitted in conformity with the requirements for the degree of Master of Laws
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Abstract

The Implications of Sections 1, 15 and 24 of the Canadian Charter of Rights and Freedoms on Health Care Allocation Decisions

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This thesis explores how sections 1, 15 and 24 of the Canadian Charter of Rights and Freedoms can and ought to serve as a framework for addressing complex public policy issues associated with allocating health care resources.

Chapter one describes the factual milieu of health policy in Canada. It explores the nature of health care policy in a pluralistic society. It also discusses the legal/political dimensions of the Canadian health care system. Chapter two examines the Charter as a source of guidance for health policy makers. It examines the implications of section 15 for allocation decisions. Chapter three is a case study, that applies section 15 analysis to women. Chapter four describes the implications of sections 1 and 24 of the Charter, general government obligations and judicial remedies. The thesis concludes with some general thoughts on the Charter and its implications for the delivery of health care in Canada.
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INTRODUCTION

Scope and Objective

The purpose of this thesis is to explore how sections 1, 15, and 24 of the Canadian Charter of Rights and Freedoms\(^1\) can and ought to serve as a framework for addressing some of the complex public policy issues associated with allocating health care resources. This study addresses such issues as the nature of the constitutional rights that individuals have with respect to decisions affecting the allocation of health care resources, the manner in which government is obligated under the Charter to allocate its health care funds, and issues that government should be considering when making decisions regarding the allocation of health care resources.

My review of the caselaw reveals that to date, the impact of the Charter on the provision of health care in Canada has been minimal. In addition, the academic literature tends not to address these issues directly. While I draw upon cases and scholarly writings concerning analogous situations, neither the cases nor the academic literature seem to provide explicit answers to the questions I consider. Accordingly, many of the issues have to be addressed at the level of principle, without clear guidance from the courts or commentators. I ask that readers approach this study as a preliminary exploration of an interdisciplinary subject, where legal analysis has only recently come on board.

This study is divided into four chapters. Chapter one describes the factual milieu of health policy in Canada. In it I explore the nature of health care policy, and the health care needs of a pluralistic society. I also discuss the legal / political dimensions of the Canadian health care system, describing the national standards government has agreed to meet in providing health care services. In chapter two I look at the Charter of Rights as a source

of guidance for health policy makers. I examine the implications of section 15 for allocation decisions. Chapter three is a case study, where I apply section 15 principles and categories in relation to women. In chapter four I describe the implications of sections 1, and 24 of the Charter, general government obligations and judicial remedies. I conclude with some general thoughts on the Charter and its implications for the delivery of health care in Canada.

Significance
The government's financing of health care service is characterized by finite resources and infinite need. Without such economic constraint most allocation decisions would be unnecessary except in situations where the needed resources were severely limited (i.e. human organ transplants). Whether the major allocation issues are framed in terms of ethics and distributive justice,2 social discrimination against the disadvantaged,3 the breaching of federal or provincial laws, or a combination of the above, it is certain that constraints on economic resources necessitate resource allocation which in turn, makes the confrontation of social, ethical and legal issues inevitable.

The money invested in Canadian health care is not the result of some comprehensive, thoroughly-designed health-care policy, but the rather the product of decisions made by federal and provincial governments, health care providers and patients.4 The decision making process is often reactive rather than planned and often perpetuates the stereotypes and narrow vision that documents such as the Charter were intended to correct. Because of time constraints and cross-pressures, may long-term social policies develop virtually

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unplanned, out of short-term contingencies. It is not uncommon for, government parties to make health care policies while focusing primarily on the next election. There are many factors which contribute to ineffective health care policy, among which is the inattention of policy makers to health care needs related to ethnicity, race, gender, physical and mental disability and age. This study is geared towards policy makers in government, lawyers, judges, health care workers and the public at large, to aid in understanding issues of resources allocation as well as the competing rights and obligations that come to the fore when governments distribute their health care resources.

While I remain skeptical about the capacity of a pluralistic society to reach a consensus regarding how health care resources must generally be allocated, I am encouraged by the fact that section 15 of the Charter provides considerable guidance to government in its task. Section 15 allows and even obligates government to allocate its health care dollars so as not to discriminate against disadvantaged persons. It also allows policy makers to use affirmative action principles in making allocation decisions.

In the context of this research, allocation will refer to setting the amounts of resources that go to health care at the expense of allocation to other purposes. It also includes dividing the health care budget into areas such as prevention, care, treatment and research, and deciding which of the various treatment regimes will be funded. This should not be confused with rationing, which refers to deciding which individuals among those with a need will get a particular health service that is in short supply. In this sense, the term "macro-allocation" applies to resource allocation, and "micro-allocation" to rationing.
The description "health care" refers to "an industry that provides a range of services and goods which may or may not be covered by government health care insurance plans."\(^5\) Health care is wider than "Medicare", a word commonly used to refer "only to those medical and hospital services which are covered by provincial or territorial public health insurance plans".\(^6\)

**FACTUAL MILIEU**

Before I explore how the law can provide guidance for specific health care policy decisions, I will describe health care policy issues in general, the inadequacy of economic analysis to this project, some political and legal dimensions of health care policy formation and more specifically, the importance of the Canada Health Act\(^7\). This chapter outlines the context in which the allocation of health care resources takes place.

**Health Care Policy**

The setting of macro-allocation health care policy begins with the understanding that government policy making plays a key role in a single payer health care system like Canada's. Government health care dollars are not unlimited, all interests cannot be satisfied and therefore difficult choices must be made. These decisions cannot rely on assumptions that may have been reasonable during times of economic wealth and which are outdated in our current era of fiscal constraint. One needs a strong foundation in what Canadians think about government funded health care and its priority relative to other values or social interests. The determination of social priorities can be seen to take place at two levels. At the first level one must try to assess how much of society's limited resources it is willing to allocate to health care. To do this one should compare the relative priority of

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\(^6\) Ibid.

\(^7\) R.S.C. 1985, c.6.
health care with other "social goods" competing for government funds. Such goods might include, public education, subsidized housing, preserving the environment, publicly funded leisure activities. This first level macro-allocation analysis usually takes place in a political arena, where government funds are distributed (at least theoretically) in accordance with society's priorities.

Once government determines a general societal consensus as to how high a priority ought to be given to health care as compared with other social goods, it must determine how to distribute the assigned resources amongst the many areas of health care delivery. Making just and equitable policy choices at this second level is the difficult task of allocating limited resources amongst infinite need. Government must decide what proportion of the health care budget should be allotted to, for example primary care and preventive medicine, as compared to high technology curative medicine. Policy decisions should take into account the trade-offs involved in the various possible funding schemes and should reflect the views and priorities of the general public and health care providers.

In making a prioritizing policy decision, one must first consider the objectives and the values the policy is intended to promote. The importance of this undertaking is explained by Brewer and de Leon in their book "The Foundations of Policy Analysis":

The initiation stage provides an important opportunity to address and define policy objectives or goals directly. The objectives will determine what priorities are assigned, and what policies are selected, provide guidelines for the implementation of the chosen programs, and determine the criteria for program evaluation. Thus, the determination of policy objectives is fundamental to the policy task. That objectives are too often left vague or ambiguous - or even not considered at all - may explain why so many programs flounder, as if they had no clear direction or purpose. Without clear objectives, they do not.8

Although setting health policy goals and objectives is difficult, especially in the early stages of discussion, it is critical to making focused decisions and guarding against unintended effects. Before any commitment of resources is made, major priorities should be set based on clearly stated policy objectives. With regard to general objectives of the health care system, there is general consensus as to the desirability of improved rates of infant mortality, increased access to primary care, and improvement in quality and longevity of life. Unfortunately, satisfying these objectives may conflict with each other and, inevitably, with the satisfaction of other societal needs. Any proposed framework for making allocation decisions will likely lead to criticisms from those who are not given priority. While prioritizing is not a new endeavor for government, the fact that this decision making process has not been well publicized until recently, may have prevented it from becoming a popular social issue.

While there is a great need for clear and consistent policy objectives to deal with the issues in health care, their formulation is difficult given the complex cultural, social, and political context of health care. In a pluralistic society, there are many conceivably legitimate, but contradictory goals, especially on issues as fundamental as the allocation of health care resources. Furthermore, because these issues are not easily amenable to bargaining and compromise, reaching a reasonable balance among the competing goals presents a great challenge. Much of the difficulty in making allocation policy decisions stems from conflicting goals or values. For example, some of the competing values which influence health care policy to varying degrees in all societies are individual freedom and choice; social or public good; scientific and technological progress; quality of life; human dignity; efficiency; social stability; and differing concepts of justice, themselves based on goals of equity, entitlement, or need. Public and government reactions to specific health care policies vary substantially depending on which social values are held.
Unless we address the complexities associated with making difficult decisions we are accepting the status quo as the decisionmaking framework for the future. While there is little likelihood of any pluralistic society reaching a consensus on long-term goals in an area as sensitive and divisive as health care, I strongly support the many recent scholarly attempts to address these issues. While acknowledging the overwhelming nature of the task, Carey contends that we must "design and pursue integrated national goals" regarding science and technology problems that are "outpacing the quality and intensity" of our current responses "by widening margins".9 Lowrance criticizes the current tendency to define risk and set priorities without first designating "preferred societal goals".10 Rettig explains that the "task of forging political consensus about major national strategies" must be of "high priority in all quarters of the interested public".11 Wenk reminds us that technology is interwoven with human culture and social institutions, and that our goals are critically affected by a combination of those forces.12

Once the objectives are reached, the various policy options should be canvassed. Although the possibilities introduced at the early stages of policy development will be tentative and subject to amendment, the initial exploration of reasonable options must be carried out while identifying the issues and determining policy objectives. When allocating health care resources, it is helpful to investigate options at an early stage in the process. An early start gives time to incorporate input from all relevant participants as to the advisability of different courses of action. It also takes time to address the implications of

the many research and development decisions that precede them, in some cases by decades.

Rather than aiming for "the view from nowhere", justice...may be more clearly illuminated by assuming "the view from everywhere", i.e. attempting to place ourselves in the shoes of all persons directly affected by our commitments. We need ... to fashion intermediate or bridge principles...from abstract and foundational principles to more specific robust notions of just action.13

Economics of Health Care in Context:
A mass of literature relevant to issues of allocating health care resources has built up in recent years. When read as a whole it suggests the near impossibility of a totally just and uncontroversial solution. Ideally, resources should be allocated so as to provide all those in need with access to adequate health care. Real life constraints make this goal difficult to achieve. There are no easy ways to decide the relative importance between, for example, prevention, the avoidance of suffering or the prolongation of life. Following this decision, one must assess the extent of the priority chosen. If morbidity as a whole is taken as the priority, the alleviation of heart disease and cancer may be given priority. If on the other hand, one calculates total hospital inpatient days, mental health may be the single most important consideration. But to say that mental health and heart disease or cancer constitute the most serious burdens on a Ministry of Health budget is not necessarily to say that they merit the greatest allocation of resources. Some commentators have argued that the nature of the population affected must be factored into the formula - i.e. an economic incentive to apply some sort of "productivity test" in distributing the resources of society.

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While the current emphasis in health care policy seems to revolve around questions of cost containment\(^1\), issues of equity and quality must not be overlooked.\(^2\) A well established characteristic of Canadian culture, seems to include the assumptions that quality care should be available to the entire population and that individuals should not suffer needlessly for want of health care. While this concept of a right to health care is not necessarily egalitarian it does make it difficult to ignore arguments for equity in the allocation of health care resources. Although the gap between the theory and the practice of equity considerations remain wide, it is unlikely that equity can be neglected as a value to be pursued in designing acceptable health policy. For this reason, any policy that depends exclusively on cost effectiveness or cost-benefit rationales without considerations of equity, or, to a lesser extent, of quality, will be inappropriate for a characteristically Canadian health care system.

When allocating scarce health care resources, applying strict economic theories associated with other goods and services will likely be ineffective, and may even be counter productive.\(^3\) The provision of health care services, inherently, involves decisions for which pricing alone is problematic. Price mechanisms do not account for social values. Even where individual values are concerned, price mechanisms can only account for values reducible to discreet monetary amounts. With regard to preserving life, enhancing quality of life, especially where comparisons between people are necessary, such discreet economic calculation is inadequate. The victims from the allocation of scarce health care resources frequently are casualties of antecedent inequalities, i.e. their lower socio-economic status as well as their lack of education and information result in poor general

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health care in the first place. It is the difference between what one could call a "just" or "fair" policy of allocating scarce resources and a policy which is merely said to maximize its overall benefits. By that I mean that a health care system spending less than it might otherwise, can result in an overall higher level of health by concentrating the bulk of its health services on the most privileged segments of society.

To search for efficiency-enhancing allocations of scarce medical resources on strictly economic grounds is to risk missing the full picture:

...to begin an exploration of alternative proposals for the reform of our health system without first setting forth explicitly, and very clearly, the social values to which the reformed system is to adhere strikes this author at least as patently inefficient: it is a waste of time. Would it not be more efficient merely to explore the relative efficiency of alternative proposals that do conform to widely shared social values?

Government policy makers must not view the problem of allocating health care resources as merely an of cost containment. The first step in improving the allocation of scarce health care resources in Canada must take place at the normative level. Given Canada's interest in cost containment, it must establish a principled approach for the development of value-based criteria for the allocation of scarce health care resources, criteria consistent with if not promoting Constitutional values (e.g. Charter section 15).

**Political and Legal Dimensions of Health Care**

In this chapter I explore some of the political and legal dimensions of macro allocation decisions in health care. I discuss the political dimensions of equality and begin to describe the legal content of the equality right in terms of health care. I specifically look to section 7 of the Canada Health Act for insight.

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Political Dimension:
While the basic concern underlying distributive justice and, presumably, national standards, is the fair share that each individual receives from Canada, and while political and moral philosophers agree that fairness should be grounded in equality, independent of legal definitions, there is considerable debate about what constitutes equality.\textsuperscript{18}
Depending on whether one favours equality of resources, equality of opportunity, equality of welfare, equal access to advantage, democratic equality, equal basic capabilities, or equality of respect, the case one makes for institutional arrangements will be different.
While equality, at a most abstract level is generally accepted as a Canadian goal, it is not yet a reality. Disabled people, racial and ethnic groups, women and others continue to be disadvantaged from enjoying valued social goods such as dignity, respect, access to resources, physical security, membership in community and power available to the advantaged\textsuperscript{19}.

Some of the implications of decisions made at the political level are that persons with similar needs are not always provided with similar services. This sometimes is a consequence of the particular disability with which they are identified. For example, it has been observed that access to community-based services is more limited for persons with psychiatric disabilities than for those with other disabilities. Differences in services may also be a consequence of the age of the disabled person. Access to certain programs are sometimes dependent upon the age of the client, as is the case with homes for the aged, even though persons who are not eligible for admission to such programs may have identical needs for the service offered.

\textsuperscript{19} H. Orton, "Section 15, Benefits Programs & Other Benefits at Law: The Interpretation of Section 15 of the Charter Since Andrews" (1990) Legal Education and Action Fund. [unpublished] [hereinafter Benefits]
The inequality of services may be aggravated as well by the variety of ministries called upon to administer various programs. This results in both overlaps and gaps in the provision of services. Under the terms of Ontario Homes for the Aged and Rest Homes Act, municipal homes for the aged were operated by regional governments, counties, cities or district boards. A proportion of the costs of this service was provided by the Ministry of Community and Social Services. By contrast, nursing homes, chronic care units and hospitals were funded by the Ministry of Health. Although the needs of both sets of clients may be similar, different funding formulae are applied to the provision of services in these settings. Differences also exist with respect to the eligibility criteria. For example, homemaker services are provided by the Ministry of Health under its Home Care program, eligibility for which does not require a financial test. By contrast, there is a needs test associated with some of the homemaker services under the jurisdiction of the Ministry of Community and Social Services.

Nor are services evenly distributed across the province. The reasons for this are many: a political decision to introduce a program in one area of the province but not in another; the establishment of the service being a function of municipal discretion (as in the case of homemaker and nursing services under the Homemaker Services Act); varying eligibility conditions, including income tests, depending on the part of the province in which the service is offered; the differentiation in access between urban and rural settings.

Legal Dimension:

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20 Homes for the aged were municipally run and funded by COMSOC subject to a 70/30 cost sharing agreement between COMSOC and the municipalities. The result was a subsidy to the homes for the aged of approximately $69 per resident per day. However, under the Nursing Homes Act, R.S.O. 1980, c.320, nursing homes were funded by the Ministry of Health, and received a subsidy of approximately $39 per resident, per day.
What guidance can the law provide in the allocation of scarce health care resources? Does it address questions such as what resources will be made available, to whom will they be made available and who will make these decisions? A significant hurdle is the fact that our present health related laws are not well suited to serve as a source of guidance to society in making these difficult decisions. Our common law and much of our statutory laws were created as a time when health care allocation was not an issue and were based on the supposition that health care decisions would always be made on the basis of what is technologically possible. Our laws are based upon a fundamental proposition that equal access to medical care is a right and until recently, it seemed reasonable to assume that it was unacceptable for anyone to be denied health care for any reason other than it was medically unnecessary.

While there are many statutes that shape our notion of equality and in turn may have implications for allocation decisions, this thesis will concentrate primarily on the Charter and secondarily how it informs the Canada Health Act. The Canada Health Act will be discussed in relation to section 15 of the Charter. In defining the content of the rights in the Canada Health Act, the criteria of the Charter may be invoked to determine which legal rights to health care currently exist and to establish our national commitment to publicly funded quality health care for all persons. The criteria of the Canada Health Act represent the minimum standard of health-care benefits voluntarily assumed and recognized by both the federal and provincial/territorial governments. The Charter may be useful in defining the abstract criteria of universality, accessibility, and comprehensiveness found in the Canada Health Act.

Under Canada's current constitutional arrangements, matters of health fall primarily within provincial jurisdiction. Provinces have the legislative right to control most aspects of health care within their borders, even though the federal government retains some limited
legislative authority over health matters with a national dimension or which raise issues of public morality and safety.

Powers of the Parliament
91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,-

(1A) The Public Debt and Property.
(3) The raising of Money by any Mode of System of Taxation.
(27) The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the procedure in the Criminal Matters.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Exclusive Powers of Provincial Legislatures
92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, -

(7) The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
(13) Property and Civil Rights in the Province.
(16) Generally all Matters of a merely local or private Nature in the Province.21

The effect of this provincial autonomy is the potential for inconsistent allocation priorities and policy across the country.

21 Constitution Act, 1867, U.K., 30 & 31 Victoria, c.3, sections 91 and 92.
The legal foundation of our national health care system is primarily based on two statutes: the Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act\textsuperscript{22} and the Canada Health Act.\textsuperscript{23} The first outlines the federal-provincial cost sharing arrangements, financial matters, and transfer payments. The second, the Canada Health Act, outlines the federal/provincial cost-sharing agreement on health care. Under its terms, provincial governments only receive full federal payments if they comply with the requirements and criteria established in the Canada Health Act. The receiving of federal funds is made dependent upon provincial compliance with federally imposed terms and conditions. A conditional grant, by definition, imposes conditions and the natural consequence of any federal cost-sharing program is federal influence within areas of provincial jurisdiction. The result is that this cost-sharing program gives the federal government influence within areas of primarily provincial jurisdiction.\textsuperscript{24} This is an unusual example of constitutional law where the federal government may spend where it cannot legislate but provinces are, in theory, free to accept or reject the federal funds. If they accept the federal money they are taken to have accepted it subject to the attached federal stipulations.\textsuperscript{25}

The underlying philosophy of the Canada Health Act is that all residents are entitled to reasonable access to, medically necessary health services. Medically necessary services are provided based on people's medical need and not ability to pay. Through the tax

\textsuperscript{22} R.S.C. 1985, c.F-8.
\textsuperscript{23} R.S.C. 1985, c.6.
\textsuperscript{24} For an overview of how the Act operates, its limited utility to private complaints, but its potential of joined with the Charter see S. Martin, Women's Reproductive Health, The Canadian Charter of Rights and Freedoms and the Canada Health Act (Ottawa: CACSW, 1989). [hereinafter Reproductive Health]
\textsuperscript{25} When a provincial decision contravenes the criteria in the Canada Health Act, the province may be acting illegally. It is important to remember that because provinces have jurisdiction over health matters, they may either accept of reject the federal funds and the federal stipulations outlined in the Canada Health Act. Therefore, there would be no cause of action if the province chose not to insure certain medically necessary services and received less federal money as a result. However, there may be cause for complaint where a province is claiming and receiving full federal contribution at a time when it is contravening the Act's criteria.
system, individuals prepay for medical services. The criteria in the Canada Health Act are framed in wide terms and are intended to establish broad norms of social justice. For example, section 3 states:

It is hereby declared that the primary objective of Canadian health care policy is to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers.

The preamble to the Canada Health Act is equally explicit that "continued access to quality health care without financial or other barriers will be critical to maintaining and improving the health and well-being of Canadians." While the goals of the Act are clear, and are reflected in the five criteria of comprehensiveness, reasonable accessibility, universality, portability, and public administration, these criteria are problematic. First, they are undefined and their ambiguity allows them to be used by different people to mean radically different things. Second, these legal norms are virtually impossible for a private citizen to enforce, even when a provincial plan fails to meet each of these criteria and is in breach of the Canada Health Act.26. By way of remedy, the Act merely gives the federal Minister the option, not even the obligation, of fining an offending province. The Act does not itself suggest that individuals can either enforce its protections or claim compensation if their province fails to supply comprehensive, reasonably accessible, comprehensive medically necessary services.27

**The Canada Health Act**

The section 15 equality provision may be used to give content to the criteria of the Canada Health Act. To judicially enforce the legislated criteria contained in the Canada Health

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26 For a further explanation see Reproductive Health, supra, note 24.
27 There may be other arguments available. Citizens could invoke the Charter or administrative law principles in some cases. There may even be a claim for unjust enrichment under private law concepts of it can be shown that the province is receiving an improper benefit when its residents are forced to individually bear the costs of their medical treatment.
Act would not create a new government liability. The court would not be imposing a new positive obligation on provincial governments, it would merely be enforcing an undertaking which they assumed voluntarily and under which they receive the benefit of full federal financial contributions. Consequently, the criteria in the Charter can be incorporated into the Canada Health Act analysis as the governments recognition of the minimum level of health care benefits it must fund. Therefore, section 15 can be used to reinforce the provinces requirements to provide health care services on equal terms and conditions.

The Canada Health Act sets out the terms and conditions according to which provinces must provide medical services before they qualify for full federal payments under the federal/provincial cost sharing program established for health care in Canada.

7. In order that a province may qualify for a full cash contribution referred to in section 5 for a fiscal year, the health care insurance plan of the province must, throughout the fiscal year, satisfy the criteria described in sections 8 to 12 respecting the following matters:

(a) public administration;
(b) comprehensiveness;
(c) universality;
(d) portability; and
(e) accessibility.28

A provincial plan which fails to meet even one of these criteria is in breach of the Canada Health Act. While theoretically, these criteria are independent and cumulative; in practice, the combination of legislative goals and vaguely framed criteria results in considerable overlap. Because of this overlap, a purposive and contextual interpretation emphasizes that certain types of provincial conduct may contravene more than one criterion and, therefore, breach more than one section. Because none of the five criteria is expressly

28 Canada Health Act, R.S.C. 1985, c.6 s.7.
defined in the Act, each criterion must be interpreted according to the natural and ordinary meaning of the words used, the presumed intention of the legislators, and a purposive interpretation which is consistent with the other sections and reading of the Act as a whole. Therefore, whether a provincial plan contravenes the Canada Health Act will depend primarily upon the proper interpretation and scope of these criteria.

Comprehensiveness:

Section 9 of the Act\(^{29}\) states that, to be comprehensive, a province's health care insurance plan must cover all "insured health services" provided by hospital and medical practitioners. This important term refers to those hospital services and physician services provided to insured persons, who are defined as residents in the province.\(^{30}\) The statutory criterion of comprehensiveness seems to require that the province insure medical services provided to its residents. Even in cases such as Tetrault, Schacter,\(^{32}\) Askov,\(^{33}\) and Manitoba Language\(^{34}\) where the Court required government to act in positive ways, the court did not specify precisely what policies the government needed to adopt.

There are at least two ways of interpreting section 9. The first interpretation of "comprehensiveness" grants the province the latitude to exclude many services. In deference to provincial jurisdiction over local matters, "insured health services" may mean only those services which have been formally designated as such by the province. According to this argument, there is no normative content to the term "insured health services" and the province must only insure the medical services it actually decides to

\(^{29}\) "In order to satisfy the criterion respecting comprehensiveness, the health care insurance plan of a province must insure all insured health services provided by hospitals, medical practitioners or dentists, and where the law of the province so permits, similar or additional services rendered by other health care practitioners." (1984, c.6. s.9).

\(^{30}\) Canada Health Act, R.S.C. 1985, c.6 s.2.


\(^{32}\) Askov et. al. v. The Queen [1990] 2 S.C.R. 1199 (S.C.C.) [hereinafter Askov].

\(^{33}\) Schacter v. Canada (1992) 20 C.C.E.L. 301 (S.C.C.) [hereinafter Schacter]

\(^{34}\) Reference Re Manitoba Language Rights, [1985] 1 S.C.R. 721 [hereinafter Manitoba Language].
insure for its residents. The concept of "insured health services" becomes the federal concept that individual provinces are free to define as they see fit. This interpretation is a weak one because, if accepted, no provincial system could be anything but "comprehensive". If the province need only insure the services it has decided to insure, then its system could never be underinclusive. An alternative interpretation must be sought because this one tends to make the words superfluous, or meaningless.

A second interpretation is that comprehensive coverage requires at least some minimal level of services. It seems that only when comprehensiveness has such a normative content are the health needs satisfied and the goal of universally accessible medical services achieved. This approach to comprehensiveness is consistent with Emmett Hall's Health Charter for Canadians35 and the report of the Royal Commission on Health Services.36 Both of these documents helped lay the foundation for our current national health care system and the criteria enunciated in the Canada Health Act37. In the Health Charter, "comprehensive" was defined to mean "all health services, preventive, diagnostic, curative and rehabilitative, that modern medical and other sciences can provide".38 Similarly, the Royal Commission thought the following types of programs would be required in a comprehensive system: medical services, dental services for children and expectant mothers and public assistance recipients, prescription drug services, optical services for children and public assistance recipients, prosthetic services, home-care services, and mental-health services. This list of services supports the widest possible coverage and appears to have been intended under the concept of comprehensiveness.

37 See M.G. Taylor, Health Insurance and Canadian Public Policy - The Seven Decisions that Created the Canadian Health Insurance System and Their Outcomes, (2nd ed.) (McGill - Queen's University Press: Kingston, 1987).
38 Health Charter, supra, note 35 at 11.
Emmett Hall's 1980 national study on the health care system concluded that extra-billing by physicians violated this criterion because "[a] program whose benefits do not meet the full costs of the services provided can in no way be considered comprehensive..." 39 This conclusion also suggests that comprehensiveness requires provinces to insure more than what they have decided to pay for.

An interpretation which ensures that at least the basic requirements of the person in need are satisfied is consistent with the principle that a court, faced with general language or contending interpretations arising from ambiguous statutory language, should adopt an interpretation which best assures adequacy of assistance. 40 This principle has been applied in a number of social welfare cases. For example, in Abrahans v. Attorney General of Canada, the Supreme Court stated:

Since the overall purpose of the Act is to make benefits available to the unemployed, I would favour a liberal interpretation of the re-entitlement provisions. I think any doubt arising from the difficulties of the language should be resolved in favour of the claimant. 41

In Kerr v. Metropolitan Toronto (Department of Social Services, General Managers) 42, the Ontario Court (General Division), Divisional Court said:

The price of ambiguity in a social welfare statute is that the ambiguity will be resolved in favour of the applicant. 43

In the United States, courts have adopted the same principle. In Brown v. Bates 44 it was stated that:

39 E.M. Hall, Canada's National-Provincial Health Program for the 1980's (Ottawa Health and Welfare Canada, 1980) at 41.
40 In the context of this discussion, "assistance" is analogous to health care.
43 Ibid at 445.
The Court does not believe Congress chose by enactment of the Work-Study program to draw the cycle of poverty tighter, but rather was attempting to break its bonds upon untrained poor. The Court will not allow the defendants to defeat this beneficent purpose by their own interpretation of the law, especially when that interpretation, however faithful it may be to the letter of the law, totally defeats the spirit of the law, and services only a sterile administrative purpose.45

In the context of our discussion, the interpretation which best accords with the spirit of the Canada Health Act, is that comprehensive coverage requires at least some minimal level of services.

In moving from abstract theory to concrete policy, the normative content of what ought to be covered by a comprehensive scheme may be determined by considering:

. which medical services are actually provided in the province;
. whether the service is provided and insured in other provinces;
. the importance of the service to the people who require it; and
. the consequences of de-insuring the service on both its availability and the burden imposed on those people who will be forced to pay for it.46

Accessibility:

The Canada Health Act's criterion of accessibility focuses on how services must be provided and is also important to allocation decisions. In some cases there is significant overlap between the criteria of comprehensiveness and accessibility because, in one sense, an uninsured medical service is inaccessible to some. Section 12(1) of the Act outlines the criteria for accessibility:

12(1) In order to satisfy the criterion respecting accessibility, the health care insurance plan of a province
(a) must provide for insured health services on uniform terms and conditions and on a basis that does not impede or preclude, either directly or indirectly whether by

45 Ibid at 902-03.
46 Reproductive Health Care, supra, note 24 at 13.
charges made to insured persons or otherwise, reasonable access to those services by insured persons;
(b) must provide for payment for insured health services in accordance with a tariff or system of payment authorized by the law of the province;
(c) must provide for reasonable compensation for all insured health services rendered by medical practitioners or dentists; and
(d) must provide for the payment of amounts to hospitals, including hospitals owned or operated by Canada, in respect of the cost of insured health services.

Access implies an absence of financial, geographical, and regulatory barriers. To the extent that the Canada Health Act is Canada's "charter of health rights", this provision may be seen as its guarantee of equality and non-discrimination. Therefore, it can be expected to raise issues of approach and interpretation similar to those which arise under section 15 of the Canadian Charter of Rights and Freedoms.

There are two aspects to subsection 12(1)(a) of the Act: first, the provincial plan must provide the insured health services on uniform terms and conditions; second the province cannot use its powers over health care to impede or preclude reasonable access to medically necessary services. In relation to the first, how the term "uniform" is defined and the choice of which insured health services must be uniformly available determines the content and extent of this protection.

In the Concise Oxford Dictionary, "uniform" is alternatively defined to mean not changing in form or character, constant, conforming to some standard or rules or pattern.\(^\text{47}\) An approach to "uniformity" based on complete conformity would merely seem to require formally identical treatment. Accordingly, as long as each insured service is available on the same terms and conditions the section would not be breached. For example, a provincial law requiring either the approval of a second physician for all abortions or that all abortions be performed in a hospital would meet the requirement of accessibility as

long as there was conformity within the designated class, i.e., that all abortions were available on identical terms. Under this approach, there would be no comparison outside the category of the procedure involved and no inquiry into the impact of the requirements imposed. If this is all the requirement of uniform terms and conditions means, then the criteria of accessibility would only operate to prevent the most blatant examples of different treatment, such as one rule for men and one rule for women or variable terms and conditions for those in urban and rural areas.

The Supreme Court's recognition that true equality may require more than formally identical treatment supports a larger and more liberal interpretation of the concept of uniformity.48 A reasonable reading of "uniformity" would require the similar treatment of like medical procedures or the more result-oriented standard of an equal availability of medically necessary services. As many commentators and courts have cautioned, restricting equality to formally identical treatment often reinforces existing inequities.49 A gender-neutral interpretation may actually interfere with the goal of quality health care for all if it does not accommodate the unique health care needs of different health care consumers.

Universality, Portability, and Public Administration:

The remaining criteria of public administration50, universality51, and portability52, contained in sections 8, 10 and 11 of the Canada Health Act may also serve as a source of

50 In order to satisfy the criterion respecting public administration, (a) the health care insurance plan of a province must be administered and operated on a non-profit basis by a public authority appointed or designated by the government of the province; (b) the public authority must be responsible to the provincial government for that administration and operation; and (c) the public authority must be subject to audit of its accounts and financial transactions by such authority as is charged by law with the audit of the accounts of the province." (1985, c.6 s.8).
guidance to those making allocation decisions. The "universal" coverage protected in section 10 of the Act was defined by the Royal Commission in 1964 to mean "that adequate health services shall be available to all Canadians wherever they reside and whatever their financial resources may be, within the limitations imposed by geographic factors". Inconsistent provincial access may therefore infringe this principle. Variable provincial tariffs and the rate at which one province will pay for services performed in another province may also raise issues concerning the criterion of portability.

In addition, as basic federal statutes, the Canada Health Act and the Fiscal Arrangements Act have no special legal significance, and either can be unilaterally amended or repealed by the federal government. A recent decision of the Supreme Court of Canada held that it was lawful for the federal government to unilaterally terminate its payments under a cost shared funding arrangement for welfare services. Similarly, health care arrangements have no constitutional status and can be changed or terminated. Under this arrangement the influence of the federal government is based on its status as banker. The result is that when federal funds cease, so does federal influence and the legal basis for national

51 "In order to satisfy the criterion respecting universality, the health care insurance plan of a province must entitle one hundred per cent of the insured persons of the province to the insured health services provided for by the plan on uniform terms and conditions." (1985, c.6, s.10).
52 "(1) In order to satisfy the criterion respecting portability, the health care insurance plan of a province (a) must not impose any minimum period of residence in the province, or waiting period, in excess of three months before residents of the province are eligible for or entitled to insured health services; (b) must provide for an be administered and operated so as to provide for the payment of amounts for the cost of insured health services provided to insured persons while temporarily absent from the province on the basis that (i) where the insured health services are provided in Canada, payment for health services is at the rate that is approved by the health care insurance plan of the province in which the services are provided, unless the provinces concerned agree to apportion the cost between them in a different manner, or (ii) where the insured health services are provided out of Canada, payment is made on the basis of the amount that would have been paid by the province for similar services rendered in the province, with due regard, in the case of hospital services, to the size of the hospital, standards of service and other relevant factors; and (c) must provide for an be administered and operated so as to provide for the payment, during any minimum period of residence, or any waiting period, imposed by the health care insurance plan of another province, of the cost of insured health services provided to persons who have ceased to be insured persons by reasons of having become residents of that other province, on the same basis as though they had not ceased to be residents of the province. (1984, c.6, s.11).
53 Royal Commission vol. 1, supra, note ? at 11.
standards can be expected to disappear. There are signs that the process of federal withdrawal has already begun. At the national level, there appears to be less commitment to the goal of a federal Medicare system than any time in recent memory. The Minister of National Health and Welfare recently said that the "asymmetrical application" of the Canada Health Act would not be viewed as legally or politically problematic. He was speculating about the possibility that Quebec would be allowed to charge a $5.00 user fee in hospital emergency departments. In addition, in the name of fiscal responsibility and deficit reduction, cash transfers to the province to support health care will virtually disappear in the coming years. The National Council of Welfare predicts that as a result "Medicare will be effectively dead as a national health care system."

The end of Canadian Medicare would be unfortunate, even if it could be achieved by overt and democratic means. Our national health care system has been described as "the social institution which suits us best." Our Medicare system is often at the core of our collective claim that we are a kinder and gentler people than our neighbors to the south. Emmett Hall, the Supreme Court Justice who wrote the two leading reports on health care in Canada, said at a recent conference:

we are aware that the trauma of illness, the pain of surgery, the slow decline to death, are burdens enough for the human heart to bear without the added burden of medical or hospital bills - penalizing the patient at the moment of vulnerability. The Canadian people determined that they should band together to pay hospital and doctor bills while they were well and income earning. Health services were no longer to be items bought off the shelf, and paid for at the checkout counter. Nor was their price to be bargained for at the time they were sought. They were a fundamental need, like education, which Canadians must meet collectively and pay for through taxes.

55 Ottawa Letter, Vol.XX, No. 18 at 155.
56 Council of Welfare, supra note 5.
57 M. Begin, Medicare: Canada's Right to Health (Montreal: Optimum, 1988) at 100.
58 Royal Commission, supra, note 36.
POLICY GUIDANCE FROM THE CHARTER OF RIGHTS
The purpose of this chapter is to outline the relevance of the Charter to this study. The
first section describes the Charter as somewhat of an "umbrella" document as a unifying
set of national standards. The second section explores the debate over the utility of the
Charter and in particular, section 15, in advancing social struggle. The third section
distinguishes between two perspectives on the Charter, both of which are relevant to the
scope of government's constitutional obligations. Finally, the fourth section provides an
overview of the basic interpretive framework set out by the courts in the caselaw.

A National Document
Federal legislation affecting health care policy suggests that the goals and priorities we
formulate concerning the allocation of health care resources must be national in scope.
They must reflect both the extent to which health care is funded at the federal level, and
the nationwide implications of allocation and rationing policy, which reach beyond
provincial, regional or local borders. While local standards might be useful in outlining the
parameters of certain policies, the fundamental questions raised by health care issues must
be dealt with at the national level.

Because federalism involves a distribution of responsibilities among at least two levels of
government, the Charter assumes a vital role in defining the nature of that distribution and
serves as a reference point for the settlement of disputes or disagreements. The Charter is
important to Canadians as a source of certain fundamental rights and principles. These
rights are especially important to minorities within the wider population as a source of
protection against the abuse of power by the majority which may be inclined to ignore the rightful claims of the minority, either willfully or simply through blindness of neglect.\textsuperscript{60}

While the Charter is of great importance to Canada we must be mindful of its abilities and limitations. It cannot bear the burden for all our allocation questions. The framers of the Charter could not foresee all social policy issues. Canadians cannot and should not look to it for all the answers to our health care policy questions. What the Charter can do is establish the ground rules, the framework, the goals and the spirit in which we can address the essential task of allocating resources.

A constitution is more than a legal document. It reflects both who we are as a society and who we would like to be. Inclusion of certain rights and principles in the constitution says a great deal about their stature and importance; omission of others has the same effect. The Charter guarantees the right to equality and provides protection against discrimination by government. It also endorses the adoption of special affirmative measures to redress persistent inequalities\textsuperscript{61}. Clear guidelines about the appropriate scope, content, and nature of such equity initiatives however have not been provided. Given this vagueness, courts and adjudicators are being asked to fill in the gaps left by legislators. Increasingly, the interrelationship between equality guarantees and specific statutory and constitutional provisions regarding affirmative action is being litigated. Though judicial involvement can be enormously helpful, and is perhaps ultimately unavoidable in a Charter era, it is nevertheless of critical importance for legislatures and policy-makers to confront the questions challenges and problems associated with equity initiatives.

\textsuperscript{60} A Renewed Canada - The Report of the Special Joint Committee of the Senate and the House of Commons, Chairmen, Hon. G. Beaudoin and D. Dobbie (Queen's Printer, Ottawa, 1992) at 12.

\textsuperscript{61} See sections 15(1) and (2) Charter, supra, note 1.
Notwithstanding the theoretical potential of section 15 to assist people in asserting claims to equality rights, the reality is that the Charter has not produced many gains for people during the first eleven years of its existence. The literature suggests that this is not the result of deficient wording, but rather is a reflection of four other factors:

1. governments' unwillingness to undertake progressive law reforms voluntarily
2. lack of access by poor people to the resources necessary to engage in the litigation process,
3. regressive, anti-egalitarian positions advanced in the courts by governments, and
4. judicial insensitivity to the problems of group disadvantage.\(^{62}\)

**Questioning Utility**

Over the past eleven years activists and academics have debated the utility of the Charter in advancing progressive social struggle.\(^{63}\) On the one side are those who argue that constitutional rights are of little use, in the development and success of social struggles. They argue that while the constitutional rights of liberty and equality seem reasonable at the theoretical level, the judiciary is unlikely to give them progressive content because of conservative attitudes and beliefs. They also argue that even if courts were inclined to give progressive content to the rights, the cost of litigation is prohibitive for most people who wish to pursue remedies for rights violations. They also argue that the libertarian form of constitutional rights prevents their being put to progressive use - providing individuals with protection from state coercion but ignoring the unequal social relations in which they live. Some commentators have pointed to the irony that while the rights protect individuals from the state, it is the state, through social programs and regulation,


\(^{63}\) See M.D. Connelly "Confronting the "Rights" Issue in Health Policy" (1991) 72(9) Health Progress at 12-16.
that protects individuals from the more flagrant forms of social inequality, exploitation and suffering that might otherwise be the result of market relations. (for example health care system in the United States). Finally they are also concerned that rights discourse legalizes social issues outside as well as inside the courts, reformulating them in abstract and individualistic terms to the detriment of progressive politics.

On the other side of the debate, are those who defend the utility of rights in advancing progressive social struggle. They contend that, while judges might be conservative, so too are officials throughout government, that judicial conservatism is only one example of the more general conservatism of state personnel, not a special case. Similarly, they rebut the argument that the costs of litigation are prohibitive by pointing out that the same can be said about lobbying government agencies. Therefore, neither arguments about judicial conservatism nor arguments about access to justice demonstrate that rights litigation is necessarily any worse than other means of social advancement available to progressive groups. They are not persuaded by arguments that point to the limiting effects of the libertarian form of rights, maintaining that protection from the state is important for progressive struggles, especially at a time when state authoritarianism, usually under the guise of law and order, is on the rise. They also argue that abstraction, individualism and antistatism are not necessarily formal attributes of rights; the concept of rights can be, and has been, understood in collectivist, social and positive terms, making rights an important strategy for those involved in social struggles. Finally, they contend that the availability of rights discourse is important not only in the court but in the political and social arenas for motivating, organizing and mobilizing groups involved in social struggle.64

Looking at section 15 cases themselves, there have been several good outcomes from the perspective of groups seeking equality. For example, with respect to the right to vote for persons with some mental disabilities there was Canadian Disability Rights Council v.  

64 Ibid.
Canada65, in R. v. Swain66 the procedures regarding persons found not guilty by reason of insanity, in Tetreault-Gadoury v. Canada (E.I.C.)67 the payment of unemployment insurance benefits to persons over the age of sixty-five when they were otherwise qualified. In recent lower court decisions, in a case called J.C. v. Forensic Psychiatric Services68 there was a determination that equal treatment facilities must be made available to women as are available to men, and in a case called Manitoba Health Care Unions v. Bethesda Hospital69 a decision that an arbitrary cap in legislation on amounts payable under a pay equity plan should be removed. As well, the potential of Andrews is significant. Its approach recognizes that disadvantage is what the equality principle is about, that the purpose of section 15 is the alleviation of disadvantage.

The section 15 right to equality has been important beyond section 15 cases. The statement in section 15, that every individual is equal before and under the law and entitled to the equal protection and equal benefit of the law without discrimination based on the list of grounds and those analogous to them, states a fundamental norm of equality between the sexes, among racial groups, religious groups etc., that was not previously not present in Canadian law. The existence of the equality rights has expressly assisted the court in a number of the Charter cases, and has implicitly assisted in others. For example, it helped in determining the interpretation of freedom of expression in both R. v. Keegstra70 and R. v. Butler71. Implicitly, commentators have suggested that the existence

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of sections 15 and 28 of the Charter assisted the Court in determining the scope of the section 7 right to security of the person and liberty in R. v. Morgentaler.

By proclaiming the Charter, Canadians have made rights a central part of their political discourse. As well, rights discourse has become an increasingly common feature of international politics. In this context, it seems unrealistic to imagine political discourse without a rights dimension. As Brody explains, the challenge is therefore to use and transform the meanings of rights as well as the institutional mechanisms which continuously shape those meanings in the process of interpreting and enforcing rights.

Competing Perspectives on the Charter

Traditionally the Charter has been viewed as a tool used by a court to constrain government. In this sense, the meaning of Charter provisions is inseparable from the meaning attributed to it by the court. Accordingly, an analysis of the implications of the Charter for the allocation of health care resources must review relevant case law, given that constitutionally sound policy initiatives would be a function of how the courts reacted to analogous policy initiatives.

While this perspective on the Charter is not wrong, it is incomplete. The Charter not only guides the courts in their review of actions of government, it requires that government act in accordance with the Charter even when a court may not enforce that obligation.

There is nothing new in stating that the Charter imposes obligations on government that might not be enforced by

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the courts is the concept of a constitutional convention. A convention is a rule of the constitution that imposes obligations on government, but it is not enforceable in a court of law. Government nonetheless is obligated to act in accordance with the convention, although the sanction for the breach is political and not judicial.

Several implications flow from this conceptualization. First, government has a responsibility to reach its own understanding of what the Charter requires, and to act accordingly. William Black and Lynn Smith have explained: "courts are not the only legitimate expositors of constitutional meaning". For example, it is generally accepted that the Charter is open to several interpretations, with some judges taking a narrow view of the provisions and others interpreting them more liberally. Government is entitled to read the Charter more expansively than the courts.

Second, the Charter may impose positive obligations on government to act in furtherance of Charter rights and freedoms even where the failure to act would attract no judicial sanction. Chief Justice Dickson has alluded to this aspect of the Charter observing that there are situations where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms (e.g., regulations limiting the monopolization of the press may be required to ensure freedom of expression and freedom of the press).

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While it is unlikely that a court would require government to pass a law on press monopolies, the Charter might be interpreted as imposing a duty on government to enact one. Similarly, the Charter may impose an obligation on government to provide certain health care services to the disadvantaged, even if a court may not impose that obligation on it.78

One of the reasons why government and courts may not have identical interpretations of Charter provisions is a function of the judiciary's perception of its own limited role. The judiciary usually takes the position that it is inappropriate for a court to assume a significant role in directing government how to allocate its resources, both because of a sense of the institutional limits to its competence as well as a sense of the legitimacy of such a role in a democratic state.79 Courts also seem to interpret the rights and freedoms in the Charter in somewhat individualistic and negative terms. The Charter exists to restrain government from violating individual rights; it does not exist to require government action to further what one philosopher has termed the value of those rights.80 For these reasons, a court may hesitate to read into the Charter any positive rights to health care services. A government, however, is not subject to the same institutional constraints. Regarding the government's responsibilities to interpret and apply the Charter, there may be a case for saying the Charter does not contain such rights.

While I am not minimizing the importance of following the court decisions on such matters, a court's interpretation about a particular Charter provision does not necessarily exhaust the possible meaning of that provision. A court's decision not to require

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78 Theory of Charter, supra, note 74 at 718 and Schacter, supra, note 33.
government to act in a particular way does not necessarily mean that government is not constitutionally obligated to so act. Practically, however, it is unlikely that a government will do more than what a court requires.

**The Charter and Section 15 - the Basic Interpretive Framework**

In this section, I will set out the meaning of some of the relevant constitutional provisions, as interpreted by the courts and, where relevant, academic commentators. This will help identify the constraints that the *Charter* imposes on government action, as well as identify those areas where government remains free to make allocation decisions as it sees fit. There are many issues that remain unsettled. Given my position that the *Charter* imposes obligations on government independent of whether a court might impose them, the case study portion of this thesis will note those policy choices I believe that the *Charter* demands and the types of choices retained by government in any given policy area.

**Scope of the Charter:**

The purpose of this section is to review briefly the principles governing the scope of the application of the *Charter*. This is significant to the thesis because some health care services are provided by non-governmental agencies under contract with or receiving funding from the Ministry. Different agencies have different service limits and eligibility criteria, the result of which may be that persons with similar needs may be provided with different services. Accordingly, it is essential to determine whether *Charter* analysis applies to these agencies in their allocation of health care resources.

The *Charter* applies to legislation and to actions of government.\(^{81}\) It will apply even where the provision of a service appears totally discretionary.\(^{82}\) The *Charter* has expanded

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\(^{81}\) *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441 (S.C.C.) (hereinafter *Operation Dismantle*).
the scope of judicial review to include not only subordinate legislation but executive action and laws.\(^8^3\) Section 32 of the Charter tells us that it applies to legislative and governmental decisions.

32(1) This Charter applies
(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.\(^8^4\)

Thus, both the provincial and the federal governments must ensure that their legislation complies with the Charter.

The executive may also be subject to judicial review. Justice Wilson in Operation Dismantle v. A.G. Canada\(^8^5\) stated:

[If we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to second guess the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of citizens, then it is not only appropriate that we answer the question; it is our obligation under the Charter to do so.\(^8^6\)

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\(^8^2\) See, e.g., Silano v. The Queen In Rights of British Columbia (1987) 42 D.L.R. (4th) 407 (B.C.S.C.) at 414-15 [hereinafter Silano], where the Supreme Court of British Columbia held that "even though payments are discretionary, a regulatory scheme which, for all practical purposes controls the exercise of that discretion, must be amenable to the reach of the Charter of Rights" (per Spencer J.).

\(^8^3\) The latter were formerly challengeable only as to the legislative competence of their makers under section 91 and 92 of the Constitution Act, 1867 U.K., 30 & 31 Victoria, c.3, under the residual power of s.91, and s.91(27).

\(^8^4\) s.32, Charter, supra, note 1.

\(^8^5\) [1985] 1 S.C.R. 441 (S.C.C.). The government of Canada agreed to allow the U.S. to test air-launched cruise missiles in Canada. The respondent organization challenged the decision on the grounds that it would infringe the right to life and security of the person under section 7 of the Charter. The court held that no infringement had been demonstrated. In Air Canada v. B.C. (A.G.), [1986] 2 S.C.R. 539 (S.C.C.), the Supreme Court of Canada similarly held that executive powers must conform to constitutional dictates.

\(^8^6\) Ibid. at 472. She goes on to illustrate with hypothetical examples, situations where the court could and could not review executive decisions.
The Charter does not apply, however, to the actions of private parties which are completely unconnected to government. The meaning of this is not entirely clear, and this uncertainty has significant implications for this study. Individuals who are exercising power they derive from a statute will be subject to judicial review under the Charter. However, if actions are deemed not to involve the government or legislature, they are said to be within the private sphere, and the Charter will not apply. The extent to which the actions of hospitals and health care workers will be held to derive from statutory power is not yet clear. Many of the services are provided by non-governmental organizations. In some cases there is a measure of government regulation (the legislation itself always subject to Charter review). In other cases, the only link appears to be that the organizations receive funds from the government. The issue is whether any disparity of services provided by these private organizations (that is not explicitly traced to legislation) engages government responsibility under the Charter.

It is important to recognize how the constitutional perspectives of a court may differ from that of government. A court trying to determine whether the Charter applies to the provision of a service, for example, in a particular situation may find a sufficient government connection or nexus in the fact that funds are granted to provide a service. Although the service could be construed as a "public one", given our current understanding of the importance of health care and social services, the same would be true of government funds for education. The case law clearly holds that, simply because government provides funding to universities does not make those universities government actors for the purpose of the Charter. Nor does the fact that there might be legislative

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89 Dolphin Delivery, supra, note 87.
standards imposed upon a particular activity necessarily mean that the providers of those services are themselves subject to the Charter. The legislation itself will be subject to constitutional constraint, but there are many examples in the law of organizations subject to government control, who in their own activities, are not subject to the Charter.

A different set of considerations is relevant when assessing the Charter's affect on government action. As a constitutional matter, government has the authority to regulate the provision of health care services in the province. The Charter, from the perspective of government, obliges government to consider the impact of its decisions on the constitutional rights and interests of its citizens. From a governmental point of view, the Charter may very well even require that it try to remedy unfairness and inequalities in society even if they are simply a result of a historical pattern delivery of health care services. While such redress might not be imposed by a court, it seems no less obligatory.

**General Principles of Interpretation:**

The Supreme Court has held that the Charter must be given a large and liberal interpretation, one that places the Charter in its philosophical and historical context. As Dickson J.(as he then was) wrote in *Big M Drug Mart*:

> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question,
but to recall that the *Charter* was not enacted in a vacuum, and must therefore be placed in its proper linguistic, philosophical and historical contexts.90

The Supreme Court has also emphasized the importance of interpreting the *Charter* in purposive terms: the meaning of a *Charter* right or freedom should be determined in light of the interests that are served by its entrenchment, understood in the light of the overall purposes of the *Charter* itself.91 The Supreme Court has stated that the *Charter* was designed to provide for "the unremitting protection of individual rights and liberties...to constrain government action inconsistent with those rights and freedoms".92 The Court has also identified the following values underlying the *Charter* and therefore significant to its interpretation:

- respect for the inherent dignity of the human person,
- commitment to social justice and equality,
- accommodation of a wide variety of beliefs,
- respect for cultural and group identity,
- and faith in social and political institutions which enhance the participation of individuals and groups in society.93

Notwithstanding that the *Charter* must be interpreted liberally, the language of the text does impose some constraints on judicial interpretation. As Justice Beetz has remarked:

> No interpretation of a constitutional provision, however broad, liberal, purposive or remedial can have the effect of giving to a text a meaning which it cannot reasonably bear and which would even express the converse of what it says.94

**Equality Jurisprudence:**

Though equality is generally endorsed as a shared community value, Canadians continue to live in a society characterized by group based patterns of social, economic and political inequality. While paying lip service to notions of equality is commonplace in Canadian

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90 Big M, supra, note 48 at 344.
92 Hunter, supra, note 91 at 155-56.
legal and political circles, the goal is not yet a reality. Moreover, it is becoming increasingly clear that inequality cannot simply be explained away as atypical, prejudicial acts of individuals. Rather we must address the deeply embedded, institutional and systemic dimensions of inequality. Women, people who are physically and mentally challenged, racial and ethnic groups, are continually denied social interests such as dignity, respect, physical security, membership in community, power, and most relevant to this discussion access to resources, available to the powerful and advantaged. While governments have taken some steps to eliminate this disadvantage and achieve equality through various social programs, including anti-discrimination legislation, and by entrenching the constitutional right to equality, the application of these rights to actual circumstances wrestling with ambiguity and complex competing interests.

Government allocation decisions impose burdens and create benefits for people living within its borders. With the implementation of programs such as social security, family allowance, and O.H.I.P. for example, Canadian governments have acknowledged that not everyone has benefited from the existing social organization, and that there is some onus on government to address this problem. The history of the development of these "benefits programs" has inevitably been the product of our unequal society. As a result, some aspects of such equality promoting programs are, just as other laws providing a benefit, discriminatory. The beneficiaries of these government programs have included those who have traditionally been subjected to discrimination, as well as those who have not. Government seems to have developed programs such as pay equity and human rights legislation in an attempt to change unequal aspects of society. Other programs seem directed at disadvantage caused by systemic discrimination, such as the "Mother's Allowance" programs under provincial welfare legislation. Still other programs are designed to address the needs of diverse groups, such as injured workers, who share a
contextual disadvantage. All of these programs have been significant societal developments. They are very important to disadvantaged groups, for whom they promote to varying degrees a greater enjoyment of society's resources.

Since Andrews v. The Law Society of British Columbia the focus of equality discussions has become whether the legislation being challenged is discriminatory. Andrews and the cases that follow indicate that not every inequality constitutes discrimination. Drawing upon conceptions of discrimination elaborated under the Human Rights legislation, the Supreme Court in Andrews defined discrimination as follows:

...discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and disadvantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merit and capacities will rarely be so classed.

Justice McIntyre held that treatment at law which violates section 15 is discriminatory treatment, epitomizing the denial of equality against which section 15 guarantees. Discrimination does not simply refer to the making of a distinctions between individuals or groups. Not all legal distinctions constitute discrimination. In fact, in circumstances such as those discussed in this thesis, it is the essence of equality to make distinctions between groups to accommodate their different needs and interests. As one Supreme Court

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95 See Benefits, supra, note 19.
96 Andrews, supra, note 48.
justice put it "every difference in treatment between individuals under the law will not necessarily result in inequality and, as well that identical treatment may frequently produce serious inequality".98 Justice McIntyre in Andrews found that "the essence of equality" is the "accommodation of difference" for which he noted, it will frequently be necessary to make distinctions.99

Despite some common themes and principles emerging in the caselaw, there remain many unanswered questions and uncertainties about how to apply the legal prohibition against discrimination in society. Nevertheless, legal commentators, such as Sheilah Martin and Helena Orton100 have provided much insight into the various dimensions of the legal definition of discrimination. First, discrimination involves the making of a prejudicial distinction between individuals or groups. The distinction can be the result of direct differential treatment or it can result from the unequal effects of treating individuals and groups in the same way. The Supreme Court of Canada has recognized the potential for both direct and adverse effect discrimination.101 Direct discrimination occurs when an individual is met with harmful differential treatment because of her or his group affiliation(s). Adverse effect discrimination occurs when the application of an apparently neutral law or policy has a disproportionate and harmful impact on individuals from particular social groups. The unequal effects of a law or policy which on its face appears to be neutral, need not have been intended to discriminate against individuals based on their group affiliation(s). It is the effect of the law or policy, not its intent, that determines whether or not discrimination has occurred.

98 Andrews, supra, note 48 at 164.
99 Ibid at 169.
A second dimension of the definition of discrimination, is the requirement that it involve the experience of some type of harm or prejudice, or entail the imposition of burdens or the withholding of benefits. In this regard, judges have relied upon concepts such as prejudice, stereotyping, vulnerability, and social disadvantage to give content to the notion of the harm of discrimination. As Justice Wilson has emphasized, the "evil which section 15 was meant to protect against is stereotype and prejudice." Although Wilson J. was in dissent in this case, on the issue of whether section 15(1) of the Charter was violated, she was in agreement with the majority. Accordingly, the enumerated grounds of discrimination in section 15 of the Charter "represent some blatant examples of discrimination which society has at last come to recognize as such. Their common characteristic is political, social and legal disadvantage and vulnerability."

A final aspect of discrimination that the courts have recognized is the pervasiveness of systemic discrimination, which includes any institutionalized practices or policies that disadvantage individuals as members of certain groups. Systemic discrimination is usually associated with adverse effect discrimination because the latter raises the problem of discrimination which has become an entrenched part of institutional practices and policies. Direct discrimination, can also reinforce systemic discrimination if it is common practice within an institution, if it is not recognized as a problem (for example, sexual or racial harassment) and to the extent that some manifestations of direct discrimination are so much as part of the dominant ideology as to be invisible. 

102 Ibid. at 180-181.
104 Ibid. at 392-93.
Justice Wilson has described the importance of considering the larger context of a legislative provision in determining whether or not there is group-based harm or disadvantage:

[I]t is only by examining the larger context that account can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.106

Many legal distinctions cause harm to individuals. But not all harms track larger patterns of group disadvantage. Wilson J.'s comments explain the significance of these larger societal patterns to the legal protection of equality.

Underinclusiveness in its various forms is the basis of most allegations of discrimination concerning benefits programs by equality-seeking groups. Some characteristics of underinclusiveness include (i) eligibility criteria denying the benefit of a law, program or activity despite comparable need on the part of a disadvantaged groups, (ii) other criteria imposing burdens that function to deny disadvantaged groups full benefit of a law or program, and (iii) programs not designed to meet the needs of disadvantaged groups.

Section 15 explicitly refers to the protection of "equal benefit" of the law, which supports arguments that "underinclusiveness" violates equality guarantees. In light of the history of cases like Bliss v. Attorney General of Canada107 in which a pregnant woman's denial of equal unemployment insurance benefits was held not to be discriminatory under the Canadian Bill of Rights108, it seems clear that the equality protections in the Charter

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108 S.C. 1960, c.44.
should ensure that when the government decides to provide benefits, it does so in a non-discriminatory way, without arbitrary exclusions.\textsuperscript{109}

**Mechanics of Section 15:**

Section 15 provides as follows:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration or conditions of disadvantaged individuals or groups included are those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, mental or physical disability.

To determine whether section 15 of the *Charter* has been infringed, one must begin by assessing whether one of the four equality rights guaranteed by the section or an analogous one, has been violated.\textsuperscript{110} If there is a violation the court must consider whether the law, by design or impact, is discriminatory by placing burden, obligations or disadvantages on the individuals in question that are not imposed on others, or by withholding or limiting access to opportunities, benefits and advantages that are available to others.\textsuperscript{111} Any justification for or consideration of the reasonableness of the law would then take place under section 1, where the onus is on the defender of the law.

Section 15 of the *Charter*, has given the Courts a new role in ensuring that laws and legal practices meet constitutional equality standards. In the early years of the *Charter's* history


\textsuperscript{110} "Every individual is equal before and under the law and has a right to the equal protection and equal benefit of the law without discrimination..."

\textsuperscript{111} The Supreme Court of Canada set the framework for this analysis in Andrews, supra, note 48.
there was substantial uncertainty amongst judges, academics and lawyers as to the proper way to interpret section 15. Much of this uncertainty has been resolved by the Supreme Court in its recent decisions on equality. In the last few years some important decisions have begun to shed light on the nature of the guarantee of equality, what constitutes a violation of the provisions as well as the appropriate judicial response to the "benefits programs" found to be underinclusive in a discriminatory manner.

The first decision of the Supreme Court to address section 15 of the Charter was *Andrews*[^12]. That decision is as significant for the understanding of equality it rejected as for the approach adopted by the majority of the Court[^13]. Specifically, the Court rejected the similarly situated test that had been continually adopted, with some modifications, by lower Canadian courts, and advocated by governments[^14]. Until *Andrews*, Canadian courts under the *Charter* have almost always used the "similarly situated" test, with some modifications, as their analytic approach to equality. While this approach to substantive equality has been rejected by the Supreme Court of Canada, I will discuss it because of its historic entrenchment in the equality thinking of the Western world[^15], and to understand its limitations for addressing the inequality of disadvantaged groups, thus necessitating an alternate approach to equality.

According to this formal or Aristotelian approach, "the concern for equality is that those who are similarly situated with respect to the purpose of the law be treated equally."[^16] In other words, alikes should be treated alike and unalikes should not.

[^13]: Any uncertainty that the majority in *Andrews* rejected the similarly situated test was eliminated in *Turpin* supra, note 106 at 1332.
[^14]: *Benefits*, supra, note 19.
While the similarly situated test seems appropriate for claims relating to the administration of and access to justice (process claims), a test for determining whether there has been a denial of substantive equality it is inadequate. Many courts will not find a section 15 violation merely on the basis of a legislative distinction, and therefore have modified the test by requiring that a differential treatment also be "unfavourable or prejudicial" or "unreasonable or unfair", or distinguishing between the permissibility of distinctions based on enumerated and non-enumerated grounds.

While each of these modifications tries to provide some substance to the similarly situated test and therefore the equality guarantee, refining the test does not address its inherent inability to protect the substantive equality of the historically disadvantaged. It seems that according to the similarly situated test, the disadvantaged can only obtain the social interests that the advantaged have enjoyed to the extent that they are the same as or perceived to be the same as the advantaged, whose characteristics have historically defined the criteria for entitlement. For example, giving a person who uses a wheelchair the same access to the second floor by a stairway will not enable that person to pursue anything on the second floor, (i.e. health care services, employment).

The similarly situated approach will not contribute to the reorganization of social institutions to meet the needs of the disadvantaged to the extent that their needs are different from the advantaged. For example, it will not help women to obtain paid maternity leave, choice around pregnancy, or laws that promote security form sexual

117 See McKinney, supra, note 103.
118 See Andrews, supra, note 48.
assault, because there is little or no comparable need in men's lives. In other words, the test does not challenge the status quo.

As stated by the Ontario Court of Appeal in Century 21 Ramos Realty Inc. v. The Queen, it is not always clear whether persons are or are not similarly situated, and whether, even if there are not, this is relevant to a section 15 inquiry...It is usually possible to find differences between classes of persons, and, on the basis of these differences, conclude that persons are not similarly situated. However, what are perceived to be "differences" between persons of classes of persons could be the result of stereotypes based on existing inequalities which the equality provisions of the Charter are designed to eliminate, not perpetuate.121

The section 15 jurisprudence before Andrews is now most useful in exposing the inability of the similarly situated test to achieve equality.122

In Andrews, the Supreme Court of Canada adopted a purposive approach to the equality guarantee, looking to the values section 15 was intended to promote and building on human rights developments over the last fifty years of equality under section 15.

In the recent case of Knodel v. British Columbia (Medical Services Commission)123 the exclusion of same sex couples from spousal medical benefits was challenged under the Charter. In concluding that the law discriminated on the basis of sexual orientation, Justice Rowles described the harm or burden of exclusion, she wrote:

Where the state makes a distinction between two classes of individuals, A and B, that has the effect of imposing a greater burden on individuals within class B, and if the individuals within class B fall within the class of individuals protected by s.15(1) of the Charter, the manner in which the legislative provision or law is

drafted is irrelevant for constitutional purposes; i.e., it is immaterial whether the subject law states: (1) A benefits; or (2) Everyone benefits except B. In both cases the impact upon the individual group within group B is the same. [emphasis added]¹²⁴

She went on to conclude that same-sex couples should be entitled to claim spousal benefits.

Section 15 will apply to those in one of the categories listed¹²⁵ in section 15 such as age, and mental and physical disability, race, national or ethnic origin, colour, religion, sex, or any group that is analogous with respect to powerlessness or group disadvantage.¹²⁶ However, the Supreme Court of Canada in Andrews was unanimous in its refusal to limit the unlisted grounds.¹²⁷ Thus, the Court may, in the future, accept non-specified forms of discrimination that are not, strictly speaking, analogous to those listed in section 15. In Andrews, McIntyre J. considered the listed and analogous characteristics to be those based on personal characteristics, and not the result of a person's merits or capacities.¹²⁸

Enumerated and Analogous Grounds:

Issues of inequality before and under the law and the equal benefit and protection of the law arise on both enumerated and analogous grounds of prohibited discrimination. The Supreme Court decision in Andrews¹²⁹ confirmed that certain types of unenumerated or analogous categories warrant constitutional protection. A law is considered discriminatory if it draws a distinction based on an enumerated or analogous ground, or disproportionately burdens a group defined by an enumerated or analogous ground.

¹²⁴ Ibid. at 756.
¹²⁵ The term "listed" is preferred to "enumerated" since section 15 does not number the grounds, see D. Gibson, The Law of the Charter: Equality Rights (Toronto: Carswell, 1990) at 143 [hereinafter The Law of Charter].
¹²⁶ Wilson J. in Andrews, supra, note 48. The concept of disadvantage is not elaborated upon.
¹²⁷ Ibid. McIntyre J. at 174.
¹²⁸ Ibid. T 174-75.
¹²⁹ Andrews, supra, note 48.
While the list is not exhaustive, all of the prohibited grounds of discrimination listed in section 15 can be described as personal characteristics. Andrews suggests, and subsequent cases confirm, that only grounds that are analogous to those listed in section 15 can support a claim of discrimination. To be considered discriminatory, a law must have an unequal impact on an individual who is a member of an enumerated group, or a group that is analogous to an enumerated group. A law that has an unequal impact on a group that is not analogous to the enumerated group does not discriminate for the purposes of section 15.

In Andrews, the Supreme Court explained that an analogous group must be similar to the enumerated groups in terms of its social, political or legal disadvantage. The Court emphasized that non-citizens lack political power, have historically suffered, been discriminated against, and therefore are an example of a discrete and insular minority deserving of section 15 protection. On the other hand, in Piercey Estate v. General Bakeries Ltd., the Court dismissed a challenge to a worker's compensation statute that denied access to the courts for the victims of workplace accidents and their dependents. The judges unanimously held that the statute did not create any discrimination for the purposes of section 15, since "[t]he situation of the workers and dependents here is in no way analogous to those listed in s.15(1), as a majority in Andrews stated was required to permit recourse to s.15(1)."131

Similarly, in R. v. Turpin, the Court rejected a challenge by accused persons outside of the province of Alberta to a provision of the Criminal Code that gave accused persons in

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131 Ibid.

132 Turpin, supra, note 106 at 143.
Alberta, but not elsewhere, the right to choose to have a trial by judge alone. The Court rejected the claim on the grounds that accused persons outside of Alberta did not constitute an analogous group for the purposes of section 15:

...it would be stretching the imagination to characterize persons accused of one of the crimes listed in s.427 of the Criminal Code in all the provinces except Alberta as members of a "discrete and insular minority"...Differentiating for mode of trial purposes between those accused of s.427 offences in Alberta and those accused of the same offences elsewhere in Canada would not, in my view, advance the purposes of s.15 in remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society. A search for indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice would be fruitless in this case because what we are comparing is the position of those accused of the offences listed in s.427 in Alberta... Persons resident outside Alberta and charged with s.427 offences outside Alberta do not constitute a disadvantaged group in Canadian society within the contemplation of s.15.133

The recent case law suggests that section 15 imposes several obligations on government. First, government should refrain from legislating on the basis of personal characteristics that reflect stereotypes about the abilities of individuals and groups. Although some of the listed and analogous grounds are relevant to some legitimate objectives, section 15 requires that government study how it can achieve its objectives without endorsing such stereotypes.

Second, it is not enough that government not legislate on the basis of an impermissible ground. Given the definition of discrimination, section 15 requires that government consider the impact of its legislation on groups defined by the enumerated grounds, even if the law is neutral on its face.134

133 Turpin Ibid.
134 For an argument along these lines as applied to the case of disability, see M.D. Lepofsky & J.E. Bickenbach, "Equality Rights and the Physically Handicapped" in Bayefsky and Eberts, eds, Equality Rights and the Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1985) 323 [hereinafter Equality Rights].
Finally, the Supreme Court cases demonstrate that a major purpose underlying section 15 is the elimination or reduction of conditions of disadvantage. Many commentators maintain that this is the primary purpose of section 15. For example, Black and Smith wrote that:

"a primary purpose of the equality rights provisions is to eliminate or reduce conditions of disadvantage. This object is most obviously reflected in subsection 15(2), which specifically refers to "the amelioration of conditions of disadvantaged individuals or groups." But we think the reduction of conditions of disadvantage is an object of the section as a whole. Section 15(1) lists among the enumerated grounds physical and mental disability (not condition) and it makes sense to assume that the other listed grounds serve a similar function, though stated in neutral terms. ...More generally, our recent history reflects a growing awareness of the problems caused by disadvantage, and increasing willingness to legislatively remedy disadvantage."

Justice McIntyre went on to decide that section 15 is concerned with the imposition of group based distinctions which disadvantage individuals and groups. The enumerated grounds of prohibited discrimination reflect the "most common and probably the most destructive and historically practiced bases of discrimination". While not exhaustive, the prohibited grounds of discrimination are also not open-ended. They are limited to grounds analogous to them, i.e. groups socially, politically and legally disadvantaged in our society. Of note is Justice Wilson's comment that:

"the range of discrete and insular minorities has changed and will continue to change with changing political and social circumstances...It can be anticipated that the discrete and insular minorities of tomorrow will include groups not recognized as such today."

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135 S.15, Meaning, supra, note 76 at 239.
136 Andrews, supra, note 48 at 175.
137 Ibid at 152-153.
Justice McIntyre described this approach to section 15 as the "enumerated or analogous grounds" approach, where the nature of the equality guarantee is understood through the enumerated grounds. Equality is therefore not about the same treatment, although the guarantee will sometimes require it. Instead, equality is concerned with the distribution of burdens and benefits in society. Treatment that is forbidden by section 15 is that "which involves prejudice or disadvantage",\(^{138}\) denying the equal enjoyment of social and political benefits on enumerated or analogous grounds.

In the case of Brown v. B.C. Minister of Health\(^{139}\) the plaintiffs maintained that the government's decision not to provide the drug AZT free of charge infringed section 15 of the Charter. They claimed that it discriminated against them as an identifiable group of AIDS patients, 90% of whom were homosexual or bisexual. The judge held that AIDS was a physical disability and thus fell within the listed grounds for section 15 protection. Furthermore, he found that sexual orientation was protected under the section as an unlisted ground, having acknowledged that homosexuals were a group historically subject to discrimination. However, the judge found no direct discrimination against this group by the Minister of Health despite inflammatory remarks about AIDS victims made in the press by him. Neither did the province's policy not to fund AZT constitute direct discrimination because the province had the constitutional power to have such a policy.

The judge accepted that discrimination need not be intentional and that the funding policy affected an identifiable group. However, he held that other identifiable groups with catastrophic illness also were required to pay for their drugs. In answer to the fact that funding was provided for drugs for cancer and transplant patients he cited McIntyre J. in Andrews, who said:

\(^{138}\) Ibid at 181.
\(^{139}\) (1990), 42 B.C.L.R. (2d) 294 (S.C.) [hereinafter Brown].
It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of s.15 of the Charter. It is, of course, obvious that legislatures may - and to govern effectively - must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupation's of legislatures.¹⁴⁰

The judge in Brown held that the distinction of funding drugs for cancer and transplant patients and not funding the drug AZT for AIDS was due to the complexity of treatment of the former that did not apply to the latter, and that this was "not the sort of inequality addressed by section 15 of the Charter".¹⁴¹

Other issues that may be challengeable in the courts include those related to selection criteria for individuals seeking particular medical procedures. For example, there is the question of whether individuals with alcohol related liver disease should be excluded from having liver transplants. At least one center in Canada has decided that discrimination on this basis would be unethical and not in keeping with the ideals of the Canadian Charter.¹⁴²

Alcoholism has been recognized as a disability by a provincial Human Rights Commission¹⁴³ and thus, could be considered under one of the listed grounds of section 15. However, evidence of non-compliance with an alcohol abstinence regime might qualify as a medical ground for exclusion.¹⁴⁴

¹⁴⁰ Andrews, supra, note 48 at 168.
¹⁴¹ Brown, supra, note 139 at 315.
¹⁴³ The Law of Charter, supra, note 125.
¹⁴⁴ Camire v. Winnipeg (1989), [1990] 43 C.R.R. 180 (Man. C.A.), the Manitoba Court of Appeal was asked to decide whether it was discriminatory to withhold social assistance unless an alcoholic recipient agreed to live in a supervised environment to ensure compliance. The court held that such a restriction did not constitute an infringement of section 7 or 15 of the Charter. The court did not comment on whether alcoholism was a "disability".
The use of medical criteria for rationing of organs for transplant should not escape scrutiny under section 15. A disadvantage caused to a group need not be intended.\textsuperscript{145} Unintentional discrimination may occur against the poor by using medical criteria to ration organ transplantation. Individuals of low socio-economic class tend to be in somewhat poorer health and thus, on the average, would rate more poorly on medical criteria as candidates for transplantation.\textsuperscript{146}

The relevant debate questions whether or not persons with similar needs be entitled to similar services without regard to their enumerated status under section 15 and whether differences in services to those with similar needs offend the Charter. The argument that such differences infringe section 15 is relatively straightforward. A person is denied the equal benefit of the law because he or she suffers from a particular disability, or is a certain age. These distinctions are explicitly enumerated in section 15, and would appear to constitute discrimination under the definition advanced by the Supreme Court in \textit{Andrews}. Furthermore, it cannot be said that the disability label is a proxy for need: by hypothesis (and in fact), individuals in the two groups have similar needs.

Regarding potential justifications under section 1, a lot will turn on the general attitude that the courts when confronting constitutional challenge. It is likely that the legislative objective would be considered important enough in all of these cases; the issue will turn on the perceived reasonableness of the use of the particular categories to determine eligibility or to set levels of benefits. And in this respect, it may be hard to justify the use of an enumerated ground when it has the effect of excluding a group defined by another enumerated ground.

\textsuperscript{145} \textit{Andrews}, supra, note 48; \textit{Turpin}, supra, note 106; \textit{Brooks} supra, note 107.

A court might well accept an argument that it was not unreasonable for government to have assumed different levels of need as between two groups.\textsuperscript{147} And depending on the rigor with which a court reviews the reasonableness of a program, this may be sufficient to uphold the law. Moreover, courts may very well be reluctant to find a violation of the Charter in circumstances where government appears to be making a good-faith effort to extend health services to those in need. Whether this is considered relevant within section 15(1), section 1, or as part of a consideration bearing on the interpretation of section 15(2), there are reasons to believe and decisions that suggest\textsuperscript{148} that a court will hesitate before it strikes down a program designed to help the disadvantaged.

Although there are cases upholding distinctions between programs for different disadvantaged groups, it must be underlined that in the United States, legislative distinctions based upon age, or mental or physical disability, are not the subject of the high Canadian standard of review. According to American constitutional law, legislative measures in the area of social and economic policy need only have a rational basis to a legitimate governmental objective.\textsuperscript{149} The American cases do however demonstrate the reluctance of the courts to interfere in this area, and in this way, I expect that Canadian judges are similar to their American counterparts. Accordingly, the following is an outline of some recent American decisions that have explored these issues.

\textsuperscript{147} An analogous situation arose in \textit{R. v. Edwards Books and Art Ltd.}, [1986] 2 S.C.R. 713 (S.C.C.) [hereinafter Edwards Books], where Dickson C.J. was prepared to defer to the legislative judgment that retail workers were in greater need of some protection (against Sunday shopping) than were workers in non-retail contexts.


One set of cases deals with programs of subsidized housing restricted to the elderly and mobility impaired. Challenges brought under the Fourteenth Amendment by non-elderly mentally and developmentally disabled were rejected, the courts invoking the idea that it was rational to provide services to the group benefited.\textsuperscript{150} On the other hand, one court has held that a decision of municipal officials to reduce certain services to mentally retarded persons living at home while increasing or maintaining benefits provided to mentally retarded persons living elsewhere violated the equal protection clause.\textsuperscript{151} The court noted that although mental retardation may not be a suspect or semi-suspect class requiring a high standard of judicial review, discrimination against the retarded must be justified by more than the claim that is rationally related to a legitimate government interest.\textsuperscript{152} This is likely to be the position that Canadian courts adopt, given that mental disability is a listed ground in section 15.

Clearly indicating the United States Supreme Court's view of these matters is the case of Jefferson v. Hackney.\textsuperscript{153} In order to allocate its resources amongst various social programs, Texas adopted a procedure whereby a percentage reduction factor was applied to the predetermined monetary needs of individuals eligible for relief under each of the federally aided categorical assistance programs. A higher percentage reduction figure was applied to the Aid to Families with Dependent Children program (AFDC) than to other

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\textsuperscript{150} See, e.g., Knutzen v. Eben Ezer Luthern Housing Centre (1987), 815 F. (2d) 1343 (U.S.C.A., 10th Cir). These cases were also informed by the fact that there is no constitutional right to low-cost housing for the poor. See, e.g., Strykers Bay Neighborhood Council Inc. v. City of New York (1988), 695 F. Supp. 1531 (U.S. Dist. Ct., S.D. New York). On refusal of a Canadian court to strike down a law restricting the establishment of group homes for the benefit of the disabled and aged on grounds that they offended the Charter, see Alcoholism Foundation of Manitoba v. Winnipeg (City) (1990), 49 M.P.L.R. 1 (Man. C.A.).


\textsuperscript{152} The case also stands for the proposition that although a city may be under no constitutional obligation to provide habilitative services to mentally retarded persons, once they do provide such services, they must not abandon such persons in a way that violates the constitution.

categorical assistance programs, including programs for the aged, blind, or disabled welfare recipients. The Supreme Court upheld the plan, holding that

So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straight jacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them.

Since budgetary constraints do not allow the payment of the full standard of need for all welfare recipients, the State may have concluded that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living. While different policy judgments are of course possible, it is not irrational for the state to believe that the young are more adaptable than the sick or elderly, especially because the latter have less hope of improving their situation in the years remaining to them. Whether or not one agrees with this state determination there is nothing in the constitution that forbids it.

While it is impossible to predict how a Canadian court would approach an analogous issue, for reasons discussed earlier, as well as cases like Irwin Toy and McKinney, it seems likely that the Supreme Court would adopt a "hands off" approach and therefore it would unlikely interfere with these kinds of legislative decisions.

The above reasoning is an examination of the issue from the perspective of the courts. From the point of view of Canadian governments, there does not appear to be good reason to initiate programs based on enumerated grounds to allocate benefits where persons with similar needs are not being treated similarly. While resources are limited, it is inconsistent with constitutional principles to provide services to one group on the backs of another, equally vulnerable and equally needy group.

154 The Texas scheme provided 75 percent of the needs to AFDC recipients, 100 percent of recognized needs to the aged, and 95 percent to the disabled and the blind.
156 Ibid. at 549.
Section 15 Jurisprudence Post Andrews:

The unanimous decision of the Supreme Court of Canada in *Turpin v. The Queen* offers further insight into the nature of the equality guarantee. The section 15 claim in that appeal, addressed whether section 430 of the *Criminal Code*, which gives accused persons in Alberta but not in any other province an election to be tried before a judge alone, violates the equality rights of an Ontario accused who wished trial by judge alone. In addressing the allegation of denial of equality before the law, Justice Wilson, writing for the Court, wrote:

> The guarantee of equality before the law is designed to advance the value that all persons be subject to the equal demands and burdens of the law and not suffer any greater disability in the substance and application of the law than others.

Wilson J. found that those charged with an offence such as the accused outside Alberta are treated more harshly, violating the right to equality before the law. However, the treatment was not discriminatory so as to violate section 15.

In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates a right to equality but also the larger social, political and legal context... It is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will, I think, in most but not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.

On the facts before the Court, Justice Wilson found no "indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice".

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157 *Turpin*, supra, note 106.
158 Ibid. at 1329.
159 Ibid. at 1331-1332.
160 Ibid. at 1333.
While a person's residence or place of trial could in some circumstances be an enumerated ground of discrimination, here, such a finding would not "advance the purposes of section 15 in remedying or preventing discrimination against groups suffering social, political and legal disadvantage".\textsuperscript{161}

While some enumerated grounds in section 15 specifically indicate the type of disadvantage to be addressed by the equality guarantee, such as mental handicap, other terms, such as race and sex, do not distinguish those who have been historically disadvantaged and those who have traditionally been members of the dominant group. The purposive analysis of the Supreme Court of Canada in \textit{Andrews} requires a court, when faced with a broad term, to establish who is disadvantaged. The first case to directly address this issue is \textit{R. v. M. (W.A.)}, in which the Saskatchewan Court of Appeal considered a claim by a male accused, that the old statutory rape provision of the Criminal Code, section 146(1), which made it an offence for adult males to have sexual intercourse with a female under the age of 14, violated section 15.\textsuperscript{162} Justice Bayda, writing for the Court, found that the accused was denied the right to equality before the law because former section 146(1) imposed sanctions on males but not on females. However, he went on to find that the provision did not violate section 15 because the distinction on the basis of sex was not discriminatory. In going beyond the particular distinction being challenged to examine the "larger social, political and legal context" Justice Bayda,

...quickly concludes that to characterize adult males generally, or more specifically, adult males who are potential accused under section 146(1) (whichever is the applicable group in these circumstances) as a "discrete and insular minority", a disadvantaged group in need of society's protection or nurture borders on the alarming if not the preposterous.\textsuperscript{163}

\textsuperscript{161} Ibid.
\textsuperscript{162} Unreported decision of the Saskatchewan Court of Appeal released November 15, 1989.
\textsuperscript{163} Ibid. at 8.
Although the majority of decided cases following Andrews have not involved equality issues raised by enumerated or analogous disadvantaged groups, a number of lower courts have found a denial of full benefit of a "benefits program" contrary to section 15.

Veysey v. Canada (Correctional Service, Commissioner) was a challenge by a gay prison inmate to the exclusion of gay partners from the Private Family Visiting Program, a benefit available to other inmates. Curiam J. explained that while the decision would not address any of the rights accorded by the Charter, and that counsel for the appellant had formally informed them that it is "the position of the Attorney General of Canada that sexual orientation is a ground covered by s.15 of the Charter". 164

The case of Symes v. Canada involved a challenge of the refusal of the Minister of National Revenue to consider child care expenses as a business deduction under the Income Tax Act. 165 The Plaintiff, a woman lawyer, mentioned that this treatment discriminated against her on the basis of sex and parental status because it is women entering the workforce with child care responsibilities who are negatively affected. After examining evidence of the status of parents and women in particular, the Court accepted the Plaintiff's arguments and held that:

...in light of Andrews, an interpretation of the Income Tax Act which ignores the realities that women bear a major responsibility for child rearing and that the costs of child rearing are a major barrier to women's participation, would itself violate section 15 of the Charter. 166

Marital status has also been found to be an analogous ground of discrimination prohibited by section 15. 167 This finding, along with those in Veysey and Symes, suggests that

164 43 Admin L.R. 316 (F.C.A.) at 322.
166 Ibid. at 19.
analogous grounds will, at a minimum, include prohibited grounds of discrimination under human rights legislation.

In *Jane Doe v. Board of Police Commissioners for the Municipality of Metropolitan Toronto*, on a motion to dismiss the claim as disclosing no cause of action, Moldaver J. ruled that police practices in investigating sexual assault may be the subject of a cause of action addressing a denial of equal benefit and protection of the law with discrimination based on sex.168 The case involves allegations that the police did not dedicate adequate resources to investigating sexual offenses against women and engaged in practice based on stereotype.

With these few lower court exceptions, the focus of most cases since *Andrews* has been on the grounds of discrimination under section 15, with less attention directed to the nature of the inequality. Although not a constitutional cases, the above mentioned decision of the Supreme Court of Canada in *Brooks v. Canada Safeway Limited* is significant for the way it deals with the discriminatory denial of a non-governmental benefit program under human rights legislation.169 This is particularly so in light of McIntyre J.'s statement in *Andrews* that "the principles which have been applied under the Human Rights Acts are equally applicable in considering questions of discrimination under section 15(1)".170

In *Brooks*, the Respondent employer provided a group insurance plan covering loss of pay due to accident or sickness. The plan covered pregnant employees subject to an exclusion from coverage shortly prior to and following the expected date of delivery, regardless of the reason for the absence from work. The Court held that the plan discriminated on the

168 *Jane Doe v. Board of Police Commissioners (Toronto)* 40 O.A.C. 161 (Div. Ct).
169 *Brooks*, supra, note 107.
170 *Andrews*, supra, note 48 at 175.
basis of pregnancy and sex. The decision is known for its progressive recognition that pregnancy discrimination is a form of sex discrimination. The fact that the plan did not discriminate against all women, and therefore only affected part of an identifiable groups did not make the impugned distinction any less discriminating. The Court also explained that "those who bear children and benefit society as a whole should not be economically or socially disadvantaged".¹⁷¹

One of the arguments made in support of the limitations of coverage for pregnant women was that mere underinclusiveness does not constitute discrimination. It was suggested that "the decisions to exclude pregnancy from the scope of the plan is not a question of discrimination, but a question of deciding to compensate some risks and to exclude others".¹⁷² Dickson C.J., however, rejected this argument:

> Underinclusion may be simply a backhanded way of permitting discrimination. Increasingly, employee benefits plans have become part of the terms and conditions of employment. Once an employer decides to provide an employee benefit package, exclusions from such schemes may not be made in a discriminatory fashion...Benefits available through employment must be disbursed in a non-discriminatory manner.¹⁷³

The Court's approach to the basis of discrimination is as important as its understanding of the nature of inequality. Having established the health related purpose of the benefits plan and that pregnant women's health related needs are as valid if not always the same as those covered, the Court concluded that the exclusion of pregnant women from the plan constituted discrimination. "Removal of such unfair impositions [imposing a

¹⁷¹ Brooks, supra note 107 at 1243.
¹⁷² Ibid. at 1239.
¹⁷³ Ibid. at 1240.
disproportionate amount of the costs of pregnancy] upon women and other groups in society is a key purpose of anti-discrimination legislation".174

Implications of the Equality Jurisprudence for Health Care Benefits:
Andrews and the cases which soon followed it indicate that the Supreme Court has adopted a significant and new approach for equality jurisprudence under the Charter. It also reveals how quickly the similarly situated approach became an entrenched part of Charter analysis. Most litigation before Andrews dealt with allegations of discriminations on bases of distinction which it is now clear do not violate section 15. The shift in focus to disadvantage has given equality-seeking groups good reason to be cautiously optimistic.

The Supreme Court's decisions in Andrews, Turpin and Brooks indicate that the purpose of the equality guarantee is to benefit individuals and groups who have had unequal access to social, economic, political and legal resources, either because of direct discrimination or because of the adverse effects of facially "neutral" policy or legislation. Section 15 therefore rejects laws and government policies that create or shape disadvantage, and provides constitutional support for government action that promotes the equal enjoyment of the valued social interests historically limited to the advantaged persons in Canadian society. Consequently, section 15 often requires remedial treatment, to the extent that disadvantaged groups have not benefited from the existing social organization. It also requires an review of existing standards, to the extent that social institutions are not designed to meet the needs of those who have been without the power to shape them. In this way, the constitutional right to equality at law may fulfill the goal of achieving equality in society.

174 Ibid. at 1238.
This approach to equality acknowledges that disadvantaged groups must be the beneficiaries of positive action on the part of government. It does not suggest that these ameliorative, equality-promoting steps are immune from review. An employer's disability plan must not be sex discriminatory. Welfare benefits for sole support mothers must not impose criteria based on sexual stereotype. Section 15(2) provides that section 15(1) does not preclude ameliorative programs and as such can be understood as an interpretive guide to section 15(1); it does not prevent a challenge of remedial programs where some aspect is discriminatory.

The Supreme Court's recent equality decisions also suggest that where benefits programs are reviewed because they deny eligibility on a discriminatory basis, or a program does not address the needs of disadvantaged groups on an equal basis, the section 15 violation is for "underinclusiveness". Unlike the similarly situated test where the concern of section 15 was the same treatment of those who are alike, the Supreme Court's purposive approach is directed at achieving "an equality of benefit and protection and no more of the restrictions, penalties or burdens" for the disadvantaged as compared to the advantaged. Once the government offers a benefit, it cannot exclude disadvantaged groups or not address their needs on a discriminatory basis. This understanding of equality is inherently different from that which formed the basis of the government statute audits prior to section 15 coming into force. Government actors now have a constitutional obligation to go back to make the benefits they provide inclusive of disadvantaged groups and their needs.

In principle, Canadian and American courts have held that the amount of resources devoted to a program is constitutionally relevant. Nonetheless, courts are also hesitant

175 Andrews, supra, note 48 at 165.
about interfering with how government allocates its resources. This understanding of equality will in turn have significant implications for the appropriate funding, this being a governmental as opposed to judicial function.\textsuperscript{178}

The infringement of section 15 is not based on relative differences in funding per se; it is rather a result of someone being denied the equal benefit of the law in a discriminatory manner. At the most general level, therefore, one should focus on the service that is delivered, rather than the amount of money that goes into providing the service. Where differences in benefits flow from differences in funding, this might pose a constitutional issue, but it is the differences in benefits that is the constitutionally relevant consideration.

An important issue in the funding question concerns the relative differences in available program funds between different ministries. I do not think it is an answer in and of itself to a constitutional challenge based upon section 15, that one ministry is either better funded or simply does not have as much money to spend as does another. Government is responsible for how it allocates its funds as between ministries, as is a ministry for how it allocates its funds between its programs. Again although one would expect a court to be reluctant to interfere with the dollar figures government has allocated to, for example, social services for the aged, education or even road maintenance.

Variations in funding that are not as much a result of one government's allocative decisions, but rather flow from the joint endeavours of two or more levels of government are more difficult to evaluate. This arises, for example, when the amount of funds

\textsuperscript{178} Illustrative of the judicial attitude is the case of \textit{R. v. King et al.} (1988), 64 O.R. 2d 768 (C.A.), where the Ontario Court of Appeal rejected a constitutional challenge to the \textit{Day Nurseries Act} R.S.O. 1980 ch.111 brought by an operator of a day nursery who was charged with operating such a nursery without the requisite license required by the \textit{Day Nurseries Act}. In the course of rejecting the argument Dubin A.C.J.O. rejected an argument that the \textit{Day Nurseries Act} offended s.15 of the Charter. In passing he wrote that "public funding of daycare facilities is a social problem which is beyond the reach of the court." (at 774).
available for a specific program is a function of what a municipality expends, or what is contributed by the federal government, and so on. Again, the important issue is the benefits being provided.

Section 15(2):
The purpose of section 15(2) is to ensure that affirmative action programs are not prevented by any interpretation of section 15(1). As Lepofsky and Bickenbach have argued, the general purpose of section 15(2) is:

...to sanction the power of governments to undertake programs, implement policies and enact laws which assist those groups in society whose social, economic or legal equality has traditionally been ignored. Section 15(2) is a safety valve which ensures that a court will not employ the Constitution in a manner which would thwart the goal of social and legal equality for disadvantaged groups in society.179

It seems that, one cannot discuss the purpose of section 15(2) without considering the relationship between section 15(1) and 15(2). As courts and academics have begun considering whether and to what extent section 15(1) is relevant in determining the objective of section 15(2) they have developed two approaches to section 15(2). The first approach interprets section 15(2) is an exception to section 15(1). Section 15(2) is only implicated if a law or policy is found to be discriminatory under section 15(1), and then functions to insulate that law or program from being struck down.180 This appears to be the prevalent approach in the caselaw. For example, the Manitoba Court of Queen's Bench characterized section 15(2) in the following way:

...the guarantees in section 15(1) are qualified by 15(2) and programs which otherwise offend 15(1) are constitutionally acceptable where there is compliance

179 Equality Rights, supra, note 134 at 354.
with 15(2). In the result, section 15(2) creates a safe haven for government action designed and implemented to serve the objective spelled out in that statutory provision. I recognize that section 15(2) is narrow in scope as compared to the general equality provisions of section 15(1).\textsuperscript{181}

The second approach to the relationship between section 15(1) and (2) implies that section 15 ought to be read as a whole, and that section 15(2) is an interpretative guide for establishing the meaning of the equality rights set out in section 15(1).\textsuperscript{182} Taking this approach, Black and Smith have argued:

If section 15(1) does not itself provide for the amelioration of conditions of disadvantaged individuals and groups, the two subsections would seem to reflect views of equality that are fundamentally at odds with one another.\textsuperscript{183}

According to the second approach, the purpose of section 15(2) cannot be established independent of section 15(1). This leads to an interpretation of section 15 as a provision designed to promote social equality for disadvantaged individuals and groups, a characterization that is consistent with the general conception of equality advanced by the Supreme Court.

There have not been many cases interpreting section 15(2) of the Charter. In the few reported cases, there has been very little discussion of the meaning and scope of the section and no discussion of how it would be applied to health care benefits. As well, there are no Supreme Court decisions interpreting section 15(2), so we remain without

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authoritative guidance on a number of important interpretive issues. For these reasons, an examination of the following cases should not be taken as an indication of how a court will react to a challenge to a health care policy or statute. What follows from the caselaw and the academic commentary is that some judicial review of affirmative action programs is appropriate. The mere declaration by government that a particular program was designed to improve the conditions of a disadvantaged group has not been and ought not be sufficient to determine its constitutionality. The difficult issue is how much, and in what circumstances is such review appropriate.

Although most judges have found "underinclusive" laws or benefits programs in violation of section 15(1), the case of Brown v. British Columbia (Minister of Health)184 mentioned above, is an example of a limited benefits program being upheld under section 15(1). In this case, the Plaintiffs challenged the Ministry of Health's policy of funding drugs for cancer and organ transplant patients, but not for those with AIDS.

In rejecting the Plaintiff's arguments Coultas J. stated:

Comparing cancer and transplant patients to HIV patients, the treatment therapies used are very different. The cancer and transplant societies were established to encourage reliance on the expertise developed by them in the administration of complicated and constantly changing medical and drug protocols. The protocol for AZT is not ever changing nor is it complicated. In my view, the distinction between HIV drug therapy and cancer and transplant drug therapy is an accommodation of the medical difference. It is not the sort of inequality addressed by s.15 of the Charter.185

In Brown, Coultas J. held that even if section 15(1) were infringed, the special drug funding program could be saved under section 15(2). In the Robert's case, it was concluded that while age limitations in the disability subsidy program were discriminatory,

184 Brown, supra, note 139 (B.S.S.C.).
185 Ibid. at 157.
the program could be upheld pursuant to the special programs provision in the Ontario Human Rights Code. In reaching this conclusion, Chairperson Backhouse seemed especially concerned about leaving virtually all special programs open to a challenge of underinclusiveness. As she put it, "it is unlikely that any affirmative action yet designed could operate on a completely inclusive basis."187

In Shewchuk v. Ricard,188 the British Columbia Court of Appeal struck down the provisions of the Child Paternity and Support Act on the basis of section 15. With regard to section 15(2), Justice MacFarland wrote:

Section 15(2) excuses discrimination under section 15(1) if the object of the discrimination is the amelioration of conditions of disadvantaged individuals or groups.189

The majority held that the provisions excluding men from applying for a remedy under the Act could not be construed as ameliorating the conditions of the disadvantaged group, i.e. children. The Act was nonetheless upheld as not infringing section 15(1). In a concurring judgment, Nemetz, J.A. underlined the need to scrutinize carefully programs under the subsection, although he would have supported the provisions under section 15(2):

Affirmative action programs contemplated under section 15(2) inevitably provide preferential treatment for certain disadvantaged groups...[T]t is my opinion that affirmative action laws or programs must be carefully scrutinized to ascertain (a) whether the law or program is in fact an ameliorative one for disadvantaged individuals or groups including those set out in section 15(2), and (b) if ameliorative, or whether the effect of the law or program is so unreasonable that it is grossly unfair to other individuals or groups.190

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187 Roberts, at D/6374. See also Symes, supra, note 165 at 530.
188 Shewchuk supra, note 181.
189 Ibid. at 341.
190 Ibid. at 330.
In Re MacVicar and Superintendent of Family & Child Services, the Supreme Court of British Columbia refused to save provisions regarding adoption proceedings under section 15(2). The court stated the following with regard to the general purpose of the section:

It was included in the Charter to silence the debate that rages elsewhere over the legitimacy of affirmative action. ...It was not intended to save from scrutiny all legislation intended to have positive effect...

Section 15(2) is intended to protect legislation which singles out a group for preferential treatment in order to cure a disadvantage. There must be a rational connection between the preferential treatment and the disadvantage. Section 15(2) excuses discrimination under section 15(1) if the persons in favour of whom the distinction is made are disadvantaged and the object of the discrimination is the amelioration of that disadvantage. ...

With regard to the provision in question, the Court stated the following:

If this provision could be saved, little discriminatory legislation could ever be attacked successfully, for almost all positive law has as its stated object the betterment or amelioration of the conditions in our community of a disadvantaged individual or group. The general object was the only one suggested by the superintendent as justification for the provisions: this legislation is for the welfare of children disadvantaged by the material status of their parents. That is not enough, in my view, to invoke the saving provision in section 15(2).

Similarly, in Reference Re the Family Benefits Act (N.S.), the Nova Scotia Court of Appeal held that the infringement of section 15(1) was not justifiable under section 15(2) since family benefits could not be considered as affirmative action:

There is no evidence that benefits payable under the Family Benefits Act can be classified as an affirmative action program. The object of the program is clearly the relief of poverty. There is nothing new in the purpose of the legislation. The history of the legislation clearly shows that it was not designed to overcome past discriminatory practices.

192 Ibid. at 502.
193 Ibid. at 503.
In *Friesen v. Gregory*,<sup>195</sup> the Saskatchewan Unified Family Court upheld a provision of the Unmarried Parents Act which allowed a woman to bring an action against the supposed father of her child to require him to pay support for the child, without giving a correlative right to the father. The provision was upheld under section 15(2) on the grounds that it was to ameliorate the conditions of a disadvantaged group, namely single mothers. It was argued that before section 15(2) could apply, it must be demonstrated that the discriminatory aspects of the legislation are required in order to achieve the ameliorative purpose of the legislation. The court proceeded on the basis that this was required, stating that "it would appear, therefore, that discrimination against putative fathers is required to attain the ameliorative object of the Act".<sup>196</sup>

In the Court of Appeal of British Columbia decision of *Harrison v. University of British Columbia*,<sup>197</sup> it was held that in order for a program to have as its object the amelioration of a disadvantaged group, the group given a special advantage must be shown to be disadvantaged in comparison with persons denied the advantage. A program comes within section 15(2) only if the legislative purpose was to assist a disadvantaged group and the need to exclude others from the benefits conferred by the legislation was properly considered.

A very strict standard of judicial review was imposed by the Manitoba Court of Queens bench in *Manitoba Rice Farmers Association v. Human Rights Commission (Man.)*,<sup>198</sup> striking down a program (approved by the Human Rights Commission) giving native people the first option to licence new production areas for wild rice.

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<sup>196</sup> Ibid. at 248.
<sup>198</sup> Manitoba Rice supra, note 181 at 101-02.
In order to justify a program under section 15(2), I believe there must be a real nexus between the object of the program as declared by the government and its form and implementation. It is not sufficient to declare that the object of a program is to help a disadvantaged group if in fact the ameliorative remedy is not directed toward the cause of the disadvantage. There must be a unity or interrelationship amongst the elements in the program which will prompt the Court to conclude that the remedy in its form and implementation is rationally related to the cause of the disadvantage.

The program was struck down in light of the impact on non-natives, on grounds that the disadvantage suffered by native people did not flow from an inability to get licenses, but rather flowed from a lack of resources more generally.

The Manitoba Rice decision was overturned by the Court of Appeal, on grounds that the trial judge did not have jurisdiction to set aside the approval of the Human Rights Commission to the scheme. In the interim, the plan had been amended, and the Court of Appeal did not address whether the original scheme violated section 15(1) or was saved by section 15(2). Nevertheless, it did cast doubt on the persuasive authority of the judge's opinion in the lower court, observing that "the order which he made consequential upon his decision has been set aside".199

I am not persuaded by the requirement in the Manitoba Rice case that there be a nexus between the cause of the disadvantage and the remedial program. While such a requirement is not found in the language or the spirit of section 15(2), it is not unreasonable to require that there be a rational connection between the nature of the disadvantage suffered by the group and the program, as suggested by the court in MacVicar.

I support many of the arguments made in the 1989 report prepared for the Ministry of Community and Social Services on the impact of the Charter on the provision of adult social services in Ontario. In particular, I agree with the report in saying that I am of two minds about the suggestion in Friesen and Harrison that the government must prove that the measures are necessary to achieve the legislative purposes. On the one hand, this does not seem required by the language of section 15(2), and it would appear to impose too strict a standard on government. On the other hand, there is no denying that the effect of some programs will be to exclude certain individuals and groups from a benefit or opportunity which they would otherwise have expected to receive. I also recognize that the issue of affirmative action is controversial, and courts may be troubled by programs that do not extend benefits to all who arguably require them. Accordingly, it seems prudent to design programs as rationally and reasonably as possible, (this is also required by section 1) justifying the need to do so and minimizing to the extent possible the exclusion of similarly situated groups. This seems to be the thrust of the approach suggested by Black and Smith, where they write the following:

Affirmative action plans are necessarily limited to certain specified groups. As a result, they will inevitably exclude some people who have suffered comparable disadvantage, and those people may claim a denial of equal benefit of the law.

[The appropriate guide [to resolve these conflicts] is that a provision which adversely affects other must contribute significantly to the achievement of the goals of an affirmative action program. In addition, we derive guidance from the fact that section 15(2) specified that the program should have as its object the amelioration of conditions of disadvantaged groups. This wording suggests that a law or program is not saved by section 15(2) if the benefit to a disadvantaged group is an accidental side-effect rather than the purpose of the provision. We also think a program would be suspect if the criteria for inclusion in the program were inconsistent with the goal of ameliorating disadvantage -- if the most severely disadvantaged members of a group were excluded, for example.]

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201 S.15, Meaning, supra, note 76 at 597-98.
I am not persuaded by the suggestion in the *Nova Scotia Family Benefits Reference* that there needs to be a finding of past discrimination to justify a program under section 15(2). This imports a requirement from U.S. constitutional law that is not appropriate given the different language and structure in our constitutions. It should be sufficient that the group is disadvantaged.

This begs the question of whether there need be a prior finding of "disadvantage" before section 15(2) is available. Although the text of section 15(2) is inconclusive, a number of practical considerations suggest why such a finding would be preferable. First, it seems obvious that courts will assume the authority to determine for themselves whether a particular group is disadvantaged for the purpose of section 15(2). Equally obvious is the fact that there will be strong self-imposed pressures on the court to defer to a legislature judgment that such a group is disadvantaged. To the extent that such a legislative finding includes evidence respecting the disadvantaged position of a given group, this information will improve the perceived legitimacy of the remedial measures under review. Second, it is important to remember that section 15(2) operates only with respect to section 15(1). A prior determination that a target group is disadvantaged will assist the task of the person seeking to uphold the program, at least inasmuch as it would confirm the "reasonableness" (if not the necessity) of the remedial measures impugned.

It seems that section 15(2) directs a court to be relatively deferential to a legislated program designed to ameliorate the conditions of disadvantaged groups. This does not

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202 One might note that some scholars argue that equality is a universal concept which does not change with the text or structure of a constitution. *Equal Protection*, supra, note 115.
204 Ibid. at 261.
205 See, e.g., *Manitoba Rice*, supra, note 181, where the Court ultimately conceded that native people were a disadvantaged group.
206 See *Turpin*, supra, note 106 and *Workers Compensation*, supra, note 130.
mean, however, that all challenges to such programs will fail, or that all challenges should fail. And it certainly does not mean the government, in the discharge of its obligations under the Charter, is relieved of the duty to ensure that its programs are effective and properly inclusive of those in need.

Section 15 and the Obligations of Government:

For the purposes of this study, the most important issue that arises in considering the purpose of section 15(2), is the extent of the obligation that it imposes on government. Most commentators seem to assume that section 15(2) does not impose a positive obligation on government to enact programs to promote social equality; it simply allows government to take such action.207 Others refer to a positive duty, although the term appears to be used in different senses.208 Sometimes the notion of a positive right refers to the remedial consequences of a court finding a breach of the Charter.209

First, the point of saying that s.15 is a positive right is that guaranteeing equality is not merely a matter of removing hurdles but of building bridges. That is, if equality is a positive right, then if it is infringed the government may be required to provide services or implement programs that will actually remedy the unequal state of affairs. If, for example, a developed mentally disabled person is held by court to have been deprived of his or her right to equality because there are no special education facilities available, then potentially, the court may instruct the provincial government to provide those facilities.

What is striking about the debate is the degree to which it is framed in terms of judicial review. But as I have argued, what a court will or will not do does not exhaust the


208 See, for example, A. Bayefsky, "The Orientation of Section 15 of the Canadian Charter of Rights and Freedoms" in Weiler and Elliot, eds, Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1986) - her conception that the overall purpose of section 15 is to promote what she terms "equality of result".

content of constitutional obligations. I read section 15 as imposing an obligation on
government to seek to reduce conditions of disadvantage suffered by individuals and
groups. Such an obligation is consistent with a primary purpose of section 15 as noted
earlier. This is not to deny that there are other legitimate and competing governmental
imperatives, including discharging its constitutional obligations when it establishes or
extends a program to ameliorate the conditions of the disadvantaged.

CASE STUDY: APPLICATION OF SECTION 15 ANALYSIS
In this section I apply the principles of section 15 to the health care needs of women in
contemporary Canadian society. Women are not a homogenous group and while there are
some aspects of health care delivery that discriminate against them purely on the basis of
sex, other aspects discriminate on the basis of their age, mental and physical ability, socio-
economic status and residence. Section 15 is relevant to women as members of both
enumerated and analogous classes. This chapter is intended to show how the foregoing
theoretical and somewhat technical discussion can be applied in practice and explore the
complexities associated with overlapping categories.

It is important to explore controls on women's reproduction under equality guarantees
because they have traditionally been discussed only in terms of individual rights and
freedoms. In the United States, for example, the right to abortion is supported on the
basis of an individual woman's privacy, not all women's equality. In Canada, the Supreme
Court in Morgentaler struck down section 251 (as it then was) of the Criminal Code on
the basis that it infringed a woman's security of the person or liberty interest under section
7 of the Charter. The Court did not even comment on the equality arguments made
against section 251. It seems that some people do not yet understand how equality
analysis is applicable or even relevant to women's health. There remains a need to educate all decision-makers, including judges, on the equality implications of controls on women's reproduction.

There are many advantages to using a sex equality analysis to examine the health care problems women face as a result of government allocation decisions. Equality is essentially a contextual, group, and comparative concept, whereas infringements of individual rights can often be discussed and resolved in very abstract terms. Equality involves and requires a comparison of real life conditions. The focus is on the effects, consequences, and applications of a provision within its modern context. This is especially significant in relation to women's health where equality requires not just notionally similar rights but the actual provision of services. An equality analysis is, for example, consistent with international studies which indicate that the toll on the life and health of women caused by illegal abortions does not significantly decrease unless abortion services made lawful in theory are made available in practice.

An equality analysis requires that attention be paid to the actual life circumstances of women and collectively based interests as well as personal autonomy. It is the difference between saying that a woman has a right to control her own body and that women, as a group, need access to reproductive health care services to have the equal opportunity to plan and control their lives. There is some overlap between individual and group rights in these cases because systemic discrimination is experienced by individuals and individual discrimination, when repeated, becomes systemic. Group rights to reproductive health care will also be measured in terms of their general availability and whether individual

members of the group have access to them. The Canadian Advisory Council on the Status of Women emphasizes a collectively based equality argument; it holds that what happens to one woman is often a representative sample and not an isolated case.212

While the Supreme Court in Andrews acknowledged that legislated burdens can be imposed and legislative distinctions made, it stated that they must, nevertheless, be imposed or made equally in accordance with section 15. Therefore, the discriminatory distribution of services through budget cuts and the selective regulation of women's health care may breach the equality standard enunciated in Andrews because the distinction is prejudicial and disadvantageous to women. The Court said "[t]he promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."213 Provincial or territorial laws or policies which impair access to health services made necessary to women because of their reproductive capabilities do not treat women as equally deserving of regulatory or medical concern, do not respect their biological differences from men, and do not give their reproductive capacities equal consideration.

**Sex Discrimination**

Any evaluation of how well women's health care needs are being met must be placed in an accurate historical and political context, in which biological differences between women and men have been used as justification for the social "disadvantaging" of women.214 In a society based on male power and privilege, there are different reactions to, and provisions

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212 Reproductive Health, supra, note 24 at 35.
213 Andrews, supra note 48 at 171.
214 Women, Constitution and Health Care, supra, note 100.
for, the health care needs associated with women and men. Even Canadian government publications have stated that health services, like any other social goods, are distributed unequally among Canadians. In 1986, the federal government stated in its document "Achieving Health for All" that women, children, the elderly, natives, low income groups and immigrants had a lower health status than other Canadians. The document recognized that in Canada the delivery of health care benefits seems to be suffering from sexism and racism in the same way as the rest of society.

Biology in Context:
Familiar Canadian health care rhetoric obliges government to ensure that all Canadians have access to health care. It says nothing, however, about the social determinants of illness, particularly the unequal social relations that affect why and to whom illness happens. The focus on access to treatment of illness ignores its social causes, describing it as a biological or natural problem with purely scientific solutions. The concept of a right to health therefore reflects and reinforces the commonly held assumption that "...determinants of health and illness are predominantly biological, so that patterns of morbidity and mortality have little to do with the social and economic environment in which they occur." In this view illness is perceived as something that just happens, rather than a consequence of poverty and inequality; and universal access to medical services, not transformation of the social conditions that cause illness, is the focus of political action. The social constitution of illness, in particular the strong correlation between its distribution and that of wealth and income, is obscured.

215 For a general overview see M. Begin, Redesigning Health Care for Women (Ottawa: CRIAW, 1989).
216 Canada, Achieving Health for All (Ottawa: Minister of Supply and Services, 1991) [hereinafter Achieving Health for All].
The comparative basis of the concept of equality has led some courts and commentators to reject an equality analysis of reproduction-related issues because the real biological differences between men and women are said to preclude any meaningful comparison. For example, until recently, the Supreme Court of Canada used equality concepts in a way which tended to penalize pregnant women for the ways in which they are not like men. But recent Supreme Court cases illustrate that biological differences and women's ability to become pregnant will no longer be allowed to preclude a sex equality argument.219

The Supreme Court has also expressly cautioned that it is wrong to believe that pregnancy related discrimination could not be sex discrimination because not all women become pregnant. While pregnancy-based discrimination only affects part of an identifiable group, it does not affect anyone who is not a member of the group. Pregnancy cannot be separated from sex. That discrimination against only some members of a class is still discrimination was reinforced by the Supreme Court's decision in Janzen which held that the sexual harassment of only some female employees was nevertheless sex discrimination.220

The Supreme Court, therefore has recognized that the uniqueness of women's reproductive situation does not justify disadvantageous, and consequently unequal, treatment by law. The Court has reasserted that while laws cannot alter the inherent reproductive capacities of men and women, they can and do prescribe the social and legal consequences which attach to them. Biology may dictate that only women can become pregnant, but how the legislature treats pregnant women will be open to judicial scrutiny under the Charter. This is significant because it is legislative powers, not the natural order, which regulate access to women's reproductive health-care services.

Women's Specific Health Care Needs

Women have distinct health care needs because of their biological role in human reproduction. Statistics Canada has reported that 70 per cent of the hospitalization of women between the ages of twenty and forty-four is attributable to their childbearing capacities and diseases affecting their reproductive organs. Women also visit doctors in greater numbers and more frequently than men in the 16 to 64 age group because of their reproductive health needs. The ability of women to bear children means that medical services concerning pregnancy, childbirth, contraception, sterilization, abortion, surgery, infertility, breast examinations, premenstrual syndrome, and menopause are considered routine parts of women's health care. Unfair restrictions on necessary reproductive health care services undermine the nationally recognized goal of accessible quality health care for all persons and jeopardize the physical and psychological well-being of women in Canada.

Women are consistently confronted by the ways in which our current perceptions of law, medicine and health care are generally male defined. Consequently, not enough attention is given to women's unique biology and relative social inequality. In terms of biology, the guiding norm for the human body is male: most medical studies use men as the control group and then improperly extrapolate to make claims about "everyone". This mixture of androcentric thought and false universality is revealed by how drug dosages are generally established: the male body is used as the point of reference and then women's dosages are reduced according to weight. Many argue that little consideration is given to

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223 R.S.C. 1985 c. s.7.
whether the significant differences in female physiology warrants a gender specific prescription.225 The fact that many health related concepts are based on our thinking about men, rather than about men and women, is at the root of many of the problems women face in health care. Sheilah L. Martin explains that this may also shed some light on how the federal government can justify the taxing of women's menstrual cycles by its decision to classify feminine sanitary products as luxury items, subject to the goods and services tax, rather than exempt necessities.226

The male norm which supports women as a class being defined and objectified as the "other", has also contributed to women's health problems being consistently understudied, underfunded or ignored. The Dalkon Shield, DES, Depo Prevera, and even some aspects of new reproductive technologies are examples of women being sacrificed by underresearched and untested products. In addition, for many years certain aspects of women's health care needs, like access to abortion, were considered criminal offenses and prohibited. Laws against abortion and controlling the sale of and information on contraceptives limited women's access to medically necessary services and restricted women's ability to control their own fertility and health.

Women's specific health care needs do not only flow from their biological capacities. Women's health care needs have a lot to do with their social inequality in contemporary society. One example of this inequality is the frequency and intensity of violence against women. In the "War on Women" there is a desperate and unmet need for crisis centers and for shelters.227 In light of recent budget cuts even funding of short term solutions are in jeopardy. Women suffer illness from sexual abuse and sexual harassment. Physical

225 Ibid.
226 Reproductive Health, supra, note 24 at 3.
exhaustion may be caused by women's double duty of working for wages and being primary caretakers of homes and families. Mental fatigue often accompanies the stress of reconciling old stereotypes with new ambitions. In some ways the health care system delivers the same unfair treatment women experience in an unequal society: women's testimony of their symptoms may not be believed by some physicians; women's illnesses are often dismissed as psychosomatic complaints; or the double hierarchy of a female patient and male doctor may result in her sexual abuse or psychological subordination.228 Within a male defined health care framework wherever women's needs differ most from those of men, they can be made to appear less medically necessary, and less significant to a "true" health care system. Women's needs are more likely to be considered optional and in time of budgetary constraint, expendable. This has significant implications for the constitutional issues raised by women's health care needs.

The many sources and forms of control on women's reproductive health available to the federal and provincial or territorial governments give them wide powers to either promote or hinder women's health care. Their decisions influence how women's reproductive health care is conceptualized and administered and also directly control which health care services are available and accessible to women. Federal standards are required to ensure the fair and equal treatment of all Canadians. The various responses of different provinces towards abortion after the federal criminal law provision was struck down, is an example of a wide range of policies, protection and tolerance. They reveal how the unique treatment of women's health care needs in some jurisdictions continue to disadvantage women; a process which must be stopped in a post Charter Canada.

The many sources and forms of regulation on women's reproductive health join to form a complex web of health care disadvantage. A provincial or territorial decision to withdraw public funding from, for example, contraceptive counseling would have a significantly different impact on the lives of women if it were the only form of regulation on women's reproductive health. Such decisions cannot be considered in isolation; judging the impact of this type of regulation independently and in the abstract is ineffective. It is within the overall context that one must consider whether the decisions of the federal or provincial governments infringe women's rights under the Canada Health Act and the Charter of Rights.

The Relevance of the Legal Standards
Provinces may influence women's health care because they determine which services are medically necessary under the federal/provincial cost-sharing program, and they set the rate at which these services are compensated. Each province has its own health care insurance plan. For example, in 1985, the Alberta government stopped the public funding of contraceptive counseling, sterilization operations for males and females, and the insertion of IUDs for all women who were not, by reason of a specifically enumerated medical reason, unable to use oral contraceptives. While the government reinsured these services as a result of political pressure, its initial decision to withdraw funding is an example of the potential impact of provincial powers over women's health. Another example of government's ability to affect women's health is the British Columbia government's attempt to withdraw public funding of abortion services after the Morgentaler decision. The decision to withhold funding was struck down by a B.C. court.

229 Press Release, Alberta Department of Hospitals and Medical Care, 19 May 1987. The announcement was ambiguous because it claimed to be withdrawing funds from non-medically necessary services. These services were prima facie uninsured but there was an exception of "unless medically required". After stating that IUD insertions, including follow-up visits were excluded, the government explained: "There may be some situations where a woman with serious illness, e.g. diabetes or heart disease, is unable to tolerate birth control pills. Under these circumstances insertion of an intra-uterine device would be insured."
on administrative law principles because the enabling statute did not allow the government to act as it did.\textsuperscript{230} That case also raised several \textit{Charter} issues because access to abortion would have been significantly limited if individual women were forced to personally pay for medically necessary services or if doctors would have been expected to provide them without compensation.

The funding decisions of certain provinces regarding women's reproductive health may violate the \textit{Canada Health Act}'s criterion of comprehensiveness. A complete withdrawal of funds, like the decision of the Alberta government to de-insure sterilizations, would be the clearest form of underinclusion and noncompliance. In this example, sterilization operations continued to be provided in the medical sense but Albertans were personally responsible to pay for them. The provincial insurance plan was not comprehensive because it did not provide funding for an objectively medically necessary procedure which was, actually being provided to its residents. The same analysis would mean that the decision of the British Columbia government to withdraw all public funding from abortion also would have breached this section.\textsuperscript{231}

Restrictions on, or partial exclusions from funding may also threaten the criterion of comprehensiveness. For example, provinces which publicly fund medical procedures such as abortions only when they are performed in hospitals may fail to pay for all medically necessary abortions provided in the province. One could argue that when the same procedure is insured if performed in one facility but not if performed in another, there is underinclusion. With regard to real government concern over where the service is performed, as opposed to concern over the inherent nature of the procedure, it can be argued that the province has many ways to monitor the quality of health care services.


\textsuperscript{231} \textit{Reproductive Health}, supra, note 24.
without withholding public funding. Alternative facilities, such as reproductive health care clinics must meet general health and safety requirements, be approved by the College of Physicians and Surgeons, and are required to employ only qualified personnel.²³²

It is unlikely that the criterion of comprehensiveness was intended to cover the underfunding of certain services, unless the level is so low in relation to its costs that one can reasonably infer that there was no real intention to include the service. Because courts may hesitant about challenging the government's economic assessment of what medical services are worth, it may be difficult to question the amount of funding directed to particular services. While it seems that courts will not intervene in anything but the exceptional cases, even limited judicial review of underfunding increases the obligation on physicians and consumer groups to ensure that the true cost and the real value of medical services are reflected in the tariff established.

The difference between formal inclusion and actual coverage also seen when a province insures a medically necessary procedure but does not provide it. If comprehensive coverage implies the availability of services at a certain minimal level, it may be inappropriate to refer to a provincial health insurance plan as comprehensive when the province will pay for, but not provide, needed services. This is the tension in Prince Edward Island where the provincial government recognizes abortion as a medically necessary service, by expressly including it in the provincial health insurance plan, but no abortions are performed in P.E.I. A woman must therefore travel to another province to obtain a service which her own provincial government recognizes as medically necessary. At a minimum, the failure to compensate a patient for travel costs in these circumstances operates as a financial penalty and extra user fee.²³³

²³² Ibid.
²³³ Ibid. at p.14.
The scope of the protection afforded by the Canada Health Act's requirement of "uniformity" is determined by which categories are used for comparisons. For example, in considering the uniformity of provincial abortion services it becomes significant decide whether abortion should be compared with medical procedures of similar complexity, procedures relating only to women's reproductive health, medical procedures performed exclusively on women, procedures involving pregnant women, or procedures involving pregnant women seeking to terminate their pregnancies. However, when the reproductive health care service being considered is abortion, one might argue that the nature and effects of the procedure are so unique that it is properly in its own category. As the category broadens, it becomes less likely that special regulations will meet the test of uniformity.

If "uniform" means formally identical treatment within definite categories, the second "accessibility" condition contained in subsection 12(1)(a) of the Canada Health Act may be more useful for those seeking to challenge the special terms and conditions imposed by certain provinces on the availability of services such as abortion. The second part of subsection 12(1)(a) (as discussed earlier) therefore grants the right to reasonable access to insured services. Under its expansive terms, reasonable access cannot be impeded or precluded, directly or indirectly, by charges or other means. Unreasonable, disproportionate, or inhibiting barriers therefore infringe this criterion whether they are economic, geographic, or legal barriers.

To establish whether access is hindered or prevented, the availability of medical services must be determined and the impact of the provincial restriction or regulation must be measured. Singling out a medical procedure for unique treatment and imposing additional

234 Ibid. at 15.
or special bureaucratic requirements would constitute prima facie barriers. Precluding or
impeding funding for medically necessary services may also raise the issues of accessibility
as well as comprehensiveness. Having individuals pay premiums or user fees was criticized
by Justice Hall as a form of improper financial barrier,235 but the principle of accessibility
protects against more than economic impediments. Large federal transfer payments create
the provincial obligation to supply and fund appropriate services.

As stated in subsection 12(1)(a), not every barrier which impedes or precludes access
violates the criterion of accessibility. The statutory standard is not one of free access or
easy access but the relative, circumstantial one of reasonable access. Once again, it is the
interpretation of this undefined term which sets the type and extent of permissible
provincial restrictions. A weighing and balancing of interests is needed to assess
reasonableness. Adopting approaches to reasonableness from other areas of law (such as
civil liability in tort and limitations on rights and freedoms allowed under section 1 of the
Charter) suggests the following as relevant considerations236:

. the nature of the health service;
. the demand for the health services;
. the reason for imposing the restriction;
. the consequences of the restriction;
. the extent of the impediment created;
. its impact on those affected by it;
. the importance of the insured services;
. the nature of the provincial interest alleged;
. whether the restriction is proportional to the end sought;

235 Royal Commission, supra, note 36 at 41.
236 Reproductive Health, supra, note 24 at ?.
whether it is rationally connected to it;
whether it is carefully tailored to impede access as little as possible; and
the cost/benefit implications of the decision.

The broad wording in subsection 12(1)(a) and the general purpose of the Canada Health Act suggest that impediments or preclusions which jeopardize the patient's health are likely to be considered unreasonable. This may include added requirements which are not caused by the nature of the medical procedure, which delay access to medically necessary services, and which threaten the patient's physical and psychological well-being. In Morgentaler, the Supreme Court of criticized the Criminal Code requirement that abortions could only be lawfully performed in approved or accredited hospitals upon the approval of a therapeutic abortion committee. The Court held that the requirement was unfair and arbitrary and the unnecessary delay it generated improperly infringed women's security of the person contrary to section 7 of the Charter. Impediments or preclusions which infringe a Charter interest may, for that reason alone, be insupportable under the Canada Health Act. In this way, provincial requirements which limit or restrict access to abortion may contravene either aspect of subsection 12(1)(a). Provinces which have a two doctor rule, a hospital proviso, and counseling requirements, single out abortion for special treatment and restrict reasonable access by lowering the overall availability of abortions in the province or making it harder for individual women to obtain one.

Subsection 12(1)(c) of the "accessibility" criterion, may also be relevant to the underfunding of medical services. It requires a province to provide reasonable compensation for all insured services rendered by medical practitioners. Consequently, underfunding may offend the criterion of accessibility even if it is not prohibited under comprehensiveness.

Residence

While place of residence is not a prohibited ground of discrimination listed in section 15, but a number of courts have considered distinctions based on residence to violate the Charter. In R. v. Turpin, discussed earlier, the Supreme Court left open the possibility that distinctions based on province of residence could be discriminatory under section 15.

I would not wish to suggest that a person's province of residence...could not in some circumstances be a personal characteristic of the individual or group capable of constituting a ground of discrimination. I simply say that it is not so here.

It seems to follow that distinctions based upon place of residence within a province could also be discriminatory. There is no principled reason to distinguish between the two for the purposes of the Charter. Until the matter is resolved in the courts, I will assume that place of residence could be considered an analogous ground under section 15. This does not necessarily mean that a province is no longer entitled to allocate its services selectively within the province. Nor does it necessarily mean that differences in the availability of services as between different areas of the province will violate the Charter.

Equality does not mean identical treatment. If there is a specific need in one area but not in another, a government decision to establish a program in that area of need will not infringe equality rights. It is appropriate to create programs that address the greatest need and where numbers warrant the provision of services at public expense. Challenges based upon section 15 would be directed to the legislation or program considered as a whole. So long as the program as a whole can be justified, the fact that an individual is denied a service or is provided with a service under less-advantageous conditions will not breach the Charter.

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239 Turpin, supra, note 106 at 143.
While inconsistent access to medically necessary reproductive health care services exists between provinces and territories, residence may not qualify as a ground of discrimination recognized under section 15 because diversity on matters within provincial or territorial jurisdiction is generally to be expected. But where a recognized national standard exists and where provinces have promised uniform obligations under a plan like the federal/provincial cost sharing programs, inter-provincial comparisons will be appropriate. Nevertheless, it may be difficult to make an analogy between provincial or territorial residence and the enumerated grounds in section 15, a task which the Supreme Court suggests forms part of the test of recognizing an unenumerated ground of distinction.\textsuperscript{240}

It may also be inappropriate to refer to all provincial or territorial residents as the type of powerless, "discrete and insular minority" to which the Supreme Court has said the Charter's equality protections will be extended.\textsuperscript{241} It may be easier to establish protections on the basis of residence within a specific province or territory, such as divisions based on urban or rural residence, because they do not raise issues relating to division of power or jurisdiction.

The principles of section 36 of the Constitution\textsuperscript{242} may be used to support the recognition of provincial or territorial residence as an analogous ground warranting constitutional protection. Section 36 reads:

36(1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to
(a) promoting equal opportunities for the well-being of Canadians;
(b) furthering economic development to reduce disparity in opportunity; and

\textsuperscript{240} Andrews supra note 48.
\textsuperscript{241} Ibid.
\textsuperscript{242} Constitution Act 1982 [en. by Canada Act, 1982 (U.K.), c.11, s.1].
(c) providing essential public services of reasonable quality to all Canadians.

This provision establishes a federal/provincial or territorial commitment to standardized services. Promoting equal opportunities for the "well-being" of Canadians has a clear physical component and relates directly to health services. Subsection 36(1)(c) works as a general reaffirmation of the principle of regional equality presented by the criteria of comprehensiveness, accessibility, universality and portability in the Canada Health Act. Therefore, this section may provide some support to a constitutional grouping around residency.

The Canada Health Act has not yet been invoked as a basis of a right to equality in health care. However, a section 15 Charter infringement was invoked in a Quebec case involving a hospital by-law. In Jasmin v. Cite de la Sante de Laval, the plaintiffs challenged a by-law that gave preference to residents of the district to receive obstetrical care in the hospital. The Quebec Superior Court held that the by-law infringed section 15 of the Charter. There was no analysis in the case with respect to geographic location as a ground for section 15 protection. However, the provincial legislation expressly gave patients the freedom to choose the hospital where they were to receive treatment.

Geographic location may be one of the unlisted grounds for which discrimination is prohibited. However, whether one could argue a Charter case on the basis of regional differences in health care between provinces is uncertain. As mentioned above, in the case of R. v. Turpin the Supreme Court held that the differential treatment did not constitute discrimination because those accused outside Alberta could not be considered a group vulnerable to disadvantage. However, Wilson J. went on to say that in the appropriate

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244 R.S.Q., c. S-5, as amended.
circumstances a person's province of residence might constitute a ground for discrimination.246

Because of the constitutional division of power, there is more scope for the provinces to differ from one another in health care provisions than in criminal law, the subject of the R. v. Turpin case. But, the scope for allowable difference in health legislation is reduced by the commitment to national equality found in the Canada Health Act247 and the Charter. Therefore if a government action has a disparate and deleterious effect on an individual protected under section 15, such action may be subject to court challenge under the Charter.

**Overlapping Categories of Gender, Socio-Economic Status and Age**

Provincial and territorial funding and regulatory restrictions may create hardship on the basis of socio-economic status because they have a disparate and deleterious impact on the poor. Many women cannot afford to pay for the cost of unfunded medical services and the trip to a jurisdiction where they are available. Provincial and territorial funding decisions therefore have particular and prejudicial consequences for them. With the documented extent of the feminization of poverty, certain funding restrictions doubly disadvantage women: first because they are women and second because they are poor. The Badgley Report found that inequalities in the distribution and accessibility of therapeutic abortion services hurt women who were less educated, women with lower incomes, and women who lived in smaller centers or rural areas.248 Taking into account

246 Ibid. at 1333.
247 Canada Health Act, R.S.C. 1985, c. C-6. Section 36 of the Constitution Act, 1982, contains a commitment to the promotion of "equal opportunities for the well-being of Canadians" and of "essential public services of reasonable quality to all Canadians". However, it is clear from the opening phrase that this does not constitute a legally enforceable obligation: "Without altering the legislative authority of Parliament or of the provincial legislature, or the rights of any of them with respect to the exercise of their legislative authority..."
the relative powerlessness of the poor, a purposive approach to extending Charter protections to analogous groups supports their inclusion. In addition, because the primary aim of the Canada Health Act is to provide health services regardless of individual ability to pay, the burdens placed on the poor to carry the costs of their own medical care make a grouping around economic inability especially significant.

Another characteristic that is particularly difficult for women is being part of the elderly population. Perhaps nowhere are allocation decisions more difficult than in the field of geriatric health care. Some commentators on resource allocation have said that to reject opportunities to allow natural dying is costly in financial terms - in a health care service with finite resources, it is neither harsh nor unethical to accept the consequences of a financial limit. G.S. Robertson describes the harsh reality of political power by suggesting that to spend a lot on the elderly might not be supported by younger members of the public if it became known that younger lives were being lost because of inadequate finance. Nonetheless, geriatric patients should expect equal consideration and the problem is to measure that equality; a productivity test, for example, demands that treatment should be both beneficial and effective whereas an evaluation on the basis of social good may conclude that benefit alone is enough to justify the resultant cost to the community.

The fact that the elderly experience poverty in such large numbers is serious in and of itself. It is even more serious when one sees that low income is a correlate of poor health,

251 The more sensational writers in this field foresee the emergence of a dangerous confrontation between the fit minority and the dependent majority - V. Coleman, The Health Scandal (1988).
and that evidence of this correlation exists in Canada notwithstanding universal health care insurance. It becomes most serious when the effects of poverty are added to the health problems that increase in both number and severity with increasing age for persons in all income brackets. In short, old age for Canadians is characterized typically by cumulating health problems accompanied by diminishing financial resources.

It is especially troubling when one considers the demographic predictions for the next 30 to 40 years. Over this time period the elderly in the Canadian population will increase in absolute numbers, expanding at an annual average rate of 3%, compared with a rate barely above 1% for the entire population; they will make up an increasingly higher proportion of the total population; and, among the elderly, the increases will be greater among persons in the older age group (75 to 84 years and 85 and over) than for those aged 65 to 74 years. The older elderly are more likely than their younger contemporaries to have used up their private resources, and therefore to be dependent on the public purse for survival.

The National Council of Welfare reported recently that one of the "saddest facts of Canadian life is the health gap that separates rich and poor":

Simply put, well-off Canadians live longer and healthier lives than average or low-income Canadians. The reasons for the gap are not fully understood, but they appear to be due in large part to the debilitating conditions of life that poverty forces upon people.254

In Achieving Health for All, "reducing inequities in the health of low - versus high income groups" is one of three fundamental health care challenges identified by Health and

Welfare Canada. The report states that financially "disadvantaged groups have significantly lower life expectancy, poorer health and a higher prevalence of disability than the average Canadian". The elderly make up a significant portion of the poor in Canada and therefore they are adversely affected. The Canadian Council on Social Development has emphasized the relationship between poverty and poor health among the elderly by warning that "[w]ith the aging of our population, the burden on our health care system will be catastrophic unless we invest in the health of our seniors."

Limitations of the Health Care System in Meeting the Needs of the Elderly:

Even with universal health care insurance, poverty still makes a significant difference to health care for the elderly. The elderly poor are adversely affected by various limitations in the universal health care plans and supplementary benefits that are available in the provinces and federal territories. M.A. Shone explores at least four such limitations. All of which are interrelated. They are that: (i) universal health insurance does not cover all medical and medically-related costs; (ii) emphasis is placed on acute, rather than chronic, health problems; (iii) emphasis is placed on physical health, rather than on mental health and social well-being; and (iv) services are focused on hospital - rather than community-based health care.

Medicare coverage is reasonably comprehensive for medically required services that are provided by medical, dental and other health care practitioners on an in-hospital or hospital outpatient basis, and for services provided by medical practitioners in the community. However, the plans do not cover all medically-related and dental services.

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256 Ibid. at 2.
257 Canadian Council on Social Development, Canada's Social Programs Are in Trouble, published for Campaign Against Bill C-69 (Ottawa: Canadian Council on Social Development, 1990) at 3.
259 See the Canada Health Act, R.S.C. 1985, c. C-6.
For example, out-of-hospital medications and routine dental care must be paid for by individuals from private insurance plans.\textsuperscript{260}

Supplementary provincial plans provide added coverage, but this coverage is restricted in terms of financial limits and time periods. In some cases, the coverage is lower than the cost of the goods or service, which would likely make the benefit inaccessible to the elderly poor. In other cases, the patient must pay directly for the goods or service and then claim reimbursement from the insurer. Out-of-pocket payment in advance may be too great a burden for a person living on a subsistence income. While people who earn middle to high incomes can afford the balance in the cost of goods and services that are partially insured and purchase those that are not covered at all, persons living in poverty must do without or make some other sacrifice.

The universal health care plans and general health care system seem to concentrate on the negative side of health, rather than the positive side. It has been claimed that Medicare has "effectively 'locked in' established patterns of delivering health care," and that as a result "innovation in the delivery of health care services, as opposed to innovation in medicine, is far from commonplace in Canada."\textsuperscript{261} Funding for long-term care for the elderly and chronically ill, "has a much smaller federal presence" and "is much less developed."\textsuperscript{262}

Because of the focus on the negative side of health, physical health problems that threaten life and limb usually receive care but mental health and social well-being do not receive as much attention. The point is emphasized by the fact that funding for "a hospital or

\textsuperscript{260} National Council of Welfare, supra, note 5 at 1.
\textsuperscript{261} Ibid. at 38.
\textsuperscript{262} Ibid at 3.
institution primarily for the mentally disordered" is excluded from shared federal funding under both the Canada Health Act263 and the Canada Assistance Plan264.

The universal health care plans focus on in-hospital or hospital outpatient services, and on services provided by medical practitioners in the community. Many elderly persons want to remain in their own homes. In order to do so, they need "not only medical care but a variety of social supports to meet their non-medical needs"265 - care and support which the elderly poor cannot afford. Community-based home care could give the elderly poor the opportunity to continue to live at home and participate in the life of the family. While "in the short term, developing a new system will no doubt add to the cost"266, home care has the advantage of being less expensive than institutional care."267 Shifting the emphasis "from the current acute care model to one that provides better support in the community" would benefit elderly and chronically ill persons, among whom unattached elderly women living in poverty predominate.268 It is possible that "the shift would have occurred long ago if men were the ones who found themselves in nursing homes in old age."269

The expansion of home care does not mean that nursing homes and other long-term residential health care facilities will no longer be required. The development of a decent system of publicly insured, community-centered nursing home care is essential to future health care for the elderly poor.270 The expansion of home care services might also reduce the rate of institutionalization of the elderly. However, the demand for nursing homes will

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263 R.S.C. 1985, c. C-6, s.2, defining hospital.
264 R.S.C. 1985, c. C-1, in which the definition of "home for special care" in s.2 excludes hospitals.
265 National Council of Welfare, supra, note 5 at 63-64.
266 Ibid. at 65.
267 C. Mjolness, "Home Care," The Spokesman (May 1990) at 2. Compare $15,000 per month for care in an acute care facility with $2,500 per month to provide care for someone in the home.
270 National Council of Welfare, supra, note 5 at 68.
escalate as the proportion of elderly persons in the total population increases, and as the proportion of elderly persons in older age groups also increases - on average, the percentage of older disabled people residing in institutions almost doubles with every five years of age over 65; the percentage of people in institutions at age 65 to 69 is 4% compared with 43% at age 85 and older.\textsuperscript{271} Canada has one of the highest rates of institutionalization of any western nation - 16% of the disabled elderly, or approximately 8% of all elderly persons, live in long-term care institutions.\textsuperscript{272}

Improving the system of residential health care facilities would especially benefit elderly women because more elderly women (approximately 19%) than elderly men (11%) live in institutions.\textsuperscript{273} Women over the age of 75 are twice as likely as men of the same age to be institutionalized in long-term care facilities.\textsuperscript{274} These figures are likely influenced by the longer life expectancy of women,\textsuperscript{275} and by the fact that elderly women are more likely to be unattached, live alone and lack family support. According to the 1986 census, of the 25% of elderly people who live alone, more than three-quarters (77%) are women (34% of all elderly women compared with just 14% of all elderly men).\textsuperscript{276} Living alone is a significant disadvantage because families provide far more services associated with activities of daily living to the elderly with disabilities than do agencies or neighbors.\textsuperscript{277}

"Health care for the frail elderly woman is more likely to depend on the woman's own

\textsuperscript{271} P.A. Dunn, \textit{Barriers Confronting Seniors with Disabilities in Canada}, Special Topic Series from the Health and Activity Limitation Survey (Ottawa: Statistics Canada, 1990) at 28. [hereinafter Barriers]
\textsuperscript{272} Ibid. at 1. The trend toward caring for the elderly in long-term care institutions has been increasing for the past two decades. William F. Forbes and Jennifer A. Jackson, \textit{Institutionalization of the Elderly in Canada} (Butterworths, Toronto and Vancouver, 1987) at vii.
\textsuperscript{273} Ibid.
\textsuperscript{274} Women and Aging, supra, note 268 at 51.
\textsuperscript{275} Health and Welfare Canada, \textit{The Active Health Report on Seniors - What We Think We Know, What We Do} (Ottawa: Minister of National Health and Welfare, 1989) at 7.
\textsuperscript{277} Barriers, supra, note 209 at 17.
ability to obtain health care services - either services that are provided to her at home or services that are part of institutionalized care."^278

It is clear that health problems, poverty and old age combine to make the elderly a seriously disadvantaged group. This group is old in a society that honours youth; this group is poor in a society that gives respect to the financially wealthy; this group is sick and disabled in a society that worships intellectual and physical strength, prowess and energy; this group is largely female in a society in which men have the power and are the political decision-makers.

Clearly, the courts alone cannot remedy all of these disadvantages. A great deal of the responsibility for solutions rests with the legislators, health care providers and other experts. Nevertheless, the courts have an important role to play at the macro level. Their role is most visible in the Charter, which states their responsibility of protecting individuals against infringement of federal, provincial and territorial human rights legislation. Under the Charter, the courts must ensure that the elderly poor are protected by the equality rights of by section 15. The protection against adverse discrimination on the basis of age, sex, and mental or physical disability, is especially relevant to the health of elderly persons put at risk by poverty. Because the Supreme Court has held that the categories of discrimination are not closed,^279 it might be found that the Charter also protects against discrimination on the basis of poverty.

The purposive approach to equality rights, established by the Supreme Court in the Andrews case,^280 may protect persons in disadvantaged groups from the systemically adverse discriminatory impact of laws that may or may not be objectionable on their

^278 Women and Aging, supr., note 268 at 51.
^280 Ibid.
face.  It also has the potential to protect vulnerable individuals from unintended adverse discriminatory effects. Given the disadvantages faced by unattached elderly individuals, the disabled elderly, and elderly women in terms of both income and health care, there seems to be good reason for the courts to apply principles relating to systemic discrimination, or to unintended discriminatory results in individual cases. Because the Charter gives the courts the opportunity to create suitable remedies, the courts may choose to extend benefits to persons or groups who are adversely discriminated against by their exclusion from classes of persons who are eligible to receive income security, health care or related benefits under public programs. The courts may support affirmative action to improve the situation of elderly women whose income needs are usually greater than those of elderly men, and whose health needs are significantly different from those of elderly men.

The Supreme Court recently concluded that underinclusive statutes are discriminatory on the basis of age. In McKinney v. University of Guelph the Court held that excluding persons over sixty-five from human rights protections against age discrimination, violated section 15(1) of the Charter. Despite this finding, the Court upheld the limited human rights protections pursuant to section 1 of the Charter. Justices Wilson and L'Heureux-Dube dissented. While they agreed that section 15(1) had been violated, they did not conclude that the limited protections could be justified under section 1.

A complainant may assert that where the health care needs of a disadvantaged group are not met, full payment under the Canada Health Act is inconsistent with the Charter.

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282 Alberta Dairy Pool supra, note 97.
283 Health Poverty and the Elderly supra note 258.
284 Section 24, Charter, supra, note 1.
285 E.g. Schacter, supra, note 33.
286 McKinney supra, note 103.
Because the Canada Health Act, like any federal statute, is subject to the Charter, it must be approached and applied in a manner consistent with the Charter's guarantees.

Decisions concerning transfer payments taken under statutory power by the federal Cabinet raise justiciable issues. Women who pay federal taxes and provincial/territorial insurance premiums are not receiving the promised level of health service they need because certain provincial or territorial regulations have singled out women-specific health care procedures for less advantageous treatment.

One of the greatest challenges facing women's health is limited access to medically necessary services. Federal, provincial and territorial jurisdiction to affect health care policy, leads to complex and interwoven allocation decisions. Allocation decisions which restrict access to medically necessary services run the risk of non-compliance with both the Canada Health Act and the Charter. The promise of comprehensive, accessible, universal and publicly administered medical services and the right to equal benefit and protection of the law, mean than women have a legal basis on which to claim adequate health services. Provinces and territories which restrict funding or access, and create special and limiting laws and policies may ultimately be challenged in the courts.

**IMPLICATIONS OF SECTIONS 1 AND 24 FOR ALLOCATION DECISIONS**

**Section 1**

Section 1 of the Charter provides for the limitation of rights and freedoms. Section 1 provides as follows:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
The person seeking a remedy has the initial burden of establishing the unconstitutionality of the impugned legislation or official action. This involves interpreting the meaning of the Charter right or freedom engaged, and determining whether it has been infringed by the law or policy. If a court concludes that the Charter has been violated, the burden shifts to the party defending the law or action to justify it under the terms of section 1 of the Charter. The responsibility of the court is to determine whether the purpose of the legislation being challenged is important enough to justify the infringement of the Charter right or freedom, and whether the means chosen to achieve that purpose are themselves reasonable and justified in terms of the objectives sought. The court will state whether or not the Charter violation has been justified under section 1, and depending on the nature of the case, the court may provide a remedy or remedies under section 24.

For a law to comply with section 1 requirements, the burden of proof is on the government to demonstrate the sufficiency of the state interest it asserts and to establish that the means employed are reasonable and justified in terms of the objectives sought.\(^\text{287}\) To do so the government must prove that the means chosen are rational, fair and not arbitrary, that the legislation impairs the right or freedom under consideration as little as possible, and that the effects of the limitation upon the relevant right or freedom are not out of proportion to the desired objective. The complainant bears the onus of showing that her or his right has been infringed and then the government must demonstrate why it should override the constitutionally protected interests. The Supreme Court seems to be divided in terms of how to apply section 1 of the Charter; there is considerable literature exploring the inconsistent application of section 1.\(^\text{288}\) While in some cases, courts have demanded that government justify its laws very strictly, in the area of social and economic

\(^{287}\) The basic framework was set out in Oakes, supra note 93 at 138-140.

legislation, courts have shown a considerable degree of deference to the legislature.289 Recent cases leave unresolved the central question concerning the standard of review to apply in equality rights cases: whether different standards are to apply depending on the nature of the case and, if so, what those standards are.290 This significantly complicates the task of predicting how a court might approach some of the issues discussed in this thesis.

Under the section 1 test set out in R. v. Oakes291, the first inquiry is whether the government objective relates to concerns which are pressing and substantial in a free and democratic society. The second inquiry involves a proportionality test. In Andrews, Justice McIntyre suggested that the first aspect of the Oakes test is too stringent when applied to breaches of the equality guarantees. He would alter the standard requirement that the state interest must be pressing and substantial and replace it with the less onerous test of whether the government can establish a desirable social objective. The majority of the Supreme Court did not, however, endorse this lower level of judicial scrutiny in the case of a breach of section 15. The Court therefore split on both the interpretation and application of section 1. According to the majority judgment of Justice Wilson, the government will still be required to demonstrate a pressing and substantial state interest, regardless of whether the breach of the infringed right occurred under section 7 or section 15. This is an important aspect of the decision because a lower level of judicial scrutiny for equality infringements may impair the evolution of equality theories and discourage the use of equality arguments.

A government attempting to establish its pressing and substantial interest in the funding of health care services, research etc., could be expected to argue that it must protect the

safety of patients, and ensure the efficient allocation of health care resources. Under section 1, a court would evaluate the propriety of the legislative goal proposed and then assess the proportionality of the means to attain those ends.

It appears as if the amount of funding that the Ministry of Health provides for the cost of certain devices such as hearing aids, wheelchairs and the like has been tied to the age of the client. To the extent that there remain any age-based limitations or distinctions, they would have to be justified under sections 15 and 1 of the Charter. In order to meet the civil burden of proof the government must present evidence to support their position that the Charter limitation has a valid purpose that can best be achieved by the means the government has chosen and not by some other means. This evidence may include social science data, reports form Royal Commissions and Parliamentary Committees, and laws in other free and democratic nations as evidenced by treatises on comparative law, and in international covenants.

The essence of the similarly situated test has not disappeared from equality analysis under the Charter. Wherever a legislative distinction burdens one group at the expense of another such that section 15 is infringed, the section 1 analysis must confront the question of whether there are differences between these two groups that would justify the different treatment. Accordingly, section 15 will still require an analysis of whether persons with similar needs ought to be provided with the same services, but the analysis will take place at a different stage in the inquiry. If a governmental action restricts a Charter guarantee, section 1 requires that it must be only "to such reasonable limits prescribed by law" that

293 Oakes supra, note 93 at 139.
can be "demonstrably justified in a free and democratic society". It is not yet clear whether section 1 will be applied differently to different sections of the Charter. The "prescribed by law" requirement means that the law or regulation must specify the criteria by which the freedom will be limited, or it must be implicit from its terms or operating requirements. It "cannot be vague, undefined, and totally discretionary" leaving limits "to the whim of an official". That is, legislators cannot make "blank cheque" laws.

Where the Charter guarantee has been infringed by an allocation or rationing decision, an economic objective may or may not be considered of sufficient importance to justify the restriction. In the Jasmin case, mentioned earlier, there was no analysis of section 1. However, the Quebec Superior Court did not accept that the hospital's need to decrease its deficit was a sufficient reason to restrict admissions to patients within the district. Wilson J. in Singh made it clear that administrative convenience is not a sufficient reason to override a Charter guarantee.

It is unclear whether special program provisions should be used to justify discriminatory underinclusive programs. It can be argued that when the individual challenging the program is a member of a socially disadvantaged group, neither section 15(2) of the

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295 Some sections have internal limits. For example, section 15 appears to require an evaluation of whether an inequality amounts to "discrimination". Whether the review occurs within the section or under section 1 is important because the plaintiff has the burden of proof for the former and the government for the latter. For a discussion of the relationship between sections 1 and 15, see Gibson at 264-272.
298 Jasmin, supra, note 241.
Charter, nor special program provisions in human rights legislation should be relied upon to insulate a partial program from legal scrutiny. Nevertheless, it may be possible to justify underinclusiveness by interpreting special program provisions as requiring an assessment of the competing equality claims at issue in the particular case. Alternatively, recourse may be had to section 1 of the Charter. Section 1 of the Charter has already been relied on to justify underinclusive legislative provisions. In McKinney, for example, the Supreme Court accepted the constitutional validity of an incremental approach to the addressing of serious social problems. As noted above, at issue was the provision in the Ontario Human Rights Code that limited protection against age discrimination to those under the age of sixty-five, therefore leaving individuals subject to mandatory retirement policies without any recourse under human rights legislation.

In upholding the limited protection pursuant to section 1 of the Charter, La Forest J. wrote:

In looking at this type of issue, it is important to remember that a legislature should not be obliged to deal with all aspects of a problem at once. It must surely be permitted to take incremental measures. It must be given reasonable leeway to deal with problems one step at a time, to balance possible inequalities under the law against other inequalities resulting from the adoption of a course of action, and to take account of the difficulties, whether social, economic or budgetary, that would arise if it attempted to deal with social and economic problems in their entirety.\(^{300}\)

In support of this perspective, La Forest J. cited Dickson C.J.'s comments in R. v. Edward's Books and Art Ltd.\(^{301}\) to the effect that legislative reforms can be directed at

\(^{300}\) Note the different outcome in Re Blainey and Ontario Hockey Association (1986), 54 O.R. (2d) 513 (C.A.) [hereinafter Blainey]; leave to appeal denied [1986] 1 S.C.R. where limitations on protections for sex discrimination under the Code were struck down. See also Haig v. Canada (1992), 9 O.R. (3d) 494 (C.A.) finding federal human rights legislation underinclusive for failing to provide protection against discrimination on the basis of sexual orientation and thus constituting a violation of the guarantee of the equal benefit of the law.

\(^{301}\) Edwards Books supra, note 147.
"sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy."\textsuperscript{302} Therefore, section 1 of the Charter provides a possible way to justify limitations on special programs and/or exclusions from protection. The onus rests on the government to justify its decision to limit the provision of benefits.

**Remedies**

One of the most critical concerns raised by concluding that a partial or underinclusive law may be discriminatory is the question of the appropriate remedy. One issue is whether or not courts and tribunals should strike down a program altogether, thereby disentitling those currently benefitting from the program, or whether the program should be extended by the court. Another issue is whether some type of individual or group exemption would be possible that would leave a program intact, but insulate certain social groups from its discriminatory effects. The remedial implications of a finding of discrimination may even affect whether or not an underinclusive program is considered discriminatory. There is considerable academic commentary that examines the difficult issue of reconciling democratic limits on the role of the judiciary with the need for creative and sometimes extensive adjudicative remedies.\textsuperscript{303} The Supreme Court has recently explored these questions and provided underlying guidelines to be taken into account when considering whether an underinclusive law should be extended by judicial order.\textsuperscript{304} The Court in Schacter emphasized that extension of a special benefits program (or "reading in" to the legislation to use the Court's phrase) is only justified where all of the following criteria are clearly met:

\textsuperscript{302} Ibid. at 772.
\textsuperscript{304} Schacter, supra, note 33.
A. the legislative objective is obvious, or it is revealed through the evidence offered pursuant to the failed s.1 argument, and severance or reading in would further that objective, or constitute a lesser interference with that objective than would striking down;
B. the choice of means used by the legislature to further that objective is not so unequivocal that severance/reading in would constitute an unacceptable intrusion into the legislative domain; and
C. severance or reading in would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question.305

The Court also stated that in some cases it would be appropriate to suspend the declaration of invalidity to give a legislature time to amend its legislation so as to conform to the Charter. Such a remedial, approach would be warranted if the immediate striking down of an unconstitutional law would create a danger to the public, interfere with the "rule of law" or result in the deprivation of benefits to deserving persons without thereby benefiting the individual whose rights have been violated.306

If a law or regulation is held to be ultra vires it will be struck down. Prerogative remedies such as injunction, certiorari, and mandamus may also be available for illegal governmental acts. However as we saw in the Finlay case307 prerogative remedies are discretionary. The court in that case allowed a declaratory action that the government acted illegally, but did not allow an injunction.

Section 24 of the Charter and section 52 of the Constitution Act expand not only the scope of judicial review, but also the remedies available to an offended part.

Charter:

24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

305 Ibid. at 718.
306 Ibid. at 719.
307 Finlay supra, note 176.
Constitution Act:

52.(1) The Constitution of Canada is the Supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. 308

Under section 52(1) of the Constitution Act, 1982 309 the courts have authority to invalidate unconstitutional laws. Under section 24(1) of the Charter, the courts may award "such remedy as the courts consider appropriate and just in the circumstances". Section 24(1) is directed to "anyone whose rights or freedoms, as guaranteed by this Charter have been infringed or denied". 310 The infringement does not need not need to be the result of statutory law, but may also result from government action in administering laws.

A remedy under the Charter must be effective given the right in question and the manner in which it is infringed. The topic headings within the Charter itself indicates that it encompasses legal, political and egalitarian rights. Where legal rights involving the freedom from government action are at stake, striking down is an effective remedy because it ensures individuals' freedom from government intrusion. 311 On the other hand, positive rights, including political and egalitarian rights, call for positive remedies. It would obviously undermine the practical value of constitutionally entrenched rights if the court's discretion regarding remedies under the Charter were restricted in such a way as to mean that effective remedies are available only for one group of Charter rights. Where the

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308 Although section 52(1) is technically not part of the Charter, this section is part of the Constitution and is relevant to Charter remedies.
309 The entire law need not be invalidated; the provision directs the court to strike down the law "to the extent of its inconsistency."
310 Thus, section 52 of the Constitution Act, 1982 responds to the question: "Is the law constitutional", and section 24(1) of the Charter to the question: "Has an individual's Charter right or freedom been infringed".
311 For example, Hunter supra, note 91 at 148; Big M supra, note 90 at 313.; Morgentaler supra, note 237 at 80.
right is an affirmative one, such as the right to vote or the right to equal benefit of the law, a remedy extending the benefit is especially appropriate.312

Purposive Approach to Remedies:
It has been held that with respect to remedies, as well as substantive rights, the Charter should be given a generous and purposive interpretation. In selecting the appropriate remedy, the court should consider what best achieves the purpose of section 15(1) of the Charter, which has been found to be to promote equality and to alleviate the effects of disadvantage, not merely to create sameness or to eliminate distinctions. The structure of the Charter itself makes it clear that equality is to be promoted and disadvantage alleviated both by the Charter and in legislation.313 The court's approach to remedies should be consistent with the Supreme Court's recognition that the Charter should not be used as an instrument of better situated individuals to roll back legislation or policies which have as their objects the improvement of the condition of less advantaged persons.

In interpreting and applying the Charter, I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.314

If advantaged persons cannot use the Charter to roll back legislation intended to improve the condition of disadvantaged persons, it follows that the court should not devise an approach to remedies that means that genuine attempts by the disadvantaged to enforce their rights under the Charter would result in other (or the same) disadvantaged persons losing their rights under legislation. Ensuring that groups or individuals have the same

314 Edwards Books supra, note 147 at 779.
entitlements to no benefits is contrary to the purpose of the equality guarantee in section 15, and produces only sameness not equality. The principle that equality cannot be achieved by reducing existing benefits has also been recognized in legislation.315

Access to Charter Guarantees:
If the only result of a challenge to underinclusive legislation is to deprive other persons of the benefits conferred by the legislation, individuals who are members of disadvantaged minorities and others who fear this consequence, will hesitate to enforce their rights under section 15 of the Charter. Such an effect on equality litigation will support the trend, already documented, of the Charter being used primarily as an "instrument of better-situated individuals", a result which the Supreme Court sought to avoid in its interpretation of equality rights in Andrews. 316 Such a result would have the effect of limiting the access of the disadvantaged persons to constitutional guarantees meant to alleviate their disadvantage. It would run counter the strong interest in access to the Charter which has been shown by the Supreme Court:

Earlier sections of the Charter assure, in clear and specific terms, certain fundamental freedoms, democratic rights, mobility rights, legal rights and equality rights of utmost importance to each and every Canadian. And what happens if those rights or freedoms are denied? Section 24(1) provides the answer - any one whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. The rights and freedoms are guaranteed by the Charter and the courts are directed to provide a remedy in the event of infringement....it would be inconceivable that Parliament and the provinces should describe in such detail the rights and freedoms guaranteed by the Charter and should not first protect that which alone makes it in fact possible to benefit from such guarantee, that is, access to a court.317

315 Pay Equity Act, 1987, S.O. 1987, c.34, s.9(1); Employment Standards Act, R.S.O. 1980, c.137, s.33; Canadian Human Rights Act, R.S.C. 1985, c.33, s.11; British Columbia Human Rights Code, R.S.B.C. 1979, c.186, s.6; Individual Rights Protection Act, R.S.A. 1980, c.I-2, s.6; Labour Standards Act, R.S.S. 1978, Ch. L-1, s.17.
316 Equal Rights for Women supra, note 49 at 56, 117-119 and 137-140.
These declarations emerged in a case dealing with lack of physical access to a court, but apply equally to a case where the adverse results of attempts to enforce Charter guarantees have a discouraging effect on future attempts at access.

Role of the Legislature and the Court:
An important reason for judicial deference to Parliament is the belief that the legislature is the better forum for balancing different interests and making decisions about allocation of resources amongst competing policies. One of the reasons for this view is the belief that the legislature is a representative institution.

When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of the vulnerable groups, they must be mindful of the legislature's representative function. For example, when "regulating industry or business it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy. (Edward's Books and Art Ltd.)\textsuperscript{318}

However, it is now recognized that while legislatures may be "representative institutions" in the sense that they are popularly elected, they may not be representative in other important ways. Traditional ideas of who should be able to vote or to run for office reflected in legislation, have meant that until relatively recently, women, persons with certain disabilities, members of particular visible minority groups, and aboriginal people, were formally excluded from a role in our Canadian democracy. In spite of legislative or judicial alleviation of these exclusions, these groups are not well-represented in democratic

\textsuperscript{318} Irwin Toy supra, note 148 at 993-994.
institutions. Their relationship to legislatures is still, most commonly, that of petitioners or lobbyists working from outside, rather than full participants working within the system.\textsuperscript{319}

The representatives of the modern democratic state have been seriously criticized:

> What the system...does not ensure is the effective protection of minorities whose interests differ from most of the rest of us. For if it is not the "many" who are being treated unreasonably but rather only some minority, the situation will not be so comfortably amenable to political correction. Indeed there may be political pressures to encourage our representatives to pass laws that treat the majority coalition on whose continual support they depend in one way, and one or more minorities whose backing they don't need less favourably.\textsuperscript{320}

Equality cases under section 15 of the Charter involve claims by the disadvantaged members of "discrete and insular minorities." Their lack of influence on the legislative process has contributed to the historical disadvantage they have suffered. The purpose of section 15 is to overcome the effects of this disadvantage.\textsuperscript{321}

A remedy which deprives such disadvantaged groups of existing benefits is likely to be particularly devastating because of their inability to move the legislative process to retrieve what the Courts have taken away in the name of someone else's rights. The Courts should hesitate, then, to select a remedy that would leave the disadvantaged dependent on the actions of a majoritarian legislature to restore to them benefits which fulfill a constitutional purpose and are deficient only in that they are underinclusive.

\textsuperscript{319} Hogg, supra, note 75 at 723; Provincial Elections Act, S.B.C. 1939, c.16, ss.2-5, as amended by S.B.C. 1945, c.26, s.2 and S.B.C. 1947, c.28, ss.5-14A; Canadian Disability Rights Council v. Canada (1988), 21 F.T.R. 268 (F.C.T.D.); S.B. Barshlevkin, Toing the Lines: Women and Party Politics in English Canada (University of Toronto Press, 1986), at 70-79.

\textsuperscript{320} J. H. Ely, Democracy and Distrust (Harvard University Press, 1980) at 78. [hereinafter Democracy and Distrust]

\textsuperscript{321} Turpin supra, note 106 at 1332; Ely, supra note 320 at 151-153, 160-161; Andrews, supra, note 48 at 183.
An Approach to the Extension Remedy:

I support the Legal Education and Action Fund's (LEAF) arguments in Schacter. As intervenors, LEAF argued that a provision which itself promotes the equality of a disadvantaged group should not be struck down in the name of the equality of another disadvantaged group unless to do so would promote, or safeguard, the equality of both groups without resort to further legislative action. Where striking down would not promote the substantive equality of both groups, then another alternative should be sought, and can be sought, given the provisions of section 24 of the Charter. In considering which alternative to striking down it should implement, the court has several options: striking down with a suspensive provision, a mere declaration, various structural remedies, and extension.

In structuring the remedy the court should consider the principle that the result should promote, or sustain, the equality of both the plaintiff (who has successfully established entitlement to Charter guarantees) and the group protected by the legislation. In designing the remedy, the court should also set against its traditional respect for legislative balancing of interests the realization that the Charter clearly sets out a role for the judiciary in protecting the interests of discrete and insular minorities. While the court may be cautious in reconciling its own role in vindicating minority interests with the role of Parliament in balancing a plurality of interests, the Charter seems to indicate that such caution should not stop the judiciary from appropriately exercising its role. Should Parliament conclude that the court has overstepped its mandate in protecting the disadvantaged, it may use the override provided in section 33 to reassert its majoritarian will.

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322 LEAF's factum for their intervenor arguments in Schacter, supra note 33.
Canadian and American Approaches to Remedy:

In interpreting the Charter, courts have considered the case law from other jurisdictions, most frequently citing American caselaw. While the Supreme Court has been influenced by arguments based on American jurisprudence, it has deliberately noted the differences between the U.S. and Canadian statutes, and in some cases, has refused to abide by U.S. law or to incorporate American terminology into the language of the Charter.324

In exercising the broad discretion granted to them by section 24(1) of the Charter, Canadian courts may be persuaded by the approach taken by courts in the United States in similar circumstances. A remedy extending benefits has been granted under the U.S. Constitution where a law is found to be invalid not because its substance is impermissible but because it is underinclusive. This remedy has clearly been adopted to extend benefits to fathers as a corrective to sex-discrimination patterns affecting women.325

The remedial route adopted by the trial judge is consistent with other cases where legislation has been found to be inconsistent with section 15(1) because benefits given to one group are denied to another and courts have granted remedies extending the benefit to both groups. Such an interpretation makes the legislation consistent with the Charter and avoids having the legislation struck down, thereby denying everyone the benefits.326

324 See Big M, supra, note 48; Operation Dismantle supra, note 81; Reference Re Section 94(2) of the Motor Vehicle Act (B.C.), [1985] 2 S.C.R. 486 (S.C.C).
325 Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), at 641-42, 651-53 (sex based distinction in social security benefits contrary to Due Process Clause in Fifth Amendment); Heckler v. Mathews, 464 U.S. 728 (1984) (pension benefits not extended equally contrary to Due Process Clause of Fifth Amendment); Welsh v. United States, supra, at 361-365 per Harlan J., concurring in the result (exemption from military service found not to extend to conscientious objectors violated First Amendment).
Courts interpreting section 15 of the Charter have granted remedies which have extended benefits. These extensions have been accomplished by striking out provisions which make exceptions to or exclusions from the benefits of the law. It seems that the availability of such an extension of rights should not depend on whether the obstacle to extension is a specific limitation, or legislative silence. Most legislation was drafted without the possibility of this effect in mind. Consequently, there is no predictable pattern in statutory construction: sometimes a benefit is withheld by means of an explicit limitation and sometimes by silence. The availability of an effective remedy should not depend upon the style of a legislative draftsperson who never turned his or her mind to the issue.

Relationship of Sections 24 and 52:

Where the Charter rights are infringed by legislation, neither section 24 nor section 52 of the Constitution Act, 1982 provides the sole remedial route. Although legislation which is inconsistent with the Charter is of no force or effect pursuant to section 52 it seems that nothing in that section or in the constitution establishes that this is the exclusive remedy.

An individual whose rights have been infringed is entitled to a remedy which is appropriate and just in the circumstances. In the case of Mahe v. Alberta it was recognized that where legislation is inconsistent with the rights under the Charter not because of what it contains but because it fails to extend far enough, or because officials have failed to take appropriate steps under it, the courts are not required to strike down the legislation under section 52 but, rather, should grant a remedy under section 24. It has been held that the

The effect of the court's broad remedial power under section 24 is not merely that an appropriate remedy is available for the violation of a Charter right but that the court is able to grant a remedy which constitutes the "best possible solution". 331

While it has been argued that reference to legislative history and debates is of limited assistance and that it is the wording of statutes which rule332 the history or debates may nevertheless be useful in confirming the appropriateness of a particular statutory interpretation.333 The legislative history of sections 24(1) and 52(1) does not suggest that where a law is inconsistent with the Charter there is no role for section 24(1). The Special Joint Committee of the Senate and the House of Commons recommended in its Senate Report (October 10, 1978) that the Constitutional Amendment Bill contain a provision clearly establishing the supremacy of the Charter over all other laws to ensure that the Charter would be interpreted as an overriding statute. Such a provision was, arguably, necessary to establish a clear departure from the principle of the supremacy of Parliament, and from the deference to that principle which had been embodied in the Canadian Bill of Rights.334 The Committee also recommended that the Charter contain a provision by which effective remedies would be available where rights were violated.

In effect, the courts should have the power to grant whatever remedy may be appropriate in the circumstances, including pecuniary damages, to enforce the protected rights and freedoms. ...Moreover, the courts should have the specific obligation placed upon them to grant an effective remedy where a denial of rights has occurred. They must not be allowed to decline to intervene. 335

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Section 52 of the **Charter** is to some extent, a legacy of the division of powers conflicts that characterized constitutional law before the creation of the **Charter**. Invalidating *ultra vires* legislation, a solution to disputes between governments, can be compared to the context of a dispute under the **Charter** between an individual and one level of government. However, the **Charter** specifically recognizes that invalidation will not be an appropriate remedy in all such cases. Section 24(1) of the **Charter** is based on the premise that the **Charter** gives rights to individuals, not governments, and that the creation of new rights for individuals in relation to the state requires the creation of more remedies than those which were developed to deal with the jurisdictional disputes of government actors.

Remedy has been defined to be a means of providing "reparation, redress, relief"\(^{336}\). In medicine, it is something which "alleviates pain and promotes restoration to good health"\(^{337}\). This plain English meaning of the term used in section 24 is inconsistent with the idea that violation of the **Charter** must in all or most cases result in invalidation under section 52.

It seems that the scope of the equality guarantee in section 15 was intended to address the problems of the old "equality before the law" definition. The conceptual change brought by this changed definition has been recognized by the Supreme Court.

> It is readily apparent that the language of section 15 was deliberately chosen in order to remedy some of the perceived defects under the Canadian Bill of Rights.

> It is clear that the purpose of section 15 is to ensure equality in the formulation and application of the law... It has a large remedial component.\(^{338}\)

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\(^{336}\) *Shorter Oxford English Dictionary*, 3rd Ed., at 1791.

\(^{337}\) Ibid.

\(^{338}\) Schacter, supra, note 33; Andrews, supra, note 48 at 170-171; Brooks, supra, note 107 at 1243-1245; Bliss supra, note 107 at 191-192.
The language of section 24(1) clearly requires that a remedy be available where Charter rights have been infringed or denied, whether the infringement arises because of a statute or because of the actions of government officials. It would considerably limit the effectiveness of the Charter guarantees if courts were restricted under section 24 of the Charter to the remedial approach developed in relation to the division of powers under the Constitution.339

Impact on Spending Power:
Parliament's authority over spending is, like all exercises of governmental power, subject to the Charter. There is no basis in the Constitution for finding that the Charter has a limited extent which does not reach all exercises of government authority. The executive branch of government has been found to have a duty to act in accordance with the dictates of the Charter.340 While the courts have recognized that, as matter of constitutional law, they do not have authority to require a Minister of the Crown to make a specific expenditure, they have done so where there is no legislation requiring the expenditure and no other provisions of the Constitution are involved.341

In the Charter context, the Supreme Court has recognized that although Parliament requires flexibility in choosing between various policy options, it must comply with the Charter when granting benefits under the Unemployment Insurance Act, 1977.

Even allowing the government a healthy measure of flexibility in legislating in this area, the complete denial of unemployment benefits is not an acceptable method of achieving any of the government objectives...342

340 Operation Dismantle supra note 81, at 463-4; Dolphin Delivery supra, note 87 at 598-99.
342 Tetrau1t supra, note 31 at 26.
The historical roots of Parliament's executive jurisdiction over spending are found in the context of restraints on arbitrary exercises of power by the executive branch of government. Parliamentary authority in this area was originally intended to balance the exercise of despotic power by the Crown.

The convention which has traditionally governed the relations between the judiciary and the legislature is that of Parliamentary sovereignty. It is the source of virtually complete judicial deference to legislative choices in a legal and political system that does not have entrenched guarantees of rights to which legislatures themselves are subject, and which are interpreted by the courts. Accordingly, it seems that one must not look to the implications of the "spending" convention for guidance as the appropriate role of the court in such instances but rather to the implications of the tradition of Parliamentary sovereignty and its modification by the fundamental guarantee of the Charter.

In the United Kingdom, the need to ensure that national law conforms with the law of the European Community has modified the doctrine of Parliamentary sovereignty. In the case of conflict between domestic law and the higher, or supreme law of the Community, the doctrine of Parliamentary sovereignty must give way and Community law prevails.343 Similarly, in Canada, the constitution, which is the supreme law, takes precedence over other legislation. While this may be an intrusion into the authority of Parliament, it is clearly called for by the Constitution Act, 1982.344

If the "spending convention" is relevant to the relations between Parliament and the courts, it seems that while the convention is flexible it is not the sole source of wisdom on

344 Constitution Act, 1982, s.52.
the appropriate relationship between the two institutions. For example, the House of Commons itself has had to legislate in the area of control over money bills, in order to refresh its traditional supremacy vis-a-vis the House of Lords.

It has been held by the Supreme Court that the purpose of constitutional conventions is "to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional principles of the period." It would be inconsistent with this approach to allow a convention developed in the height of Parliamentary sovereignty (now limited by the Charter) to prevent the judiciary from creating remedies consistent with the Charter's equality guarantees. In determining both the force and applicability of a constitutional convention the crucial questions must always be whether or not a particular class of action is likely to destroy respect for the established distribution of authority and whether or not it is likely to maintain respect for the constitutional system by changing the distribution of authority. This distribution of authority implies the maintenance of limited monarchy, representative government, responsible government and efficient government; it implies also that constitutional rules must be comparable with the realities of practical politics.

On this test, the remedy of extension, granted in the appropriate situations, actually fosters respect for basic constitutional values and representative institutions by providing for the protection of vulnerable minorities through the proper and effective interplay of court and legislature. In fact, the entrenchment of rights and freedoms in the Charter, and the courts' role in ensuring that governments respect those rights, are in keeping with that spirit of

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345 Const. & Admin. Law supra, note 75 at 43-44.
346 Parliament Act, 1911, 1 & 2 Geo. V, c.13; Const. & Admin. Law supra, note 75 at 36.
348 Const. & Admin. Law supra, note 75 at 35, 37.
349 Ibid. at 46.
resistance to arbitrary exercises of power by the dominant which is at the root of Parliament's original assertion of its authority over spending vis-a-vis the monarch.

It is also consistent with the relationship between reviewing courts and legislatures which has evolved over the years. For example, in non-Charter adjudication the courts have traditionally made orders which affect, directly or indirectly, Parliament's authority over spending and the allocation of governmental resources. Where the Crown has been found liable for breach of trust and breach of fiduciary duty, for example, courts have made damage awards against the Crown. The Crown is not excused from paying such awards on the basis that they have not been authorized by Parliament.350

In the development of the fairness doctrine in administrative law it has been accepted that the courts' decisions would require resources to be allocated to provide the procedures necessary for fair process. These decisions involve the courts in their traditional role of developing the law and, although they may have had a significant impact on legislative or parliamentary decisions about spending, were not considered to usurp the spending power.351 In cases where legislation has been reviewed on federalism grounds the courts have granted remedies which have the result of requiring an expenditure of public funds. While Parliament's power over revenues is constitutionally entrenched, its exercise of that power must comply with the Constitution and is subject to review by the courts.352

The power to raise money through income taxes was called into question in the case of Prior v. Canada353. The Federal Court of Appeal in that case found that it did not have jurisdiction to interfere with the power. However, the court did not conclude that it

351 For example, Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311.
353 101 N.R. 401 (Fed C.A.).
would lack jurisdiction to determine whether or not the exercise of that power in a specific piece of legislation was in conformity with the Charter. The courts have always had the jurisdiction to consider whether legislation regulating taxation was validly enacted pursuant to the powers in the constitution, and it has been stated in a decision of the Supreme Court that "action taken under the Constitution Act, 1867 is of course subject to Charter review" in order "to supervise and on a proper occasion curtail the exercise of a power to legislate".354

In cases decided under the Charter, expense has been held not to justify limitations on rights under section 1 of the Charter. As in the administrative law area, courts have made rulings regarding fair procedure which may have a significant effect on public spending and on the allocation of funds. Just as financial consequences are not an obstacle to the courts' ability to create effective remedies for the right to trial within a reasonable time and the right to counsel, they should not prevent courts from granting effective remedies where equality rights are at issue.355

It has also been held that a lack of funds or resources does not necessarily justify discrimination under section 15 of the Charter and cannot be used as a basis for rendering Charter rights meaningless.356 Where a Charter right imposes a positive obligation on government, the court may order that public funds must be spent. Under section 23 of the Charter it has been held that the government must do whatever is necessary to discharge its obligation to provide minority language education, including providing public funding

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355 Singh supra, note 302 at 218; Askov supra, note 32.
that is adequate for the purpose. The framers must be taken to have intended the foreseeable financial consequences of the enactment of the Constitution Act, 1982.\textsuperscript{357}

It seems that there is nothing in the Constitution Act precluding a court from granting a remedy that results in an expenditure of public funds not specifically authorized by Parliament where that remedy is appropriate and just in the circumstances. This is particularly noticeable in the case of section 15. Section 32(2), postponing the coming into force of section 15 for three years after proclamation of the Charter, was meant to give governments time to bring their legislation and practices into conformity with the equality guarantee. Had the framers of the Constitution Act, 1982 not wanted this compliance effort (or any other, future, compliance effort) to affect government spending priorities, they might have so specified.\textsuperscript{358}

The decision in Schacter did not override the functions of Parliament, carve out a new legislative role for the courts or interfere with Parliamentary authority over revenue and expenditures. The Court in Schacter accurately applied the following well-established principles: it took a purposive approach to Charter rights, it granted the remedy which was most appropriate and just in the circumstances and which was consistent with the purpose of the Charter, it carried out the purpose of alleviating disadvantage as opposed to rolling back the gains made in legislation, it respected the principle that administrative cost and inconvenience do not justify the infringement of rights and it did not interfere with Parliament's authority to choose among various policy options and enact legislation which conforms to the Charter.

\textsuperscript{357} Mahe supra, note 312 at 393-5; Marchand, supra, note 312 at 661-62.
\textsuperscript{358} Proposed Resolution respecting the Constitution of Canada, October 6, 1980, reproduced in Canada's Constitution supra, note 319 at 715.
CONCLUSION

The line between what is unfortunate and what is illegal is an important one for those responsible for allocating scarce resources amongst competing valid interests. This line seems to justify certain social and economic inequalities. In particular, it justifies inequalities in the distribution of health care resources that are the result of differences in legally acquired resources and privileges. Natural and social lotteries, the existence of private entitlements, and the outcomes of free choice, both individually and communally, destine individuals to lives of unequal scope and fulfillment.\(^{359}\) To a certain extent, it is appropriate to attempt to set these inequalities aside. There are however, limits on what attempts are legally permissible. These limits will define where inequalities and unfortunate outcomes are the result of illegality. While adhering to legal requirements will not resolve all problems in the health care arena, legal requirements do provide a just framework for distributing scarce health care resources. The Charter can and ought to be regarded as the line that divides what is unfortunate and what is illegal; it ought to serve as a framework for addressing some of the complex public policy issues associated with allocating health care resources.

The Charter guarantees certain basic rights that are fundamental to our Canadian society. These rights are guaranteed not absolutely, but subject to such "reasonable limits, prescribed by law, as are demonstrably justified in a free and democratic society". These words are especially important for policy makers who must prioritize or choose amongst competing interests. Canadian jurisprudence has recognized that our society both safeguards rights and permits rights to be limited in certain situations. In serving as a decisionmaking framework, government allocation decisions which limit Charter rights must be justified. When the government seeks to justify a limitation upon a Charter right,

it must do so in terms that are consistent with and promote the goals and principles of a free and democratic society.

Section 15 equality analysis helps all those affected by allocation decisions to explore the impact of social constraints on socially disadvantaged groups. From the legal requirements flows a healthy and ongoing debate, as the advocates of rights to particular health care services, as well as those who seek to limit those rights, must equally frame their arguments in terms of the values that make our society a good one in which to live.

In health care policy matters, as in life, perfection can be the enemy of the good. The greatest obstacle to health policy progress at this challenging time in its history is trying to attain perfection. There can be no perfect solutions. In health care policy there is always a risk of not fully resolving issues because things are never perfectly clear, neither intentions nor words, and the future of technology and illness is unknown. Canadian health care policy is a process that evolves over time as the country and provinces develop. In terms of allocating resources, there are clearly many issues still to be resolved. In fact, by adopting Charter analysis, there is a risk of fixating upon rights, and a risk that rights interpreted by the courts will become both the floor and the ceiling against which proposed health care policy will be evaluated. But recognizing that risk, is an important step in avoiding it. The alternative of having no fundamental constitutional statement about equality, in my view, would be unacceptable.

The task before us is not the creation of the perfect calculus for allocating health care resources. The task is the development of a framework for making desperately needed health policy adjustments that will allow the health care system to continue in the best spirit of Canadian goals and values. Using the Charter as a framework for allocation
decisions will ensure a continued government commitment to health, well-being and justice for all of the people and communities of Canada.