Health Care and Human Rights after Auton *and* Chaoulli

Mel Cousins*

The judicial interpretation of the entitlement to health care under the *Charter* and human rights legislation has tended to swing between interventionist and non-interventionist poles. In *Eldridge*, the Supreme Court of Canada held that a failure to provide sign language interpretation where this was necessary to ensure equal access to health care was in breach of the equality provisions of the *Charter*. However, in a subsequent case, *Auton*, the Court narrowly circumscribed the limits of this approach, holding that the Canadian system of public health care was, by its very terms, a partial health plan. It followed that exclusion of particular non-core services could not, in itself, be seen as less favourable treatment.

The *Chaoulli* decision marked a return to a more interventionist approach with the Court holding (by a narrow majority) that the prohibition on private health insurance provided for in Quebec law was inconsistent with section 1 of the *Quebec Charter*. This judgment has been cited in over eighty decisions of courts and tribunals. However, just how important has *Chaoulli* been in terms of the overall approach of the Canadian courts?

The author suggests that *Chaoulli*—despite its significance in the legislative arena—has had a somewhat limited impact to date on the case law concerning health care, and that *Auton* has clearly had a greater impact to date. The author examines several examples from subsequent case law that point to the weakness of the approaches taken in both *Auton* and *Chaoulli*. The narrow approach adopted in *Auton* can lead to equality claims being dismissed without any proper discrimination analysis and shows the manner in which a broad use of the "benefit provided by law" requirement may weaken equality jurisprudence. Conversely, the case law highlights the fact that the courts will have to reject much more difficult claims than those upheld in *Chaoulli* unless they wish to develop positive obligations under section 7 of the *Charter*.

L'interprétation judiciaire du droit à des soins de santé en vertu de la *Charte* et des instruments législatifs protégeant les droits de la personne a tendance à osciller entre les pôles interventionniste et non interventionniste. Dans *Eldridge*, la Cour suprême du Canada a statué que l'omission de fournir une interprétation en langage des signes lorsque nécessaire pour assurer un accès égal aux soins de santé constituait une violation des dispositions de la *Charte* protégeant le droit à l'égalité. Toutefois, dans une affaire subséquente, *Auton*, la Cour a étroitement circonscrit les limites de cette approche, en affirmant que le régime public de soins de santé canadien est foncièrement un régime partiel. Conséquemment, l'exclusion de services particuliers non essentiels ne peut, en elle-même, correspondre à un traitement moins favorable.

L'affaire *Chaoulli* marque un retour à une approche plus interventionniste. La Cour y affirme par une courte majorité que la prohibition de souscription à une assurance privée de soins de santé dans la loi québécoise n'est pas compatible avec l'article premier de la *Charte québécoise*. Ce jugement a par la suite été cité dans plus de quatre-vingts décisions de cours et de tribunaux. Toutefois, quelle est réellement l'importance de *Chaoulli* en ce qui concerne l'approche globale des cours canadiennes ?

L'auteur suggère que *Chaoulli*, malgré son importance dans la sphère législative, a jusqu'à présent eu une influence relativement limitée dans la jurisprudence concernant les soins de santé. *Auton* demeure clairement à ce jour une décision beaucoup plus influente. L'auteur examine plusieurs exemples de la jurisprudence subséquente qui éclairent la faiblesse des approches respectives retenues dans *Auton* et dans *Chaoulli*. D'un côté, l'approche étroite adoptée dans *Auton* peut mener au rejet de demandes de protection du droit à l'égalité sans véritable analyse de la discrimination alléguée, ce qui montre que l'interprétation large exigeant qu'un «avantage prévu par la loi» existe peut affaiblir la jurisprudence sur le droit à l'égalité. D'un autre côté, la jurisprudence souligne que les cours devront rejeter des demandes beaucoup plus exigeantes que celles acceptées dans *Chaoulli*, à moins qu'elles ne souhaitent développer des obligations positives en vertu de l'article 7 de la *Charte*.

* Mel Cousins B.L. is attached to the School of law and social sciences, Glasgow Caledonian University, Scotland. The author would like to thank the editors and two anonymous referees for very helpful and constructive comments on an earlier draft.

To be cited as: (2009) 54 McGill L.J. 717
Mode de référence : (2009) 54 R.D. McGill 717

Introduction

The judicial approach to the interpretation of the entitlement to health care under the *Canadian Charter of Rights and Freedoms* and human rights legislation has tended to swing between interventionist and non-interventionist poles.[1] In *Eldridge v. British Columbia (A.G.)*, the Supreme Court of Canada held that a failure to provide sign language interpretation where this was necessary to ensure equal access to health care was in breach of the equality provisions in section 15(1) of the *Charter*.[2] However, in the subsequent case of *Auton (Guardian ad litem of) v. British Columbia (A.G.)*, the Court rather narrowly circumscribed the limits of this approach.[3] In *Auton*, the Court held that the failure to provide a particular treatment for autistic children of certain ages was not an infringement of their equality rights. The Court introduced a new requirement in the section 15 analysis: that the benefit claimed be "provided by law". It construed the benefit claimed (specific treatment for autistic children) as "funding for all medically required treatment" but held that such a benefit was not provided by the legislative scheme.[4] The Canadian system of public health care was, by its very terms, a partial health plan and its purpose was not to meet all medical needs. It followed that the exclusion of particular non-core services could not, in itself, be seen as less favourable treatment. Thus the Court appeared to have established a distinction between (1) the obligation to ensure reasonable accommodation so as to allow access for disabled persons to the general health care system and (2) the recognition that the precise scope of the services provided is a matter primarily within the jurisdiction of the legislature.[5]

---

[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

[2] [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577 [*Eldridge* cited to S.C.R.].

[3] 2004 SCC 78, [2004] 3 S.C.R. 657, 245 D.L.R. (4th) 1 [*Auton*]. There has been extensive commentary on this case, most of it quite critical: Natasha Bakht, "Furthering an Economic/Social Right to Health Care: The Failure of *Auton v. British Columbia*" (2005) 4 J.L. & Equality 241; Claire Bond, "Section 15 of the *Charter* and the Allocation of Resources in Health Care: A Comment on *Auton v. British Columbia*" (2005) 13 Health L.J. 253; Margot Finley, "Limiting Section 15(1) in the Health Care Context: The Impact of *Auton v. British Columbia*" (2005) 63 U.T. Fac. L. Rev. 213; Daphne Gilbert & Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006) 24 Windsor Y.B. Access Just. 111; Martha Jackman, "Health Care and Equality: Is There a Cure?" (2007) 15 Health L.J. 87; Ellie Venhola, "Goliath Arisen: Taking Aim at the Health Care Regime in *Auton*" (2005) 20 J.L. & Soc. Pol'y 67. It should be noted that the lower court decisions had also been criticized from a different perspective: Donna Greschner & Steven Lewis, "*Auton* and Evidence-Based Decision-Making: Medicare in the Courts" (2003) 82 Can. Bar Rev. 501.

[4] *Auton*, *ibid.* at paras. 30-31.

[5] See also *Cameron v. Nova Scotia* (1999), 204 N.S.R. (2d) 1, 177 D.L.R. (4th) 611 (C.A.). A somewhat similar distinction has been adopted in the United States. See *Alexander v. Choate*, 469 U.S. 287 (1985) (reduction in number of in-patient days covered by Medicare not discriminatory against disabled persons); *Lincoln CERCPAC v. Health and Hospitals Corp.* 147 F.3d 165 (2nd Cir. 1998) (closure of specialist child rehabilitation centre and transfer to another centre not in breach of

Many commentators were therefore somewhat surprised when the Supreme Court of Canada in *Chaoulli v. Quebec (A.G.)*[6] held (by a four-to-three majority) that the prohibition on private health insurance in Quebec law was inconsistent with section 1 of Quebec's *Charter of Human Rights and Freedoms*.[7] Three members of the majority held that the prohibition also violated section 7 of the Canadian *Charter* and was not justifiable under section 1. This decision has, of course, been the subject of a large volume of commentary and has had an important impact on subsequent legislative developments.[8] It has also (at the time of writing) been cited in over eighty decisions of courts and tribunals (to mention only those included in the Canlii database). However, just how important has the *Chaoulli* decision been in terms of the overall approach of the Canadian courts? Has it marked a sea change in approach or has business gone on largely as before, with *Chaoulli* being confined to its own particular facts? This comment examines the relative impact of *Chaoulli* and *Auton* in the post-*Chaoulli* case law on health care and the *Charter* and/or human rights legislation, and considers what the subsequent case law can reveal about the merits (and demerits) of these important cases.[9]

Part I reviews the case law to date under section 7 of the *Charter*, while Part II goes on to consider the case law as it concerns section 15(1). Part III considers cases concerning human rights legislation, which may provide a higher level of protection

---

the *Americans with Disabilities Act* (*ADA*). But see *Lovell v. Chandler*, 303 F.3d 1039 (9th Cir. 2002) (specific exclusion of old and disabled people from health care program in breach of the *ADA*) and *Rodde v. Bonta*, 357 F.3d 988 (9th Cir. 2004) (closing down disability facility without replacement in breach of the *ADA*).

[6] 2005 SCC 35, [2005] 1 S.C.R. 791, 254 D.L.R. (4th) 577 [*Chaoulli*].

[7] R.S.Q., c. C-12 [*Quebec Charter*]. This section provides that "[e]very human being has a right to life, and to personal security, inviolability and freedom."

[8] Anon., Case Note on *Chaoulli v. Quebec (A.G.)*, (2005) 119 Harv. L. Rev. 677; Colleen Flood, Kent Roach & Lorne Sossin, eds., *Access to Care, Access to Justice: The Legal Debate over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005); Colleen Flood & Sujith Xavier, "Health Care Rights in Canada: The Chaoulli Legacy" in A.P. den Exter, ed., *International Health Law: Solidarity and Justice in Health Care* (Apeldoorn, The Netherlands: Maklu, 2008) 97; Martha Jackman "'The Last Line of Defence for [Which?] Citizens': Accountability, Equality and the Right to Health in *Chaoulli*" (2006) 44 Osgoode Hall L.J. 349; Christopher P. Manfredi & Antonia Maioni, "'The Last Line of Defence for Citizens': Litigating Private Health Insurance in *Chaoulli v. Quebec*" (2006) 44 Osgoode Hall L.J. 249; Danielle Pinard, "Une malheureuse célébration de la *Charte des droits et libertés de la personne* par la Cour suprême du Canada : l'arrêt *Chaoulli*" (2006) R. du B. 421; Marie-Claude Prémont, "L'affaire *Chaoulli* et le système de santé du Québec : cherchez l'erreur, cherchez la raison" (2006) 51 McGill L.J. 167; Marie-Claude Prémont, "Wait-Time Guarantees: An Analysis of Quebec's Reaction to the *Chaoulli* Supreme Court Decision" (2007) 15 Health L.J. 43; Michael Yeo & Carole Lucock, "Quality v. Equality: The Divided Court in *Chaoulli v. Quebec*" (2006) 14 Health L.J. 129. This is by no means a complete list.

[9] Although *Auton* concerned the health care system, the treatments for autistic children fall on the border between the health care and educational systems and there have been a number of (unsuccessful) cases concerning such treatment and the educational system. See e.g. *Wynberg v. Ontario* (2006), 82 O.R. (3d) 561, 269 D.L.R. (4th) 435 (C.A.), leave to appeal to S.C.C. refused, (2007), 153 C.R.R. (2d) 375, 234 O.A.C. 397.

on the grounds listed therein than does section 15(1) of the *Charter*. Part IV concludes that, with the exception of cases taken under human rights legislation, health care cases post-*Chaoulli* have been largely unsuccessful. This comment argues that the post-*Auton* and *Chaoulli* case law can throw some light on the merits and demerits of those decisions and that, of the two decisions, *Auton* has clearly had a greater impact to date. This comment suggests that the Supreme Court of Canada may need to revisit its judgment in *Auton* concerning the scope of section 15(1) so as to achieve its objective of protecting the legislature's authority to determine the scope of educational and health services without undermining the *Charter* equality analysis. In contrast, *Chaoulli* has had a somewhat limited impact to date on the case law concerning health care. This comment argues that the subsequent case law indicates that the courts—unless they wish to develop positive obligations under section 7—will have to reject much harder claims than that in *Chaoulli*. The difficulties of trying to resolve questions of health policy though legal decisions have been emphasized by commentators and (some) judges. However, the fact that a majority of the Court in *Chaoulli* were prepared to change health policy in a section 7 context while, at the same time, the Court has been very reluctant to challenge policy in a section 15 context, has created a definite tension in the case law that must be addressed.

I. Health Care and Section 7 of the *Charter*

Section 7 of the *Charter* provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The most important case to date concerning section 7 and access to health care has been *Chaoulli*, in which, as noted above, three of the majority ruled that the prohibition on private health insurance in Quebec law violated section 7 of the *Charter* and was not justifiable under section 1.[10] This case was exceptional in a number of ways and its full implications for access to health care remain unclear.

A. Flora *and Medical Care Abroad*

The most significant post-*Chaoulli* case concerning section 7 to date has been *Flora v. Ontario Health Insurance Plan.*[11] This case involved a claim for a reimbursement of life-saving health care expenditures made abroad. Mr. Flora, who

[10] *Chaoulli*, *supra* note 6.

[11] 2008 ONCA 538, 91 O.R. (3d) 412, 295 D.L.R. (4th) 309 [*Flora*]. There are a number of ongoing cases which have generated an extraordinary level of comment given the fact that there has not yet been a substantive judgment on the *Charter* issues: *Murray v. Alberta (Calgary Health Region)*, 2007 ABQB 231, 445 A.R. 1, 76 Alta. L.R. (4th) 118 (Alta. Q.B.); *McCreith v. Ontario* (statement of claim filed 5 September 2007), Toronto 07-CU-339454PD3 (Ont. Sup. Ct. Just.), online: <http://www.law.utoronto.ca/healthlaw/docs/case_McCreith.pdf> (both supported by the "non-partisan" or "extremely right-wing" (depending on your point of view) Canadian Constitution Foundation).

had contracted hepatitis C in the 1970s from a blood transfusion, was diagnosed with liver cancer in 1999. He was told that he was not a suitable candidate for a liver transplant in Ontario and was given approximately six to eight months to live. He underwent successful treatment to contain the growth and decrease the size of his existing tumours and received a liver transplantation procedure at a hospital in England. He subsequently applied to the Ontario Health Insurance Plan (OHIP) for reimbursement of his medical expenses. This was refused and the refusal was upheld by the Health Services Appeal and Review Board (the Board). Mr. Flora challenged this decision before the Ontario Divisional Court and, on appeal, the Ontario Court of Appeal.

The *Health Insurance Act* provides that an insured person is entitled to receive payment from OHIP for "insured services" in such amounts and subject to such conditions and copayments, if any, as are prescribed.[12] Under subsection 28.4(2) of the relevant regulation, in order to establish that an out-of-country medical treatment constitutes an "insured service", a person must show that

> (a) the service is generally accepted by the medical profession in Ontario as appropriate for a person in the same medical circumstances as the insured person;
>
> (b) the service is medically necessary;
>
> (c) either,
>
> (i) the identical or equivalent service is not performed in Ontario or,
>
> (ii) the identical or equivalent service is performed in Ontario, but it is necessary that the insured person travel out of Canada to avoid a delay that would result in death or medically significant irreversible tissue damage.[13]

A major aspect of Mr. Flora's challenge related to the reasonableness of the Board's decision but as this is not directly germane to the issues I consider here, it can simply be noted that both the Divisional Court and the Ontario Court of Appeal upheld the Board's decision of these grounds.[14] The second aspect of the challenge was the argument that the regulation was in breach of section 7 of the *Charter*. Mr. Flora argued that:

> (i) the denial of his OHIP Application deprived him of access to a life-saving medical treatment, thereby violating his s. 7 rights to life and security of the person; (ii) the state also deprived him of his s. 7 rights by amending, in 1992, a predecessor version of the regulation that would have provided funding for his [liver transplant] on the basis of medical necessity; (iii) in any event, s. 7 imposes a positive obligation on the state to provide life-saving medical treatments, thus obviating the need for a finding of state action amounting to

---

[12] R.S.O. 1990, c. H.6, s. 12(1).
[13] R.R.O. 1990, Reg. 552, ss. 28.4(2)(a)-(c).
[14] See *Flora*, *supra* note 11 at paras. 32-92.

> deprivation; and (iv) finally, [the regulation] does not comport with the principles of fundamental justice.[15]

In *Gosselin*, Chief Justice McLachlin identified three elements that must be established in a section 7 claim.[16] As summarized by the Divisional Court these were:

> First, Mr. Flora must demonstrate that the Regulation affects an interest protected by the right to life, liberty or security of the person within the meaning of s. 7. Secondly, he must demonstrate that the limitations contained in the Regulation pertaining to funding for out-of-country treatment constitute a "deprivation" by the state. Thirdly, if deprivation of a right protected by s. 7 is established, Mr. Flora must demonstrate that this was not in accordance with the principles of fundamental justice.[17]

The Divisional Court accepted that the regulation did affect access to health care and not simply "economic" interests (which have been excluded from section 7 protection). Turning to the second aspect, the court accepted that there was "an element of state action" sufficient to attract *Charter* scrutiny.[18] However, it concluded that there was no deprivation of the right to life or security of the person by this state action. In *Chaoulli*, the government's prohibition on private insurance had deprived an individual of the opportunity to avoid a life-threatening delay in obtaining treatment. However, the Divisional Court found that in Mr. Flora's case, the government had not prohibited anything. It concluded that "there was no state action directly prohibiting an individual from making personal choices that impacted his or her life, liberty, or security of the person."[19] Finally, the court rejected the "fundamental justice" argument on the basis that "grounding the deprivation on a breach of fundamental justice is inconsistent with both the wording of section 7 and the manner in which the section has been interpreted."[20] Indeed, the section 7 jurisprudence (as outlined above) indicates that a person must show a specific breach of the right to life, liberty, and/or security of person, rather than a general breach of the "principles of fundamental justice".

---

[15] *Flora*, *supra* note 11 at para. 93.

[16] See *Gosselin v. Quebec (A.G.)*, 2002 SCC 84, [2002] 4 S.C.R. 429 at para. 75, 221 D.L.R. (4th) 257 [*Gosselin*].

[17] *Flora v. Ontario Health Insurance Plan* (2007), 83 O.R. (3d) 721 at para. 142, 278 D.L.R. (4th) 45 (Div. Ct.) [*Flora (D.C.)*].

[18] *Ibid.* at para. 166.

[19] *Ibid.* at paras. 183-84. The court also rejected Mr. Flora's complaint that the change in the law engaged s. 7, holding that this was not the case unless there was a pre-existing and freestanding *Charter* right (at para. 186).

[20] *Ibid.* at para. 189. While taking the view that Mr. Flora's s. 7 rights were not engaged, the court also found no breach of principles of fundamental justice as would be required to show a breach of s. 7 (at paras. 206-23). The Ontario Court of Appeal simply and correctly stated that in view of its conclusions that there was no deprivation of a right under s. 7 and no positive obligation to provide health care, it was unnecessary to address the arguments regarding the conformity of the regulation with the principles of fundamental justice (*Flora*, *supra* note 11 at para. 109).

The Ontario Court of Appeal adopted a largely similar approach but focused on whether there had been a deprivation of a right.[21] It also distinguished Mr. Flora's case from that of *Chaoulli*; Justice Cronk (writing for the court) argued:

> In *Chaoulli*, the pivotal consideration was the fact that the impugned prohibition on private health insurance "conspired" with excessive costs in Quebec's public health care system to force Quebeckers onto the wait lists that pervaded the public system. It was this connection between the statutory prohibition on private health insurance and the delays in the public system that anchored the *Chaoulli* holding that the wait lists constituted a deprivation of rights protected under s. 7. In other words, the statutory prohibition in issue was directly linked to the harm suffered by Quebeckers who were compelled by the prohibition to rely on the public health care system and to endure the consequences of significant wait lists.[22]

In contrast, Justice Cronk argued that the regulation in dispute did "not prohibit or impede anyone from seeking medical treatment."[23] She argued:

> Section 28.4(2) neither prescribes nor limits the types of medical services available to Ontarians. Nor does it represent governmental interference with an existing right or other coercive state action. Quite the opposite. Section 28.4(2) provides a defined benefit for out-of-country medical treatment that is not otherwise available to Ontarians—the right to obtain public funding for certain specific out-of-country medical treatments. By not providing funding for *all* out-of-country medical treatments, it does not deprive an individual of the rights protected by s. 7 of the *Charter*.[24]

Unsurprisingly, the Ontario Court of Appeal also rejected the argument that the 1992 amendment constituted a deprivation of rights under section 7, stating that a *Charter* violation could not be founded on a mere change in law.[25]

The court then turned to the argument that section 7 imposes a positive obligation of the state to provide life-saving medical treatments. Justice Cronk noted that the Supreme Court of Canada had expressly left this issue open in *Gosselin*, but that to date it had only extended the protection afforded by section 7 to cases involving a state restriction on rights. She took the view that

---

[21] It is not clear whether the Ontario Court of Appeal accepted that s. 7 was engaged based on Mr. Flora's submissions or because this aspect of the Divisional Court's findings was not appealed.

[22] *Flora*, *supra* note 11 at para. 98. Cronk J.A. argued that a similar link between state actions and delays in accessing health care was found in *R. v. Morgentaler*, in which the Supreme Court of Canada had held that significant delays in access to abortions arising from the operation of a mandatory committee system were in breach of s. 7 ([1988] 1 S.C.R. 30, 63 O.R. (2d) 281 [*Morgentaler*]).

[23] *Flora*, *ibid.* at para. 101.

[24] *Ibid*. She referred for support to the recent decision of the Ontario Court of Appeal in *Wynberg v. Ontario* (*supra* note 8), in which the court found that the refusal to fund intensive behavioural intervention for autistic children was not in breach of s. 7.

[25] *Flora*, *ibid.* at para. 104, citing *Ferrel v. Ontario (A.G.)* (1998), 42 O.R. (3d) 97, 168 D.L.R. (4th) 1.

> on the current state of s. 7 constitutional jurisprudence, where—as here—the government elects to provide a financial benefit that is not otherwise required by law, legislative limitations on the scope of the financial benefit provided do not violate s. 7. On the law at present, the reach of s. 7 does not extend to the imposition of a positive constitutional obligation on the Ontario government to fund out-of-country medical treatments even where the treatment in question proves to be life-saving in nature.[26]

Thus, the Ontario courts have taken a narrow reading of *Chaoulli*, albeit one which is perfectly reasonable in the light of that judgment. The Divisional Court was correct to hold that Mr. Flora's rights under section 7 were engaged. However, the difficulty he faced was in showing that there was a deprivation of those rights. Fundamentally, he was asking the Ontario courts to rule that there was a positive right to a certain level of health care (at least with regard to life-threatening illnesses). This the courts were not prepared to do. The distinction between a positive right to care and a restriction on care is well-established in the case law but highly artificial. In *Chaoulli*, the state decided to prohibit access to private health insurance in order to promote (what it saw as) the best model of health care. In *Flora*, the state refused to fund expensive treatment abroad in order to prioritize resources. The degree of impact was arguably more immediate and direct in *Flora*, and yet it has been classified as a case where there was no deprivation of section 7, whereas *Chaoulli* was categorized as deprivation, despite the absence of any consensus on whether the introduction of private health care will lead to an overall improvement in health care standards.[27] Thus the decision in *Flora*—a case tied to a very concrete situation—serves to emphasize the criticisms of the somewhat artificial link in the *Chaoulli* judgment between the ban on private health insurance and long waiting times for access to services.

One explanation for this difference in approach is the public-private distinction between the cases, a distinction that is also at play when one compares the outcomes in *Chaoulli* and *Auton*. *Auton* involved a claim which would have created an obligation on the state to provide additional public funding for a specific type of health care. In contrast, *Chaoulli* did not involve a direct claim for public resources but rather concerned the individual's right to access private health insurance. Thus, one can argue that *Auton* and *Chaoulli* are consistent in that one limits a claim to a state-funded benefit while the other allows access to a private benefit. Nonetheless, in terms of public policy, the argument was that this restriction (on access to private health insurance) had been imposed in order to improve overall access to health care. *Auton* and *Chaoulli* can only be seen as consistent if one sees the Supreme Court of

---

[26] *Flora*, *ibid.* at para. 108.

[27] This case has recently been followed by the Ontario Divisional Court in *C.C.W. v. Ontario Health Insurance Plan*, in which the court ruled that the requirement of prior approval for medical treatment outside Canada was not a denial of the right to life or security of person under s. 7 ((2009), 95 O.R. (3d) 48, 305 D.L.R. (4th) 538 (Div. Ct.)).

Canada as adopting a *Lochner*-type approach favouring personal rights over social legislation[28]—a view that, frankly, is difficult to sustain in these cases.[29]

B. Association pour l'accès à l'avortement *and Access to Abortion*

Chaoulli was considered (albeit briefly) in another section 7 case which also considered the *Quebec Charter*. In *Association pour l'accès à l'avortement c. Québec (P.G.)*, it was argued that women who had to pay a certain contribution to have access to an abortion in Quebec were entitled to reimbursement from the state and that, *inter alia*, the failure to reimburse these women involved a breach of both the Canadian and the Quebec charters.[30] The court set out the background to the case as follows: In the 1980s, Canadian women, in order to have access to abortion, had to submit a claim to the abortion committee at accredited hospitals. The procurement of an abortion without the approval of such a committee was a breach of the *Criminal Code*.[31] In *R. v. Morgentaler*, the Supreme Court of Canada held that the relevant provisions of the *Criminal Code* were in breach of section 7 as they interfered with a woman's right to physical and bodily integrity.[32] As a result of this judgment, more extensive services were put in place. However, by the late 1990s it was estimated that about a third of women seeking an abortion in Quebec had to pay for it themselves, as the public system was unable to provide free services to all Quebec women. The association questioned why women should have to pay for an abortion if this service was covered by Quebec health insurance.[33]

While the case raised interesting legal questions concerning the Canadian and Quebec charters, the Superior Court of Québec was able to decide it on non-*Charter* grounds and made only limited reference to *Charter* issues. Drawing on the judgment of Justice Deschamps in *Chaoulli*, the court held that the constitutional questions should not be considered in a theoretical manner, but only on the basis of a specific factual situation.[34] The court ruled that, unlike in the *Morgentaler* case (where the issue was women's right to an abortion in the light of the barriers imposed by the law then in place), there was no evidence that the women involved in the present case had suffered from emotional and psychological trauma as a result of the law (i.e., the court had no proof that the requirement to pay a supplement had caused such

---

[28] *Lochner v. New York* was a United States Supreme Court case that held general right to make a contract in relation to one's business was part of the liberty protected by the Fourteenth Amendment to the U.S. Constitution and struck down a New York law that limited hours of work (198 U.S. 45 (1905)).

[29] But see Sujit Choudhry, "Worse than *Lochner*?" in Flood, Roach & Sossin, *supra* note 7, 3.

[30] 2006 QCCS 4694, [2006] R.J.Q. 1938, [2006] R.R.A. 760 [*Association pour l'accès à l'avortement*].

[31] R.S.C. 1970, c. C-34, ss. 251(1), 423(1)(d).

[32] *Supra* note 22.

[33] *Health Insurance Act*, R.S.Q. c. A-29.

[34] *Association pour l'accès à l'avortement*, *supra* note 30 at paras. 127-28.

trauma).[35] In addition, the court concluded that it was not the Quebec legislation which had caused the problem but its non-respect, which the government had not only tolerated but encouraged for financial reasons.[36] Therefore, while upholding the association's claim on other grounds, the court found no breach of either the *Charter* or the *Quebec Charter*. The court's approach—if perhaps understandable given its findings on other grounds—is disappointingly brief from a *Charter* perspective. However, it is not clear from the evidence whether the sums that women were required to pay would have interfered with a woman's right to physical and bodily integrity.

C. Ali v. Canada—*Tax Credits and the* Charter

In *Ali v. Canada* (discussed in more detail in Part II, below), the Federal Court of Appeal shortly held that a claim concerning a tax credit for medical expenses did not engage section 7 of the *Charter*.[37] The appellants had argued that the denial of their claims for a medical expense tax credit in respect of certain dietary supplements had caused them anxiety or stress leading to a real or imminent deprivation of their life, liberty, or security of the person, contrary to section 7. Justice Ryer stated that "[i]t would be a remarkable proposition if the demonstration of anxiety or stress at the prospect of having to pay income taxes were a sufficient basis upon which to be excused from having to pay such taxes."[38]

II. Health Care and Section 15 of the *Charter*

A. The Judicial Approach to Section 15 and Health Care

Section 15(1) of the *Charter* provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law

---

[35] *Ibid.* at paras. 129-30. See also *Jane Doe v. Manitoba*, 2005 MBCA 109, 195 Man. R. (2d) 309, 260 D.L.R. (4th) 149. See generally Joanna N. Erdman, "In the Back Alleys of Health Care: Abortion, Equality and Community in Canada" (2007) 56 Emory L.J. 1093.

[36] It is not clear why this should form any basis for a denial of the claim, as the Supreme Court of Canada has elsewhere held that non-respect or improper implementation of valid legislation may constitute a *Charter* breach. See e.g. *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120 at para. 125, 193 D.L.R. (4th) 193.

[37] 2008 FCA 190, 379 N.R. 200, [2008] 4 C.T.C. 245 [*Ali*], leave to appeal to S.C.C. refused, 32762 (28 May 2008). Ryer J.A. followed the reasoning in *Mathew v. Canada* (2003 FCA 371, [2004] 1 C.T.C. 115, 110 C.R.R. (2d) 299). In the circumstances of the case, this decision may have been correct. However, the approach of the Ontario Court of Appeal in *Flora* (*supra* note 11) favouring the substance rather than the form of the claim is arguably also correct. That is to say, a denial of a claim concerning tax credits might in some (albeit perhaps exceptional) circumstances engage s. 7 rights.

[38] *Ali*, *ibid.* at para. 21 (holding that a claim concerning a tax assessment was an economic right not covered by s. 7). The appellants' concerns seem less remarkable when one realizes that they had a chronic and debilitating condition with no known cure and spent $10 000 per annum on the medicine in question (facts not considered worthy of mention in the judgment of the Federal Court of Appeal).

without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." As we have seen, the Canadian case law has tended to distinguish between (1) ensuring reasonable accommodation so as to allow access for disabled persons to the general health care system and (2) recognizing the legislature's authority to determine the precise scope of the services provided. In *Auton*, the Supreme Court of Canada—faced with a claim that the failure to provide an emerging treatment for autistic children was a breach of section 15—had introduced a new requirement in section 15 analysis: that the benefit claimed be one "provided by law".[39] Thus the fact that the treatment sought was neither a "core" medical service nor a designated "non-core" service meant that it was not "provided by law" and, therefore, not within the ambit of section 15(1). It is, of course, unexceptionable that a claimant could not make a successful claim under section 15(1) where nobody else was entitled to an equivalent service. But surely this should be a matter for detailed investigation rather than being based on whether or not a particular service was categorized in a particular manner.

It is true that the Supreme Court of Canada went on to say that a finding that the benefit was not one provided by law "does not end the inquiry".[40] However, the Court's reasoning on this point appears tautological and/or circular. The Court stated:

> It is not open to Parliament or a legislature to enact a law whose policy objectives and provisions single out a disadvantaged group for inferior treatment. On the other hand, a legislative choice not to accord a particular benefit absent demonstration of discriminatory purpose, policy or effect does not offend this principle and does not give rise to s. 15(1) review. This Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner.[41]

Thus the legislature cannot enact a discriminatory law. However, in the area of health care the legislature may offer to fund non-core services. Therefore, the exclusion of certain non-core services cannot (without more) be viewed as discriminatory.[42] But this is simply a return to the "benefit provided by law" requirement.

B. Medical Expense Tax Credits and the Equality Analysis

A number of cases have recently considered one aspect of this issue. These concerned the right to claim a tax credit for medical expenses. The *Income Tax Act* permits an individual to deduct an amount, referred to as the medical expense tax

---

[39] *Supra* note 3 at paras. 27ff. With respect to McLachlin C.J.C.'s reasons for judgment, it is not clear that the need for the benefit to emanate from law is required by either the previous jurisprudence or the language of s. 15 ("equal benefit of the law" does not equate to "benefit provided by the law").

[40] *Ibid.* at para. 39.

[41] *Ibid.* at para 41 [references omitted].

[42] And it is entirely unclear what the "more" might be.

credit (METC), in respect of the taxpayer's total medical expenses.[43] In *Ali*, the appellants both suffered from fibromyalgia syndrome, a chronic and debilitating condition with no known cure. As part of a multi-dimensional treatment regime, they each spent approximately ten thousand dollars annually on vitamins, herbs, and minerals recommended by a naturopath. Their claim for the METC was refused as the *ITA* confined reimbursement to medicine *prescribed* by a medical practitioner (a term which the Crown argued did not include naturopaths) and *recorded* by a pharmacist.[44] The Federal Court, in a non-*Charter* case, had previously ruled that items bought "off the shelf" and not "recorded" did not qualify as medical expenses.[45] The appellants in *Ali* argued that the "recorded by a pharmacist" requirement violated their rights under subsection 15(1) and section 7 of the *Charter*. As *Ali* (decided by the Federal Court of Appeal) is the highest authority on this issue, I will first discuss this ruling. However, as that court dismissed the case on quite narrow grounds, I will also look at some of the broader issues which the lower courts had considered.

Justice Ryer (for the court) relied on *Auton*, in which the Supreme Court of Canada held that subsection 15(1) of the *Charter* will not be infringed where the benefit sought is not one provided by the impugned legislation. In the present case, the benefit claimed by the appellants was the METC in respect of the cost of off the shelf dietary supplements. Justice Ryer observed that, in *Ray*, the Federal Court of Appeal had ruled that such a benefit was not provided by the *ITA*. Therefore, he argued that it could not be discriminatory to deny the appellants a benefit (the METC in respect of the cost of off the shelf drugs) that no one gets.[46] Proceeding to the "second"[47] element of the *Auton* test, the court was satisfied that the exclusion (or "non-inclusion") of the benefit claimed by the appellants under the *ITA* did not constitute direct discrimination nor (indirect) discrimination by effect.[48] Thus, the Federal Court of Appeal rejected the claim on the basis that it did not satisfy the *Auton* threshold test—the claim was not for a benefit provided by law and section 15(1) was not engaged. The court did not have to apply—and indeed specifically avoided—the standard *Law* test determining whether there had been differential

---

[43] R.S.C. 1985 (5th Supp.), c. 1, s. 118.2(1) [*ITA*].

[44] See *Ali v. Canada*, 2006 TCC 287, [2006] 4 C.T.C. 2087 [*Ali (T.C.C.)*]. The details of the case are set out only in the judgment of the Tax Court of Canada. As Woods T.C.J. noted, the Tax Court of Canada had previously upheld the same provision in *Charter* challenges on the basis that the provision applies equally to all persons: *Pagnotta v. Canada*, [2001] 4 C.T.C. 2613, 55 D.T.C. 3797 (T.C.C.); *Lewis v. Canada*, 2004 TCC 237, [2004] 2 C.T.C. 3067, 117 C.R.R. (2d) 351; *Herzig v. Canada*, 2004 TCC 344, [2004] 3 C.T.C. 2496. *Ali* has recently been followed in *Ray v. Canada* (2009 TCC 140, [2009] 6 C.T.C. 2110).

[45] *Ray v. Canada*, 2004 FCA 1, [2004] 2 C.T.C. 40 at paras. 12-13, 58 D.T.C. 6028 [*Ray*], cited in *Ali*, *supra* note 37 at para. 5.

[46] *Ali*, *ibid.* at para. 12.

[47] I argue above that this is simply a restatement of the "benefit of the law" requirement.

[48] *Ali*, *supra* note 37 at para. 19.

treatment and, if so, whether this was discriminatory within the meaning of the *Charter*.[49]

The lower courts considered broader arguments concerning the METC. Describing the *Ali* appellants' circumstances as "certainly sympathetic",[50] Justice Woods in the Tax Court of Canada (although referring to the distinction in *Auton* between benefits which were and were not provided under the legislation) proceeded to an analysis of whether there had been a breach of section 15.[51] Justice Woods reviewed the history and object of the scheme and found that it was not intended to provide tax relief for *all* prescribed medical expenses. Inevitably, Parliament had to decide where to draw the line between those therapeutic substances that qualify for tax relief and those that do not. She found that the line was not drawn arbitrarily and that the pharmacist-recording requirement was justified.[52] She found that the appropriate comparator group consisted of "individuals who can tolerate pharmaceutical drugs and who claim a medical expense tax credit for drugs that (1) are not within well-defined parameters; (2) are not well-established as being safe and efficacious; and (3) are prescribed by a medical practitioner whose profession is not regulated in every province."[53] She held that the appellants were not treated differently from those in this comparator group because no one was entitled to claim the METC for drugs under these criteria. For these reasons, she also concluded that the rule did not infringe the appellants' rights under section 15(1) of the *Charter*.

Chevalier v. Canada also involved a challenge to the same provisions of the *ITA*.[54] The appellant, who was diagnosed with chronic fatigue syndrome, claimed the METC for the cost of organic products and foods as well as for services provided by a naturopath and an osteopath (who under Quebec legislation are not recognized medical practitioners). As in *Ali*, these claims were refused as not meeting the statutory requirements. The appellant gave evidence that she reacted strongly to pharmaceutical products and consequently turned to natural remedies. She argued that the tax credit provision was intended to assist all persons with disabilities, but that as drafted it "fail[ed] to take into consideration her needs for a special diet, while reducing the tax burden of virtually all other disabled persons."[55] As Justice Bédard pointed out, this amounted to a claim that she was denied the METC on the basis of her particular disability.

---

[49] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1 [*Law*].

[50] *Ali (T.C.C.)*, *supra* note 44 at para. 73.

[51] Her decision to do so was considered "not necessary" by the Federal Court of Appeal (*Ali*, *supra* note 37 at para. 11).

[52] *Ali (T.C.C.)*, *supra* note 44 at paras. 122-35.

[53] *Ibid.* at para. 137.

[54] 2008 TCC 11, [2008] 4 C.T.C. 2009, 62 D.T.C. 2477.

[55] *Ibid*. at para. 23.

Justice Bédard turned first to the *Auton* inquiry as to whether the claim was for a benefit provided by law. He agreed with the analysis of Justice Woods in *Ali*, noting that the *ITA* did not confer the benefit of the METC on every person with a disability. He held that "Parliament intentionally limited the scope of subsection 118.2(2) of the *ITA*; it was never intended to accommodate every disability."[56] Therefore, he concluded that the benefit claimed by the appellant was not one provided by law. However, given the importance of the issue, he went on to consider the second branch of the *Law* test: whether the claimant was subject to differential treatment based on one or more enumerated and analogous grounds. The appellant sought to compare herself to "taxpayers who have other disabilities, yet are able to claim the medical expense tax credit in respect of their specific disabilities."[57] However, Justice Bédard was unconvinced by this, pointing out that there was no evidence that only individuals suffering from fibromyalgia, chronic fatigue syndrome, or multiple chemical sensitivities require alternative medicine. He concluded that the distinction in subsection 118.2(2) of the *ITA* was "based on types of therapeutic substances and not physical characteristics of people."[58] Therefore, the claimant had not shown that differential treatment existed.

Justice Bédard further concluded that, even if there was differential treatment of taxpayers suffering from fibromyalgia, chronic fatigue syndrome, or multiple chemical sensitivities, that differential treatment did not discriminate against her as the provision did not "promote the view that the appellant was less capable or less worthy of recognition as a human being." It simply provided for "a financial benefit to qualifying taxpayers on the basis of qualifying services and products" and consequently, there was no discrimination.[59]

This series of cases shows the chilling effect which *Auton* can have in relation to section 15 health care claims. The fact that the Tax Court of Canada was able to reject the claims after a full analysis suggests that the need for "summary" rejection on the basis of the benefit provided by law requirement is unnecessary and unduly narrows the scope of section 15 review. This is particularly important given that in the recent case of *R. v. Kapp*, the Supreme Court of Canada appears to have responded to its critics and moved away somewhat from the much-criticized notion of human dignity in the application of section 15(1), instead re-emphasizing the importance of "perpetuation of disadvantage and stereotyping as the primary indicators of discrimination."[60] However, it is not clear that the METC cases would have been decided differently had this approach been applied. Justice Bédard, the only one who

---

[56] *Ibid.* at para. 33.

[57] *Ibid.* at para. 41.

[58] *Ibid.* at para. 52.

[59] *Ibid.* at paras. 53-65. Finally, even if s. 118.2(2) of the *ITA* did infringe s. 15(1) of the *Charter*, the Tax Court of Canada found that such infringement could have been justified under s. 1 of the *Charter* (*ibid.* at paras. 66-78).

[60] *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 at para. 23, 294 D.L.R. (4th) 1 [*Kapp*].

specifically considered the issue, did accept that individuals suffering from fibromyalgia, chronic fatigue syndrome, or multiple chemical sensitivities were subject to a pre-existing disadvantage. However, his conclusions on the other three "contextual factors" in assessing whether discrimination had occurred were generally against the claimants. Only time will tell how the Supreme Court of Canada's apparent change of emphasis will be applied.[61]

III. Access to Health Care and Human Rights Law

Finally, there have been a number of decisions by courts and tribunals in relation to health care entitlements under federal and provincial human rights legislation. It is not yet clear whether alleged discrimination under the statutory human rights codes should be assessed in the same way as alleged discrimination under the *Charter*.[62] This is a potentially important issue as certain of the human rights codes may provide more specific protection against discrimination than that set out in section 15(1) of the *Charter* and may not allow a section 1–type justification of an otherwise discriminatory provision.[63] Even if the *Law* test is to be applied to human rights claims, statutory human rights codes may still provide a higher level of protection, as courts and tribunals have taken the view that once different treatment on a ground prohibited under a human rights code is established, there is no need to consider the third branch of the *Law* test where the legislature has deemed adverse treatment to be discrimination.[64]

A. Buffett*—Infertility Treatment and Gender Discrimination*

Canada (A.G.) v. Buffett involved a claim by a male member of the Canadian Forces for the provision of in vitro fertilization (IVF) with intracytoplasmic sperm injection (ICSI).[65] The Canadian Forces refused to fund this treatment under its health

---

[61] Although it falls outside the scope of this article, the approach to comparators in *Auton* (and similar cases) may also need to be revised in light of *Kapp*.

[62] See Karen Schucher & Judith Keene, Paper prepared for Women's Legal Education and Action Fund (LEAF), *Statutory Human Rights and Substantive Equality—Why and How to Avoid the Injury of the* Law *Approach* (5 March 2007), online: LEAF <http://www.leaf.ca/legal/submissions/2007-statutory-human-rights-substantive-equality.pdf#target>.

[63] As, for example, in the Ontario and Saskatchewan codes: *Human Rights Code*, R.S.O. 1990, c. H.19; *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1. See e.g. *Hogan v. Ontario (Health and Long-Term Care)*, 2006 HRTO 32, 58 C.H.R.R. D/317 at para. 385 [*Hogan*].

[64] See *Hogan*, *ibid.* at para. 116.

[65] 2007 FC 1061, 78 Admin. L.R. (4th) 54, 319 F.T.R. 119 [*Buffett*]. As described by the court, IVF is a process whereby a woman's eggs are removed, fertilized in a Petri dish, and implanted in her uterus. When there are abnormalities in the sperm IVF alone has had very little success and is not recommended. ICSI can increase the success rate of IVF with abnormal sperm by isolating normal-looking, active sperm from the sample prior to fertilization. In 2005-2006, the cost of one cycle of IVF was between roughly $5500 and $6000. ICSI costs up to an additional $1500.

care program. Mr. Buffett argued that this was a breach of the *Canadian Human Rights Act*, as female members of the Canadian Forces with infertility problems are entitled to IVF at public expense.

Section 7 of the *Canadian Human Rights Act* provides that "[i]t is a discriminatory practice, directly or indirectly, ... (*b*) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination."[66] Prohibited grounds of discrimination include sex, marital status, family status, and disability.[67] The Canadian Human Rights Tribunal found that discrimination had been established on the basis of sex and on male-factor infertility (disability).[68] The tribunal argued that the proper comparative question was whether the Canadian Forces "offer the same benefit to its male members with infertility problems that it is offering to its female members with infertility problems."[69] The answer to this question, the tribunal found, was clearly no. The tribunal ordered that the Canadian Forces fund both IVF (which by nature involved Mr. Buffett's wife, who was not a member of the Canadian Forces and not covered by the health care program) and ICSI. The tribunal categorized these treatments as ones that "offer the couple the opportunity to conceive and have a child that is biologically theirs, irrespective of who has the infertility problem."[70] Thus, although the IVF treatment physically related to Mr. Buffett's wife, the tribunal considered the treatments in a holistic manner as relating also to Mr. Buffett.

On appeal, the main issue was whether the tribunal had been correct in defining the benefit available to female members of the Canadian Forces as the opportunity to conceive a child, as opposed to treatment of female infertility.[71] The Federal Court held that the tribunal had correctly compared Mr. Buffett to female members of the Canadian Forces (who were entitled to IVF treatment although any ICSI treatment (where necessary) was not funded). However, the court did not agree with the tribunal's characterization of IVF and ICSI as offering an "opportunity to conceive" rather than a specific medical treatment. The Federal Court did find that Mr. Buffett had been discriminated against but only in relation to the failure to fund the ICSI (and not the IVF) treatment. It described this outcome—which means that the Canadian Forces must only fund the much less expensive part of the treatment—as arising from "a biological reality".[72] Thus, IVF must be funded for women and ICSI for men.

---

[66] R.S.C. 1985, c. H-6.

[67] *Ibid.*, s. 3(1).

[68] *Buffett v. Canadian Armed Forces*, 2006 CHRT 39, 58 C.H.R.R. D/435 [*Buffett (C.H.R.T.)*].

[69] *Ibid.* at para. 54.

[70] *Ibid.* at para. 52.

[71] *Buffett*, *supra* note 65 at para. 33. The Attorney General also argued that the health services of the Canadian Forces did not constitute an employment benefit within the meaning of s. 7 of the *Canadian Human Rights Act*. The Federal Court shortly dismissed this argument (*ibid.* at para. 40).

[72] *Ibid.* at para. 56.

While there is a certain surface logic to this approach, it is perhaps less satisfactory than the Canadian Human Rights Tribunal's more holistic approach to the issue. It is of course the case that there are biological differences between men and women and that, as the Federal Court explained, a difference in the cost of treating ovarian or prostate cancer does not give rise to a human rights complaint.[73] However, it is arguable that the courts need to look to the impact of their decisions rather than simple biological comparisons. Such simplistic comparisons are similar to those that determined much of the early case law on pregnancy and gender discrimination: the courts held that because men could not be pregnant, inequality resulting from pregnancy was not caused by gender discrimination but by nature.[74] In this case, the outcome of the Court's decision is that women with fertility problems will have all (or the major part) of their treatment funded whereas a man like Mr. Buffett will only have a minor part of his treatment funded. Unless there is some objective justification for this difference, this would seem to involve indirect discrimination (or discrimination by effect) rather than "a biological reality".[75]

B. Sex Reassignment Surgery—Gender and Disability Discrimination

Finally, the Human Rights Tribunal of Ontario in *Hogan* considered whether the provincial government's cutting of public funding for sex reassignment surgery (SRS) discriminated against transsexual persons on the grounds of sex and disability. There had already been a number of decisions in which courts and tribunals had found that distinguishing on the basis of transsexualism could amount to gender and disability discrimination. In *Kavanagh*, the Federal Court Trial Division upheld a ruling by the Canadian Human Rights Tribunal establishing that discrimination on the basis of transsexualism (in relation to a blanket policy prohibiting SRS) constituted discrimination on the basis of sex as well as on the basis of disability.[76] In *Waters v. British Columbia (Ministry of Health Services)*, the British Columbia Human Rights Tribunal had found that the denial of SRS was contrary to section 8 of the British Columbia *Human Rights Code*,[77] taking the view that discrimination based on sex included discrimination based on transsexualism.[78]

The circumstances leading to the *Hogan* case arose in 1998, when the Government of Ontario decided to delist SRS from the fee schedule that the

---

[73] *Ibid.*

[74] See *Bliss v. Canada (A.G.)* (1978), [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, 59 D.L.R. (4th) 321.

[75] No objective justification is apparent in the decision of the tribunal (*supra* note 68) and the point was not argued before the court.

[76] *Canada (A.G.) v. Canada (Human Rights Commission)*, 2003 FCT 89, 228 F.T.R. 231, 46 C.H.R.R. D/196 [*Kavanagh*].

[77] R.S.B.C. 1996, c. 210.

[78] 2003 BCHRT 13, 46 C.H.R.R. D/139.

government will pay for insured physicians' services.[79] The effect was that SRS would no longer be an insured benefit under OHIP. A number of transsexual persons challenged this under the Ontario *Human Rights Code* (the *Code*).[80] Section 1 of the *Code* provides that "[e]very person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability." The *Code* also contains a strong protection against constructive (or indirect) discrimination and section 11(1) provides:

> A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
>
> (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
>
> (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

Section 11(2) provides that a requirement, qualification, or factor is not to be found reasonable and bona fide unless "the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any."

The majority of the tribunal, finding that Ontario in the 1990s was facing serious economic difficulties and that each ministry was required to cut expenditure, ruled that the "decision to delist [the SRS] service was a legitimate part of [Ontario's] deep cuts to preserve the health care system for the long term."[81] The majority went on to consider whether the decision involved indirect discrimination against the complainants.[82] The majority pointed out that, under section 11 of the *Code*, to establish a prima facie case, the complainant need only show that he or she falls within a prohibited ground and sustained adverse impact by the requirement. It was satisfied, in this case, that the complainants fell within the grounds of both disability[83] and sex.[84] However, given the economic context, the tribunal held that the

---

[79] *Hogan*, *supra* note 63.

[80] *Supra* note 63.

[81] *Hogan*, *supra* note 63 at para. 92.

[82] *Ibid.* at paras. 97ff. Applying the alternative *Law* analysis (by finding that the third "discrimination" step was unnecessary because of the terms of the Ontario legislation) the tribunal came to the same conclusions (*ibid.* at paras. 112-17).

[83] The tribunal found that gender identity disorder (with which the complainants had been diagnosed) was a disability (*ibid.* at para. 19).

[84] *Ibid.* at paras. 121ff. The tribunal was satisfied that "[g]ender ambiguity as in transsexualism or intersexed is a form of sex" and that "transgenderism is the sexual identity of a person and it is of

government was able to show that the requirement was reasonable and bona fide.[85] Nonetheless, in relation to a number of the complainants who had already commenced treatment toward SRS when the decision to delist was made, the tribunal held that the limited (thirty-five day) transitional provision was insufficient to accommodate their needs. In the case of a further complainant who had not begun treatment or transition before delisting, the tribunal found no breach of the *Code*.[86]

The dissenting member of the tribunal, Vice-Chair Ross Hendriks, took a very different approach. First, she found that "the elimination of this service was tainted by discrimination based on a serious lack of understanding of transsexuality, rather than being based on social, political or economic factors as normally befits Cabinet decisions."[87] As a result, she found that there had been a breach of section 1 of the *Code* both as a matter of direct interpretation of the Ontario legislation and under the *Law* analysis.[88] Accordingly, she would have ruled that Ontario fund SRS for all the complainants and for all persons diagnosed with gender identity disorder who were recommended for SRS. However, it is implicit even in this dissenting opinion that the government could delist SRS if it did so in a non-discriminatory manner.

The case is a very interesting one and the differences between the majority and the dissenting member of the tribunal flow more from their different analyses of the facts than from the law. Both the majority and the dissent held that the issue of discrimination based on transsexualism raised the grounds of both disability and sex, and both held that the delisting had an adverse impact on the complainants. The difference as to whether this was direct or indirect discrimination flowed mainly from the analysis of how the delisting took place. The lesson from both rulings was that SRS could only be delisted where such delisting was done in a manner compatible with the *Human Rights Code*. The case shows the extent to which additional protection of human rights may be more available under specific human rights legislation than under the more general protection provided by the *Charter*. This is due to the more specific terms of the human rights legislation, which makes it easier to justify a finding of discrimination,[89] and perhaps it is also due to the interpretation of this legislation by specialized human rights tribunals.

---

critical importance to demand or attract protection under the Code under the ground of sex" (*ibid.* at paras. 125, 127). The dissenting member came to the same conclusion on this point (*ibid.* at paras. 413-30).

[85] *Ibid.* at paras. 103-105.

[86] *Ibid.* at paras. 132-41.

[87] *Ibid.* at para. 383.

[88] Applying *Law*, she held that the appropriate comparator group was those affected by the delisting of other services which had been subject to a process of review, unlike the delisting of SRS. Accordingly, the complainants had been treated differently (*ibid.* at para. 393).

[89] In addition, the scope of any such finding will often be delimited by the scope of the legislation, in contrast to the difficulties involved in delimiting the scope of *Charter* decisions.

Conclusion

As outlined in this article, health care claims after *Chaoulli* have generally been unsuccessful, with the important exception of claims under human rights legislation. As we have seen, the courts have, to date, taken a limited view of *Chaoulli* and have not been prepared to adopt the somewhat expansive approach of that judgment so as to impose positive duties on the state in the area of health care under section 7 of the *Charter*. Equally, the Federal Court of Appeal has followed *Auton* in requiring that the claimant show that the benefit claimed is one "provided by law", and it has rejected claims under section 15(1) without a detailed analysis of whether differential treatment and discrimination occurred. Only in the area of human rights legislation have rights-based health care claims been successful (at least in part).

It is suggested that the post-*Auton* and *Chaoulli* case law can throw some light on the merits and demerits of those decisions. Of the two decisions, *Auton* has clearly had a greater impact to date.[90] In *Auton*, the Supreme Court of Canada was (perhaps understandably) concerned about the potential for equality claims in relation to emerging forms of medical/educational treatments. If successful, such claims could—indirectly—have a similar effect to finding a positive obligation to protect life and health under section 7 (something the Court has carefully avoided doing to date). However, the Court could have rejected such claims on straightforward equality grounds, as it did in the second part of its judgment in *Auton*.[91] Unfortunately, the Court instead relied on a requirement that the benefit claimed be one provided by law. The implications of this can be seen in the claims for the METC, which could have been rejected on the basis of a full equality analysis (as the lower courts had done). Whatever the policy merits of the argument, in neither *Ali* nor *Chevalier* did the appellants succeed in showing that they were being discriminated against on a prohibited ground. However, rather than analyzing the allegations of discrimination in detail using the *Law* test, the Federal Court of Appeal, following *Auton*, dismissed the claim on the basis that the benefit was not provided by law. The approach taken by the court allowed it to dismiss the appellants' challenge without any proper discrimination analysis. This shows the manner in which a broad use of the "benefit provided by law" requirement may weaken equality jurisprudence. The Supreme Court of Canada may need to revisit its *Auton* decision so as to achieve its objective of protecting the legislature's jurisdiction over the scope of educational and health services without undermining the *Charter* equality analysis.

Chaoulli—regardless of its impact in the legislative arena—has had a somewhat limited impact to date on the case law concerning health care. However, cases such as *Flora*, which are, it is submitted, consistent with the Supreme Court of Canada's approach in *Auton*, highlight the fact that the courts will have to reject much more

---

[90] Note also its impact outside the health care area in cases such as *Wynberg v. Ontario* (*supra* note 9).

[91] For criticism of the Court's approach, see e.g. Gilbert & Majury, *supra* note 3 at 126-32.

difficult claims than that upheld *Chaoulli* unless they wish to develop positive obligations under section 7. This fact again raises the question of whether it was wise for the Court to take such an interventionist position on the issue of private health care in *Chaoulli*. The dissent in *Chaoulli* pointed to the difficulties the courts would face in trying to resolve questions of health policy as a matter of law.[92] The fact that a majority of the Supreme Court of Canada in *Chaoulli* rejected that argument in a section 7 context while, at the same time, the Court has strongly (arguably too strongly) reinforced such an approach in a section 15 context, has created a definite tension in the Court's case law in this area which needs to be addressed.

---

[92] *Supra* note 6 at para. 161.