Interpreting Equality Rights under Sections 7 and 15 in New and Old Ways: An Empirical Analysis of the Concurrent Claims Approach

Kiran Kang[*] *and Sonia K. Kang*[**]

This article responds to concerns about the continued relevance of s. 15 in equality rights litigation by analyzing the frequency and quality of decisions that have considered concurrent s. 7 and 15 arguments between April 1, 2013 and October 1, 2014. The research in this article reveals that Canadian courts are overwhelmingly deciding s. 15 issues alongside s. 7 arguments, and that the concurrent claims approach is the norm in equality rights litigation. The article also shows that courts are no more likely to find unjustified violations of equality rights when these issues are raised together than when they are raised separately. The implications and potential of the concurrent claims approach are considered in light of these findings.

Dans cet article, l'auteure répond aux préoccupations concernant la pertinence de l'article 15 dans les litiges portant sur les droits à l'égalité en analysant la fréquence et la qualité des décisions qui ont examiné les arguments fondés sur les articles 7 et 15 et plaidés de manière concurrente entre le 1er avril 2013 et le 1er octobre 2014. Elle révèle que, dans une très importante majorité des cas, les tribunaux canadiens déterminent les questions portant sur l'article 15 en parallèle avec les arguments de l'article 7 et que l'approche des demandes concurrentes est la norme dans les litiges en matière de droits à l'égalité. Elle montre aussi que les tribunaux ne sont pas plus susceptibles de constater des violations injustifiées de droits à l'égalité lorsque ces questions sont soulevées ensemble que lorsqu'elles le sont séparément. Les implications et le potentiel de l'approche des demandes concurrentes sont pris en considération à la lumière de ces résultats.

---

[*] B.A. (University of Alberta), J.D. (Osgoode Hall Law School); email: kiranjeetkang@osgoode.yorku.ca.

[**] Assistant Professor, Department of Management, Institute for Management Innovation, University of Toronto Mississauga, and Rotman School of Management, University of Toronto; email: sonia.kang@rotman.utoronto.ca.

AUTHOR NOTE: The authors are grateful to Cheryl Milne and the organizers of the Asper Centre's Symposium on Life, Liberty and Equality — Canadian Style, for including our research among such a rich array of perspectives on the interplay of ss. 15 and 7. Part of the research for this article was conducted during KK's participation in the seminar, Discrimination and the Law, taught by Fay Faraday at Osgoode Hall Law School in 2014. The authors benefitted greatly from the materials and discussions in the seminar, and additionally thank Bruce Ryder, Faisal Bhabha, and Dana Achtemichuk for their helpful comments on earlier drafts.

INTRODUCTION

When the *Canadian Charter of Rights and Freedoms* was constitutionally entrenched in 1982, members of equality-seeking groups who had previously lacked avenues for legally redressing structural inequality[1] envisioned a new hope for access to equal protection and benefit of the law. After 30 years, however, the protections provided under s. 15 of the *Charter* have fallen short of the hopes and expectations of many members of such groups.[2] While the scope and depth of s. 15 has remained uncertain,[3] there is reason to explore how s. 15 can be better deployed to advance the interests of substantive equality. There has been some indication that s. 7, the protection of life, liberty and security of the person, could offer an alternative route to mount challenges to government action (or inaction) on equality issues.[4] This use of alternative constitutional grounds to advance equality goals is what we call the "concurrent claims approach" to litigating equality rights.

The efficacy of s. 15 to advance a transformational equality agenda has already been subject to doubt. Scholars[5] have argued that the courts have failed to interpret s. 15 in line with the model of substantive equality aspired to by the *Charter*. At the same time, courts[6] have suggested that a more expansive application and understanding of s. 7 could remedy some of the harms that perpetuate inequality. In her minority concurring judgment in *Morgentaler*, Wilson J. contextualized principles of fundamental justice as incorporating 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."[7] Such reasoning

---

1 See generally: Margot Young, "Social Justice and the *Charter*: Comparison and Choice" (2013), 50(3) O.H.L.J. 669.

2 Paul Schabas, Kaley Pulfer & Umar Abdul, "Section 7: The New Section 15?" (2012) 44 O.H.L.J. 2 at 1.

3 Bruce Ryder, Cidalia C. Faria & Emily Lawrence, "What's *Law* Good For? An Empirical Overview of Charter Equality Rights Decisions" (2004), 24 S.C.L.R. (2d) 103 (Ryder, Faria, & Lawrence).

4 Jennifer Koshan, "Redressing the Harms of Government (In)Action: A Section 7 Versus Section 15 Charter Showdown" (2013), 22(1) Constitutional Forum 31 (Koshan).

5 *Ibid*., at 40; See also: Radha Jhappan, "The Equality Pit or the Rehabilitation of Justice" (1998), 10 *Canadian Journal of Women & the Law* 60; Margot Young, "Context, Choice and Rights: *PHS Community Services Society v. Canada (Attorney General)"* (2011), 44 UBC L. Rev. 221 at 236-7; Marie-Eve Sylvestre, "The Redistributive Potential of Section 7 of the *Charter*: Incorporating Socio-economic Context in Criminal Law and in the Adjudication of Rights" (2010-12) 42 Ottawa L. Rev. 389 at 403.

6 See *R. v. Morgentaler*, 1988 CarswellOnt 954, 1988 CarswellOnt 45, (*sub nom*. R. v. Morgentaler (No. 2)) [1988] 1 S.C.R. 30 (S.C.C.); *Rodriguez v. British Columbia (Attorney General)*, 1993 CarswellBC 1267, 1993 CarswellBC 228, [1993] 3 S.C.R. 519 (S.C.C.) at para. 72.

7 *Morgentaler*, *ibid*., at p. 165.

calls for a more expansive understanding of s. 7 that incorporates equality principles under an analysis of fundamental justice. This view has not yet been firmly embraced by the courts, 25 years after *Morgentaler*.

Scholarly commentary considering the s. 7 versus s. 15 debate is characterized by confusion about the appropriate balancing of the two *Charter* protections when litigating equality-based claims.[8] Questions of what is lost versus what is gained by advancing equality claims through the language of life, liberty, and security of the person have animated the discussions developing out of the post-*Kapp*[9] era.[10] Moreover, understanding courts' opinions on concurrent s. 7 and s. 15 claims is made difficult by the wide range of judgments which exist on the matter. To our knowledge, no study has yet analyzed or organized this body of cases or empirically examined how frequently and meaningfully courts engage with claims that raise concurrent s. 7 and s. 15 arguments.[11] This article takes the first step towards filling this gap by analyzing the frequency and quality of decisions that have considered concurrent s. 7 and 15 arguments over an 18-month period in 2013-2014.[12] This study also considers, where possible, judicial reasons for not engaging in a s. 15 analysis.

Our research reveals that Canadian judges considered s. 15 in 69 cases between April 1, 2013 and October 1, 2014; of these 69 cases, 48 decisions (69.6%) considered both s. 7 and s. 15 concurrently. These data suggest that Canadian courts are overwhelmingly deciding s. 15 issues alongside s. 7, and that the concurrent claims approach was the norm in equality rights litigation during this period. Further, when claims are raised concurrently, courts are no more likely to find violations of the right to life, liberty, or security of the person (s. 7) than they are willing to find unjustified violations of equality rights (s. 15). Thus, despite calls from commentators to consider s. 7 as an alternative route to equality rights, courts did not accept s. 7 arguments at a statistically greater rate than they adopted concurrent s. 15 arguments. While this research supports many of the concerns about the shortcoming of s. 15,[13] it also demonstrates that

---

[8] Koshan, *supra* note 4; Sylvestre, *supra* note 5; Daphne Gilbert, "The Silence of Section 15: Searching for Equality at the Supreme Court of Canada in 2007" (2008), 42 S.C.L.R. (2d) 497.

[9] *R. v. Kapp*, 2008 SCC 41, 2008 CarswellBC 1312, 2008 CarswellBC 1313, [2008] 2 S.C.R. 483 (S.C.C.).

[10] Koshan, *supra* note 4; Sylvestre, *supra* note 5.

[11] Note that there have been several exceptional studies that have tracked the frequency with which courts dispose of s. 15 claims and whether or not violations of its provisions were unjustified. See generally: Ryder, Cidalia & Lawrence, *supra* note 3; Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa : Canadian Advisory Council on the Status of Women, 1989); Bruce Ryder, "The Strange Double Life of Canadian Equality Rights," (2013), 63 S.C.L.R. (2d) 261.

[12] This research is conclusive of all decisions rendered that consider both ss. 7 and 15 from April 1, 2013 to October 1, 2014. That is a date range of 18 months.

[13] Indeed, it demonstrates that courts are more often than not deciding s. 15 alongside s. 7,

calls advocating for s. 7 as a viable alternative for promoting equality-based rights may be premature, if not unfounded. These findings, though counterintuitive and perhaps surprising, allow for a meaningful assessment of how courts are interpreting equality rights in new and old ways.

This article begins with a summary of the Supreme Court's approach to s. 15(1) and 15(2) of the *Charter* through a brief historical overview of their application at common law. Part 1 discusses the cases of *Kapp*, *Withler*,[14] and *Cunningham*[15] in terms of their development of and departure from *Law v. Canada (Minister of Employment & Immigration)*.[16] Part 2 examines how s. 7 has been considered a viable alternative for members of disadvantaged groups seeking equality. We canvass both the jurisprudence and scholarship to weigh the relative potential and value of raising equality claims within the framework of s. 7. In Part 3, we outline the methodology undertaken in evaluating the concurrent application of ss. 7 and 15, and then present the findings of the study in Part 4. Part 5 contextualizes these findings and their implications, and Part 6 draws conclusions as to the implications of this research. Finally, Part 7 identifies avenues for future research in order to further understand the benefits and harms of the concurrent claims approach.

1. DEVELOPMENT AND CONSTRICTION OF EQUALITY RIGHTS UNDER SECTION 15

(a) Section 15(1): Equality and Discrimination

For several years, the definitive Supreme Court pronouncement on s. 15(1), *Law*, set out a three-step test for claims of discrimination under the *Charter*.[17] The test focussed on whether the claimant could establish a violation of human dignity using several contextual factors: (1) pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group; (2) the correspondence (or lack thereof) between the ground(s) on which the claim was based and the actual need, capacity, or circumstances of the claimant or others; (3) the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society; and (4) the nature and scope of the interest affected by the impugned law.[18]

---

which may lead to the conclusion that equality-rights seekers may have to present equality-based arguments both in terms of s. 7 and s. 15.

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

[15] *Peavine Métis Settlement v. Alberta (Minister of Aboriginal Affairs & Northern Development)*, 2011 SCC 37, 2011 CarswellAlta 1210, 2011 CarswellAlta 1211, (*sub nom.* Alberta (Aboriginal Affairs and Northern Development) v. Cunningham) [2011] 2 S.C.R. 670 (S.C.C.).

[16] 1999 CarswellNat 359, 1999 CarswellNat 360, [1999] 1 S.C.R. 497 (S.C.C.) ("*Law*").

[17] *Ibid.*

The prerequisite of demonstrating a violation of "essential human dignity"[19] led many commentators to criticize what they described as the Court's mechanical and formalistic approach to s. 15(1) and resulting narrowing of the section's applicability.[20] Additionally, commentators warned that the third contextual factor (the ameliorative purpose) improperly imported s. 1 justificatory considerations into s. 15, thereby potentially justifying an infringement before properly weighing the harm to the claimant.[21]

The Court in *Law* also affirmed the comparative approach in considering analogous (*i.e.*, unlisted) grounds of discrimination under s. 15(1).[22] This approach has also received criticism, with equality-rights observers noting that the Court's analysis of comparators has often been used to defeat equality claims, particularly when the analysis has focussed on finding a "mirror" comparator of the claimant.[23]

Almost a decade later and within the context of assessing the constitutionality of the federal government's Aboriginal fishing strategy, the Supreme Court acknowledged these criticisms and reconsidered its use of the human dignity approach. In *Kapp*, the Court abandoned the human dignity assessment and consolidated the test for discrimination into two steps: (1) Does the law create a distinction based on an enumerated or analogous ground; and (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[24] While the comparator approach and the four contextual factors laid out in *Law* continued to hold relevance, the Court re-positioned the question of the ameliorative purpose or effect of the law to one falling under the ambit of s. 15(2).[25]

Kapp's effect was mixed. On the one hand, removing the human dignity frame corrected a flaw in the *Law* approach by eliminating what had become an additional evidentiary hurdle for claimants. On the other hand, the definition of discrimination was narrowed with the Court's apparent focus on group stereotyping and historical disadvantage.[26] Such a focus, critics argued, failed to capture other harms of discrimination, such as marginalization, oppression,

---

[18] *Ibid.*, at para. 88.

[19] *Ibid.*, at para. 47.

[20] Koshan, *supra* note 4, at 31; Roslyn J. Levine & Jonathon W. Penney, "The Evolving Approach to Section 15(1): Diminished Rights or Bolder Communities?" (2005), 29 S.C.L.R. (2d) 137 at 145.

[21] Koshan, *ibid.,* at 32.

[22] Approach established in *Andrews v. Law Society (British Columbia)*, 1989 CarswellBC 16, 1989 CarswellBC 701, [1989] 1 S.C.R. 143 (S.C.C.) at 164 (S.C.R.).

[23] Koshan, *supra* note 4, at 32.

[24] *Kapp*, *supra* note 9, at para. 17.

[25] *Ibid.*, at para. 23. Note also that the Court left open the possibility that the ameliorative purpose or effect of the law might also be relevant in considering whether the law perpetuated disadvantage. See Koshan, *supra* note 4 at 32.

[26] Koshan, *supra* note 4, at 32.

and exclusion from public entitlements and benefits.[27] Additionally, *Kapp* provided little guidance on how this new approach to s. 15(1) should be applied.[28]

The next major development in the s. 15(1) analysis was a response to a claim of age-based discrimination in *Withler*.[29] Here, the claimant class argued that a discriminatory distinction based on age had been created via a reduction in supplementary death benefits paid to surviving spouses of deceased federal employees. The Court confirmed the two-step test for discrimination outlined in *Kapp*, but also modified the comparator approach adopted in *Andrews* by calling for a new, more flexible approach to comparison.[30] The Court acknowledged that the mirror comparator approach may provide a means of achieving *formal* equality without providing for *substantive* equality.[31] Moreover, the Court noted that the mirror approach risked excluding intersecting grounds of discrimination from its analysis, which would burden claimants with the impossible task of producing evidence of differential treatment compared to a non-existent perfect comparator group.[32]

Unfortunately, the Court's new flexible approach to the comparator question inadvertently created two distinct procedures: one for claims of direct discrimination, and another for claims of indirect discrimination. In essence, if the claimant could establish a distinction based on an enumerated ground, the claim would then proceed to stage two of the *Kapp* test without having to identify a particular comparator group.[33] Alternatively, in cases attempting to establish indirect discrimination (i.e., where a law is neutral on its face but adversely impacts a member of a disadvantaged group), the claimant would "have more work to do" in proving a systematic historical disadvantage.[34] It would then be up to the courts to consider whether comparison would be useful in weighing the disadvantage or stereotype perpetuated by the impugned act or law.[35]

Additionally, the Court in *Withler* expanded the range of contextual factors identified in *Law* by allowing for the "allocation of resources and particular policy goals" of the legislature to be considered within the s. 15(1) analysis.[36] This intensified concerns that the Court was inappropriately importing s. 1

---

27 Jonnette Watson Hamilton & Jennifer Koshan, "Courting Confusion? Three Recent Alberta Cases on Equality Rights Post-*Kapp*" (2010), 47 Alta. L. Rev. 927 at 937.

28 Koshan, *supra* note 4.

29 *Withler*, *supra* note 14.

30 *Ibid.,* at paras. 55-59.

31 *Ibid.*

32 *Ibid.*

33 *Ibid.*

34 *Ibid.,* at para. 64.

35 *Ibid.,* at para. 65.

36 *Ibid.,* at para. 67.

justificatory considerations about the purpose and policy of the impugned law into the s. 15(1) analysis.[37]

The resulting effect of the trajectory of Supreme Court jurisprudence related to s. 15(1) over the past 15 years is that it has become one of the most difficult *Charter* provisions to apply. There has been no successful equality rights claim at the Supreme Court including or since *Kapp*.[38] Indeed, while the majority of the Court in *Droit de la famille – 091768*[39] (the most recent revision of the s. 15 analysis) agreed that a discriminatory distinction had been made that triggered s. 15(1)[40], the majority declined to find such an infringement in contravention of s. 1. Here, the Court considered the validity of excluding *de facto* spouses (i.e., common law spouses) from the patrimonial and support rights granted to married and civil union spouses. Although the Court clarified that a s. 15 analysis should focus on the *effect* of the impugned law rather than on its attitude or intent,[41] the Court's divisiveness failed to alleviate uncertainty about how to apply *Charter* scrutiny within the equality rights context.

Moreover, the Court has been criticized for actively avoiding s. 15(1), instead preferring to decide cases that reach its jurisdiction on other grounds where available.[42] This suggests that the Supreme Court of Canada has made it more burdensome for members of vulnerable groups to seek redress for discrimination under s. 15(1).

(b) Section 15(2): Ameliorative Programs and Affirmative Action

In the same year that the Supreme Court decided Withler, it also rendered its decision in Cunningham — a case involving the loss of privileges under the Métis Settlements Act (MSA) for Métis persons who registered as status Indians to receive health benefits under the Indian Act. The claimants asserted that denying

---

37 *Ibid*., at para. 38.

38 Koshan, *supra* note 4 at 34.

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

40 Note that the Court was divided on finding an infringement of s. 15(1). While McLachlin C.J. and Deschamps, Abella, Cromwell and Karakatsanis JJ. all agreed that the impugned provisions infringed s. 15(1), LeBel, Fish, Rothstein, and Moldaver JJ. all held that appellant had not established an infringement of her constitutionally protected equality rights.

41 *Supra* note 39, at para. 332.

42 *Ibid*. Consider the decisions of *Hutterian Brethern* (decided on religious freedom under s. 2(a) of the Charter); *AC v. Manitoba* (focussing on 2(a) and 7 of the Charter after dismissing the s. 15 claim); or Fraser (decided pursuant to s. 2(d)); or *Ermineskin Indian Band and Nation v. Canada* (rejected argument of discrimination). The dissenting opinion of Abella J. in *Quebec v. A* is one exceptional example of a Justice on our top Court finding both a violation of s. 15(1) and that such a violation could not be saved under s. 1. Unfortunately, however, Abella J.'s s. 1 analysis was not adopted by the majority; while the majority of the Court agreed with Abella J.'s s. 15 analysis, she was on her own in finding a breach of s. 1.

membership under the MSA violated the Charter guarantees of equality (s. 15), freedom of association (s. 2(d)), and liberty (s. 7) by making Métis persons choose between their dual "status Indian" and "Métis" identities.

The Court in Cunningham denied the claims, holding that that the shield of s. 15(2) applies even to under-inclusive ameliorative programs if the goal of the program is to "target particular disadvantaged groups as a matter of priority".[43] Here, the MSA was understood to be an ameliorative program protected by s. 15(2), aimed at enhancing and preserving the identity, culture, and self-governance of the Métis.[44] In its unanimous defence of equality-positive government action, the Court noted that, "it is unavoidable that ameliorative programs, in seeking to help one group, will necessarily exclude others."[45] Further, the Court concluded that governments ought to be afforded the ability to target particular disadvantaged groups through ameliorative programs, even if doing so excludes other disadvantaged groups. As long as the exclusion is established to "serve and advance" the object of the ameliorative program, the Court held that under-inclusiveness should not render a program beyond the protection of s. 15(2).[46]

Commentators worry that the deferential approach adopted by the Court in *Cunningham* may make it difficult for members of disadvantaged groups to demonstrate that they have been wrongfully excluded from benefits programs where those programs are targeted at "serving and advancing" the interests of other disadvantaged groups.[47] Thus, while protecting ameliorative programs may be a sound anti-discrimination goal, especially when faced with claims of "reverse discrimination" by members of dominant social groups (e.g., *Kapp*), in-group/out-group discrimination may be exacerbated if protecting an ameliorative program means insulating it from review for under-inclusiveness.

To summarize, while the Court established a doctrine of substantive equality through its early judgments, confirmed in recent restatements,[48] the current reality is that raising a s. 15 claim is not only difficult, but almost impossible in the post-*Kapp* era. Consequently, changes to s. 15(1) and 15(2) have left the equality rights terrain uncertain, with commentators calling for new approaches to advance constitutional equality. The next section examines the expansion of s. 7 as a viable alternative for members of disadvantaged groups to seek justice. In particular, we discuss the cases of *PHS Community Services Society* ("*Insite*")[49] and *Bedford*.[50]

---

[43] *Cunningham*, *supra* note 15, at para. 45.

[44] *Ibid*., at para. 3.

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

[46] *Ibid*., at para. 45.

[47] Koshan, *supra* note 4, at 35; Hamilton & Koshan, *supra* note 27, at 89.

[48] E.g. *R. v. Turpin*, 1989 CarswellOnt 76, 1989 CarswellOnt 957, [1989] 1 S.C.R. 1296 (S.C.C.) at 1333 (S.C.R.) (Wilson J. described the purpose of s. 15 as "remedying or preventing discrimination against groups suffering social, political, and legal disadvantage in our society").

2. RE-FRAMING EQUALITY RIGHTS UNDER SECTION 7

(a) *PHS Community Services Society*

Section 7 has been historically recognized as one of the protectors of the "most basic interests of human beings — life, liberty, and security."[51] Because the engagement of s. 7 requires the Court to consider "many difficult moral and ethical issues," it has been regarded as a section that ought to be developed "cautiously and incrementally."[52] Recent cases dealing with addictions, mental health, and prostitution, have applied s. 7 with sensitivity to social facts, including sources and causes of inequality. This context-driven jurisprudence reflects an appreciation of the systemic social forces that limit the "choices" of members of disadvantaged groups and reveals implicit biases and assumptions that blame many of society's weakest members for their disadvantaged status.[53]

PHS involved the Insite safe injection centre, which provides support services to intravenous drug users in the Downtown Eastside ("DTES") district of Vancouver. Insite operates on the basis of a statutorily protected exemption[54], which allows staff to legally purchase, possess, and administer controlled substances for the purpose of providing a safe alternative to harmful, uncontrolled injections. In 2008, the federal Minister of Health, Tony Clement, refused to extend the exemption, which resulted in a group of claimants mounting a *Charter* challenge based on s. 7.

In finding for the claimants, the unanimous Court paid particular attention to the intersecting levels of oppression and hardship faced by Insite's clients. Specifically, the Court made clear that Insite's clients are intravenous drug users who "are not engaged in recreational drug use" but are addicts[55] with histories of physical and sexual abuse, drug use, and mental illness.[56] The Court further highlighted the significant levels of homelessness and inadequate housing

---

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

[50] *Bedford v. Canada (Attorney General)*, 2013 SCC 72, 2013 CarswellOnt 17681, 2013 CarswellOnt 17682, [2013] 3 S.C.R. 1101 (S.C.C.).

[51] *Chaoulli c. Québec (Procureur général)*, 2005 SCC 35, 2005 CarswellQue 3276, 2005 CarswellQue 3277, (*sub nom*. Chaoulli v. Canada (Attorney General)) [2005] 1 S.C.R. 791 (S.C.C.) at para. 193, Binnie and LeBell, JJ. dissenting.

[52] *Ibid*.

[53] Sylvestre, *supra* note 5 at 397.

[54] Under the *Controlled Drugs and Substances Act*, S.C. 1996, C. 19 ("the *CDSA*").

[55] This distinction proved important in rejecting the government's argument that the removal of the exemption was not the cause of the harms suffered, but that it was the personal choices of the claimants that produced and perpetuated their precarious status. We return this point later in this section.

[56] *PHS*, *supra* note 49 at para. 7. Note also that government lawyer, John Hunter, QC, acknowledged during oral arguments at the B.C.S.C. that addiction was an illness. See: Margot Young, *supra* note 5 at 239.

conditions within the DTES.[57] Moreover, the Court gave significant attention to demographic data about drug users, particularly with respect to social disadvantage in terms of age, Aboriginality, criminal history, addiction, and harmful injection practices.[58]

Under its s. 7 analysis, the Court adopted the long established two-step test, which asks: (1) is s. 7 engaged by virtue of state interference with the life, liberty, or security of the applicant; and (2) if s. 7 is engaged, is the state interference with the life, liberty, or security of the person in accordance with the principles of fundamental justice?[59]

The Court first considered the right to liberty and held that the "penalty of imprisonment" under the *CDSA* engaged the liberty interests of the Insite staff, which in turn impacted the s. 7 rights of clients accessing health services.[60] If Insite's staff are "unable to offer medical supervision and counselling to Insite's clients," vulnerable individuals would be deprived of "potentially lifesaving medical care, thus engaging their rights to life and security of the person."[61] The Court then relied on well-accepted definitions of 'security of the person', holding that a deprivation occurs whenever a law or government action "creates a risk to health by preventing access to health care," and that such a risk is exacerbated when "the law creates a risk not just to the health but also to the lives of the claimants."[62]

Before moving on to apply the principles of fundamental justice, the Court dealt with the government's argument that "any negative health risks drug users may suffer if Insite is unable to provide them with health services, are not caused by the *CDSA*'s prohibition on possession of illegal drugs, but rather are the consequences of the drug users' decision to use illegal drugs."[63] The Court squarely rejected the notion that drug users who accessed Insite's services were exercising free will, holding instead that "addiction is a disease in which the central feature is impaired control over the use of the addictive substance".[64] Such reasoning can be read as the Court importing s. 15 considerations into its s. 7 analysis — that is, contextualizing its interpretation of liberty and security of the person in terms of disadvantage and disability.

---

57 PHS, *ibid*., at para. 8.

58 For more, see Koshan, *supra* note 4, at page 36. *PHS, ibid*., at paras. 8-11.

59 Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012) at 21-22. According to Stewart, the test actually consists of four steps, the first two of which ask procedural questions about the applicability of the *Charter* and the standing of the person invoking the s. 7 rights. The overwhelming focus of the s. 7 test, however, falls on the two steps we have highlighted.

60 *PHS, supra* note 49 at para. 90.

61 *Ibid*., at 91.

62 *Ibid*., at 93.

63 *Ibid*., at 97.

64 *Ibid*., at 101.

The Court then considered whether the deprivation was in accordance with the principles of fundamental justice and found that the Minister's refusal to grant an exemption under the *CDSA* was both arbitrary and grossly disproportionate in consideration of the interests of the government.[65] The evidence demonstrated that: (1) the criminal prohibitions had done little to reduce drug use in the DTES; (2) the risk of harm to injection drug-users diminished when they injected at Insite; and (3) the presence of Insite did not contribute to increased crime rates, incidents of public injection, or relapse rates in injection drug users.[66] Indeed, the evidence instead revealed that Insite's presence in the DTES had many favourable impacts, suggesting "not only that exempting Insite from the application of the possession prohibition does not undermine the objectives of public health and safety, but furthers them."[67]

Turning to gross disproportionality, the Court applied the test set out in *Malmo-Levine*, which requires an assessment of whether "state actions or legislative responses to a problem . . . are so extreme as to be disproportionate to any legitimate government interest."[68] The evidence supported the claimants' contention that the "effect of denying the services of Insite . . . is grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics."[69] Moreover, the Court found that the Minister's actions could not be saved by s. 1 and ordered that the Minister grant the exemption to Insite under the *CDSA* forthwith pursuant to s. 24(1) of the *Charter*.[70]

Overall, the decision in *PHS* is a compelling example of how claims that could have otherwise been argued under s. 15 may find traction under s. 7.[71] While critics contend that *PHS* is a victory for the rights of a particular vulnerable group, they also argue that the victory is a limited one, providing only for a narrow justice claim that in no way creates precedent-setting positive obligations on governments to establish facilities similar to Insite.[72] The resulting

---

65 *Ibid*., paras 131-133. Note that the Court did not consider overbreadth because it had already established arbitrariness and disproportionality.

66 *Ibid*., at 131.

67 *Ibid.*

68 *Ibid*., at 133

69 *Ibid*., at 133

70 *Ibid*., at 150.

71 It is not our intention in this article to consider how s. 15 could have been applied in *PHS*. One might take up this task in future scholarship. For now, we simply put forward that *PHS* could have engaged s. 15(1) guarantees of freedom from discrimination in terms of disability. *PHS* could have also argued, similar to *Inglis*, that the refusal to continue the exemption violated the equality rights of disadvantaged persons who had previously relied on the benefits derived from the exemption. See: *Inglis v. British Columbia (Minister of Public Safety and Solicitor General)*, 2013 BCSC 2309, 2013 CarswellBC 3813, [2013] B.C.J. No. 2708 (B.C. S.C.).

72 Margot Young, *supra* note 5, at page 673; Koshan, *supra* note 4, at 37.

effect is that s. 7 may have proven useful in *PHS* but its application and potential value in future claims of vulnerable groups may be limited to those which fall within its narrow scope.

(b) *Bedford*

Two years after *PHS*, the Supreme Court issued another landmark decision on constitutional guarantees under ss. 2(b) and 7 of the *Charter*. In *Bedford*, the Court considered whether three prohibitions under the *Criminal Code* unconstitutionally criminalized various activities related to prostitution. The impugned provisions concerned actions with respect to bawdy-houses, living on the avails of prostitution, and communicating for the purposes of engaging in prostitution.[73]

The applicants were former and currently-working prostitutes who asked the Court to strike down the impugned provisions because they made necessary safety measures illegal. The applicants successfully argued that, because prostitution is not illegal, the law could not create situations wherein the liberty and security of those working as prostitutes would be directly limited.

The Supreme Court easily found that s. 7 was engaged, holding that the impugned provisions heightened the risk the applicants faced in performing a legal activity — prostitution.[74] Indeed, McLachlin C.J., writing for a unanimous Court, held that the provisions not only imposed conditions on how prostitutes operate, but went a "critical step further, by imposing *dangerous* conditions on prostitution" (emphasis in original).[75] Consequently, "people engaged in a risky — but legal — activity (were prevented) from taking steps to protect themselves from the risks."[76]

Similar to the approach observed in *PHS*, the Court then considered the government's arguments that (1) an insufficient causal connection between the laws and the risks faced by prostitutes precluded s. 7 engagement, and that (2) "it is the choice of the applicants to engage in prostitution, rather than the law, that is the causal source of the harms they face."[77] The Court again squarely rejected the causal connection and choice arguments launched by the government. First, the Court held that a sufficient causal connection standard should be adopted at the engagement stage of the s. 7 analysis. Such a standard "does not require that the impugned government action or law be the only dominant cause of the prejudice suffered by the claimant" and instead allows a contextual analysis that considers the particulars of each case to be taken into account.[78] Moreover, the Court noted that a sufficient causal connection standard at the engagement stage

---

[73] *Supra* note 50, at para. 4.

[74] *Ibid.*, at paras. 58-60.

[75] *Ibid.*, at para. 60.

[76] *Ibid.*

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

[78] *Ibid.*, at paras. 75-6.

of the s. 7 analysis "represents a fair and workable threshold for engaging s. 7 of the *Charter*."[79] Such a standard operates as a "port of entry" for s. 7 claims, in which the claimant bears the burden, on a balance of probabilities, to establish a connection.[80] By allowing for a contextual, workable threshold, the Court signalled that it was aware of the negative impact setting the "bar too high" would have for claimants to access recourse for meritorious claims.[81]

Second, the Court rejected the choice arguments raised by the Attorney General. The Court reasoned:

> . . .While some prostitutes may fit the description of persons who freely choose (or at one time chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so. Ms. Bedford herself stated that she initially prostituted herself "to make enough money to at least feed myself". . . . As the application judge found, street prostitutes, with some exceptions, are a particularly marginalized population... Whether because of financial desperation, drug addictions, mental illness, or compulsion from pimps, they often have little choice but to sell their bodies for money. Realistically, while they may retain some minimal power of choice — what the Attorney General of Canada called "constrained choice" . . . — these are not people who can be said to be truly "choosing" a risky line of business.[82]

Turning to the principles of fundamental justice, the Court held that the state interference with the liberty and security interests of the applicants was not in accordance with the principles of fundamental justice. Specifically, the Court held that the laws were arbitrary, overly broad, and grossly disproportionate to achieving the object and goals of the law.[83] Having found that the impugned provisions were not in accordance with the principles of fundamental justice, the Court then turned to a brief consideration of s. 1, holding that the government action could not be justified under s. 1.[84] Accordingly, the Court ordered a declaration of invalidity of the impugned provisions, to be suspended for one year to allow Parliament time to devise a new approach.

(c) The Effects of *PHS* and *Bedford* on Equality Claims

The decisions of *PHS* and *Bedford* demonstrate how issues that might otherwise be framed as equality infringements have achieved success through s. 7 analysis. Both cases involve claimants whose allegations of constitutional infringement intersected clearly with conditions of disadvantage. For example, in *PHS*, the claimants were addicts, noted for their disadvantaged past histories of

---

79 *Ibid.*, at para. 78.

80 *Ibid.*

81 *Ibid.*

82 *Ibid.*, at para. 86.

83 *Ibid.*, at paras. 93-160.

84 *Ibid.*, at para. 163.

abuse, drug use, mental illness, and homelessness. Similarly, in *Bedford*, the claimants were all women with histories of financial desperation, addiction, mental illness, and abuse. Such factors are commonplace in s. 15 claims, wherein claimants often raise intersecting levels of disadvantage in pleading their claims.[85] As the above commentary on s. 15 demonstrates, the legal test for discrimination under s. 15 is not an easy one to overcome. Indeed, the history of s. 15 jurisprudence has potentially left claimants uncertain about what they need to prove or demonstrate to successfully overcome s. 15 scrutiny. On the other hand, the legal test under s. 7 appears to provide a clearer "port of entry" for claimants to enter in order to enforce their rights under the *Charter*.[86] What this means is that equality-seeking groups may question whether there is more strategic potential in mounting s. 7 claims as opposed to s. 15. It is this question that animates the next section of this article and that has led to our empirical review of the caselaw.

3. TESTING THE CURRENT DEBATE: SECTION 7 VERSUS SECTION 15

Professor Bruce Ryder has tracked the number and percentage of Canadian court rulings finding violations of constitutional equality rights since 1990.[87] Ryder's research reveals that claimants raising s. 15 considerations have seen a steady decline in the success rate of their claims since the early 2000s. Notably, between 2000 and 2004, Canadian courts considered s. 15 claims in 224 cases.[88] Of these 224, only 26 (11.6%) saw equality rights recognized under s. 15. This number continued to decline, with the most current data[89] revealing success rates hovering at approximately 7.2%.

The current research builds on Ryder's study and specifically examines whether the use of the concurrent claims approach has successfully overcome the low success rates reported in his findings. In doing so, this research responds to calls from the legal community[90] to reconsider equality claims in terms of s. 7 in

---

85 For example, in *Inglis, supra* note 71, the Court recognized that the claimants experienced disadvantage on intersecting grounds of discrimination, with sex being "but one" of the grounds to consider (at para. 601).

86 For more on the lift and development on s. 7 over the past 30 years, see: Peter Hogg, "The Brilliant Career of Section 7 of the Charter" (2012), 58 S.C.L.R. (2d) 195.

87 *Supra* note 10.

88 These data include all cases where a s. 15 claim was raised and decided by the court. Where a s. 15 claim was raised, but not decided by the court, Ryder did not include it in his database. Additionally, where a s. 15 claim was appealed, only the final appellate disposition of the s. 15 claim was included in his database.

89 From January 2010 to August 2013.

90 Koshan, *supra* note 4; Young, *supra* note 1. While both Koshan and Young in their respective works do not make any conclusions about which mode is preferable, they both engage in a discussion with both sections and attempt to explore both the value and drawbacks in raising claims under each *Charter* provision.

order to understand whether there is any observable strategic value in framing equality rights in terms of both s. 7 and s. 15.

(a) Methodology

The data presented in this article are based on all reported court rulings[91] which raised concurrent s. 7 and s. 15 considerations between April 1, 2013 and October 1, 2014. This time frame was selected in order to provide the most up-to-date understanding of how courts are deciding concurrent claims and to allow for meaningful engagement with a considerable sample size of equality cases. Additionally, the choice to analyze decisions from all levels of court was made in order to understand whether judgments rendered at the trial level are interpreting s. 7 and s. 15 in harmony with appellate precedent.

Departing from Professor Ryder's methodology, this research tracks both the general consideration of s. 7 and s. 15 in courts (i.e., counting the number of times concurrent claims were raised, whether or not they were decided upon) as well as the number of times cases were decided on their merits *Charter* claim. All cases decided on the merits were coded for the ground of discrimination raised, the legal area (e.g., criminal law, family law, immigration law, etc.), and the court's findings in respect to ss. 7 and 15. Where possible, notes were also collected on the judge's justifications for finding (or not finding) a *Charter* breach.

The observed frequency of the concurrent claims approach was adjusted to account for cases that were heard at appellate courts. Where a case made its way to appeal, only the final decision rendered was recorded in the data. This method was adopted to ensure that the number of cases utilizing the concurrent claims approach was not artificially inflated.

(b) Limitations to Methodology

The methodology is limited in three respects. First, this analysis only allows one to consider what the court deems most important and to find meaning in judicial decision-making. A more detailed, nuanced approach might analyze how lawyers put together their claims and to what extent they spend time building a s. 7 versus s. 15 claim in their legal argument. While we recognize this limitation, analyzing court data is a necessary first step to understanding the concurrent claims approach on a macro level. Future research would greatly benefit from comparing judicial decisions to the arguments as presented in factums, and examining why counsel choose to adopt a concurrent claims approach and what their outcome expectations were.

Similarly, this research is unable to meaningfully track who is raising the s. 7 and/or s. 15 claim. Such an analysis would allow for a comprehensive understanding of how different stakeholders make use of the *Charter* and the extent to which lawyers leave equality-rights advocacy to intervenors in certain

---

[91] That is, decisions rendered from *all* court levels.

cases. Future research may wish to take up this line of inquiry in order to understand the competing and complementary interests of parties and public interest intervenors, and the litigation choices that flow from those interests. Such research might assist stakeholders in more effectively strategizing a resort to the concurrent claims approach.

Lastly, this research is inherently limited by its scope. A broader study than is possible here could lead to more reliable conclusions about the use of the concurrent claims approach. Although the sample size of this research provides a valuable opportunity to engage in preliminary observations about the use of the concurrent claims approach over a recent 18-month period, a larger sample size and longer sample period would have provided greater statistical reliability concerning concurrent claims.

4. RESULTS

(a) Evaluating the Frequency of the Concurrent Claims Approach

Canadian courts considered[92] s. 15 in 69 cases between April 1, 2013 and October 1, 2014. As displayed in Table 1, 48 of these cases (69.6%) made use of the concurrent claims approach. Courts only issued a decision on s. 7 and/or s. 15 in 23 of the 48 cases (47.9%).[93]

Table 1: Number and Percentage of Canadian Court Rulings Considering the Concurrent Claims Approach from April 1, 2013 to October 1, 2014

	Raw Value	Percentage
Use of the concurrent claims approach	48	69.6%[94]
Frequency of decision issuing re: s. 7 and/or s. 15[95]	23	47.9%

[92] Considered as opposed to decided upon the s. 15 claim on the merits.

[93] See Appendix A: Summary of Canadian Court Dispositions of Sections 7 and 15 Concurrent Claims.

[94] Based upon the 69 cases that considered s. 15 generally during the analyzed time period.

[95] That is, the frequency with which courts issued a formal decision as to the merits of a s. 7 and/or s. 15 claim.

(b) Evaluating the Success Rates of Section 7 vs. Section 15 in Concurrent Claims

We hypothesized that claims that raised both s. 7 and s. 15 would be more likely to find a breach of the right to life, liberty, and/or security of the person than to find a breach of equality rights. Surprisingly, the data did not reveal such findings. As displayed in Table 2, of the 23 cases that issued a decision on one of the concurrently raised claims, the results were quite similar: 15 claims (61%) found no violation of s. 15 whereas 17 claims (74%) found no violation of s. 7.

Table 2: Number and Percentage of Canadian Court Rulings Not Finding Violations of Section 7 versus Section 15 in Concurrent Claims Cases

	Violations Not Found	Claimant's Failure Rate
Breach of Section 7	17	74%
Breach of Section 15	15	65%

As shown in Table 3, four claims (i.e., 17%) found a breach of s. 7 and three claims (i.e., 13%) found a breach of s. 15. In three cases, a decision was rendered as to s. 7 but the court remained silent on s. 15.

Table 3: Number and Percentage of Canadian Court Rulings Finding Violations of Section 7 versus Section 15 in Concurrent Claims Cases

	Violation Found	Claimant's Success Rate
Breach of Section 7	4	17%
Breach of Section 15	3	13%

It is worth noting that the claims that found a breach of one of the concurrently raised claims did not always result in a finding of a breach under both s. 7 and s. 15. In fact, in *Canadian Doctors for Refugee Care,*[96] the Federal Court held that changes to the Interim Federal Health Program breached ss. 12 and 15 of the *Charter* by intentionally making the lives of certain disadvantaged groups even more difficult in order to force those seeking refuge in Canada to leave more quickly, and to deter others from entering Canada to seek protection. However, the court simultaneously held that the applicants were unable to

---

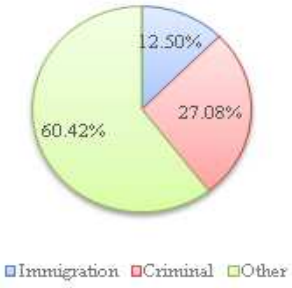
[96] *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651, 2014 CarswellNat 2430, 2014 CarswellNat 2431, [2014] F.C.J. No. 679 (F.C.).

establish a breach of s. 7 rights, as s. 7 did not include a positive right to state funding for health care. Likewise, in *Tinker*[97] the court held that amendments to *Criminal Code* provisions concerning the payment of a victim surcharge resulted in a breach of s. 7 rights. Having found that a breach occurred under s. 7 that could not be saved under s. 1, the court held that it was unnecessary to proceed to a s. 15 analysis.

(c) Evaluating the Types of Claims Utilizing the Concurrent Claims Approach

As displayed in Table 4, claims that arose in the context of immigration and/or criminal law made the most use of the concurrent claims approach. Most significantly, 13 of the 48 claims analyzed (27.1%) raised issues of criminal law, whereas six claims (12.5%) considered some aspect of immigration law. Other areas of law that raised the concurrent claims approach included family, tort, health, labour, and pensions and benefits law.

Table 4: Areas of Law Utilizing the Concurrent Claims Approach



5. ANALYSIS

The quantitative results suggest that critics' calls for viewing s. 7 as an alternative route to securing equality rights is not yet readily demonstrated as strategic in the caselaw. Though counterintuitive and perhaps surprising, these findings still allow for a meaningful assessment of how our courts grapple (or refuse to grapple) with s. 15 when considering competing *Charter* claims.

(a) Where Courts Decline to Consider Section 15 Considerations

One interesting trend revealed by the data is that courts decline to decide on the merits of s. 15 if a s. 7 breach is tenable. Alternatively, courts do not defer to

---

[97] *R. v. Tinker*, 2014 ONCJ 208, 2014 CarswellOnt 5589, [2014] O.J. No. 2056 (Ont. C.J.), reversed 2015 CarswellOnt 4936 (Ont. S.C.J.).

the s. 15 breach in order to avoid a consideration of a s. 7 claim. Two cases illustrate this trend: *Anderson*[98] and *Tinker*.[99]

In *Anderson*, the Supreme Court considered whether s. 255 of the *Criminal Code* was constitutionally sound. The provision provides Crown counsel, in advance of a plea, the opportunity to seek a greater punishment of an accused charged with impaired driving by reason of previous impaired driving convictions. That is, the provision sets out a scheme of escalating mandatory minimum sentences for individuals convicted of impaired driving without considering contextual factors specific to the case. The accused in *Anderson* unsuccessfully argued that the Crown must consider an accused's Aboriginal status when making decisions that would impact the sentencing options available to a judge (i.e., the decision to seek a mandatory minimum sentence for impaired driving dependent upon prior convictions). Instead, the Court held that while proportionality in sentencing is a principle of fundamental justice, it is the sentencing obligation of *judges*, not Crown counsel, to "craft a proportionate sentence for Aboriginal offenders".[100] Thus, the Court held that Crown counsel retain the discretion to seek escalating mandatory minimum sentences for impaired driving where the accused's prior conduct has resulted in impaired driving convictions, as long as judges then consider proportionality and systemic background factors (like Aboriginality) in issuing an appropriate sentence.

Finding that s. 255 did not breach the accused's rights as protected under s. 7, the Court then declined to comment or raise anew the constitutionality of the statutory scheme under a s. 15(1) *Charter* analysis. The Court instead held that it was unnecessary to endorse or disapprove of the trial judge's finding as to s. 15.[101] Likewise, in *Tinker*, the court held that it was sufficient to find a breach of s. 7 that could not be saved under s. 1 in order to issue a s. 52 remedy that deemed the requirement of a mandatory surcharge for offences under the *Controlled Drugs and Substances Act* of no force or effect.[102] Beninger J. held that the mandatory imposition of the surcharge negatively impacts the security of the person for the claimants by failing to consider their personal circumstances, which at times limited their ability to pay the prescribed surcharge.[103] Having decided the claim on the basis of s. 7, Beninger J. found it "unnecessary" to address arguments with respect to s. 15 of the *Charter*.[104]

---

[98] *R. v. Anderson*, 2014 SCC 41, 2014 CarswellNfld 166, 2014 CarswellNfld 167, [2014] 2 S.C.R. 167, [2014] S.C.J. No. 41 (S.C.C.).

[99] *Supra* note 96.

[100] *Anderson*, *supra* note 97, at para. 25.

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

[102] *Tinker*, *supra* note 96, at para. 43.

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

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

(b) Where Courts Provide Reasons on Each Concurrent Claim

It is not novel for courts to avoid deciding cases under s. 15 when a s. 7 argument is also mounted.[105] Yet, as this research demonstrates, when courts find a s. 15 breach, they often still proceed to consider concurrent s. 7 arguments. For example, in *F. (T.) v. Children's Aid Society of Brant*,[106] Harper J. first provided pronouncement as to the constitutionality of certain provisions of the *Child and Family Services Act* ("CFSA")[107] under s. 15. The court held that the definition of "parent" in the CFSA does not violate equality guarantees to be free from sex discrimination under the *Charter*. The court then held that claimants were equally unable to make out a claim of a s. 7 breach that could render the impugned provisions of the CFSA unconstitutional. Similarly, in *R. v. C. (P.),*[108] the court first dismissed the appellant's s. 15 claim, finding that provisions of the *Criminal Code* which give a judge discretion to appoint counsel for an indigent accused on appeal "where it appears desirable in the interests of justice"[109] did not infringe upon the accused's right to equal benefit and protection of the law because the provision served an ameliorative purpose under s. 15(2).[110] The court then ruled that the impugned provision did not breach fairness guarantees enshrined as principles of fundamental justice as protected under s. 7, nor could it be characterized as disconnected from the objective of the legislature.

These cases demonstrate that courts do not as readily defer to the authority of s. 15 to ground a *Charter* analysis when considering a concurrent s. 7 claim. While the implications of such results are beyond the scope of this article, one may appropriately question why courts do not decline to comment on concurrently raised s. 7 claims after deciding a s. 15 claim on its merits.

(c) The Concurrent Claims Approach in the Criminal Law Context

A considerable proportion of the analyzed cases that employed the concurrent claims approach came from the criminal law.[111] Of the criminal claims that employed the concurrent claims approach, three cases[112] questioned the validity of mandatory minimum sentencing requirements (23.1%). Each of

---

[105] See generally: Sylvestre, *supra* note 5; Ryder, Faria & Lawrence, *supra* note 3.

[106] 2014 ONSC 5313, 2014 CarswellOnt 14547, [2014] O.J. No. 2918 (Ont. S.C.J.).

[107] R.S.O. 1990, c. C.11.

[108] 2014 ONCA 577, 2014 CarswellOnt 10834, [2014] O.J. No. 3727 (Ont. C.A.), leave to appeal refused 2015 CarswellOnt 266, 2015 CarswellOnt 267 (S.C.C.).

[109] R.S.C. 1985, c. C-46, s. 684(1).

[110] *Supra* note 97 at para. 14.

[111] Recall Table 4: 27.08% of claims considered that utilized the concurrent claims approach were from the criminal law.

[112] *Anderson*, *supra*, note 97; *R. v. Hailemolokot*, 2013 MBQB 285, 2013 CarswellMan 646, [2013] M.J. No. 412 (Man. Q.B.); *R. v. B. (T.M.)*, 2013 ONSC 4019, 2013 CarswellOnt 10174, [2013] O.J. No. 3413 (Ont. S.C.J.).

the three cases raised concerns that mandatory minimum sentences fail to consider disadvantages historically linked to race and that such a failure results in disproportionate impacts on persons from racialized communities.

Though none of the three cases resulted in a finding of a *Charter* breach in favour of the accused, the trend does reveal an interesting way in which s. 7 liberty concerns may be directly informed and textured by an understanding of discrimination under s. 15. Moreover, there may be strategic value in pressing courts to evaluate whether criminal law practices like mandatory minimum sentences create overly broad punishments for individuals who may repeatedly find themselves engaged in criminal conduct in part due to immutable social characteristics. Indeed, scholars contend that "litigation losses" may, even counter-intuitively, "contribute to the process of reform by producing conversations that rely on the multiple (and conflicting) ways in which we think about courts' constraints and the role of those constraints in the process of social change."[113]

6. CONCLUSION

This article began by highlighting a tension between: a) scholars' understanding of the viability of s. 15 to advance a transformational equality agenda, and b) how the history of equality rights jurisprudence has signalled an expansive approach to s. 7 while simultaneously muddying the waters of s. 15 jurisprudence. The data presented in this article show that while the tension is still alive and prevalent, it is also being challenged in new ways. The idea that ss. 7 and 15 are interrelated is not novel. Indeed, as Wilson J. noted in *Morgentaler*, equality can and should be understood as a principle of fundamental justice, as protected under s. 7. Though her comments formed a minority concurring judgment, the wisdom of her analysis should not be overlooked. This is especially relevant today as the decisions of *Kapp*, *Withler*, and *Cunningham* have left s. 15 an almost impossible avenue for seeking substantive equality in most cases. As a result, scholars have grown cynical and appear eager to abandon s. 15 in hopes of success under s. 7. The data presented in this article, however, demonstrate that abandoning s. 15 is not advisable. Instead, what is needed now is a re-interpretation of s. 15 *alongside* s. 7 in order to strengthen the protections provided under the *Charter*. Such an approach need not be seen as undermining the potential for s. 15 to independently provide redress for members of disadvantaged groups. Rather, the concurrent claims approach should be understood as a means of expanding the equality rights agenda to permeate constitutional principles more definitively, and to deliver on the promise of s. 15 as being the "broadest of all guarantees."[114]

---

[113] Douglas NeJaime, "Winning Through Losing" (2011), 96 Iowa L. Rev. 941.

[114] *Andrews*, *supra* at 185.

7. FUTURE RESEARCH

This research demonstrates that there is strategic potential in utilizing a concurrent claims approach to litigating equality-based claims. While it makes clear that courts are not entirely ready to decide s. 15 and s. 7 with the same level of depth or analysis when raised concurrently, this research does show that the two *Charter* protections have a strong interconnection that ought to be strategically employed by equality seekers. Beyond the areas for future scholarship addressed previously,[115] future scholarship may wish to consider claims that only raise s. 7 to see if a s. 15 lens could be meaningful. Doing so would allow for an important understanding of what is lost versus what is gained by only raising one *Charter* breach. Additionally, future scholarship may wish to consider whether the language of discrimination makes judges unconsciously averse to finding a breach of s. 15 where they are willing to find a s. 7 breach. Such analysis may provide a useful empirical tool to advocates considering adopting a concurrent claims approach in order to bolster a s. 15 claim where a court might otherwise avoid finding a breach. Lastly, future research should consider whether other *Charter* rights contain an equality dimension that could be developed by courts.

In addition to these broad agendas for future research, we also propose a program of three studies to further our understanding of the differential perceptions guiding the application of ss. 7 and 15.

In Study 1, we will examine whether there are identifiable differences between cases bringing s. 7 vs. s. 15 claims. We will conduct a thorough and detailed content analysis of equality rights cases bringing claims under both sections over a longer period of time (e.g., 3-5 years) than investigated in the current article. Our content analysis will first identify relevant ''codes'' on which cases vary from each other (e.g., age, sex, race, religion, severity, etc.). By engaging with a longer time period, we will have a large enough sample size to conduct inferential statistical analyses to determine what kinds of characteristics are typically associated with claims falling under each section, and whether there are unique characteristics are typically predictive of concurrent claims. Further, we will be able to identify correlations between our codes and outcome data (i.e., are certain types of claims more successful?) and examine interactions between the codes and each section (i.e., are certain types of claims more successful under one section than the other?). For example, it may be the case that s. 15 is more often successfully applied to cases coded as high on severity, while s. 7 is more often successfully applied to cases coded as low on severity (or vice versa). A quantitative analysis using a large sample size will enable us to detect these kinds of patterns in the data.

In Study 2, we will examine whether lawyers and non-lawyers have differential perceptions about the utility of ss. 7 and 15. This cross-group analysis will help to determine whether the sections are interpreted similarly by

---

[115] See *Limitations to Methodology*, above in Part 3.

those with and without formal legal training, which may provide insight into whether the application of different sections is based on legal strategy or a more universal understanding of the language of the *Charter*. More specifically, we will use a mixed-methods approach combining both quantitative and qualitative methods to examine discrepancies between lawyers and non-lawyers in the perceived applicability of ss. 7 and 15 to discrimination claims. In the current study we identified 48 decisions which considered both s. 7 and 15 concurrently. We plan to select a subset of approximately 20 of these decisions for further analysis in this proposed Study 2. We will recruit a sample of 100 lawyers and 100 non-lawyers, and first ask all participants to read and familiarize themselves with ss. 7 and 15 of the *Charter*. Each participant will then be randomly presented with 5 decisions from our stimulus subset, and asked to decide which section (or both) is engaged and to make judgements about the feasibility and commonality of a claim under each section being successful. We will give participants the opportunity to provide open-ended responses in order to more fully understand their responses. This study will enable us to determine whether there are any systematic differences between judgements made by lawyers and non-lawyers and to comment on the implications of any differences for legal education and public policy. Further, ensuring a more consistent understanding and application of the *Charter* is important when considering issues related to access to justice.

Finally, in Study 3, we propose an experiment to directly address the question of how s. 7 and 15 claims differ. Using what we learn in Studies 1 and 2, we will manipulate a s. 7 (or 15) decision step by step until people are more likely to think it is appropriate for s. 15 (or 7) and to pinpoint the time at which people think that applying both sections is appropriate. This experiment will allow us to more precisely identify and understand the characteristics that people rely on when forming opinions about claims which engage ss. 7 and 15 separately and concurrently. This type of analysis could provide useful information for lawyers and non-lawyers alike in determining how to frame a given claim of discrimination.

In sum, these three proposed studies should provide further insight into some of the questions which remain unanswered by our current analysis. By combining quantitative, qualitative, and experimental approaches, we hope to provide a more extensive analysis of whether there is strategic potential to a concurrent claims approach for litigating equality-based claims. The results of these experiments should be of interest to legal scholars and practitioners, as well as for public policy aimed at ensuring equality across a wide variety of social domains.

BIBLIOGRAPHY

LEGISLATION

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being
Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.
Child and Family Services Act, R.S.O. 1990, c. C.11.
Controlled Drugs and Substances Act, S.C. 1996, c. 19.
Criminal Code, R.S.C. 1985, c. C-46.

JURISPRUDENCE

Manitoba (Director of Child & Family Services) v. C. (A.), 2009 SCC 30, 2009 CarswellMan 293, 2009 CarswellMan 294, [2009] 2 S.C.R. 181 (S.C.C.).
Peavine Métis Settlement v. Alberta (Minister of Aboriginal Affairs & Northern Development), 2011 SCC 37, 2011 CarswellAlta 1210, 2011 CarswellAlta 1211, (*sub nom*. Alberta (Aboriginal Affairs and Northern Development) v. Cunningham) [2011] 2 S.C.R. 670 (S.C.C.).
Hutterian Brethren of Wilson Colony v. Alberta, 2009 SCC 37, 2009 CarswellAlta 1094, 2009 CarswellAlta 1095, [2009] 2 S.C.R. 567 (S.C.C.).
Andrews v. Law Society (British Columbia), 1989 CarswellBC 16, 1989 CarswellBC 701, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 (S.C.C.).
Bedford v. Canada (Attorney General), 2013 SCC 72, 2013 CarswellOnt 17681, 2013 CarswellOnt 17682, [2013] 3 S.C.R. 1101 (S.C.C.).
PHS Community Services Society v. Canada (Attorney General), 2011 SCC 44, 2011 CarswellBC 2443, 2011 CarswellBC 2444, [2011] 3 S.C.R. 134 (S.C.C.).
Canadian Doctors for Refugee Care v. Canada (Attorney General), 2014 FC 651, 2014 CarswellNat 2430, 2014 CarswellNat 2431, [2014] F.C.J. No. 679 (F.C.).
Chaoulli c. Québec (Procureur général), 2005 SCC 35, 2005 CarswellQue 3276, 2005 CarswellQue 3277, (*sub nom*. Chaoulli v. Canada (Attorney General)) [2005] 1 S.C.R. 791 (S.C.C.).
Ermineskin Indian Band & Nation v. Canada, 2009 SCC 9, 2009 CarswellNat 203, 2009 CarswellNat 204, [2009] 1 S.C.R. 222 (S.C.C.).
Inglis v. British Columbia (Minister of Public Safety and Solicitor General), 2013 BCSC 2309, 2013 CarswellBC 3813, [2013] B.C.J. No. 2708 (B.C. S.C.).
Law v. Canada (Minister of Employment & Immigration), 1999 CarswellNat 359, 1999 CarswellNat 360, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1 (S.C.C.).
Droit de la famille – 091768, 2013 SCC 5, 2013 CarswellQue 113, 2013 CarswellQue 114, (*sub nom*. Quebec (Attorney General) v. A.) [2013] 1 S.C.R. 61 (S.C.C.).
R. v. Hailemolokot, 2013 MBQB 285, 2013 CarswellMan 646, [2013] M.J. No. 412 (Man. Q.B.).
R. v. Kapp, 2008 SCC 41, 2008 CarswellBC 1312, 2008 CarswellBC 1313, [2008] 2 S.C.R. 483 (S.C.C.).

R. v. Morgentaler, 1988 CarswellOnt 954, 1988 CarswellOnt 45, (*sub nom.* R. v. Morgentaler (No. 2)) [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 (S.C.C.).
R. v. C. (P.), 2014 ONCA 577, 2014 CarswellOnt 10834, [2014] O.J. No. 3727 (Ont. C.A.), leave to appeal refused 2015 CarswellOnt 266, 2015 CarswellOnt 267 (S.C.C.).
R. v. B. (T.M.), 2013 ONSC 4019, 2013 CarswellOnt 10174, [2013] O.J. No. 3413 (Ont. S.C.J.).
R. v. Tinker, 2014 ONCJ 208, 2014 CarswellOnt 5589, [2014] O.J. No. 2056 (Ont. C.J.), reversed 2015 CarswellOnt 4936 (Ont. S.C.J.).
R. v. Turpin, 1989 CarswellOnt 76, 1989 CarswellOnt 957, [1989] 1 S.C.R. 1296, [1989] S.C.J. No. 47 (S.C.C.).
Rodriguez v. British Columbia (Attorney General), 1993 CarswellBC 1267, 1993 CarswellBC 228, [1993] 3 S.C.R. 519, 107 D.L.R. (4th) 342 (S.C.C.).
F. (T.) v. Children's Aid Society of Brant, 2014 ONSC 5313, 2014 CarswellOnt 14547, [2014] O.J. No. 2918 (Ont. S.C.J.).
Withler v. Canada (Attorney General), 2011 SCC 12, 2011 CarswellBC 379, 2011 CarswellBC 380, [2011] 1 S.C.R. 396 (S.C.C.).

SECONDARY SOURCES: ARTICLES

Gilbert, Daphne. "The Silence of Section 15: Searching for Equality at the Supreme Court of Canada in 2007" (2008), 42 S.C.L.R. (2d) 497.
Hogg, Peter. "The Brilliant Career of Section 7 of the Charter" (2012), 58 S.C.L.R. (2d) 195.
Jhappan, Radha. "The Equality Pit or the Rehabilitation of Justice" (1998), 10 C.J.W.L. 60.
Koshan, Jennifer. "Redressing the Harms of Government (In)Action: A Section 7 versus Section 15 Showdown" (2013), 22(1) *Constitutional Forum* 31.
Levine, Roslyn J & Jonathon W Penney. "The Evolving Approach to Section 15(1): Diminished Rights or Bolder Communities?" (2005), 29 S.C.L.R. (2d) 137.
NeJaime, Douglas. "Winning Through Losing" (2011), 96 Iowa L. Rev. 941.
Ryder, Bruce. "The Strange Double Life of Canadian Equality Rights" (2013), 63 S.C.L.R. (2d) 261.
Ryder, Bruce, Cidalia C. Faria & Emily Lawrence. "What's *Law* Good For? An Empirical Overview of Charter Equality Rights Decisions" (2004), 24 S.C.L.R. (2d) 103.
Schabas, Paul, Kelly Pulfer & Umar Abdul. "Section 7: The New Section 15?" (2012), 44 O.H.L.J. 2.
Sylvestre, Marie-Eve. "The Redistributive Potential of Section 7 of the *Charter*: Incorporating Socio-Economic Context in Criminal Law and in the Adjudication of Rights" (2010-12) 42 Ottawa L. Rev. 389.
Watson, Jonnette Hamilton & Jennifer Koshan. "Courting Confusion? Three Recent Alberta Cases on Equality Rights Post-*Kapp*" (2010), 47 Alta. L. Rev. 927.

Young, Margot. "Context, Choice and Rights: *PHS Community Services Society v. Canada (Attorney General)*" (2011), 44 UBC L. Rev. 221.
Young, Margot. "Social Justice and the *Charter*: Comparison and Choice" 50(3) O.H.L.J. 669.

SECONDARY SOURCES: MONOGRAPHS

Brodsky, Gwen & Shelagh Day. *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: CACSW, 1989).
Stewart, Hamish. *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012).

APPENDIX A

Summary of Canadian Court Dispositions of Sections 7 and 15 Concurrent Claims

Listed below are all Canadian court decisions from April 1, 2013 to October 1, 2014 where a concurrent claim was considered by the court. If a case was appealed, only its final disposition is counted. The methodology used below is an adaptation of that adopted by Ryder, Faria & Lawrence, in "What's *Law* Good For? An Empirical Overview of Charter Equality Rights Decisions," *supra*, note 3.

Key

Ground = ground of discrimination asserted

Section 15 violated? = whether the court found a violation of section 15, and if not, at which stage of the section1 5 analysis the claim failed (1st = because no difference in treatment found; 2nd = because the difference in treatment was not found to be on the basis of a prohibited ground; 3rd = because the difference in treatment on a prohibited ground was found not to be discrimination in a substantive sense; 4th = because the difference in treatment was found to be ameliorative; other = section 15 held to be inapplicable).

Section 7 violated? = whether the court found a violation of section 7, and if so, which right was violated ("life", "liberty", and/or security of the person ["security"]).

Denial of fundamental justice? = if section 7 is engaged, does the state interference result in a denial of the principles of fundamental justice?.

Section 1 limit? = whether the violation(s) upheld pursuant to section 1.

Result = whether an unjustifiable violation of section 7 or 15 was found.

Case	Ground	Section 15 violated?	Section 7 violated?	Denial of fundamental justice?	Section 1 limit?	Result
Arabi v. Alberta.[116]	Sex	No (other)	N/A	N/A	N/A	No

[116] *Arabi v. Alberta*, 2014 ABQB 295, 2014 CarswellAlta 795, [2014] A.J. No. 518 (Alta. Q.B.).

Case	Ground	Section 15 violated?	Section 7 violated?	Denial of fundamental justice?	Section 1 limit?	Result
Barbara Schlifer.[117]	Sex	No (1st)	No	N/A	N/A	No
BC/Yukon Assn.[118]	Mental and/or physical disability, race, national or ethnic origin, and/or colour	No (other)	N/A	N/A	N/A	No
Canadian Doctors.[119]	Country of origin and immigration status	Yes	No	N/A	No	Yes
Cambie Surgeries Corp.[120]	Access to health care	No (other)	N/A	N/A	N/A	No
Carter v. Canada (Attorney General).[121]	Physical disability	No (other)	Yes (life)	Yes	No	Yes
Catholic Children's Aid Society.[122]	Child's adoptability	No (other)	N/A	N/A	N/A	No

[117] *Barbra Schlifer Commemorative Clinic v. Canada (Attorney General)*, 2014 ONSC 5140, 2014 CarswellOnt 12297, [2014] O.J. No. 4164 (Ont. S.C.J.).

[118] *British Columbia/Yukon Assn. of Drug War Survivors v. Abbotsford (City)*, 2014 BCSC 1817, 2014 CarswellBC 2895, [2014] B.C.J. No. 2439 (B.C. S.C.), reversed in part 2015 CarswellBC 948 (B.C. C.A.).

[119] *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651, 2014 CarswellNat 2430, 2014 CarswellNat 2431, [2014] F.C.J. No. 679 (F.C.).

[120] *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2014 BCSC 1028, 2014 CarswellBC 1627, [2014] B.C.J. No. 1148 (B.C. S.C.).

[121] *Carter v. Canada (Attorney General)*, 2013 BCCA 435, 2013 CarswellBC 3051, [2013] B.C.J. No. 2227 (B.C. C.A.), reversed 2015 CarswellBC 227, 2015 CarswellBC 228, [2015] 1 S.C.R. 331 (S.C.C.).

Case	Ground	Section 15 violated?	Section 7 violated?	Denial of fundamental justice?	Section 1 limit?	Result
Doak v. Nurses Assn. of New Brunswick.[123]	Physical disability	No (other)	N/A	N/A	N/A	No
Dudley Estate v. British Columbia (Minister of Public Safety).[124]	Race and place of residence	No (other)	N/A	N/A	N/A	No
Farhadi v. Canada (Minister of Citizenship and Immigration)[125]	Immigration status	No (other)	N/A	N/A	N/A	No
Fontaine v. Canada (Attorney General)[126]	Place of residence while attending school off-reserve	No (2nd)	No	N/A	N/A	No
Fotinov v. Royal Bank of Canada [127]	Financial status	No (other)	N/A	N/A	N/A	No

[122] *Catholic Children's Aid Society of Toronto v. B. (S.)*, 2013 ONSC 7087, [2013] O.J. No. 6117 (Ont. S.C.J.).

[123] *Doak v. Nurses Assn. of New Brunswick*, 2013 CarswellNB 343, 2013 CarswellNB 344, [2013] N.B.J. No. 200 (N.B. C.A.).

[124] *Dudley Estate v. British Columbia (Minister of Public Safety)*, 2013 BCSC 1005, 2013 CarswellBC 1679, [2013] B.C.J. No. 1258 (B.C. S.C.).

[125] *Farhadi v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 926, 2014 CarswellNat 3746, 2014 CarswellNat 6454, [2014] F.C.J. No. 959 (F.C.).

[126] *Fontaine v. Canada (Attorney General)*, 2013 SKQB 323, 2013 CarswellSask 660, [2013] S.J. No. 569 (Sask. Q.B.).

[127] *Fotinov v. Royal Bank of Canada*, 2014 CarswellNat 959, 2014 CarswellNat 4389, [2014] A.C.F. No. 355, [2014] F.C.J. No. 355 (F.C.A.), leave to appeal refused 2014 CarswellQue 9224, 2014 CarswellQue 9225 (S.C.C.).

Case	Ground	Section 15 violated?	Section 7 violated?	Denial of fundamental justice?	Section 1 limit?	Result
N. (F.R.) v. Alberta[128]	Race, age, and stigmatization of children in Crown care	No (other)	N/A	N/A	N/A	No
Goodwin[129]	Disability and injured worker status	No (other)	N/A	N/A	N/A	No
Graham[130]	Physical and mental disability	No (1st)	No	N/A	N/A	No
Hamilton v. Alberta [131]	Age	No (other)	N/A	N/A	N/A	No
Inglis[132]	Incarcerated mother status and sex	Yes	Yes (liberty and security)	Yes	No	Yes
Jia v. Canada (Minister of Citizenship and Immigration)[133]	Country of residence	No (other)	No	N/A	N/A	No

[128] *N. (F.R.) v. Alberta*, 2014 ABQB 375, 2014 CarswellAlta 1043, [2014] A.J. No. 672 (Alta. Q.B.).

[129] *Goodwin v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, 2014 NBQB 119, 2014 CarswellNB 311 (N.B. Q.B.).

[130] *Graham v. Ontario (General Manager, Health Insurance Plan)*, 2014 ONSC 1623, 2014 CarswellOnt 3137, [2014] O.J. No. 1185 (Ont. Div. Ct.).

[131] *Hamilton v. Alberta*, 2014 ABCA 103, 2014 CarswellAlta 420 (Alta. C.A.).

[132] *Inglis v. British Columbia (Minister of Public Safety and Solicitor General)*, 2013 BCSC 2309, 2013 CarswellBC 3813, [2013] B.C.J. No. 2708 (B.C. S.C.).

[133] *Jia v. Canada (Minister of Citizenship and Immigration)*, 2014 CarswellNat 2228, 2014 CarswellNat 2451, [2014] F.C.J. No. 647, [2014] A.C.F. No. 647 (F.C.), affirmed 2015 CarswellNat 2294 (F.C.A.).

Case	Ground	Section 15 violated?	Section 7 violated?	Denial of fundamental justice?	Section 1 limit?	Result
Serrano Lemus v. Canada (Minister of Citizenship and Immigration)[134]	Immigration status	No (1st)	No	N/A	N/A	No
Kaminski v. Canada (Attorney General)[135]	Physical disability	No (other)	N/A	N/A	N/A	No
MacLellan v. Canada (Attorney General)[136]	Occupation	No (2nd)	N/A	N/A	N/A	No
MacLellan v. Canada (Attorney General)[137]	Choice of food	No (other)	N/A	N/A	N/A	No
McHale v. Ontario [138]	Political affiliation	No (other)	N/A	N/A	N/A	No
McIlvenna[139]	Physical and mental disability	No (other)	N/A	N/A	N/A	No

[134] *Serrano Lemus v. Canada (Minister of Citizenship and Immigration)*, 2014 FCA 114, 2014 CarswellNat 1362, 2014 CarswellNat 4859, [2014] F.C.J. No. 439 (F.C.A.).

[135] *Kaminski v. Canada (Attorney General)*, 2014 CarswellNat 1284, 2014 CarswellNat 653, [2014] A.C.F. No. 273, [2014] F.C.J. No. 273 (F.C.).

[136] *MacLellan v. Canada (Attorney General)*, 2014 NSSC 280, 2014 CarswellNS 575, [2014] N.S.J. No. 412 (N.S. S.C.), additional reasons 2015 CarswellNS 290 (N.S. S.C.).

[137] *Mancuso v. Canada (Minister of National Health and Welfare)*, 2014 CarswellNat 3914, 2014 CarswellNat 2540, [2014] F.C.J. No. 732, [2014] A.C.F. No. 732 (F.C.), affirmed 2015 CarswellNat 5213 (F.C.A.).

[138] *McHale v. Ontario*, 2014 ONSC 5179, 2014 CarswellOnt 12883, [2014] O.J. No. 4434 (Ont. S.C.J.).

[139] *McIlvenna v. Greater Sudbury (City)*, 2014 ONSC 2716, 2014 CarswellOnt 7230, [2014] O.J. No. 2578 (Ont. S.C.J.), additional reasons 2014 CarswellOnt 8923 (Ont. S.C.J.).

Case	Ground	Section 15 violated?	Section 7 violated?	Denial of fundamental justice?	Section 1 limit?	Result
McLennon v. Berger[140]	Physical disability	No (3rd)	No	N/A	N/A	No
Meigs v. R.[141]	Inmate status	No (1st)	N/A	N/A	N/A	No
Millen[142]	Employment status	No (other)	N/A	N/A	N/A	No
Providence Health Care Society[143]	Mental and physical disability	No (other)	N/A	N/A	N/A	No
R. v. Adamo[144]	Race	Yes	Yes	Yes	No	Yes
R. v. Anderson[145]	Race	No (other)	No	N/A	N/A	No
R. v. Anderson[146]	Race	No (other)	N/A	N/A	N/A	No
R. v. Carter[147]	Race, ethnicity, and mental disability	No (other)	N/A	N/A	N/A	No

[140] *McLennon v. Berger*, 2013 ONSC 3356, 2013 CarswellOnt 7957, [2013] O.J. No. 2718 (Ont. S.C.J.).

[141] *Meigs v. R.*, 2013 CarswellNat 991, 2013 CarswellNat 1805, [2013] F.C.J. No. 407 (F.C.).

[142] *Millen v. Manitoba Hydro-Electric Board*, 2014 MBQB 88, 2014 CarswellMan 169, [2014] M.J. No. 121 (Man. Q.B.).

[143] *Providence Health Care Society v. Canada (Attorney General)*, 2014 BCSC 936, 2014 CarswellBC 1503, [2014] B.C.J. No. 1058 (B.C. S.C.), additional reasons 2014 CarswellBC 1884 (B.C. S.C.).

[144] *R. v. Adamo*, 2013 MBQB 225, 2013 CarswellMan 492, [2013] M.J. No. 302 (Man. Q.B.).

[145] *R. v. Anderson*, 2014 SCC 41, 2014 CarswellNfld 166, 2014 CarswellNfld 167, [2014] 2 S.C.R. 167, [2014] S.C.J. No. 41 (S.C.C.).

[146] *R. v. Anderson*, 2014 BCPC 44, 2014 CarswellBC 837, [2014] B.C.J. No. 819 (B.C. Prov. Ct.).

[147] *R. v. Carter*, 2014 SKPC 150, 2014 CarswellSask 634, [2014] S.J. No. 432 (Sask. Prov. Ct.).

Case	Ground	Section 15 violated?	Section 7 violated?	Denial of fundamental justice?	Section 1 limit?	Result
R. v. Hailemolokot[148]	Race	No (1st)	No	No	N/A	No
R. v. M. (L.)[149]	Mental disability	No (other)	N/A	N/A	N/A	No
R. v. Nur [150]	Race, ethnicity, and sex	No (1st)	No	N/A	N/A	No
R. v. C. (P.)[151]	Offender status	No (4th)	No	N/A	N/A	No
R. v. Tinker [152]	Offender status	No (other)	Yes (security)	Yes	No	Yes
R. v. B. (T.M.)[153]	Race	No (2nd)	No	N/A	N/A	No
R. v. Wywrot [154]	Race	No (other)	N/A	N/A	N/A	No
Saskatchewan Federation of Labour[155]	Employment status	No (2nd)	No	N/A	N/A	No

[148] *R. v. Hailemolokot*, 2013 MBQB 285, 2013 CarswellMan 646, [2013] M.J. No. 412 (Man. Q.B.).

[149] *R. v. M. (L.)*, 2014 ONCA 640, 2014 CarswellOnt 12695, [2014] O.J. No. 4343 (Ont. C.A.).

[150] *R. v. Nur*, 2013 ONCA 677, 2013 CarswellOnt 15898, [2013] O.J. No. 5120 (Ont. C.A.), affirmed 2015 CarswellOnt 5038, 2015 CarswellOnt 5039, [2015] 1 S.C.R. 773 (S.C.C.).

[151] *R. v. C. (P.)*, 2014 ONCA 577, 2014 CarswellOnt 10834, [2014] O.J. No. 3727 (Ont. C.A.), leave to appeal refused 2015 CarswellOnt 266, 2015 CarswellOnt 267 (S.C.C.).

[152] *R. v. Tinker*, 2014 ONCJ 208, 2014 CarswellOnt 5589, [2014] O.J. No. 2056 (Ont. C.J.), reversed 2015 CarswellOnt 4936 (Ont. S.C.J.).

[153] *R. v. B. (T.M.)*, 2013 ONSC 4019, 2013 CarswellOnt 10174, [2013] O.J. No. 3413 (Ont. S.C.J.).

[154] *R. v. Wywrot*, 2013 CarswellOnt 11802, [2013] O.J. No. 4100 (Ont. C.J.).

[155] *SFL v. Saskatchewan*, 2013 SKCA 43, 2013 CarswellSask 252, [2013] S.J. No. 235 (Sask. C.A.), reversed in part 2015 CarswellSask 32, 2015 CarswellSask 33, (*sub nom.* Saskatchewan Federation of Labour v. Saskatchewan) [2015] 1 S.C.R. 245 (S.C.C.).

Case	Ground	Section 15 violated?	Section 7 violated?	Denial of fundamental justice?	Section 1 limit?	Result
Scott v. Canada (Attorney General)[156]	Veteran status	No (other)	N/A	N/A	N/A	No
Spooner v. Canada (Minister of Citizenship and Immigration)[157]	Physical disability, sexual orientation, and refugee status	No (other)	N/A	N/A	N/A	No
Tabingo v. Canada (Minister of Citizenship and Immigration)[158]	Race, and national or ethnic origin	No (other)	No	N/A	N/A	No
Thompson v. Ontario (Attorney General)[159]	Mental and physical disability	No (1st)	No	N/A	N/A	No
F. (T.) v. Children's Aid Society of Brant[160]	Sex	No (1st)	No	N/A	N/A	No

[156] *Scott v. Canada (Attorney General)*, 2013 BCSC 1651, 2013 CarswellBC 2710, [2013] B.C.J. No. 1973 (B.C. S.C.).

[157] *Spooner v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 870, 2014 CarswellNat 4051, 2014 CarswellNat 3559, [2014] F.C.J. No. 902 (F.C.).

[158] *Tabingo v. Canada (Minister of Citizenship and Immigration)*, 2014 FCA 191, 2014 CarswellNat 3180, 2014 CarswellNat 6290, [2014] F.C.J. No. 863 (F.C.A.), leave to appeal refused 2015 CarswellNat 1278, 2015 CarswellNat 1279 (S.C.C.).

[159] *Thompson v. Ontario (Attorney General)*, 2013 ONSC 5392, 2013 CarswellOnt 12626, [2013] O.J. No. 4106 (Ont. S.C.J.), additional reasons 2013 CarswellOnt 15275 (Ont. S.C.J.).

[160] *F. (T.) v. Children's Aid Society of Brant*, 2014 ONSC 5313, 2014 CarswellOnt 14547, [2014] O.J. No. 2918 (Ont. S.C.J.).

Case	Ground	Section 15 violated?	Section 7 violated?	Denial of fundamental justice?	Section 1 limit?	Result
Tumarkin v. Canada (Minister of Citizenship and Immigration)[161]	Immigration status, national or ethnic origin, and race	No (other)	N/A	N/A	N/A	No
Wong v. British Columbia (Superintendent of Motor Vehicles)[162]	Physical disability	No (other)	N/A	N/A	N/A	No
Yuan[163]	Race, ethnicity, and language	No (1st)	No	N/A	N/A	No

[161] *Tumarkin v. Canada (Minister of Citizenship and Immigration)*, 2014 CarswellNat 3609, 2014 CarswellNat 3852, [2014] F.C.J. No. 918, [2014] A.C.F. No. 918 (F.C.).

[162] *Wong v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 2091, 2013 CarswellBC 3490, [2013] B.C.J. No. 2516 (B.C. S.C.).

[163] *Yuan v. Transitional Council of the College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario*, 2014 ONSC 351, 2014 CarswellOnt 1168, [2014] O.J. No. 420 (Ont. Div. Ct.), additional reasons 2014 CarswellOnt 2439 (Ont. Div. Ct.).