

2016

Carter v. Canada (Attorney General), The Constitutional Attack on Canada's Ban on Assisted Dying: Missing an Obvious Chance to Rule on the Charter's Disability Equality Guarantee

David Lepofsky

Osgoode Hall Law School of York University

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/sclr>

 Part of the [Law Commons](#)



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Citation Information

Lepofsky, David. "Carter v. Canada (Attorney General), The Constitutional Attack on Canada's Ban on Assisted Dying: Missing an Obvious Chance to Rule on the Charter's Disability Equality Guarantee." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 76. (2016).

DOI: <https://doi.org/10.60082/2563-8505.1330>

<https://digitalcommons.osgoode.yorku.ca/sclr/vol76/iss1/5>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

***Carter v. Canada (Attorney General)*, The Constitutional Attack on Canada's Ban on Assisted Dying: Missing an Obvious Chance to Rule on the Charter's Disability Equality Guarantee**

David Lepofsky*

I. INTRODUCTION

Is it important only to legal scholars that the Supreme Court decided *Carter v. Canada (Attorney General)*,¹ — the landmark, assisted dying case — under the wrong Charter provision? In this case, when the Court struck down the *Criminal Code* provision that makes it a crime to assist another person to end their life (section 241(b)),² it found an unjustified violation of Charter section 7.³ This provision guarantees that no one will be “deprived” of their “life, liberty or security of the person”, except “in accordance with the principles of fundamental justice.”⁴ The Court did

* David Lepofsky CM, O.Ont, LL.B. (Osgoode Hall Law school), LL.M. (Harvard Law School), LL.D. (hon) (Queens University and University of Western Ontario), visiting professor at the Osgoode Hall Law School and adjunct faculty member of the University of Toronto, Faculty of Law. Twitter: @davidlepofsky

** I acknowledge with gratitude, the excellent assistance of Osgoode Hall Law School student Emily Lewsen, for her invaluable help with citations and text refinement.

¹ [2015] S.C.J. No. 5, 2015 SCC 5, [2015] 1 S.C.R. 331 (S.C.C.), revg [2013] B.C.J. No. 2227 (B.C.C.A.) [hereinafter “*Carter*”].

² *Criminal Code*, R.S.C. 1985, c. C-46, s. 241(b) [hereinafter “*Criminal Code*”].

Section 241(b) provided that, [e]very one who.....(b) aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

³ *Carter*, *supra*, note 1, at para. 147.

⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act*, 1982 (U.K.), c. 11 [hereinafter “*Charter*”].

not consider whether the impugned law violated the principle of disability equality guaranteed by Charter section 15. This section guarantees the constitutional right to equality “before and under the law”, and to “the equal protection and equal benefit of the law without discrimination” on various grounds, including “mental or physical disability”.⁵

To Charter claimants, it is the result of a case, and not a court’s typically impenetrable legal reasoning, that usually matters. Yet this article’s question is important to legal scholars, Charter rights-holders and obligated organizations alike. If the Supreme Court fails to see a glaring Charter disability equality violation, this can be symptomatic of a bigger problem.

Consider an historic example involving discrimination based on race and religion — not disability. Five years after World War II, in *Noble v. Alley*,⁶ the Supreme Court considered whether to enforce a restrictive covenant on property that forbade owners from, *inter alia*, selling the property to “any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood.”⁷ Unlike both lower courts, the Supreme Court commendably declined to enforce the covenant. However it did so by reasoning that the restrictive covenant was void for uncertainty.⁸

After Canadians heroically gave their lives in the fight against Nazi racism and anti-Semitism, it would have been a cruel irony for a Canadian court to deploy state power to enforce racist and religious bigotry. Viewed through the lens of hindsight, the Supreme Court reached the right result. No doubt, its majority latched on to the most readily available legal doctrine to do so. Would it be too much to expect of the Supreme Court of that day, to refine Canadian common law to explicitly enshrine the principle of racial and religious equality? The U.S. Supreme Court would show that kind of historic judicial leadership just

Charter s. 7 provides, “[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.”

⁵ *Id.*, Charter s. 15. This section provides:

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

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

⁶ *Noble v. Alley*, [1950] S.C.J. No. 34, [1951] S.C.R. 64 (S.C.C.), revg [1949] O.J. No. 466 (Ont. C.A.) [hereinafter “*Noble*”].

⁷ *Id.*, at 3.

⁸ *Id.*, at 5 (*per* Rand J.A., Kellock J.A., Estey J.A. & Fauteux J.A.).

four years later when it overturned institutional racism in schools and other public services in *Brown v. Board of Education*.⁹

In *Carter*, unlike *Noble*, the Supreme Court had legal tools readily at hand, that would have enabled it to reach the same result that it did, but by viewing the case through the lens of equality. This article shows that disability equality should have been the judicial focus of this case, and that Charter section 7 should not be used in these situations. It concludes with proposals for refinements of constitutional doctrines that flow from this analysis.

II. CARTER: IT'S ALL ABOUT DISABILITY EQUALITY

What does it look like when the Supreme Court stares right at a case that “screams” disability equality, but treats it as something different, using a different Charter provision, enacted for different purposes, with an analytical framework that can disregard disability equality’s aims and tools?

Carter is, first and foremost, a disability equality case. The *Carter* claimants were people with serious disabilities. That was what brought them to court. The claimants wanted to be able to end their lives at the time of their individual choosing.¹⁰ Their claim was to a right of access to disability accommodation. (At trial, Smith J. also provided compelling reasons why the legislation violated Charter section 15’s disability equality guarantee.¹¹)

Anyone who has no disabilities can end their own life when and how they wish, without needing another’s help. Whatever be one’s moral, religious or political views about ending one’s life, it is legal to think about it, talk about it, try it, and even do it. There was a time when attempting suicide was a crime in Canada. That absurd offence was removed from the *Criminal Code* in 1972.¹²

The *Carter* claimants contended that they would not be able to end their own lives, because of their disabilities. They needed help to carry out that wish. If they had found someone willing to assist, such as a

⁹ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (U.S.S.C.) [hereinafter “*Brown*”].

¹⁰ *Carter*, *supra*, note 1, at para. 11.

¹¹ *Carter v. Canada (Attorney General)*, [2012] B.C.J. No. 1196, 2012 B.C.S.C. 886, at paras. 1009-1077 (B.C.S.C.), revd [2013] B.C.J. No. 2227 (B.C.C.A.) [hereinafter “*Carter – trial decision*”].

¹² *The Criminal Law Amendment Act 1968-1969*, S.C. 1968-69, c. 38. Discussed in *Carter – trial decision*, *id.*, at para. 105.

doctor, the only barrier that stood in their way is section 241(b) of the *Criminal Code*.¹³ This section made it a crime for anyone to accommodate the applicants' disabilities by assisting them to do something that everyone else can do. A law that operates to criminalize the willing provision of a disability accommodation is a transparently obvious, glaring section 15 disability equality violation.

Is it exceptional for a law to make it illegal to provide a disability accommodation? Examples are in subsections 44.1 and 44.2 of Ontario's *Election Act*.¹⁴ These provisions ban the use of network-connected voting technology in Ontario provincial elections, forbidding telephone and Internet voting. These technologies could, for the first time, fully enable many voters with disabilities to independently and privately mark their ballot and verify their choices in a provincial election. For example, a blind or dyslexic voter cannot mark a paper ballot and verify their choice on their own, in private, on voting day in their local polling station. The ability to do so is central to Charter section 3's right to vote. People with disabilities have fought for this voting accommodation in Canada for years.¹⁵

These election provisions impose an arduous legislative regime to get that ban lifted. They, *inter alia*, give Ontario's unelected and unaccountable Chief Electoral Officer an absolute and arbitrary veto.¹⁶ Ontario legislation unjustifiably bans this access technology in provincial elections, even though Ontario municipal legislation ironically does not ban telephone and Internet voting. At least 44 municipalities have deployed some form of telephone and/or internet voting for municipal elections.¹⁷

The Supreme Court's failure to approach *Carter* as a disability equality case is not due to a current deficiency in section 15 disability equality jurisprudence — though the Court's exploration of Charter disability equality did get off to a bad start. Two decades earlier, the Court's initial effort at expounding on disability equality was a profound disappointment. One of its earliest ventures at applying section 15's disability equality

¹³ *Criminal Code*, *supra*, note 2.

¹⁴ *Election Act*, R.S.O. 1990, c. E.6, ss. 44.1 and 44.2.

¹⁵ See e.g., AODA (*Accessibility for Ontarians With Disability Act*) Alliance, "2014 Updates" Online: <<http://www.aodaalliance.org/strong-effective-aoda/ElectionInOntario.asp>>.

¹⁶ *Id.*

¹⁷ See AODA (*Accessibility for Ontarians With Disabilities Act*) Alliance, "Elections Ontario Report on Telephone and Internet Voting is a Slap in the Face to Voters With Disabilities — Elections Ontario Refuses to Now Use Its Authority to Test Telephone and/or Internet Voting in By-Elections, Despite Their Use in 59 Municipalities and Nova Scotia and No Findings that they were Hacked or Unreliable" (26 June 2013), online: <<http://www.aodaalliance.org/strong-effective-aoda/06272013.asp>>. [hereinafter "AODA Alliance Website"].

guarantee was in *Eaton v. Brant County Board of Education*.¹⁸ Here, the Court unanimously and wrongly rejected a claim that segregating public school students with disabilities outside the mainstream classroom, in segregated special education classes, was a *per se* denial of section 15's guarantee of a right to equality for children with disabilities, that cannot stand absent a Charter section 1 justification.¹⁹

In *Eaton*, the Supreme Court failed to apply the Ontario Court of Appeal's commendable treatment of disability segregation in school as presumptively unconstitutional, requiring a section 1 justification.²⁰ The Court also did not follow the U.S. Supreme Court's pivotal and transformative racial discrimination approach from *Brown* that in schools, "separate but equal" was a denial of equality.²¹

Elsewhere, I have catalogued *Eaton*'s serious analytical deficiencies.²² Beyond my earlier critique, the Supreme Court's oral argument transcript reveals two troubling perspectives on disability equality. The first instance occurred when Emily Eaton's lawyer argued that unwanted segregation of a student with a disability like Emily's is presumptively an equality denial, just as segregation on the basis of race was found to be a racial discrimination in *Brown*.²³ Then, Gonthier J.A. made a startling suggestion that disability is different from race, since one is born with one's race, but not one's disability.²⁴

Mr. Justice Gonthier: I think I agree with you that whether forced segregation is, *per se*, discrimination and [a] violation of equality rights, so we can assume that one first has to establish that. And you have made some reference to the *Brown* case that dealt with racial segregation and I am just wondering whether we are on all fours with that, because race, of course, is something you are born with and, very often, there is very little relevance to the treatment that is given to your race. But when you are dealing with a disability, is that not fundamentally an individual condition and you get a whole range of disabilities?

¹⁸ *Eaton v. Brant County Board of Education*, [1996] S.C.J. No. 98, [1997] 1 S.C.R. 24 (S.C.C.), revg [1995] O.J. No. 315 (Ont. C.A.) [hereinafter "*Eaton*"].

¹⁹ *Id.*, at para. 80.

²⁰ *Eaton v. Brant County Board of Education*, [1995] O.J. No. 315, 22 O.R. (3d) 1, at 13 (Ont. C.A.).

²¹ *Brown*, *supra*, note 9, at 483.

²² David Lepofsky, "A Report Card on the Charter's Guarantee of Equality to Persons with Disabilities After 10 Years. What Progress? What Prospects?" (1997) 73 NJCL, at 263.

²³ *Brown*, *supra*, note 9, at 495.

²⁴ *Eaton v. Brant County Board of Education*, "Oral Arguments Transcript, File 24668" (8 October 1996), at 86 [hereinafter "*Eaton, Oral Arguments*"].

Mr. Stephen Goudge, QC [as he then was]: Absolutely. And I say, with the greatest respect, My Lord, that often disability is something you were born with as well. And I simply say, My Lord, that what is at stake, if I am right, is that the segregation, the forced segregation of people because of disability is *prima facie* a violation of their equality rights. I am not saying at all that there should not then be a careful analysis of the individual needs of that disabled person. That is the Section 1 analysis.²⁵

In the second instance, counsel for the intervener Ontario Public School Boards Association, speaking for all of Ontario's public schools, was defending the public school's segregation of Eaton. In her oral argument she explicitly distinguished between students with disabilities on the one hand and "normal" students on the other. This transparently offensive and grossly outdated term drew no response from the bench. She argued:

Our system is set up on the basis of pupil needs, even those of non-exceptional pupils. The materials you have before you indicate that every pupil, whether exceptional or non-exceptional, must be approached as an individual. The Ministry of Education mandates that is what school boards do. They approach each child and its determination is made with respect to the needs of each child. One child may need a little bit more work in reading and writing. In the case of an exceptional child, the needs are much, much different, much greater than the needs of a *normal child* in a regular class.²⁶

Imagine if in the employment context, one referred to "normal employees" on the one hand, and female employees or non-white employees on the other. For counsel representing all Ontario's public schools during oral argument, in Canada's highest court on a major disability equality case, to refer to people with disabilities as not being "normal" is emblematic of wrenching discriminatory attitudes that have held people with disabilities back for so many decades.

Happily, the *Eaton* case's rough start on disability equality was substantially superseded by two later Supreme Court cases. The most recent of the two cases, *Moore v. British Columbia (Education)*²⁷ though decided under human rights legislation and not under the Charter, takes a far more modern, egalitarian approach to disability equality in the

²⁵ *Id.*

²⁶ *Eaton, Oral Arguments*, *supra*, note 24, at 61 (emphasis added).

²⁷ [2012] S.C.J. No. 61, 2012 SCC 61, [2012] 3 S.C.R. 360 (S.C.C.), *varg* [2010] B.C.J. No. 2097 (B.C.C.A.).

education context. Although it does not openly claim to overturn *Eaton*, it effectively relegated *Eaton* to the back drawer of constitutional history.

There is also *Eldridge v. British Columbia (Attorney General)*,²⁸ Canada's most powerful judicial pronouncement on constitutional disability equality and accessibility. This case provides a good, strong and clear enunciation of disability equality. It holds that a core feature of the constitutional right to disability equality is the duty to accommodate disability-related needs.²⁹ It follows that, equality for people with disabilities is denied where there is "a failure to ensure that they benefit equally from a service offered to everyone."³⁰ As the Court explains, it would be "a thin and impoverished vision of s. 15(1)"³¹ to approach equality as if "governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits."³²

By criminalizing the voluntary provision of a requested and needed accommodation to a person with a disability, the *Criminal Code*'s assisted dying ban flew in the face of *Eldridge*. It also failed the *Eldridge* requirement that a law be designed to take into account the needs of people with disabilities.

Sadly, *Carter* is not the only case where the Supreme Court missed a glaring constitutional disability equality violation. In *R. v. Swain*,³³ the Supreme Court tackled the constitutionality of the *Criminal Code*'s treatment of accused persons with mental health conditions. Historically, the *Criminal Code* subjected a subset of accused persons with mental health disabilities to inherently more onerous procedures. If an accused was judged unfit to stand trial, he or she could be detained indefinitely before trial, for periods that could be longer than the maximum prison term to which he or she were exposed if convicted.³⁴ As well, if an accused person with a mental health disability was found not guilty by reason of insanity, he or she could also be detained indefinitely, potentially for periods longer than would apply if he or she were found

²⁸ [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 (S.C.C.), revg [1995] B.C.J. No. 1168 (B.C.C.A.).

²⁹ *Id.*, at para. 79.

³⁰ *Id.*, at para. 66.

³¹ *Id.*, at para. 73.

³² *Id.*, at para. 72.

³³ [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933 (S.C.C.), revg [1986] O.J. No. 2358 (Ont. C.A.) [hereinafter "*Swain*"].

³⁴ *Id.*, at para. 31.

guilty of the same offence.³⁵ Furthermore, the prosecution could force the insanity defence on an accused who did not want it raised at his or her trial.³⁶ This exposed the accused to a far greater liberty intrusion via potentially much longer incarceration. Those found not guilty by reason of insanity or unfit to stand trial were mandatorily detained indefinitely.³⁷ They were afforded slim procedural protections for a post-trial review of their detention.³⁸ These did not include the level of procedural protections available for convicted offenders who apply for parole. The provisions created a blistering disability equality violation. If they were to survive, they would have cried out for a section 1 justification for disability discrimination.

In a bizarre twist, the *Swain* majority (written by Lamer C.J.C. [as he then was]) turned attention in one isolated context to section 15 disability equality. Its analysis was seriously flawed. It held that the common law rule, permitting the prosecution to force an insanity defence on an unwilling accused, violated Charter section 7.³⁹ The *Swain* majority enunciated a new common law rule, and then subjected it to section 15 scrutiny.⁴⁰ It held that its new common law rule did not violate the section 15 equality rights of accuseds with a mental disorder, on whom an insanity defence is forced by the prosecution, over their objection⁴¹ — a hopelessly erroneous conclusion.

The *Swain* majority then concluded that it was open to a party to raise that section 15 question afresh in a future case,⁴² — as if a lower court might promptly reject the Supreme Court's pronouncement on the constitutionality of the Supreme Court's brand-new common law rule.

In *Rodriguez v. British Columbia (Attorney General)*,⁴³ the earlier Supreme Court case that upheld the *Criminal Code*'s assisted dying ban, the majority assumed without commenting on it, that the provision violated section 15 disability equality.⁴⁴ The majority upheld that provision under Charter section 1.⁴⁵ At least the majority gave some tacit

³⁵ *Id.*, at para. 31.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*, at paras. 5, 8, 17 and 31.

³⁹ *Id.*, at para. 47.

⁴⁰ *Id.*, at paras. 75-88.

⁴¹ *Id.*, at para. 88.

⁴² *Id.*

⁴³ [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (S.C.C.), affg [1993] B.C.J. No. 461 (B.C.C.A.) [hereinafter "*Rodriguez*"].

⁴⁴ *Id.*, at paras. 184-185.

⁴⁵ *Id.*, at paras. 186-189.

attention to section 15. Yet by failing to explore the meaning of disability equality and how it was violated, and by simply assuming a violation and then proceeding to section 1, the *Rodriguez* majority failed to ensure that its section 1 analysis gave disability equality the weight and understanding it deserved.

In her *Rodriguez* dissent, L'Heureux-Dubé J.A. went even further off track. She found that the impugned provision violated Charter section 7 but not section 15. She held:

...this is not at base a case about discrimination under s. 15 of the Canadian Charter of Rights and Freedoms, and...to treat it as such may deflect the equality jurisprudence from the true focus of s. 15.⁴⁶

Exacerbating this statement, L'Heureux-Dubé J.A. embarked on a section 7 fundamental justice, arbitrariness analysis that was nothing short of a finding that the law treated Sue Rodriguez worse because of her disability:

In summary, the law draws a distinction between suicide and assisted suicide. The latter is criminal, the former is not. The effect of the distinction is to prevent people like Sue Rodriguez from exercising the autonomy over their bodies available to other people.⁴⁷

Such judicial failures to see glaring section 15 disability equality denials run the long-term risk of disability equality being counterproductively downplayed and sidelined. This is especially troubling since disability equality is the *only* constitutional right that our political leaders decided to add to the proposed Charter during Canada's 1980-82 patriation debates.⁴⁸

Missing a disability equality violation can directly affect the court's overall assessment of a case. When the Government must justify a Charter violation under section 1 as a reasonable limit on Charter rights, the Government's burden is higher, where the Charter rights violation is more severe.⁴⁹ If a law violates two of a claimant's Charter rights at the same time, this should at least in some situations constitute a more severe Charter rights intrusion than if only one of their Charter rights has been violated.

⁴⁶ *Id.*, at para. 196.

⁴⁷ *Id.*, at para. 212.

⁴⁸ David Lepofsky & Jerome E. Bickenbach, "Equality Rights and the Physically Handicapped" in A.F. Bayefsky & M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 323, at 332.

⁴⁹ *Reference re Criminal Code (Canada)*, ss. 193 and 195.1(1)(c) (*Man.*), [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123, at para. 5 (Dickson C.J.C. concurring) (S.C.C.), affg [1987] M.J. No. 453 (Man. C.A.).

A context-sensitive section 1 analysis should take into account the nature and goals of the Charter right or rights that were infringed. If the impugned law is a glaring denial of disability equality, any section 1 analysis that is oblivious to this fact is not context-sensitive.

If disability equality is not included in the section 1 mix, on the grounds that only a section 7 violation has been found, the section 1 analysis can be distorted. This unfairly skews the section 1 analysis against the claimant and the Government gets an undeserved windfall. As well, as part of its section 1 analysis under the *Oakes* test,⁵⁰ how can a court accurately conclude that an impugned law minimally impairs Charter rights if the court does not examine all the Charter rights that the impugned law violates?

When crafting a remedy that is appropriate and just in the circumstances within the meaning of Charter section 24(1), a court must be alive to all the Charter rights that the defective legislation violates. Otherwise, a court cannot be certain that its remedies will serve to fully respect all Charter rights that are in jeopardy. In *Carter*, if the section 15 violation is as I describe, the remedy of assisted dying should extend to persons with disabilities who are free from external coercion, and who cannot end their own life without assistance, due to their disability. That is different from the *Carter* decision's remedy.⁵¹

These problems arise whether section 15 equality rights are overlooked because lawyers argued section 15 but the court chose not to rely on it, or because lawyers never raised section 15 and the court did not press counsel about it. The Charter's disability equality guarantee is over a third of a century old. It is fair to expect judges to raise it, even if parties did not.

Does this all become academic since in *Carter*, the Charter claimants won? No. In *Carter*, the Court gave guidance on what Parliament must consider when reforming the law.⁵² If section 15 disability equality is not considered, this judicial guidance risks being incomplete. The post-*Carter* decision, broad public discussion and debate about designing new legislation to address assisted dying would benefit from judicial recognition that disability equality is on the table. As shown above, section 15 would have influenced *Carter*'s remedy.

⁵⁰ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at paras. 69-71 (S.C.C.), affg [1983] O.J. No. 2501 (Ont. C.A.) [hereinafter "*Oakes*"].

⁵¹ *Carter*, *supra*, note 1, at para. 127.

⁵² *Id.*, at paras. 126-132. *Swain*, *supra*, note 33.

III. IT WAS WRONG TO DECIDE CARTER UNDER CHARTER SECTION 7'S PROBLEMATIC "OVERBREADTH" PRINCIPLE

Making things worse, in *Carter*, the Supreme Court ventured further down its inherently flawed road of deploying Charter section 7 when an impugned law is found to be "overbroad".⁵³ In my view, the three related bases that the Supreme Court crafted for section 7 fundamental justice review — arbitrariness, overbreadth and gross disproportionality — are each fatally problematic bases for invalidating a law under section 7. Under these overlapping principles, an impugned law that deprives a person of their right to life, liberty or security of the person violates the principles of fundamental justice, contrary to section 7, if:

- (a) the impugned law's means is not rationally connected to its purposes (arbitrariness);⁵⁴
- (b) the law goes too far, interfering with conduct having no connection to the impugned law's objective ("overbreadth"),⁵⁵ or
- (c) the impugned law's effect is grossly disproportionate to its objects. ("gross disproportionality").⁵⁶

In his excellent "Circularity, Tautology and Gamesmanship: 'Purpose' Based Proportionality-Correspondence Analysis in Sections 15 and 7 of the Charter",⁵⁷ constitutional scholar and litigator Hart Schwartz shows that the section 7 fundamental justice "overbreadth" principle is irremediably unprincipled and hollow. As Schwartz argues, it inevitably produces an unavoidable unprincipled "arcane game" in court.⁵⁸

In a section 7 overbreadth case, a court's declaration of an impugned law's purpose inevitably dictates the case's outcome. A judge has sweeping discretion over how to frame a law's purpose. It can be defined in a way to yield the result that a legislature's means for achieving that purpose is a perfect fit. Alternatively the court can define the law's

⁵³ *Carter*, *supra*, note 1, at paras. 85-88.

⁵⁴ *Id.*, at paras. 83-84. *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, [2013] SCC 72, at para. 111 (S.C.C.), *varg* [2012] O.J. No. 1296 (Ont. C.A.) [hereinafter "*Bedford*"].

⁵⁵ *Carter*, *supra*, note 1, at paras. 85-88. *Bedford*, *supra*, note 54, at paras. 112-113.

⁵⁶ *Carter*, *supra*, note 1, at paras. 89-90. *Bedford*, *supra*, note 54, at paras. 103-106.

⁵⁷ Hart Schwartz, "Circularity, Tautology and Gamesmanship: 'Purpose' Based Proportionality-Correspondence Analysis in Sections 15 and 7 of the Charter" (2016) 32 NJCL, at 1 [hereinafter "*Schwartz*"].

⁵⁸ *Id.*, at 3.

purpose in a way that results in the chosen legislative means being an unconstitutionally overbroad mismatch.

Litigators know that a decisive tactical aim in case preparation is framing the impugned law's purpose. The Charter claimant frames the law's purpose to make its means mismatch its ends; the law's defender frames the law's purpose to show that it is a perfect fit with the law's means. There is no principled constitutionally "right" definition of a law's objective, so as to direct a judge to what they should do, when judging the parties' verbal tennis match over the law's purpose. There is no principled basis constraining a judge's decision on how to frame an impugned law's purpose during a section 7 overbreadth analysis. There is no principled constraint on appellate review of a lower court's identification of an impugned law's purpose.

Thus, a section 7 overbreadth case's key issue, on which the outcome depends, is entirely discretionary at trial. It is reviewable *de novo* with unbridled discretion at each appeal level.

How can a legislature know in advance if it has fulfilled its Charter duty? How is a potential litigant to know if a Charter challenge is worth pursuing, with all its costs and hardships? The legislator and rights claimant face this question, equipped only with a pair of dice in hand.

The Supreme Court faced this problem in *R. v. Moriarity*.⁵⁹ The Court did not identify the problem's severity, as delineated by Schwartz — whose article had not yet been published. The Court sought to provide guidance to trial judges on how to identify an impugned law's purpose for section 7's overbreadth analysis. Yet its guidance provides no clarity, simply because none is possible.

In *Moriarity*, the Court held that a court's description of a law's purpose "should focus on the ends of the legislation rather than its means."⁶⁰ The law's purpose should be described at "an appropriate level of generality" and should "capture the main thrust of the law in precise and succinct terms. ..."⁶¹ The Court warned against framing a law's purpose "in too general terms", and against an "unduly broad statement of purpose "on the one hand", or doing so "in too specific terms" on the other.⁶² The Court added little when it directed:

The appropriate level of generality, therefore, resides between the statement of an "animating social value" — which is too general — and

⁵⁹ [2015] S.C.J. No. 55, 2015 SCC 55 (S.C.C.) [hereinafter "*Moriarity*"].

⁶⁰ *Id.*, at para. 26.

⁶¹ *Id.*

⁶² *Id.*, at para. 28.

a narrow articulation, which can include a virtual repetition of the challenged provision, divorced from its context — which risks being too specific.⁶³

It similarly achieved little by directing that a law's purpose "should generally be both precise and succinct".⁶⁴

Its attempt at clarification culminated with an admonition, which merely wishes away the problem, rather than providing lower courts with informative criteria:

...Courts should be cautious to articulate the legislative objective in a way that is firmly anchored in the legislative text, considered in its full context, and to avoid statements of purpose that effectively predetermine the outcome of the overbreadth analysis without actually engaging in it.⁶⁵

Any principle of fundamental justice must provide "objective and manageable standards" for the application of section 7.⁶⁶ Schwartz's analysis shows that the section 7 overbreadth doctrine does not and cannot fulfil this indispensable requirement.⁶⁷

It is no answer to this criticism to point to the fact that there is a purpose/means analysis in the section 1 *Oakes* test for rational connection and proportionality.⁶⁸ This is so because under section 1, the state does not have utter freedom to frame a law's purpose as it wishes. Unlike the section 7 proportionality analysis, the section 1 analysis requires the state to show that the impugned measure's purpose is a pressing and substantial one, sufficiently important to outweigh the Charter rights that the measure infringes.⁶⁹ If a government, defending a law, frames too weak a purpose for the impugned law, it could fail that threshold, section 1, pressing objective requirement. This analytical constraint is not replicated in the Supreme Court's section 7 arbitrariness/overbreadth/gross disproportionality principles. Moreover, the section 1 purpose/means analysis is only reached after a court has found that an impugned measure violates a constitutional

⁶³ *Id.* The Court, in this quote, references *Carter*, *supra*, note 1, at para. 76.

⁶⁴ *Id.*, at para. 29.

⁶⁵ *Id.*, at para. 32.

⁶⁶ *Reference re Motor Vehicle Act (British Columbia) s. 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at para. 499 (*per* Lamer J.A.) (S.C.C.), *affg* [1983] B.C.J. No. 2259 (B.C.C.A.) [hereinafter "*BC Motor Vehicle Act Reference*"].

⁶⁷ Schwartz, *supra*, note 57, at 3.

⁶⁸ *Oakes*, *supra*, note 50.

⁶⁹ *Id.*

right listed between Charter sections 2 and 23. It is not part of the adjudication of whether one of those rights has been infringed.

To supplement Schwartz's excellent critique, I add that the Supreme Court's section 7 overbreadth principle suffers from additional, irremediable fatal flaws. First, it inevitably makes an impugned law's policy wisdom the test for its constitutionality. With other Charter rights, and with other section 7 doctrines, a court must measure an impugned law against a fundamental and recognizable constitutional norm, such as freedom of expression or religion, freedom of movement into or out of Canada or among its provinces, or freedom from unreasonable search or seizure. Whether an impugned law comports with or violates one of those fundamental constitutional norms is not determined by a naked judicial assessment of the impugned law's policy wisdom.

However, in the case of the section 7 overbreadth principle, and in the case of its arbitrariness and gross disproportionality doctrines, a constitutional decision boils down to just that. This is the case, even if judges do not think that is what they are doing, or believe that doing so is inappropriate, and even if judges explicitly say that a law's policy wisdom should not be the test of its constitutionality.

In section 7's earliest days before the courts, the Supreme Court wisely enunciated a bedrock principle in the *BC Motor Vehicle Act Reference*:

...the principles of fundamental justice are to be found in the basic tenets of our legal system. *They do not lie in the realm of general public policy* but in the inherent domain of the judiciary as guardian of the justice system.⁷⁰

The Supreme Court thus held that courts should avoid "adjudication of policy matters".⁷¹

That the Supreme Court has devolved into making a law's policy wisdom the implicit test of its constitutionality, despite that wise judicial warning, is typified by a case as early as the *BC Motor Vehicle Reference* itself, and by as recent a case as *Bedford* (where the Supreme Court reaffirmed its troubled section 7 proportionality analysis).⁷² In the *BC Motor Vehicle Act Reference*'s very first sentence, the Supreme Court proclaimed:

A law that has the potential to convict *a person who has not really done anything wrong* offends the principles of fundamental justice and, if

⁷⁰ *BC Motor Vehicle Act Reference*, *supra*, note 66, at para. 30 (emphasis added).

⁷¹ *Id.*, at para. 30.

⁷² *Bedford*, *supra*, note 54, at para. 97.

imprisonment is available as a penalty, such a law then violates a person's right to liberty under s. 7 of the Charter of Rights and Freedoms...⁷³

In *Bedford*, the Supreme Court spoke in terms of “inherently bad laws” violating section 7:

*The s. 7 analysis is concerned with capturing inherently bad laws: that is, laws that take away life, liberty, or security of the person in a way that runs afoul of our basic values.*⁷⁴

For the court to assign itself to decide if a law is “inherently bad” or punishes conduct that is not really “wrong” is an overt invitation to make the law’s policy wisdom the test of its constitutionality. Sadly, a judicial admonition that the principles of fundamental justice do not lie in the realm of public policy cannot countermand this. The two contradictory propositions cannot co-exist in peace and harmony.

The section 7 overbreadth principle entitles a court to review *de novo* the policy wisdom of any penal offence with a possible imprisonment penalty. The right to liberty is violated whenever a law creates an offence that can lead to a punishment of imprisonment. This is so, even if imprisonment is not a mandatory penalty.

Bedford made this problem worse where it held that a law is overbroad under section 7 if it applies to fact situation in one case where it should not apply.⁷⁵ A court need only find that the facts before it do not fit the impugned law’s purpose, and overbreadth is proven, in the case of legislation that deprives a person of their life, liberty or personal security.

The only way to get around this is to rely on the fact that this clear pronouncement in *Bedford* was *obiter*. It was unnecessary to that decision. *Bedford* found the impugned prostitution provisions applied in many situations where they are unjustified.⁷⁶ Supreme Court *obiter dicta* is not binding.⁷⁷

This *Bedford obiter* departs substantially from settled jurisprudence which *Bedford* did not say it was overturning. As noted, the Charter does not require legislation to fit perfectly. It is impossible to craft legislation

⁷³ *BC Motor Vehicle Act Reference*, *supra*, note 66, at para. 1 (emphasis added).

⁷⁴ *Bedford*, *supra*, note 54, at para. 97 (emphasis added).

⁷⁵ *Id.*, at paras. 122 and 127.

⁷⁶ *Id.*, at paras. 139-145.

⁷⁷ *R. v. Henry*, [2005] S.C.J. No. 76, 2005 SCC 76, at para. 57 (S.C.C.), affg [2003] B.C.J. No. 2068 (B.C.C.A.).

with perfection.⁷⁸ As well, it contradicts the Supreme Court's contextual approach to Charter rights for a single fact situation to invalidate an otherwise valid law, regardless of the severity of the deprivation of life, liberty or personal security.

The overbreadth jurisprudence, crystallized in *Bedford*, invites an accused, in any case where imprisonment is a possible penalty, to present evidence and arguments to the trial judge to show that he or she did not do anything that is really wrong, in the circumstances. Charter section 7 lets a judge decide to acquit, if the judge thinks that the accused did not do anything that is really wrong, and if the law really should not apply in that accused's circumstances. This erroneously converts each trial court into a mini-parliament, making gut decisions on whether an accused's conduct should be a crime, or whether their conduct was "morally wrong" or "morally innocent".⁷⁹

Second, further supplementing the Schwartz critique, the section 7 arbitrariness/overbreadth/gross disproportionality principles each violate another settled doctrine for the interpretation of the principles of fundamental justice. In *Cunningham v. Canada*,⁸⁰ the Supreme Court held:

The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally...⁸¹

Yet according to *Bedford*, the arbitrariness/overbreadth/gross disproportionality principles, no longer involve a court in weighing the public interest against any private interests that a Charter claimant invokes, when deciding whether a law violates the principles of fundamental justice.⁸² Proponents of the Supreme Court's arbitrariness/overbreadth/gross disproportionality principles may argue that *Bedford's* doctrinal change is of no moment, since under this fundamental justice analysis, a court does not

⁷⁸ *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497, at paras. 105-106 (S.C.C.), affg [1996] F.C.J. No. 511 (F.C.A.).

⁷⁹ *BC Motor Vehicle Act Reference*, *supra*, note 66, at paras. 14-15 and 30 (*per* Lamer J.).

⁸⁰ [1993] S.C.J. No. 47, [1993] 2 S.C.R. 143 (S.C.C.) [hereinafter "*Cunningham*"].

⁸¹ *Id.*, at para. 17.

The court also quoted this passage in: *Rodriguez*, *supra*, note 43, at para. 146; *R. v. Corbett*, [1988] S.C.J. No. 40, [1988] 1 S.C.R. 670, at 745 (S.C.C.), affg [1984] B.C.J. No. 2066 (B.C.C.A.); and *R. v. Penno*, [1990] S.C.J. No. 96, [1990] 2 S.C.R. 865, at 894 (S.C.C.), affg [1986] O.J. No. 1205 (Ont. C.A.).

⁸² *Bedford*, *supra*, note 54, at para. 125.

assess whether an impugned law's purpose is important enough to warrant an intrusion into the rights to life, liberty or personal security. As such, they may argue that this regime gives government a major break. However, a constitutional lens that tells judges that under section 7 fundamental justice, the only perspective that counts is that of the Charter claimant is one-sided, and hence, lopsided. If a court is going to test a law's policy wisdom, which the overbreadth principle necessarily invites, it must consider both perspectives under section 7.

This section 7 jurisprudence has led Canada to the very place against which some litigants forewarned over 30 years ago, when the Supreme Court first considered how to approach section 7. In the *BC Motor Vehicle Act Reference*, Attorneys General warned the Supreme Court not to open section 7 to assess a law's substantive content and not just its procedure for decision-making in individual cases.⁸³ They cautioned that to empower courts under section 7 fundamental justice, to review a law's substantive design, and not just its procedural fairness, would threaten to lead Canada down the harmful path that the U.S. Supreme Court erroneously blazed from 1905 to 1937 under the now-discredited "substantive due process" jurisprudence originating with *Lochner v. New York*.⁸⁴

During the *Lochner* "substantive due process" era, U.S. courts struck down progressive social legislation under the U.S. Constitution's due process clauses, not due to procedural unfairness, but due to a judicial conclusion that those laws violated substantive norms of freedom of contract. After three controversial decades of this, the U.S. Supreme Court dramatically retreated from this substantive due process regime. That retreat started in 1937 with *West Coast Hotel v. Parrish*.⁸⁵ The substantive due process years are now viewed as a flawed period in U.S. constitutional history.⁸⁶

Canada's current arbitrariness/overbreadth/gross disproportionality principles are not worded in the same way as *Lochner*'s substantive due process principles. Canadian judges might bristle at any suggestion that they are engaging in "Lochnerizing". Yet the resulting freedom of judges to overturn legislation based on a disagreement over the impugned law's policy wisdom constitutes an overarching and resounding commonality.

⁸³ *BC Motor Vehicle Act Reference*, *supra*, note 66, at para. 122. As a matter of full and fair disclosure, I note that I was co-counsel for the Attorney General of Ontario in that case. Ontario joined in the argument to this effect.

⁸⁴ 198 U.S. 45 (1905) (U.S.S.C.).

⁸⁵ 300 U.S. 379 (1937) (U.S.S.C.).

⁸⁶ Morton J. Horwitz, "History and Theory" (1986-1987) 96 Yale L.J. 1825, at 1827.

It is no small irony that when it was first faced with the choice of whether to allow for section 7 fundamental justice to engage a judicial review of the substantive content of an impugned law, or only the fairness of its procedures, the Supreme Court initially said, in the *BC Motor Vehicle Reference* case, that this was not something the Court needed to decide in that case.⁸⁷ The irony arises from the fact that the Supreme Court has subsequently held that the *BC Motor Vehicle Reference* has decided that section 7's principles of fundamental justice include both substantive and procedural principles.⁸⁸

Several critical cases in the history of section 7 could have been decided without section 7 at all. That would have avoided the problems I describe above. Three examples amply illustrate this: first, in the Charter's earliest years, the *BC Motor Vehicle Reference* could have been readily considered under Charter section 12's ban on cruel and unusual treatment or punishment. In that case, the impugned law imposed a mandatory 7-day prison term for driving without a licence, regardless of the accused's state of knowledge.⁸⁹ A person could go to jail despite having *bona fide* and reasonably thought they had a valid licence. Second, in *R. v. Heywood*⁹⁰ — the case that fully unleashed on Canada the section 7 overbreadth principle — the impugned restrictions on the offender's liberty could also have instead been tested under Charter section 12's ban on cruel and unusual punishment. Third, as is this article's prime focus, *Carter* cried out for consideration under the section 15 disability equality guarantee.

Even if every point made so far in this article was assumed to be meritless, there is no sense in incorporating a backdoor equality requirement in Charter section 7, as the Supreme Court in effect did, in *Carter*. The Charter's equality rights guarantee, if properly construed, has the potential to fully and effectively address equality claims. If the section 15 test were considered deficient, the proper solution would be to fix that test, rather than smuggling a second constitutional equality rights guarantee into section 7's principles of fundamental justice.

⁸⁷ *BC Motor Vehicle Act Reference*, *supra*, note 66, at paras. 19-21.

⁸⁸ In *Cunningham*, *supra*, note 80, at para. 17, McLachlin C.J.C. cites the *BC Motor Vehicle Act Reference* to stand for this proposition. And this passage is quoted in *Rodriguez*, *supra*, note 43, at para. 146.

⁸⁹ *BC Motor Vehicle Act Reference*, *supra*, note 66, at paras. 5 and 98.

⁹⁰ [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 (S.C.C.), affg [1992] B.C.J. No. 2596 (B.C.C.A.).

Injecting a backdoor equality principle into the section 7 principles of fundamental justice makes no sense. It serves no constitutional purpose. It adds unnecessary complexity and potential confusion. Will the section 7 equality principle employ the same test as does section 15? If so, it adds nothing. If not, would it be broader or narrower than section 15? If narrower, it adds nothing. If broader, it adds confusion. Why not instead add to section 15 whatever new coverage it would have brought to section 7? Under a section 7 backdoor equality claim, should a court use all the section 15 equality analytical tools, no matter their foibles? If these should not be used when assessing a section 7 equality claim, because they are deficient, why should they remain in force under section 15?

Can a party launch an equality claim under section 7 that does not involve any of the specific prohibited discrimination grounds listed in section 15 or on an analogous ground? If section 7's equality principle allows for constitutional attacks on discrimination grounds other than the grounds enumerated in section 15 or those analogous to them, that throws section 7 into the morass of inviting open-ended equality claims that sadly flourished under section 15 in Canada's lower courts during the 1980s. The Supreme Court wisely brought those to an end in its landmark *Andrews v. Law Society of British Columbia*⁹¹ and *R. v. Turpin*⁹² decisions. For a detailed critique of the pre-*Andrews* section 15 equality approach, see "Constitutional law - Charter of Rights and Freedoms - Section 15 - an Erroneous Approach to the Charter's Equality Guarantee: *R. v. Ertel*"⁹³ written by Schwartz and me. In both *Andrews* and *Turpin*, the Supreme Court cited this article with approval.⁹⁴ To a great extent, the Supreme Court's section 7 overbreadth approach replicates and revives problems that Schwartz and I raised over a quarter of a century ago in that article, there focusing on section 15 and not section 7.

⁹¹ [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.), affg [1986] B.C.J. No. 338 (B.C.C.A.) [hereinafter "*Andrews*"].

⁹² [1989] S.C.J. No. 47, [1989] 1 S.C.R. 1296 (S.C.C.), affg [1987] O.J. No. 767 (Ont. C.A.) [hereinafter "*Turpin*"].

⁹³ See David Lepofsky and Hart Schwartz, "Constitutional law - Charter of Rights and Freedoms - Section 15 - an Erroneous Approach to the Charter's Equality guarantee: *R. v. Ertel*" (1988) 67 Can. Bar Rev., at 115.

⁹⁴ *Andrews*, *supra*, note 91, at para. 28. *Turpin*, *supra*, note 92, at para. 40.

IV. CONCLUSION: WITHER THE FUTURE?

This article shows that there is a pressing need for several refinements to the Supreme Court's approach to Charter sections 7 and 15.

The Supreme Court's section 7 fundamental justice overbreadth principle — if not the entire package of section 7 arbitrariness/overbreadth/ gross disproportionality principles — needs a serious rethink. The best approach would be for the Court to go back to the section 7 fundamental justice drawing board, and dispense with section 7 arbitrariness/overbreadth/gross disproportionality review. The Supreme Court has commendably made significant changes to its approach to some other Charter provisions over time, based on its accumulated experience. This is best illustrated by its reboots of Charter section 24(2)'s *Collins* test,⁹⁵ 10 years later, in *R. v. Stillman*,⁹⁶ and again over a decade after that, in *R. v. Grant*.⁹⁷

The Court should replace its open-ended and fatally flawed, arbitrariness/overbreadth/gross disproportionality principles with more refined, specific and targeted principles of fundamental justice. These should have objective and manageable standards. They should ensure that a law's policy wisdom does not become the test of its constitutionality. They should be capable of producing reasonably predictable outcomes.

When assessing the content of the principles of fundamental justice in a specific case, regard should be had to the severity of the denial of life, liberty or personal security. A more exacting fundamental justice test should apply where there is a substantial intrusion into life, liberty or personal security than where the intrusion is more remote, more unlikely or more trivial. This would better implement the commendable Supreme Court contextual approach to Charter rights.

Wherever possible, the court should endeavour to first resolve a Charter claim by employing the Charter right that most specifically addresses the mischief that lies at the core of the claimant's complaint. If it is a complaint that the law impedes a disability accommodation, then section 15 should be a court's first stop. If other, more directly engaged Charter rights may not solve the case due to foibles with the existing case

⁹⁵ *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265, at para. 31 (S.C.C.), revg [1983] B.C.J. No. 2307 (B.C.C.A.).

⁹⁶ [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607, at paras. 69 and 93 (S.C.C.), revg [1995] N.B.J. No. 113 (N.B.C.A.).

⁹⁷ [2009] S.C.J. No. 32, 2009 SCC 32, at paras. 60, 61 and 67-71 (S.C.C.), varg [2006] O.J. No. 2179 (Ont. C.A.).

law under those provisions, then that should signal to the Supreme Court that the pre-existing case law under those provisions also may call out for a reboot.

A court should consider whether an impugned law violates more than one Charter right. It is arguably time to back away from the long-term practice in Canadian courts of going to section 1 right away, once it is clear that one Charter right is violated, and without first considering other Charter rights that may also be violated. A multiple rights violation can be relevant to the section 1 balancing, the design of remedies and any offer of judicial guidance to a legislature on principles to weigh when designing a replacement law or policy.

The Supreme Court has made some great pronouncements about the Charter's disability equality guarantee. Yet governments too readily disregard them. Consequently, the lives of Canadians with disabilities are full of accessibility barriers, many of which are a government responsibility. All violate the Charter and/or human rights statutes.

People with disabilities have therefore resorted to pressing elected politicians to enact new laws to make the Charter and Human Rights Code protections become a reality in their lives. As a result, the Ontario Legislature passed the *Ontarians with Disabilities Act* in 2001,⁹⁸ and the stronger *Accessibility for Ontarians with Disabilities Act*⁹⁹ in 2005. The Manitoba Legislature passed *The Accessibility for Manitobans Act*¹⁰⁰ in 2013. The Nova Scotia Government is now designing a provincial disabilities Act.¹⁰¹ In the 2015 federal election, now Prime Minister Justin Trudeau promised to enact a national disabilities Act.¹⁰²

In the 2007 Ontario provincial election, the three major party leaders promised that if elected, the Ontario Government would review all Ontario statutes and regulations for accessibility barriers.¹⁰³ That of course,

⁹⁸ *Ontarians with Disabilities Act, 2001*, S.O. 2001, c. 32.

⁹⁹ *Accessibility for Ontarians with Disabilities Act, 2005*, S.O. 2005, c. 11.

¹⁰⁰ *The Accessibility for Manitobans Act*, S.M. 2013, c. 40.

¹⁰¹ See Nova Scotia Government, Department of Community Services, "Government Releases Report On Accessibility Legislation" (June 3, 2015), online: <<http://novascotia.ca/news/release/?id=20150603002>>. See report, online: <http://novascotia.ca/coms/accessibility/>.

¹⁰² See the Liberal Party Website, "A New Health Accord" page online: <<http://www.liberal.ca/realchange/a-new-health-accord/>>. The liberal party website does not have a date for this announcement but this AODA information website, discussed this announcement in a post, dated October 5, 2015, online: <<http://www.aoda.ca/federal-liberal-party-promises-to-introduce-canadians-with-disabilities-act/>> [hereinafter "AODA Information"].

¹⁰³ See, Accessibility for Ontarians with Disabilities Act Alliance, "Brief to the final report of the Mayo Moran AODA Independent Review", *Part VIII. Meeting the Unmet Need to Ensure that*

is something the Charter's disability equality guarantee necessitates. As of early 2016, the Ontario Government has only reviewed 51 of its 750 statutes, and only proposed to amend a mere 11 of those laws it had reviewed.¹⁰⁴

The Supreme Court must speak louder and more clearly before legislatures will give the Charter's disability equality guarantee the attention it deserves. The *Carter* case gave the Supreme Court an excellent opportunity to do just that. Next time, the Court should seize the moment.

All Ontario Laws Do Not Authorize or Require Disability Barriers (June 30, 2014), available online: <www.aodaalliance.org/strong-effective-aoda/06192014-aoda-brief-moran.doc>.

¹⁰⁴ See AODA Information, *supra*, note 102, "Nine Years After the Ontario Government Promises to Review All Ontario Laws for Accessibility Barriers, the Wynne Government Proposes Modest Legislative Changes to 11 Laws To Be Fast Tracked Through the Legislature." (March 16, 2016). Online : <<http://www.aoda.ca/nine-years-after-the-ontario-government-promises-to-review-all-ontario-laws-for-accessibility-barriers-the-wynne-government-proposes-modest-legislative-changes-to-11-laws-to-be-fast-tracked-throug/>>.