THE LAW AS IT AFFECTS PEOPLE WITH DISABILITIES:

A CASE STUDY PAPER ON RIGHTS TO SUPPORTS

PREPARED FOR THE LAW COMMISSION OF ONTARIO

FINAL PAPER

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I. INTRODUCTION

A. The Meaning of Equality for People with Disabilities

Equality for people with disabilities often requires more than formal equality or a simple guarantee that "things that are alike should be treated alike…" according to their actual rather than attributed characteristics.[1] Formal equality, treating an individual in the same way as others who share his or her characteristics, may result in substantial inequality for people with disabilities. For example, all individuals and all people with disabilities are treated equally, in a formalistic sense, if a building prohibits entry of animals. However, people with service animals will be differentially impacted and effectively denied entry because of their disability resulting in inequality of access.

In contrast, substantive equality takes into account how the same treatment might affect individuals differently. Substantive equality is particularly important for people with disabilities because it recognizes that action may be required to have their different needs accommodated. Continuing the example above, an exception to the animal prohibition to allow the entry of service animals promotes substantive equality (or equality of outcome) rather than formalistic equality. The elimination of disability discrimination often requires action, such as providing accommodations, and consideration of individual variation in the experience of disability;[2] "[t]he elimination of discrimination against people with disabilities is not furthered by 'equal' treatment that ignores their individual disabilities."[3]

There are many different definitions of disability, most of which require action to further substantive equality, but the content of those obligations may differ depending

on the model. For example, the bio-medical approach to disability views disability as the result of impairment. This approach aims to overcome or minimize the negative effects of an individual's disability. Because of its goal, the bio-medical definition of disability may entail obligations on government to provide different forms of medicine and rehabilitation.[4] The social model of disability, which arose in response to critiques of the bio-medical model of disability, views disability as a result of socially constructed barriers.[5] Similarly, the human rights approach to disability views it as a result of the interaction between an individual's impairments and socially constructed barriers.[6] The social and human rights models may entail obligations on government to remove barriers in transportation, buildings, and services that prevent people with disabilities from participating in society.[7]

Regardless of the model of disability employed and because of the unique nature of disability, establishing and enforcing rights to disability-related supports becomes paramount to achieve substantive equality. However, Canadian courts have thus far been slow to recognize obligations on government to take action as part of rights to equality or rights to life, liberty, and security of the person under the *Canadian Charter of Rights and Freedoms*.[8] The Supreme Court has explicitly acknowledged that the existence of such rights remains to be determined, but many claimants seeking recognition of such rights have failed.[9]

B. This Paper

The Law Commission of Ontario has undertaken the ambitious task of articulating principles and considerations for a coherent analytical framework that will

address the law as it affects people with disabilities. One challenge of this project, among many others, is how to address the issue of the right to disability-related supports for people with disabilities. The question of whether and how the law can be used to establish and enforce rights to disability-related supports, such as social assistance; accommodation measures; or supports for activities of daily living, is an essential one.

In this paper, the term “supports” is used to refer to all of types of disability-related supports, whether financial supports, such as social assistance; accommodation measures, such as sign language interpretation; or supports for activities of daily living, such as personal support workers. “Rights to supports” refers to the establishment and enforcement of rights to disability-related supports through the imposition of obligations on government.

In this context, “positive rights” are contrasted with “negative rights”; the former are rights that necessitate action by the government, whereas the latter require only that the government abstain from curtailing rights. For example, the right to healthcare is a positive one, entailing corresponding obligations on the government to provide medical services, whereas the right to refuse unwanted treatment requires only that the government abstain from interfering with one’s own treatment decisions. However, not all rights can be classified as strictly positive or negative; some fall along the spectrum between these two extremes. For example, the right of deaf patients to be provided with sign language interpretation where required to access healthcare services is not strictly negative because it entails an obligation on government to provide interpretation. On the other hand, it is not strictly positive because the right to sign language

interpretation only exists where government is already providing the healthcare services in question.[10]

This paper addresses the establishment and recognition of positive obligations on government to provide disability-related supports. To be clear, this paper does not address the related issue of eligibility for disability-related supports once the government's obligation to provide them has been recognized as this is the subject of another paper commissioned by the Law Commission. Similarly, this paper does not address the issue of quality assurance once disability-related supports are provided. While these are undoubtedly related and important issues that affect how meaningful a right to a support is, they are beyond the confines of this paper.

This case study reviews obstacles in current legal analysis to the recognition of legal rights to supports for people with disabilities with a view to identifying pathways to their establishment and recognition. The analysis that follows is the result of research of both primary and secondary sources, including key appellate court decisions in Canada, the United States and South Africa, the *Convention on the Rights of Persons with Disabilities* [*Convention*], and literature in legal and critical disability studies regarding disability-related supports and positive obligations.[11] While the Law Commission's mandate is confined to Ontario, the review of Canadian caselaw extends across Canada, with a focus on the decisions of the Supreme Court of Canada. Similarly, while the project is limited to the obstacles to the recognition of the right to disability-related supports, the review of caselaw is not restricted to reviewing cases that arise from such claims.

Informal consultations were conducted with experts in the disability-sector, which focused on identifying pathways to the recognition of rights to supports for persons with disabilities. The findings of these consultations are incorporated within the appropriate sections of the paper. In the sections that follow, the paper reviews the themes that emerged from this research.

In section II, the paper reviews the current Canadian approach to disability-related supports, with a focus on the elements of judicial analysis that act as obstacles to claims for disability-related supports. This review highlights Canadian courts' reluctance to impose positive obligations on government under rights to equality or rights to life, liberty, and security of the person as well as the courts' deference to government allocation of scarce resources.

In section III, the paper considers different potential pathways to the recognition of disability-related supports. First, it considers potential legislative pathways to the recognition of disability-related supports suggested by our review of Canadian jurisprudence. It then considers legislative pathways suggested by our review of international sources, including American and South African legislation and jurisprudence, and the *Convention*. The focus of this section is on legislative approaches that are within the Law Commission's mandate of recommending law reform measures to make the law accessible to all Ontarians.[12] Section IV reviews the findings of the paper and makes recommendations for law reform based on those findings.

II. OBSTACLES TO DISABILITY-RELATED SUPPORTS: THE CURRENT CANADIAN APPROACH

The sections that follow discuss the themes that emerge from Canadian jurisprudence regarding rights to supports under the *Charter* and human rights legislation. Within this discussion, the frameworks developed by courts for determining whether a claimant has established a violation of his or her rights are also examined. These frameworks are crucial because, unless one can fit a claim for supports into the parameters of the established legal test, that claim is bound to fail. Moreover, examining the frameworks alongside their application in caselaw is important to determine whether and when there is something inherent in the frameworks themselves that precludes courts from imposing positive obligations on government.

A. Courts' Reluctance to Impose Positive Obligations on Government: Section 7

In various contexts, the Supreme Court of Canada has recognized that a lack of government action may infringe rights and freedoms guaranteed by the *Charter*. Stated differently, judges have appreciated that positive government action may be required to give effect to *Charter* rights and freedoms. For example, *in Reference re Public Service Employee Relations Act (Alberta)*, Dickson C.J., writing in dissent, explained that a conceptual approach in which "freedoms" in the *Charter* are said to "involve simply an absence of interference or constraints … may be too narrow since it fails to acknowledge situations where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms …"[13]

In this vein, the Court has found that underinclusive legislation may, in some circumstances, substantially impact the exercise of a constitutional freedom.[14] For

example, in *Dunmore v. Ontario (Attorney General)* the majority of the Court found that the exclusion of agricultural workers from Ontario's *Labour Relations Act, 1995* meant that the workers were substantially incapable of exercising their freedom of association, as protected by section 2(d) of the *Charter*.[15] However, the thrust of jurisprudence regarding rights to equality and rights to life, liberty, and security of the person indicates that there are significant obstacles to enforcing these rights where such enforcement would entail positive obligations on government.

The courts have thus far been slow to recognize positive obligations as part of the right to life, liberty, and security of the person protected under section 7 of the *Charter*, though there is nothing inherent in the section 7 framework developed by courts to foreclose that possibility. Under Canadian jurisprudence, in order to establish a violation of one's section 7 rights a claimant must demonstrate two things: (i) an interference, in purpose or effect, with one of the three interests protected by section 7; and (ii) that the interference is not in accordance with the principles of fundamental justice. The second stage of the section 7 analysis often amounts to a proportionality inquiry that weighs the importance of the state objective at issue against the severity of the violation of life, liberty, and/or security of the person.[16] The Supreme Court has explained that the principles of fundamental justice include rules of procedural fairness (or natural justice) and substantive principles that are the "basic tenets of our legal system."[17] Section 7 has been applied in a variety of contexts, including the administration of human rights legislation,[18] state-imposed medical treatment,[19] state-initiated custody proceedings,[20] and state-prohibitions on the purchase of private

insurance.[21] The Supreme Court has consistently left open an interpretation of section 7 that includes positive obligations on government.

In the first two subsections that follow (1. *G.(J.)* and *Gosselin*: Disability Supports where Impecunious and 2. *Wynberg* and *Flora*: Health and Social Services) the paper discusses cases in which claimants have attempted to impose positive obligations on government to provide supports, both generally and in the context of disability-related supports. This caselaw demonstrates the courts' reluctance to impose positive obligations on government under section 7. By contrast, in the third subsection that follows (3. *Chaoulli* and *Adams*: Successful Claims), the paper reviews novel contexts in which claimants have been successful in arguing that their section 7 rights were infringed. This caselaw illustrates that it is not the novelty of the claim that determines its success or failure; instead, the result is largely dependent on whether the claim is a negative one (requiring only that the government abstain from curtailing rights) or a positive one (requiring the government to take positive action).

1. G.(J.) and Gosselin: Disability Supports where Impecunious

In an early case concerning the scope of section 7, the Court stated that it would be "precipitous" to rule out the possibility that the section included such rights as "… rights to social security, equal pay for equal work, adequate food, clothing and shelter …"[22] In 1999, the Court went much further in the case of *New Brunswick (Minister of Health and Community Services) v. G. (J.)* [*G. (J.)*], holding that in certain circumstances section 7 imposes a positive obligation on the government to provide an impecunious, unsophisticated parent with state-funded counsel when the government

seeks a judicial order suspending the parent's custody of his or her child.[23] The Court held that, in the circumstances of the case, the right to a fair hearing (a principle of fundamental justice) required that the mother be represented by counsel. The Court reached this conclusion by considering the seriousness of the interests at stake in child custody proceedings, the complexity of those proceedings, and the fact that the mother in this case did not possess superior intelligence, education, communication skills, composure, or familiarity with the legal system.[24]

Despite the theoretical possibility that section 7 may encompass positive rights and the hope offered by the Court's decision in *G.(J.)*, in subsequent cases the Supreme Court has habitually dismissed section 7 claims that would require positive state action, both generally and in the context of disability-related supports. For example, in *Gosselin v. Québec (Attorney General)* [*Gosselin*], a welfare recipient challenged the adequacy of welfare benefits.[25] The majority of the Supreme Court rejected the claim. In the majority's view, existing jurisprudence on section 7 indicated that it restricts the government's ability to deprive individuals of their rights to life, liberty, and security of the person. According to the majority, existing jurisprudence did not suggest that section 7 imposes positive obligations on government to ensure that each person enjoys life, liberty, and security of the person.[26]

The majority's judgment in *Gosselin* implies that the Court's decision in *G.(J.)* did not impose positive obligations on the government. It suggests that the Court's findings resulted from the state's threat to *G.(J.)*'s security of the person by seeking to extend the custody order in place. However, as noted by Arbour J. writing in dissent in *Gosselin*,

> One must resist the temptation to dilute the obvious significance of this decision by attempting to locate the threat to security of the person in *G. (J.)* in state action. It is of course true that the proceedings at issue in *G. (J.)* were initiated by the government. But Lamer C.J. pointed out that it was not the actions of the state in initiating the proceedings, per se, that gave rise to the potential s. 7 violation. Rather, "[t]he potential s. 7 violation . . . would have been the result of the failure of the Government of New Brunswick to provide the appellant with state-funded counsel . . . after initiating proceedings under Part IV of the Family Services Act" *(G. (J.)*, supra, at para. 91 (emphasis added)). This focus on state omission rather than state action is consistent with Lamer C.J.'s characterization of the state's obligation to provide counsel as a positive obligation. It is in the very nature of such obligations that they can be violated by mere inaction, or failure to perform the actions that one is duty-bound to perform.[27]

The majority suggests that what was lacking in *Gosselin*, which could sustain a claim to positive obligations arising from section 7 in the future, was a serious record of hardship. However, Arbour J. had no difficulty concluding that the evidentiary record was sufficient to find a violation of Ms Gosselin's section 7 rights.[28] Arguably, the serious record of hardship which was before the Court suggests that, in the majority's view, section 7 can never be used to impose positive obligations on government to guarantee a minimum standard of living.

2. Wynberg and Flora: Health and Social Services

In subsequent cases, Canadian courts have followed the narrow approach to section 7 applied by the Supreme Court majority in *Gosselin*, including cases where claimants have sought to impose positive obligations on government to provide disability-related supports. For example, in a series of cases where parents of autistic children sought to impose an obligation on the government to provide their children with autism-related services, the Ontario Court of Appeal and the Supreme Court declined to find violations of section 7.[29]

In *Wynberg v. Ontario* [*Wynberg*], parents challenged Ontario's failure to fund intensive behavioural intervention ("IBI") programs for autistic children aged six and over. Among other things, the parents claimed that the province's special education regime adversely impacted their children's liberty and security of the person by denying them access to the only program known to provide any hope to autistic children of being able to participate meaningfully in the community.[30] Both the trial judge and the Ontario Court of Appeal rejected the section 7 claim advanced by the parents. Central to this determination was the fact that Ontario's *Education Act* does not create a mandatory requirement that school-age children attend public school. The Court relied on this fact in concluding that the government's failure to provide the IBI program to autistic children did not amount to the kind of deprivation required to bring section 7 rights into play.[31] The Court of Appeal emphasized that "existing jurisprudence [does] not permit an interpretation of section 7 as imposing a constitutional obligation to ensure that every school-age autistic child has access to specific educational services."[32] In other words, the Court was not willing to depart from the existing caselaw to impose a positive obligation on the government to provide the IBI program at issue.

The reluctance of courts to impose positive obligations on government under section 7 is also evident in other contexts where claimants have sought disability-related supports. For example, in *Flora v. Ontario (Health Insurance Plan, General Manager)* [*Flora*], the Ontario Court of Appeal upheld the province's refusal to reimburse Mr. Flora for a life-saving liver transplant he received outside Canada.[33] As in *Wynberg*, the Court held that existing jurisprudence did not permit it to interpret section 7 as imposing a constitutional obligation on government to fund out-of-country medical treatments

beyond those already covered by the province's health insurance scheme.[34] This was so despite the undisputed findings that the treatment Mr. Flora received outside of Canada was not available in Ontario and was required to save his life.[35]

3. Chaoulli and Adams: Successful Claims

Canadian courts' reluctance to impose positive obligations on government becomes more glaring when one considers some of the novel section 7 claims courts have upheld where those claims concerned negative rights. For example, *Chaoulli v. Québec (Attorney General)* [*Chaoulli*] involved a challenge to the provisions of a Québec statute that prohibited residents from making private health insurance contracts.[36] A majority of the Supreme Court found that the provisions at issue violated the rights to life and security of the person under Québec's *Charter of Human Rights and Freedoms* in the face of the province's long waiting lists for medical services.[37] Of the five members of the Court who addressed the Canadian *Charter*, three members found that the provisions at issue violated section 7 and could not be justified under section 1. The majority's decision in *Chaoulli* was arguably a radical one as it is criticized as threatening Canada's public health care system. However, it remained in the realm of negative rights; the appellants did not seek to impose a positive obligation on government (such as an order requiring the government to fund private health care, to spend more money on health care, or to reduce waiting times for treatment). Instead, the appellants sought the right to spend their own money to obtain insurance for private health care services. Because the appellants sought to enforce negative rights, the

Court was able to uphold the claim of a section 7 breach without having to reinterpret the scope of section 7.

Similarly, in *Victoria (City) v. Adams* [*Adams*], the British Columbia Court of Appeal upheld a novel, but negative, section 7 claim.[38] The Court found that municipal by-laws prohibiting persons from erecting any form of temporary overhead shelter at night violated the section 7 rights of homeless persons, where the evidence indicated that the number of homeless people exceeded the number of available shelter beds.

Chaoulli and *Adams* demonstrate the willingness of Canadian courts to find novel breaches of section 7 where the claims involve negative rights only. These cases stand in stark contrast to the findings in *Gosselin* and *Wynberg* where the courts are clearly reluctant to impose positive obligations on government. As discussed below, the distinction the judiciary has drawn between positive and negative rights reflects its deference to government decisions and priorities in allocating resources.

4. Implications of the Caselaw

Existing jurisprudence under section 7 indicates that, while courts pay lip service to the theoretical possibility that section 7 could be used to impose positive obligations on government, they are unwilling to turn that possibility into reality. However, the framework developed by the courts for determining section 7 claims does not inherently preclude the imposition of positive obligations on government. Indeed, Justice Arbour, writing in dissent in *Gosselin*, affirmed an interpretation of section 7 as imposing positive obligations on government. She explained that in section 7 cases the protection of positive rights is grounded in the first clause of section 7, "… which provides a free-

standing right to life, liberty and security of the person and makes no mention of the principles of fundamental justice."[39] According to Justice Arbour, the fact that the principles of fundamental justice are those found in "the basic tenets of our legal system" means that they are not relevant in positive rights' cases because the source of a positive rights violation is in the legislative process. In other words, positive rights can be violated by mere inaction on the part of government, which implicates public policy decisions, rather than the justice system.

Justice Arbour's interpretation of section 7 shows that the major obstacle to the recognition of disability-related supports is not the framework for determining section 7 claims, but courts' reluctance to apply that framework in a manner that would impose positive obligations on government. The judiciary's refusal to interpret section 7 as imposing an obligation on government to ensure that each person enjoys life, liberty, and security of the person largely forecloses the possibility of obtaining disability-related supports through a legal challenge under section 7.

B. Courts' Reluctance to Impose Positive Obligations on Government: Section 15

As discussed above in the context of section 7, Canadian courts have recognized that a lack of government action may infringe rights and freedoms guaranteed by the *Charter* but have nevertheless resisted imposing positive obligations on government. Likewise, in equality cases under section 15 of the *Charter*, the thrust of jurisprudence indicates that there are significant obstacles to enforcing these rights where such enforcement would entail positive obligations on government.

An important similarity between section 7 and section 15 jurisprudence in the context of disability-related supports is that the frameworks developed by the courts for adjudicating claims under these provisions do not preclude the imposition of positive obligation on government. The jurisprudence discussed above in relation to rights to life, liberty, and security of the person, most notably the dissent of Justice Arbour in *Gosselin*, makes it clear that the framework developed by the courts for determining section 7 claims does not inherently preclude the imposition of positive obligations on government. Similarly, the framework used by courts for determining equality claims under the *Charter* for the last decade, known as the *Law* approach (as it originated in the case *of Law v. Canada, (Minister of Employment and Immigration)*), does not inherently preclude the imposition of positive obligations on government, though it does pose obstacles to their recognition.[40]

1. Law: Formal Versus Substantive Equality

An examination of the comparator analysis in the *Law* approach, which has posed a significant obstacle to those seeking disability-related supports, shows that it may not be the comparator analysis itself that is problematic. Arguably, it is the courts' reluctance to impose positive obligation on government that has led the courts to apply the comparator analysis in a manner that precludes the imposition of positive obligations on government.

Under the *Charter*, the right to equality is protected in both negative and positive terms. The focus of section 15(1), which sets out the guarantee of equality before and under the law, is on preventing governments from drawing distinctions on enumerated

or analogous grounds that have the effect of perpetuating a stereotype or of imposing a disadvantage based on a stereotype. The focus of section 15(2), which protects affirmative action programs from being found constitutionally invalid under section 15(1), is on enabling governments to take positive steps to help disadvantaged groups improve their situation.[41]

Since the equality rights provision of the *Charter* came into effect, the Supreme Court's interpretation of the legal test to establish an infringement of one's equality rights has evolved dramatically.[42] In its first section 15 decision, *Andrews v. Law Society of British Columbia* [*Andrews*], the Court rejected the application of the similarly-situated test, which focuses on treating likes alike. It recognized that such an analysis results in formal rather than substantive equality because it justifies treating those who are unalike differently: "mere equality of application to similarly situated groups or individuals does not afford a realistic test for a violation of equality rights…a bad law will not be saved merely because it operates equally upon those to whom it has application."[43] For example, the similarly-situated analysis would permit a requirement that all employees have a driver's license, on the basis that the rule applies equally to all, despite the fact that persons whose disability prevents them from having a driver's license would be disproportionately, and discriminatorily, affected by such a requirement. Thus, the Supreme Court rightly rejected the similarly-situated analysis as it gives *carte blanche* to discriminate against all individuals of the same disability.[44]

Following *Andrews*, there were several years of differing opinions among members of the Supreme Court as to the appropriate interpretation of section 15(1). The Court finally agreed on an approach and provided guidelines for lower courts in the

seminal case of *Law v. Canada, (Minister of Employment and Immigration*) [*Law*].[45] This approach involves three main inquiries:

> First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the Charter in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).[46]

Each branch of the *Law* test proceeds based on a comparison with another relevant group or groups. The Supreme Court has explained that the appropriate comparator group is one that possesses all of the relevant characteristics of the claimant group apart from the characteristic that is the claimed ground of discrimination.[47] To satisfy the third inquiry, the claimant must show that the impugned law has the effect of demeaning the claimant's dignity, which is considered both objectively and subjectively.[48]

In *Law*, the Supreme Court noted several contextual factors that are relevant to a determination of whether a claimant's dignity has been demeaned: whether the individual or group has been subject to pre-existing disadvantage, stereotyping, prejudice or vulnerability; whether there is a correspondence between the ground upon which the claim is based and the actual need, capacity, or circumstance of the claimant(s); whether the impugned law is ameliorative (in purpose or effect); and the nature and scope of the interest affected by the impugned law.[49] The Supreme Court explicitly saw this approach as one aimed at substantive, rather than formal equality.[50] However, subsequent cases show that the *Law* approach has been applied in a manner

that affirms formal rather than substantive equality, which poses a significant obstacle for those seeking to establish rights to disability-related supports.

The Supreme Court recently reformulated the *Law* approach in *R. v. Kapp* [*Kapp*]. In *Kapp*, the Court set out the following test for determining whether section 15(1) has been infringed: First, does the law creates a distinction based on an enumerated or analogous ground? If so, does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[51] The Court's reformulation of the section 15(1) test in *Kapp* was engendered in part by criticisms of the *Law* approach, including the formal equality that resurfaced through the artificial comparator analysis.[52] Because the Court's decision in *Kapp* is so recent, it is difficult to determine whether it will refocus judicial analysis on substantive equality. It is, however, worth noting that in the three section 15 challenges considered by the Supreme Court since *Kapp*, there has been less emphasis on the strict application of comparator groups and greater focus on the broader context of the distinctions at issue from a substantive equality perspective.[53]

2. Auton: Renewal of the Similarly-Situated Test

The formal approach to equality can be seen in the manner in which the comparator analysis in *Law* has been applied by the Supreme Court in cases subsequent to *Law*, such as *Auton (Guardian ad litem of) v. British Columbia (Attorney General)* [*Auton*]. In *Auton* (which post-dated *Law* but pre-dated *Kapp*), parents argued that the government's refusal to fund a particular program (applied behavioural analysis and intensive behavioural intervention [ABA/IBI]) for their preschool aged children with autism constituted discrimination on the basis of disability.[54] The parents based their

claim on the argument that the program at issue was “medically necessary”, with the implication that the government discriminated against their autistic children because it provided non-autistic children with medically necessary services. Dismissing the claim on other bases, the Court proceeded to consider the substantive merits of the equality claim. The Court rejected the claimants’ proposed comparator groups, which were children without disabilities and adults with mental illness. The Court found that the appropriate comparator groups were persons without disabilities or persons suffering a disability other than a mental disability, seeking or receiving funding for a non-core therapy important for their present and future health which was emergent and only recently recognized as medically required. The Court found no evidence to suggest that the government’s approach to funding the program was different from its approach to other novel therapies for persons without disabilities or persons with another disability. Without that evidence, there could be no finding of discrimination.[55]

The manner in which the Supreme Court applied the comparator analysis in *Auton* poses a significant obstacle for those seeking disability-related supports because the Court’s approach implicitly reaffirms the similarly-situated analysis. Following its approach in other cases, in *Auton*, the Court insisted that the comparator group must be “like the claimants in all ways save for characteristics relating to the alleged ground of discrimination.”[56] In other words, claimants are required to find a group to which they could belong but-for the personal characteristic that separates them.[57] This is problematic because the specificity engendered by such an application of the comparator analysis “precludes complexity, intersectionality or any analysis of layers of oppression.”[58] Further, the Supreme Court’s chosen comparator groups focus on the

support sought by adding the elements of “emergent”, “non-core”, and “recent” treatment. [59]

In contrast, the comparator groups selected by the claimants show how a comparative analysis has the potential to affirm substantive equality by comparing outcomes. The first comparator group chosen by the claimants, children without disabilities, highlights how the support sought (ABA/IBI) would allow autistic children to participate in “regular” classrooms in the public school system.[60] The second comparator group chosen by the claimants, adults with mental illnesses, highlights the impact of the denial of the support sought on the claimants by showing how adults with mental illnesses benefit from medical treatment.[61] These comparator groups both focus the claim on outcomes – the educational opportunities made possible by the provision of the support at issue (compared with children without disabilities), and the impact of being denied the support sought (compared with adults with mental illnesses).[62] In so doing, these comparator groups show how a focus on outcomes can put substantive equality at the heart of the comparator analysis.

A formal approach to equality is certainly not limited to the comparator analysis that has been employed by the courts following *Law*. Nevertheless, an examination of how the courts have applied the comparator analysis, as in *Auton*, is a salient example of how a formal approach to equality poses a significant obstacle for those seeking to impose a positive obligation on government to provide disability-related supports.

3. Eldridge: A Successful Claim

Claimants in section 15 challenges have been most successful where they are able to frame their claims to a disability-related support as a gap in an existing program (as discussed more fully in Section III below). For example, in *Eldridge v. British Columbia (Attorney General)* [*Eldridge*], claimants were successful in arguing that the government's failure to provide sign language interpretation to deaf patients seeking hospital services violated their equality rights.[63] The Supreme Court found that this gap (the failure to make hospital services accessible to deaf patients) in the government's existing healthcare services meant that deaf patients were not provided with substantively equal treatment as hearing patients. However, a claimant's attempt to frame their claim as a gap in an existing program is not determinative as the courts may reject that characterization.

In contrast, claimants have achieved little success in section 15 claims where they seek to impose free-standing, positive obligations on government. For example, as seen in a series of cases including *Auton*, Canadian courts have refused to impose a positive obligation on government to provide autistic children with a particular educational program.[64] As *Auton* demonstrates, Canadian courts' reluctance to impose positive obligations on government under section 15 is often justified through a formalistic, rather than substantive, approach to equality.

The extent to which framing claims to supports as an accommodation in an existing service is further discussed in the Pathways section below.

4. Implications of the Caselaw

Existing jurisprudence under section 15 indicates that, while courts explicitly recognize the importance of substantive equality, their analyses are often formalistic and do not recognize the contextual needs and realities of those seeking disability-related supports. The Supreme Court's decision in *Kapp* however gives one reason to be optimistic that the formalistic approach seen in equality jurisprudence will evolve into an approach that focuses on substantive equality. If it does, claimants are much more likely to be successful in imposing a positive obligation on government to provide disability-related supports, since, for people with disabilities, substantive equality is intrinsically connected with the provision of disability-related supports.

C. Courts' Deference to Government Allocation of Scarce Resources

The courts often choose to defer to government and legislative decisions on the allocation of scarce resource and prioritizing competing policy concerns.[65] While this is particularly true when the courts are asked to impose positive obligations on government, the courts also defer in cases where they are asked to extend protection to a vulnerable group rather than being asked to expend resources. In *Irwin Toy*, the Supreme Court explained the rationale for this approach:

> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for those difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function. For example, when "regulating industry or business it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy" [citation omitted].[66]

Such deference often informs courts' analysis of whether a breach of the *Charter* has been established.[67] For example, in *Auton*, the Supreme Court's finding that the claimants failed to establish a breach of section 15 relied in part on the Court's deference to the government's allocation of scarce resources for healthcare services generally: "… the legislative scheme does not promise that any Canadian will receive funding for all medically required treatment …It is, by its very terms, a partial health plan."[68]

Courts' deference to government allocation of resources is explicitly incorporated in the legal test applied by courts to determine whether government can justify a breach of the *Charter*. Once a claimant has established a violation of his or her *Charter* rights (including sections 7 and 15), the opposing party, usually the government, may justify such violation under section 1 of the *Charter*. To do so, two central criteria must be satisfied. First, the party invoking section 1, usually the government, must establish that the objective of the impugned law is "pressing and substantial". Second, that party must show that the means chosen are reasonable and demonstrably justified. This involves a form of proportionality test with three components: (a) the measures adopted must be rationally connected to the objective; (b) the means chosen must minimally impair the right or freedom in question; and (c) the effects of the measures must be proportional with respect to the objective.[69]

Under the second stage of the section 1 test, courts are deferential to government arguments regarding limited funding. For example, in *Cameron v. Nova Scotia (Attorney General)* [*Cameron*], a married couple was able to establish that the failure of Nova Scotia's health insurance plan to provide coverage for fertility treatment

violated their equality rights on the basis of disability (infertility).[70] Nevertheless, the Court of Appeal dismissed their claim on the basis that the government's discrimination was justified under section 1 because the health insurance plan had to exclude some procedures in order to provide the best possible health care coverage in the context of limited financial resources.

The challenge of imposing positive obligation on government where this would involve funding was also evident in *Newfoundland (Treasury Board) v. N.A.P.E.*.[71] In that case, unions were successful in arguing that the government's refusal to make retroactive pay equity adjustments to female employees in the health care sector violated their equality rights. However, the Court upheld the finding that such wage discrimination was justified under section 1 of the *Charter* in light of the severe fiscal crisis being faced by the government. As noted by the Court in *Cameron*, existing jurisprudence indicates that where the section 1 analysis involves the balancing of competing interests and matters of social policy, government must be afforded "wide latitude to determine the proper distribution of resources in society."[72]

Courts' deference to government may be one explanation for the distinction drawn by the courts between positive and negative rights. In other words, courts may be willing to recognize negative rights claims because they do not affect government allocation of resources but are wary of recognizing positive rights claims because doing so would not only question, but also directly affect, government distribution of resources. While it is certainly true that government funding is limited, courts' deference to government allocation of scarce resources poses a significant obstacle for those

seeking to impose an obligation on government, especially for people with disabilities for whom positive obligations will often be necessary to achieve substantive equality.

D. Defences for Ameliorative Programs and the Risk of Program Cancellation

As discussed more fully in section III below, claimants have been successful in seeking disability-related supports where they are able to frame their claim as a gap in an existing program. For example, in *Nova Scotia (Workers' Compensation Board) v. Martin* [*Martin*], the claimants were successful in showing that provisions of Nova Scotia's workers' compensation legislation that entirely excluded chronic pain from the purview of the regular workers' compensation system, violated section 15 by imposing differential treatment upon injured workers suffering from chronic pain on the basis of the nature of their physical disability.[73] Where claims to disability-related supports are framed in this manner, the success of the claim is not the result of the courts' recognition of a freestanding right to a support. Instead, as in *Martin*, the success results from the courts' recognition that the government, having chosen to provide certain benefits, was providing them in a manner that discriminated against people with disabilities.

However, two related obstacles arise where the right to a disability-related support is framed as a gap in an existing program. First, the government may defend such a claim by arguing the program is ameliorative. Ameliorative programs are protected from discrimination claims under section 15(2) of the *Charter* and comparable provisions of human rights legislation.[74] Thus, the government may defend against a claim that a disability-related program is underinclusive by alleging that it is an

ameliorative program. The second, related obstacle, is that the government may cancel an ameliorative program at any time.

These obstacles to the recognition of disability-related supports can be seen in *Ball v. Ontario (Community and Social Services)*, a challenge to the Ontario government's "special diet allowance".[75] As part of Ontario Works and Ontario Disability Support Program benefits, individuals with certain types of disabilities who have specific dietary needs are provided with a pre-defined financial supplement intended to offset some of the expense of these dietary needs. Before the Human Rights Tribunal of Ontario, the applicants argued that the special diet allowance discriminated against some individuals with disabilities whose dietary needs are not funded or are inadequately funded through the special diet allowance. In response, the provincial government argued that the program could not be discriminatory, as it is a special program designed to assist persons who are disadvantaged because of disability.[76]

The Tribunal rejected the government's claim, finding that the protection provided for ameliorative programs only "addresses challenges from those whose needs do not fall within the purpose or underlying rationale of the program."[77] The Tribunal found that the program's underlying rationale was "… to assist in alleviating the disadvantage of persons with disabilities and to support substantive equality by funding certain additional dietary costs that result from disability."[78] Therefore, if a claimant was able to demonstrate that their disability required a special diet with higher costs and the program did not provide funding or provided inadequate funding for the additional costs, that would be sufficient to establish that the program discriminated against him or her on

the basis of disability.[79] The Tribunal found that each of the three claimants in the case before it established that their special diet needs fell within the underlying rationale of the program and that they were not provided with funding for the additional costs. Thus, the Tribunal held that the denial of these claimants' funding constituted disability-discrimination and could not be defended on the basis that the special diet program was ameliorative. However, following the release of the Tribunal's decision, the Ontario government announced its plan to cut the special diet allowance entirely.[80] The obstacles to seeking disability-related supports that are part of an ameliorative program are especially important to bear in mind because, as discussed below, claimants have been more successful in seeking supports where their claims were framed as a gap in the law.

E. Limits to Substantive Remedies Ordered

In the rare case where those seeking to enforce a right to a disability-related support have been successful, the orders made by courts reveal the substantive limits to judicial recognition of rights to disability-related supports. In other words, even where successful, claimants are not necessarily given the remedy sought or a remedy that will necessarily end the substantive inequality. For example, in *Eldridge v. British Columbia (Attorney General)* [*Eldridge*], the Court found that the failure to provide sign language interpretation to deaf patients seeking hospital services violated equality rights. However, it was left to government to determine when sign language interpreters are necessary for deaf patients to communicate effectively with physicians.[81] Similarly, in *G.(J.)*, where the Court found that the failure to provide an unsophisticated,

impecunious parent with state-funded counsel violated her right to security of the person, the Court did not order the government to rectify its legal aid policy to provide all impecunious litigants with state-funded counsel for custody proceedings. Instead, the Court emphasized the vested discretion in trial judges to order state-funded counsel on a case-by case basis and provided factors for trial judges to consider in determining whether such funding was required to ensure the fairness of a custody hearing.[82]

Arguably, courts may be justified in fashioning such remedies on the basis that they should not intrude "into the legislative sphere beyond what is necessary."[83] Nevertheless, the limits to substantive remedies that will be ordered by courts pose a significant obstacle to those seeking disability-related supports. While claimants may be granted a remedy that rectifies their own situation, these decisions do not alter the provision of supports on a more widespread basis.

III. PATHWAYS TO THE RECOGNITION OF RIGHTS TO SUPPORTS

As stated in the introduction, the purpose of this paper includes identifying pathways to the establishment or recognition of a right to disability-related supports. For the purpose of this paper, the term "pathways" refers to different legislative approaches that would work towards establishing secure access to necessary disability-related supports. This section of the paper assumes that any legislative approach must operate within the fiscal constraints of government and that government is unlikely to enact legislation granting a right to disability-related supports without any limit for its fiscal reality. If a statutory right to disability-related supports does include such a limit,

the courts would likely interpret the right to include such considerations, as they have under the *Charter*.

The preceding section emphasized the obstacles to enforcing and establishing rights to supports under the *Charter* and human rights legislation. In contrast, this section draws on those obstacles to identify potential legislative pathways to the recognition of rights to supports.[84] In addition to the potential pathways suggested by Canadian jurisprudence and legislation, an examination of jurisprudence from other countries as well as international instruments is useful in finding potential pathways to the recognition of supports. As such, this section considers pathways to the recognition of supports suggested by Canadian, American, and South African jurisprudence and by the *Convention*.

A. Framing Claims to Supports as a Gap in an Existing Program or Accommodation in an Existing Service

Claimants have achieved some success where they are able to frame their claims as a gap in an existing program or service rather than the creation of a new program. In two seminal cases before the Supreme Court of Canada, claimants successfully established that existing legislation that provided benefits to people with disabilities discriminated against them based on their type of disability. In *Martin*, the Court found that provisions of Nova Scotia's workers' compensation legislation which entirely excluded chronic pain from the purview of the regular workers' compensation system violated section 15 by imposing differential treatment upon injured workers suffering from chronic pain on the basis of the nature of their physical disability.[85] In that case, the Court emphasized that the provisions at issue did not further the

ameliorative purpose of the legislation, as the provisions deprived injured workers of an opportunity to establish the validity of their individual claims for compensation on a fair basis. The legislation at issue provided for the benefit sought by the claimants generally (workers' compensation), thus they were able to frame their claim as a gap in an existing program.

Similarly, in *Eldridge*, claimants were able to enforce rights to disability-related supports (sign language interpretation) by framing their claim as an accommodation required to access an existing government program (medical services). In that case, the Supreme Court held that where sign language interpretation is necessary for deaf patients to communicate effectively with their doctors, sign language interpretation is an integral part of the medical services provided. It is "the means by which deaf persons may receive the same quality of medical care as the hearing population."[86] While the judgment in *Eldridge* provides that deaf persons must be able to communicate with their physicians, which may require the provision of sign language interpretation in some cases, it does not impose a freestanding obligation on government to provide deaf persons with sign language interpretation.[87]

In *Martin* and *Eldridge*, it is central to the claimant's success that the disability-related support that is being sought can be framed as a gap in an existing program or an accommodation required to access an existing program. While the claims in these cases cannot be classified as strictly negative, they fall closer to the negative rights end of the spectrum because a finding of discrimination does not mean that the government is under a constitutional obligation to provide the benefit sought. Instead, once the government has provided a benefit, it is under a constitutional obligation to do so in a

non-discriminatory manner. In other words, had the government not already chosen to provide the program or benefit at issue in each case, the claims would have failed.

The ability to frame a claim to supports as a gap in an existing program does not guarantee the success of that claim, as evidenced by *Gosselin*, where the claim was framed as a gap in the government's provision of welfare benefits but failed nonetheless. However, as seen in *Auton* and *Wynberg*, a freestanding claim to disability-related supports is less likely to be successful because courts are largely unwilling to impose freestanding constitutional obligations on government. Thus, where possible, claimants should attempt to frame their claims to supports as a gap in an existing program or service because this may enhance their success in achieving access to disability-related supports. Admittedly, not all claims for supports can be framed as gaps in existing programs and therefore many necessary disability-supports may be excluded, but it is one option for enforcing rights to supports.[88]

However, this not only suggests litigation strategy, but also a legislative approach to establishing a right to supports. In fact, to the extent that a person is seeking an accommodation in an existing program, the government has already implemented this legislative pathway by imposing a duty on public and private entities to accommodate persons with disabilities under Ontario's *Human Rights Code* [*Code*].[89] While the *Code* does place a legal obligation on government to accommodate persons with disabilities in existing programs, that duty does not address government obligations where the program or service at issue is not already being provided.

On one hand, limiting the duty to accommodate to existing programs may allow the legislature to define the limits of the right and to allay some of the courts' fears

regarding the expenditure of public resources. On the other hand, as one expert we spoke with suggested, the definition of the duty to accommodate under the *Code* could be expanded by the legislature to include circumstances where the support sought is not already one provided by government. Redefining the parameters of the duty to accommodate is beyond the scope of this paper, however it is a possibility that deserves both scholarly and legislative attention.

B. Statutory Language that Promotes Substantive Equality

As discussed above, where the framework used to adjudicate claims for supports is based on a formal approach to equality, even if only implicitly, such claims are likely to fail. Thus, Canadian jurisprudence suggests that any right to supports must be based in substantive equality.[90]

One way claimants may do so is by using contextualized comparative analyses in their claims.[91] In *Andrews*, McIntyre J. emphasized that equality is "a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises."[92] If the analysis for disability supports is focused on contextual needs, as the claimants attempted to do in *Auton* for example, substantive outcomes are more likely to be realized. Indeed, a contextual approach may be particularly relevant for those seeking disability-related supports as the need of people with disabilities for certain supports may be heightened by their membership in other disadvantaged groups, such as older adults or women. In assessing the social context of an impugned distinction, it should

be relevant to courts that, for example, the sub-group of older persons with disabilities has been historically marginalized in our society.

While the Law Commission cannot direct the courts' interpretation of equality principles, the legislature could provide greater clarification to ensure that all disability-related rights are interpreted so as to encourage substantive rather than formal equality. In the sections that follow, the paper reviews American and international examples of how such an approach might be included in Ontario statutes

1. Olmstead and Cedar Rapids: American Recognition of Rights to Supports

This section focuses on American cases that relate to statutes that establish specific and substantive rights to supports for persons with disabilities.[93] An examination of two significant American cases regarding disability-related supports shows the potential for language in benefit-conferring statutes to promote substantive, equitable outcomes.

In *Olmstead v. L.C.* [*Olmstead*], the United States Supreme Court considered the government's obligation to place persons with mental disabilities in community settings rather than institutions in the context of anti-discrimination legislation, the *Americans with Disabilities Act* (*ADA*).[94] The opening provisions of the *ADA* set out the findings of Congress, which are applicable to all parts of the statute. These include:

> (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
>
> (3) discrimination against individuals with disabilities persists in such critical areas as … institutionalization …; …

> (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, … failure to make modifications to existing facilities and practices, … [and] segregation …[95]

The majority of the Court in *Olmstead* found that the prohibition of discrimination, requires the State to provide,

> …community-based treatment for persons with mental disabilities [rather than institution-based treatment] when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restricted setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.[96]

The Court emphasized that the recognition of undue segregation as discrimination reflects two legislative judgments: undue institutionalization perpetuates stereotypes that the isolated persons are incapable of participating in community life, and that institutionalization severely diminishes an individual's ability to participate in community life.[97] Because the legislation in issue specifically recognized that substantive equality requires, where possible, the inclusion of persons with disabilities, the statutory language buttressed the majority's conclusion that the government had a positive obligation to provide community-based treatment to qualified persons with disabilities.

In *Cedar Rapids Community School Dist. v. Garret F.* [*Cedar Rapids*], the United States Supreme Court considered the State's obligation to provide one-on-one nursing services for students with disabilities in the context of the *Individuals with Disabilities Education Act* (*IDEA*), federal legislation designed to ensure free appropriate public education for children with disabilities.[98] The *IDEA* authorizes federal financial assistance to States that provide children with disabilities with special education and "related services".[99] In finding that the State has an obligation to provide a student dependent on a ventilator with nursing services during school hours, the majority

emphasized the wording and purposes of the *IDEA*.[100] It highlighted the fact that the *IDEA* expressly requires that children with disabilities be educated with children who do not have disabilities to the maximum extent appropriate and defines "related services" to encompass supportive services that "may be required to assist a child with a disability to benefit from education."[101] The majority explained that the purposes of the *IDEA* required the State to fund the services sought in order to ensure that children with disabilities are integrated into public schools.[102]

In both *Olmstead* and *Cedar Rapids*, the majority's consideration of the language used in the legislation at issue is critical to the finding that the State is obliged to provide the respective supports sought by claimants. The explicit indication in the *ADA* that undue institutionalization is discrimination supports the finding that the State has a positive obligation to provide treatment to qualified persons with disabilities in community-based settings. Similarly, the wide definition of "related services" in the *IDEA*, coupled with its emphasis on integrated education, promotes the view that States are required to provide students with the nursing services they require to remain in public schools.[103] These cases suggest that statutory language that promotes substantive equality may be relied upon in establishing and enforcing rights to disability-related supports. Where broad definitions of services are used, and the purposes of the legislation are explicitly set out, people with disabilities may be able to rely on the statutes to impose a positive obligation on government to provide disability-related supports.

2. The Convention on the Rights of Persons with Disabilities: International Recognition of Rights to Supports

Similar to the language used in the *ADA* and *IDEA*, the use of participatory, inclusive language that promotes substantive equality is also evident in the *Convention*.[104] Unlike the *Charter* and human rights statutes in Canada, the *Convention* goes further than prohibiting discrimination by explicitly requiring States to take positive action to remove barriers faced by people with disabilities to their "participation as equal members of society".[105] The use of inclusive, participatory language throughout the *Convention* is significant, because it focuses "on the societal dimension of the rights experience, thereby departing from human rights' traditional emphasis on the relationship of the individual to the state."[106]

The right to "full and effective participation and inclusion in society" is one of the *Convention*'s "General Principles".[107] The *Convention* explicitly recognizes the right to participate "in public and political life"[108] and the right to participate in "cultural life, recreation, leisure and sport,"[109] both of which are supplemented by a number of provisions that elucidate their scope. As Frédéric Mégret has explained,

> The vision of a "right to participation," however, goes further than these two rights taken together. Lack of participation in society and in the community are seen both as an inherent part of the very definition of disability, a cause of persons with disabilities' dismal rights experience, and what the Convention seeks to combat primarily. The whole Convention is infused by this notion of "participation" being something akin to a right more generally. That right goes beyond participation as the ability to stand and vote for public office, for example, or participate specifically in "cultural life, recreation, leisure and sport."[110] Rather, it is a broader demand, made not only to the state but also to society, to allow persons with disabilities to fully become members of society and the various communities of which they are part.[111]

For example, the right to education ensures that people with disabilities can access an inclusive, quality, and free primary and secondary education on an equal basis with others in the communities in which they live, and are not excluded from the general

education system because of their disability.[112] The express provision for inclusive education is similar to the approach of the American *IDEA*. As seen in *Cedar Rapids*, this express provision may provide courts with legislative direction regarding educational supports.

3. Application to the Ontario Context

The potential for inclusive, statutory language (such as that used in the *ADA*, *IDEA* and the *Convention*) to promote judicial recognition of rights to supports may be elucidated by an example in the Canadian context. In *Eaton v. Brant County Board of Education* [*Eaton*], the Supreme Court had an opportunity to consider whether the placement of Emily Eaton, a student with a disability, in a segregated classroom amounted to discrimination under section 15 of the *Charter*. The Ontario Court of Appeal had found that the *Charter* and Ontario's *Human Rights Code* require a presumption in favour of the integration of students with disabilities; however, the Supreme Court unanimously rejected that contention.[113] Instead, the Court found that in determining whether a child with a disability should be taught in an integrated setting, "the decision-making body must determine whether the integrated setting can be adapted to meet the special needs of an exceptional child."[114] In the result, the Court upheld the initial determination that Emily Eaton should be placed in a segregated special education class.

While *Eaton* was an Ontario case, the Court did not apply Ontario's current legislation relating to education, presumably because the applicable provision is contained in a regulation that came into effect after the facts under review in that case.

Under Ontario's current legislation relating to education, the process to be used by the committee tasked with determining what placement would be most appropriate for an "exceptional pupil" is set out as follows:

> 17. (1) When making a placement decision … the committee shall, before considering the option of placement in a special education class, consider whether placement in a regular class, with appropriate special education services,
>
> (a) would meet the pupil's needs; and
>
> (b) is consistent with parental preferences.
>
> (2) If, after considering all of the information obtained by it or submitted to it … that it considers relevant, the committee is satisfied that placement in a regular class would meet the pupil's needs and is consistent with parental preferences, the committee shall decide in favour of placement in a regular class.[115]

At present, there is little jurisprudence considering the effect of section 17, which means that it is unclear whether the provision merely requires that regular placement be considered first, or creates a presumption in favour of integration.[116] However, if the *Education Act* contained a clear presumption in favour of integration at the time Emily Eaton's placement decision was made, the Supreme Court may have found that she should have been placed in an integrated classroom, with the corresponding need for the government to adapt the integrated setting to meet Emily's needs.

Indeed, it is still possible for section 17 to have this effect if courts were to interpret it as mandating a presumption of inclusion. The point is simply that explicit statutory language that promotes inclusion may enhance claims to disability-related supports. If an explicit obligation on government to integrate students with disabilities in "regular classrooms" was included in Ontario legislation, such as the *Education Act* or its Regulations, this might influence courts' interpretation of government obligations to provide disability-related supports. In the context of education, such language might buttress the conclusion that the government is required to provide disability-related

supports that a student requires in order to remain in class with students without disabilities, as the United States Supreme Court found in *Cedar Rapids*.[117]

Similarly, the use of inclusive statutory language in other sectors, such as transportation, might influence the courts' interpretation of government obligations to provide disability-related supports. If the legislature introduced inclusive language in transportation legislation, such as a requirement that mass transit be accessible to persons with disabilities, it is much more likely that a court would find that the government is obliged to provide the auxiliary aids necessary to ensure that persons with disabilities can access mass transit. In fact, the Supreme Court of Canada has already indicated its willingness to use inclusive legislative language to impose positive obligations on government in the context of healthcare. In its unanimous judgment in *Eldridge*, the Court noted that American legislation, including the *ADA*, specifically imposes a requirement on health care providers to supply appropriate auxiliary aids and services, including qualified sign language interpreters, to ensure "effective communication" with deaf persons.[118] This arguably influenced the Court's conclusion that section 15 requires government to provide sign language interpretation where it is necessary for "effective communication" between deaf persons and their physicians.[119]

It is worth noting that if the legislature was prepared to use inclusive statutory language to expand the scope of disability-related supports there might be fewer legal claims in court, as presumably the supports would be more inclusive from development and there would be less need to engage in litigation to enforce those rights.

C. Statutory Language that Recognizes Fiscal Constraints

As noted above, a significant obstacle to the recognition of rights to supports in Canadian jurisprudence is the courts' deference to government allocation of scarce resources. While it is certainly true that government funding is limited, persons with disabilities cannot achieve substantive equality if fiscal constraints are used to negate their rights to disability-related supports entirely. With these realities in mind, this section seeks to identify potential legislative pathways to the recognition of rights to supports that might address courts' concerns regarding limited government resources but at the same time affirm the right to disability-related supports.

1. South African Socio-Economic Rights

Unlike Canada and the United States, South Africa's constitution explicitly provides for socio-economic rights.[120] Because of this notable difference, it is useful to look to South African jurisprudence as it helps to show how legislatures can craft laws that provide for the rights to supports and how the judiciary can enforce such rights, while taking into account the limited resources of government. In two landmark decisions, the Constitutional Court elucidated its interpretation of the scope of socio-economic rights under South Africa's constitution.

In *Government of the Republic of South Africa and Others v. Grootboom and Others* [*Grootboom*], the claimant sought to enforce a constitutional right of access to adequate housing.[121] In *Minister of Health and Others v. Treatment Action Campaign and Others (No. 2)* [*T.A.C.*], the claimant sought to enforce a constitutional right of

access to health care services.[122] Central to the Court's interpretation in each case is the language setting out socio-economic rights in South Africa's constitution, which has two components. First, that "everyone has the right of access" to the specified rights, and second that "the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of" the right(s).[123]

In *Grootboom*, the Court found that the state housing program in question fell short of the State's constitutional obligation to provide a right of access to adequate housing because the program failed to provide any form of relief to those desperately in need of access to housing in face of the acute housing shortage in the area at issue.[124] In reaching this conclusion, the Court paid careful attention to the express qualifications placed on socio-economic rights guaranteed in South Africa's constitution. The Court emphasized that the precise content of the State's obligation to provide adequate housing is primarily a matter for the legislative and executive branches of government, and that the content is governed by the availability of resources.[125] The Court's concern for the limited resources of government is evident, for example, in the remedy it ordered. While the lower court had ordered that the State was required to provide shelter and housing immediately upon demand, the Constitutional Court found that the constitutional right to adequate housing did not impose this obligation on the State, but instead obliged it to provide a coherent program to meet its obligations.[126] In addition to the availability of resources, the Court focused on the context surrounding the claim. One of the reasons the Court found that the lack of short-term housing measures was unreasonable was that the nationwide housing program could not provide affordable

houses for most people within a reasonably short time because of the scale of the nationwide housing crisis.[127]

In *T.A.C.*, where the claimant sought to enforce a constitutional right of access to health care services, the Court reaffirmed the balanced approach taken to enforcing socio-economic rights set out in *Grootboom*.[128] In *T.A.C.*, the Court found that the government failed to meet its constitutional obligation to provide access to health care services by refusing to make available a drug which reduces the risk of mother-to-child transmission of HIV even where it was medically indicated. It also breached its obligations by failing to make provision for training all counselors at hospitals and clinics on the use of this drug as a means of reducing mother-to-child transmission of HIV.[129]

The Court affirmed that the right of access to health services is not a free-standing right with reference to the express qualifications on that right, including that the measures adopted are "within [the State's] available resources." This qualification buttressed the conclusion that courts are not suited to "rearranging budgets."[130] The remedy ordered by the Court expressly recognized that it was open to government to adapt its policy in a manner consistent with the Constitution if equally appropriate or better methods became available to it for the prevention of mother-to-child transmission of HIV. Further, the Court declined to impose a timeframe on government for developing a national program to prevent mother-to-child transmission of HIV.[131] While the relief ordered by the Court in *T.A.C.* certainly went further into the content of the government's obligation than in *Grootboom*, the Court nevertheless recognized both the need to balance government obligations with limited resources and the scope of the judiciary's role.

In both cases, the Court focused on the actual circumstances of the claimants in determining whether the State had met its constitutional obligations, including looking at the issues in each case "in their social, economic and historical context."[132] The courts' determinations of whether the program provided by the government met its constitutional obligations involved a contextual analysis of the remedial purpose of the program and the actual circumstances of the claimants. Further, the Court respected the limited resources available to government and the primary role of the legislative branch of government in defining the scope of its obligations.

2. Application to the Ontario Context

The cases of *Grootboom* and *T.A.C.* demonstrate that it is possible for the judiciary to enforce rights to supports while recognizing the limited funding of government and the scope of the judiciary's role. While rights to socio-economic supports are not constitutionally guaranteed in Canada, a new statutorily recognized right to disability-related supports could expressly recognize that the right is limited by available resources, as the South African constitution does. Narrowing or restricting statutory rights to supports by expressly recognizing fiscal constraints may help respond to the concerns of Canadian courts and the legislature regarding the government's allocation of scarce resources. Instead of allowing fiscal considerations to justify the infringement of a *Charter* right under section 1, courts might instead consider fiscal considerations as restricting the ambit of the support sought under section 7 and/or section 15.

There is a risk that such restrictions on statutory rights to supports may make it more difficult for claimants to enforce those rights, depending on where the burden fell to demonstrate the possibility of providing supports within available resources. Further, if the burden was placed on claimants to demonstrate the possibility of providing supports within available resources, it is likely that there would be fewer cases litigated in courts regarding the provision of disability-related supports due to this increased burden on claimants. Nonetheless, restricting rights to supports, either by recognizing fiscal constraints or in another manner, is an important potential pathway to the recognition of rights to supports. This type of restriction responds to judicial concerns that the allocation of scarce resources is a matter for the legislative branch of government. A fiscal restriction in the provision of supports also respects the fact that government resources are limited. Such a restriction is particularly useful where the supports do not exist and cannot be characterized as an accommodation within an existing program.

D. Incorporating Universal Design

As discussed above, claimants have achieved greater success in legal claims for disability-related supports where they are able to frame their claims as a gap in an existing program or service rather than the creation of a new program. This suggests that an important legislative pathway to the recognition of rights to supports is to broaden the scope of existing and new programs to include the widest possible segment of persons with disabilities. An examination of the *Convention* provides some direction on how legislation might be used in this manner.

1. The Convention's Principles of Universal Design

One of the general obligations of States under the *Convention* is to "undertake or promote research and development of universally designed goods, services, equipment and facilities … and to promote universal design in the development of standards and guidelines."[133] The *Convention* defines "universal design" as the "design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design", but notes that "'universal design' [should] not exclude assistive devices for particular groups of persons with disabilities where this is needed.[134] Encouraging or requiring government to consider universal design in the determination of what supports it will provide may lead to the provision of supports that are accessible to a wider range of persons with disabilities.

Martin, discussed above, provides an example of how universal design might influence the provision of supports. If the Nova Scotia government had considered universal design in crafting the province's workers' compensation scheme it may have guided the government to include workers suffering from chronic pain in the regular scheme (instead of its decision to exclude them), since that would make the scheme usable by more persons. [135]

2. Application to the Ontario Context

At present, the federal government and several provinces and municipalities are either considering or already using the principles of universal design in creating and

evaluating government policies and programs by adopting a "disability lens" or "accessibility lens".[136] A "disability lens" is a tool for government policy and program developers to identify, consider and address the impacts of any initiative (policy, program or decision) on persons with disabilities. The lens is essentially a checklist of questions that is posed about government initiatives to ensure that they include and respect persons with disabilities and do not have unintended adverse effects.[137] In Ontario, the Ontario Public Service Diversity Office has developed an accessibility lens that is currently in draft form and is expected to be launched in September 2010. However, it is still unclear whether the accessibility lens will be published or whether it will remain an internal document.[138] Thus, the Law Commission could encourage government to make the accessibility lens available publicly and to carry out public consultations with disability organizations with respect to the content of the accessibility lens. It could also recommend a legislative requirement that the government consider universal design and/or the accessibility lens when enacting new programs and policies, and/or when reviewing existing ones.

IV. CONCLUSION

As the Law Commission of Ontario has recognized, the complexity of the legal issues affecting persons with disabilities means that a principled, analytic framework is required. In this context, this paper has sought to evaluate the elements of judicial analysis in Canada that act as obstacles to the enforcement of rights to disability-related supports. It found that the major obstacles to judicial enforcement of disability-related supports are the reluctance to impose positive obligations on government; a formal

approach to equality; deference to government allocation of scarce resources; difficulties with challenging ameliorative programs; and the limits to remedies that will be ordered.

At present, it is clear that Canadian courts are largely unwilling to impose positive obligations on government under the *Charter* and human rights statutes. While the significant obstacles to enforcing rights to supports through the *Charter* should not foreclose these kinds of legal challenges, the obstacles make it clear that such challenges cannot be the only pathway to the recognition of rights to supports if substantive equality is to be achieved.

Our review of Canadian jurisprudence and international sources has suggested that law reform initiatives may also be a significant pathway to achieving substantive equality. Legislation that explicitly promotes the inclusion and participation of people with disabilities but also recognizes fiscal limitations has the potential to respond to the judiciary's reluctance to impose positive obligations on government, its deference to government's allocation of resources, and governmental concerns on the potential cost of a right to disability-related supports. Based on the paper's findings, the authors make the following recommendations for law reform:

- The legislature should explicitly recognize the importance of substantive equality rather than formal equality in the interpretation of all Ontario statutes, particularly the *Human Rights Code*
- The importance of rights to supports for persons with disabilities should be explicitly acknowledged in benefit-conferring legislation

- Legislation that is specifically geared to persons with disabilities should use language that facilitates the inclusion and participation of persons with disabilities
- If necessary, a broad recognition of a right to disability-related supports could recognize fiscal limitations to their provision
- Government should consider universal design when enacting new programs and policies, and/or when reviewing existing ones

ENDNOTES

[*] The authors wish to thank Mary Eberts, Martha Jackman, Kerri Joffe, Laurie Letheren, Ed Montigny, Yvonne Peters and Dianne Wintermute for consulting with us regarding potential pathways to the recognition of disability-related supports.

[1] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 [*Andrews*] at paras. 27 and 36, quoting Aristotle, *Ethica Nichomacea*, trans. W. Ross, Book V3 (Gloucestershire: Clarendon Press, 1925) at 1131a-6.

[2] *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 [*Eaton*] at para. 69.

[3] *Purvis v. New South Wales (Department of Education and Training)*, [2003] HCA 62 [*Purvis*] McHugh and Kirby JJ., dissenting at para. 86.

[4] Law Commission of Ontario, *The Law As It Affects Persons with Disabilities, Preliminary Consultation Paper: Approaches to Defining Disability* (June 2009) [LCO, *Defining Disability*] at 16.

[5] Raymond Lang, "The Development and Critique of the Social Model of Disability" (January 2001), University of East Anglia (unpublished), online: <http://www.ucl.ac.uk/lc-ccr/lccstaff/raymond-lang/DEVELOPMMENT_AND_CRITIQUE_OF_THE_SOCIAL_MODEL_OF_D.pdf> (last accessed: 30 April 2010) at 3.

[6] Phillip French and Rosemary Kayess, "Deadly Currents Beneath Calm Waters: Persons with Disability and the Right to Life in Australia" (2008), UNSW Law Research Paper No. 2008-34 at 8, online: Social Science Research Network, <http://ssrn.com/abstract=1397388> (last accessed: 30 April 2010). A longer version of this article is published in L. Clements and J. Read, eds., *Disabled People and the Right to Life: The Protection and Violation of Disabled People's Most Human Rights* (Oxford, UK: Routledge, 2008). See also Jenny Morris, "Impairment and Disability: Constructing an Ethics of Care That Promotes Human Rights" (Fall 2001) 16:4 Hypatia 1 at 2.

[7] LCO, *Defining Disability*, note 4 at 26-27, 30.

[8] *Canadian Charter of Rights and Freedoms*, enacted as Schedule B to the *Canada Act, 1982*, (U.K.) 1982 c. 11 [*Charter*]. In contrast to the language setting out rights to equality and rights to life, liberty, and security of the person under sections 15 and 7 of the *Charter* respectively, the provision setting out

minority language educational rights under the *Charter* explicitly imposes a positive obligation on government:

> 23 (1) Citizens of Canada
>
> (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
>
> (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,
>
> have the right to have their children receive primary and secondary school instruction in that language in that province.

The wording of section 23 imposes an obligation on government to provide education to English or French linguistic minorities in that language.

[9] See, for example, the Supreme Court's statements in *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927 at 1003-1004 [*Irwin Toy*] and *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84 [*Gosselin*] at para. 82, and the outcomes in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657, 2004 SCC 78 [*Auton*]; *Sagharian v. Ontario (Education)*, [2008] O.J. No. 2009, 2008 ONCA 411 [*Sagharian*]; *Wynberg v. Ontario*, [2006] O.J. No. 2732 [*Wynberg*]; and *Flora v. Ontario (Health Insurance Plan, General Manager)*, [2008] O.J. No. 2627, 2008 ONCA 538 [*Flora*].

[10] This was the case in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 [*Eldridge*] discussed more fully below.

[11] *Convention on the Rights of Persons with Disabilities*, U.N. GAOR, 61st Sess., Item 67(b), U.N. Doc. A/61/611 (2006) (entered into force 3 May 2008, ratified by Canada 11 March 2010) [*Convention*], online: United Nations, <http://www.unhcr.org/refworld/docid/45f973632.html> (last accessed: 15 April 2010).

[12] Law Commission of Ontario, "Learn About Us", <http://www.lco-cdo.org/en/content/learn-about-us> (last accessed: 17 May 2010).

[13] *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at para. 77. This case concerned the constitutionality of legislation (i) prohibiting strikes and imposing compulsory arbitration to resolve impasses in collective bargaining and (ii) relating to the conduct of arbitration and limiting the right to arbitrate certain items, and requiring the arbitration board to consider certain factors in making an arbitration award. The majority of the Court answered both questions in the negative, holding

that the constitutional guarantee of freedom of association under section 2(d) of the *Charter* does not guarantee the right to strike, nor does it guarantee a specific form of dispute resolution as a substitute for the right to strike.

[14] *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94 [*Dunmore*] at para. 22.

[15] *Dunmore*, note 14; *Ontario Labour Relations Act, 1995,* S.O. 1995, c. 1, Sched. A [*Labour Relations Act*]. In this case, the majority of the Court found that Ontario's *Labour Relations Act* is designed to safeguard the exercise of the freedom to associate. As such, the *Labour Relations Act* recognizes that without a statutory vehicle, employee associations are, in many cases, impossible. The majority held that in the particular context of this case, where the evidence demonstrated that agricultural workers were substantially incapable of exercising their freedom to associate without legislative protection, the provision at issue violated section 2(d) of the *Charter* and could not be saved under section 1.

[16] See e.g. *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 [*Suresh*]; *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7 [*Burns*].

[17] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 502-503, 511-513. In addition to the specific legal rights listed in sections 8 through 14 of the *Charter*, the principles of fundamental justice include: intelligible legal standards (*R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606); lack of arbitrariness (*Chaoulli v. Québec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35 [*Chaoulli*]); and proportionality (*Suresh*, note 16; *Burns*, note 16).

[18] *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44.

[19] *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.

[20] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 [*G. (J.)*].

[21] *Chaoulli*, note 17.

[22] *Irwin Toy*, note 9 at 1003-1004.

[23] *G. (J.)*, note 20.

[24] *G. (J.)*, note 20 at paras. 6, 75-80, 91, 116, 119, 120, 126.

[25] *Gosselin*, note 9. The legislation at issue in *Gosselin* capped the base amount of welfare payments (by two-thirds of the regular amount) to welfare recipients under the age of thirty, however those under the age of thirty could increase their welfare payments, over and above the basic entitlement, to the same or

nearly the same level as those in the thirty-and-over group by participating in training or work experience employment programs. The record before the Supreme Court indicated that although there were 85 000 welfare recipients in Québec under the age of thirty, only 30 000 placements in these programs were initially made available (and those placements were also open to welfare recipients over the age of thirty). The record before the Court also indicated that at least two-thirds of the recipients under the age of thirty at times received only $170 a month in benefits. Louise Gosselin challenged Québec's legislation on three grounds: (1) as age discrimination in violation of section 15; (2) as a violation of the right to security of the person under section 7; and (3) as a violation of the anti-discrimination guarantee under the Québec *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12. The Supreme Court split on each issue, with five members of the nine member panel dismissing the appeal on all grounds. Of particular relevance were the following provisions of Québec's *Social Aid Act*, R.S.Q., c. A-16, as amended by *An Act to amend the Social Aid Act*, S.Q. 1984, c. 5 (repealed by *An Act respecting income security*, S.Q. 1988, c. 51, s. 92) and Québec's *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1:

Social Aid Act, R.S.Q., c. A-16

> 11. The Minister may propose a recovery plan to a family or individual who is receiving or who applies for social aid. The recovery plan may include, in particular, the participation of an individual or a member of a family in a program of work activities or a training program established by the Minister in view of developing the recipient's qualifications for an employment. The criteria of eligibility to a program established under the second paragraph may take the recipient's age into account.
>
> 11.1 The Government, by regulation, shall designate to which work activities programs or training programs sections 11.2 to 11.4 apply.
>
> 11.2 In the case of an individual or a family having no dependent child, needs relating to a recipient's participation in a designated program are special needs to the extent determined by regulation for each program. In all other cases, needs described in the first paragraph are special needs to the extent determined by the Minister for each recipient, but not in excess of the amount determined by regulation.
>
> 31. In addition to the other regulatory powers assigned to it by this act, the Gouvernement [*sic*], subject to the provisions of this act, may make regulations respecting:
>
> > (*e*) the extent to which the ordinary needs of a family or individual may be met through social aid and the methods whereby such needs must be proven and appraised; in determining what the aid shall be, account may be taken of the age or capacity for work of an individual or of the members of a family having no dependent children, having had no children who are deceased, or the fact that a family or individual is living with a relative or a child;

Regulation respecting social aid, R.R.Q. 1981, c. A-16, r. 1

(This is the text of the pertinent sections of the Regulation as it appeared on April 17, 1985.)

23. The ordinary needs of a household shall be determined in terms of its members, each month, according to the following scale:

Adults	*Dependent children*	*Ordinary needs*
1	0	357 $
1	1	488
1	2 and over	526
2	0	568
2	1	615
2	2 and over	651

However, the ordinary needs can be accorded only insofar as the costs a household incurs for lodging on a monthly basis within the meaning of section 27 are equal to or greater than 85 $ for a family and 65 $ for a single person. The ordinary needs are reduced by the amount by which these costs fall short of these amounts.

29. Aid for ordinary needs shall not exceed:

(*a*) 121 $ per month, in the case of an individual capable of working and less than 30 years of age;

(*b*) twice the monthly amount prescribed in subparagraph *a* for a family without dependent children, where both consorts are able-bodied and under 30 years of age.

In the case of a family without children receiving uninterrupted aid following an application made before 1 July 1984, subparagraph *b* of the first paragraph does not apply if the said family had a child who died before 1 July 1984.

For the month in which the application was made, the amounts prescribed in the first paragraph represent the ordinary needs of the household. The latter are apportioned in the manner indicated in section 10.

35.0.1 Sections 11.2 to 11.4 of the Act shall apply to the following programs established by the Minister under section 11 of the Act:

(*a*) On-the-job Training Program;

(*b*) Community Work Program.

Section 11.2 of the Act shall also apply to the Remedial Education Program.

35.0.2 In order to develop employability, an amount of 150 $ is granted to the single person or to the adult of a family without dependent children for a complete month during which he participates in a program subject to section 35.0.1.

In the case of a participant in the Remedial Education Program whose work load established by the school is less than 60 hours per month, an amount of 150 $ is deducted on the basis of the number of hours of work in relation to 60.

35.0.5 The amount provided in section 35.0.2 or determined by the Minister under section 35.0.3, except for child care expenses, is reduced on the basis of unauthorized hours of absence under programs subject to section 35.0.1 for the said month with respect to the required hours of participation.

In the case of the Remedial Education Program, the deduction is established according to unauthorized hours of absence from classes under this program with respect to the monthly number of class hours.

35.0.6 No reduction is made when the unauthorized hours of absence do not exceed 5 % of the hours of participation established for a participant during the month.

35.0.7 The aid shall also meet the cost required by a person attending a vocational training course that makes this person eligible for an allowance under the National Vocational Training Program Act (S.C., 1980-81-82-83, c. 109).

This cost is equal to the amount of the allowance paid, as reduced under subparagraph *f* of section 40.

For recipients covered by section 29, the cost is equal to the same amount less the difference between ordinary needs under section 23 and the amount prescribed in section 29.

However, it shall not exceed:

i. for a family, 40 $ plus 5 $ per dependent child, plus 50 $ in the case of a family including only one adult;

ii. for a single person, 25 $;

The maximum provided in the fourth paragraph shall not apply to the month in which courses begin if aid for ordinary needs has been granted for at least 3 consecutive months without this paragraph having been applied during the six preceding months.

Section 35.0.2 was amended, effective August 1, 1985, by O.C. 1542-85, 24 July 1985, (1985) 117 O.G. II 3690, s. 1 as follows:

35.0.2 To assist in developing aptitudes for work, an amount is granted as a special need to the single person or to a spouse in a family without dependent children, for a complete month of participation in a program subject to section 35.0.1.

This amount is equal to the amount obtained when 100 $ is subtracted from the difference between the amount paid subject to the first paragraph of section 23, taking into account section 31, to a single person under 30 years of age and the maximum amount paid under section 29, taking into account section 31, to a single person under 30 years of age.

In the case of a participant in the Remedial Education Program whose course schedule is under 60 hours per month, the amount is reduced to a prorata of the number of actual course hours with respect to 60.

The Regulation was amended, effective April 30, 1986, by *Regulation respecting social aid (Amendment)*, O.C. 555-86, 23 April 1986, (1986) 118 O.G. II 605, ss. 1, 3:

23. The ordinary needs of a household shall be determined in terms of its members, each month, according to the following scale:

Adults	*Dependent children*	*Ordinary needs*
1	0	448
1	1	609
1	2 and more	659
2	0	712
2	1	769
2	2 and more	815

However, the ordinary needs of a household living with a parent ora child are reduced by 85 $.

In all other cases, the ordinary needs are reduced by the amount by which the costs incurred by the household for lodging on a monthly basis within the meaning of section 27 are less than 85 $ for a family or less than 65 $ for a single person.

29. Aid for ordinary needs shall not exceed:

(*a*) 163 $ per month, in the case of an individual capable of working and less than 30 years of age;

(*b*) twice the monthly amount prescribed in subparagraph *a* for a family without dependent children, where both consorts are able-bodied and under 30 years of age.

The amounts provided for in the first paragraph are increased by 8 $ per adult except:

(*a*) when the household lives with a parent or child;

(*b*) when a single person lives with a foster family;

(*c*) when the household lives in housing administered by a municipal housing bureau constituted under the Act respecting the Sociétéd'habitation du Québec (R.S.Q., c. S-8).

In the case of a family without children receiving uninterrupted aid following an application made before 1 July 1984, subparagraph *b* of the first paragraph does not apply if the said family had a child who died before 1 July 1984.

For the month in which the application was made, the amounts prescribed in the first paragraph represent the ordinary needs of the household. The latter are apportioned in the manner indicated in section 10.

[26] *Gosselin*, note 9 at para. 81.

[27] *Gosselin*, note 9 at para. 325.

[28] *Gosselin*, note 9 at paras. 369-377.

[29] *Auton*, note 9; *Sagharian*, note 9; *Wynberg*, note 9. *Sagharian* was a proposed class proceeding to challenge the provision of autism and education services to children with autism, initiated on behalf of all children with autism in Ontario and their parents and guardians against the province and seven named school boards. The plaintiffs' claims included negligence, breach of fiduciary duty, breach of sections 7 and 15 of the *Charter* and *Charter* damages. In the result, almost every ground claimed was struck, though the Court of Appeal did give the plaintiffs leave to amend their claims in negligence and for *Charter* damages. *Auton* is discussed more fully at pages 18-20.

[30] *Wynberg*, note 9 at paras. 212, 216.

[31] *Wynberg*, note 9 at para. 229; *Education Act*, R.S.O. 1990, c. E.2 [*Education Act*]; *Wynberg v. Ontario*, [2005] O.J. No. 1228, 252 D.L.R. (4th) 10 [*Wynberg* Trial Decision] at para. 755.

[32] *Wynberg*, note 9 at para. 218.

[33] *Flora*, note 9. In this case, Mr. Flora challenged the validity of section 28.4(2) of Ontario Regulation 552, R.R.O. 1990, made under Ontario's *Health Insurance Act*, R.S.O. 1990, c. H.6, which provides that:

> 28.4 (2) Services that are part of a treatment and that are rendered outside Canada at a hospital or health facility are prescribed as insured services if,
>
> (a) the treatment is generally accepted in Ontario as appropriate for a person in the same medical circumstances as the insured person; and
>
> (b) either,
>
> (i) that kind of treatment that is not performed in Ontario by an identical or equivalent procedure, or
>
> (ii) that kind of treatment is performed in Ontario but it is necessary that the insured person travel out of Canada to avoid a delay that would result in death or medically significant irreversible tissue damage.

The Court of Appeal summarized his argument of unconstitutionality at para. 93 as follows:

> Before this court, Mr. Flora renews his claim that s. 28.4(2) of the Regulation offends s. 7 of the *Charter*. He argues that: (i) the denial of his OHIP Application deprived him of access to a life-saving medical treatment, thereby violating his s. 7 rights to life and security of the person; (ii) the state also deprived him of his s. 7 rights by amending, in 1992, a predecessor version of the Regulation that would have provided funding for his LRLT on the basis of medical necessity; (iii) in any event, s. 7 imposes a positive obligation on the state to provide life-saving medical treatments, thus obviating the need for a finding of state action amounting to deprivation; and (iv) finally, s. 28.4(2) does not comport with the principles of fundamental justice. For the reasons that follow, I conclude that Mr. Flora's *Charter* s. 7 claim fails.

[34] *Flora*, note 9 at para. 109.

[35] *Flora*, note 9 at paras. 24, 26, 27.

[36] *Chaoulli*, note 17. The appellants challenged the validity of section 15 of the *Health Insurance Act*, R.S.Q., c. A-29 and section 11 of the *Hospital Insurance Act*, R.S.Q. c. A-28, which read as follows:

> 15. No person shall make or renew a contract of insurance or make a payment under a contract of insurance under which an insured service is furnished or under which all or part of the cost of such a service is paid to a resident or a deemed resident of Québec or to another person on his behalf.
>
> 11. (1) No one shall make or renew, or make a payment under a contract under which
>
> (a) a resident is to be provided with or to be reimbursed for the cost of any hospital service that is one of the insured services;
>
> (b) payment is conditional upon the hospitalization of a resident; or
>
> (c) payment is dependent upon the length of time the resident is a patient in a facility maintained by an institution contemplated in section 2.

[37] *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12 [*Quebec Charter*].

[38] *Victoria (City) v. Adams*, [2009] B.C.J. No. 2451, 2009 BCCA 563 [*Adams*]. A similar *Charter* challenge seeking to compel the federal and Ontario governments to provide affordable housing has recently been

launched by a coalition of social welfare groups (Kirk Makin, "Charter challenge aims to force governments to create public housing", Globe and Mail (26 May 2010), online: Globe and Mail <http://www.theglobeandmail.com/news/national/charter-challenge-aims-to-force-governments-to-create-public-housing/article1580971/> (last accessed: 2 June 2010). At issue in *Adams* were the following provisions of bylaws enacted by the City of Victoria:

Parks Regulation Bylaw No. 07-059:

13(1) A person must not do any of the following activities in a park:

(a) cut, break, injure, remove, climb, or in any way destroy or damage

(i) a tree, shrub, plant, turf, flower, or seed, or

(ii) a building or structure, including a fence, sign, seat, bench, or ornament of any kind;

(b) foul or pollute a fountain or natural body of water;

(c) paint, smear, or otherwise deface or mutilate a rock in a park;

(d) damage, deface or destroy a notice or sign that is lawfully posted;

(e) transport household, yard, or commercial waste into a park for the purpose of disposal;

(f) dispose of household, yard, or commercial waste in a park.

(2) A person may deposit waste, debris, offensive matter, or other substances, excluding household, yard, and commercial waste, in a park only if deposited into receptacles provided for that purpose.

14(1) A person must not do any of the following activities in a park:

(a) behave in a disorderly or offensive manner;

(b) molest or injure another person;

(c) obstruct the free use and enjoyment of the park by another person;

(d) take up a temporary abode over night;

(e) paint advertisements;

(f) distribute handbills for commercial purposes;

(g) place posters;

(h) disturb, injure, or catch a bird, animal, or fish;

(i) throw or deposit injurious or offensive matter, or any matter that may cause a nuisance, into an enclosure used for keeping animals or birds;

(j) consume liquor, as defined in the *Liquor Control and Licensing Act*, except in compliance with a licence issued under the *Liquor Control and Licensing Act*.

(2) A person may do any of the following activities in a park only if that person has received prior express permission under section 5:

(a) encumber or obstruct a footpath …

> 16(1) A person may erect or construct, or cause to be erected or constructed, a tent, building or structure, including a temporary structure such as a tent, in a park only as permitted under this Bylaw, or with the express prior permission of the Council …
>
> 18 A person who contravenes a provision of this Bylaw is guilty of an offence and is liable on conviction to the penalties imposed by this Bylaw and the *Offence Act*.

Streets and Traffic Bylaw No. 92-84:

> 73(1) Except the agents, servants or employees of the City acting in the course of their employment, no person shall excavate in, disturb the surface of, cause a nuisance in, upon, over, under, or above any street or other public place, or encumber, obstruct, injure, foul, or damage any portion of a street or other public place without a permit from the Council, who may impose the terms and conditions it deems proper.
>
> 74(1) Without restricting the generality of the preceding section or of section 75, no person shall place, deposit or leave upon, above, or in any street, sidewalk or other public place any chattel, obstruction, or other thing which is or is likely to be a nuisance, or any chattel which constitutes a sign within the meaning of the Sign Bylaw and no person having the ownership, control or custody of a chattel, obstruction or thing shall permit or suffer it to remain upon, above or in any such street, sidewalk or other public place.

[39] *Gosselin*, note 9 at para. 386.

[40] *Law v. Canada, (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [*Law*]. The approach to discrimination under federal and provincial human rights legislation is aimed at preventing the same general wrong as section 15(1), but also applies to private parties. There has been some debate as to whether the analytical framework applied to section 15 also applies to human rights claims, or whether the applicable test is that set out by the Supreme Court in the earlier case of *Ontario Human Rights Commission v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536 [*Simpsons Sears*]. Under *Simpsons Sears*, the complainant must first establish a *prima facie* case of discrimination, meaning a case "…which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the [respondent]." See note 67 below for defences available to a respondent to justify *prima facie* discrimination.

[41] *R. v. Kapp*, [2008] 2 S.C.R. 483, 2008 SCC 41 [*Kapp*] at paras. 16, 37. This case was a challenge to the federal government's Aboriginal Fisheries Strategy, which permitted fishers designated by three Aboriginal bands the exclusive right to fish for salmon in the mouth of the Fraser River for a period of 24-hours. Several commercial fishers, mainly non-aboriginal, who were excluded from the fishery during this 24-hour period, participated in a protest fishery and were charged with fishing at a prohibited time. At trial, they argued that the communal fishing licence discriminated against them on the basis of race. The

Supreme Court unanimously found that the communal fishing licence fell within the ambit of section 15(2) of the *Charter* and was therefore constitutional.

[42] *Charter*, note 8, section 32(2).

[43] *Andrews*, note 1 at para. 28. In this case, a British citizen who was a permanent resident in Canada met all the requirements for admission to the provincial bar except that of Canadian citizenship. The majority of the Court struck down the requirement for citizenship as a violation of section 15. The Court recognized that citizenship is typically not within the control of the individual, and held that a rule which bars an entire class of persons from certain forms of employment, solely on the ground of a lack of citizenship and without consideration of educational and professional qualifications or other individual attributes, is a violation of the right to equality.

[44] Martha Jackman and Bruce Porter have noted that,

> The most decisive shift from a formal to a substantive approach to equality by the Supreme Court was in a sex discrimination case brought under human rights legislation*: Brooks v. Canada Safeway* [1989] 1 S.C.R. 1219. In finding that an employee benefit plan that differentiated adversely against pregnant women violated sex equality guarantees under Manitoba human rights legislation, the Supreme Court reversed its earlier decision in the *Bliss v. Attorney General of Canada* [1979] 1 S.C.R. 83, where it had ruled that an unemployment insurance regime that provided lesser benefits to pregnant women was not discriminatory because it treated all pregnant "people" the same… (Martha Jackman and Bruce Porter, "Women's Substantive Equality and the Protection of Social and Economic Rights Under the *Canadian Human Rights Act*" in *Status of Women Canada, Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 1999) 43 at 99 n. 55).

[45] *Law*, note 40.

[46] *Law*, note 40 at para. 39.

[47] *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357, 2004 SCC 65 [*Hodge*] at paras. 17, 23.

[48] *Law*, note 40 at paras. 59-61, 88.

[49] *Law*, note 40 at paras. 63-75.

[50] See especially paras. 84-88.

[51] *Kapp*, note 41 at para. 23.

[52] *Kapp*, note 41 at paras. 21-22.

[53] As of 8 June 2010, the following Supreme Court decisions cited *Kapp*: *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, 2009 SCC 37 [*Hutterian Brethren*]; *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181, 2009 SCC 30 [*A.C.*]; and *Ermineskin Indian Band and Nation v. Canada*, [2009] 1 S.C.R. 222, 2009 SCC 9 [*Ermineskin Indian Band*].

In *Hutterian Brethren*, members of the Hutterian Brethren challenged the constitutional validity of legislation requiring a photograph to be taken of each driver's licence holder, since their religion prohibits them from having their photograph willingly taken. The focus of the judgment is on freedom of religion, with the majority of the Court finding that the violation of freedom of religion was justified under section 1. There is little discussion of equality rights since the majority of the Court found that the legislation did not violate the right to equality and the dissenting judgments of Abella J., Fish J. and LeBel J. do not address the issue.

In *A.C.*, a child and her parents who were all devout Jehovah's Witnesses challenged the constitutional validity of child welfare legislation which had permitted a court to authorize a blood transfusion for the child since she had been apprehended by the government as in need of protection and she was under 16 years old. The majority of the Court found that the legislation did not violate rights to equality, the right to life, liberty, and security of the person or freedom of religion. The discussion around equality rights is based on the comparator of age (under 16, and 16 and over), but the analysis focuses on contextual needs rather than a formalistic application of comparator groups.

Ermineskin Indian Band challenged the Crown's failure to invest oil and gas royalties received on behalf of two Aboriginal bands as a breach of its fiduciary duty and as a violation of equality rights. The Supreme Court dismissed the bands' claims. While the Court's brief discussion of equality rights recognizes that the legislation at issue drew a distinction between Indians and non-Indians, the Court's judgment focuses on the broader context of the distinction rather than a formalistic application of comparator groups.

[54] *Auton*, note 9.

[55] *Auton*, note 9 at para. 62.

[56] *Auton*, note 9 at para. 55; see also *Hodge*, note 47 and *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28 [*Granovsky*]. For an excellent discussion of this

critique, see Daphne Gilbert and Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006) 24 *Windsor Y.B. Access Just.* 111 [Gilbert and Majury].

[57] Gilbert and Majury, note 56 at 130.

[58] Gilbert and Majury, note 56 at 130.

[59] Gilbert and Majury, note 56 at 132.

[60] Gilbert and Majury, note 56 at 130-131.

[61] Gilbert and Majury, note 56 at 131.

[62] Gilbert and Majury, note 56 at 130-132.

[63] *Eldridge*, note 10.

[64] *Auton*, note 9; *Sagahrian*, note 9; *Wynberg*, note 9.

[65] See e.g. Janet Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (Montreal: McGill-Queen's University Press, 1996); and Mary Eberts, "The Charter and equality rights: The Vriend case" (September-October 1999) 7:4-5 Canada Watch, online: Robarts Centre for Canadian Studies, Canada Watch, <http://www.yorku.ca/robarts/projects/canada-watch/pdf/vol_7_4-5/eberts.pdf> (last accessed: 9 July 2010).

[66] *Irwin Toy*, note 9 at 993-994.

[67] Similarly, the defences established by legislatures in human rights statutes also incorporate cost considerations. If a complainant is able to establish that he or she has been discriminated against, the onus shifts to the respondent to establish a *bona fide* justification, which a respondent may do by demonstrating that it could not accommodate the complainant short of undue hardship. Under Ontario's human rights legislation, there are only three considerations in assessing whether an accommodation would cause undue hardship: cost, outside sources of funding, and health and safety risks (*Human Rights Code*, R.S.O. 1990, c. H.19, s. 17 (2) [*Code*]). Federal human rights legislation sets out health, safety and cost as relevant considerations for the undue hardship analysis (*Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 15(2)). Similarly, the *Saskatchewan Human Rights Code* defines undue hardship as "intolerable financial cost or disruption to business" (S.S. 1979, c. S-24.1, s. 2(1)(q)). Thus, claimants face a similar obstacle to the recognition of rights to supports under human rights statutes as they do

under the *Charter*, namely, that cost considerations may justify a refusal to provide disability-related supports.

[68] *Auton*, note 9 at paras. 35, 43.

[69] *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*] at paras. 69-71.

[70] *Cameron v. Nova Scotia (Attorney General)*, [1999] N.S.J. No. 297 [*Cameron*], leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 53.

[71] *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381, 2004 SCC 66 [*NAPE*].

[72] *Cameron*, note 70 at para. 214, citing *Eldridge*, note 10 at para. 85.

[73] *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54 [*Martin*]. The legislation at issue excluded chronic pain from the purview of the regular workers' compensation system and provided, in lieu of the benefits normally available to injured workers, a four-week Functional Restoration Program beyond which no further benefits were available. Of particular relevance were the following provisions from the Nova Scotia *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, as amended by S.N.S. 1999, c. 1 and the *Functional Restoration (Multi-Faceted Pain Services) Program Regulations*, N.S. Reg. 57/96:

> *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, as amended by S.N.S. 1999, c. 1
>
> 10A In this Act, "chronic pain" means pain
>
> (a) continuing beyond the normal recovery time for the type of personal injury that precipitated, triggered or otherwise predated the pain; or
>
> (b) disproportionate to the type of personal injury that precipitated, triggered or otherwise predated the pain,
>
> and includes chronic pain syndrome, fibromyalgia, myofascial pain syndrome, and all other like or related conditions, but does not include pain supported by significant, objective, physical findings at the site of the injury which indicate that the injury has not healed.
>
> 10B Notwithstanding this Act, Chapter 508 of the Revised Statutes, 1989, or any of its predecessors, the Interpretation Act or any other enactment,
>
> (a) except for the purpose of Section 28, a personal injury by accident that occurred on or after March 23, 1990, and before February 1, 1996, is deemed never to have included chronic pain;
>
> (b) a personal injury by accident that occurred before February 1, 1996, is deemed never to have created a vested right to receive compensation for chronic pain;
>
> (c) no compensation is payable to a worker in connection with chronic pain, except as provided in this Section or in Section 10E or 10G or, in the case of a worker injured on or after February 1, 1996, as provided in the Functional Restoration (Multi-

Faceted Pain Services) Program Regulations contained in Order in Council 96-207 made on March 26, 1996, as amended from time to time and, for greater certainty, those regulations are deemed to have been validly made pursuant to this Act and to have been in full force and effect on and after February 1, 1996.

10E Where a worker

(a) was injured on or after March 23, 1990, and before February 1, 1996;

(b) has chronic pain that commenced following the injury referred to in clause (a); and

(c) as of November 25, 1998, was in receipt of temporary earnings-replacement benefits; or

(d) as of November 25, 1998, had a claim under appeal

(i) for reconsideration,

(ii) to a hearing officer,

(iii) to the Appeals Tribunal, or

(iv) to the Nova Scotia Court of Appeal,

or whose appeal period with respect to an appeal referred to in subclauses (i) to (iv) had not expired,

the Board shall pay to the worker a permanent-impairment benefit based on a permanent medical impairment award of twenty-five per cent multiplied by fifty per cent, and an extended earnings replacement benefit, if payable pursuant to Sections 37 to 49, multiplied by fifty per cent and any appeal referred to in clause (d) is null and void regardless of the issue or issues on appeal.

185 (1) Subject to the rights of appeal provided in this Act, the Board has exclusive jurisdiction to inquire into, hear and determine all questions of fact and law arising pursuant to this Part, and any decision, order or ruling of the Board on the question is final and conclusive and is not subject to appeal, review or challenge in any court.

252 (1) The Appeals Tribunal may confirm, vary or reverse the decision of a hearing officer.

Functional Restoration (Multi-Faceted Pain Services) Program Regulations, N.S. Reg. 57/96

2 In these regulations …

(b) "chronic pain" means pain

(i) continuing beyond the normal recovery time for the type of personal injury that precipitated, triggered, or otherwise predated the pain, or

(ii) disproportionate to the type of personal injury that precipitated, triggered, or otherwise predated the pain;

and includes chronic pain syndrome, fibromyalgia, myofascial pain syndrome, and all other like or related conditions, but does not include pain supported by significant, objective, physical findings at the site of the injury which indicate that the injury has not healed …

3 (1) Chronic pain is included in the operation of Part I of the Act, subject to the terms and conditions set out in these regulations.

(2) For greater certainty, except as provided in these regulations, chronic pain is and is deemed always to have been excluded from the operation of Part I of the Act, and no compensation is payable in connection with chronic pain except in accordance with these regulations.

4 There is hereby established a program of the Board known as the Functional Restoration (Multi-Faceted Pain Services) Program.

5 A worker may be designated by the Board as a participant in the Functional Restoration (Multi-Faceted Pain Services) Program if

(a) the worker is suffering from chronic pain; and

(b) the worker has, at the time of designation, a loss of earnings subsequent to a compensable injury and identifies pain and pain-related symptoms as the reason for the loss of earnings.

6 No worker may be designated as a participant in the Functional Restoration (Multi-Faceted Pain Services) Program if more than twelve months have elapsed since the worker's date of injury.

7 (1) Participation in the Functional Restoration (Multi-Faceted Pain Services) Program is limited to four weeks.

(2) During a worker's participation in the Functional Restoration (Multi-Faceted Pain Services) Program, the worker is eligible to receive a benefit equal to the amount of temporary earnings-replacement benefits the worker would have received if the worker were eligible for temporary earnings-replacement benefits.

8 (1) These regulations apply to all decisions, orders or rulings made pursuant to the Act on or after February 1, 1996.

(2) For greater certainty, these regulations apply to any decision, order or ruling made on or after February 1, 1996, concerning eligibility for compensation or the calculation or re-calculation of an amount of compensation.

(3) Despite subsections (1) and (2), where a decision, order or ruling was made by the Board or the Appeal Board before February 1, 1996, finding that a worker has a permanent impairment in connection with chronic pain but not fixing the worker's permanent-impairment rating, a rating shall be awarded pursuant to Section 34 and compensation may be paid accordingly pursuant to Sections 226, 227 or 228 of the Act, as the case may be.

(4) Despite subsections (1) and (2), where a decision, order or ruling was made by the Board or the Appeal Board before February 1, 1996, fixing a worker's permanent-impairment rating, the rating is deemed to be the rating to which the worker is entitled and compensation shall be paid accordingly pursuant to Sections 226, 227 or 228 of the Act, as the case may be.

[74] *Kapp*, note 41 at paras. 37-40. Section 14 of the *Code* protects ameliorative programs from discrimination claims.

[75] *Ball v. Ontario (Community and Social Services)*, 2010 HRTO 360 [*Ball*].

[76] *Ball*, note 75 at paras. 110-116.

[77] *Ball*, note 75 at para. 123, see also paras. 110-125.

[78] *Ball*, note 75 at para. 88, see also paras. 81-87.

[79] *Ball*, note 75 at paras. 89-109.

[80] See Ontario, Ministry of Finance "2010 Ontario Budget", online: Ontario Ministry of Finance, <http://www.fin.gov.on.ca/en/budget/ontariobudgets/2010/> (last accessed: 14 May 2010). The Ontario Human Rights Commission ("Commission") has recognized this potential obstacle to enforcing rights to disability-related supports in the context of mass transit systems. The Commission has taken a policy position that transit services for individuals with disabilities are not special programs, but an accommodation measure that allows persons with disabilities to access transportation services. As noted by the Commission, this interpretation has the effect of ensuring that these transit services are subject to the general analysis under human rights legislation and "are not insulated from careful scrutiny on the basis of being a special program that transit providers are opting, but not required, to provide." (Ontario Human Rights Commission, "Human Rights Commissions and Economic and Social Rights", *A Research Paper from the Policy and Education Branch* (October 2001) at 33, online: Ontario Human Rights Commission <http://www.ohrc.on.ca/en/resources/discussion_consultation/EconomicSocialRights> (last accessed: 3 May 2010)).

[81] *Eldridge*, note 10 at paras. 95-96.

[82] *G. (J.)*, note 20 at paras. 102-104.

[83] *Osborne v. Canada (Treasury Board*), [1991] 2 S.C.R. 69 at 104, quoted with approval in *G. (J.)*, note 20 at para. 102.

[84] As noted in the introduction to this section, the focus of this section is on potential legislative pathways to the establishment or recognition of rights to supports, given the Law Commission's mandate of legislative reform. However, it is worth noting that the preceding review of Canadian jurisprudence also suggested potential litigation strategies that may enhance the success of legal claims for disability-related supports. For example, the barrier posed by courts' formal approach to equality suggests that claimants should utilize legal strategies that will refocus judicial analysis on substantive equality. One way claimants may do so is by using contextualized comparative analyses in their claims (Gilbert and Majury, note 56 at 140). If the analysis for disability supports is focused on contextual needs, as the claimants attempted to do in *Auton* for example, substantive outcomes are more likely to be realized. Another potential way for claimants to refocus judicial analysis on substantive equality is to emphasize the need to consider equality values when considering other rights and statutory provisions. For example, claimants

might emphasize that the pre-existing disadvantage of persons with disabilities requires an expansion of the existing interpretation of the right to life, liberty, and security of the person. Similarly, if claimants emphasize the need to consider equality values within the section 1 analysis this may enhance their success because of the difficulty the government will have in proving that a *Charter* violation advances equality values. Indeed, in a number of cases different judges of the Supreme Court have indicated that equality interests should be considered in interpreting the scope and content of section 7 and in the section 1 analysis (see, for example, the concurring judgment of L'Heureux-Dubé J. in *G. (J.)*, note 20, and the dissenting judgments of L'Heureux-Dubé J. and Arbour J. in *Gosselin*, note 9. As this report focuses on law reform, pursuant to the Law Commission's mandate, a detailed discussion of such litigation strategies is beyond its scope.

[85] *Martin*, note 73. Similarly, in *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566, the Supreme Court found that a distinction between physical and mental disabilities in the provision of income replacement benefits under an employer's insurance policy violated Saskatchewan's human rights legislation. In *Saskatchewan (Department of Finance) v. Saskatchewan (Human Rights Commission)*, [2004] S.J. No. 637, 2004 SKCA 134, the Saskatchewan Court of Appeal held that the exclusion of chronic alcoholism from the purview of the disability benefit legislation reflected an outdated view of addiction and constituted discrimination contrary to the province's human rights legislation.

[86] *Eldridge*, note 10 at para. 71.

[87] *Eldridge*, note 10 at paras. 95-96. See also *Canadian Assn. of the Deaf v. Canada (F.C.)*, [2007] 2 F.C.R. 323, 2006 FC 971, where the Court found that the federal government's guidelines for the administration of its Sign Language Interpretation Policy denied deaf and hard-of-hearing Canadians the opportunity to fully participate in government programs, because the effect of the guidelines was to deny interpretation services to members of the public where required to allow them to participate meaningfully in government programs. At paragraph 96, the Court stated that, "Substantive equality means that all Canadians must be able to interact with government institutions when approached by them to participate in surveys and programs. Given the special situation of deaf persons, this requires accommodation through visual interpretation services." This judgment was not appealed.

[88] *Eldridge*, note 10 and *Chaoulli*, note 17 provide good examples of issues that could be framed as either positive or negative claims. The claim in *Eldridge* could have been framed as a right to sign-language interpreters; the claim in *Chaoulli* as the right to healthcare.

[89] *Code*, ss. 11 and 17.

[90] Gilbert and Majury, note 56 at 139.

[91] Gilbert and Majury, note 56 at 140.

[92] *Andrews*, note 1 at para. 26.

[93] This paper focuses on American jurisprudence considering statutes that provide for disability-related supports because our brief review indicates that, like Canadian courts, American courts are reluctant to interpret constitutional protections to include affirmative duties on States. Thus, a comparative analysis of American constitutional law jurisprudence is unhelpful because it simply highlights obstacles to the imposition of positive obligations under constitutional law.

[94] *Olmstead v. L.C.*, 119 S. Ct. 2176, 527 U.S. 581 (1999) [*Olmstead*]; *Americans with Disabilities Act*, 42 U.S.C. § 12101 *et seq.* (2000) [*ADA*].

[95] *ADA*, note 94, § 12101(a)(2), (3), (5).

[96] *Olmstead*, note 94 at 22.

[97] *Olmstead*, note 94 at 15-16.

[98] *Cedar Rapids Community School Dist. v. Garret F.*, 119 S. Ct. 992, 526 US 66 (1999) [*Cedar Rapids*]; *Individuals with Disabilities Education Act*, 20 U.S.C. § 1400 *et seq.* [*IDEA*].

[99] *IDEA*, note 98, § 1401, § 1412. The *IDEA* is "spending clause legislation," meaning that it only applies to States that accept federal funding under the *IDEA*, but all fifty U.S. states receive *IDEA* funding. See Terry Jean Seligmann, "Muddy Waters: The Supreme Court and the Clear Statement Rule for Spending Clause Legislation" (November 6, 2009) Drexel University Earle Mack School of Law Research Paper No. 2009-A-23, online: Social Science Research Network <http://ssrn.com/abstract=1501303> (last accessed: 30 April 2010) (forthcoming: Tulane Law Review, May 2010); Richard N. Apling and Nancy Lee Jones, *Congressional Research Service Report for Congress, Individuals with Disabilities Education Act (IDEA): Overview and Selected Issues*, RS22590 (last updated 14 January 2009), online: Open CRS, <http://opencrs.com/document/RS22590> (last accessed: 30 April 2010) at 2 n. 5.

[100] *Cedar Rapids*, note 98 at 4, 6-7, 11.

[101] *Regulations of the Offices of the Department of Education*, 34 C.F.R. Part 300 § 300.550; *IDEA* § 1401(26).

[102] *Cedar Rapids*, note 98 at 12-13.

[103] *IDEA*, note 98 § 1401(26).

[104] The *Convention* was ratified by Canada on 11 March 2010. Thus, there is also the possibility of relying on the *Convention* as a source of law in domestic constitutional challenges, as the courts often look to international law in interpreting domestic law. However, a fulsome consideration of the possibility of using the *Convention* in this manner is beyond the scope of this paper.

[105] *Convention*, note 11, Preamble.

[106] Frédéric Mégret, "The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?" 30 (2008) Human Rights Quarterly 494 at 507.

[107] *Convention*, note 11, Art. 3(c).

[108] *Convention*, note 11, Art. 29.

[109] *Convention*, note 11, Art. 30.

[110] *Convention*, note 11, Art. 30.

[111] Mégret, note 106 at 509.

[112] *Convention*, note 11, Arts. 24(1), 24(2)(a),(b).

[113] *Eaton*, note 2 at paras. 32, 78, 79.

[114] *Eaton*, note 2 at para. 77.

[115] *Education Act*, note 31.

[116] In *Ismail v. Toronto District School Board*, [2006] O.J. No. 2470 (Ont. S.C.J.), the Divisional Court upheld the Special Education Tribunal's decision confirming the Toronto District School Board's decision to place the child in a special education classroom on the basis that he was an exceptional student. With respect to section 17, the Court simply stated that, "When making a decision on placement, the IPRC must, before considering a placement in a special education class, consider whether placement in a regular class, with special education services, would meet the pupil's needs and be consistent with the parents' preferences." (para. 13).

Similarly, in *Ms. I. v. Toronto District School Board*, File 46c, 2005-11-17 (Ontario Special Education Tribunal), the Tribunal merely stated that its decision had been made in accordance with the language of section 17, without analyzing the meaning of that section (at 21-22). In *Y. v. X.X. District School Board,* File No. 31, 2002-02-18 (Ontario Special Education Tribunal), the School Board argued that section 17 created a presumption in favour of placement in a regular classroom, but the Special Education Tribunal does not state whether it agrees with this interpretation (at 21).

[117] *Eaton*, note 2. Ontario Regulation 181/98, made pursuant to the *Education Act*, note 31. In fact, the Supreme Court of Canada has already indicated its willingness to use inclusive legislative language to impose positive obligations on government. In its unanimous judgment in *Eldridge*, the Court noted that American legislation, including the *ADA*, specifically imposes a requirement on health care providers to supply appropriate auxiliary aids and services, including qualified sign language interpreters, to ensure "effective communication" with deaf persons (*Eldridge*, note 10 at para. 80). This arguably influenced the Court's conclusion that section 15 requires government to provide sign language interpretation where it is necessary for "effective communication" between deaf persons and their physicians (*Eldridge*, note 10 at paras. 71-72).

A current example of broad language in Canadian benefits-conferring legislation is that used in the *Canada Health Act*, R.S.C. 1985, c. C-6, a statute which establishes the criteria and conditions in respect of insured health services and extended health care services that each province must meet in order to be eligible for the full cash contribution of the federal government. Section 3 of the *Canada Health Act* provides that:

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

Such expansive language may make it easier for a court to find that there is a positive obligation on government to provide certain disability-related supports.

[118] *Eldridge*, note 10 at para. 80.

[119] *Eldridge*, note 10 at paras. 71-71.

[120] Another important difference between the South African legal system and Canadian and American legal systems is that the latter are common law jurisdictions whereas South Africa's legal system is a

hybrid one, with a mix of English common law, Dutch civil law, and indigenous law (also referred to as African customary law).

[121] *Government of the Republic of South Africa and Others v. Grootboom and Others*, [2000] ZACC 19; 2000 (11) BCLR 1169 [*Grootboom*] at para. 99; *Constitution of the Republic of South Africa 1996*, No. 108 of 1996, s. 26 [*Constitution*].

[122] *Minister of Health and Others v. Treatment Action Campaign and Others (No. 2)*, [2002] ZACC 15, 2002 (10) BCLR 1033 (CC) [*T.A.C.*] at para. 135.

[123] As Paul Nolette has noted, framing socio-economic rights as right "of access" delineates the outer boundaries of the judiciary's role in enforcing these rights, as it makes clear that courts are not "free to provide 'unlimited rights on demand' without regard to the actual circumstances of the individual(s) seeking relief" ("Lessons Learned from the South African Constitutional Court: Towards a Third Way of Judicial Enforcement of Socio-Economic Rights" (2003-2004) 12 Mich St. J. Int'l L. 91 at 107). In *Grootboom* and *T.A.C.* the Court emphasized that the rights of access to housing and health services are expressly limited to "*reasonable … measures*", within "*available resources*", towards "*progressive realization*" (emphasis added) (*Grootboom*, note 121 at paras 39-46, 54-74, 88-92; *T.A.C.*, note 122 at paras. 23-24, 28-39, 67-73).

[124] *Grootboom,* note 121 at paras. 56, 57, 65, 69, 95.

[125] *Grootboom,* note 121 at paras. 41 and 46. The Court found that it did not have sufficient information nor was it appropriate in this case to determine what would comprise the minimum core obligation under the constitutional right of access to adequate housing (para. 33).

[126] *Grootboom,* note 121 at para. 95.

[127] *Grootboom,* note 121 at para. 65.

[128] *T.A.C.*, note 122 at para. 135.

[129] *T.A.C.*, note 122 at para. 135.

[130] *T.A.C.*, note 122 at paras. 38-39.

[131] *T.A.C.*, note 122 at para. 128.

[132] *Grootboom*, note 121 at para. 43.

[133] *Convention*, note 11, Art. 4(1)(f).

[134] *Convention*, note 11, Art. 2. In addition to the *Convention*'s definition of "universal design" there is also a set of seven Principles of Universal Design developed by a group of architects, product designers, engineers and environmental design researchers at the Centre for Universal Design at North Carolina State University. These principles may be applied to evaluate existing designs, to guide the design process, and to educate designers and consumers about more usable products and environments. The seven principles are: equitable use; flexibility in use; simple and intuitive use; perceptible information; tolerance for error; low physical effort; and size and space for approach and use: M. Story, "Maximizing Usability: The Principles of Universal Design" 10:1 Assistive Technology 4. See also Phyllis Gordon, "A Federal Disability Act: Opportunities and Challenges", *A Paper Commissioned by the Council of Canadians with Disabilities and Canadian Association for Community Living* (October 2006) at 41, online: Council of Canadians with Disabilities <http://www.ccdonline.ca/en/socialpolicy/fda/1006#Universal> (last accessed 8 June 2010), where the author discusses using universal design in a proposed Federal Disability Act.

[135] *Martin*, note 73.

[136] Government of British Columbia, Ministry of Employment and Income Assistance, "Disability Lens" (August 2002), online: Ministry of Employment and Income Assistance <http://www.mhr.gov.bc.ca/PUBLICAT/DB/DisabilityLens.htm> (last accessed: 7 July 2010); Manitoba Disabilities Issues Office, "Full Citizenship: A Manitoba Strategy on Disability", online: Manitoba Disabilities Issues Office <http://www.gov.mb.ca/dio/citizenship/account.html#len> (last accessed: 7 July 2010); Government of Canada, Department of Justice, "Integrated Diversity and Equality Analysis Screen" (July 2009), online: Department of Justice <http://www.justice.gc.ca/eng/dept-min/pub/ideas-giade/> (last accessed: 7 July 2010); City of Toronto, "Equity Lens", online: City of Toronto <http://www.toronto.ca/diversity/equity-lens-q-a.htm> (last accessed 7 July 2010).

[137] Government of British Columbia, Ministry of Employment and Income Assistance, "Disability Lens" (August 2002), online: Ministry of Employment and Income Assistance <http://www.mhr.gov.bc.ca/PUBLICAT/DB/DisabilityLens.htm> (last accessed: 7 July 2010);

[138] Ontario Public Service Diversity Office (Discussion on 7 July 2010). Ontario's accessibility lens will likely be renamed as the IDEA lens (Inclusive Diverse Equitable Accessible).