ARTICLE

FUNDAMENTAL RIGHTS FOR ALL: TOWARD EQUALITY AS A PRINCIPLE OF FUNDAMENTAL JUSTICE UNDER SECTION 7 OF THE *CHARTER*

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ABSTRACT

Section 7 of the *Canadian Charter of Rights and Freedoms* has led to some groundbreaking wins for Canadians. However, its life, liberty, and security of the person guarantees are not currently expansive enough to truly protect the interests of marginalized claimants. Furthermore, the equality protections guaranteed by section 15 of the *Charter* are often insufficient for marginalized claimants due to unsettled jurisprudence. In response to the need for novel claims to alleviate complex systemic problems, this paper advocates for the introduction of equality as a principle of fundamental justice underlying the section 7 test. The equality conceptualized at the heart of this argument is intersectional and therefore inclusive of the various barriers that individuals face when attempting to protect their *Charter* rights. With this definition in mind, the paper considers four Supreme Court of Canada decisions—*PHS*, *Boudreault*, *Gosselin*, and *Carter*—to examine recent equality trends beyond section 15 of the *Charter* and consider the pressing need for equality as a new principle of fundamental justice. Finally, the benefits of the proposed principle are weighed against potential judicial concerns in order to suggest that balance will be necessary to satisfy opposing interests. The overall message here is not that *Charter* litigation can fix every need, but rather that everyone should have fair opportunities to advocate for their protected rights.

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> *The* BNA Act *planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada.*
> —Lord Sankey, *Edwards v Canada*[1]

> *The rights in s. 7 must be interpreted through the lens of ss. 15 and 28, to recognize the importance of ensuring that our interpretation of the* Constitution *responds to the realities and needs of all members of society.*
> —Justice L'Heureux-Dubé, *New Brunswick v G(J)*[2]

INTRODUCTION

Life, liberty, and security of person—these are the fundamental rights protected under section 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").[3] Throughout the *Charter's* history, section 7 claims have resulted in groundbreaking wins for Canadians, including laws that protect matters such as fair trial procedures, abortion rights,[4] and the right to physician-assisted death.[5] At the same time, judges have resisted recognizing the section 7 rights of marginalized claimants in the context of their social positioning. In some instances, judges have upheld a section 7 claim brought by a marginalized claimant, but the impact of the win was too narrow to force true systemic change. Other times, a court's failure to recognize systemic or economic marginalization has resulted in an unjust finding of no section 7 violation. This reluctance to recognize equality rights in a section 7 claim is a pressing problem, given the number of claims brought by individuals who face heightened systemic disadvantage due to factors such as race, Indigeneity, gender, disability, sexual orientation, and socioeconomic status.[6]

The current section 7 test cannot consistently persuade judges to address the unique fundamental needs of marginalized claimants. In response to both academic and judicial calls for change, this paper suggests the court should move toward recognizing equality as a substantive principle of fundamental justice. While equality-based analysis is not necessarily limited to section 15 of the *Charter*, recent section 7 decisions highlight the need for such an explicitly holistic approach to the section 7 test. Drawing from legal scholar and professor Kerri Froc's argument that substantive equality as a principle of fundamental justice would grant women equal access to section 7 *Charter* rights,[7] this paper contends that such a principle could have positive effects for other minority groups who increasingly rely on section 7 claims. An equality-focused principle of fundamental justice could help protect the established *Charter* rights of marginalized individuals while also advancing necessary novel claims. Though judges are typically reluctant to establish new principles of fundamental justice, equality is an essential social concept worthy of the *Charter's* defence. Those who face barriers in relation to factors such as gender, race, and disability should have their section 7 rights assessed in the context of their unique and intersectional societal positions.

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1 1929 CanLII 438 (UK JCPC) at 107–108, 1929 CarswellNat 2.

2 From the concurring decision in *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 [*G(J)*] at 115, 1999 CanLII 653 (SCC).

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

4 See *R v Morgentaler*, [1988] 1 SCR 30, 1988 CanLII 90 (SCC). Note, the majority did not rule on whether there is a right to access abortion services. Rather, the Court struck down the criminal prohibitions relating to abortion at the time due to their specific violations to the security of person of women.

5 See *Carter v Canada (Attorney General)*, 2015 SCC 5 [*Carter*].

6 See *Gosselin v Quebec*, 2002 SCC 84 [*Gosselin*].

7 Kerri A Froc, "Constitutional Coalescence: Substantive Equality as a Principle of Fundamental Justice" (2011) 42 Ottawa L Rev 411 [Froc, "Equality as a PFJ"].

Several key points help justify the need for an equality-focused approach to section 7. After a brief introduction to section 7 and the principles of fundamental justice in Part I of this paper, the focus of Part II will turn to conceptualizing "equality." The Supreme Court of Canada ("SCC") has affirmed that substantive equality is the correct approach under section 15 of the *Charter*. Two SCC decisions, *Canada (Attorney General) v PHS Community Service Society ("PHS")*[8] and *R v Boudreault ("Boudreault")*,[9] serve as examples of how equality has significantly contributed to *Charter* analysis outside the realm of section 15. Next, Part III will delve into two more SCC decisions, *Carter v Canada (Attorney General) ("Carter")*[10] and *Gosselin v Quebec ("Gosselin")*,[11] whose aftermaths emphasize the pressing and substantial need for equality to become recognized as a principle of fundamental justice. *Gosselin* has provided a particularly troubling legacy for the existence of positive section 7 rights, which many scholars contend are necessary in order for many Canadians to achieve true fundamental freedoms. With these cases in mind, Part V will weigh the potential benefits and concerns with recognizing equality under section 7.

The goal here is not to suggest that an equality-focused principle of fundamental justice will solve every problem that disadvantaged section 7 claimants face. *Charter* litigation is not a perfect solution to achieving the systemic changes necessary for more Canadians to enjoy equitable access to fundamental rights and freedoms. Rather, the assertion is that this option has the potential to increase the likelihood of success for marginalized claimants raising section 7 claims. If we are to live in a fair and democratic society,[12] then such a promotion of new and diverse voices must serve as a priority for the Canadian justice system.

I. SECTION 7 OF THE *CHARTER* AND THE PRINCIPLES OF FUNDAMENTAL JUSTICE

Section 7 of the *Charter* states that "[e]veryone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[13] These protections under section 7 typically arise in connection with the state's conduct in administering justice,[14] including criminal law processes,[15] child protection hearings,[16] and immigration proceedings.[17] Section 7 has not yet been interpreted as imposing positive obligations on governments to ensure the enjoyment of life, liberty, and security of the person, but the SCC has not foreclosed this possibility.[18]

The two-step test for establishing a violation of section 7 is well recognized in the Canadian jurisprudence. First, claimants must prove that the impugned laws deprive them of the right to life, liberty, or security of the person. Second, claimants must show that any such infringements are not in accordance with the principles of fundamental justice.[19] There is

8 2011 SCC 44 [*PHS*].
9 2018 SCC 58 [*Boudreault*].
10 *Carter, supra* note 5.
11 *Gosselin, supra* note 6.
12 As prescribed by s 1 of the *Charter.*
13 *Charter*, *supra* note 3.
14 *Gosselin*, *supra* note 6 at para 77.
15 *Ibid* at paras 77–78.
16 See e.g. *G(J), supra* note 2.
17 See e.g. *Charkaoui v Canada*, 2007 SCC 9.
18 *Gosselin*, *supra* note 6 at paras 82–83.
19 *Boudreault, supra* note 9 at para 186.

no constitutional guarantee that the state will never interfere with a person's life, liberty, or security of person. Rather, the state cannot do so in a way that violates the principles of fundamental justice.[20]

In *Re BC Motor Vehicle Act* ("*Motor Vehicle Reference*"),[21] the SCC recognized that the principles of fundamental justice are concerned with the basic values underpinning the Canadian constitutional order.[22] The section 7 analysis is therefore concerned with capturing inherently bad laws that violate basic societal values. Given the fundamental nature of section 7 rights and the unique self-regulating role that the principles of fundamental justice play within section 7, the SCC has affirmed that it is very unlikely for a section 7 violation to be justified under section 1 of the *Charter*.[23] This grants the principles of fundamental justice great authority over which matters are upheld under section 7.

Three primary principles of fundamental justice have emerged from the jurisprudence: arbitrariness, overbreadth, and gross disproportionality.[24] While judges have relied on these principles to justify some groundbreaking section 7 decisions, the principles of fundamental justice do not inherently promote contextual analyses focused on discriminatory factors. This can lead to inconsistent decision-making, given that some judges will be more willing than others to make connections between the pre-existing principles of fundamental justice and the disadvantaged circumstances of some claimants.

Courts are typically unwilling to recognize new principles of fundamental justice. However, given the highly individualized nature of section 7, and both academic and judicial recognition that individuals have distinct needs, the section 7 analysis requires a more nuanced approach if it is to adequately represent Canada's diverse population. Froc has convincingly revealed how equality meets the requirements for establishing a new principle of fundamental justice under the *Malmo-Levine* test through a step-by-step analysis.[25] In 2019, equality must be considered a "basic tenet of the legal system"[26] with respect to judicial perspectives of individual matters. A contextual equality analysis under section 7 would help the justice system evolve to meet greater societal calls for change.

Section 7 also has a uniquely political role amongst the *Charter* rights, making its recognition of diverse interests especially pressing. Mark Carter has discussed the need to conceptualize fundamental justice under section 7 according to values that support and advance human rights theory.[27] This could allow for a more honest and doctrinally defined debate about any reasonable limits placed on section 7 by policy imperatives and alternative interpretations of justice posed under section 1 of the *Charter*.[28] Margot Young has more explicitly considered section 7's usefulness in advancing the rights of marginalized individuals, particularly given the difficulty claimants face when attempting

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20 *Carter*, *supra* note 5 at 71.

21 [1985] 2 SCR 486 at para 31 [*Motor Vehicle Reference*], 1985 CanLII 81 (SCC).

22 *Ibid*.

23 *G(J)*, *supra* note 2 at para 99.

24 *Carter*, *supra* note 5 at para 72.

25 Froc, "Equality as a PFJ", *supra* note 7 at 436–444; *R v Malmo-Levine*, 2003 SCC 74 at para 113. According to the *Malmo-Levine* test, a principle of fundamental justice must be (1) a legal principle; (2) that is by consensus fundamental to the fair operation of the legal system; and (3) that can be identified with sufficient precision to yield a manageable standard for measuring against section 7 rights.

26 *Motor Vehicle Reference*, *supra* note 21 at para 31.

27 Mark Carter, "Fundamental Justice in Section 7 of the *Charter*: A Human Rights Interpretation" (2003) 52 UNBLJ 243 at 244–245 [Carter, "Fundamental Justice in Section 7"].

28 *Ibid* at 260.

to assert section 15 rights.[29] Young argues that if the *Charter* is to effectively legitimize the rights of disadvantaged people, its protections must be informed by substantive and progressive understandings of social concepts such as democracy, citizenship, individual autonomy, equality, and justice.[30]

In a more recent paper, Young maintains that compared to section 15, section 7 is amenable to contextual and nuanced understanding of complex social justice claims.[31] Hence, section 7's important role for marginalized claimants has survived long enough to demonstrate its potential future power. Now, judges must refine this potential by consistently focusing on equality needs in relation to section 7.

II. CONCEPTUALIZING EQUALITY

Given the trend of marginalized claimants evoking section 7 to help protect their fundamental rights, it makes sense for the section 7 test to evolve in an equality-focused manner. To identify how this evolution should proceed, it is necessary to inclusively define the concept of equality for its ready application by the public, courts, and governments alike. Section 15 of the *Charter* protects equality rights on the basis of an adverse impacts approach. Since *Andrews v Law Society of British Columbia* ("*Andrews*"),[32] and most recently affirmed in *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux* ("*Alliance*"),[33] the legal definition of equality under section 15 has focused on substantive equality. This conception of equality focuses on ensuring that laws or policies do not subordinate groups who already face social, political, or economic disadvantages in Canada.[34]

The substantive equality approach recognizes that individuals may require different treatment in order to achieve equality.[35] For the sake of consistency, an equality-concerned principle of fundamental justice should also focus on substantive equality. However, given judicial reluctance to grant claimants section 15 rights, it is worth considering how marginalized claimants could benefit if judges relied on revamped substantive equality analyses. Not only could this rejuvenated equality analysis benefit claimants under section 7, but its reach could also extend to section 15 and beyond.

There is no perfect definition of equality—our society is far too diverse for that. In 2001, Chief Justice Beverley McLachlin, as she then was, labelled equality the most challenging right to establish under the *Charter*.[36] Given both the lack of clarity surrounding the term and individualized perceptions of equality, it is often difficult to recognize equality needs outside the scope of one's daily life and experiences. It is therefore difficult for judges to make contextual decisions about marginalized issues that they have not personally experienced. This seems to influence the struggles that claimants currently face in attempting to establish equality rights.

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29 Margot Young, "Section 7 and the Politics of Social Justice" (2005) 38 UBCL Rev 539 at 539–540 [Young, "Section 7 Politics"].

30 *Ibid* at 541.

31 Margot Young, "Social Justice and the Charter: Comparison and Choice" (2013) 30 Osgoode Hall LJ 669 at 673 [Young, "Social Justice and the Charter"].

32 [1989] 1 SCR 143 at 165, 1989 CanLII 2 (SCC).

33 2018 SCC 17 at para 25.

34 Jennifer Koshan & Jonnette W Hamilton, "The Continual Reinvention of Section 15 of the Charter" (2013) 64 UNBLJ 19 at 24–25 [Koshan & Hamilton, "Continual Reinvention of Section 15"].

35 *Ibid*.

36 Beverly McLachlin, "Equality: The Most Difficult Right" (2001) 14 Sup Ct L Rev 17.

Claimants are rarely successful when it comes to making section 15 claims. If they are successful, their success does not necessarily promote substantive equality.[37] The trend of courts hesitating to uphold equality rights under section 15 implies judicial confusion surrounding the concept of equality that must be avoided in the context of section 7. The primary reason for this confusion, which has been consistently revealed throughout section 15's evolutions, is that courts focus too heavily on comparators and fail to undertake truly contextual analyses of equality rights.[38] The limited number of protected enumerated grounds under section 15 does not help matters. These grounds help ensure a further uphill battle for claimants who face discrimination due to analogous or intersecting grounds. It follows that the human dignity of section 15 claimants is not assessed equally under the current substantive equality approach.[39]

If substantive equality is recognized as a principle of fundamental justice under section 7, its conception must be more inclusive to avoid some of the current section 15 issues. This could be achieved through increased emphasis on intersectionality within the substantive equality framework. Intersectionality is a feminist theory introduced by Kimberlé Crenshaw that examines how intersecting social or economic barriers, often labelled "oppressions," can uniquely impact individuals.[40] For example, a Black woman is more likely to face heightened systemic discrimination than a Black man or a white woman. This discrimination can manifest in a number of ways, notably here with respect to how likely a person is to achieve justice within the Canadian legal system. Canadian judges are familiar with the concept of intersectionality in theory. The SCC has even recognized the intersection of enumerated equality grounds as analogous grounds.[41]

In practice, however, there appears to be gaps between the way that judges understand intersectionality and how they apply it to section 15 cases involving marginalized claimants. In response to inconsistent applications of intersectionality throughout society and its institutions, academics have demanded more contextual approaches to the theory. Leslie McCall prefers an "intercategorical complexity" approach to intersectionality that focuses on explicating the nature of inequality relationships rather than solely relying on the use of categories.[42] Colleen Sheppard focuses on what she calls "inclusive equality" and underscores the importance of examining both "inequitable substantive outcomes in various social contexts" and "unfairness and exclusions in the structures, processes, relationships, and norms that constitute the institutional contexts of our daily lives."[43] Sheppard's "multi-layered contextual analysis" focuses on micro, meso, and macro levels of context in order to emphasize the "need to develop mechanisms for amplifying the voices and power of those who experience discrimination and institutionalized inequalities."[44] Both McCall and Sheppard's approaches propose that equality, in its fairest sense, must go beyond labels and focus on the underlying contextual factors that influence a person's disadvantages.

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37 Koshan & Hamilton, "Continual Reinvention of Section 15", *supra* note 34 at 37.

38 *Ibid* at 50.

39 See generally Denise G Reaume, "Dignity, Equality, and Comparison" in Deborah Hellman and Sophia Moreau, eds, *Philosophical Foundations of Discrimination Law* (Oxford: OUP, 2013) 1.

40 See generally Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43 Stan L Rev 1241.

41 *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 94, 1999 CanLII 675 (SCC).

42 Leslie McCall, "The Complexity of Intersectionality" (2005) 30 Signs 1771 at 1784–1785.

43 Colleen Sheppard, *Inclusive Equality* (Montreal & Kingston: McGill-Queen's University Press, 2010) at 4 [Sheppard, "Inclusive Equality"].

44 Sheppard, "Inclusive Equality", *supra* note 42 at 9, 13.

In order for substantive equality to become a principle of fundamental justice, the term must address the unique systemic discriminations that marginalized individuals face in various social and institutional contexts. Dean Spade notes the "violence" that legal and administrative systems promote through processes including criminal punishment, immigration enforcement, child welfare, and public benefits[45]—all of which are inherently subject to section 7 criticism. Significant here is the understanding that equality claims can promote further damage to marginalized individuals if, instead of truly addressing social and economic barriers, such claims divide constituencies, participate in structures that uphold domination relationships that are opposed, or expand relations and structures of domination.[46] In other words, an equality approach to section 7 must not create additional barriers for marginalized claimants. It should only help judges recognize and prioritize fundamental needs and barriers that are often forgotten or ignored.

III. RECENT EQUALITY TRENDS BEYOND SECTION 15

Equality analyses have never been solely restricted to section 15 litigation. Peter Hogg notes the importance of equality as a *Charter* value throughout various sections, specifically mentioning its usefulness to section 7 and the principles of fundamental justice.[47] This section explores two recent cases, *PHS* and *Boudreault*, which highlight the types of equality analyses the SCC has been willing to consider outside the realm of section 15. The importance of these cases for marginalized claimants also portrays the need for equality to play a more consistent role in *Charter* litigation, particularly with respect to life, liberty, and security of person rights.

A. Equality and Section 7: *PHS*

PHS is a novel section 7 case that reveals the SCC's potential open-mindedness to a more contextual form of the section 7 test. A unanimous Court required the federal government to uphold its previous commitment to exempt Insite, a supervised injection facility located in Vancouver's Downtown East Side, from criminal prohibitions under the *Controlled Drugs and Substances Act* ("*CDSA*").[48] The SCC found that revoking this exemption would violate the liberty interests of Insite staff and the life and security of person rights of its clients.[49] Further, the Minister of Health's attempt to reverse the exemption was viewed as arbitrary and grossly disproportionate and, therefore, not in accordance with the principles of fundamental justice.[50]

PHS is a somewhat surprising decision, given the stigma surrounding safe injection sites. Jennifer Koshan argues that *PHS* serves as "an important example of how a compelling evidentiary record of harm that flows from state action can lead to the finding of a section 7 violation and a robust remedy."[51] The claimants' success in *PHS* allows us to imagine ways in which section 7 could grow and allow more marginalized people to assert their fundamental rights.

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45 Dean Spade, "Intersectional Resistance and Law Reform" (2013) 38 Signs 1031 at 1031–1032.

46 *Ibid* at 1037.

47 Peter W Hogg, "Equality as a Charter Value in Constitutional Interpretation" (2003) 20 Sup Ct L Rev 113.

48 SC 1996, c 19 [*CDSA*].

49 *PHS, supra* note 8 at para 126.

50 *Ibid* at paras 129–133.

51 Jennifer Koshan, "Redressing the Harms of Government (In)Action: A Section 7 versus Section 15 Charter Showdown" (2013) 22 Const F 31 at 37 [Koshan, "Section 7 vs 15"].

Among its reasons, the Court recognized that Insite staff provided potentially life-saving services to poor and vulnerable individuals. The Court also recognized the vulnerability of Insite's clients, and how they were influenced by factors such as "physical and sexual abuse as children, family histories of drug abuse, early exposure to serious drug use, and mental illness."[52] Lack of adequate housing and disability were also cited as reasons that a person was likely to become addicted to drugs.[53] The Court rejected the government's argument that addiction was a matter of personal choice,[54] accepting the claimants' argument that addiction is an "illness, characterized by a loss of control over the need to consume the substance to which the addiction relates."[55] State conduct was found to cause the claimants' deprivation—not choice.[56]

PHS indicates how equality can integrally function within the section 7 test. Equality issues seemed to ultimately persuade the Court to find for the claimants. However, *PHS* alone cannot ensure that marginalized claimants consistently have their section 7 rights analyzed in a contextual manner. The *PHS* remedy is somewhat narrow in terms of what it can offer a broader range of Canadians—even those similar to the plaintiffs in the case. While the government was not allowed to shut down Insite, given the essential role that it already played in the community, the case does not oblige governments to establish new safe injection facilities.[57] Again, this case serves as one step toward necessary structural change. Now, its legacy must expand.

B. Equality and Section 12: *Boudreault*

The SCC recently demonstrated another movement toward a more inclusive conception of equality rights in *Boudreault*. The case concerned the constitutionality of victim surcharges, which were mandatory for people who discharged, pleaded guilty, or were found guilty of an offence under the *Criminal Code*[58] or the *CDSA*. While section 7 was also pleaded, the Court quashed the surcharges on the sole basis that they were cruel and unusual punishment under section 12 of the *Charter*. This was Justice Martin's first decision for the Court, and she made a memorable mark by reading in a highly contextual equality approach without the claimants even pleading section 15. *Boudreault* may represent the SCC's willingness to think of equality as a flexible concept with an expansive role throughout the *Charter*.

Justice Martin recognized that the plaintiffs faced significant social and economic barriers, including serious poverty, precarious housing situations, addiction, growing up under child protection, Indigeneity, and physical disabilities.[59] She also noted that marginalized people were more likely to offend and be required to pay these surcharges more often.[60] Overall, Justice Martin found that mandatory victim surcharges caused undue hardship for "impecunious" offenders[61] and were grossly disproportionate to those individuals lacking "adequate financial capacity."[62]

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52 *PHS, supra* note 8 at para 7.
53 *Ibid* at para 8.
54 *Ibid* at paras 97–101.
55 *Ibid* at para 99.
56 *Ibid* at para 106.
57 Koshan, "Section 7 vs 15", *supra* note 51 at 37.
58 RSC 1985, c C-46.
59 *Boudreault, supra* note 9 at para 54.
60 *Ibid* at para 55.
61 *Ibid* at para 57.
62 *Ibid* at para 60.

To aid her conclusion, Justice Martin detailed the "four interrelated harms" the surcharge caused offenders:

> "(1) the disproportionate financial consequences suffered by the indigent, (2) the threat of detention and/or imprisonment, (3) the threat of provincial collections efforts, and (4) the enforcement of *de facto* indefinite criminal sanctions."[63]

While the surcharges were found to have a valid penal purpose—to raise funds for victim support services and to increase offenders' accountability to victims of crime and the community—Justice Martin recognized that "these objectives [were] not likely to be realized" in the case of marginalized offenders.[64]

In a follow-up blog article, legal scholars Jennifer Koshan and Jonnette Watson Hamilton persuasively examine how *Boudreault* has potentially paved the way for an inclusive understanding of equality under *Charter* rights beyond section 15—including both sections 12 and 7.[65] For example, despite the usual difficulty of proving an adverse impact under section 15, Justice Martin referred to this concept several times throughout the *Boudreault* decision.[66] Justice Martin's contextual analysis also focused on equality grounds not currently recognized under section 15, including poverty, addiction, and Indigeneity.[67] The tenuous status of these grounds under section 15 is likely why the plaintiffs only relied on sections 7 and 12 in this case.[68]

Koshan and Hamilton recognize that avoidance of section 15 will not be possible in every case involving marginalized claimants. However, before the Supreme Court of Canada ideally confirms a more inclusive approach to section 15, it is useful to know that disadvantaged claimants have access to alternative constitutional routes that may provide them with greater chances of success. *Boudreault* will hopefully ensure that equality continues to underlie section 12 judicial analyses. Given the overlap between the section 12 and 7 tests,[69] future section 7 claims deserve similar and consistent applications of an inclusive form of equality.

Substantive equality is not an inherently problematic concept and may ultimately help serve marginalized claimants as a permanent tool under section 7. However, current judicial applications of substantive equality under section 15 underscore the need for the reconceptualization of the term before it becomes a normalized standard under other *Charter* analyses. Justice Martin does not explicitly point to intersectionality or a reconceptualization of substantive equality in the *Boudreault* decision. Yet, her recognition of the unique social and economic barriers faced by the claimants that made it cruel and

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63 *Boudreault*, *supra* note 9 at para 65.

64 *Ibid* at para 63.

65 Jennifer Koshan & Jonnette Watson Hamilton, "The Impact of Mandatory Victim Surcharges and the Continuing Disappearance of Section 15 Equality Rights" (7 January 2019), online (blog): *ABlawg* <https://ablawg.ca/2019/01/07/the-adverse-impact-of-mandatory-victim-surcharges-and-the-continuing-disappearance-of-section-15-equality-rights/> at [Koshan & Hamilton, "Impact of Mandatory Victim Surcharges"] archived at [https://perma.cc/GN8J-N4A9].

66 *Ibid* at 4; See *Boudreault*, *supra* note 9 at paras 3, 28, 58, and 86.

67 Koshan & Hamilton, "Impact of Mandatory Victim Surcharges", *supra* note 65 at 5–6.

68 *Ibid* at 6.

69 The section 12 test comes from *R v Nur*, 2015 SCC 15. First, a court must determine what would constitute a proportionate sentence for the offence according to the principles of sentencing in the *Criminal Code*. Second, the court must ask whether the mandatory punishment is grossly disproportionate when compared to the fit sentence for either the claimant or for a reasonable hypothetical offender (at para 46). The second step's emphasis on gross disproportionality mirrors the principles of fundamental justice analysis under section 7.

unusual for them to pay mandatory victim surcharges under section 12 paves the way for an equality analysis under section 7.

IV. THE PRESSING NEED FOR EQUALITY AS A NEW PRINCIPLE OF FUNDAMENTAL JUSTICE

As confirmed in *PHS*, equality is not a new concept to section 7 of the *Charter*. Past decisions illuminate the importance of recognizing a claimant's marginalization in relation to a violation of their fundamental rights. However, both past and present section 7 trends exhibit the need for a more consistent contextual approach to the section 7 test. The next section of this paper highlights two SCC cases, *Gosselin* and *Carter*, in order to validate the pressing and substantial need for equality to become a principle of fundamental justice.

A. *Gosselin:* An Unfair Precedent for Positive Section 7 Rights

The *Gosselin* decision exemplifies the danger of judges not paying adequate attention to the systemic barriers that influence a claimant's access to section 7 rights. The case involved a challenge to the base amount of welfare benefits provided for adults under 30 years of age by a 1984 Quebec social assistance scheme. This base rate was set as approximately one-third the rate of benefits available to older welfare recipients.[70] When this legislation was in effect, young people could only increase their welfare payments if they participated in a designated training program. Designed to encourage individuals under the age of 30 to acquire training or basic education, this paternalistic scheme sought to prevent dependence on social assistance during these individuals' "formative years."[71]

The claimant, Louise Gosselin, retroactively challenged the scheme's presence from 1985 to 1989, when it was replaced by legislation that did not make age-based distinctions.[72] Ms. Gosselin, a welfare recipient who was under 30 when the legislation was in effect, brought the claim on behalf of all of the welfare recipients impacted by the scheme.[73] Ms. Gosselin pleaded sections 7 and 15 of the *Charter*, on the basis of security of person and age infringement.[74] In addition she brought her claim under section 45 of the Quebec *Charter of Human Rights and Freedoms*.[75] The remedy sought was a Court declaration that the lesser welfare rate was invalid from 1987 to 1989, and an order to compel the Quebec government to reimburse all welfare recipients for the difference between what they received and what they would have received if they had been over 30 years of age during that period of time. The SCC ultimately had to decide whether a government could be compelled to provide services on the basis of section 7 of the *Charter*. In other words, whether section 7 can provide positive rights was in dispute. The SCC was highly divided on this issue.[76] Given their importance to the section 7 jurisprudence, the majority decision and Justice Arbour's dissent will be the foci of this paper.

The majority rejected Gosselin's claim, finding that Quebec's social welfare scheme had not violated any of her constitutional rights. With respect to section 7, eight out of the nine judges either supported Ms. Gosselin's use of section 7 or left open the future possibility

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70 *Gosselin, supra* note 6 at para 6.

71 *Ibid* at paras 6–7.

72 *Ibid* at para 9.

73 *Ibid*.

74 Young, "Section 7 Politics", *supra* note 29 at 542.

75 CQLR c C-12, s 45. Provides a right to "measures provided for by law, susceptible of ensuring an adequate standard of living."

76 Justices McLachlin, Gonthier, Iacobucci, Major, and Binnie encompassed the majority (with Justice McLachlin writing the decision), and Justices Bastarache, LeBel, Arbour, and L'Heureux-Dubé each issued separate dissenting decisions.

of such a use.[77] The majority found that there was insufficient evidence in this case to justify a section 7 claim. However, Justice McLachlin specifically held that the "novel" use of section 7 to impose positive section 7 rights remained an option for the future.[78]

The majority decision is puzzling for several reasons. First, Justice McLachlin cited insufficient evidence as the primary reason for the rejection of Ms. Gosselin's claim. Yet, the plaintiff's evidentiary record included several qualified expert reports, including a social worker, psychologist, dietitian, and physician working in a community health practice. All of these experts had interacted closely with young welfare recipients. The expert evidence showed that young welfare recipients were malnourished, socially isolated, in poor physical and psychological health, and often homeless. A lack of stable housing, telephone, or presentable clothing made it very difficult for young welfare recipients to find work.[79] Ms. Gosselin also provided extensive testimony about her struggle to survive on the under-30 welfare benefits, and how her poverty-related experiences led to her failed attempts to participate in the government training programs and the greater workforce.[80] Overall, the evidentiary record seemed to confirm the roles that Ms. Gosselin's gender, disability, and economic status played in supporting the "acute material and psychological insecurity, deprivation, and indignity" she suffered.[81]

Despite being presented with extensive evidence relating to Ms. Gosselin's background, the majority failed to capture the "complexity of the oppression"[82] that was at stake for her in relation to the insufficient welfare scheme. Rather, the judges blamed Ms. Gosselin for failing to adhere to the structure of the welfare program. For example, Justice McLachlin stated that Ms. Gosselin "ended up dropping out of virtually every program she started, apparently because of her own personal problems and personality traits."[83] Throughout the majority decision, it is implied that if Ms. Gosselin had just worked a little harder she would have survived better.

The majority's reasoning ignores the intersectional issues underlying this case, setting a dangerous precedent for future marginalized claimants. People who face multiple social and economic barriers are not always able to participate in mainstream activities, even those intended to "help" them. Ms. Gosselin may have exerted some autonomy when she dropped out of the government's programs, but her actions may also be seen as linked to the programming's lack of inclusivity. In this case, the primary issue seems to go beyond a lack of evidence. Rather, the evidence provided was not of the type that the majority was willing to integrate into the section 7 analysis. Equality had a key role to play here, but it was overlooked.

Another troublesome aspect of the majority decision is its treatment of positive section 7 rights. Rather than completely discounting the concept, Justice McLachlin stated that positive rights may have a role to play in future section 7 cases. *Gosselin* was simply not the right case. Justice McLachlin does not provide explicit criteria for what would be required to justify a positive section 7 right, but the surrounding circumstances would presumably need to differ from Ms. Gosselin's. Herein lies the issue. *Gosselin* is a case about a woman

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77 *Ibid.* Justice Bastarache alone took a limited approach to section 7, holding that it only applies to judicial or administrative contexts in which the state acts against an individual (*Gosselin, supra* note 6 at paras 205–223).

78 *Gosselin, supra* note 6 at 82.

79 Martha Jackman, "Constitutional Castaways: Poverty and the McLachlin Court" (2010) 50 Sup Ct L Rev 297 at 312 [Jackman, "Constitutional Castaways"].

80 Young, "Social Justice and the Charter", *supra* note 31 at 683.

81 Jackman, "Constitutional Castaways", *supra* note 79 at 313.

82 Young, "Social Justice and the Charter," *supra* note 31 at 683.

83 *Gosselin, supra* note 6 at para 8.

who faced multiple social and economic barriers preventing her from achieving the adequate social assistance that she relied on to survive. Ms. Gosselin's circumstances were about as dire as they come. It is thus difficult, if not impossible, to imagine another case persuading a court to find a positive section 7 right using the current legal framework. A more equality-focused approach seems to be necessary if certain claimants are to achieve the fundamental rights they so desperately need. Overall, *Gosselin* had the potential to become the landmark case for the progressive evolution of the *Charter*.[84] Instead, the majority judgement has made things worse for marginalized claimants.

Though the majority ruled against Ms. Gosselin, Justice Arbour's dissent sheds light on the need for a more equality-focused approach to the section 7 test. She found that the welfare scheme violated Ms. Gosselin's section 7 rights, arguing that:

> a minimum level of welfare is closely connected to the issues relating to one's basic health (or security of person), and potentially even to one's survival (life interest), that it appears inevitable that a positive right to life, liberty and security of person must provide for it.[85]

Overall, Justice Arbour wrote a strong endorsement of the state having a positive obligation to provide full benefits under the Quebec income assistance scheme.[86] She relied on former Chief Justice Dickson's statement in *Irwin Toy* that courts must not rashly exclude from section 7 "such rights, included in various international covenants" including "rights to social security, equal pay for equal work, adequate food, clothing and shelter."[87]

Justice Arbour argued against narrow interpretations of section 7 that only provide protection for "legal rights"[88] or to guarantees of negative state action.[89] This "purposive and contextual interpretation" of section 7 revives an earlier notion that section 7 protects both negative and positive rights.[90] An adoption of Justice Arbour's perception of section 7 could go beyond helping marginalized claimants with similar circumstances to Gosselin. This equality-focused acceptance of positive section 7 rights could open the door to a diversity of claims from often-silenced groups and individuals.

B. *Carter:* A Groundbreaking Win with Unjust Results for Marginalized Claimants

In the more recent *Carter* decision, the SCC unanimously held that the federal criminal prohibition on assisted dying violated the right to life, liberty, and security of person under section 7. The Court found the prohibition void to the extent that it deprived a competent adult of receiving assistance in death where: (1) the person could "clearly consent"; and (2) they had a "grievous and irremediable medical condition (including an illness, disease, or disability)" that caused "enduring" and "intolerable" suffering in the circumstances of the person's condition.[91] The Court suspended the declaration of invalidity for 12 months,[92] and later granted the new Liberal government a four-month extension to allow them to craft appropriate response legislation.[93] *Carter* was groundbreaking, particularly because

84 Young, "Section 7 Politics", *supra* note 29 at 542.

85 *Gosselin, supra* note 6 at para 358.

86 *Ibid* at paras 307–400. Justice L'Heureux-Dubé generally concurred on this part of Justice Arbour's argument at para 141.

87 *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 1003, 1989 CanLII 87 (SCC).

88 *Gosselin, supra* note 6 at paras 314–318.

89 *Ibid* at paras 319–329.

90 Young, "Section 7 Politics", *supra* note 29 at 545.

91 *Carter, supra* note 5 at para 4.

92 *Ibid* at para 147.

93 *Carter v Canada (Attorney General)*, 2016 SCC 4.

the Court required the government to legislate medically assisted dying legislation. The foundation seemed to have been laid for real systemic improvements that could help those living with disabilities.

In June 2016, Parliament passed Bill C-14, which regulates access to medical assisted dying ("MAID") for individuals at least 18 years old who suffer from a "grievous and irremediable medical condition."[94] Of note is the requirement that a person with a grievous and irremediable medical condition must be in "an advanced state of irreversible decline in capacity" with a natural death that is "reasonably foreseeable."[95] This vague wording has limited the law's applicability to people with terminal conditions, including multiple sclerosis, spinal stenosis, Parkinson's disease, and Huntington's disease.[96] The Court's baseline threshold for access does not contemplate such a limit, making the legislation's narrow threshold for access more restrictive than required.[97]

Just 10 days after the passing of Bill C-14, Julia Lamb and the British Columbia Civil Liberties Association challenged the constitutionality of its eligibility criteria. Lamb suffers from Type 2 Spinal Muscular Atrophy, a hereditary and degenerative disease that causes weakness and wasting of the voluntary muscles. Restricted to a wheelchair, Lamb lives with significant pain and requires constant help from others in order to complete daily living activities. Eventually, she is likely to lose the use of her hands and require a long-term ventilator and a feeding tube.[98] At the time of enacting litigation, Ms. Lamb did not meet the criteria for medical assisted dying because her death was not reasonably foreseeable. Yet, she knew the progression of her disease would bring her intolerable and incurable suffering.[99] Ms. Lamb sought the right to access MAID when she is no longer able to tolerate her pain.[100] After losing a bid for speedy trial, the *Lamb* trial was set for fall 2019.[101]

On September 18, 2019, Ms. Lamb and the British Columbia Civil Liberties Association announced the adjournment of their case after the federal government's witness admitted that Ms. Lamb would qualify for an assisted death under the MAID eligibility criteria.[102] According to the expert report, medical practitioners who help patients with medical assisted death have reached a clear understanding that the law does not require a person to be near death. Rather, there is a medical consensus that a patient's natural death will become reasonably foreseeable if they refuse care that will lead to death, such as care that prevents infection.[103] Ultimately, the expert report admitted that the government's MAID law allows medical practitioners flexibility to interpret the law to help those like Ms. Lamb who are not technically dying, but who would be subjected to predictable and short deaths due to refusing preventative care. No other experts challenged this evidence.[104]

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94 Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, SC 2016, c 3, s 3, amending *Criminal Code*, RSC 1985, c C-46, s 241.2(1)(b)-(c).

95 *Ibid*, s 3, amending RSC 1985, c C-46, 2 241.2(2)(b), (d).

96 *Lamb v Canada (Attorney General)*, 2017 BCSC 1802 (Notice of Civil Claim, Julia Lamb and the British Columbia Civil Liberties Association at 10–11) [*Lamb* NOCC].

97 Emmett Macfarlane, "Dialogue, Remedies, and Positive Rights: *Carter v Canada* as a Microcosm for Past and Future Issues Under the *Charter of Rights and Freedoms*" (2017) 49 Ottawa L Rev 107 at 110 [Macfarlane, "Dialogue, Remedies, and Positive Rights"].

98 *Lamb* NOCC, *supra* note 96 at para 3–6.

99 *Ibid* at para 6.

100 *Ibid*.

101 *Lamb v Canada (Attorney General)*, 2018 BCCA 266, leave to appeal to SCC refused, 38256 (13 December 2018).

102 British Columbia Civil Liberties Association, "Release: B.C. Supreme Court adjourns B.C. Civil Liberties Association's assisted dying case" (2019) online: BCCLA <https://bccla.org/news/2019/09/release-b-c-supreme-court-adjourns-b-c-civil-liberties-associations-assisted-dying-case/> archived at [https://perma.cc/2SPD-Y332].

103 *Ibid*.

104 *Ibid*.

Despite this win for Ms. Lamb and those like her, there are still concerns surrounding the federal government's MAID criteria—particularly related to the remaining "reasonably foreseeable" requirement. On September 11, 2019, the Quebec Superior Court released its decision in *Truchon*, declaring the "reasonably foreseeable" requirement unconstitutional under both the federal and provincial MAID requirements. Justice Baudouin found the requirement violated both sections 7 and 15 of the *Charter* because it did not permit assistance in dying for Canadians who are suffering with no immediate or specifically predicable end in sight. The Court suspended the declaration of invalidity for six months.[105]

The fact that Lamb and other people living with degenerative disabilities were ever excluded from Bill C-14's scheme is perplexing. Nothing in the *Carter* decision explicitly excludes them from the Court's remedial decision. On the contrary, they always seem to have met the SCC's proposed criteria. Emmett Macfarlane says this unjust result for disabled individuals is a matter of the complex institutional relationships that governments and courts share.[106] It is possible to conclude that Parliament ignored the SCC's will, and drafted legislation that it thought was most suitable. This may in fact be consistent with previous governmental responses to court decisions, seeing as courts are typically more reluctant to enforce legislative action.

However, the Court's role in further marginalizing disabled Canadians should not be ignored. The Court was provided with the opportunity to base its decision on the systemic barriers faced by each of the plaintiffs. It also could have provided a more robust definition of "grievous and irremediable medical condition" that may have prevented Parliament's unjust exclusion. An equality analysis attached to the principles of fundamental justice could have better served the interests of a greater number of people than the overbreadth analysis that was ultimately relied upon.[107] While the federal government did not have to draft such narrow responsive legislation, the Court could have done more to demand inclusive justice.

As a result of the Court's failure to adequately address equality needs in its remedial decision, disabled Canadians were forced to fight for rights that they have arguably already won. The plaintiffs in *Lamb* and *Truchon* were required to go through the expensive litigation process that included much of the same evidence as *Carter*. It took years for them to achieve justice, which may still be taken away pending legislative re-drafting. What was meant to be a groundbreaking decision for individuals like Julia Lamb turned into somewhat of a nightmare. If the Supreme Court of Canada had truly recognized the marginalization of the *Carter* plaintiffs, the situation may have been different.

C. Summary

Carter and *Gosselin* are not the only cases that suggest the need for a more equality-focused approach to the section 7 analysis. Yet, both cases illuminate that judicial failure to contextualize fundamental needs is a current issue backed by heavily cited Supreme Court of Canada decisions. The aftermath of *Carter* illustrates that an apparent victory for marginalized individuals may be misleading without a remedy focused on the underlying equality issues at stake. Further, *Gosselin* highlights the danger of a court making progressive claims without enforcing progressive actions. The fate of positive section 7 rights is currently dangling by weak threads. It seems that without a change to the section 7 test, true access to such rights may not be possible.

105 *Ibid; Truchon c Procureur général du Canada,* 2019 QCCS 379.

106 Macfarlane, "Dialogue, Remedies, and Positive Rights", *supra* note 97 at 127.

107 *Carter*, *supra* note 5 at paras 85–88.

Though both *Carter* and *Gosselin* demonstrate how slow progress has been for marginalized claimants in the *Charter* litigation arena,[108] all hope is not lost. Cases such as *PHS* and *Boudreault* indicate that the SCC is willing to take equality-focused approaches outside the context of section 15. The goal now should be to ensure that such applications are consistent, particularly in relation to section 7.

V. WEIGHING EQUALITY AS A PRINCIPLE OF FUNDAMENTAL JUSTICE

The lack of consistency amongst judges to contextually consider the section 7 claims of marginalized claimants reveals the need for structural change to the section 7 analysis. This section explores some of the positive functions that an equality-focused principle of fundamental justice could have for a wider range of claimants, most notably through its potential to allow for novel claims. This section will also identify judicial concerns likely to arise regarding this proposed principle. While this analysis is underscored by an understanding that such a change to the section 7 analysis will likely have some inherent flaws, when judicial concerns are weighed against the benefits that disadvantaged individuals serve to gain from an equality-focused principle of fundamental justice, it is evident that change is still necessary.

A. The Ideal Benefits for Marginalized Claimants

A key benefit to the introduction of an equality-focused principle of fundamental justice is its potential to allow for marginalized claimants to make necessary and novel section 7 claims. Such claims could mirror those made in *PHS*, *Boudreault*, and *Carter*, in which a government has deprived a group of their fundamental rights—likely through some form of criminal prohibition or enforcement. These are the section 7 claims most likely to be successful in court today, given that they can adhere to the current test. However, an equality-concerned principle of fundamental justice could still benefit marginalized claimants making these claims by enforcing more consistent contextual analyses of the social and economic factors that have contributed to their deprivations.

Even more intriguing is the potential for the proposed equality principle to allow for positive section 7 obligations, such as those argued for in *Gosselin,* to succeed. Despite *PHS*, in which the Supreme Court of Canada had a much more progressive understanding of choice than in *Gosselin*, it still seems unlikely that Louise Gosselin would be successful if she brought her case today and was forced to rely on the same section 7 framework. The Court's understanding of equality issues may be progressing, but without an embedded equality analysis it seems unlikely that the move will be made toward recognizing positive section 7 rights.

The need for positive section 7 rights among marginalized individuals is sufficiently clear. All Canadians still lack positive rights to fundamental services such as social welfare, health care,[109] and housing[110] under the *Charter.* Some section 7 claims concerning these topics

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108 Cara Wilkie and Meryl Zisman Gary, "Positive and Negative Rights under the Charter: Closing the Divide to Advance Equality" (2011) 30 Windsor Rev Legal Soc Issues 37 at 42 [Wilkie & Gary, "Positive and Negative Rights"].

109 See *Chaoulli v Quebec*, 2005 SCC 35 at para 104 [*Chaoulli*]; *Flora v Ontario Health Insurance* Plan, 2008 ONCA 538 at paras 105–111.

110 See generally Scott McAlpine, "More than Wishful Thinking: Recent Developments in Recognizing the Right to Housing Under S 7 of the *Charter*" (2017) 38 Windsor Rev Legal & Soc Issues 1, which addresses recent developments in case law surrounding the recognition of a right to housing under section 7.

have had some success, but only in the context of an explicit deprivation.[111] Governments do provide many fundamental social services, and sometimes they are sufficient to help marginalized individuals. However, if such a service is taken away, section 7's lack of protection over positive rights may deprive a claimant of legal recourse. The Supreme Court of Canada, in *PHS*, has recognized how a lack of resources or services can force individuals into precarious lifestyles. Without the Court going a step further to affirm positive rights under section 7, it seems unlikely that marginalized Canadians will receive consistent and equal *Charter*-protected access to the resources they need to survive with dignity.[112]

B. Potential Judicial Concerns

It would be unfair for this paper to ignore potential judicial concerns surrounding this proposed change to the section 7 test. A primary issue that relates to the discussion of positive rights is whether equality as a principle of fundamental justice would open the door to too many claims. In other words, whether this change would open the feared litigation "floodgates." The answer to this lies in judicial ability to both spot and balance valid equality issues. The ongoing *Cambie Surgeries*[113] litigation serves as a helpful example to explain this point. The plaintiffs argue that the current British Columbia health-care scheme violates their section 7 rights because it forces them to endure lengthy wait times in order to receive necessary medical procedures.[114] They claim that they should have access to reasonable alternatives, including services provided in independent medical facilities through use of private health insurance. Broad access to private medical services is currently limited by the *Medicare Protection Act*[115] and under the provincial Medical Services Plan. If the plaintiffs are successful in their bid for what is truly a positive right to health care, this case has the potential to undermine universal healthcare schemes throughout the country.

There is no denying that the individual plaintiffs in *Cambie Surgeries* have suffered.[116] If equality were a factor under the principles of fundamental justice, each could contend that the British Columbia healthcare scheme violates their section 7 rights on at least the ground of disability. Yet, equality's function under section 7 is intended to be holistic. While the plaintiffs in this case could potentially have better health-care access with private insurance, other Canadians would suffer as a result of not being able to access such insurance. The British Columbia government contends that the recognition of positive health-care rights in the context of this case would unreasonably harm marginalized individuals.[117] The judge in this case is forced to balance diverse equality interests. An equality-focused principle of fundamental justice would allow for this balancing, but should ultimately favour the party who faces the greater social and economic barriers. This proposed change to the section 7 test would help regulate the types of cases brought under its guise.

Another concern that may arise with equality as a principle of fundamental justice is whether there would be too much overlap between sections 7 and 15 of the *Charter*. Some will argue that a broadening of section 7 to include equality rights would take away the need for section 15. While some overlap between section 7 and 15 is already impossible

111 Wilkie & Gary, "Positive and Negative Rights", *supra* note 108 at 45. See also *Chaoulli, supra* note 109; *Victoria (City) v Adams*, 2008 BCSC 1363, aff'd 2009 BCCA 563.

112 Wilkie & Gary, "Positive and Negative Rights", *supra* note 108 at 39.

113 See especially *Cambie Surgeries Corporation v British Columbia (Attorney General)*, 2018 BCSC 2084 [*Cambie Surgeries*].

114 *Ibid* at paras 58–72.

115 RSBC 1996, c 286.

116 See *Cambie Surgeries*, *supra* note 113 (Notice of Civil Claim, Cambie Surgeries Corporation, Chris Chiavatti, Mandy Martens, Krystiana Corrado, Walid Khalfallah, and Specialist Referral Clinic (Vancouver) Inc at 6–15).

117 *Ibid* (Response to Notice of Civil Claim, Medical Services Commission of British Columbia, Minister of Health of British Columbia, and Attorney General of British Columbia at 15–16).

to avoid, an equality-focused change to section 7 would still allow for section 15 to serve a unique *Charter* role. Sections 7 and 15 protect against constitutionally-recognized harms that are "qualitatively different in nature"[118] and the Supreme Court of Canada has implicitly recognized this distinction.[119] Section 7 would still require a claimant to prove an infringement of a life, liberty, or security of interest right. In equality-focused cases where this is not possible, claimants will still need to rely on section 15.

Equality as a principle of fundamental justice may also alleviate the need for claimants to plead both sections 7 and 15. Currently, many claimants rely on both because an infringement of their life, liberty, or security of person interest involves underlying equality issues. This is what happened in *PHS, Carter,* and *Gosselin*. If the claimants had instead been able to rely on just section 7, knowing that they could make equality arguments within their section 7 claim, the trial and appeal processes may have gone faster. Not only would this help promote access to justice generally, but section 7 claimants could also obtain speedier access to their fundamental rights.

The argument here is not that section 7 should replace section 15 entirely. However, there is no denying that achieving section 15 rights is typically more difficult for claimants who could instead rely on section 7. Insofar as courts continue to struggle to apply section 15 to meet the equality needs of marginalized claimants, it is vital that these claimants have alternate strategies that they can reasonably rely upon to achieve their *Charter* rights. Thus, this overlap between sections 15 and 7 can benefit claimants in a way that section 15 alone has so far failed.

CONCLUSION

Charter litigation alone cannot solve the systemic problems faced by marginalized Canadians. The process is timely, expensive, and typically offers limited remedies. However, when a disadvantaged individual or group does choose to bring a *Charter* challenge, it is crucial that they receive an equitable chance of success. The section 15 jurisprudence emphasizes judicial failure to account for marginalized voices and experiences, with many questioning the ability of section 15 to uphold inclusive equality rights. At present, section 7 shows more promise for marginalized claimants protecting their *Charter* rights, so long as they have a life, liberty, or security of person interest to rely upon.

An equality-focused principle of fundamental justice could help ensure that more consistent judicial attention is focused on diverse perspectives throughout the litigation process. This proposition is not a perfect solution, but it does serve as a necessary start. An embedded equality analysis could open the minds of judges who would not ordinarily consider the intersectional systemic barriers that certain claimants face when attempting to acquire their *Charter*-protected rights. Comparing the *PHS* and *Gosselin* decisions, for example, stresses the difference that a contextual analysis can make in the determination of a claimant-friendly outcome.

In order for *Charter* litigation to move forward in an equality-focused manner, it is important to dwell on past judicial misinterpretations of systemic disadvantages. An equality-focused principle of fundamental justice must not follow the same unjust path as the section 15 analysis. As Canada's population continues to diversify, and as new people gain more opportunities to speak their truths publicly, it is necessary for the law to change accordingly. This is how the living branches of the Canadian constitution must grow.

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118 Koshan, "Section 7 vs 15", *supra* note 51 at 41.

119 *Ibid.*