Health Care and THE CHARTER

Legal Mobilization and Policy Change in Canada

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AND ANTONIA MAIONI

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Introduction

How does rights-based litigation affect social policy? In this book, we seek insights into this question by examining three critical Canadian Charter of Rights judgments by the Supreme Court of Canada in the field of health policy: *Eldridge v British Columbia* (1997), *Auton v British Columbia* (2004), and *Chaoulli v Quebec* (2005). Our choices of policy field and specific cases are driven by several factors. Spending on health care constituted 11 percent of Canada's GDP in 2014, accounted for $36.07 billion in direct transfers from the federal government to the provinces and territories under the Canada Health Transfer in 2016–17, and is the single largest expenditure item in provincial and territorial budgets (consuming approximately 40 percent of total program spending).[1] Consequently, when the Supreme Court applies the Charter to health care policy, it is not simply intervening on the periphery of public policy: it is engaging with the most important practical (and, in some sense, symbolic) policy field in Canada. These particular cases provide variation with respect to type of claimant (health care consumers in *Eldridge* and *Auton;* consumer and provider in *Chaoulli*); objective (extension of publicly funded services in *Eldridge* and *Auton;* enhanced private sector financing and delivery in *Chaoulli*); lower court outcomes (success in *Auton;* failure in *Eldridge* and *Chaoulli*); and Supreme Court outcome (success in *Eldridge* and *Chaoulli;* failure in *Auton*). Finally, because at least a decade has passed since the Court's judgments in all of these cases, we have a reasonable opportunity to gauge both their legal and policy impact.

This book has two purposes. One is to describe and understand the paths that these litigants took to the Court, the arguments and evidence they mustered to support their positions, and the substance of the victory or defeat. In this sense, the book represents a legal-historical analysis of three relatively high-profile cases with potentially far-reaching consequences in a significant policy area. The book's second purpose is to assess the impact of these cases in both policy and political terms. Did legal victory translate into political victory? Did legal defeat become a political victory? Did the litigation affect the course of health policy development in the provinces that were directly affected? What were the spillover effects, if any, of the litigation into other provinces? In pursuing these two purposes, this book contributes to understanding two vital, yet understudied, phenomena in Canadian policy studies. The first is the systematic use of litigation to achieve specific policy outcomes. Canadian scholars have not entirely ignored this phenomenon, but they have focused their attention on a relatively narrow set of issues and social actors. The second phenomenon concerns the policy impact of judicial decisions. Although there have been some attempts to study judicial impact in Canada, the nature of the relationships among litigation, legal rule change, and socio-political transformation requires more systematic investigation.

We are not the first, of course, to examine these broader phenomena and questions. Existing scholarship on such policy activism tends to fall into three categories. First, scholars have identified and explored "legal mobilization," which is, in the cases under study, the articulation of health care policy preferences in the form of enforceable constitutional rights claims and the pursuit of those claims before the courts. Second, analysts have explored what they call "remedial decree litigation," referring to the type of legal proceedings generated by such mobilization. Third, scholars have identified the "judicial policymaking" that courts have engaged in as a result of these processes. Our exploration and analysis of *Eldridge, Auton,* and *Chaoulli* relies on insights derived from literature in all three of these areas. In the remainder of this introduction, we

review these three areas and their key findings, providing readers with the intellectual context for our discussion of the specific cases.

Legal Mobilization, Remedial Decree Litigation, and Judicial Policy Making

Legal Mobilization

Legal mobilization has been variously described as a "process by which legal norms are invoked to regulate behavior"[2]; the translation of policy preferences into specific outcomes through "an assertion of one's rights"[3]; and a "planned effort to influence the course of judicial policy development to achieve a particular policy goal."[4] As a strategy for policy reform, legal mobilization ideally aims at establishing new legal rules that generate desirable policy consequences and strengthen the political position of the reform's advocates. Reality, however, is usually more complicated: legal mobilization may fail to establish sought-for legal rule changes, yet desirable policy consequences may follow; desirable rules may emerge from litigation but have no impact on policy or social conditions; unsuccessful legal mobilization may nevertheless strengthen a policy reform movement by energizing individuals around particular causes; or, by contrast, successful mobilization may enervate a movement or energize a counter-movement.

Not surprisingly, given the centrality of the US Bill of Rights to legal and political questions in that country, and the American reputation for litigiousness, there is a long history of scholarly attention to the phenomenon of legal mobilization in the United States, where its roots can be traced to at least the early twentieth century.[5] Credit for the systematic development of legal mobilization usually goes to two groups: the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP). Although both organizations oriented legal mobilization around a "leading case" approach,[6] the NAACP initially took a more programmatic approach than did the ACLU. Indeed, the NAACP explicitly developed "a strategic

plan for cumulative litigation efforts aimed at achieving specified social objectives."[7]

The NAACP turned to litigation because restrictive election laws and voting requirements, not to mention poverty and the legacy of slavery, ensured that African Americans remained a "discrete and insular minority" that found it difficult to defend or advance its interests through normal democratic political participation.[8] Thus, in 1915 the NAACP entered the judicial arena to defend the existing legal rights of African Americans, and in 1939 it established an independent Legal Defense and Education Fund to undertake a systematic program of social reform through legal mobilization.[9] These legal struggles achieved important victories against restrictive property covenants and segregated education, and in favour of voting rights. The crowning achievement was the US Supreme Court's unanimous decision, in *Brown v Board of Education* (1954), that segregated public education violates the constitutional guarantee of equal protection.[10] *Brown* has been credited with making judicial activism possible,[11] and with being "such a moral supernova in civil liberties adjudication that it almost single handedly justifies the exercise."[12] To be sure, these victories required further legal and political action to become even partially effective, but the NAACP's apparent success came to define the method of and potential for legal mobilization.

By the end of the 1960s, based largely on the NAACP's experience, conventional wisdom held that the principal reason for legal mobilization was political disadvantage. According to this theory, litigation occurs when groups are systematically blocked from other avenues of political change. However, by the middle of the 1970s this conventional wisdom was under attack. In perhaps the most widely cited article in the law and society literature, Marc Galanter argued that only repeat-player litigants, with accumulated legal expertise and extensive legal resources, were likely to mobilize the law successfully to achieve long-term programmatic objectives.[13] Scholars identified other factors, such as diffuse financial support and the organization's longevity, as important in making litigation a feasible strategy.[14] In venturing "beyond the political disadvantage

theory," it became apparent that groups without political and economic resources were also unlikely to possess the legal resources necessary to sustain systematic litigation campaigns.[15] Although the NAACP represented a disadvantaged group, as an organization it succeeded because of political resources in the form of financial support from philanthropic organizations and influential, dedicated, and hard-working individuals with ties to the majority political community.[16] These observations suggested that legal mobilization, which appears superficially to be the province of political outsiders, actually belongs as much, and perhaps more, to political insiders.[17]

Whether seeking to press existing advantages, or mobilizing to overcome political disadvantage, organized group litigants face several strategic and tactical choices. The basic strategic choice is between direct sponsorship of test cases and participation as an intervener (or *amicus curiae*, to use American terminology). Direct sponsorship maximizes control of litigation but is expensive; intervener participation is less costly but provides far less control over the development of legal rules. From a strategic point of view, legal mobilization will be more successful to the extent that a social movement exercises centralized control, brings cases in the proper sequence, and identifies favourable venues. The principal tactical decision is to identify "winnable" cases and arguments. The incremental character of judicial policy making means that the ultimate legal objectives of a litigation campaign can best be achieved through the gradual development of discrete rules that eventually form the basis for a new, overarching, legal doctrine. In practical terms, this means that cases involving the easiest legal questions must be identified and litigated first, before moving on to those raising more problematic issues. Factual clarity and sympathetic plaintiffs are also important factors in winning individual cases.

Another factor that led to the decline of the 1960s ideal of legal mobilization as an instrument for improving the position of the politically disadvantaged was a questioning by scholars of whether the achievements of groups like the NAACP were more apparent than real. As Stuart Scheingold observed in 1974, "two decades after

the *Brown* decision, [Americans] are still struggling inconclusively with school desegregation." According to Scheingold, the "continued vitality of litigation," despite the unfulfilled promise of *Brown*, could "be read as a triumph of myth over reality."[18] In his view, litigation could produce social reform at best indirectly, by contributing to a broader process of political mobilization in which interests are activated, organized, and realigned.[19]

Scheingold's observations foreshadowed an important debate about legal mobilization between Gerald Rosenberg and Michael McCann, among others, during the 1990s. This debate opened with Rosenberg's 1991 book, *The Hollow Hope*.[20] Rosenberg examined six areas (civil rights, abortion, women's rights, the environment, reapportionment, and criminal law) and posed this question: Did judicial decisions produce significant social reform? His findings were pessimistic, and he concluded that systematic institutional factors, including the limited nature of constitutional rights, limited judicial independence, and limited judicial implementation capacity, made legal mobilization an unreliable path to social reform.[21] Despite this pessimism, Rosenberg did recognize some conditions under which litigation might be effective: when incentives exist for key actors to implement changes; when there are costs associated with resisting change; and where the possibility exists for parallel institutions to implement the social change dictated by courts. Finally, success will be higher where court orders can be used as leverage to extract additional resources from political actors.[22]

In 1992, Michael McCann described *The Hollow Hope* as "bold, compelling, and important," yet ultimately unconvincing.[23] McCann raised concerns about evidence, interpretation, and conceptualization, and argued that Rosenberg's approach missed the "constitutive capacity of law" in which "legal knowledge prefigures in part the symbolic terms of material relations and becomes a potential resource in ongoing struggles to refigure those relations."[24] McCann's own study of legal mobilization and the pay equity movement led him to conclude that legal mobilization provides important political payoffs, even in the absence of directly positive effects.[25] In particular, the mobilization of rights discourse by marginalized groups,

according to McCann, can be a source of empowerment that facilitates long-term improvement in their disadvantaged status.[26] In response, Rosenberg argued that McCann's "de-centered" approach missed important phenomena – such as union activism – that affected the degree of successful legal mobilization in the pay equity field.[27] According to Rosenberg, a close analysis of McCann's findings actually supported the central thesis of *The Hollow Hope,* that "courts can help progressive forces, but only under conditions that both occur infrequently and are virtually determinative of change on their own."[28]

One of the most important lessons of the McCann-Rosenberg debate is that measuring either the success or influence of legal mobilization is extremely difficult. Success is not a simple concept, nor is it identical to influence. Success can mean favourable outcomes in individual cases or the development of desired legal doctrine. Yet even accomplishing these two difficult objectives does not guarantee achieving the broader socio-economic and political changes at which legal mobilization aims. Moreover, case outcomes, doctrinal developments, and broader policy shifts may be entirely independent of group participation. As Charles Epp has argued, the emergence of a policy-transformative "rights revolution" depends on the development of what he calls a "litigation support structure."[29] He suggested that neither bills of rights nor activist courts on their own could establish the conditions for legally driven change. Equally, and perhaps even more, important are democratization of access to justice, the influence of advocacy groups, the establishment of governmental enforcement agencies, the growth of financial and legal resources, and strategic planning by grassroots organizations.

Canadian scholarly interest in constitutional litigation by organized groups dates back over sixty years,[30] but during the past three decades this interest has intensified because of new opportunities for such litigation provided by the Canadian Charter of Rights and Freedoms, including Supreme Court findings based on Charter challenges. Although scholars disagree about both the meaning and extent of "judicial activism" under the Charter,[31] there can be

little doubt that the Charter has expanded the range of social and political issues within the jurisdiction of Canadian courts. Scholars have been quite naturally drawn to the study of why, how, and to what effect social movements and organized groups have exploited this expanded jurisdiction.[32] As a consequence, the pursuit of substantive equality by women and gays and lesbians[33] and the expansion of minority-language education rights[34] have drawn significant attention from Canadian scholars.

Remedial Decree Litigation

The purpose of legal mobilization is to extract a judicial decision that both declares a violation of rights and defines a remedy – a remedial decree – for that violation. The opportunity for broad remedial decrees is quite high under the Charter. In the post-Charter world, Canadian courts have *three* remedial alternatives: nullification of legislation under section 52(1) of the *Constitution Act, 1982;* exclusion of evidence under section 24(2) of the Charter to remedy violations of certain rights in the context of criminal cases; and the broad power under section 24(1) to redress Charter infringement by crafting whatever remedies they consider "appropriate and just in the circumstances." Although each of these remedial alternatives has the potential to alter public policy, section 24(1) provides courts with an opportunity to develop positive and prospective remedies, in contrast to the largely proscriptive nature of the other two alternatives. In any event, the Supreme Court of Canada has interpreted remedial powers under the Charter quite broadly, making remedial decree litigation at least in theory a powerful tool for shaping public policy.

Remedial decree litigation has been a crucial element of constitutional adjudication in the United States for more than a half century. Taking advantage of increased access to courts and judicial willingness to formulate novel remedies, litigants have been successful in persuading American federal courts to participate actively in shaping and administering public policy in areas such as zoning and land-use planning, housing, social welfare, transportation, education, and the operation of complex institutions like prisons

and mental health facilities.[35] Phillip J. Cooper has suggested that remedial decree litigation should be viewed as a process consisting of four key elements, which he describes as the trigger, liability, remedy, and post-decree phases of litigation.[36] Although these phases correspond to the chronological progression of ordinary lawsuits, Cooper argues that they are also analytically distinct categories whose attributes exert a unique influence on the ability of judges to resolve remedial decree cases successfully.

The trigger phase consists of both the general historical practices and specific triggering events that lead to the initiation of a case. These practices and events are the product of individual or group demands, local political forces, and conditions in the broader political system. According to Cooper, the importance of these factors to the trigger phase suggests that remedial decree litigation can be both reactive and the product of carefully planned reform strategies. During this phase of the process, one of the principal tasks facing litigants is to meet the threshold requirements necessary for continuing the lawsuit. At a minimum, this means gaining access to the courts. For parties directly involved in the dispute, the major hurdle is standing; for groups indirectly affected by the litigation, the major hurdle is to obtain intervener status.

As Cooper's model suggests, the fact that litigants must meet threshold requirements before proceeding from the trigger phase to the liability and remedy phases means that a significant degree of judicial choice is involved at the earliest stages of remedial decree litigation. Indeed, at the highest level of the judicial process, courts have virtually complete control over their dockets, and this provides them with the discretion to select the most appropriate cases for resolving complex policy issues. However, given the constraints faced by interest group litigants, the pool of cases from which courts may choose often consists entirely of "outliers" whose facts do not necessarily reflect general conditions. The principal danger is that these cases may produce reforms "that prevent the worst case, but make things worse in most situations."[37]

The liability and remedy phases form the core of remedial decree litigation. They may occur simultaneously or be the subject of

separate proceedings. In addition, they may encompass certain elements of the trigger phase, such as determining whether litigants have met threshold requirements. The key aim of litigants at the liability phase is to persuade the court that there has been a violation of constitutional rights that merits a remedy. According to Cooper, several aspects of the liability phase affect the ultimate success of litigation.[38] Litigants must develop an adequate record to support the court's liability findings and subsequent remedial order. This is important because successful litigation ultimately depends on a strong judicial opinion on liability issues. If the court's liability findings are equivocal, the subsequent remedy will be weak and may not survive scrutiny on appeal. These requirements impose considerable burdens on litigants, who must design litigation strategies that feature sympathetic plaintiffs, ensure centralized control over the lawsuit, take advantage of favourable venues, and do not require unusual departures from established legal doctrine to achieve the desired outcome.[39]

Once litigants have been successful in the liability phase, it is necessary to formulate a remedy. The remedial process may consist solely of negotiations between the parties to produce a remedy that is simply approved by the court. On other occasions, it is necessary for the court to impose a remedy following an adversarial remedial hearing. The remedy phase of remedial decree litigation also includes the appeals process. The principal element of this process is review of both the liability and remedy decisions rendered by lower courts. In some cases, appellate review of liability findings may occur while the lower court is still crafting its remedial decree. Under other circumstances, the implementation of remedies may be stayed while appellate review takes place. In still other cases, remedy implementation may proceed simultaneously with appellate review. Each of these scenarios introduces additional complexity into remedial decree litigation.

Finally, the post-decree phase is concerned with the implementation, evaluation, and refinement of the initial remedy. This phase is characterized by interaction between litigants and judges, with the degree of interaction determined by the nature of the initial

remedy. Although courts may have access to several remedial alternatives, these remedies can be imposed only by coercive orders whose implementation depends on officials and institutions over which courts may exercise little direct control. According to Cooper, the implementation of process-oriented remedies generally requires less judicial participation than do remedies specifying particular actions. However, when courts order process remedies, and then limit their active involvement in implementation and evaluation, additional litigation is often necessary to enforce the remedy. The final step in the post-decree phase, and in remedial decree litigation generally, is disengagement by courts from the situation they were initially called upon to remedy.

Judicial Policy Making

When courts respond positively to legal mobilization by declaring rights violations and crafting remedies to resolve broad social questions, they transition from dispute resolution to policy making. Feeley and Rubin define judicial policy making as the process whereby judges "exercise power on the basis of their judgment that their decisions will produce socially desirable results."[40] They argue that this process occurs in two steps, with courts first invoking a legally authoritative text to establish their jurisdiction over an issue and then deriving the policy response to that issue from legally non-authoritative sources.[41] Although judicial policy making is not exclusive to rights-based judicial review, the existence of constitutionally entrenched rights increases the opportunity for judicial policy making by expanding the range of policy issues that can be brought within a court's jurisdiction.

One common proposition about judicial policy making is that it is affected in several important ways by the institutional attributes of adjudication. These attributes flow from the traditional structure of adjudication,[42] and they give judicial policy making "its own devices for choosing problems, its own habits of analysis, its own criteria of the relevance of phenomena to issues, [and] its own repertoire of solutions."[43] Unlike politics, which is a bargaining process that relies on exchange to accommodate conflicting interests and

is characterized by flexibility, dynamism, and power, adjudication resolves conflicts through the authoritative articulation of norms.[44] For Horowitz, the result is a process that is passive, incremental, focused on rights and remedies, concerned with historical rather than social facts, and less amenable to policy review than other forms of policy making.[45] From this perspective, there is a tension between the type of analysis needed to solve complex and multifaceted social problems and the techniques used in the judicial process to gather, process, and evaluate information.

To the extent that a tension exists between the institutional attributes of adjudication and the demands of policy making, it is exacerbated in the Canadian case by the very structure of Charter adjudication. Indeed, in the majority of Charter cases, courts perform their most important task not in defining the substantive meaning of rights or liberties, or in measuring government action against those definitions, but in determining the scope of "reasonable limits" on rights under section 1 of the Charter.[46] The controlling jurisprudence on this question dictates that a limit is reasonable if it is proportionate to a "pressing and substantial" legislative objective.[47] Proportionality is determined according to a three-pronged test: (1) whether there is rational connection between means and ends; (2) whether there is a minimal impairment of the right or freedom; and (3) whether the social benefits of the limit outweigh its cost to the individual. Given the absence of any legally authoritative measurement of proportionality, the reasonable limits analysis almost by definition entails judicial policy making. Judicial policy making is not merely an accidental byproduct of Charter adjudication: it is the very essence of the judicial function under the Charter in many cases.

A second proposition about judicial policy making is that the passive, rights-focused nature of adjudication narrows the range of alternatives available to judicial policy makers. Adjudication is initiated and controlled by the parties, and the very purpose of articulating policy demands in the form of constitutional rights is to *exclude* alternative policy choices from consideration. "Rights talk," in other words, narrows the scope of policy discussion by equating

legally enforceable rights with a single, "correct" policy choice.[48] As a result, even such ardent supporters of judicial policy making as Feeley and Rubin concede that "courts rarely engage in a sort of systematic survey of alternatives."[49] In particular, "rights talk" delegitimizes concern with the financial costs of alternative solutions to complex policy problems. As one Canadian analyst has put it, "constitutional rights ... must receive a higher priority in the distribution of available government funds than policies or programs that do not enjoy that status. A different preference for allocation of resources cannot justify encroachment on a right."[50]

A third proposition – that its adversarial character impedes comprehensive information gathering and processing – is derived from several attributes of adjudication. The judicial process is designed primarily to ascertain historical/adjudicative facts about discrete events that transpired in the past rather than social/legislative facts about causal relationships, "recurrent patterns of behavior," and future impact.[51] Policy making nevertheless requires extensive reliance on social/legislative facts. Adversarial fact-finding complicates matters further at the trial court level by presenting information in a manner that detracts from its comprehensiveness, quality, and integrity; that promotes unrealistic simplification; and that hinders the "logical order needed for a systematic consideration of findings on a specific topic."[52] At the appellate level, the adversarial nature of adjudication tends to exaggerate the authoritativeness of information and to encourage courts to treat hypotheses as axioms.[53] The adjudicative process' affinity for historical facts also affects its capacity to measure the impact of decisions on future behaviour.[54] Courts may be equipped to determine cause-and-effect relationships in the context of discrete, historical events, but their ability to do so in the context of ongoing phenomena is limited.

One of the more high-profile examples of this limited capacity to process extrinsic evidence of social facts in the Canadian context is the Supreme Court's attempt to formulate a general policy on unreasonable trial delays. At issue in *R v Askov* (1990) was a relatively straightforward question: had there been an unreasonable delay in bringing the accused to trial? According to Justice Peter Cory, the

answer to this question depended on several historical facts: the length of the delay, the specific reasons for the delay, whether the right to be tried in a reasonable time had been waived, and the degree of prejudice caused by the delay. Applying these factors to the particular case before him, Justice Cory determined that the two-year delay between preliminary hearing and trial was clearly excessive, and he stayed the proceedings against Askov.

Justice Cory was not content, however, to leave matters there. Among the evidence submitted on behalf of Askov was an affidavit by Carl Baar about three court delay studies he had conducted. These studies indicated that the jurisdiction from which *Askov* had originated experienced significantly longer institutional delays than comparable jurisdictions. Although the affidavit had a narrow purpose – to demonstrate the unreasonableness of trial delays in a specific case and jurisdiction – Justice Cory read it as a broader analysis of the general problem of trial delay. Based on the affidavit, as well as his own inquiries, Cory identified delays of six to eight months as the outside limit of reasonableness and confidently predicted that this would only "infrequently" result in stays of proceedings.

As it turned out, *Askov* led to dismissals, stays, or withdrawals of almost 52,000 criminal charges involving more than 27,000 cases in Ontario alone between October 1990 and November 1991.[55] In unprecedented public comments about the unanticipated consequences of *Askov,* Cory expressed the Court's "shock" at the impact of the decision.[56] According to Baar himself, the unintended negative consequences of *Askov* were an entirely predictable result of the Court's extremely flawed use of extrinsic evidence. In trying to formulate general policy, rather than decide a particular case, "the Supreme Court went beyond the facts in *Askov*, and beyond the material presented in both affidavits, to establish principles of law not necessary for the decision in the case, principles founded on incomplete and incorrect analysis of the material before it."[57] The Court tried to repair the damage in *R v Morin* (1992) by indicating that it had intended only to articulate general guidelines in *Askov* and by changing the outer limits of "unreasonable delay" from eight to fourteen months.[58] Finally, in *R v Bennet* (1992) the Court

apparently gave up altogether trying to understand the social science of court delay.[59]

The issue of trial delays as a *legal policy question* did not entirely disappear, however. In a 2007 speech to the Empire Club of Canada, Chief Justice McLachlin identified it as one of the four most important challenges facing the legal system.[60] Just under a decade later, in 2016, the Court would return to the question of constitutional limits on trial delays in *R. v Jordan* (2016).[61] In that judgment, a unanimous Court set an upper limit of eighteen months on trial delays in provincial courts and of thirty months in superior courts. Despite allowing a "transitional special circumstances" provision to prevent consequences similar to those that followed *Askov*, the *Jordan* ruling threw standard operating procedures into chaos, and even led to proceedings being stayed in several high-profile homicide cases.[62] In this instance, the Court clearly acted as a legal policy maker: it identified a policy problem (unreasonable trial delays), identified a solution (trial within 18 or 30 months, depending on the court level), and articulated a constitutionally entrenched legal rule to implement that solution (trial delays beyond 18 or 30 months violated a *Charter* right and were grounds for dismissal). The Court aggressively asserted its privileged position as a policy maker in this field in *R v Cody* (2017), where it issued a unanimous "By the Court" judgment affirming the *Jordan* rule.[63]

The passive, rights-focused nature of adjudication has two additional consequences for judicial policy making. First, it transforms an attribute of adjudication that might be an asset in other policy-making contexts – incrementalism – into a liability. In ordinary litigation, courts contribute to the evolution of legal-moral principles and public policy by resolving disputes on a case-by-case basis. This attribute of adjudication enhances judicial decision-making capacity in ordinary litigation because it allows judges to implement small changes, measure their impact, and respond to new information. As a result, incrementalism can reduce the likelihood of large-scale policy errors. However, rights-based judicial policy making negates the value of incrementalism because the demands to which it is a response generally require comprehensive

and conclusive solutions. The problem with incrementalism in this context is that individual cases are often unrepresentative of general conditions. Just as conventional legal wisdom holds that hard cases often produce bad law, easy cases may result in bad policy.

Adjudicative passivity and the emphasis on rights also limit opportunities for policy review. The need to rely on parties to initiate litigation can make the process of discovering and responding to unintended consequences relatively cumbersome.[64] The inability of courts to *initiate* policy review is especially important in view of the implementation difficulties that judicial policy making faces.[65] Ultimately, poor compliance with, and the weak impact of, judicially formulated policies can be traced back to the adjudicative process' difficulty in gathering and processing social/legislative facts. These difficulties hinder the communication of expected consequences to individuals and institutions affected by the decisions, leading to frustration and inhibiting compliance.[66]

Eldridge, Auton, and *Chaoulli* all involve legal mobilization, remedial decree litigation, and judicial policy making. Each involved a conscious decision to seek policy change through litigation; each sought a judicial decree in favour of a specific policy measure; and each engaged courts in a polycentric dispute about how best either to allocate future health care resources or structure the delivery of health care services.

A Note on Sections 7 and 15 of the Charter

Since the three cases analyzed in this book involved challenges brought under sections 7 (*Chaoulli*) and 15 (*Eldridge, Auton*) of the Charter, it is worth reviewing the judicial development of these provisions. Section 7 appears under the heading "Legal Rights," which apply to the investigation and prosecution of criminal offences. It provides that "[E]veryone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Nothing in the text, placement, or historical origins of section 7 provides an obvious connection to health care. However, the seeds

for its application to broad questions of social policy, including health policy, were sown in two early decisions: *Re BC Motor Vehicle Act* (1985) and *Operation Dismantle* (1985).[67] In *Re BC Motor Vehicle Act*, Justice Antonio Lamer held that a "broad, purposive analysis" of section 7 requires that the "principles of fundamental justice" not be constrained by any meaning the Charter's drafters might have attached to them. To interpret section 7 according to its intended meaning, Justice Lamer argued, would cause Charter rights to be "frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs."[68] "If the newly planted 'living tree' which is the Charter is to have the possibility of growth and adjustment over time," he continued, "care must be taken to ensure that historical materials ... do not stunt its growth."[69] The practical consequence of this approach was to attach a substantive meaning to the principles of fundamental justice. The Charter's framers had sought to avoid such an interpretation because a similar approach had permitted the US Supreme Court to declare laws unconstitutional simply because they "arbitrarily" interfered with protected rights.[70]

Operation Dismantle's contribution was to extend section 7 beyond matters concerning the administration of justice and to reject a political questions doctrine that would *prima facie* exclude some issues from ever being decided by courts as a limit on Charter review. At issue in the case was the federal cabinet's decision to allow cruise missile testing. A coalition of disarmament groups challenged the decision on the grounds that, by increasing the risk of nuclear conflict, it infringed the rights to life and security of the person. Rather than dismiss the claim outright as non-justiciable, or at least as unrelated to the purposes of section 7, the Court concluded that "disputes of a political or foreign policy nature may be properly cognizable by the courts."[71] Once this policy area was included within Charter review, then every policy – including, eventually, health care – had to be included.

Two other judgments are also important for the development of section 7 in the context of health care: *R v Morgentaler* (1988) and *Rodriguez v British Columbia* (1993).[72] Since we discuss *Morgentaler*

at greater length in the next chapter, we confine ourselves here to brief remarks about *Rodriguez*. At issue was the constitutionality of the criminal prohibition against assisted suicide, and in a 5–4 judgment the Court upheld the prohibition. Of particular importance, however, was Justice Beverley McLachlin's dissenting judgment, in which she identified "arbitrariness" as inconsistent with the principles of fundamental justice. In her view, legislation is arbitrary "if it bears no relation to, or is inconsistent with, the objective that lies behind the legislation." Ironically, it was precisely to avoid having Canadian courts pronounce on the arbitrariness of regulatory measures that the Charter's drafters adopted the language they did for section 7. As will become apparent in our chapter on *Chaoulli,* there is a direct line to that case from McLachlin's *Rodriguez* dissent.

With the exception of section 7, no Charter provision applies to as broad a range of public policy as section 15. Section 15 guarantees equality before and under the law, guarantees equal benefit and protection of the law, and prohibits discrimination on the basis of nine enumerated characteristics. Thus, even had the Court adopted the narrowest possible interpretation of section 15 – that it prohibits *direct* discrimination against *enumerated* characteristics – that section would have affected policy development in important ways. However, in its first equality rights decision, *Andrews v Law Society of British Columbia* (1989),[73] the Court broadened section 15 to include *indirect* discrimination and non-enumerated (though analogous) characteristics. The history of equality rights in the Supreme Court is therefore largely one of a self-described process of "equality-seeking," in which groups have sought to mobilize recognition under section 15 to extract favourable policy outputs from governments. Although obvious groups like women, sexual minorities, religious minorities, older Canadians, and the physically disabled have accounted for most section 15 litigation, workers' compensation claimants, male prisoners, and accountants have all attempted to stake claims under that section.[74]

From 1995 on, the Court broadened the interpretation of section 15 even further by shifting the definition of discrimination away