Constitutional forum constitutionnel

R v Sharma's "*Clarification*"[1] *of the Section 15 Framework and its Creation of Unique Barriers for Disability-Based Equality Claims*

Caitlin Salvino*

I. Introduction

The equality clause in early drafts of the *Canadian Charter of Rights and Freedoms* (*Charter*) looked very different than it does now.[2] Notably, the earlier versions of the equality clause excluded any reference to disability as a ground of discrimination. Through the committed advocacy of disability rights organizations, such as the Canadian National Institute for the Blind, the Canadian Paraplegic Association, and the Canadian Mental Health Association, the Special Joint Committee on the Constitution voted to amend the *Charter*'s equality clause to explicitly list "mental or physical disability" as an enumerated ground of discrimination.[3]

* Human Rights and Law (Carleton University), MPhil in Law (University of Oxford), DPhil in Law (University of Oxford).

1 The SCC majority in *R v Sharma* characterized their approach to the section 15(1) framework as a "clarification" to the application of the test. See *R v Sharma*, 2022 SCC 39 at para 34 [*Sharma*].

2 The original text of the equality clause (now section 15(1) of the *Charter*) presented to the Special Joint Committee on the Constitution was: "everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex." See Adam M Dodek, ed, *The Charter Debates: The Special Joint Committee on the Constitution, 1980-81, and the Making of the Canadian Charter of Rights and Freedoms* (Toronto: University of Toronto Press, 2018) at 235. The text of section 15(1) that was entrenched in the *Charter* is: "[E]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." See *Canadian Charter of Rights and Freedoms*, s 15, Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act, 1982 (UK)*, 1982, c 11 [*Canadian Charter of Rights and Freedoms*].

3 To read the submissions to the Special Joint Committee made by the Canadian National Institute for the Blind, the Canadian Paraplegic Association, and the Canadian Mental Health Association, see: "Special

Since the entrenchment of Canada's *Charter* in 1982, the equality clause under section 15 has been recognized by the Supreme Court of Canada (SCC) as "perhaps the *Charter*'s most conceptually difficult provision."[4] Over the past forty years, the SCC has grappled with this "elusive concept"[5] of equality by adopting a new approach to section 15 every decade.[6] In 2020, the SCC released its influential equality decision in *Fraser v Canada*.[7] In *Fraser*, the majority decision written by Justice Abella sets out a clear two-step framework for establishing a section 15(1) *prima facie* infringement.[8] The majority also re-affirmed that section 15(1) shields individuals from discrimination on its face and in its adverse effects.[9] At the time, *Fraser* was widely regarded as a "victory for equality seeking groups,"[10] with feminist scholars tentatively celebrating the potential end of the "continual reinvention"[11] of section 15.[12]

However, this cautious optimism for a settled section 15(1) framework was short-lived. Less than two years later, the SCC re-framed the section 15(1) test in *R v Sharma*.[13] The SCC's decision in *Sharma* has once again thrown the section 15(1) framework into jurisprudential uncertainty — with potential heightened negative impacts for equality claimants from specific marginalized groups.

This article analyzes the re-framing of the section 15(1) test in *Sharma* and its potential implications for future equality rights claimants. First, I identify the ways *Sharma* altered the section 15(1) framework. Then, I argue that this re-framed section 15(1) test poses unique challenges for disability-based equality claims.

II. *Sharma*'s Alteration of the Section 15(1) Framework

In *Sharma*, the SCC considered the case of Cheyenne Sharma — a First Nations woman who pleaded guilty to importing a Schedule I substance contrary to the *Controlled Drugs and Sub-*

Joint Committee on the Constitution", online: *Canada's Human Rights History* <https://historyofrights.ca/archives/special-joint-committee-constitution-1980-1/> [perma.cc/5J47-5V5B]; see also Dodek, *supra* note 2 at 257–265.

4 *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1 at para 2.

5 *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1 at 164.

6 Jennifer Koshan & Jonnette Watson Hamilton, "The Continual Reinvention of Section 15 of the *Charter*" (2013) 64 UNBLJ 19 at 19.

7 *Fraser v Canada (Attorney General)*, 2020 SCC 28, [2020] 3 SCR 113 [*Fraser*].

8 Section 15(1) has two branches that must be met. First, claimants must show that the law or state action "on its face or in its impact, creates a distinction based on enumerated or analogous grounds." Second, claimants must show that the law or state action "imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage." See *ibid* at para 27.

9 *Ibid* at paras 47–50.

10 Sonia Lawrence, "Critical Reflections on *Fraser*: What Equality Are We Seeking?" (2021) 30:2 Const F 43 at 43.

11 Koshan & Hamilton, *supra* note 6.

12 Jonnette Watson Hamilton, "Cautious Optimism: *Fraser v Canada (Attorney General)*" (2021) 30:2 Const F 1; Colleen Sheppard, "Lessons from Fraser: Equal Benefit of the Law and Societal Inequalities" (10 June 2022), online: *McGill University Centre for Human Rights & Legal Pluralism* <https://www.mcgill.ca/humanrights/article/lessons-fraser-equal-benefit-law-and-societal-inequalities> [https://perma.cc/6GUR-ZRAG].

13 *Sharma*, *supra* note 1.

stances Act.[14] At issue was the constitutionality of *Criminal Code* provisions that made conditional sentences unavailable for her offence.[15] She argued that, as a First Nations woman, these *Criminal Code* provisions unjustifiably infringed her *Charter* rights under sections 7 and 15(1).

In a split 5:4 decision, the SCC majority denied Ms Sharma's *Charter* claims. On the equality claim, the majority found that Ms Sharma failed to satisfy the first stage of the section 15(1) test. Under this stage of the test, the majority held that Ms Sharma failed to adduce statistical or other evidence to show that the *Criminal Code* provisions created or contributed to a disproportionate impact on her as an Indigenous offender.[16] The four dissenting judges disagreed, finding that Ms Sharma had satisfied both stages of the section 15(1) test and that this equality rights infringement was not demonstrably justified under section 1 of the *Charter*.[17]

The application of section 15(1) to the facts was not the only aspect of the decision on which the majority and dissent disagreed. The majority and dissent also part company on whether the majority, through their interpretation, had re-framed the section 15(1) test. Justices Rowe and Brown, writing on behalf of the majority, characterize their approach to section 15(1) as a "clarification" of the framework.[18] They state that they "do not alter the two-step test for s.15(1)" but instead "bring clarity and predictability to its application."[19]

Justice Karakatsanis, writing on behalf of the dissent, takes a different and critical view. She refers to the majority's approach as a "wholesale revision"[20] of the section 15(1) framework, finding that the majority "raises the bars at each step of the [section 15(1)] test."[21] She concludes that the majority's revision of the section 15(1) framework is "unsolicited, unnecessary, and contrary to *stare decisis*."[22]

This article directly engages with this conflict between the majority and dissent in *Sharma*. In the rest of this section of the article, I analyze whether the section 15(1) framework was reframed in *Sharma* and, if so, to what extent. To conduct this analysis, I examine each branch of the section 15(1) test separately and compare their formulations in *Fraser* and *Sharma*.

A. Comparing the First Stage of the Section 15(1) Test

In the majority decision in *Fraser*, the first stage of the section 15(1) test requires the claimant to demonstrate that the legislation or state action in question "on its face or in its impact,

14 *Ibid* at para 2. See also *Controlled Drugs and Substances Act*, SC 1996, c 19, s 6(1).

15 The *Criminal Code* bars conditional sentences for offences with a maximum imprisonment term of 14 years or life (section 742.1(c)) and for offences, prosecuted by indictment, having a maximum term of imprisonment of 10 years and involving the import, export, trafficking, or production of drugs (section 742.1(e)(ii)). See *Criminal Code*, RSC 1985, c C-46, ss 742.1(c) and 742.1(e)(ii).

16 *Sharma*, *supra* note 1 at paras 66, 72–73.

17 *Ibid* at para 251.

18 *Ibid* at para 34.

19 *Ibid* at para 33.

20 *Ibid* at para 206.

21 *Ibid* at para 205.

22 *Ibid* at para 206.

creates a distinction based on enumerated or analogous grounds."[23] To establish an adverse effects distinction, claimants must show that the law has a disproportionate impact on members of a protected group.[24] Although not required, two types of evidence are identified as helpful in this analysis: (1) evidence of the situation of the claimant group, and (2) evidence of the practical outcomes of the law.[25] The SCC in *Fraser* also clarifies that under this branch, claimants do not need to show that the legislature intended to create a distinction, that the protected characteristic caused the disproportionate impact, or that all members of the group were impacted in the same way.[26]

In *Sharma*, the SCC majority replicates the overarching first stage of the section 15(1) test.[27] However, *Sharma* departs from *Fraser* by altering the evidentiary burden required to establish adverse effect discrimination. *Fraser* requires adverse effect claimants to show only that the impugned law "has a disproportionate impact."[28] *Sharma* alters *Fraser* by now requiring claimants to show that the impugned law "creates or contributes to" the disproportionate impact.[29]

By importing the words "creates or contributes to a distinction" into the section 15(1) test, the majority in *Sharma* makes "causation … a central issue."[30] Now, at the first stage of the section 15(1) test claimants must present sufficient evidence to establish causation by showing a link "by [way of] a reasonable inference" between the impugned law and the disproportionate impact.[31]

B. Comparing the Second Stage of the Section 15(1) Test

Per *Fraser*, the second stage of the section 15(1) test requires claimants to demonstrate that the legislation or state action in question "imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage."[32] There is "no 'rigid template'" to be applied at the second stage of the section 15(1) test.[33] Instead, the goal of this analysis is to "examine the impact of the harm caused to the affected group" by looking at a non-exhaustive list of harms that can include economic exclusion, social exclusion, psychological harms, physical harms, and political exclusion.[34] In *Fraser*, the presence of social prejudices and stereotyping were held to not be separate elements that must be established at this second stage.[35] Further, the SCC rejected any consideration of the law's objective or

23 *Fraser*, *supra* note 7 at para 27.
24 *Ibid* at paras 53–53.
25 *Ibid* at para 56.
26 *Ibid* at paras 69, 70, 72.
27 The first branch of the section 15(1) test in *Sharma* requires that the law "creates a distinction based on enumerated or analogous grounds, on its face or in its impact." See *Sharma*, *supra* note 1 at para 28.
28 *Fraser*, *supra* note 7 at para 30.
29 Notably, *Fraser* does not use the terms "creates" or "contributes to." Instead, *Sharma* draws this language from the 1993 SCC decision in *Symes v Canada*. See *Sharma*, *supra* note 1 at para 42, citing *Symes v Canada*, [1993] 4 SCR 695, 110 DLR (4th) 470 at 765.
30 *Sharma*, *supra* note 1 at para 42.
31 *Ibid* at paras 44, 49.
32 *Fraser*, *supra* note 7 at para 27.
33 *Ibid* at para 76.
34 *Ibid*.
35 *Ibid* at para 78.

its arbitrariness — finding that these analyses are best left for consideration under section 1 of the *Charter*.[36]

As with the first stage of the section 15(1) test, the majority in *Sharma* does not alter the overarching second stage of the section 15(1) analysis.[37] However, *Sharma* adds four qualifications that must be met to establish the second stage of section 15(1).

First, *Sharma* asserts that "leaving the situation of a claimant group unaffected is insufficient" to satisfy the second stage requirements.[38] Second, *Sharma* adds arbitrariness as an additional factor that may assist courts in evaluating the second stage of the section 15(1) test.[39] The majority's importing of arbitrariness into the section 15(1) analysis is contradictory with *Fraser*, where the majority held that this factor should be left to the section 1 analysis.[40] Third, *Sharma* instructs courts to consider the broader legislative context[41] to determine if a distinction is discriminatory.[42] Again, this introduction of legislative context as a consideration directly conflicts with *Fraser*, where the majority rejects any consideration of the state's objective in the section 15(1) analysis.[43] Finally, *Sharma* forecloses the application of section 15(1) in the context of positive state obligations.[44]

In sum, the majority in *Sharma* significantly alters the requirements needed to establish the second stage of the section 15(1) analysis. Even though the majority rejected Ms Sharma's claim at the first stage, they went on to considerably raise the second stage threshold through the addition of the above qualifications.

C. Conclusion on the Re-framing of the Section 15(1) Test

Although *Sharma* leaves the general wording of the two overarching stages of the section 15(1) test untouched, it enacts significant changes to the elements required at each stage. Through a jurisprudential comparison between *Fraser* and *Sharma*, I identified five significant changes made to the section 15(1) framework. At the first stage, the evidentiary burden is raised considerably by requiring the establishment of causation. At the second stage, *Sharma* adds a series of qualifications that raise the threshold required to establish that a distinction is discriminatory in nature.

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36 *Ibid* at paras 79–80.

37 The second branch of the section 15(1) test in *Sharma* requires claimants to show that the law or state action "imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage." See *Sharma*, *supra* note 1 at para 28.

38 *Ibid* at para 52.

39 *Ibid* at para 53.

40 *Fraser*, *supra* note 7 at para 80.

41 *Sharma* defines broader legislative context as including: 1) the objects of the scheme; 2) whether a policy is designed to benefit a number of different groups; 3) resource allocation; 4) the particular policy goals sought to be achieved; and 5) whether the lines are drawn mindful as to those factors. See *Sharma*, *supra* note 1 at para 59.

42 *Ibid* at para 56.

43 *Fraser* held that the state's objective should be considered under section 1. See *Fraser*, *supra* note 7 at para 79.

44 *Sharma*, *supra* note 1 at para 63.

III. *Sharma* Creates Unique Barriers for Disability-Based Equality Claims

Sharma raises the threshold required for all equality claims. I argue, however, that this new section 15(1) framework poses unique barriers for disability-based equality claims.[45]

Section 15(1) of the *Charter* enumerates mental and physical disabilities as grounds of unlawful discrimination.[46] Within Canadian equality jurisprudence, people with disabilities[47] are recognized as a group "suffering social, political, and legal disadvantage in our society."[48]

In the context of section 15(1), the SCC has identified disability as a unique ground of discrimination. Both mental and physical disabilities are considered distinct from other grounds of discrimination because of the role that accommodations[49] play in achieving substantive equality in the disability context. The unique status of disability as a section 15(1) ground was recognized in *Eaton v Brant County*, where the SCC held that "disability … differs from other enumerated grounds … because there is no individual variation with respect to these [other] grounds."[50] Disability is considered a distinct ground of discrimination because equality in this context inherently requires people with disabilities to be treated differently through individualized accommodations tailored to their needs. Without accommodations, the acceptance of people with disabilities in society is conditional on their "emulation of able-bodied norms"[51] where they are forced "to sink or swim within the mainstream environment."[52]

Due to the unique nature of disability as an enumerated ground of discrimination, *Sharma*'s alterations of the section 15(1) framework make establishing disability-based equality claims particularly onerous. I argue that three aspects of the post-*Sharma* section 15(1) framework pose distinct barriers for disability-based equality claims: 1) the added requirement of causation; 2) the importation of broader legislative context into the infringement analysis; and

45 "Disability-based equality claim" refers to any section 15(1) claim based on the enumerated grounds of mental or physical disability. This term also refers to intersectional section 15(1) claims where disability is one of the intersecting grounds of discrimination.

46 *Canadian Charter of Rights and Freedoms*, *supra* note 2, s 15.

47 In this article I adopt person-first language to refer to persons who live with disabilities. However, I recognize that individuals may choose to use different language to describe their experiences with disability and identity. The *United Nations Convention on the Rights of Persons with Disabilities* non-exhaustively defines people with disabilities as individuals who have "long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others." See *Convention on the Rights of Persons Living with Disabilities*, 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008, ratified by Canada 11 March 2010 with effect April 12 2019) [*CRPD*].

48 *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577 at para 54 [*Eldridge*], citing *R v Turpin*, [1989] 1 SCR 1296 at 1333.

49 The *United Nations Convention on the Rights of Persons with Disabilities* defines the term "reasonable accommodation" as: "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms." See *CRPD*, *supra* note 47, art 2.

50 *Eaton v Brant County Board of Education*, [1997] 1 SCR 241, 142 DLR (4th) 385 at para 69 [*Eaton*].

51 *Eldridge*, *supra* note 48 at para 56.

52 *Eaton*, *supra* note 50 at para 67.

3) the pre-emptive foreclosing of positive state obligations under section 15(1). I will address each in turn.

A. Causation and Addressing Gaps Between Groups

The added causation requirement at the first stage of the section 15(1) test poses unique barriers for disability-based equality claims. Following *Sharma*, claimants must now show a nexus between the impugned law and the disproportionate impact on them.[53] Causation cannot be established by "leaving a gap between a protected group and non-group members."[54]

Disability-based equality claims will face significant hurdles in establishing causation. Accommodations are designed to bridge gaps between individuals with disabilities and the able-bodied population. Due to functional impairments combined with social barriers, people with disabilities often require individualized accommodations tailored to their needs to participate equally in society. By pre-emptively asserting that causation cannot be established by gaps left between groups, the SCC's decision in *Sharma* puts into question whether accommodation-related disability claims can ever meet this heightened section 15(1) causation standard.

This alteration to the first branch of the section 15(1) test is difficult to reconcile with existing disability-based equality jurisprudence. In *Eldridge*, the SCC unanimously held that a provincial government's failure to provide sign language interpretation at hospitals violated the section 15(1) *Charter* rights of deaf and hard of hearing patients.[55] In making this finding, the SCC noted that governments will rarely "single out disabled persons for discriminatory treatment."[56] Instead, section 15(1) can be triggered by "a [government's] failure to ensure that [people with disabilities] benefit equally from a service offered to everyone."[57]

By contrast, it is unlikely that accommodations-related claims could ever satisfy the heightened section 15(1) standard laid out in *Sharma*. Per *Sharma*, a government's decision to leave a functional and/or social gap between people with disabilities and abled-bodied people could never establish the required causative link between a government law and disproportionate impact. In this regard, *Sharma*'s added causation requirement risks undoing decades of SCC equality jurisprudence recognizing that a government's failure to offer accommodations that bridge gaps between people with disabilities and able-bodied people infringes section 15(1).

B. The High Cost of Disability Accommodations and Resource Allocations as Broader Legislative Context

Sharma's importation of broader legislative context factors into the section 15(1) analysis raises distinct challenges for disability-based equality claims. *Sharma* departs from *Fraser* by requiring courts to consider the broader legislative context at the second stage of the section 15(1) analysis.[58] The court lists a series of factors, including the object of the law and the allocation of resources, that can be considered. Of particular relevance to this alteration of

53 *Sharma*, *supra* note 1 at paras 44, 49.
54 *Ibid* at para 40.
55 *Eldridge*, *supra* note 48.
56 *Ibid* at para 64.
57 *Ibid* at para 66.
58 See footnote 41. See also *Sharma*, *supra* note 1 at para 59.

the section 15(1) framework is the shifted burden of proof. Now, instead of the burden being on the government to prove on a balance of probabilities that its legislation (considering the broader legislative context) is justified, the onus is on equality claimants to show that, despite the broader legislative context, the law's distinction is still discriminatory.

This incorporation of broader legislative context factors from section 1 into section 15(1) has heightened impacts for disability-based equality claims. Of particular concern is the added consideration of resource allocation as part of the section 15(1) analysis. Resource allocation is of particular concern for disability-based equality claims because of the high costs associated with accommodations. Accommodations for people with disabilities are wide ranging and include modified work hours, technology-based aids, physically accessible spaces, communication aids, and support persons.[59] These wide-ranging types of accommodations also vary in costs. Although there is limited data on the costs of general accommodations, 26 percent of Canadians with disabilities are unable to address their disability needs for aids, devices, and medication due to costs.[60] Generally, existing human rights[61] and *Charter*[62] jurisprudence establishes that the costs of providing required disability accommodations are borne by the employer and/or service provider. Thus, in the context of the *Charter*, considerations of resource allocation will be linked to disability-based equality claims.

The potential high costs associated with disability accommodations are relevant to resource allocation as a broader legislative context factor to be considered under section 15(1). Because of accommodation costs that will usually be present in disability-based equality claims, *Sharma* will require disability-based equality claimants to overcome resource allocation concerns to establish that their equality rights have been violated. Compared to other section 15(1) grounds, disability-based equality claims will be more onerous because of the inherent resource allocation concerns that are more likely to be present due to accommodation costs.

C. Positive State Obligations in the Context of Disability Accommodations

The SCC's pre-emptive assertion in *Sharma* that freestanding positive rights never fall within the ambit of section 15(1) is particularly problematic in the disability context. In *Sharma*, the SCC held that section 15(1) "does not impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation."[63] The majority reasoned that a broader approach to obligations under section 15(1) would require courts to decide complex policy issues that are best left for the legislature within the separation of powers.[64]

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59 Statistics Canada, *Workplace accommodations for employees with disabilities in Canada, 2017*, by Stuart Morris, Canadian Survey on Disability Reports (Ottawa: Statistics Canada, 25 September 2019), online: <www150.statcan.gc.ca/n1/pub/89-654-x/89-654-x2019001-eng.htm> [perma.cc/7S2A-3FVT].

60 Statistics Canada, *A demographic, employment and income profile of Canadians with disabilities aged 15 years and over, 2017*, by Stuart Morris et al, Canadian Survey on Disability Reports (Ottawa: Statistics Canada, 28 November 2018), online: <www150.statcan.gc.ca/n1/pub/89-654-x/89-654-x2018002-eng.htm> [perma.cc/NG2Z-LEEC].

61 Ontario Human Rights Commission, *Policy on Ableism and Discrimination Based on Disability* (Ontario: OHRC, 27 June 2016), online (pdf): <www3.ohrc.on.ca/sites/default/files/Policy%20on%20ableism%20and%20discrimination%20based%20on%20disability_accessible_2016.pdf> [perma.cc/2RRZ-XHFY].

62 *Eaton*, *supra* note 50; *Eldridge*, *supra* note 48.

63 *Sharma*, *supra* note 1 at para 63.

64 *Ibid*.

Positive rights refer to rights that require government "performance of certain actions" for the right to be realized.[65] In the Canadian context, examples of recognized positive *Charter* rights include minority language rights that require provincial government funding for their realization.[66] Alternatively, negative rights require governments to "refrain from acting in certain ways."[67] Often negative rights can be realized by a government doing nothing. Examples of recognized negative rights in the Canadian context include the section 12 *Charter* right to "not be subjected to any cruel and unusual treatment or punishment."[68]

Increasingly, the distinction between positive and negative rights is being questioned.[69] Leading constitutional scholars have argued that the distinction between positive and negative rights is problematic because many rights contain both positive and negative elements. For such scholars, a categorical approach to rights as either negative or positive fails to recognize that rights and the obligations attached to them exist on a spectrum.[70]

If one accepts that a distinction exists between positive and negative rights, as the SCC has in *Sharma*, the exclusion of positive rights from section 15(1) is particularly concerning. Within *Charter* jurisprudence, the SCC has thus far only recognized positive obligations under a handful of *Charter* sections.[71] For example, in *Chaoulli v Québec*, the SCC declined to recognize positive rights under section 7 by holding that the right to life, liberty, and security of the person "does not confer a freestanding constitutional right to healthcare."[72] However, in *Gosselin v Québec*, the SCC left open the possibility that "[o]ne day s[ection] 7 may be interpreted to include positive obligations."[73]

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65 Michael Da Silva, "Positive Charter Rights: When Can We Open the 'Door?'" (2021) 58:3 Osgoode Hall LJ 669.

66 See, for example, *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62; *Mahe v Alberta*, [1990] 1 SCR 342, 68 DLR (4th) 69; *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13.

67 "Positive and Negative Rights" (4 July 2019), online: *Centre for Constitutional Studies* <www.constitutionalstudies.ca/2019/07/positive-and-negative-rights/> [perma.cc/W9MQ-6YHM].

68 *Canadian Charter of Rights and Freedoms*, *supra* note 2, s 12.

69 See for example Justice Abella's four-judge dissent in *City of Toronto*, where she writes: "In any event, the distinction between positive and negative rights is an unhelpful lens for adjudicating *Charter* claims. During nearly four decades of *Charter* litigation, this Court has recognized that rights and freedoms have both positive and negative dimensions. That recognition has led the Court to adopt a unified purposive approach to rights claims, whether the claim is about freedom from government interference in order to exercise a right, or the right to governmental action in order to get access to it. To paraphrase Gertrude Stein, a right is a right is a right. The threshold does not vary with the nature of the claim to a right. Each right has its own definitional scope and is subject to the proportionality analysis under s. 1 of the *Charter*." *Toronto v Ontario (Attorney General)*, 2021 SCC 34, 462 DLR (4th) 1 at para 152.

70 Cara Wilkie & 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 38–40; Margot Young, "Social Justice and the *Charter*: Comparison and Choice" (2012) 50 Osgoode Hall LJ 669 at 695; Bruce Porter & Martha Jackman, "Introduction: Advancing Social Rights in Canada" in Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) at 13.

71 The SCC has recognized that several *Charter* rights have or could have both positive and negative elements, including sections 2, 3, 7, 15, 23, and 29.

72 *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 104.

73 *Gosselin v Québec (Attorney General)*, 2002 SCC 84 at para 82.

The SCC's approach to positive rights obligations under section 15(1) is less definitive. In *Eldridge*, as mentioned above, the SCC recognized that provincial governments must offer sign language interpretation for deaf and hard of hearing patients accessing healthcare in hospitals.[74] In making this finding, the SCC explicitly rejected what they referred to as a "thin and impoverished vision of s. 15(1)" that forgoes any government obligation to implement programs to alleviate disadvantages that exist independently of state action.[75] Instead, the SCC found that "this Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner."[76] Shortly thereafter, the SCC in *Vriend v Alberta* ruled that Alberta's exclusion of sexual orientation as an enumerated ground of discrimination in their human rights code unjustifiably infringed section 15(1) of the *Charter*.[77] In making this finding the SCC affirmed that nothing in the text of section 32 precludes an interpretation of the *Charter* that imposes positive obligations on the government, so long as the matter being considered is "within the authority of the legislature of each province."[78] The SCC found that the *Charter* imposes positive obligations on governments when they pass legislation that omits the interests of a class of people. In making this finding, the SCC held that an interpretation of section 15(1) that allows the government to skirt *Charter* obligations by simply omitting the interests of certain groups "would be illogical and more importantly unfair."[79] In both *Eldridge* and *Vriend*, the SCC emphasized that they were leaving the door open on the potential future expansion of positive obligations under section 15(1).[80] However, in the subsequent *Auton v British Columbia* decision the SCC held that section 15(1) does not apply to a provincial government's refusal to fund a treatment for children with autism.[81] The SCC distinguished this case from *Eldridge* by emphasizing that section 15(1) is only triggered where the government fails to provide access to a benefit they have already granted in law.[82] Thus, until 2022, the SCC had expressely left open the door for future expanded recognition of positive obligations under section 15(1).

However, in *Sharma*, the SCC sought to close the door on recognition of positive state obligations under section 15(1). In this decision, the SCC pre-emptively denied that positive obligations fall within the ambit of section 15(1) by holding that the provision "does not impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation."[83] This pre-emptive foreclosing of positive obligations under section 15(1)

74 *Eldridge*, *supra* note 48.

75 *Ibid* at paras 72–73.

76 *Ibid* at para 73, citing *Tétreault-Gadoury v Canada (Employment and Immigration Commission)*, [1991] 2 SCR 22, 81 DLR (4th) 358; *Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995, 105 DLR (4th) 577 at 1041–1042; *Native Women's Assn of Canada v Canada*, [1994] 3 SCR 627, 119 DLR (4th) 224 at 655; *Miron v Trudel*, [1995] 2 SCR 418, 124 DLR (4th) 693.

77 *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385 at paras 59–63 [*Vriend*].

78 *Ibid* at para 60, citing Dianne Pothier, "The Sounds of Silence: *Charter* Application when the Legislature Declines to Speak" (1996), 7:4 Const F 113 at 115.

79 *Vriend*, *supra* note 77 at para 61.

80 *Eldridge*, *supra* note 48 at para 73;*Vriend*, *supra* note 77 at para 64.

81 *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78.

82 *Ibid* at para 38.

83 Although the SCC majority cited *Eldridge* to support this assertion that section 15(1) does not impose general positive obligations, they do not distinguish or engage with the pre-existing jurisprudence recognizing that section 15(1) imposes limited positive obligations when the government has already taken some action. Consequently, there is ambiguity post-*Sharma* as to whether section 15(1) excludes all general positive

poses unique barriers for disability-based equality claims, since barriers for people with disabilities are based in social inequality. As recognized by the *United Nations Convention on the Rights of Persons with Disabilities*, disability stems from functional impairments that in combination with social barriers hinder a person's equal participation in society.[84]

Similarly, in *Eaton* the SCC recognized that disability as a ground of discrimination is inherently tied to the existence of social barriers. In this decision, the SCC found that discrimination against people with disabilities can result from their inability to access a society that is designed only to serve mainstream attributes.[85] Relying on the examples of a "written test for a blind person" and a person in a wheelchair's "need for ramp access," the SCC held that a government's failure to "fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation" falls within the ambit of section 15(1).[86]

For people with disabilities to participate equally in society, they require individualized accommodations that remove social barriers limiting their participation. However, in *Sharma*, a case not related to disability, the SCC held that section 15(1) does not impose positive obligations on governments to remedy social inequalities. Based on this new interpretation of section 15(1), *Sharma* puts into question whether there is a section 15(1) obligation on the government to provide disability accommodations to access services conferred by law. The problem with this is that disability discrimination often stems from general social inequality, where people with disabilities cannot participate equally due to existing social barriers. By excluding obligations to remedy general social inequality, which can include disability-related barriers, *Sharma* significantly narrows the applicability of section 15(1) in the context of disability-based claims.

The unique aspects of disability-based equality claims also reveal overarching shortcomings within the SCC's blunt approach to positive rights under section 15(1). The SCC majority in *Sharma* justified their approach based on concerns that the recognition of positive obligations under section 15(1) could engage the "complex legislative domain of policy" and "resource allocation" considerations.[87] However, in the context of disability-based equality claims, these concerns are exaggerated and misguided.

First, requiring the state to provide disability-based accommodations is not a "complex legislative domain of policy."[88] The federal government and the majority of Canadian provinces already have accessibility legislation requiring the private sector to remove social barriers for people with disabilities.[89] Further, Canadian representatives led the development of the *United*

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obligations or only those that fall outside of the limited positive obligation categories already recognized in *Eldridge* and *Vriend*. See *Sharma*, *supra* note 1 at para 63. See also *Eldridge*, *supra* note 48; *Vriend*, *supra* note 77.

84 *CRPD*, *supra* note 47.

85 *Eaton*, *supra* note 50 at para 67.

86 *Ibid*.

87 *Sharma*, *supra* note 1 at para 63.

88 *Ibid.*

89 The federal government, Newfoundland and Labrador, Nova Scotia, Quebec, Ontario, Manitoba, Saskatchewan, and British Columbia all have accessibility legislation. See *Accessible Canada Act*, SC 2019, c 10; *Accessibility Act*, SNL 2021, c A-1.001; *Accessibility Act*, SNS 2017, c 2; *Act to secure handicapped persons in the exercise of their rights with a view to achieving social, school and workplace integration*, CQLR c E-20.1;

Nations Convention on the Rights of Persons with Disabilities (*CRPD*) and signed it on the first day it opened for signature in 2010.[90] Since then, Canada, with the support of the provinces and territories, also ratified the *CRPD Optional Protocol*, which allows individuals to make complaints directly to the *CRPD* Committee.[91]

The process for determining the individualized accommodations for persons with disabilities also does not render them into a "complex legislative domain of policy."[92] Accommodations are determined by medical practitioners in consultation with people with disabilities. They are individualized and can vary between persons with the same disability diagnosis. In the public sector, the role of the state is to actualize these individualized accommodations determined by medical practitioners and to remove disability barriers that may inhibit a person's participation in society. Far from being complex, disability accommodations are remarkably simple for governments to enact because they are pre-identified by experts working directly with the persons affected.

Second, resource allocation concerns should not automatically bar all disability accommodations from falling within the ambit of section 15(1). As already discussed in the previous section, many disability-based equality claims will engage resource allocation concerns. However, this is not in itself a basis to deny people with disabilities the ability to secure accommodations through section 15(1) of the *Charter*.

Disability is highly individualized. By extension, the accommodations required to remove participation barriers for peoples with disability vary extensively. This variation in disability accommodations is also reflected in their costs. In many instances, the costs of accommodating persons with disabilities will be minimal, such as permitting them to work remotely or providing necessary aids. A total rejection of positive obligations on the state because of resource allocation concerns fails to recognize that many disability accommodations are not resource intensive. Consequently, the concerns with resource allocation in the context of positive obligations are exaggerated — with devastating effects on vulnerable sectors of society, such as people with disabilities.

Accessibility for Ontarians With Disabilities Act, 2005, SO 2005, c 11; *The Accessibility for Manitobans Act*, CCSM 2022, c A1.7; *The Accessible Saskatchewan Act*, SS 2023, c 19; and the *Accessible British Columbia Act*, SBC 2021, c 19. All of the territories, Alberta, and New Brunswick do not have accessibility legislation. However, the New Brunswick government announced its intent to pass accessibility legislation in 2023. See Nathalie Sturgeon, "N.B. disability advocates applaud province's move to draft accessibility legislation", *Global News* (August 1, 2023), online: *Global News* <https://globalnews.ca/news/9868222/new-brunswick-draft-accessibility-legislation/> [https://perma.cc/4KM5-8RUW].

90 *CRPD*, *supra* note 47. See also Robert Mason, Laura Munn-Rivard & Julian Walker, "The United Nations Convention on the Rights of Persons with Disabilities: An Overview", *Library of Parliament*, No 2013-09-E (Revised 25 November, 2021), online: <https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201309E#ftn43> [https://perma.cc/D5UU-2PHK].

91 *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2518 UNTS 283 (ratified by Canada 3 December 2018) [*CRPD Optional Protocol*]. See also Employment and Social Development Canada, *Canada accedes to the Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities*, (News Release) (Ottawa, ON: Employment and Social Development Canada, 3 December 2018), online: <https://www.canada.ca/en/employment-social-development/news/2019/01/canadaaccedes-to-the-optional-protocol-to-the-united-nations-convention-on-the-rights-of-persons-with-disabilities.html>.

92 *Sharma*, *supra* note 1 at para 63.

Of course, there are instances of resource-intensive disability accommodations. For example, in *Auton*, the claimants argued that British Columbia's failure to fund specialized therapy for all children with autism in the province infringed section 15(1) of the *Charter*.[93] However, the potential for resource-intensive disability-based equality claims does not justify a complete rejection of positive obligations on the state as was done in *Sharma*. Rather, the resource allocation concerns that underlie this positive rights approach can be addressed at the section 1 justification stage. The state can raise concerns with resource allocation to argue that the infringement on the equality rights of people with disabilities is reasonably justified in a free and democratic society. Much like the identification and accommodation of disability, the state's resource allocation concerns can only be addressed on an individualized basis.

In sum, disability-based equality claims reveal fundamental shortcomings with the SCC's approach to positive rights under section 15(1) in *Sharma*. The SCC's continued insistence on a distinction between negative and positive rights, with the latter falling largely outside the ambit of the *Charter*, entails a simplified approach to equality rights that fails to grapple with the unique realities of peoples with disabilities. An investigation of disability-based equality claims reveals that flat rejection of positive rights claims under section 15(1) on the basis of complex legislative policy and resource allocation concerns is misguided.

IV. Conclusion

The SCC's majority decision in *Sharma* once again throws section 15(1) into jurisprudential uncertainty. Although the overarching section 15(1) framework was left unaltered, the SCC made significant changes to the elements required at each step of the analysis. In response, this article has aimed to demonstrate that *Sharma*'s alterations of the section 15(1) framework pose unique barriers for disability-based equality claims. Specifically, the causation requirement, the consideration of broader legislative context, and the pre-emptive exclusion of positive obligations, will make future equality claims on the enumerated grounds of mental and physical disability more difficult to establish.

93 *Auton*, *supra* note 81.