CHAPTER D-3

Fault Lines: COVID-19, the *Charter*, and Long-term Care*

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Abstract

COVID-19 has underscored the crucial role of the single-payer health care system in ensuring access to care based on need, consistent with the *Canadian Charter of Rights and Freedoms* (the *Charter*) and international human rights guarantees. But significant fault lines were exposed when health authorities across the country concentrated their pandemic readiness efforts on maximizing hospitals' capacity to deal with the anticipated surge of COVID-19 patients, without considering the potentially disastrous consequences for an already struggling long-term care system. COVID-19 laid bare the reality that barriers to care continue to exist as a function of who patients are and where they are being treated. Focussing on COVID-19 hospital transfer decisions and their impact on the life, liberty, and security of the person and the equality rights of long-term care residents, this chapter argues that governments and health care decision makers in Canada must recognize that access to a comprehensive range of care is a fundamental right, and that human rights–based accountability is urgently needed in the battle against COVID-19, and beyond.

* This paper is dedicated to Robert Bycraft, Anna Babey, and the many other grandparents, parents, and friends whose lives have been cut short by the COVID-19 pandemic./Ce chapitre est dédié à Robert Bycraft et Anna Babey, ainsi qu'aux nombreux autres grands-parents, parents, amis et amies qui ont perdu la vie en raison de la pandémie de COVID-19.

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Résumé
Les failles : la COVID-19, la *Charte* et les soins de longue durée

La COVID-19 a souligné le rôle crucial du système de soins de santé à payeur unique pour assurer l'accès aux soins en fonction des besoins, conformément à la *Charte canadienne des droits et libertés* et aux garanties internationales relatives aux droits de la personne. Mais d'importantes failles ont été mises au jour lorsque les autorités sanitaires de tout le pays ont concentré leurs efforts sur l'optimisation de la capacité des hôpitaux en prévision de l'augmentation du nombre de patients et de patientes atteints de la COVID-19, sans tenir compte des conséquences potentiellement désastreuses sur un système de soins de longue durée déjà en difficulté. La pandémie a révélé qu'il existe toujours des obstacles aux soins en fonction de l'identité des patients et des patientes et de l'endroit où ils et elles sont traités. Ce chapitre porte sur les décisions en matière de transfert hospitalier dans le contexte de la COVID-19, ainsi que sur leurs répercussions sur la vie, la liberté et la sécurité des personnes et sur les droits à l'égalité des résidents et résidentes des centres de soins de longue durée. Il soutient que les gouvernements et les décideurs en matière de soins de santé au Canada doivent reconnaître que l'accès à une gamme complète de soins est un droit fondamental et qu'il est urgent de miser sur une responsabilisation fondée sur les droits de la personne dans la lutte contre la COVID-19, et au cours des années qui viennent.

COVID-19 has underscored the crucial role of Canada's single-payer system[1] in ensuring that everyone has access to care based on need, in keeping with the *Canada Health Act*,[2] the *Canadian Charter of Rights and Freedoms* (the *Charter*),[3] and international human rights guarantees.[4] But significant fault lines in our system were also exposed when health authorities across the country concentrated their pandemic

1. Ian Austen, "Two Medical Systems, Two Pandemic Responses", *New York Times* (1 May 2020), online: <www.nytimes.com/2020/05/01/world/canada/america-canada-coronavirus-comparison.html>.
2. *Canada Health Act*, RSC 1985, c C-6.
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 generally Martha Jackman, "*Charter* Review of Health Care Access" in Joanna Erdman, Vanessa Gruben & Erin Nelson, eds, *Canadian Health Law and Policy*, 5th ed (Toronto: LexisNexis Canada, 2017) 71.

readiness efforts on maximizing the capacity of hospitals to treat those who fell critically ill.[5] In pursuit of that objective, non-emergency surgeries (including for cancer, cardiac, and other serious illnesses) were cancelled, and diagnostic testing, clinical trials, palliative care, medically assisted death, and other hospital services were suspended.[6] The resulting costs to life and health are only now being calculated.[7]

Beyond hospitals, the pandemic also deepened pre-existing access problems within the broader health care system. As other chapters in this book document, long-standing inequalities in health services for Indigenous people on reserves and in rural and remote areas were amplified,[8] as were barriers to prison health,[9]

5. Kelly Grant & Thu Thanh Ha, "How Shoring up Hospitals for COVID-19 Contributed to Canada's Long-term Care Crisis", *Globe and Mail* (20 May 2020), online: <www.theglobeandmail.com/canada/article-how-shoring-up-hospitals-for-covid-19-contributed-to-canadas-long/>; Karen Howlett, "With an Early Focus on Seniors' Residences, Kingston Has So Far Avoided the Brunt of COVID-19", *Globe and Mail* (28 April 2020), online: <www.theglobeandmail.com/canada/article-with-an-early-focus-on-seniors-residences-kingston-has-so-far/>.

6. Avis Favaro, Elizabeth St Phillips & Ben Cousins, "Canadian Hospitals Take Drastic Measures Amid COVID-19 Crisis", *CTV News* (16 March 2020), online: <www.ctvnews.ca/health/coronavirus/canadian-hospitals-take-drastic-measures-amid-covid-19-crisis-1.4855849>; Financial Accountability Office of Ontario, *Ontario Health Sector: A Preliminary Review of the Impact of the COVID-19 Outbreak on Hospital Capacity* (Toronto: Queen's Printer for Ontario, 2020) at 9; Charlie Pinkerton, "Ontario Inches Closer to Allowing More Doctor Support at Long-term Care Homes", *iPolitics* (6 May 2020), online: <ipolitics.ca/2020/05/06/ontario-inches-closer-to-allowing-more-doctor-support-at-long-term-care-homes/>; Tom Blackwell, "In Scramble over COVID, the Patients We Forgot", *Ottawa Citizen* (9 May 2020) NP1, 3.

7. Financial Accountability Office of Ontario, *supra* note 6; Blackwell, *supra* note 6; Sandie Rinaldo & Jonathan Forani "Provinces Begin to Address Backlog of Surgeries in Wake of COVID-19", *CTV News* (9 May 2020), online: <www.ctvnews.ca/health/coronavirus/provinces-begin-to-address-backlog-of-surgeries-in-wake-of-covid-19-1.4932424>.

8. See Anne Levesque & Sophie Thériault, this volume, Chapter D-6; Aimée Craft, Deborah McGregor & Jeffery Hewitt, this volume, Chapter A-2; "Assembly of First Nations Declares State of Emergency on COVID-19 Pandemic" (24 March 2020), online: *Assembly of First Nations* <www.afn.ca/assembly-of-first-nations-declares-state-of-emergency-on-covid-19-pandemic/>; Teresa Wright, "First Nations Health Authorities Tell Commons Committee They Need More PPE" (24 May 2020), online: *Times Colonist* <www.timescolonist.com/first-nations-health-authorities-tell-commons-committee-they-need-more-ppe-1.24140363>.

9. "COVID-19 Status Update" (23 April 2020), online (pdf): *Office of the Correctional Investigator* <www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20200423-eng.pdf>; "COVID-19 et prisons provinciales – Les données doivent être rendues publiques" (22 April 2020), online: *Ligue des droits et libertés* <liguedesdroits.ca/prison-covid19-transparence/>; Adelina Iftene, this volume, Chapter D-5.

abortion,[10] pharmaceuticals,[11] mental health care,[12] and substance dependence programs.[13] Perhaps most egregiously, the failed promise of equal access to care is reflected in the massive death toll in long-term care.[14] While we expect, and domestic and international human rights demand, that care be available based on need, COVID-19 has laid bare the reality that barriers continue to exist as a function of who patients are and where they are being treated. Focussing on the unfolding tragedy in long-term care, I will argue that governments and health care decision makers must recognize that access to a comprehensive range of care is a fundamental right, and that human rights-based accountability is urgently needed in the battle against COVID-19, and beyond.

COVID-19 and Long-term Care

In 2018–2019 there were 191,835 long-term care residents in 1,319 facilities in Canada, outside Quebec.[15] Their average age was 83, and over two thirds were women.[16] Over 70% had heart/circulation diseases; over half, musculoskeletal diseases; and over two thirds, neurological diseases, including dementia.[17] Like hospitals, long-term care facilities

10. Laura Osman, "Advocates Sound Alarm Over COVID-19 Limiting Access to Contraceptives, Abortion", *Globe and Mail* (2 April 2020), online: <www.theglobeandmail.com/canada/article-advocates-sound-alarm-over-covid-19-limiting-access-to-contraceptives/>.
11. Jan Malek, "COVID-19 Shows that Pharmacare is Needed Now" (24 April 2020), online: *Council of Canadians* <canadians.org/analysis/covid-19-shows-pharmacare-needed-now>.
12. Kathleen Finlay, "So Far, Canada's Answer to COVID-19 Mental Health Crisis Doesn't Measure up", *Ottawa Citizen* (30 April 2020), online: <ottawacitizen.com/opinion/finlay-so-far-canadas-answer-to-covid-19-mental-health-crisis-doesnt-measure-up/>.
13. Raina Delisle, "It's a Risky Time for People with Substance Use Issues", *The Tyee* (14 April 2020), online: <thetyee.ca/News/2020/04/14/How-A-Pandemic-Affects-Substance-Use/>; Jeff Turnbull, Vern White & Mathieu Fleury, "Treat Drug Addiction Through Safe Supply", *Ottawa Citizen* (25 May 2020) A7.
14. Tonda MacCharles, "82% of Canada's COVID-19 Deaths Have Been in Long-term Care, New Data Reveals", *Toronto Star* (7 May 2020), online: <www.thestar.com/politics/federal/2020/05/07/82-of-canadas-covid-19-deaths-have-been-in-long-term-care.html>.
15. "Quick Stats: Profile of Residents in Residential and Hospital-Based Continuing Care, 2018–2019" at Table 1, online: *Canadian Institute for Health Information* <www.cihi.ca/en/quick-stats>.
16. *Ibid* at Table 3.
17. *Ibid* at Table 6. See eg "British Columbia Residential Care Facilities Quick Facts Directory 2018 Summary" (2018) at 1, online (pdf): *Office of the Seniors Advocate*

are regulated at the provincial/territorial level. But although governments provide over 70% of funding, long-term care falls outside the framework of the *Canada Health Act* and the single-payer system.[18] As a result, levels of public investment and ownership vary greatly across the country, and no national standards or uniform conditions exist.[19]

There is wide agreement that "funding and services have not kept pace with increasing needs of residents."[20] Over the past 20 years, health care and seniors' advocacy groups, labour unions, public interest and human rights organizations, researchers, ombudspersons, and governments themselves, have criticized the substandard condition of many facilities, the insufficient level of public funding, the undue financial burden placed on low-income seniors, wait times, and the lack of oversight and failure to enforce existing health, safety and other regulations.[21] Poor wages and working conditions, as Pat Armstrong,

<www.seniorsadvocatebc.ca/app/uploads/sites/4/2018/01/QuickFacts2018-Summary.pdf>; "This is Long-Term Care 2019" (2019) at 3, online (pdf): *Ontario Long-term Care Association* <www.oltca.com/OLTCA/Documents/Reports/TILTC2019web.pdf>.

18. "Health Spending—Nursing Homes" (last visited 29 May 2020) online (pdf): *Canadian Institute for Health Information* <secure.cihi.ca/free_products/infosheet_Residential_LTC_Financial_EN.pdf>; Steven Lewis, "The Pandemic and the Politics of Long-term Care in Canada", *Policy Options* (11 May 2020), online: <policyoptions.irpp.org/magazines/may-2020/the-pandemic-and-the-politics-of-long-term-care-in-canada/>. In Ontario, for example, provincial funding in 2018 was $4.28 billion or 7% of the overall provincial health budget; "About Long-term Care in Ontario: Facts and Figures" (last visited 29 May 2020), online: *Ontario Long Term Care Association* <www.oltca.com/oltca/OLTCA/Public/LongTermCare/FactsFigures.aspx>.

19. "Ensuring Quality Care for All Seniors" (November 2018) 5-11, online (pdf): *Canadian Health Coalition* <www.healthcoalition.ca/wp-content/uploads/2019/12/Seniors-care-policy-paper-FINAL-Version-Dec-2019.pdf>; "Seniors in Transition: Exploring Pathways Across the Care Continuum" (2017), online (pdf): *Canadian Institute for Health Information* <www.cihi.ca/sites/default/files/document/seniors-transition-methodology-notes-2017-en-web.pdf>; "Dignity Denied: Long-term Care and Canada's Elderly" (February 2007) at 7, online (pdf): *National Union of Public and General Employees* <nupge.ca/sites/default/files/publications/Medicare/Dignity_Denied.pdf>.

20. "This is Long-Term Care 2016" (2016) at 8, online (pdf): *Ontario Long-term Care Association* <www.oltca.com/OLTCA/Documents/Reports/TILTC2016.pdf>.

21. See e.g. National Union of Public and General Employees, *supra* note 19; Canadian Health Coalition, *supra* note 19; Andrew Longhurst, *"Privatization and Declining Access to Seniors' Care: An Urgent Call for Policy Change"* (March 2017), online (pdf): *BC Office of the Canadian Centre for Policy Alternatives* <www.policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2017/03/access_to_seniors_care_report_170327%20FINAL.pdf>; "Situation Critical: Planning, Access, Levels of Care and Violence in Ontario's Long-Term Care" (21 January 2019), online (pdf):

Hugh Armstrong, and Ivy Bourgeault outline in Chapter E-1 of this book, have been a long-standing issue for staff—also predominantly women.[22]

In this context, the impact on long-term care residents of COVID-19 and government decisions around how to manage it were catastrophic. While "horror stories from Italy convinced authorities they had to free up room on [hospital] wards and in intensive care units for potential COVID-19 sufferers,"[23] the obvious threat the virus posed in long-term care facilities did not seem to register. In Quebec, like elsewhere:

> The focus was on ensuring hospitals could manage their COVID-19 caseloads... Officials opened as many hospital beds as possible by postponing elective surgeries and relocating patients to hotels or elder-care facilities. Instead, the virus struck hardest in those very facilities for seniors. The ensuing devastation came in a part of the system that had long been underfunded, understaffed, and packed with vulnerable people.[24]

Reports from across Canada suggest that, even as patients were being moved from hospitals to long-term care facilities without prior testing, long-term care residents infected with COVID-19 were being denied transfer to hospitals for treatment.[25] Personal protective equipment and

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Ontario Health Coalition <www.ontariohealthcoalition.ca/wp-content/uploads/FINAL-LTC-REPORT.pdf>; Québec, Protecteur du citoyen, *Mémoire du Protecteur du citoyen présenté à la Commission de la santé et des services sociaux* (Québec: Protecteur du citoyen, 2013).

22. Pat Armstrong, Hugh Armstrong and Ivy Bourgeault, this volume, Chapter E-1; Canadian Health Coalition, *supra* note 19 at 11.

23. Blackwell, *supra* note 6 at A3; Grant & Ha, *supra* note 5.

24. Tu Thanh Ha, "How Quebec's Long-term Care Homes Became Hotbeds for the COVID-19 Pandemic", *Globe and Mail* (7 May 2020), online: <www.theglobeandmail.com/canada/article-how-quebecs-long-term-care-homes-became-hotbeds-for-the-covid-1/>; Grant & Ha, *supra* note 5; Andrew MacLeod, "BC Seniors' Homes Problems Aren't New: The Virus Showed They Could be Deadly", *The Tyee* (27 April 2020), online: <thetyee.ca/News/2020/04/27/BC-Seniors-Homes-Problems-Arent-New/>.

25. Elizabeth Payne & Andrew Duffy, "No-transfer Practice at Some Long-term Care Homes Denies Residents Rights During Pandemic, Say Advocates", *Ottawa Citizen* (14 April 2020), online: <ottawacitizen.com/news/local-news/no-transfer-policy-at-some-long-term-care-homes-denies-residents-rights-during-pandemic-say-advocates/>; Terry Reith, "'No Benefit' to Sending Seniors ill with COVID-19 to Hospital, Some Nursing Homes Tell Loved Ones", *CBC News* (3 April 2020), online: <www.cbc.ca/news/health/covid-19-long-term-care-1.5519657>; Editorial, "How Canada Gave a Pandemic Key to the Country's

COVID-19 testing were heavily rationed and, in some cases unavailable, allowing the virus to spread rapidly among patients and staff, and leading to deadly outbreaks in almost every province.[26] As workers fell ill or were quarantined, conditions for remaining staff and residents deteriorated further.[27] Reports emerged of nurses caring for 20 to 30 residents without assistance, staff working back-to-back 12- and 16-hour shifts; and infected and non-infected residents sharing rooms. By the time health authorities intervened in one Montréal home, "residents were found ... unclothed, severely malnourished, dehydrated, without their medication and left in their feces and urine..."[28]

Patient transfers from hospitals to long-term care facilities did not end in Ontario until a month after the province declared a state of emergency, with "hospital occupancy rates at a historic low ... 69%, down from 96% before the pandemic."[29] Only then did the province

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Nursing Homes", *Globe and Mail* (14 April 2020), online: <www.theglobeandmail.com/opinion/editorials/article-how-canada-gave-a-pandemic-the-key-to-the-countrys-nursing-homes/>. For instance, as of April 17, 2020, only 22 of 899 nursing and retirement home residents with COVID-19 in Toronto were being treated in hospital and, as of May 12, only 24 of 364 cases of COVID-19 in long-term care in Alberta had been hospitalized; Grant & Ha, *supra* note 5.

26. Kathy Tomlinson & Grant Robertson, "It Took a Pandemic: Why Systemic Deficiencies in Long-term Care Facilities Pose such a Danger to our Seniors", *Globe and Mail* (27 April 2020), online: <www.theglobeandmail.com/canada/article-it-took-a-pandemic-why-systemic-deficiencies-in-long-term-care/>; Rachel D'Amore, "Coronavirus: Hospital cleaners, admin workers need PPE too, unions say", *Global News* (7 April 2020), online: <globalnews.ca/news/6787770/coronavirus-canada-protective-equipment-cleaners-admin-workers/>.

27. Grant & Ha, *supra* note 5; Murray Brewster & Vassy Kapelos, "Military Alleges Horrific Conditions, Abuse in Pandemic-hit Ontario Nursing Homes", *CBC News* (26 May 2020), online: <www.cbc.ca/news/politics/long-term-care-pandemic-covid-coronavirus-trudeau-1.5584960>.

28. Jillian Kestler-D'Amours, "Canada: How Quebec Elder Care Homes Became Coronavirus Hotspots", *Al Jazeera* (24 April 2020), online: <www.aljazeera.com/indepth/features/canada-quebec-elder-care-homes-coronavirus-hotspots-200423214537289.html>; Lorian Hardcastle, "Opinion: COVID-19 Lays Bare Poor Conditions in Long-term Care Homes", *Edmonton Journal* (24 April 2020), online: <edmontonjournal.com/opinion/columnists/opinion-covid-19-lays-bare-poor-conditions-in-long-term-care-homes/>; Ha, *supra* note 24; Andrew Rankin, "Nova Scotia Delayed Implementing Federal COVID-19 Guidelines for Long-term Care Homes", *The Chronicle Herald* (1 May 2020), online: <www.thechronicleherald.ca/news/provincial/ns-government-delayed-implementing-federal-covid-19-guidelines-for-long-term-care-homes-444709/>; Elizabeth Payne, "Nurses Raise Concerns About Care Home", *Ottawa Citizen* (8 May 2020) A4.

29. Ha, *supra* note 24; Laura Stone, Karen Howlett & Les Perreaux, "Ontario Places Pause on Transfers from Hospitals to Seniors' Facilities; Quebec Issues Third Plea for Military Aid", *Globe and Mail* (16 April 2020), online: <www.theglobeandmail.

announce a plan to increase testing of staff and residents, restrict staff from working in more than one facility, and redeploy health care staff into long-term care homes.[30] A week later, Ontario and Quebec called on the federal government for aid from the Canadian military.[31]

COVID-19, the *Charter*, and Access to Care

By mid-April, governments across Canada recognized that long-term care homes were "facing unprecedented tragedy."[32] Ontario Premier Doug Ford admitted: "I know the system ... is absolutely broken."[33] In Quebec, Premier François Legault asked: "How could we have gotten into the situation we're in, where we didn't take care of our elders, the most vulnerable?" Prime Minister Justin Trudeau confessed: "We are failing our parents, our grandparents, our elders."[34] What governments and health officials have not yet acknowledged is that this public health failure is an equally inexcusable violation of *Charter* and international human rights.

Article 12 of the *International Covenant on Economic, Social and Cultural Rights* recognizes the right of everyone in Canada "to the enjoyment of the highest attainable standard of physical and mental health,"[35] including to "medical service and medical attention in the event of sickness,"[36] "without discrimination of any kind."[37] Although the Canadian *Charter* does not contain an explicit right to health care,

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com/canada/article-ontario-places-pause-on-transfers-from-hospitals-to-seniors/>.

30. Financial Accountability Office of Ontario, *supra* note 6 at 9, 20.
31. Lee Berthiaume, "Trudeau Says Military Is Short-Term Solution to Caring for Seniors", *CTV News* (23 April 2020), online: <www.ctvnews.ca/health/coronavirus/trudeau-says-military-is-short-term-solution-to-caring-for-seniors-1.4908602>.
32. "COVID-19 Action Plan: Long-term Care Homes—Version 1" (15 April 2020), online: *Ontario Ministry of Long-term Care* <www.ontario.ca/page/covid-19-action-plan-long-term-care-homes>.
33. Antonella Artuso, "Ford Vows to Fix Broken Long-term Care System", *Toronto Sun* (6 May 2020), online: <torontosun.com/news/provincial/ford-vows-to-fix-broken-long-term-care-system>.
34. Berthiaume, *supra* note 31.
35. *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Can TS 1976 No 46 at art 12(1) (entered into force 3 January 1976, accession by Canada 19 May 1976).
36. *Ibid* art 12(2)(d).
37. *Ibid* art 2(2). See generally Bruce Porter, "International Human Rights in Anti-Poverty and Housing Strategies: Making the Connection" in Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) 33.

s. 7 protects "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."[38] Section 15 guarantees "equal protection and equal benefit of the law without discrimination and, in particular, without discrimination on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[39]

The Supreme Court of Canada has affirmed that the *Charter* applies not only to governments, but to hospitals and other private entities when they are delivering publicly funded health care.[40] The Court has been more ambivalent about the *Charter* as a source of positive obligations to ensure access to such care.[41] In *Eldridge v British Columbia (Attorney General)*, the Court held that failure to provide interpretation services for the Deaf within the public system violated the *Charter*'s equality guarantees.[42] In contrast, in *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, the Court ruled that lack of funding for autism treatment did not violate s. 15, because a finding of discrimination "would effectively amend the medicare scheme and extend benefits beyond what it envisions—core physician-provided benefits plus non-core benefits at the discretion of the province."[43] In *Chaoulli v Québec (Attorney General)*, striking down Quebec's ban on private health insurance, Chief Justice McLachlin opined that, "The *Charter* does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*."[44] Six years later, in *Canada (Attorney General) v. PHS Community Services Society*, the Court found that, by depriving the Insite supervised injection facility's clients of "potentially lifesaving medical care ... and health-protecting services," the federal government had violated their rights to life and security of the person.[45]

38. *Charter, supra* note 3 at s 7.
39. *Ibid*, s 15.
40. [1997] 3 SCR 624, [*Eldridge*]. See Martha Jackman, "The Application of the Canadian *Charter* in the Health Care Context" (2001) 9 Health L Rev 22.
41. See Jackman, *supra* note 4; Martha Jackman, "Health Care and Equality: Is There a Cure?" (2007) 15 Health LJ 87.
42. *Eldridge, supra* note 40 at para 80.
43. 2004 SCC 78 at para 44.
44. 2005 SCC 35 at para 104.
45. 2011 SCC 44 [*Insite*] at paras 91-92. In the Chief Justice's words, at para 93: "Where a law creates a risk to health by preventing access to health care, a deprivation of the right to security of the person is made out... Where the law creates a risk not just to the health but also to the lives of the claimants, the deprivation is even clearer."

Given these inconsistencies in the case law, it is unclear to what extent pandemic-related inaction by health care decision makers within and outside the long-term care system, including the failure to provide sufficient COVID-19 testing or personal protective equipment, to adopt adequate containment measures, or to effectively regulate care and working conditions, might be subject to *Charter* review.[46] While *Chaoulli* and *Auton* have been heavily criticized, both decisions present significant hurdles for *Charter* claimants seeking positive rights to care under s. 7, or arguing s. 15 demands more than equal access to existing services.[47] But even a narrow reading of the current jurisprudence leaves little doubt that decisions to move patients from hospitals to long-term care, and not to transport long-term care residents to hospitals if they fell ill with COVID-19, raise serious *Charter* concerns.

In terms of s. 7, these transfer decisions severely compromised long-term care residents' physical and mental health, security, and autonomy. They increased not just the risk of death, but of dying in "horrific conditions."[48] These decisions did not, by any measure, comply with principles of fundamental justice. They were made without "effective participation" by those affected;[49] they undermined their own public health objectives,[50] and they caused grossly disproportionate harm.[51] As one adult son described his mother's experience—after being hospitalized for a fall that left her incapable of returning home—of being moved to a long-term care facility where she died of COVID-19 three weeks later: "When I talked to her at the hospital, she

46. In *Ontario Nurses Association v Eatonville/Henley Place*, 2020 ONSC 2467, nurses working in four Ontario long-term care facilities obtained an injunction, based in part on s. 7 of the *Charter*, forcing their employers to provide them with adequate personal protective equipment; Katherine Lippel, this volume, Chapter E-3; Vanessa Gruben & Louise Bélanger-Hardy, this volume, Chapter E-4.
47. See e.g. Marie-Claude Prémont, "L'affaire *Chaoulli* et le système de santé du Québec : cherchez l'erreur, cherchez la raison" (2006) 51:1 McGill LJ 167; Martha Jackman, "'The Last Line of Defence for [Which?] Citizens': Accountability, Equality and the Right to Health in *Chaoulli*" (2006) 44:2 Osgoode Hall LJ 349; Colleen M Flood, Kent Roach & Lorne Sossin, eds, *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005); Jackman, "Health Care and Equality", *supra* note 41; Natasha Bakht, "Furthering an Economic/Social Right to Healthcare: The Failure of *Auton v British Columbia*" (2005) 4:2 JL and Equality 241; Jackman, *supra* note 4.
48. Brewster & Kapelos, *supra* note 27; *Insite*, *supra* note 45 at paras 91-93.
49. *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at paras 73, 119.
50. *Insite*, *supra* note 45 at paras 129-32.
51. *Ibid* at para 133.

told me she didn't want to go there... But they were telling her that was the only option she had."[52]

The violations of long-term care residents' s. 7 rights can be ascribed to *where* they receive care. As the *Globe and Mail* averred: "If COVID-19 has shown us anything, it's that whatever is done to protect hospitals during pandemics also needs to be done for seniors' facilities."[53] The infringement of long-term care residents' s. 15 rights are, on the other hand, a consequence of *who* they are. More than anywhere else, long-term care residents in Canada bore a disparate and unfair share of the cost of pandemic preparedness.[54] Unlike other Canadians, they did not receive the "equal protection and equal benefit" of that pandemic planning, or of the publicly funded health and hospital system it was trying to defend.[55] Instead, "most of the nursing—and retirement home residents who have succumbed to COVID-19 in Canada died inside the virus-stricken understaffed facilities, while many of the hospital beds opened up for coronavirus patients sat empty."[56]

Whether intentional or not, governments' pandemic-related actions and inaction amounted to differential, adverse, treatment that perpetuated disadvantage on a number of prohibited grounds of discrimination—most obviously on the basis of age. As Martine Lagacé, Linda Garcia, and Louise Bélanger-Hardy contend in Chapter D-2 of this book,[57] the role of ageism cannot be overstated: "The COVID-19 pandemic may be unprecedented in recent times, but its impacts are being felt in [long-term care facilities] because of the way seniors' care has been undervalued, underfunded, and privatized."[58] Carole Estabrooks summarizes a more insidious dynamic: "About 95 per cent

52. Grant & Ha, *supra* note 5. The facility in question was one singled out in the Canadian Military's damning report on conditions in five Ontario nursing homes the military was called in to support; Brewster & Kapelos, *supra* note 27.
53. Globe and Mail, *supra* note 25.
54. Adelina Comas-Herrera et al, *Mortality Associated with COVID-19 Outbreaks in Care Homes: Early International Evidence* (last modified 21 May 2020), online (pdf): *International Long Term Care Policy Network* <ltccovid.org/wp-content/uploads/2020/05/Mortality-associated-with-COVID-21-May-6.pdf>.
55. *Eldridge, supra* note 40; *Quebec (Attorney General) v A*, 2013 SCC 5 at para 332.
56. Brewster & Kapelos, *supra* note 27.
57. Martine Lagacé, Linda Garcia & Louise Bélanger-Hardy, this volume, Chapter D-2.
58. Andrew Longhurst & Kendra Strauss, "Time to End Profit-making in Seniors' Care" (22 April 2020), online: *Policynote* <www.policynote.ca/seniors-care-profit/>; Susan Bradley, "Our Long-term Care System is Failing Because we are Ageist", *Ottawa Citizen* (26 May 2020) A9; Susan Mintzberg, "Long-Term Care: Please Let Families Back In", *Ottawa Citizen* (15 May 2020) A7.

of the paid workers are women, 75 per cent of unpaid caregivers are women, two thirds of people with dementia are women and two thirds of people in nursing home are women. This is a highly gendered environment and we cannot ignore that."[59] Coupled with age and sex, social condition is, as Steven Lewis underscores, also a salient factor: "Less prosperous seniors who far outnumber those able to afford upscale alternatives are left to take their chances in the nursing home lottery."[60] Finally, a large majority of long-term care residents have physical and cognitive illnesses and impairments. The multiple failures that contributed to COVID-19 deaths and other harms in long-term care are, as Tess Sheldon and Ravi Malhotra's chapter (Chapter D-9 in this volume) explains, manifestations of systemic discrimination based on physical and mental disability that s. 15 prohibits.[61]

Charter rights are not absolute. Section 1 permits, "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[62] Intensive hospital care or ventilation is not the appropriate treatment in every COVID-19 case.[63] Most long-term care residents have pre-existing medical conditions, and many are in their final years of life.[64] In one Nova Scotia facility experiencing one of Canada's worst COVID-19 outbreaks, only 20 of almost 500 residents had not signed do-not-resuscitate orders.[65] It is likely that only a small minority of residents would opt for aggressive COVID-19 hospital treatment, were it offered. But it is virtually certain that no one would have chosen to be needlessly exposed to the virus, to receive little or no palliative or comfort care, and to die in forced isolation, leaving family and loved ones to cope with anger as well as grief.[66]

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59. Michael Brown, "How COVID-19 Overwhelmed Canada's Long-term Care System" (22 April 2020), online: *Folio* <www.folio.ca/how-covid-19-overwhelmed-canadas-long-term-care-system/>; Pat Armstrong et al, *Re-imagining Long-term Residential Care in the COVID-19 Crisis* (April 2020) at 7-8, online (pdf): *Canadian Centre for Policy Alternatives* <www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2020/04/Reimagining%20residential%20care%20COVID%20crisis.pdf>.
60. Lewis, *supra* note 18; *Canadian Health Coalition*, *supra* note 19; *National Union of Public and General Employees*, *supra* note 19.
61. Tess Sheldon & Ravi Malhotra, this volume, Chapter D-9.
62. Colleen M Flood, Bryan Thomas and Kumanan Wilson, this volume, Chapter C-1.
63. Amina Zafar, "What Is a Ventilator and Who Gets One If COVID-19 Turns Catastrophic in Canada?" *CBC News* (31 March 2020), online: <www.cbc.ca/news/health/covid19-ventilators-1.5515550>; Payne & Duffy, *supra* note 25.
64. *Canadian Institute for Health Information*, *supra* note 15.
65. Rankin, *supra* note 28.
66. Grant & Ha, *supra* note 5; Reith, *supra* note 25; Payne & Duffy, *supra* note 25.

In the face of COVID-19, governments and health authorities were forced to make difficult decisions and trade-offs, in a very short time, often with incomplete and inadequate information.[67] As Colleen M. Flood, Bryan Flood and Kumanan Wilson discuss, the courts will undoubtedly exercise considerable deference towards those choices.[68] Containing the pandemic and ensuring hospitals and the health care system could manage the projected surge of COVID-19 patients were critical objectives. There were, however, long-standing warnings about the danger of viral outbreaks in long-term care facilities. Recommendations made by the Federal SARS Commission to mitigate this risk were disregarded, even as measures were implemented in hospitals.[69] With few exceptions,[70] the threat to long-term care residents was not seriously considered in most parts of the country. Inattention to the vulnerability of the long-term care system and to the particular risks created by COVID-19 transfers was not a rational means of achieving public health objectives and, in fact, undermined them. In sum, the failure to take into account, much less adopt proactive measures to protect, the life, security, and equality of long-term care residents, cannot be justified under s. 1.

The Way Forward: Comprehensiveness and Accountability

With long-term care residents representing only 1% of the Canadian population, but over 80% of COVID-19 deaths,[71] political leaders have expressed sadness and shame; governments have committed to conducting post-pandemic reviews; health profession regulatory bodies have signalled their intention to investigate; criminal inquiries have been called for, and lawsuits have been launched.[72]

67. Flood, Thomas & Wilson, this volume, Chapter C-1.
68. *Ibid*; Paola Loriggio, "Proposed Lawsuits Raise Questions on 'Reasonable Care'" *Ottawa Citizen* (4 May 2020) NP3.
69. Tomlinson & Robertson, *supra* note 26; *Globe and Mail*, *supra* note 25.
70. Howlett, *supra* note 5; Hina Alan, "Vancouver Care Homes Cast a Wide Net in Testing", *Ottawa Citizen* (11 May 2020) NP4.
71. MacCharles, *supra* note 14.
72. Nick Boisvert, "Ontario Long-Term Care Homes in Scathing Report Could Face Charges, Says Ford", *CBC News* (26 May 2020), online: <www.cbc.ca/news/canada/toronto/ontario-military-ltc-report-1.5585131>; Christopher Guly, "I Know How Precious It Is to Say Goodbye to a Parent Dying In Care", *The Tyee* (12 May 2020), online: <thetyee.ca/Analysis/2020/05/12/Precious-Goodbye-Parent-Dying-In-Care/?utm_source=daily&utm_medium=email&utm_campaign=130520>; Béatrice Roy-Brunet, "CHSLD : deux organisations veulent que

Whatever answers are ultimately found, the devastation caused by the pandemic has exposed two significant fault lines that must be addressed.

The lack of comprehensiveness of the single-payer system is the first and most obvious barrier to equal access to care for long-term care residents, like for those seeking home care, mental health, substance abuse, pharmaceutical, dental, and other crucial services that are excluded from the *Canada Health Act*.[73] The prioritization of hospitals in governments' pandemic preparedness is a reflection of the privileged status of acute care delivered by physicians and hospitals within the public system.[74] William Lahey observes that:

> [The] compartmentalization of our health care system obscures the nature of the premises and assumptions on which we implicitly rely when we make choices about ... funding... These include a premise that ... curing is more important than caring (as well as prevention), that dealing with the episodic illness of the healthy is more important than dealing with chronic illness and disability, and that physical health takes priority over other dimensions of health, including mental health.[75]

Expansion of the *Canada Health Act* to include long-term care has been identified as a major step towards resolving underfunding, lack of uniform standards, and other systemic problems within the current "mashup of systems" as the National Institute on Aging has described it.[76] Whether through the *Canada Health Act* or new federal/provincial/territorial framework legislation, the full integration of long-term care

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le gouvernement brasse la cage", *Journal de Montréal* (13 April 2020), online: <www.journaldemontreal.com/2020/04/13/chsld--deux-organisations-veulent-que-le-gouvernement-brasse-la-cage>; Loriggio, *supra* note 68.

73. Jackman, "Health Care and Equality", *supra* note 41.

74. Lewis, *supra* note 18; Colleen M Flood, Bryan Thomas & David Rodriguez, "The Role of Law in the Rise and Fall of Canadian Medicare" in Joanna Erdman, Vanessa Gruben & Erin Nelson, eds., *Canadian Health Law and Policy*, 5th ed (Toronto: LexisNexis Canada, 2017) 51.

75. William Lahey, "The Legal Framework of Canada's Health Care System" in Jocelyn Downie, Karen McEwen & William MacInnis, eds, *Dental Law in Canada* (Markham: Lexis/Nexis Butterworths, 2004) 29 at 79-80.

76. MacCharles, *supra* note 14; Armstrong, *supra* note 59; *National Union of Public and General Employees*, *supra* note 19; "Mark Hancock Calls on Trudeau to Fix Long-term Care Now" (21 May 2020), online: *Canadian Union of Public Employees* <cupe.ca/mark-hancock-calls-trudeau-fix-long-term-care-now>.

into a comprehensive, properly funded, public health care system is long overdue.[77]

The tragic experience of COVID-19 in long-term care highlights a second barrier to equal access to care for disadvantaged groups: the absence of human rights-based accountability for health care decision-making.[78] The interdependence between human rights and accountability is well understood internationally, and UN treaty monitoring bodies have criticized Canada for failing to meet its obligations in both areas.[79] Paul Hunt explains:

> Because of the complexity, sensitivity and importance of many health policy issues, it is vitally important that effective, accessible and independent mechanisms of accountability are in place to ensure that reasonable balances are struck by way of fair processes that take into account all relevant considerations, including the interests of disadvantaged individuals, communities, and populations.[80]

The life, security of the person, and equality rights of long-term care residents were directly implicated in choices made by governments and health and hospital authorities in relation to the pandemic—most especially by COVID-19 transfer decisions. Yet no accountability mechanisms were in place to ensure that the rights and interests of this vulnerable group were taken into account in early pandemic planning, or that long-term care residents or those advocating on their behalf were included or even consulted, until the rising death count became a national disgrace. Over and above public expressions "of anger … sadness … frustration [and] grief,"[81] federal and provincial/territorial governments must accept and affirm that access to care is a

77. Lewis, *supra* note 18; *Canadian Health Coalition*, *supra* note 19.
78. See generally Martha Jackman, "The Future of Health Care Accountability: A Human Rights Approach" (2016) 47:2 Ottawa L Rev 437; Colleen M Flood & Sujit Choudhry, *Strengthening the Foundations: Modernizing the Canada Health Act, Discussion Paper No 13* (Saskatoon: Royal Commission on the Future of Health Care in Canada, 2002).
79. Paul Hunt, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights: Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, UNHRC, 7th Sess, Un Doc A/HRC/7/11 (2008) at paras 51, 65; Porter, *supra* note 37.
80. Hunt, *supra* note 79 at para 64.
81. Brewster & Kapelos, *supra* note 27.

human right. And they must establish effective mechanisms, capable of preventing and providing meaningful accountability and remedies for violations of that right.

There is a growing understanding in Canada that "the pandemic did not cause the crisis; it came along and caused a massive shock to the long-term care system, shining a harsh light on fractures in a system that was ripe for catastrophe."[82] The lack of comprehensiveness and the absence of effective human rights accountability mechanisms within our publicly funded system, have created and reinforced discriminatory barriers to care for many disadvantaged groups. For residents in long-term care, caught in the battle against COVID-19, these fault lines have proven fatal. Moving forward, "The hope is that the deaths of so many people will not be in vain, and governments will finally take serious action."[83]

82. Brown, *supra* note 59.
83. Mohammed Adam, "Long-term Care: Military Support is a Short-term Solution Only", *Ottawa Citizen* (1 May 2020) A7.