# Litigating Health Rights

**Author :** Tim Jost

**Date :** February 20, 2013

Colleen Flood, *Charter Rights and Health Care Funding: A Typology of Canadian Health Rights Litigation*, 19 Annals Health L. 479 (2010).

When lawyers (or, at least, U.S.-trained lawyers) think of legal rights, they think of rights enforceable in courts. While a "right to health" or "right to health care" is widely recognized in international legal conventions and national constitutions, judicial decisions effectuating these rights are quite uncommon. Moreover, it is not altogether clear that litigation is the most effective approach to realizing these rights.

Colleen Flood is one of Canada's leading health law professors. In *Charter Rights & Health Care Funding: A Typology of Canadian Health Rights Litigation*, (which appears both at 19 Annals of Health Law 479 (2010) and as a chapter in Grand Challenges in Health Law and Policy (Catherine Regis and Robert Kouri, eds., 2010), Professor Flood and Y.Y. Brandon Chen analyze health care rights litigation in Canada. They identify several categories of cases in which health care rights have been asserted in Canadian courts, classifying the cases by whether the claim sought to establish a positive or negative right, was accepted or rejected by the court, and in fact succeeded or failed to establish the right the claimant asserted.

The claims they analyze were brought under the Canadian Charter of Rights and Freedoms, the Canadian equivalent of the U.S. Bill of Rights. The Canadian Charter does not recognize a right to health as such. Rather the litigation was brought under section 7, which guarantees a right to life, liberty, and security of the person, and section 15, which guarantees equal rights. Litigation has been brought in Canada both to establish positive rights—such as the right to sign language interpretation in medical facilities or access to in vitro fertilization—and negative rights—notably challenging laws limiting access to abortions or physician-assisted suicide or prohibiting the purchase of private health insurance to finance services covered by public insurance.

Few positive rights Charter claims have succeeded; the claim for sign language interpreter services being the notable exception. Negative rights claims have been more successful, including R. v. Mogentaler, the Canadian equivalent of Roe v. Wade, and Chaoulli v. Quebec, which held that Quebec's ban on private insurance violated the Quebec Charter of Human Rights and Freedom. But even success in litigation does not guarantee that the right for which the litigants fight is in fact realized. Sign language interpretation is still woefully underfunded, abortions are arguably less accessible than they were before *Morgentaler*, and access to private insurance remains contested, (although the *Chaoulli* decision has gone far toward legitimating private health insurance and health care in Canada). Unless a health care right in fact is accepted politically—and resources are made available to make it a reality—mere judicial recognition counts for little. Indeed, Flood and Chen are unable to identify a single situation in which the recognition of a positive right has in fact resulted in universal availability of the claimed service.

More interesting perhaps are claims that have failed. Flood and Chen note that failed rights claims can have two results. In some instances, illustrated by Auton v. British Columbia—a claim for autism services—the court has rejected the Charter claim but the case has generated support for the claimants, resulting in wider availability of the service. In other cases, such as Cameron v. Nova Scotia—a claim

for IVF services—the rejection of the legal claim has contributed to undermining political support for making the service available.

In sum, the establishment of health care rights has, in the end, less to do with judicial decisions than with political realities. Litigation, successful or unsuccessful, can help illuminate a problem hitherto unrecognized, generating political support for solving the problem. But failed litigation can render a claimed right less credible. And successful litigation does not guarantee the ultimate establishment of a right.

In the end, as Flood and Chen demonstrate, the narrow focus of legal scholars on litigated claims, successful or unsuccessful, misses the point. Rights come to exist when they are accepted politically, socially, and economically. Judicial decisions may help or hinder the process of acceptance, but they do not determine it.

Cite as: Tim Jost, *Litigating Health Rights*, JOTWELL (February 20, 2013) (reviewing Colleen Flood, *Charter Rights and Health Care Funding: A Typology of Canadian Health Rights Litigation*, 19 Annals Health L. 479 (2010)), https://health.jotwell.com/litigating-health-rights/.