SUPREME COURT OF CANADA

CITATION: Williams *v.* Canada, 2020 SCC XYZ

APPEAL HEARD: June 30, 2020
JUDGMENT RENDERED: July 30, 2020
DOCKET: 123

BETWEEN:

Jamal Andrew Williams
Appellants

and

Canada (Minister of Health)
Respondent

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT: (paras. 1 to 6)	Brown J. (Wagner C.J. and Abella, Rowe and Kasirer JJ. concurring)
DISSENTING REASONS: (paras. 7 to 13)	Martin J. (Moldaver, Karakatsanis and Côté JJ.)

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WILLIAMS *v.* CANADA

Jamal Andrew Williams *Appellant*

v.

Canada (Minister of Health) *Respondent*

Indexed as: Canada *v.* Williams

2020 SCC XYZ

File No.: 123

Hearing: June 30, 2020.
Reasons Delivered: July 30, 2020

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of rights — Right to life, liberty and security of the person — Right to equality — Health care databases — Government failure to collect disaggregated race-based data on COVID-19 — Systemic racism —Canadian Charter of Rights and Freedoms, ss. 7, 15

Mr. Williams brought an application seeking a declaration that the Minister's failure to collect disaggregated race-based data concerning the consequences of the COVID-19 pandemic infringes his rights under ss. 7 and 15 of the *Charter* and cannot be saved under s. 1.

The Ontario Superior Court of Justice denied the application because ss. 7 and 15 could not impose such positive obligations on the Minister. The Ontario Court of Appeal reversed the Court of Justice and granted the application, declaring, without suspension, that the government's failure to collect disaggregated race-based data infringed ss. 7 and 15 of the *Charter* and could not be saved under s. 1.

Held (Martin, Moldaver, Karakatsanis and Côté JJ. dissenting): The appeal should be allowed.

Per Wagner C.J. and Abella, **Brown**, Rowe and Kasirer JJ.: The order of the application judge should be reinstated. There is no constitutional obligation on the Minister to collect disaggregated race-based data.

Per Moldaver, Karakatsanis, Côté and **Martin** JJ. (dissenting): The appeal should be dismissed. Failing to collect disaggregated race-based data infringed ss. 7 and 15 of the *Charter* and could not be saved under s. 1.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7, 15.

APPEAL from a judgment of the Ontario Court of Appeal, setting aside a decision of the Ontario Superior Court of Justice. Appeal granted, Moldaver, Karakatsanis, Côté and Martin JJ. dissenting.

The judgment of Wagner C.J. and Abella, Rowe, Brown and Kasirer JJ. was delivered by

BROWN J. —

[1] The COVID-19 pandemic is an exceptional circumstance warranting an exceptional judicial response. Given the urgency of the pandemic—and the pressing need to respond to that pandemic in both a timely and thoughtful manner—these reasons are being released in uncharacteristic pace and depth. At all stages of this dispute, the parties have consented to its expedited resolution, while the Minister of Health has never challenged the Applicant's capacity to bring this application on any procedural grounds. Given this, I have limited my reasons to the constitutional issues on which the parties focussed in both their written and oral arguments.

[2] The Applicant—Mr. Williams—alleges that the Minister's failure to collect disaggregated race-based data infringes his rights, as a Black man, to life, liberty and security of the person (under s. 7 of the *Charter*) and equality (under s. 15 of the *Charter*). The Ontario Superior Court of Justice dismissed Mr. Williams' application. But the Ontario Court of Appeal reversed, and declared, without suspension, that the government's failure to collect disaggregated race-based data infringed ss. 7 and 15 of the *Charter* and could not be saved under s. 1. I would allow the appeal.

[3] In times of emergency, our norms with respect to the proper division between the judicial and legislative arms of the state are amplified, not diminished. Fundamentally, how the Minister decides to collect public health data with a view to preserving the health of Canadians is a political decision, over which this Court lacks institutional expertise.

[4] Further, the applicant seeks to impose a positive obligation on the Minister to collect disaggregated race-based data concerning public health. But the cost, and scope, of such collection is uncertain. For how many different aspects of the health care system is there a constitutional obligation to collect race-based data? And for how many different races—and seemingly infinite combinations thereof—must the Minister collect such information? Is the cost of collecting, and protecting, such information justifiable when governments the world over are struggling to balance various complex considerations in seeking to protect societal interests in response to an unprecedented

health crisis? Once we open the door to such a positive obligation, it will be difficult, if not impossible, to know how far such obligations may eventually reach.

[5] Lastly, and as further evidence of the complex political balance engaged here, is the collection of race-based data even something that will improve public health from the standpoint of racial disparities? Perhaps confirmation that more Black people have been impacted by the COVID-19 pandemic will increase racial prejudice against those people, who some will—wrongly—assume are the authors of their own misfortune. And perhaps the collection of race-based data will be liable to the risk that such data will be used by public and private interests in ways that ultimately undermine racial justice in terms of surveillance and systemic discrimination. Ultimately, it is for the legislature to decide how best to balance these complex and overlapping considerations.

[6] For these reasons, I would allow the appeal, and reinstate the order of the Ontario Superior Court of Justice, with costs throughout.

The reasons of Moldaver, Karakatsanis, Côté and Martin JJ.were delivered by

MARTIN J. —

[7] The COVID-19 pandemic is exceptional. But whether we are in times of crisis or calm, the constitution remains—a set of commitments that this Court must

always uphold. Indeed, maintaining certain aspirations, despite difficult, even daunting, circumstances, is precisely why we have a constitution in the first place.

[8] I have read the reasons of my colleague, but must respectfully dissent. While I agree with him that, in the unique circumstances of this case, it is acceptable to focus only on the constitutional issues with respect to which the parties focussed their submissions, I disagree with his resolution of those issues.

[9] The constitutional duty to collect race-based data is only political insofar as the constitution directs this Court to, at times, engage in the inevitably political act of delineating the content of our constitutional rights.

[10] Further, this Court has previously left the door open to positive obligations on the state, and the mere collection of disaggregated race-based data—which relates not to *how* the state provides public health care, but rather, *whether* the state even knows the systemic consequences of the care it purports to provide—in my view, falls comfortably within the scope of acceptable constitutional obligations. It is, I acknowledge, not simple to assess what amounts to a constitutionally sufficient collection of race-based data. Nor is it simple to assess what amounts to a constitutionally sufficient electoral process—yet the latter positive obligation is universally accepted, without a hint of objection. In my view, this issue does not come down to the artificial divide between so-called "positive" and "negative" rights, but rather, to the legal limits of our rights—a question of interpretation that the constitution specifically directs this Court to answer. In any event, the Minister concedes that she

collects virtually no disaggregated race-based data. Accordingly, in the instant dispute, we are confronted, not with assessing whether she has done *enough*, but rather, whether doing *nothing* is constitutionally acceptable. In my view, it is not.

[11] My colleague cautions that the collection of race-based data could exacerbate racial prejudice. But the promotions of women's rights could, in the minds of some, exacerbate gender prejudice as well. We should not, as an institution charged with upholding the fundamental rights of Canadians, let such narrow minds constrain the broad realization of our constitutional rights. Likewise, my colleague notes how the collection of race-based data could, in turn, result in the use of that data for pernicious ends, by either public or private interests. However, such pernicious ends would, in my view, be potentially subject to constitutional challenges themselves, and are no categorical barrier to the government properly informing itself of the racial effects of its public health policy. Indeed, to let the government abdicate its constitutional obligations on account of the mere potential for abuse would license all sorts of defects across the constitutional spectrum.

[12] Without the collection of disaggregated race-based data, the Minister of Health simply cannot know the disparate effects of the COVID-19 pandemic or her response to that pandemic, in any meaningful sense. This is systemic discrimination, contrary to s. 15 of the *Charter*. Further, without disaggregated data, the Minister is, effectively, letting Black Canadians—like Mr. Williams—fall through the cracks of a potentially ineffectual system. If it would infringe the right to life for the Minister to

intentionally exclude Black Canadians from life-saving treatment for a deadly virus, I fail to see why the Minister's neglect—which could result in an identical consequence for many Canadians—warrants distinct constitutional treatment.

[13] For these reasons, I would dismiss the appeal, and maintain the order of the Ontario Court of Appeal.

Appeal granted with costs throughout, MOLDAVER, KARAKATSANIS, CÔTÉ AND MARTIN JJ. *dissenting.*