File Number: 29508

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal of British Columbia)

BETWEEN:

THE ATTORNEY GENERAL OF BRITISH COLUMBIA and
THE MEDICAL SERVICES COMMISSION OF BRITISH COLUMBIA

Appellants (Respondents on Cross-Appeal)

AND:

CONNOR AUTON, an Infant, by his Guardian Ad Litem, MICHELLE AUTON, and the said MICHELLE AUTON, in her personal capacity, MICHELLE TAMIR, an Infant, by her Guardian Ad Litem, SABRINA FREEMAN, and the said SABRINA FREEMAN in her personal capacity, JORDAN LEFAIVRE, an Infant, by his Guardian Ad Litem, LEIGHTON LEFAIVRE in his personal capacity, RUSSELL GORDON PEARCE, an Infant, by his Guardian Ad Litem, JANET GORDON PEARCE, and the said JANET GORDON PEARCE in her personal capacity

Respondents (Appellants on Cross-Appeal)

AND:

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Attorney General of Manitoba
Attorney General of Quebec
Attorney General of Ontario
Attorney General of Canada
Attorney General of Alberta
Attorney General for Saskatchewan
Attorney General of Newfoundland and Labrador

Interveners

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(RESPONDENTS ON CROSS-APPEAL)
The Attorney General of British Columbia
And the Medical Services Commission of British Columbia
PURSUANT TO S. 71 OF THE SUPREME COURT RULES &
S. 40 OF THE *SUPREME COURT ACT*

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PART I: STATEMENT OF FACTS

Summary of Appeal

1. This appeal is from findings of discrimination made in the Courts below that arise from a denial by the Crown of various requests for individual funding for a controversial form of behavioural therapy for autism, or autism spectrum disorder (hereafter referred to collectively as "autism").

2. It is submitted that the Courts below erred in finding a breach of s.15 (1) of the *Charter* based on an inference that a refusal of funding for behavioural therapy to treat autistic children was discriminatory. There was no evidence in the Court below that the decision concerning behavioural therapy was made in any different manner from a countless number of similar decisions involving the allocation of health care funding among the various providers and therapies which make up the health care system. The inference drawn below was based solely upon judicial findings of efficacy and need and based upon conflicting scientific evidence. It is submitted that the Court erred in treating the resolution of scientific controversy as the factual foundation for a finding of discrimination. The Courts below ought to have found that the manner in which the government responded to the request for funding and the demand to extend coverage addressed relevant questions and was not discriminatory.

3. In arriving at the inference of discrimination the Courts below also treated budgetary concerns as irrelevant. By framing the issue of the scope of insurance coverage as restricted to the questions of efficacy and need, the Court concluded, in effect, that it was discriminatory for the government to consider budgetary questions in deciding whether or not to add an additional service and a new form of therapy to the public health insurance scheme. It cannot be the case that budgetary considerations would render a decision concerning the allocation of health dollars unconstitutional.

Appellant's Record, Vol. XVI, pp. 3029-3033, Vol. XXIV, p. 4531.

4. The Courts below approached the constitutional claims advanced by petitioners from the point of view of an entitlement to health care which is not reflected in the common law, statutes or the Constitution. In particular, the Courts below interpreted the statutory concept of universality as creating a right to **any** effective treatment. This overlooks the entire structure of the medicare system which funds institutions, medical and health care providers and drug therapies on the basis of decisions which take into account many factors relating to geography, population demographics, history, medical science, and budgetary limits imposed by the legislature.

5. The Courts below created, in effect, a constitutional right to treatment for some but not all users of the health care system. As a result, the impact of the decision below will be to distort the process by which these decisions are made and to create a category of constitutionally mandated medical services. This represents an unhelpful and potentially unfair interference in the necessarily complex and difficult governmental task of allocating limited health care resources to relatively unlimited needs.

History of Proceedings

6. This action was commenced following a brief, but unsuccessful, lobbying effort by the adult petitioners to convince the provincial Government to compensate them for the costs of a therapy they had privately instituted for their children. In July, 1996 the Petitioner Sabrina Freeman first wrote to elected and unelected representatives of the province of British Columbia to secure funding for Lovaas Autism Treatment ("Lovaas"), a form of behavioural therapy she had obtained for her daughter Michelle Tamir while living in the United States. Lovaas Autism Treatment is named for the physician, Dr. Ivar Lovaas, who pioneered its development. Additional letters from other parents, with some supporting documentation from various psychiatrists, psychologists and physicians for funding for Lovaas followed in 1997 and 1998, culminating in the commencement of this legal action in 1998. The response of the Deputy Ministers of Education and Children and Families was that no funds were available for the therapy. The Province was of the view that as a means of managing the condition of autism, Lovaas, a U.S. based therapy, was novel, controversial, experimental and not a medically

required service.

Reasons of Allan J., dated July 26, 2000, Appellant's Record, Vol. I., p. 68, para 6

7. In the proceedings below, the petitioners sought a declaration that the denial of their requests for funding for Lovaas constituted a violation of the infant petitioners' right to equal benefit of the law by denying them access to health care. The adult petitioners also argued that the denial of funding for Lovaas constituted a violation of both the adult and infant petitioners' rights to liberty and security of the person as guaranteed by s. 7 of the *Charter*, in a manner inconsistent with the principles of fundamental justice. They also sought an order in the nature of *mandamus* to compel the Medical Services Commission to establish a tariff for the payment of Lovaas under the Medical Services Plan tariff. In addition, the petitioners sought an order in the nature of *mandamus* to compel the Ministers of Health, Children and Families, or Education to fund Lovaas and to indemnify the petitioners for their past costs of Lovaas.

Order of Allan J., dated March 31, 1999, Appellant's Record, Vol I, p. 37;
Reasons of Allan J., dated March 31, 1999, Appellant's Record, Vol. I, pp. 6 - 36

Autism and its Treatment

8. Autism is a complex neurologically based developmental disorder characterized by three general categories of qualitative behavioural impairments: social interaction, the primary symptom of which is a lack of reciprocal social interaction; communication, including delays in verbal and nonverbal communication; and restricted repetitive and stereotyped patterns of behaviour, such as hand flapping, head banging, rocking or pacing and/or repetitive interests or activities. Autism is often co-extensive with mental retardation: about 75% to 80% of children diagnosed with autism perform in the range of mental retardation on standardized intelligence tests. Its cause is unknown and there is no known cure.

Reasons of Allan J., dated July 26, 2000, Appellant's Record, Vol. I., pp. 66, 70, paras 2, 10; Affidavit of Dr. James A. Mullick, Appellant's Record, Vol. XI, p. 1925

9. Figures regarding the incidence of autism in the population vary. The Chambers Judge accepted that autism now affects between 10 and 15 of every 10,000 children and is significantly more prevalent among boys than girls. Other figures indicate that may be low. In 1999-2000, Ministry of Education figures indicate that out of 608,965 students, 1,089 were diagnosed with autism; about 18 out of every 10,000.

> Reasons of Allan J., dated July 26, 2000, Appellant's Record, Vol. I, p. 70, para 10; Affidavit of Dr. Glen Davies, sworn April 10, 2000, Exhibit "A", Appellant's Record, Vol. XII, p. 1531; Affidavit of Claudia Roch, sworn February 15, 2000, Appellant's Record, Vol. XIV, p. 2557, paras 30-1

10. While there is no known cure for autism, the condition has in recent decades been shown to be manageable for some, and then only to varying degrees, by the early and intense application of certain behavioural and educational interventions. While psycho-educational interventions for children with autism are many and varied, the petitioners brought this action for an order compelling the Provincial Crown to fund Lovaas; their treatment of choice. The petitioners maintained in the courts below that Lovaas is the only treatment scientifically established to be effective in the management of autism.

> Reasons of Allan J., dated July 26, 2000, Appellant's Record, Vol. I, p. 68, para 7; Appellant's Record, Vol. I, pp. 41- 64; Vol. II, pp. 266-7

11. In descriptive terms, Lovaas is an intensive form of behavioural instruction based, conceptually at least, on the principles of operant conditioning or behavioural modification ("applied behavioural analysis" or "ABA"). While Lovaas is a teaching method that utilizes the principles of ABA to modify behaviour, it is not the only method that applies ABA principles in an effort to modify some of the behavioural deficits associated with autism.

> Reasons of Allan J., dated July 26, 2000, Appellant's Record, Vol. I., pp. 75-9, paras 24-8

12. The Lovaas method focuses primarily on discrete trial discrimination learning, or discrete trial training as it is also called ("DTT") as distinct from other methods of behavioural and educational instruction. As one of the experts below noted, DTT is one of the oldest, most ubiquitous of all teaching methods, and is used in countless variations:

> "All it means is that the teacher has prepared some relevant materials or events to present to the student, and is prepared to answer correctly any possible response the student may make to them. DTT is, essentially, only the teacher's careful preparation of what is to be taught and learned today. The incidental teaching method ...is best seen as still another variation of the DTT format."

Affidavit of Dr. Baer, Appellant's Record, Vol. XXI, pp. 3927-8

13. Dr. Lovaas' central hypothesis was that behavioural modifications designed to manage autism might be retained if the therapy was delivered intensively and specifically during the child's pre-school years. Dr. Lovaas later surmised that such early interventions might work because of the peculiarities associated with the developing brain in early childhood.

Reasons of Allan J., dated July 26, 2000, Appellant's Record, Vol. I, pp. 76-7, paras 25-6; Affidavit of Tristram Smith, Exhibit "C", Appellant's Record, Vol. X, pp 1728-1734

14. Although published in 1987 (supplemented by a follow- up study in 1993), the application in Canada of the results of Lovaas, or other ABA based interventions, is relatively recent. As Dr. McEachin, a close colleague of Dr. Lovaas noted in a report dated January 24, 2000, "ABA (which Dr. McEachin incorrectly refers to as a sort of pseudonym for Lovaas) with autistic children has gained acceptance over the past six years." Each of the four petitioners herein learned of Lovaas in the early to mid 1990's. In almost every case, the petitioners obtained the services of Lovaas therapists from the United States, either because they were living in the U.S. at the time of discovery, or because no such therapies were funded or available in Canada.

Appellant's Record, Vol. IV, p. 641, paras 36-8; Vol. V, p. 868, para 10; Vol. VI, p. 1096, paras 30-2; Vol. X, pp. 1804-5, para 25; Vol XIX, p. 3596

15. As the Chambers Judge noted, Lovaas is very expensive and requires many hours each week of one-on-one behavioural instruction. The treatment requires four levels of service providers: student therapists, of which there should be approximately five for each patient; senior therapists; case supervisors; and project directors. At the apex, project directors are doctoral level personnel who have been licensed in a mental health profession and who have completed a

nine-month internship at the UCLA Lovaas site. Behavioural therapists, unlike other health service providers, are not regulated by a specific professional association. The program costs on average between $45,000 and $60,000 per year per child for a number of years. Evidence before the Chambers Judge estimated the cost of funding Lovaas for all children in the Province diagnosed with autism would amount to approximately $50,960,000 to $76,440,000 per annum. This figure may be understated given the increase in incidence of autism in the population, and the increasing expense of the service. In addition, even the low estimate equalled nearly the entire budget appropriated for special needs children in the Province of British Columbia before these proceedings.

> Reasons of Allan J., dated July 26, 2000, Appellant's Record, Vol. I., p. 76, para 24; Affidavit of Tristram Smith, Exhibit "A", Appellant's Record, Vol. XI, p. 1987; Affidavit of Randi Mjolsness, Appellant's Record, Vol. XVII, p. 3189, para 71; p. 3173, para. 12.

16. The evidence below clearly supported the view that Lovaas is a controversial therapy. While not disagreeing, the Chambers Judge declined to descend into the debate which she described as having occupied thousands of pages of print in the medical and scientific journals. Lovaas is controversial for its claim as the only effective treatment for autism, which is a claim that was made by the petitioners below in support of their demand for government funding. Lovaas is also controversial for the criticisms around the science behind the 1987 study itself. Ultimately, while the petitioners below sought Lovaas funding specifically, the Chambers Judge ordered the Crown to fund effective therapies for autism so long as they were based on the principles of applied behavioural analysis. The Chambers Judge particularly emphasised that "there is a window of opportunity during which it is possible to treat autism and obtain, in some cases, significant results."

> Reasons of Allan J., dated July 26, 2000, Appellant's Record, Vol. I., pp. 80-9, paras 30-51; p. 128, paras 156-7

17. Despite the development of Lovaas sites in many parts of North America and Europe dedicated to the task of replicating the results published in the 1987 study, those results have never been replicated. While Crown experts considered this a significant flaw with respect to the scientific validity of the therapy, the Chambers Judge accepted the explanation that Lovaas

could not likely be replicated because of the limits of experimental methodology involving children and the unacceptability of some of the physical aversives (i.e. slapping or punishing misbehaviour by physical correction) employed in the study.

> Reasons of Allan J., dated July 26, 2000, Appellant's Record, Vol. I, pp. 84-5, para 40

Legal Reasoning in the Courts Below

18. In finding a violation of s. 15(1) of the *Charter*, the Chambers Judge did not expressly identify the difference in treatment at law, which is the subject matter of the first leg of the s. 15(1) analysis. Rather, the Chambers Judge found that the appropriate comparative groups were non-autistic children and mentally disabled adults and that in comparison to those groups, the infant petitioners were subject to adverse differential treatment based on the enumerated ground of mental disability. She found that, on the facts, there was direct discrimination because of the absence of a treatment program for autistic children:

> ...must consciously or unconsciously be based on the premise that one cannot effectively treat autistic children. The extensive evidence in this case shows that assumption to be a misconceived stereotype.
>
> Reasons of Allan J., dated July 26, 2000, Appellant's Record, Vol. I, pp. 116-7, para 127

19. In the Court of Appeal, Saunders J.A. upheld the finding that differential treatment exists where the provincial medical scheme, "provides necessary medical services for non-autistic children, but does not provide funding for treatment for autistic children." The Court of Appeal held that the issue of differential treatment was answered by focusing on the nature of the required service:

> To say that these children do not receive the only treatment they greatly need is to say they are treated differently than other children.
>
> Reasons for Judgment of Saunders J.A., dated October 9, 2003, Appellant's Record, Vol. II, p. 191, para 40

20. The Court of Appeal also upheld the finding of differential treatment by comparison with a program providing limited benefits to adults with mental disabilities. In this regard, Saunders J.A. found direct discrimination in that "denial of therapy for a mental disability, in my view, directly differentiated between the infant Petitioners and those in the comparative groups." Alternatively, the court would have said that the statutory exclusion of the providers of intensive behavioural therapy adversely affected the infant Petitioners.

> Reasons for Judgment of Saunders J.A., dated October 9, 2002, Appellant's Record, Vol. II, p. 192, para 43

21. The Court of Appeal noted that, "not all refusals to treat a health care problem will be seen as discrimination." The court then found that the complaint in the present case is a failure to treat a severe condition where treatment offers, "substantial improvement in communication and behavioural skills" where "other serious, and indeed less serious, conditions are treated by publicly funded therapies." On this point, the court concluded that:

> "the failure of the health care administrators of the Province to consider the individual needs of the infant Petitioners by funding treatment is a statement that their mental disability is less worthy of assistance than the transitory medical problems of others. It is to say that the community was less interested in their plight than the plight of other children needing medical care and adults needing mental health therapy. This is a socially constructed handicap within the oversight, in my view of s. 15 of the *Charter*."
>
> Reasons for Judgment of Saunders J.A., dated October 9, 2002, Appellant's Record, Vol. II, p. 194, para 49

Court of Appeal Remedy

22. In response to the July 26, 2000 declaration of Allan J. that the Crown had violated the infant petitioners s. 15(1) right by failing to fund effective therapies for autism, the Crown commenced funding early intensive behavioural therapies for autistic children under age six. The Chambers Judge agreed the Crown's response was reasonable based on the evidence and the petitioners' own submission. Nonetheless, the petitioner sought an order compelling the Crown to fund irrespective of age, which application was refused by the Chambers Judge who

noted the most compelling aspect of the evidence in the case was the early "window of opportunity" for treatment, however expensive.

Reasons of Allan J., dated February 6, 2001, Appellant's Record, Vol. I, p. 83, para 37

23. On appeal, the majority determined that the declaration regarding funding for early intensive behavioural therapy was unlikely to be of particular help to the infant petitioners, all of whom were over age six. Consequently, invoking s. 24(1) of the *Charter*, the majority directed the Crown to fund the costs of the infant petitioners' Lovaas from July 26, 2000 until such time that no further significant benefit in alleviating the condition of autism could reasonably be expected from a continuation of treatment.

Reasons for Judgment of Saunders J.A., dated October 9, 2002, Appellant's Record, Vol. II, p. 223, para 90

24. Since the Order of the Court of Appeal, Pitfield J. of the B.C. Supreme Court has ordered the Crown to fund a further 26 families in the same manner as that ordered by the Court of Appeal in this proceeding, on the grounds they were indistinguishable from the infant petitioners herein. As a result of the Order of the Court of Appeal, the Crown has now received invoices for $720,000 for past costs up to December, 2002. Claims for future costs are approximately $60,000 per child.

Affidavit of Leah Greathead, application for leave to adduce as fresh evidence pending; Reasons for Judgment of Saunders J.A., Appellant's Record, Vol. II, pp. 224-5, para 92; *Anderson, et al v. AGBC*, 2003 BCSC 1299

Statutory Context

25. Statutory Health Insurance: The definitions of "benefits" and "health care practitioners" in British Columbia's *Medicare Protection Act*, R.S.B.C. 1996, c. 286 (the "*Medicare Act*"), and the *Medical and Health Care Services Regulation* arise from the focus on health services provided by medical or health care practitioners and through hospitals. The use of behavioural therapies to treat infant Autism is not only novel, but springs from disciplines which are neither solely medical nor educational in their character.

Budgetary Context

26. Publicly insured health care services are funded in British Columbia pursuant to the provisions of the *Medicare Act*. As in most, if not all jurisdictions in Canada, health care spending in British Columbia constitutes the single largest budget expenditure. At the time of the hearing before Allan J., the Ministry of Health, which is responsible for the administration of the delivery of health care in British Columbia, received 37% of the Provincial budget, or some $7.7 billion. Although the Ministry of Health has attempted to stabilize and even to reduce health care costs over the last decade, its budget has nonetheless grown, on average, at the rate of 6.4% per year over the last decade. This budget increase exceeds both that of the increase in the provincial budget, the province's G.D.P. as well as the general rate of inflation.

Affidavit of Heather Davidson, Appellant's Record, Vol. XV, p. 2666, paras 6, 10, 11

27. The budget of the Ministry of Health Services is allocated over three major program areas: the Regional Health Authorities; the Medical Services Plan; and Pharmacare. The remainder of the budget is allocated to Emergency Health Services, Other Funded Agencies, debt servicing and administration. The Regional Health Authorities, composed of 11 Regional Health Boards and other Community Health Service Societies and Councils, received 56% of the Ministry of Health budget in fiscal 1999/00. Together, the Authorities, Societies and Boards are responsible for: acute care; continuing care; adult mental health; and public and preventative health services.

Affidavit of Heather Davidson, Appellant's Record, Vol. XV, p. 2668, paras 11-2

28. The Medical Services Plan (MSP) is the second major program area administered by the Ministry of Health. In the 1999/00 fiscal year, MSP received 24% of the Ministry's budget, or slightly less than $2 billion. The Medical Services Commission, constituted under the *Medicare Act*, administers the tariff of listed benefits or medical services set out in the *Medicare Act* and *Regulations*.

Affidavit of Heather Davidson, Appellant's Record, Vol. XV, p. 2668, para 13

29. The third major program area administered by the Ministry of Health is the Pharmacare program, under which the Ministry funds the cost of prescription medications. Plan E, which covers most British Columbians, provides a reimbursement of 70% of drug costs only after the plan member has contributed $800.00 annually toward the cost of pharmaceutical therapies.

Affidavit of Heather Davidson, Appellant's Record, Vol. XV, p. 2669, para 15

Allocation of Medical Benefits

30. The benefits under the MSP consist of medically required (or medically necessary) services rendered by a physician, or approved health care practitioner. However, it is necessary but not sufficient for the services to be provided by either a physician or an approved health service provider. At the time of the hearing below, the government estimated it funded approximately 68% of all health services provided in the province. This estimate is similar for all jurisdictions in Canada.

Affidavit of Heather Davidson, Appellant's Record, Vol. XV, p. 2675, para 31

31. While the MSP will cover most services provided by a physician, it does not cover cosmetic surgery that is not "medically required", fertility therapy or experimental medicine. The MSP does not generally cover payment for artificial limbs, crutches, wheelchairs or other mobile equipment for the disabled. It does not cover hearing aids, eyeglasses or office based dental treatment. While the MSP does fund services provided by a psychiatrist, it does not cover services provided by a clinical psychologist or other mental health counsellor.

Affidavit of Heather Davidson, Appellant's Record, Vol. XV, p. 2676, para 33

32. Coverage under the MSP is generally limited to the services provided by physicians. However, MSP does fund services provided by other prescribed health care practitioners to a maximum of 12 visits per year.

Affidavit of Heather Davidson, A.B. Vol. XV, p. 2676, para 33

PART II: ISSUES ON APPEAL

33. On September 30, 2003, Chief Justice McLachlin stated the following four Constitutional Questions:

1. Do the definitions of "benefits" and "health care practitioners" in s. 1 of the *Medicare Protection Act*, R.S.B.C. 1996, c. 286, and ss. 17-29 of the *Medical and Health Care Services Regulation*, B.C. Reg. 426/97, infringe s. 15(1) of the Canadian *Charter of Rights and Freedoms* by failing to include services for autistic children based on applied behavioural analysis?

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society by s. 1 of the Canadian *Charter of Rights and Freedoms*?

3. Do the definitions of "benefits" and "health care practitioners" in s.1 of the *Medicare Protection Act*, R.S.B.C. 1996, c. 286 and ss. 17-29 of the *Medical and Health Care Services Regulation*, B.C. Reg. 426/97, infringe s. 7 of the Canadian *Charter of Rights and Freedoms* by failing to include services for autistic children based on applied behavioural analysis?

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s.1 of the Canadian *Charter of Rights and Freedoms*?

Remedy:

34. In the alternative, the appellants submits that this appeal raises the question whether, assuming the appellant is constitutionally obligated to fund services for autistic children based on ABA, the Court of Appeal erred in directing the Crown to fund the past and future costs of Lovaas therapy for the four infant petitioners pursuant to s. 24(1) of the *Charter.*

PART III: ARGUMENT

A. s. 15(1) of the Charter

Introduction

35. It is respectfully submitted that the reasoning in the Courts below constitutes a fundamental misapplication of s. 15(1) of the *Charter*, and a direct interference with the legitimate processes of democratic government. Mandatory treatment by judicial *fiat* avoids the necessarily uncomfortable and complex process of allocating limited health care dollars amongst the many needy and meritorious users of the health care system. By their very nature, therapies are directed at ameliorating a specific illness or disability, and hence a decision to fund or not will necessarily affect the group of persons suffering from that illness or disability. The Courts below incorrectly treated the decision to extend coverage as choosing between groups of people defined by their disability, rather than choosing not to include an extra service in a health care system which covers some, but not all possible services to the residents within the Province who are members of the Medical Services Plan.

36. The decision under review concerns a refusal to prescribe (and hence fund) recently developed behavioural therapies provided by the new discipline of behavioural therapists for the treatment of autism in British Columbia. The application of behavioural therapy to the treatment of autism, and training of behavioural therapists who deliver the therapy arose from developments in the United States. At the commencement of these proceedings, these therapies were being reviewed and considered by many Provinces. Since then, in reaction to either litigation or intense lobbying, all of the Provinces have instituted either pilot projects or full programs.

> Reasons of Allan J., dated July 26, 2000, Appellant's Appeal Record, Vol. I, pp. 95-100, paras 69-83

37. Even accepting the hearing Judge's findings as to efficacy and need, the Courts below converted those findings into a finding of discrimination without any sensible comparative analysis and by an inference of discrimination that cannot be supported on the record or reason.

38. By treating the case as one revolving around only the concerns of efficacy and need, the Courts below framed funding decisions in a simplistic fashion that is not open to the Government of British Columbia. The overall limit on health care funding is expressly stated as one of the purposes of the *Medicare Act*, *supra*, in order to provide a fiscally sustainable health care system. The necessity for an appropriation to be approved by the Legislature for the expenses of the health care system is also expressly embodied within the *Medicare Act's, supra,* purposes, objectives and limitations. There can be no question that budgetary limits such as those recognized by the *Medicare Act*, *supra*, are constitutional and require that governments allocate a determined budget amongst the general population where at least some will be disappointed.

39. Both Courts below treated as irrelevant, matters which are fundamental to the architecture of a publicly funded health care system. These include: the nature of the service provider, the extent and quality of scientific evidence respecting the therapy, its cost relative to costs of other treatments for the same condition and relative to the benefits likely to be achieved for the individuals and society at large, balance and equity between groups of users, and the need to provide an accessible and fiscally sustainable system which fairly addresses the health care needs of the population as a whole.

40. The Courts below artificially forced a dispute over public funding into an equality analysis. There is no express or implicit reference throughout the statutory architecture of British Columbia's health care system to either the therapy or the therapists demanded by the Petitioners. The MSP's emphasis on hospitals and traditional health care professionals such as physicians, is not aimed at the exclusion of the therapies at issue. Rather, the reliance on physicians and hospitals arises from the history of medical science, and the original conception of medicare as covering core medical services.

41. The only legal mechanism to publicly fund the requested therapy is the exercise of a residual discretion to prescribe non-traditional health care providers and non-traditional therapies. It was not suggested in either court below that the Government's response to Lovaas was any more or less cautious than its response to similar requests lying outside the boundaries of the services of professionals recognized under the Medicare Services Plan administered by the Medical Services Commission.

42. The proper reconciliation of the many demands on public resources lies not in a judicial analysis of efficacy and need, but in assessing many factors, which can only properly be taken into account by those who are accountable and responsible for the administration of the health care system as a whole. It is not a task for which the courts are institutionally competent as this Court noted recently in *Nova Scotia (Worker's Compensation Board) v. Martin*, [2003] SCC 54, at para 82.

Was there an Infringement of s. 15(1)?

43. The first constitutional question asks whether the definitions of "benefits" and "health care practitioners" in s. 1 of the *Medicare Act*, and ss. 17 to 29 of the *Medical and Health Care Services Regulation*, infringe s. 15(1) of the *Charter* by failing to include services for autistic children based on applied behavioural analysis ("ABA"). The definitions of "benefits" and "health care practitioners" neither embrace nor exclude the behavioural therapists who deliver ABA therapy. The ultimate issue concerning s. 15(1) is the same: was the Province's refusal to fund ABA an unjustifiable infringement of the Petitioner's right to equal benefit of the law?

44. Since *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143, this Court has consistently affirmed the requirement that there be a substantive conflict between the challenged differential treatment effected by a law, and the anti-discrimination purposes of s. 15(1). As noted in *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497, at para. 40-1, this requirement of a conflict applies to each element of a discrimination claim. Accordingly, each step in the analysis must be undertaken in a purposive and contextual manner.

45. The case law recognizes some very general purposes of s. 15(1) such as the promotion of a "society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration": *Andrews*, per MacIntyre J. in dissent at p. 171. Similarly, LaForest, J. stated that a very general purpose of preventing the imposition of differential treatment was the preservation of a society that is free and democratic for all. In *Law* it was said that the aim of the Constitution is to prevent the

violation of human dignity and freedom through the imposition of disadvantage, stereotyping or political or social prejudice. Beneath all these general principles is an equally general test of fairness: does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law. *Law*, *supra*, para. 53

46. It is respectfully submitted that the reduction of these very general principles within a workable framework for the determination of whether a given distinction violates s. 15(1) requires careful analysis of the objective assessment of the situation. The Courts below adopted the petitioners' perspective and desire for behavioural therapy to the exclusion of any objective or general view of the decision. Indeed, Allan, J.'s observation that the petitioners' take no comfort from the availability of cancer therapy when what they want is behavioural therapy is demonstrates how exclusive a perspective was adopted in the Court below. This Court has held that both the claimants' perspective and an objective assessment must be used in determining whether discrimination exists in the law under review. It is respectfully submitted that a reasonable person, "dispassionate and fully apprised of the circumstances" would not regard the refusal to prescribe behavioural therapy under the medicare system as based on a stereotype or prejudice about children suffering autism. Unless that conclusion is objectively justified there is no stigmatization or imposition of prejudice to justify a Charter dimension to the dispute over funding.

47. This Court has recently considered the interaction of equality claims on behalf of disabled persons and publicly funded programs in three decisions. In *Granovsky v. Canada, (Minister of Employment and Immigration)* [2000] 1 S.C.R. 703, this Court stated that laws affecting disabled persons only attract a s. 15 analysis and human rights dimension when the state's response to the disability can be said to stigmatize or perpetuate a stereotype respecting the characteristics, inherent dignity and value of persons burdened with a disability. In *Granovsky, supra*, this Court dismissed a claim that the conditions of qualifying for benefits relating to chronic disability relating to back injury were in violation of s. 15 and expressly held that governments are constitutionally entitled and required to draw lines and qualifications relating to benefits for disabled persons. .

48. In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, it was found that failure to provide hospital translators for the deaf failed to provide accommodation to access medical services designed to benefit both deaf and non-deaf persons without discrimination between them. Commenting on *Eldridge*, *supra*, the majority opinion observed that, "The government was not required to provide 'extra' services."

49. Most recently, in *Nova Scotia (WCB) v. Martin, supra,* this Court held that an express exclusion from the compensation scheme of the Workers Compensation Board of all those persons suffering disability from chronic pain amounted to discrimination and an unjustifiable infringement of s. 15(1) of the *Charter*. This Court emphasized that "courts are not the appropriate forum for an evaluation of the available medical evidence concerning chronic pain for general scientific purposes." The Court held that the exclusion of all persons from the benefits of the workers compensation system by express reference to their particular disability interfered with the proper consideration of whether their individual circumstances qualified for compensation under the statute. There is of course in this case no express exclusion based on disability. Further, there is no general right to public funds for all treatments that may be effective.

50. Both levels of court below held that this case concerns a claim for an extra service or therapy, and not a claim for accommodation to ensure access to medical care. It is therefore distinguishable from the claims in *Eldridge*, *supra*:

> ....the petitioners' disadvantaged position stems from the government's failure to provide effective health treatment to them, not from the fact that their autistic condition is characterized, in part, by an inability to communicate effectively or at all.
>
> Reasons of Allan J., dated July 26, 2000, Appellant's Record, Vol. I, pp. 118-9, para 132; Reasons for Judgment of Saunders J.A., dated October 9, 2002, Appellant's Record, Vol. II, p. 219, para. 85; *Eldridge v. British Columbia (Attorney General)*, *supra*.

51. In this case the Courts have now required the Government of British Columbia to fund extra services. Indeed, the cost of these services dwarfed the budget allocation for services

for all special needs children at the time of the hearing. This represents the realization of the very concern raised in *Eldridge* that subjecting differences in health care services to a s. 15(1) analysis would judicialize a governmental responsibility and imperil the democratic administration of the Medicare system.

52. Both Courts below followed the three-step analysis set out in *Law v. Canada, supra*. For ease of references the three steps are:

> (A) whether a law imposes differential treatment between the claimant and others, in purpose or effect;
>
> (B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and
>
> (C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.

53. **Is there Differential Treatment?** There is no direct discrimination drawn by the law in this case. On their face, neither the *Medicare Act* nor the Regulations refer to, much less expressly distinguish, between the claimants and others. The impugned legislation makes no actual distinctions and applies equally to all members of the Plan. There is no service provided to others for which the claimants also do not qualify. Conversely, like these Petitioners, many services that would be efficacious for the treatment or management of illnesses or disabilities for other members of the Plan are not funded under the impugned legislation.

54. The hearing Judge's reasons did not distinguish between the first and second test and concluded that there "is no need to consider adverse effects discrimination." No formal distinction at law is identified by the hearing Judge between the claimants and others. In the Court of Appeal Saunders, J.A. appears to have found that a formal distinction or failure to accommodate was proven in the present case by the refusal of the Cabinet or legislature to prescribe behavioural therapy or behavioural therapists as permitted under the definitions of "benefits" and "health care practitioners" under the *Medicare Act*.

55. The distinction drawn in the legislation is between therapies and medical providers who are recognized under the *Medicare Act* (chiefly medical physicians and hospitals) and all other providers and treatments. This distinction is deeply embedded in the Medicare system in British Columbia and all other provinces, and has historical roots in the genesis of Medicare and the medical health care system. It is recognized in the federal legislation.

56. It is not appropriate or accurate to say that the refusal to prescribe was based on the petitioner's personal characteristics. It is not based on any aspect of their disability but rather on the government's view of the appropriateness of the treatment for public funding. For this reason the first test is not met. The relationship between the refusal to fund and the Hearing Judge's finding of "direct discrimination" also relates to the third step in the analysis concerning discrimination and is dealt with further below.

No Distinction Based on Mental Disability

57. It is submitted that any differential treatment on the record was not based upon the Petitioners' disability. The Appellants agree that if the refusal to fund Lovaas constitutes differential treatment in the law based on mental disability this would constitute differential treatment based on an enumerated ground.

58. The definitions of "benefits" and "health care practitioners" contain general language broad enough to include the services provided by Lovaas or other behavioural therapists, or teachers, or social workers, ministers, or even sign language interpreters; however, the *Medicare Act* requires that such practitioners be included by prescription by the executive or legislative branches of government.

59. While the system is under-inclusive in that it fails to cover the Petitioners' therapy of choice, the more difficult question is whether the failure to prescribe the therapists or therapies demanded by the Petitioners constitutes substantively different treatment on the basis of one or more personal characteristics.

60. Under s. 5(1)(j) of the *Medicare Act*, the Medical Services Commission is empowered to determine whether a service is a benefit or whether any matter is related to the rendering of a benefit. Under s. 13, the Commission may consider applications by medical or health care practitioners who wish to be enrolled under the *Medicare Act* for the purposes of billing for services rendered. While the Commission has discretion to determine benefits, the Commission is also limited by the *Medicare Act* in this sense: it cannot decide to fund a service provided by a health care practitioner unless that practitioner's profession has been prescribed by Regulation. The *Medicare Act* makes no express distinction between the Petitioners and others. Similarly, the *Medicare Act* has not been structured or designed so as to effectively prevent the Petitioners from accessing the same services the *Medicare Act* makes available to all.

61. The claim here is for an extra service, not presently funded under the *Medicare Act*. Children with autism are of course users of the health care system generally, and benefit from the services provided under the *Medicare Act*. The claim here is not that the children with autism cannot access or enjoy the benefits of services under the *Medicare Act*. For this reason this is not a case of the government looking at the health care scheme from the point of view of an able bodied person and failing to differentiate between those persons and others with disabilities. In this case the government of British Columbia has implemented a benefit package available to all, including the petitioners, and the petitioners are seeking additional services and benefits on the grounds that such services would ameliorate their existing disadvantage without regard to the statutory context.

The Refusal of Coverage was not Discriminatory

Stereotype

62. Allan, J. held that the refusal to fund the therapy demanded by the petitioners' family was explained by the conscious or unconscious "premise that one cannot effectively treat autistic children." She held that the evidence showing the efficacy of behavioural therapy demonstrated that this premise was a "misconceived stereotype."

> Reasons of Allan J., dated July 26, 2000, Appellant's Record, Vol. I, pp. 116-7, para 127

63. The Chambers Judge was persuaded that behavioural therapy was sufficiently developed and tested to justify its use in British Columbia. In the words of Saunders J.A., the treatment has "passed out of the experimental stage". Both Courts below were also critical of British Columbia's relative scepticism towards the therapy when compared with recent funding decisions in other jurisdictions in North America.

> Reasons for Judgment of Saunders J.A., dated October 9, 2003, Appellant's Record, Vol. II, p. 219, para 85

64. In their true character these findings all relate to the efficacy of and need for behavioural therapy for pre-school age autistic children. The 'assumption' or 'premise' inferred by Allan, J. does not relate to an actual or imputed characteristic of children suffering from autism, but rather of its amenability to effective treatment. This is not an adequate basis for an inference of discrimination for several reasons.

65. First, there was no evidence in the record that the decision respecting therapy for autism was carried out in any different manner than other decisions respecting medical providers or medical treatments. Whether or not the Province's concerns respecting the experimental and controversial nature of the therapy were correct, these objections were not founded on any characteristic of the children affected. The effectiveness of treatment relative to cost is an element in many allocation decisions in any health care system. Whether right or wrong, they are not based upon a stereotype of those affected, but are made having regard to a large number of factors, including budgetary considerations.

66. Second, by drawing an inference of discriminatory intent based upon stereotype solely on the basis of efficacy, the Courts below treat other issues such as budgetary limitations and balance between users of the health care system as irrelevant. If the reasoning below is correct, then in effect it is unconstitutional for government officials to take into account budgetary limitations or the needs of other groups in assessing whether to prescribe new therapies or medical providers. It must be incorrect to effectively deprive government of the ability to take into account fiscal policy as well as the overall management of the health care system as it relates to decisions respecting coverage and funding of particular therapies.

67. Third, it assumes that the statutory scheme guarantees universality in a far broader sense than that provided in fact and law. The provision of "medically necessary" services is subject to the many and varied controls expressed through the powers given to the Commission and by the fundamental focus on physicians and hospitals. Although universal in the sense that it is accessible to all, it is not universal in the sense of being unlimited as to the nature of the benefits, and the professional discipline of the providers. In the absence of a statutory right to treatment (which in the absence of a prescription approving the therapy or therapists under the health scheme does not exist) there is no legal right to demand funding for a particular therapy, however urgent or critical.

Canada Health Act, R.S.C. 1985, Chap. C-6, ss. 9, 10

68. The preparation of a comprehensive tariff necessarily embodies a multitude of judgments about the value and need for particular services, including those delivered by physicians for a fee. The creation of the MSP tariff is a vast, ongoing and intrinsically difficult process. Indeed, Allan, J.'s criticism of the government's policy of balance assumes that government funding for medical therapies need only meet standards of judicially determined efficacy and need, and is immune from considerations of affordability. Publicly funded health care in Canada is not now and never has been "all effective treatments for all persons with all conditions."

69. By treating these complexities as irrelevant, and framing the question as one solely relating to efficacy and need, the hearing judge created the very stereotype she inferred rather than using the whole of the record to evaluate whether prejudice or stereotype lay at the root of the Government's decision.

70. The *Medicare Act* is not designed to eradicate illness and disability, but to ensure access to core medical services such as those provided by physicians and in hospitals, irrespective of ability to pay. The extension of programs to embrace therapies and new professional providers of medical services must undergo the normal processes of government, rather than be short-circuited by an inference of discrimination when the programs are not publicly funded, delayed by governmental considerations or reduced in scope by competing

health care needs. The stated purposes of the *Medicare Act* includes the need to provide health care that is fiscally sustainable. The focus on physicians and hospitals and the statutory necessity to prescribe additional services and health care practitioners are both means of ensuring universality without leaving the Plan open-ended.

Lovelace v. Ontario, [2000] 1 S.C.R. 950 at paras 58-9, 69.

71. Finally, the Courts below ignored the historical context of the decision under review. The historical intractability of autism to treatment is an acknowledged fact. The Chambers Judge was obliged to resolve the issue of efficacy in relation to the Petitioners' claim for a s. 7 right to state-funded treatment; however, it is respectfully submitted that the trial judge misdirected herself in applying judicial findings of efficacy to infer that those who disagreed with her view of the scientific evidence must have been actuated by a conscious or unconscious animus. Choosing one side or the other of a question acknowledged to be complex, difficult, and capable of more than one reasoned answer, is not discrimination.

72. The finding ignores or distorts the host of non-discriminatory reasons demonstrated in the evidence which explain the government's response to the evidence respecting Lovaas type treatment. It treats the government's policy of taking into account other factors including other medical needs as a symptom of hostility to autistic children rather than regard to the needs of children suffering other illnesses or disabilities.

Socially Constructed Handicap

73. It is respectfully submitted that the Court of Appeal's holding that the decision not to prescribe behavioural therapy constituted a socially constructed handicap misconstrues the concept and its role in determining whether a governmental measure is discriminatory. Saunders J.A. concluded that the failure to consider individual needs of the infant complainants by funding treatment was a statement that their mental disability is less worthy of assistance than the transitory medical problems of others: Reasons, para. 51. Again, the basis of this finding was that the decision concerned therapy for a severe condition and a treatment method which holds a

realistic prospect of improvement in communication and behavioural skills for some. Saunders J.A. cited *Eldridge*, *supra*, at paras. 75-77 in support of this conclusion.

74. In *Eldridge*, the absence of translators for the deaf at hospitals meant that deaf persons could not directly communicate with their health care providers. In this sense, the socially constructed handicap came about because of the failure to provide translators as part of the health care system.

75. The present case directly concerns whether there is treatment for the amelioration of a disability itself. While the decision below may mean that fewer autistic children receive behavioural therapy in British Columbia than elsewhere, it does not mean that British Columbia has created a socially constructed handicap by the way in which it has extended the Medicare system to those children. For the reasons already given, decisions respecting the scope of coverage for health care insurance are properly not based solely on "individual needs", but upon a myriad of factors.

Children with other medical conditions and other programs for mentally disabled adults are not useful comparisons

76. It is submitted that the acceptance in this case of non-autistic children and adults with mental disabilities as appropriate comparators was in error and failed to assist in the proper characterization of the Province's decision. Discrimination is a comparative concept and selection of an appropriate comparator may demonstrate prejudice and stereotyping where it is otherwise unobvious. The central conclusion in the Court of Appeal as to discrimination was that the absence of funding for autistic therapy constituted a statement that the petitioners' problems were less "worthy of assistance" than others with more "transitory" or less difficulties.

77. There are two aspects to this comparative analysis. The first is the reference to the funding of other therapies for other conditions to support a conclusion of discrimination. The second is the judicial imposition of hierarchies of need for allocation decisions in health care funding.

78. With respect to the use of funding for other conditions (either for children or disabled adults) as a comparator, differences will always exist where anything less than full public funding for all conditions is made available. Such differences are not, without more, discriminatory. There was no finding of bad faith made in the Courts below. More importantly, this case concerned the introduction into Canada of a form of therapy for a condition long considered intractable: surely any proper comparison would require comparison with the Province's response to other developing therapies.

79. No effort was made to test the government's response in this case to other truly comparable circumstances such as other forms of therapy for mental disabilities, or developing forms of therapy for other conditions. For example, the very idea of a pilot program (being tried in other Provinces) is itself a non-universal approach that has as its genesis the idea that a given therapy deserves a try, but has not progressed to the point where it should be universally accessible. Similarly, limits on use (i.e. 12 visits per year) such as those which exist for chiropractic care are not based on need, but represent a government imposed limit on certain services for certain conditions. These measures do not flow from discriminatory motives, but from a complex of facts including their differences from the core of medical care, the existence of controversy respecting their efficacy relative to cost, and budgetary allocation within a determined health care budget for the Province.

80. The Court of Appeal's identification of hierarchies of need for health care as part of the process of determining whether a decision is discriminatory effectively imposes a judicially defined priority for some treatments on the health care system. The Court of Appeal compared the petitioners' demand with funding for other 'transitory' conditions, presumably such as medical treatments for infectious disease and trauma. The complex reality of any government's health care budget needs to address and take into consideration many dynamic and inter-related factors including ones relating to: geography (British Columbia is a vast province with a relatively small, yet widely dispersed population), demographic characteristics (including the characteristics of regional populations), the changing cost and efficacy of various treatments, advances in technology, the changing characteristics of disease and other disabling conditions within the population, the views of members of the various health professions as well as those of

the general community. These are not easy choices. With respect to any one person or therapy there may not be clear answers. However, real choices need to be made, and real choices often entail the onerous responsibility of saying no or not yet.

81. By characterizing the determination of the availability and extent of funding for programs to cure illness or disability as judgments about the value of persons (and hence the subject of s. 15 analysis) the Courts below have brought under judicial review policy and administrative decisions that are inherently difficult to resolve, and are made even more challenging because of the reality that public resources are limited. Constitutionalizing these decisions may appear attractive because as a human right it enables the questions to be framed in terms of pure entitlement. It avoids the difficulties faced by public administrators who must respond to a potentially limitless demand for an inexhaustible range of treatments for an endless list of conditions real or apprehended. It also excludes traditionally recognized democratic values such as the need for fiscal responsibility and the need to maintain some measure of balance and equity as between worthy groups contending for public support that are complex and difficult in their application.

82. The reality is that people diagnosed with a severe condition like autism, or fetal alcohol syndrome, or even a severe learning disability, will feel offended and wronged when treatment for their condition is not publicly funded even though persons who might ameliorate their condition bear no resemblance to a physician or allied health care practitioner. To paraphrase the Chambers Judge, they will find no comfort knowing they too may be eligible for the services such as those provided by massage therapists or cancer clinicians; they want treatment for their autistic condition as well as any other conditions they may be unfortunate enough to experience. But fundamentally these are not judgments about the worth of individuals in the sense contemplated by section 15; they are decisions made about the best way to allocate finite resources across a range of demands and opportunities to ensure the highest standards of health of a population of a province.

> Reasons of Allan J., dated July 26, 2000, Appellant's Record, Vol. I, p. 119, para 134

83. If the government is compelled to fund services found to be efficacious in judicial proceedings on the basis that they will ameliorate a disadvantage, the constitutional protection against state sanctioned discrimination is transformed into a constitutional obligation to eliminate disadvantage wherever adjudged possible. This would transform one purpose of s. 15(1), its ameliorative value, into a substantive constitutional right that is independent of the purposes and objects of s. 15(1) which is concerned with equality under the law. As Bastarache J. cautioned in *Gosselin v. Quebec*, albeit in regard to s. 7, "Without some link to the language of the *Charter*, the legitimacy of the entire process of *Charter* adjudication is brought into question".

> *Gosselin v. Quebec (Attorney General)*, [2002] S.C.R., at para 214; *Symes v. Canada*, [1993] 4 S.C.R. 695; *Ferrell v. Ontario (A.G.)*, (1988), 42 O.R. (3d) 97 (Ont. CA); *Eldridge v. British Columbia*, *supra*, pp. 679-80, paras 75-6;

84. Society must strive to find ways to alleviate or eliminate disabilities; however, the inference of a discriminatory purpose or effect when, as in this case, differences have arisen about how to approach therapies, which have recently, "passed out of the experimental stage", constitutes the creation of a free-standing obligation to provide treatment that is not recognized by the constitution, and should be entrusted to the normal mechanisms of government.

> Reasons for Judgment of Saunders J.A., dated October 9, 2002, Appellant's Record, Vol. II, p.219, para. 85

85. The Courts below also found discrimination on the basis of age in comparison to adults with mental disabilities. The 1998 B. C. Mental Health Care Plan, a plan which the evidence does not indicate was ever instituted, describes various services that would ideally assist adults with mental health disabilities in accessing housing, income assistance and rehabilitation services and benefits. The plan, even had it been implemented, was a modest proposal. The general reference to "rehabilitation" in the plan is in no way comparable to the kind of intervention at issue here, estimated to cost at least $45,000 to $60,000 per year, per person. No reasonable person standing in place of these Petitioners would find the services listed under the adult Mental Health Care Plan, particularly the vague reference to "rehabilitation", as constituting a statement that society views children with autism as being less worthy than adults with mental health problems.

Affidavit of E. Jane Garland, Appellant's Record, Vol. XXIII, pp. 4275-4285.

Conclusion as to s. 15 Analysis

86. This is a contest over the allocation of funding for health care. The petitioners have sympathetic claims on public resources. They are not alone. Their challenges in obtaining public funding included overcoming the differences from core medical services represented by Lovaas, as well as the huge costs associated with delivering it to each individual affected with autism. Those are real challenges and not socially created handicaps. There is no need or appropriate role for judges to assume the office of making these choices. The petitioners and their families understandably seek to alleviate their condition, but there is no *Charter* dimension on the record to justify a finding under s. 15 that the Province of B.C. has directly discriminated against them either in choosing to structure its health care system around physicians and hospitals or in refusing to prescribe ABA as a qualified therapy under the *Medicare Act*.

B. Is the Crown Obligated to Fund ABA Therapies Pursuant to s. 7 of the *Charter*?

87. For ease of reference, s. 7 of the *Charter* provides as follows:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

88. As was the case with respect to social assistance in *Gosselin v. Quebec (Attorney General)*, this case raises the question when or whether persons in Canada are constitutionally entitled to health care benefits as a matter of basic human rights. Central to this issue is whether s. 7 may be applied in such a manner as to impose upon the state a positive obligation to guarantee the rights protected by s. 7 or whether, to the contrary, s. 7 was intended only to prohibit the state from acting so as to threaten or deprive persons of the rights to life, liberty or security of the person in a manner inconsistent with the principles of fundamental justice.

> *Gosselin v. Quebec (Attorney General),* [2002] SCC 84, per McLachlin CJC at para. 82, per Bastarache J., at para. 218

89. Both the Learned Chambers Judge and the majority of the Court of Appeal dismissed the Petitioners' arguments respecting s. 7 of the *Charter*. That issue was not appealed and arises in this case as one of the constitutional questions stated by this Court. The Chambers Judge gave no reasons for dismissing the Petitioners' application pursuant to s. 7. The majority held that the under-inclusiveness of the health system, even as it relates to children, would not violate a principle of fundamental justice.

> Reasons for Decision of Saunders J., Appellant's Record, Vol. II, pp. 210-1, paras 69-74

90. The appellant submits firstly, that as worded, s. 7 is not engaged in the absence of state action at least in the context of this case. As a general proposition, s. 7 does not guarantee a positive right to life, liberty or security of the person such that the state must take steps to ensure such rights are available to its citizenry. Rather, s. 7 guarantees against state incursions into each of those rights, except and unless such an incursion accords with the principles of fundamental justice. In exceptional circumstances, the Crown might well justify an incursion that does not accord with the principles of fundamental justice pursuant to s. 1 of the *Charter*. Those circumstances would be rare, but if s. 1 is to have any meaning, must exist, at least in theory.

> *Gosselin v. Quebec (Attorney General)*, [2002] SCC 84, per Bastarache J., at paras 213-14

91. Where a demand for state funded health care is denied, it cannot be said that the state has thereby deprived a person of their right to life or security of the person. If a person's health is such that their life or security of the person is engaged, it still cannot be said that the state has caused the deprivation. On what basis then can the state be constitutionally compelled to remedy the deprivation. While the language delineating the boundaries of the guarantee of security of the person has been broadly interpreted to include protection of the individual's psychological integrity from state interference, no case has gone so far as to suggest that the absence of state interference, or state action might also trigger s. 7 rights. For example, while this Court recently extended the s. 7 right to security of the person to a parent in a child apprehension proceeding, this was done in the context of a state action.

New Brunswick (Minister of Health and Community Services) v. G.(J.), (1999), 177 D.L.R. (4th) 124 (S.C.C.), at paras 59-64

92. The circumstances of this case are also distinguishable from those at issue in *Dunmore v. Ontario (Attorney General)*, in which under-inclusive legislation was found to have substantially impacted the exercise of a fundamental freedom, thus providing the s. 7 analysis with the requisite state action. Contrary to the situation in *Dunmore*, the Petitioners' herein are not precluded by the *Medicare Act* from accessing Lovaas or other behavioural therapies. Indeed, because such therapies are not insured under the *Medicare Act*, the Petitioners are able to access those services with no state intervention in the market place.

Dunmore v. Ontario (Attorney General), 2001 SCC 94, per Bastarache J. at para 220

93. If regard is to be had to the second consideration of the s. 7 analysis, the Crown's refusal to fund Lovaas does not violate any principle of fundamental justice. As we are here dealing with an omission in the law, *viz.*, a refusal to fund, we are not concerned with principles of fundamental justice that are procedural in nature. In other words, there are no procedures, nor would there be, around a failure to take action. Rather, the Petitioners must locate some substantive principle of fundamental justice that is violated by the Crown's failure to fund the therapy of their choice. In this regard, the Petitioners have identified no substantive principle of fundamental justice that would be violated by the Crown's failure to fund Lovaas or other ABA based programs. As this Court noted in *Rodriguez v. B.C.*, it is no easy task to discern substantive principles of fundamental justice. Mere common law rules do not suffice, rather, principles upon which there is some consensus that they are vital to our societal notion of justice are required. These principles must be legal principles.

Rodriguez v. B.C. (A.G.), [1993] 3 S.C.R. 519, at para. 141; *R v. Malmo-Levine*; *R. v. Caine*, 2003 SCC 74

94. In the instant case, as the evidence clearly demonstrates, there is no agreement that Lovaas is so universally accepted as a treatment for autism, that to fail to fund it would constitute a violation of the principles of fundamental justice. In the circumstances of this case,

it is also submitted that the failure to fund behavioural treatment generally cannot be said to constitute a violation of the principles of fundamental justice.

C. If either ss. 15(1) or 7 are found to be Infringed, is the Violation of either Section Justifiable Pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms?*

95. If the refusal to fund behavioural therapists constitutes a violation of s. 7 of the *Charter*, it is conceded that in the circumstances of this case, the Crown could not justify such a violation under s. 1. In that instance, there would be no need to consider s. 1. However, if s. 7 is not found to have been infringed the Crown submits that an infringement of s. 15(1) of the *Charter* is, in the context of this case, justifiable under s. 1 of the *Charter*.

96. To justify a limitation of a *Charter* right, the Crown must establish that the limit is prescribed by law and is reasonable in a free and democratic society. The analytical framework is set out in *R. v. Oakes*, and requires the Crown to demonstrate first that the legislation constitutes a pressing and substantial objective. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. The rights violated must be rationally connected to the aim of the legislation, they must be minimally impaired, and there must be proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. More recently, governments have also been asked to demonstrate proportionality between the effect of the measure and its benefits. As with the remainder of the *Charter*, the analysis is highly contextual.

> *R v. Oakes*, [1986] 1 S.C.R. 103; *Dagenais v. Canadian Broadcasting Corp.* (1994), 120 D.L.R. (4th) 12

97. The relevant context in this case includes the state of health care and costs in British Columbia. Health care finance is the largest expenditure item in every provincial budget, and the most complex management task faced by provincial governments. Funding for British Columbia's health care system is not unlimited. Choices regarding the allocation of health care dollars to health care services and demands must be made. These choices, difficult under any

circumstances, are made more difficult by the ever-increasing volume of demand for health care services.

98. Not all health care needs or demands are or could be met by the state. The *Medicare Act* provides a core group of medical services to all eligible applicants. It may also be able to respond to additional needs some of the time. However, not every need will be funded. Health policy makers must choose from among any number of competing demands, many of which are equally valid, some perhaps more expensive than others. Whatever choice is made, that choice will undoubtedly be made at the intersection between expectations and necessarily limited resources.

Objective of the Legislation

99. As the preamble to the *Medicare Act* evidences, there is a recognised need for "judicious use of medical services in order to maintain a fiscally sustainable health care system". It is recognised that providing "reasonable access" necessarily means that limits will be placed on the services paid for under the tariff of medical services set out in the Medical Services Plan. Therefore, the objective of the *Medicare Act* is to fund a core of medical services. The objective is not and cannot be to fund all services that might have the effect of improving health.

100. While this Court has stated that purely economic considerations alone will generally not justify *Charter* infringements, it has expressly taken economic factors into account in a section 1 analysis. While saving money alone will never justify an infringement of rights, such an infringement may be justified where the very sustainability of laudable objectives is contingent upon finding an appropriate allocation of limited resources. In *McKinney*, La Forest J. writing for the majority said:

> The majority in [*Irwin Toy v. Quebec*, [1989] 1 S.C.R. 927] made it clear that the reconciliation of claims not only of competing individual or groups but also the proper distribution of scarce resources must be weighed in a section 1 analysis.

McKinney v. University of Guelph, [1990] 3 S.C.R. 229. *Eldridge v. British Columbia*, *supra*, at para 85

101. As this Court has also noted, it cannot be realistically assumed that there are unlimited funds to address the needs of all. Governments are, in that regard, entitled to take an incremental approach to a social issue such as health care and to address health care needs where they are most essential and in accordance with a scheme by which, it is submitted, health care can be rationally delivered.

Egan v. Canada, [1995] 2 S.C.R. 513, at para. 104

102. As earlier noted, no health care plan can deliver all services to all persons. Lines must be drawn. While there is clearly room for the application of s. 15(1) in health care planning – governments could not, for example, limit health care funding on the basis of such personal characteristics as race or religion – it is undeniable that the lines have always been drawn in public health care based in part on economic considerations and that the effect of such line drawing is that not everyone will obtain every conceivable health care service at state expense.

103. The objective of "providing reasonable access to health care" cannot be divorced from the objective of ensuring that the scheme is fiscally sustainable. It is therefore clear that the government's objective of limiting health care expenditures by focusing on the funding of core health care services is pressing and substantial.

Rational Connection

104. The pressing and substantial objective of the Province requires it to allocate limited public funds among a limitless number of public health needs and demands. Clearly, in order to meet this objective, the *Medicare Act, supra,* must of necessity limit the breadth of services funded by government. In that regard, the scheme of the *Medicare Act*, *supra*, which allows government to list the services it will fund, thereby excluding other services, is rationally connected to its objective.

Minimal Impairment

105. No government can allocate unlimited resources to its health care system. Any allocation of health care resources is extremely complex and is a choice that will impact different groups differently. In light of these facts, it is submitted that the appellant has demonstrated that it has infringed the rights of the petitioners as little as possible in order to achieve its objective.

> *Cameron v. Nova Scotia (A.G.)* (1999), 177 D.L.R. (4th) 611 (leave to appeal denied); *Nova Scotia (Worker's Compensation Board) v. Martin, supra.*

106. This dilemma, which is particularly *a propos* to benefit conferring legislation such as the *Medicare Act*, *supra*, was discussed at some length in the decision of Lambert J.A. in *Eldridge* who questioned whether the courts could ever strike the appropriate balance among competing priorities in the funding of medical services. Lambert J.A. noted that the allocation of resources to one service may result in an infringement of the *Charter* rights of another group, or the denial of perhaps even more crucial medical services for another. The polycentric nature of these choices makes it very difficult for a court to determine whether the government has struck a constitutionally valid marker in this case. Difficulty alone does not, of course, exclude this kind of decision from judicial review. However, where the difficulty lies in determining the range of constitutionally permissible options, the question is whether or to what degree these types of decisions on resource allocation ought to be scrutinized by the courts. Although *Eldridge* was overruled by this Court, this discussion of s. 1 by Lambert J.A. was not affected and remains useful.

> *Eldridge v. British Columbia (Attorney General)* (1995), 125 D.L.R. (4th) 323, at paras. 55-9

107. This Court has recognised that governments will from time to time be required to make choices among disadvantaged groups and that such choices are not only legitimate, but that government must be granted a measure of deference in so doing. In the context of health care funding, virtually every person seeking health services will have demonstrated some need based on an illness or disability. That need may be lesser or greater than others who also seek health services but it is not appropriate to use this concept of relative disadvantage as a basis for

ordering priorities in accordance with the *Charter*. The imposition of the *Charter* as a means of priorizing health care decisions based on relative disadvantage only encourages the "race to the bottom" that this Court has disapproved.

> *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927, at pp. 993-4. See also *McKinney, supra,* at p. 399; *Lovelace, supra*, at para.

108. The evidence respecting British Columbia's health care system demonstrates that it is intended to fund core medical services provided by hospitals and physicians and, to a lesser extent, the services of allied health care providers. To fund those services, the government of British Columbia has to say no to demands for other services. As these petitioners can and do avail themselves of all the services currently funded, any limit on the rights they may have to other services such as behavioural therapy is demonstrably justifiable. To say otherwise is to invite the courts to review funding decisions on a case-by-case basis and to determine among all those persons seeking health services, who should obtain publicly funded health care and who should not. How would the courts do this while at the same time ensuring the system is sustainable? In the appellant's view, it is a role the courts cannot discharge. The health care system cannot be sustained unless governments are able choose in good faith those health services it will fund and those it will not. So long as all persons are entitled to equal access to all the services being funded, there is no room for judicial review of this particular governmental function.

D. Did the Court of Appeal Err in Altering the Order of Allan J. dated February 6, 2001, to Compel the Crown to Fund the Costs of the Petitioners' Therapy of Choice?

109. By Order dated February 6, 2001, the Chambers Judge directed the Crown to fund early intensive behavioural therapy for children with autism. The Chambers Judge left it to the Crown to implement the appropriate policies necessary to meet its constitutional obligations. At that time, the Chambers Judge was aware that the Crown had, in response to Her declaration of constitutional right dated July 26, 2000, commenced a program for the delivery of early intensive behavioural therapies for children under age six. The Petitioners sought an order compelling the

Crown to continue funding irrespective of age, because each of the four infant Petitioners was well past age six at the time of the hearing.

110. The Chambers Judge dismissed the Petitioners' application for an order compelling the Crown to fund Lovaas or other early intensive therapies irrespective of age. In Her Reasons for Decision, the Chambers Judge noted that the Crown implemented the age limit based on the evidence, Her Reasons for Judgment and indeed, on the Petitioners' own submissions as to the effectiveness of treatment for young children. The Chambers Judge added that she considered the most compelling argument for early intensive behavioural therapy by experts for both parties to be that autistic children have a "narrow window of opportunity" to benefit from early intensive intervention. Bearing in mind the age of the infant Petitioners, the Chambers Judge awarded each of them a "symbolic" damages award in the amount of $20,000.00 per family as compensation for having shouldered the burden of the litigation.

> Order of Allan J., dated February 6, 2001, Appellant's Record, Vol. I, p. 164; Reasons of Allan J., dated February 6, 2001, Appellant's Record, Vol. I, pp. 149-150, 160, paras. 37, 39, 64

111. On this appeal, this aspect of the Order of the learned Chambers Judge was altered by the majority. By Order dated October 9, 2002, the Court of Appeal directed the Province to fund the costs of the Petitioners' Lovaas from July 26, 2000 until such time as the service is no longer useful in alleviating the condition of Autism. To date, the Province has paid three of the Petitioners approximately $172,174.08 for the cost of Lovaas from July 26, 2000. Additional claims for costs have and are expected to continue to be made by these Petitioners as well as those in *Anderson*, *supra*, all of whom are over age six and thus not qualified for funding for early intensive behavioural therapy as ordered by Allan J.

> Order of the Court of Appeal, dated October 9, 2002, Appellant's Record, Vol. I, p. 255; Affidavit of Leah Greathead, application for leave to adduce as fresh evidence pending; *Anderson, et al v. AGBC*, 2003 BCSC 1299

112. The cost of early intensive behavioural therapy for all children with autism under age six is prohibitively expensive. With the Order of the Court of Appeal, the cost has become a matter of serious concern. Even though the provincial health care budget amounted to some $7.7

billion, the amount budgeted for the medical services plan, which plan covers the cost of physician and health care practitioner services for all British Columbian's, was slightly less than $2 billion. The effect of the decision of the lower courts in this case is that the Province is now facing additional potential costs of approximately $350 million per year for health care funding. Such matters are relevant considerations and ought to have been taken into consideration by the lower courts. The effect of the decision of the lower courts in this case is that the Province is now facing additional potential costs that could easily reach $75 to $100 million per year for Lovaas or other early, intensive behavioural funding. Costs of this magnitude are relevant and ought to have been given some consideration by the lower courts.

Gosselin v. Quebec (Attorney General), *supra*, at para 297

113. The Order of the Court of Appeal dated October 9, 2002, is in error not only because of the expenses involved relative to the evidence of efficacy for older children, but because the Learned Chambers Judge, having heard all of the evidence, declined specifically to make such an order.

114. If the Crown is found to have unjustifiably infringed s. 15(1) by having refused to fund Lovaas when asked, and if that infringement rests on the fact that the *Medicare Act* is under-inclusive, the remedy is to declare the *Medicare Act* invalid to the extent of its inconsistency with s. 15(1) and to stay the remedy while the Crown addresses the issue rather than to deny persons access to those health services already insured. The remedy, however, is based on s. 52(1) of the *Constitution Act*. In the result, there is no room in this case for the application of s. 24(1). It should not have been applied by either Court below.

Schachter v. Canada, [1992] 2 S.C.R. 679, at p. 719; *Gosselin, supra*, at para 295

115. In the alternative, if this is a case in which s. 24(1) rather than s. 52(1) applies, there is nonetheless no basis for alteration of the Order of the learned Chambers Judge by the Court of Appeal. Reviewing courts must show deference to a trial judge's choice of remedy, and may interfere only where the trial judge has committed an error of law or principle. The Court of

Appeal found no such error, yet interfered with the discretion of the trial judge, who had refused to grant the remedy requested by the Petitioners.

> *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, at para 87

116. By Order dated February 6, 2000, the Learned Chambers Judge, relying on the authority of s. 24(1) of the *Charter,* directed the Crown to fund early intensive behavioural therapies. No further direction regarding the amount of funding or its duration was given, except that the Chambers Judge refused to order the Crown to fund irrespective of age. This Order was upheld by the Court of Appeal, with the variation previously noted. As s. 24(1) does not apply in this case, neither the Chambers Judge nor the Court of Appeal had any jurisdiction to order funding. The remedy ought to have been a simple declaration pursuant to s. 52(1) leaving it to the Crown to best determine how to address the declaration of constitutional right.

> *Schachter*, *supra*, at p. 719; *Eldridge v. British Columbia*, *supra*, at para 96

117. Neither the Chambers Judge nor the majority of the Court of Appeal have specified the basis upon which the province of British Columbia has breached the *Charter* by funding services available in hospital, or provided by physicians and health care practitioners. In this regard, it should be noted that the insured services provided in hospital and by physicians are fully funded: that is the comprehensive aspect of health care as mandated by the *Canada Health Act*. However, the services of health care practitioners are not fully funded. As a consequence, if the Crown has violated the rights of children with autism by refusing to fund early intensive behavioural therapies even though it funds the services provided by chiropractors, equality does not demand full funding of this or any other therapy.

118. The direction of the learned Chambers Judge does not conform to the long-standing constitutional requirement that only the legislature or parliament can appropriate public funds. This was exacerbated by the Court of Appeal which further directed the Crown to fund Lovaas, the therapy of choice of the infant Petitioners, on the basis that the direction of the Chambers Judge to fund early intensive behavioural therapy, coupled with her view that the evidence was insufficient to compel the Crown to fund irrespective of age, meant the Petitioners

would not benefit from this litigation. With all due respect, the Petitioners did obtain, at least partially, the declaration sought which was that children with autism were entitled to state funded early intensive behavioural intervention. On the evidence, the Petitioners did not qualify for such intervention. Section 24(1), assuming it applies in this case, did not confer on the Court of Appeal the authority to ignore the evidence, or to overrule the exercise of the Chambers Judge in the absence of an error of law or principle.

> Reasons for Decision of Saunders J., Appellant's Record, Vol. II, pp. 223-4, paras 90-2; *R .v. Ho*, 2003 BCCA 663, per Southin J. at paras 68-70

119. As the majority of the Court of Appeal below noted, issues of funding programs for children of school age may involve additional considerations not before the court either in evidence or submissions. This was the finding of the Chambers Judge as well. In the province of Ontario, a number of plaintiffs have filed legal actions seeking funding for Lovaas and other behavioural interventions for children over age six. Indeed, in British Columbia, there are a number of similar ongoing cases on behalf of persons ranging in age from 7 to 19. As the Ontario litigation demonstrates, the evidence regarding funding for behavioural therapies over age six is complex and voluminous. This evidence was not before the Courts below. It is not suggested that this Court review the evidence, particularly that now before the Ontario Court. However, it is necessary to note that such evidence exists and the Province of British Columbia ought to be able to adduce it in a hearing if necessary.

> Reasons of Allan J., dated February 6, 2001, Appellant's Record, Vol. I, pp. 147-151, paras 31-42; Affidavit of Bob Charney, application for leave to enter as fresh evidence pending; Affidavit of Leah Greathead, application for leave to enter as fresh evidence pending.

E. Conclusion

120. In the Courts below the processes of government are painted with a blunt, almost malevolent quality. Once government endeavours to provide a service, its abilities to extend, experiment, deny or ration must then be viewed through a judicial lens which converts any decision to deny, delay or disappoint into a moral judgment that must have discriminatory animus at its heart. This not only fails to respect the hard job of government; it fails to come to

grips with the necessity of these very tasks in the course of any health program - whether publicly funded or not. It ignores the complex reality of dealing with a population rather than individuals; with a kaleidoscope of needs and wants and possible responses; and with the rapid tide of technological and cultural history which erases once solid features. It creates new obstacles and opportunities overnight.

121. This Court has recently reaffirmed the need to be fearless in defence of constitutional right, while at the same time respecting the proper boundaries of judicial office. The framework adopted in the Courts below permits, and indeed encourages, Canadians to believe that so long as their need is great, then a constitutional right will be found to order that it be so. That process ignores the fact that government's realities are not self-created. Ultimately a judicial decision to prefer treatment to one group will have consequences for others, perhaps in terms of lower funding or other allocations of resources that are not subject to judicial review. The public interest in this process is to ensure that whoever allocates the resources of government dedicated to health care, is responsible, accountable and ultimately answerable to the democratic process. Anything less is not only unsatisfactory and unwise; it is profoundly contrary to the core values of the Constitution.

PART IV: NATURE OF ORDER REQUESTED

122. That this appeal be allowed. That Constitutional Questions # 1 and #3 be answered in the negative, or, alternatively, if Constitutional Questions #1 and #3 are answered in the positive that Questions # 2 and #4 be answered in the positive.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated January _____, 2004 at Victoria, British Columbia