

**IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of British Columbia)**

BETWEEN:

**ATTORNEY GENERAL OF BRITISH COLUMBIA and
MEDICAL SERVICE COMMISSION OF BRITISH COLUMBIA**

Appellants
(Appellants/Respondents on Cross-Appeal)

- and -

**CONNOR AUTON, an infant, by his Guardian Ad Litem MICHEL AUTON,
MICHEL AUTON, in her personal capacity,
MICHELLE TAMIR, an infant, by her Guardian Ad Litem SABRINA FREEMAN,
SABRINA FREEMAN, in her personal capacity,
JORDON LEFAIVRE, an infant, by his Guardian Ad Litem LEIGHTON LEFAIVRE,
LEIGHTON LEFAIVRE, in his personal capacity,
RUSSELL GORDON PEARCE, an infant, by his Guardian Ad Litem JANET GORDON PEARCE, and
JANET GORDON PEARCE, in her personal capacity**

Respondents
(Respondents/Appellants on Cross-Appeal)

- and -

**ATTORNEY GENERAL OF NEW BRUNSWICK
ATTORNEY GENERAL OF MANITOBA
ATTORNEY GENERAL OF QUEBEC
ATTORNEY GENERAL ONTARIO
ATTORNEY GENERAL CANADA
ATTORNEY GENERAL ALBERTA
ATTORNEY GENERAL OF SASKATCHEWAN
ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR
ATTORNEY GENERAL OF PRINCE EDWARD ISLAND
ATTORNEY GENERAL OF NOVA SCOTIA**

Interveners

**FACTUM OF THE INTERVENER,
THE ATTORNEY GENERAL OF ALBERTA**

ALBERTA JUSTICE

Constitutional and Aboriginal Law
4th Floor, Bowker Building
9833 - 109 Street
Edmonton, Alberta T5K 2E8
Telephone: (780) 427-0072
Facsimile: (780) 425-0307

Margaret Unsworth

Solicitor for Intervener,
Attorney General for Alberta

GOWLING LAFLEUR HENDERSON, LLP

Barristers & Solicitors
2600, 160 Elgin Street
P.O. Box 466, Stn "D"
Ottawa, Ontario K1P 1C3
Telephone: (613) 233-1781
Facsimile: (613) 563-9869

Henry S. Brown, Q.C.

Ottawa Agent for the Intervener,
Attorney General for Alberta

Office of the Attorney General
Legal Services Branch
Centennial Building, Room 447
P.O. Box 6000
Fredericton, NB E3B 5H1
Telephone:(506) 453-2222
Facsimile: (506) 453-3275

Gaétan Migneault
Solicitor and Agent of the
Attorney General

Fasken Martineau DuMoulin LLP
2100-1075 W. Georgia Street
Vancouver, BC V6E 2G2
Telephone:(604) 631-3131
Facsimile: (604) 631-3232

Ministry of Attorney General
Legal Services Branch
P.O. Box 9270, Stn Prov Govt
1312 Blanshard Street
Victoria, BC V8W 9J5
Telephone:(250) 356-8848
Facsimile: (250) 387-0343

**Geoff D. Cowper, Q.C. and
Lisa Mrozinski**
Solicitors for the Appellants/Respondents
On Cross Appeal

Harper Grey Easton
3200-650 Georgia Street West
P.O. Box 11504
Vancouver, BC V6B 4P7
Telephone:(604) 687-0411
Facsimile: (604) 669-9385

Bradbrooke Crawford Green
North Shore Law
6th Floor, 171 W. Esplanade
North Vancouver, BC V7M 3J9
Telephone:(604) 980-8571
Facsimile: (604) 980-4019

**Christopher E. Hinkson, Q.C.
and Brigitta von Krosigk**
Solicitor for the Respondents/Appellants
on Cross Appeal

Gowling Lafleur Henderson
Barristers and Solicitors
Suite 2600
160 Elgin Street
Ottawa, ON K1P 1C3
Telephone: (613) 233-1781
Facsimile: (613) (563-9869)

Henry Brown, Q.C.
Ottawa Agent of the Intervener

Burke-Robertson
70 Gloucester Street
Ottawa, ON K1P 0A2
Telephone: (613) 236-9665
Facsimile: (613) 235-4430

Robert E. Houston, Q.C.
Ottawa Agent for the
Appellants/Respondents on Cross Appeal

Gowling LaFleur Henderson LLP
2600, 160 Elgin Street
P.O. Box 466, Stn "D"
Ottawa, ON L1P 1C3
Telephone: (613) 233-1781
Facsimile: (613) 563-9869

Henry S. Brown, Q.C.
Ottawa Agent for the
Respondents/Appellants on
Cross Appeal

Department of Justice
2199 – 284 Wellington Street
Ottawa, ON K1A 0H8
Telephone:(613) 957-4842
Facsimile: (613) 954-1920

Graham Garton, Q.C.
Solicitor and Agent of the Attorney
General of Canada

Attorney General of Manitoba
Attorney General of Saskatchewan

Attorney General of Quebec

Attorney General of Ontario
Attorney General of Newfoundland
and Labrador

Department of Justice
1216 – 234 Wellington Street
Ottawa, ON K1A 0H8
Telephone: (613) 941-2351
Facsimile: (613) 954-1920

Christopher M. Rupar
Ottawa Agent for the Attorney General of
Canada

Gowling Lafleur Henderson LLP
2600, 160 Elgin Street
P.O. Box 466, Stn “D”
Ottawa, ON L1P 1C3
Telephone: (613) 233-1781
Facsimile: (613) 563-9869

Henry S. Brown, Q.C.
Ottawa Agent for the Attorney
General of Manitoba and the Attorney
General of Saskatchewan

Noël & Associés
111, rue Champlain
Hull, Québec J8X 3R1
Telephone: (819) 771-7393
Facsimile: (819) 771-5397

Sylvie Roussel
Ottawa Agent for the Attorney General
of Quebec

Burke-Robertson
70 Gloucester Street
Ottawa, ON K1P 0A2
Telephone: (613) 236-9665
Facsimile: (613) 235-4430

Robert E. Houston, Q.C.
Ottawa Agent for the Attorney General of Ontario
and the Attorney General of
Newfoundland and Labrador

I N D E X

	<u>Page</u>
OVERVIEW OF ALBERTA'S POSITION	1
PART I - STATEMENT OF FACTS	2
PART II - ISSUE ON APPEAL	7
PART III - ARGUMENT	8
PART IV - NATURE OF ORDER REQUESTED	18
PART V - LIST OF AUTHORITIES	19

OVERVIEW OF ALBERTA'S POSITION

1. Since the mid-1990's, Alberta has provided some funding for intensive behavioural
5 intervention programs for children with autism in the province. As well, Alberta has provided
some occupational, physical, and speech therapy. That funding started as a pilot project for pre-
school children and is a matter of constant review. Notwithstanding the policy decision of the
province to provide such funding, Alberta intervenes in this appeal in support of the position of
the Attorney General of British Columbia. The decisions of British Columbia Courts have serious
10 consequences on government's ability to make decisions about the use of finite dollars in the face
of ever increasing public demands.

2. Alberta supports the arguments advanced by the Attorney General of British
15 Columbia except that Alberta does not concede that a violation of s. 7 of the *Charter* could not be
justified under s. 1 of the *Charter*.

3. Alberta's position is that the first and third constitutional questions must be
20 answered "no." British Columbia's health legislation does not violate the *Charter* and, in fact,
the Plaintiffs (Respondents on appeal) have never alleged that it does. The Plaintiffs at trial
sought a declaration that the failure or refusal of *government* to fund Lovaas (a form of
intensive behavioural intervention or IBI) for their autistic children violated the *Charter*. In other
words, the challenge was and continues to be to a government funding decision and not to health
25 care. Even on this appeal, the Respondents ask this Honourable Court to answer the first and
third constitutional questions "no." In as much as this Court may look beyond health care as a
means of funding, Alberta's position is that government decisions which result in a failure or
refusal to fund or placing limits on funding also do not violate the *Charter*.

PART I

STATEMENT OF FACTS

5

4. Alberta adopts the Statement of Facts detailed in the factum of the Appellants. The following facts are also relevant and important in analyzing the issues in this appeal.

10 **Provincial Health Insurance**

5. The provinces are primarily responsible for providing health care services to their residents. However, provincial policy decisions regarding health care must take into account the *Canada Health Act* if the Province wishes to receive federal transfer funding. The *Canada Health Act* sets five pre-conditions for provinces to meet in order to qualify for a full share of federal transfer funds - public administration of the health care insurance plan; comprehensive coverage of all *medically necessary services* provided by hospitals and doctors; universal availability of all insured services; portability of insured services for travel outside the province; accessibility of the insured services unimpeded by financial or other barriers. In order to qualify for federal funding, the *Alberta Health Care Insurance Act* (like every other provincial health insurance legislation) has established a provincial health plan which provides full coverage of physician services to all Alberta residents.

25

Alberta Health Care Insurance Act, R.S.A. 2000, c. A-20, s. 3(1)

Alberta Health Care Insurance Regulation, A.R. 216/81 as am.

Canada Health Act, R.S.C. 1985, c. C-6, s. 7

30

6. Under the *Canada Health Act*, “insured medical services” includes three types of services: (1) medically required services provided in hospitals; (2) medically required services provided by physicians; and (3) medically required dental surgery. Since none of the services provided in conjunction with IBI are provided in a hospital, neither that category nor the dental surgery services, are of relevance here.

35

Canada Health Act, s. 2

7. The federal transfer to Alberta for 2001-02 was approximately \$2.29 billion. This amount represents approximately 1/6 of Alberta's total health budget for the year. The majority of the remainder of the provincial health revenue is from internal government revenues and from premiums, fees and licenses.

Government of Alberta 2002-03 Annual Report, page 7

Health and Wellness Business Plan 2003-06 (March 21, 2003)
page 216

8. In addition to *Canada Health Act* insured services, Alberta (again like most provinces) provides additional health services ("discretionary services") which are funded and provided in a variety of ways:

(a) Some discretionary services are prescribed by legislation, and include services provided by other health professionals. However, funding is often partial or limited.

Alberta Health Care Insurance Act, R.S.A.2000, c. A-20, ss. 1 & 3

Chiropractic Benefits Regulation, A.R. 268/95, ss. 2-4

Podiatric Benefits Regulation, A.R. 152/95, ss. 3 & 4

(b) Discretionary services may be required by government policy.

Regional Health Authorities Act, R.S.A. 2000, R-10, s. 16

Regional Health Authorities Regulation, A.R. 15/95, ss. 1 & 9

(c) Many discretionary services are provided by Regional Health Authorities as bodies with statutory authority to "determine priorities in the provision of health services in the health region and allocate resources accordingly".

Regional Health Authorities Act, R.S.A. 2000, R-10,
s. 5

9. Insured services provided by physicians (outside hospital settings) are set out in the Schedule of Benefits authorized by the Medical Benefits Regulation. The Schedule identifies the services covered, rates of benefits payable and their descriptions. It includes over 3000 insured services.

Medical Benefits Regulation, A.R. 173/93

Schedule of Medical Benefits

10. In Canada as a whole, there was a constant rate of growth in health expenditures from 1975 to 1991 and then from 1997 to the present. The mid-1990's was a period of fiscal restraint across the country. In Alberta, as in other Canadian jurisdictions, health, education and social services constituted the largest expenditures within government budget, about 70% in total - 33%, 27% and 10% respectively in 2002-03.

Canadian Institute for Health Information, *National Health Expenditure Trends; 1975-2003*, (2003) page 3

2003-03 Annual Report, Government of Alberta

Provincial Funding of Intensive Behavioural Intervention Programs for Autistic Children

11. As noted in the trial decision of Justice Allen dated July 26, 2000, Alberta does provide funding to intensive behavioural intervention (IBI) programs for autistic children but not through its Ministry of Health.

Appellants' Record, 96 - 98 (paragraphs 70-76)

12. Prior to 1999, the Alberta Ministry of Children's Services instituted a pilot pre-school IBI project for treatment of 15 children. The project utilized IBI intervention, and also provided some speech and language therapy, occupational therapy, and physiotherapy.

Appellants' Record, 97 (paragraph 73)

13. Subsequently, Alberta Children's Services introduced a much broader policy on
5 May 27, 1999. The policy allowed Children's Services to provide funding up to approximately
\$60,000 per child for in-home, early IBI programs for pre-school children aged 2 to 5 with
autism or ASD.

10 Appellants' Record, 97 (paragraph 74)

14. Under that policy, a child needed to have a diagnosis of autism made by a medical
practitioner in Alberta. A child could then access an IBI program for a maximum of 40 hours a
week, for up to three years. The program was home-based and its stated intent was to improve
15 the child's communication, academic, social and behavioural skills to a level where he/she was
able to transition to the community and educational system without IBI programming or intensive
support.

20 The Interim policy and guidelines of the Alberta policy describe
who is eligible for the treatment and the qualifications for those who
provide IBI treatment. While the procedures are to be developed in
collaboration with health and educational departments of
government, the IBI services are funded by the Ministry of
Children's Services and not through medicare.

25 Appellants' Record, 97-98 (paragraphs 75-76)

15. This policy enabled the Ministry of Children's Services, through the Handicapped
30 Children's Services (HCS) program, to fund IBI services for preschool and younger school-aged
children with a documented diagnosis. An evaluation of the IBI pilot program in 2002 concluded
that IBI services benefited children and families in several ways such as improved functioning,
self efficiency and quality of life for the children, and increased knowledge and skills for the
families. Younger children with higher preprogram cognitive and functioning abilities in families
35 more actively involved were found more likely to make progress. Multi-disciplinary teams and
home-based early intervention were found to be two of several factors which worked well in

delivery of the services.

5

Intensive Behavioural Interventions Pilot Project Comparative Evaluation, NFO CF Group Inc./ARC Applied Research Consultants/ Psychometrix International (2002-09-17)

10

16. A subsequent Expert Panel on Autism was mandated to “review the research literature, consider current best practice experience and recommend best practice guidelines for programming for pre-school children with autism and for transition services for school aged children.”

15

A System of Care for Children with Autism – Expert Panel Report (Expert Panel Report), Alberta Children’s Services (September 2002), page 2

20

17. The Expert Panel Report noted that Alberta Health and Wellness does not fund IBI programs but does provide a variety of assessment, diagnostic and medical services to children with autism. Alberta Learning provides funding to school authorities to support appropriate programs for children with disabilities through school years. Children’s Services provides funding for IBI programs for pre-school children or, if they have not yet received three years of funding, to the end of the first full school year (grade one).

25

Expert Panel Report, pages 9-10

30

School Act, R.S.A. 2000, c. S-3, s. 47

2003-2004 Funding Manual for School Authorities, Section 1.10

35

18. Aside from expenses relating to child welfare needs, funding for programs to children with disabilities, which includes children with autism constitutes the largest part of the budget in Children’s Services. Handicapped Children’s Services (a program within Children’s

Services under the *Child Welfare Act* – recently renamed Resources for Children with Disabilities) provides funding for IBI to pre-school children with autism for a maximum of three years following assessment by a multi-disciplinary team. Children who began to receive IBI services through the pre-school policy have continued to receive funding through extension agreements by the Ministry of Children’s Services. The proposed *Family Support for Children with Disabilities Act* (passed in 2003 but not yet proclaimed) anticipates no age limit to the funding of specialized services which would include treatment currently known as IBI, if the treatment is recommended by a multi-disciplinary assessment team, but continues to focus on early intervention.

5

10

Children’s Services Business Plan 2003-2006

Handicapped Children’s Services Program Manual (January 2001)
page 3-35

15

Family Support for Children with Disabilities Act, 2003, Bill 23

PART II

ISSUES ON APPEAL

5

19. On September 30, 2003, Chief Justice McLachlin stated the following four constitutional questions:

10

1. Do the definition 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?

15

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*?

20

3. Do the definition 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?

25

4. 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*?

30

20. If there is found to be an unjustifiable infringement of either s. 15(1) or s. 7 of the *Charter* then this appeal also raises the constitutional question of the appropriate remedy.

35

21. It is the position of Alberta that the first and third constitutional questions should be answered no and that, if necessary, the second and fourth questions should be answered yes. The appropriate remedy, if an unjustifiable violation of the *Charter* is found, is to issue a declaration declare the *Act* and of invalidity with a stay giving government time to consider how best to implement the Court’s ruling.

40

PART III

ARGUMENT

22. Alberta supports the arguments made by British Columbia except that Alberta does
5 not concede that a violation of s. 7 of the *Charter* might not be saved by s. 1. With respect to s.
1, Alberta adopts the submissions of the Appellants at pages 31-35 of their factum and of the
Intervener, New Brunswick, in their factum at pages 17-22.

10 23. Alberta addresses its submissions to the right and responsibility of government in
respect of decisions regarding the funding of socio-economic programs – total funding, funding
for pilot programs only or no funding at all. The Respondents never challenged the British
Columbia health legislation and in their factum specifically ask this Court to answer “no” to the
15 first and third constitutional questions. The Respondents instead challenged the failure or refusal
of government to fund Lovaas (a form of intensive behavioural intervention therapy or IBI) for
their autistic children. In other words, the challenge was and is to government funding generally
and not to health care.

20 **A. No violation of s. 7 of the *Charter***

24. It is respectfully submitted that non-funding of behavioural therapy programs for
autistic children does not violate “liberty or security of the person” protected in s. 7 of the
Charter because there is no constitutional protection for positive economic action by
25 governments. Should this Honourable Court wish to proceed with a s. 7 analysis beyond a
decision on “liberty or security of the person,” Alberta adopts the factum of the Appellants at
paragraphs 89-90 wherein the requirements of “principles of fundamental justice” are explored.

30 25. It is now trite law that to establish a violation of s. 7 of the *Charter*, a claimant
must first establish a deprivation of the right to life, liberty or security of the person and then

must establish that the deprivation was not in accord with principles of fundamental justice.

Gosselin v. Quebec (AG), 2002 SCC 84 (TAB 12 of Appellants' Authorities) paragraph 205

5

26. The Respondents' argue that anything other than full funding for Lovaas behavioural therapy violates the liberty and security interests of children with autism. They do not however, identify the principle of fundamental justice which the violation is said to violate.

10 On that basis alone, the s. 7 *Charter* argument should be dismissed.

27. The liberty and security interests argued can be stated briefly as a claim for an economic interest (funding) which may enhance the life of autistic children. The difficulty with
15 this argument is that it runs contrary to case law.

28. One of the earliest cases on point involved an argument that seriously injured boating accident victims should not face limits on their liability claims. The B.C. Court of
20 Appeal, in a decision by Justice MacLachlin, held that limited liability did not constitute a violation of s. 7 of the *Charter*. Money, it was noted, might always be argued to affect a person's liberty and security but that effect is not contemplated by s. 7.

Whitbread v. Walley (1988) 51 D.L.R. (4th) 509 (B.C.C.A.)

25

29. Similarly, the B.C. Supreme Court in *Brown v. British Columbia (Minister of Health)* held that a government decision not to fully subsidize AIDS drugs was an economic claim not covered by s. 7.

30

Brown v B.C. (Minister of Health) (1990) 66 D.L.R. (4th) 444 (B.C.S.C.)

35 30. The most recent detailed discussion on economic rights and s. 7 is by this Honourable Court in *Gosselin*. This Court did not decide the point but decided that even if s. 7

could be said to encompass economic rights, it does not impose a positive obligation on governments to ensure a person enjoys life, liberty or security. The obligation is to not deprive a person of these rights.

5 *Gosselin, supra*, paragraphs 75-83 (MacLachlin C.J.) and
 paragraphs 205-218 (Bastarache J.)

31. It is submitted that the s. 7 claim should be dismissed both because the *Charter*
10 does not protect economic rights and because s. 7 does not impose a positive obligation on the
state to provide funding. The Respondents' children in this case suffer a devastating disability,
autism, and it is that disability which impacts their liberty or security interests not any
government action. In order that s. 7 be engaged, the threat to the rights must emanate from the
state.

15 *Gosselin, supra*, paragraph 218

32. The Respondents suggest that *B. (R) v. Children's Aid Society* and *J.G. v. Ministry*
20 *of Health and Comm. Services* support their deprivation of liberty or security arguments.
However, both cases are distinguishable because in both cases there was a clear government
action that was challenged – in *B. (R)*, the use of child welfare legislation to override a parents
wish about blood transfusion for the child; in *J.G.*, state apprehension of a child. There is no
challenged state action in this case which caused the alleged liberty or security violation.

25 33. The Respondents also urges this Court to include a “right to funding” within the
protection of s. 7 of the *Charter*, apart from the *Charter* and existing case law, because of the
International Convention on the Rights of the Child.

30 34. International obligations require implementation of the treaty by the appropriate
level of government under s. 91 and s. 92 of the *Constitution Act, 1867* because in Canada, unlike
other jurisdictions, there is no independent federal treaty implementation power. Although

international documents may be instructive in interpreting the *Charter*, such documents do not impose free standing obligations in Canada.

5 P. Hogg, *Constitutional Law of Canada* (3ed), c. 11, page 11-2

B. No violation of s. 15 of the *Charter*

10 35. Section 15 of the *Charter* prohibits discrimination in access to existing government programs. It does not, however, authorize courts to create new programs. In this case, unlike *Eldridge* which is relied upon by the Respondents, a court Order was sought requiring government to fund a service (IBI therapies, specifically Lovass) which had not previously been funded by government.

15

36. The submissions of British Columbia respecting the s. 15 *Charter* argument at paragraphs 42 to 83 of the Appellants factum are adopted. The principle question for this Court to address is whether lack of funding for IBI (or indeed anything other than full funding) is discrimination. Does it violate the human dignity of children with autism.

20

Law v. Canada [1999] 1 S.C.R. 497 at 555 [TAB 16 of Appellants' Authorities]

25

37. The Appellant in *Law v. Canada* was a woman without dependent children or disability who was denied a Canada Pension Plan survivor's pension when her husband died at age 50 after having made CPP contributions for the period necessary to qualify. This denial was based solely on age. She would have been entitled to a full survivor's pension had she been 45 years of age when her husband died. Had she been between 35 and 45, she would have been entitled to a partial pension, which would have increased by 1/120th of the full rate per month through the decade. Being under 35 when widowed, she was precluded from receiving survivor's pension until she reached 65 years.

35

38. This Court noted that:

5 The law on its face treats such younger people differently, but the differential treatment does not reflect or promote the notion that they are less capable or less deserving of concern, respect and consideration, when the dual perspectives of long-term security and the greater opportunity of youth are considered. Nor does the differential treatment perpetuate the view that people in this class are less capable human beings or less worthy of recognition or value as human beings or as members of Canadian society.

Law, supra at 559

15 39. These principles of human dignity and stereotyping have been applied by this Court in three cases where publicly funded programs have been claimed by disabled persons. In *Eldridge v. B.C. (A.G.)* [1997] 3 S.C.R. 624 [TAB 10 of Appellants' Authorities] deaf persons claimed access to existing medical services. This Court noted that historically persons with disabilities were stereotyped and denied access to otherwise available programs. Therefore, the Court ordered funding for interpreters to enable access to an otherwise widely available service – health care.

25 40. In *Granovsky v. Canada (Minister of Employment and Immigration)* [2002] 1 S.C.R. 703 [TAB 13 of Appellants' Authorities] this Court upheld the federal CPP scheme because the claimant could not establish that the scheme either demeaned the dignity of persons with disabilities or cast doubt on their worthiness as human beings.

30 41. Similarly, in *Nova Scotia (Worker's Compensation Board) v. Martin* [2003] S.C.C. 54 (TAB 19A of Appellants' Authorities) held that denying access to a provincial *Workers' Compensation Act* of chronic pain sufferers sent a message that “chronic pain sufferers are not equally valued as members of Canadian society” and demean their dignity.

35 *Martin*, paragraphs 105-106

42. This Court has therefore made stigma or stereotyping a key toward determining whether there exists a violation of s. 15 of the *Charter*. The British Columbia Court of Appeal in the decision below did not address stigma or stereotyping. The Court first identified autism in terms of its disability then spoke to the available treatment. The Court did not consider social attitudes toward the disability, as required in the cases decided by this Court, but shifted the entire focus of the s. 15 analysis to treating the disability for its own sake.

Appellants' Record, Vol. I, page 194, paragraph 49 of the Reasons of the British Columbia Court of Appeal

43. It is submitted that mere lack of funding cannot constitute discrimination. In this case, there are simply no facts to support a claim that the lack of funding was an attempt by government to demean either the specific individual claimants or persons with autism generally. The decision not to fund was based on:

- (a) Effectiveness concerns – IBI is not the only effective therapy for autism and there are serious criticisms about the science behind the 1987 study.

Appellants' Record, Vol. I., page 80-89 and 128

Ludwig, Sue and Christa Narstall, *Intensive Intervention Programs for Children with Autism* (Alberta Heritage Foundation for Medical Research; 2001)

Iovannone, R. et al, "Effective Educational Practices for Students with Autism Spectrum Disorders" (2003) 18:3 *Focus on Autism and Other Developmental Disabilities* 150

- (b) Cost & Allocation of Dollars – IBI costs approximately \$45,000 to \$60,000 per child per year. Estimates before the Trial Judge were that the cost of funding treatment for all autistic children in the province would be \$50 mil to \$76 mil.

Appellants' factum, paragraph 15

44. This case is most closely analogous to *Shulman v. College of Audiologists and*
5 *Speech Language Therapists of Ontario* where the Ontario courts examined government decisions
regarding hearing aid evaluations and re-evaluations. It was held that withholding funding for
such evaluations “in no way reflects the stereotypical application of presumed group of personal
characteristics.” The Court based this finding in large part on its realization that there are
“institutional impediments to design of a healthcare system by the judiciary.” Health, social
10 services and education across Canada typically make up the largest part of provincial budgets.
Decisions on how to allocate funds is a complex exercise and there is no evidence that the British
Columbia government in any way considered that autistic children were less worthy of funding
than others.

15 45. The Respondents cites three Alberta cases at paragraph 53 of their factum and
argues there is Canadian precedent for ordering government funding of IBI. It must be noted that
in none of those cases was the *Charter* raised. In each case, funding was ordered solely because
jurisdiction was found, at law, to lie with Children’s Services and not with Learning as an
20 educational program.

C.R. v. Alberta (Director of Child Welfare), [1996] A.J. No. 760
(Alta. Q.B.)

25 *L.S. v. Child Welfare Appeal Panel and Director of Child Welfare*,
[2002] A.J. No. 1604

L.K. v. Child Welfare Appeal Panel and Director of Child Welfare,
2004 ABQB65, January 29, 2004

30 46. In the one Alberta decision which referenced the *Charter*, the Court of Queen’s
Bench held that discretionary funding decisions for autism treatment do not breach the *Charter*.

35 *D.J.N. v. Alberta (Child Welfare Appeal Panel)*, [1999] A.J. No.
877

Section 1

5 47. On the s. 1 analysis, Alberta adopts the factum of the Appellants at pages 31-35 in relation to s. 15 and pages 17-22 of the factum of the Intervener, New Brunswick as it relates to ss.15 & 7. The major issue for this Court to come to terms with is the extent to which financial considerations might be taken into account in a s. 1 analysis.

10 48. Generally, this Court has stated that financial considerations alone may not justify a *Charter* infringement. However, this Court has not rejected the possibility that financial implications will play an important part in the s. 1 analysis. It is submitted that in relation to social benefit legislation, like that before this Court, cost considerations must be relevant.

15 Whether or not one likes it, cost may be a relevant practical consideration in a section 1 defence of an under-inclusive social benefit program. The choices Parliament makes are cost driven. If the program, as designed, is not acceptable, what is? Should Parliament reduce the amount of the benefit in order to cast the net wider? Should Parliament withdraw or restrict funds from other existing social programs? Should it forego future social initiatives in order to finance coverage of those who have been excluded from the program under attack? Or, should Parliament fund a broader program by raising taxes or foregoing a potential tax reduction or, in less robust economic times, increasing the deficit, the cost of which is borne by future generations? These questions point out the competing interests and cost considerations involved in a decision to restrict the benefit program.

20
25
30 Honourable Marshall Rothstein, “Section 1: Justifying Breaches of Charter Rights and Freedoms” (2000) 27 *Man. L.J.* 171-183 at 183

35 49. The results of the British Columbia Court of Appeal decision will have major financial ramifications (paragraphs 106-107 of Appellants’ factum). There will either have to be increased government funding to fund, as ordered, a service not before covered or there will need to be severe re-allocation of resources. The latter will undoubtedly negatively impact resources and programming provided in respect of other disabilities. Financial resources are not unlimited.

Remedy

5 50. The Court of Appeal in the decision below ordered that the government fund the full cost of Lovaas treatment for each of the individual infant petitioners from the date of the Court's decision until such time as no significant benefit could be determined. It is submitted that if this Honourable Court finds an unjustifiable breach of the *Charter*, this Order by the Court of Appeal should be set aside.

10 Appellant's Record, Vol. II, p.223

15 51. The cost implications of this Order for British Columbia are detailed at paragraphs 106 to 107 of the Appellants' factum. The impact on other provinces would be at least as severe. Given those financial ramifications, it is submitted that the s. 52(1) remedy suggested by the Appellants is appropriate – a declaration that there is an unjustifiable *Charter* violation and a suspension of that declaration to allow governments time to reallocate resources to take into account the Court's ruling.

20 *Schachter v. Canada* [1992] 2 S.C.R. 679, 719 [TAB 24 of Appellants' Authorities]

25 *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624 at paragraph 96 [TAB 10 of Appellants' Authorities]

30 52. Given the extent of the cost involved, money will undoubtedly have to be redirected from other programs. This judicial decision to prefer treatment to this group of disabled individuals will have consequences for other disabled groups.

PART IV

NATURE OF ORDER REQUESTED

5

53. The Attorney General of Alberta agrees with the Orders sought by the Appellants in this case.

10

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of March, 2004.

15

Per: _____
Margaret Unsworth
Counsel for the Intervener
Attorney General for Alberta

20

LIST OF AUTHORITIES

	<u>Paragraphs</u>
A. CASE LAW	
<i>Brown v. B.C.</i> (1990) 66 D.L.R. (4 th) 444 (B.C.S.C.)	29
<i>D.J.N. v. Alberta (Child Welfare Appeal Panel)</i> , [1999] A.J. No.877 (Q.B.)	46
<i>Whitbread v. Walley</i> (1988) 51 D.L.R. (4 th) 509 (B.C.C.A.)	28
B STATUTES AND LEGISLATIVE INSTRUMENTS	
<i>Alberta Health Care Insurance Act</i> , R.S.A. 2000, c. A-20, s. 3(1)	5,8
Alberta Health Care Insurance Regulation, A.R. 216/81 as am.	5
<i>Family Support for Children with Disabilities Act</i> , 2003, Bill 23 (2004, Bill 5)	18
<i>Health Disciplines Act</i> , R.S.A. 2000, c. H-2	-
<i>Health Professions Act</i> , R.S.A. 2000, c. H-7	-
Medical Benefits Regulation, A.R. 173/93 as am.	9
Oral and Maxillofacial Surgery Benefits, A.R. 123/95	-
Chiropractic Benefits Regulation, A.R. 268/95	8
Optometric Benefits Regulation, A.R. 267/95	-
Podiatric Benefits Regulation, A.R. 152/95, as am	8
<i>School Act</i> , R.S.A. 2000, c. S-3, s. 47	17
C. ACADEMIC MATERIALS	
2003-03 Annual Report, Government of Alberta	7,10
2003-2004 Funding manual for School Authorities, Section 1.10	17
Canadian Institute for Health Information, <i>National Health Expenditure Trends; 1975-2003</i> , (2003) page 3	10
Children's Services Business Plan 2003-2006	18
Handicapped Children's Services Program Manual (January 2001) page 3-35	18
Health and Wellness Business Plan 2003-06 (March 21, 2003), page 216	7

<i>Intensive Behavioural Interventions Pilot Project Comparative Evaluation</i> , NFO CF Group Inc./ ARC Applied Research Consultants/ Psychometrix International (2002-09-17)	15
Iovannone, R. et al, “Effective Educational Practises fro Students with Autism Spectrum Disorders” (2003) 18:3 <i>Focus on Autism and other Developmental Disabilities</i> 150	43
Ludwig, Sue and Christa Narstall, <i>Intensive Intervention Programs for Children with Autism</i> (Alberta Heritage Foundation for Medical Research;2001)	43
P.Hogg, <i>Constitutional Law of Canada</i> (3ed), c.11, page 11-2	35
Honourable Marshall Rothstein, “Section 1: Justifying Breaches of Charter Rights and Freedoms” (2000) 27 <i>Man.L.J.</i> 171-183 at 183	48
<i>A System of Care for Children with Autism – Expert Panel Report</i> (Expert Panel Report), Alberta Children’s Services (September 2002), page 2	16,17