File No.: 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
(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, and the said 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
(Respondents/Appellants on Cross-Appeal)

-and-

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ATTORNEY GENERAL OF MANITOBA,
ATTORNEY GENERAL OF QUÉBEC,
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PART I - STATEMENT OF FACTS

Introduction

1. Governments across Canada are confronted on a daily basis with innumerable compelling demands by individuals and groups for health care funding. Given that health care resources are finite, it is inevitable that not all of these demands can be met. Making the difficult choice not to fund a particular treatment for a medical condition, however great the need for it, is not necessarily discrimination. The key in determining whether a decision not to fund amounts to a violation of s. 15(1) of the *Charter* is a correct assessment of the particular benefit being sought by the claimant group, and the identification of a proper comparator group whose needs are being met by the system. Only by carefully scrutinizing the benefit at issue and the groups being compared can a court determine whether a pattern of discrimination exists.

2. Under Canada's public health care system, decisions to allocate scarce health care resources are made on the basis that limited fiscal resources must serve whole populations. Those decisions are within the special competence of legislatures, provincial and territorial governments and their medical professions. Courts can only address the particular claims of individuals and groups who litigate before them. They are not in a position to measure the impact of their remedies upon all other demands, and the health care system generally. As a result, courts have been, and must continue to be, very reluctant to order remedies that require the expenditure of public funds and that minimize the scope for remedial discretion.

3. In this case, the Court of Appeal's analysis neither identified the precise benefit at issue nor selected an appropriate comparator group. As a result, its judgment made a deep intrusion into the domain of government. It provided that the courts, not the government, would establish priorities for the delivery of health care services by determining, on a case-by-case basis, what is "medically required". Further, it granted a remedy that was inconsistent with the constitutional infringement identified at trial: the failure to provide for intensive behavioural intervention treatment for children up to age 6. The Attorney General of Canada intervenes in order to address these issues.

Facts

4. The Attorney General of Canada accepts the facts as stated by the appellants.

5. Several of the participants in this appeal have alluded to the interplay between the principles of the *Canada Health Act*[1] ("*CHA*") and the issues in this appeal. The *CHA* is Canada's federal health insurance legislation. Sections 8 through 12 set out the five criteria that provincial and territorial insurance plans must meet in order to be entitled to full federal contributions under the Canada Health and Social Transfer (which, as of April 1, 2004, will be known as the Canada Health Transfers). The criteria apply only to insured health care services, namely hospital, physician and surgical-dental services that require a hospital for their proper performance. The two criteria that have been referred to in this appeal are universality[2] and comprehensiveness.[3]

6. In order to satisfy the criterion of universality, one hundred per cent of the insured residents of a province or territory must be entitled to the health services provided by the plan, on uniform terms and conditions.[4] In essence, this criterion sets out who must be covered by the health insurance plan for the province or territory to receive full federal funding.

7. In order to satisfy the criterion of comprehensiveness, the provincial health care insurance plan must provide for all insured health services defined in s. 2 of the *CHA* (*i.e.*, medically necessary hospital, physician and surgical-dental services), and, "where the law of the province so permits", similar or additional services rendered by health care practitioners.[5] In essence, this criterion defines the type of health care services that must be covered by the provincial or territorial plan in order to receive full federal funding. Provinces can, and do, cover additional benefits under their plans over and above hospital, physician and surgical-dental services. Such additional benefits are provided on terms and conditions set by each province or

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1 R.S.C. 1985, c. C-6.
2 *Ibid.*, s. 10.
3 *Ibid.*, s. 9.
4 *Ibid.*, s. 10.
5 *Ibid.*, s. 9.

territory as appropriate for the needs of its residents and in keeping with the administration and management of the provincial/territorial health care system.

8. The Attorney General of Canada agrees that the Court of Appeal has confused the principle of "universality" (who is covered) with that of "comprehensiveness" (what is covered). In keeping with the universality criterion, the claimants, as insured persons, are entitled to receive all insured health care services under the provincial plan just like all other insured persons of the province. From a *CHA* perspective, the treatment services the claimants seek are not insured services. Whether they are additional benefits that should be covered by the province is a separate question that cannot be addressed by reference to the *CHA*.

PART II - POINTS IN ISSUE

9. The following Constitutional Questions were stated by Chief Justice McLachlin on September 30, 2003:[6]

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 under 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*?

10. The appeal also raises the issue of whether the remedies ordered by the lower courts are "appropriate and just" in the circumstances of this case.

11. The Attorney General of Canada submits that: (1) the respondents' rights under s. 15(1) of the *Charter* have not been infringed, but (2) if there is an infringement, it is justified under s. 1 of the *Charter*; (3) there has been no infringement of *Charter* s. 7 rights; and (4) if any of the respondents' *Charter* rights have been infringed, the appropriate remedy ought to be limited to a declaration to that effect.

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[6] Order of the Chief Justice (Court File No. 29508), dated September 30, 2003.

PART III - ARGUMENT

A. SECTION 15(1) OF THE *CHARTER*

12. **Overview:** The concern of the Attorney General of Canada is that the Court of Appeal's s. 15(1) analysis has the potential to render most benefit schemes vulnerable to a charge of underinclusion. The Court of Appeal initially determined that intensive behavioural intervention ("IBI") therapy was a "medically necessary" service for autistic children under the B.C. Medical Services Plan. Then, because certain other groups were receiving "medically necessary" services while the claimants were not receiving IBI, the Court concluded that the claimants were being subjected to differential treatment and, potentially, discrimination. On this approach, almost any decision not to fund a treatment for a medical condition would be constitutionally suspect. This overshooting of the purpose of s. 15(1) occurred because the Court of Appeal did not identify the particular benefit at issue and, as a result, selected inappropriate groups for comparison with the claimant group. On a proper analysis, and in view of the relatively recent emergence of IBI treatment as an effective therapy for autism, the decision not to fund IBI under the Medical Services Plan was not discriminatory.

(a) The legal framework for analysis under s. 15(1)

13. In *Law v. Canada (Minister of Employment and Immigration)*, this Court set out three broad inquiries that must be undertaken in order to determine whether an infringement of s. 15(1) of the *Charter* has occurred:

> (a) Does the impugned law draw a formal distinction between the claimant and others on the basis of one or more personal characteristics or fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively different treatment between the claimant and others on the basis of one or more personal characteristics?
>
> (b) Was the claimant subject to differential treatment on the basis of one or more of the enumerated or analogous grounds?

(c) Does the differential treatment discriminate in a substantive sense, bringing into play the purpose of subsection 15(1) of the *Charter*?[7]

14. In addressing the first question, s. 15(1) complainants are allowed considerable scope in identifying an appropriate group for purposes of comparison. Nevertheless, as *Law* recognizes, a complainant's choice of a comparator group is not determinative because, on a proper assessment of the situation, it may turn out "that the differential treatment is not between the groups identified by the claimant, but rather between other groups."[8] Consequently, as a preliminary matter, a court needs to consider whether the claimant's selection of a comparator group is appropriate.

15. The proper identification of the group for comparison must focus on the benefit sought by the claimants and determine whether and how the impugned governmental action draws a distinction between groups, and upon what basis. In *Granovsky v. Canada (Minister of Employment and Immigration)*, Binnie J., for the Court, noted that the proper comparator group must "bear an appropriate relationship between the group selected for comparison and the benefit that constitutes the subject matter of the complaint."[9] More recently, in *Nova Scotia (Attorney General) v. Walsh*, Bastarache J., for the majority, stated that the choice of comparator group must "adequately address the full range of traits, history and circumstances of the comparator of which the claimant is a member."[10]

(b) Erroneous identification of the benefit in this case

16. The Medical Services Plan, the scheme that sets out which benefits are funded for eligible residents of British Columbia, is established by the *Medicare Protection Act* ("the *Act*"). The *Act* defines benefits as, *inter alia*, any "medically required services rendered by a medical

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7 [1999] 1 S.C.R. 497 [*Law*], at 548-549, para. 88 [Appellants' Authorities Tab 16].

8 *Ibid.*, at 532, para. 58 [Appellants' Authorities Tab 16]. See also: *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703 [*Granovsky*], at 730, para. 46 [Attorney General of Canada ("AGC") Authorities Tab 5].

9 *Granovsky, supra* note 8, at 730, para. 47 [AGC Authorities Tab 5].

10 [2002] 4 S.C.R. 325 [*Walsh*], at 353-354, para. 39 [AGC Authorities Tab 9].

practitioner",[11] subject to the determination by the provincial Medical Services Commission. The terms "medically required" or "medically necessary" are not defined. According to the appellants, the B.C. medical care system focuses on the funding of core medical services provided by hospitals and physicians.[12] IBI is a behavioural or developmental treatment that is performed by a therapist, not a physician.

17. In the Court of Appeal, Saunders J.A., for the majority, initially defined the benefit at issue in this case as "treatment for an autistic child".[13] While this definition appears to have been forgotten in the ensuing analysis, it was closer to "the benefit the [claimants sought] to share", as Binnie J. put it in *Granovsky*,[14] than the other two definitions that she later applied. The claimants asserted a constitutional right to a very specific form of IBI treatment for autistic children – Lovaas Autism Treatment – which involves behavioural modification therapy aimed at improving an autistic child's social and educational functioning.

18. When Saunders J.A. came to compare the situation of the claimants with that of other groups, she lost sight of her initial definition and instead identified benefits that she described as "necessary medical services" (in the case of non-autistic children), and "the health care service they needed for their affliction" (in the case of adults with a mental disability).[15] "Necessary medical services" is the full range of services provided to all residents of B.C. under the Medical Services Plan, including autistic children. The claimants did not seek what they were already receiving, but rather a particular addition to the list of services being provided. While "the health care service they needed for their affliction" is a narrower benefit, it is still broader than, and different from, the very precise benefit sought here. It includes a range of "medically necessary" treatments for mentally disabled adults provided by physicians as well as certain social assistance services, but it is not particularly aimed at behaviour modification therapy.

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[11] *Medicare Protection Act*, R.S.B.C. 1996, c. 286, s. 1.
[12] **Factum of the Appellants**, para. 25.
[13] Reasons of Saunders J.A., **Appellants' Record**, Vol. II at 188, para. 33.
[14] *Granovsky, supra* note 8, at 731, para. 50 [AGC Authorities Tab 5].
[15] Reasons of Saunders J.A., **Appellants' Record,** Vol. II at 191-192, paras. 38 and 41.

19. These two definitions adopted by the Court of Appeal were based on Allan J.'s definition of "medically necessary" – *i.e.*, any treatment that cures or ameliorates illness – and her finding that IBI treatment is "medically necessary". On these broad definitions of the benefit, almost any group receiving "medically necessary" services would be in an advantageous position compared to the claimants. Consequently, the failure to fund almost any type of treatment with the potential to ameliorate a medical condition under a provincial health care scheme could conceivably constitute a discriminatory distinction contrary to s. 15(1) of the *Charter*. This would be so regardless of considerations such as the nature of the condition to be treated, the treatment's form and type, its overall efficacy, the treatment provider, or even whether the treatment is experimental.

20. An analysis that fails to identify the precise benefit at issue is not meaningful, as it necessarily sweeps in as potentially discriminatory distinctions all denials of funding for medical treatments. It is an inevitable reality that not all medical needs will be met by the public health care system. That is the nature of publicly funded health care, but it should not render a government's difficult decisions to fund or not to fund inherently suspect under s. 15(1).

(c) The Court of Appeal erred in its selection of comparator groups

21. Having concluded the benefit in question was access to "medically necessary" services, the Court of Appeal's conclusion inevitably followed. With respect to non-autistic children, Saunders J.A. found that this group was receiving medically necessary treatment, whereas the claimants were not.[16] As a result, she agreed with Allan J. and concluded that differential treatment existed. With respect to mentally disabled adults, Saunders J.A. relied on Allan J.'s finding that the Province provided certain treatments and rehabilitative services to this group. She concluded that "the infant petitioners were treated differently than adults with mental

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[16] "Differential treatment exists where, as here, neither treatment nor funding for treatment was provided, yet the scheme provides necessary medical services for non-autistic children.": Reasons of Saunders J.A., **Appellants' Record**, Vol. II at 191, para. 38.

disabilities in that the health care service they needed for their affliction was not available to them."[17]

22. However, as noted in paragraphs 17 and 18 above, there was no obvious equivalency between the very particular benefit being sought by the claimants and the more general range of services that are provided to the two comparator groups selected by the Court of Appeal. The reason for this absence of congruity was that the Court of Appeal lost sight of what was actually being claimed and, as a consequence, it selected as comparators two groups whose situations were not properly comparable with that of the claimants. The other groups were not suitable comparators because it was not established, as *Granovsky* requires, that they had an appropriate relationship to the actual benefit being sought.

23. In order to identify the correct comparator group, the focus needs to be on the particular benefit that is provided to another group, but is denied to the claimants. For example, in *Granovsky* the claimant, who was temporarily disabled, sought to obtain benefits under the *Canada Pension Plan* which were available to those with permanent disabilities. The *Plan* allowed persons with severe and permanent disabilities to exclude periods of disability in the calculation of their eligibility for benefits. In his analysis of the suitable comparator group, Binnie J. identified two possible comparator groups: permanently disabled workers, and non-disabled workers. Binnie J. held that the permanently disabled was the appropriate comparator group, as that group enjoyed the benefit the claimant sought to access.[18]

24. As well, in *Cameron v. Nova Scotia (Attorney General)*, Chipman J.A. provided a more nuanced analysis of the benefit sought than was achieved by the Court of Appeal here. Initially, he cautioned that courts should only examine the question of whether a treatment is medically necessary to the extent required in order to resolve the particular issue before them.[19] He characterized the benefit sought by the infertile claimants in that case as access to the "full array

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17 *Ibid.*, at 192, para. 41.

18 *Granovsky, supra* note 8, at 730-731, paras. 47-50 [AGC Authorities Tab 5].

19 (1999), 177 D.L.R. (4th) 611 (N.S.C.A.) [*Cameron*], at 631 and 638-639 [AGC Authorities Tab 1]; leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 531.

of services for reproduction."[20] The group receiving these services was fertile persons, who were therefore identified as the appropriate comparator group. In this way, the court identified the benefit that was denied to the claimants but that was provided to the appropriate comparator group.

25. In this case, the proper analysis of the benefit should focus, as in *Cameron* and *Granovsky*, on the type of treatment that the claimants seek to access, and not on whether that treatment is "medically necessary". The proper comparison is between the claimants, who are seeking this type of treatment, and those groups receiving funding for comparable treatment under the *Act*. Only in this way may a discernable pattern in the coverage or non-coverage for treatment of particular kinds of disabilities be ascertained.

26. The claimants here seek full funding for behavioural modification treatment by non-physicians to improve their social and educational functioning. An appropriate comparator group is, therefore, persons who receive similar types of funded treatment.[21] Contrary to the suggestion of the courts below,[22] this approach does not involve what Binnie J. in *Granovsky* termed "pitting groups of disadvantaged people against each other to determine who is more disadvantaged."[23] Rather, this approach, since it seeks to identify similarity instead of difference, reflects a meaningful and tailored analysis of the benefit sought by the claimants, in order to assess whether the legislative scheme in question creates a distinction.

27. The appellants' evidence was that the Province did not fund behavioural therapy under the Medical Services Plan - including for persons with Attention Deficit Disorder, Hyperactivity Disorder, or Fetal Alcohol Syndrome - irrespective of the condition that the therapy was designed to ameliorate.[24] Consequently, there was no other group of persons with whom the claimants might appropriately have been compared. When the focus is properly on the precise

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20 *Ibid.*, at 651 [AGC Authorities Tab 1].

21 See, in this regard, Greschner and Lewis, "*Auton* and Evidence-Based Decision-Making: Medicare in the Courts" (2003), 82 *Can. Bar Rev.* 501, at p. 521 [AGC Authorities Tab 19].

22 Compare Reasons of Saunders J.A., **Appellants' Record,** Vol. II at 185, para. 28.

23 *Granovsky, supra* note 8, at 739, para. 67 [emphasis in original] [AGC Authorities Tab 5].

24 Affidavit of Heather Davidson, **Appellants' Record,** Vol. XV at 2682, para. 53.

benefit being sought, it becomes apparent that the Plan does not draw a distinction between groups on the basis of a personal characteristic.

(d) The Court of Appeal erred in finding that any distinction is discriminatory

28. If this Court should find that the denial of funding for IBI treatment creates a distinction between the claimants and an appropriate comparator group on an enumerated or analogous ground, the distinction nevertheless does not discriminate in a substantive sense against the claimants. No publicly funded health care system can meet every need, however compelling. It is designed to meet the needs of as many as possible, with a broader ameliorative purpose. It cannot be said that the distinction created by the failure to fund the particular treatment being sought by the claimants engages their dignity or suggests that they are less worthy in society.

29. In *Law*, this Court stated that not all legal distinctions result in a finding of discriminatory treatment, even where those distinctions are based on enumerated or analogous grounds. In determining whether a particular distinction is discriminatory, the court has identified four factors that provide guidance in answering this question: (1) pre-existing disadvantage; (2) correspondence between the distinction and the claimant's characteristics or circumstances; (3) the existence of ameliorative purposes or effects; and (4) the nature of the interest affected.[25]

30. As with the identification of the appropriate comparator group, the inquiry into whether the distinction violates essential human dignity and is discriminatory requires a "contextual" approach.[26] This approach begins from the perspective of the claimants, but also requires consideration of the larger context of the particular law or government action at issue. Further, it requires an objective assessment of the circumstances in this context, including a consideration of the individual or group's traits in relation to the differential treatment. The objective

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[25] *Law*, *supra* note 7, at 550-552, para. 88 [Appellants' Authorities Tab 16].
[26] *Ibid.*, at 532, para. 59 [Appellants' Authorities Tab 16].

component of this assessment must be carried out from the perspective of a reasonable person in circumstances similar to those of the claimant.[27]

31. In her analysis of whether the distinction was discriminatory, Saunders J.A., for the Court of Appeal, erred in failing to conduct an objective assessment of this issue. While she accepted at the outset that the inquiry is contextual and requires an understanding of the benefit scheme and the claimants' circumstances,[28] she focused her analysis solely on the effect of the denial of funding for IBI treatment on the claimants. She failed to consider the purpose of the overall legislative scheme and the inherent limitations in being able to provide all effective treatments for all persons with medical conditions. In effect, she erred in her discrimination analysis by focusing on the first and fourth conditions identified in *Law*, namely the pre-existing disadvantage and the nature of the affected interest, without adequately addressing the other factors outlined by Justice Iacobucci.

32. Further, Saunders J.A.'s conclusion that the distinction was discriminatory is based on an erroneous interpretation of this Court's decision in *Eldridge v. British Columbia*. *Eldridge* differs from this case in that it dealt only with barriers to access to health care services. La Forest J., for the Court, expressly held that the violation of s. 15(1) in that case was not related to the failure of the government to fund a particular medical service under its health care plan,[29] which is the issue here. Consequently, Saunders J.A.'s reliance on *Eldridge* in this context was incorrect.

33. Similarly, the respondents' reliance on the decision of the Constitutional Court of South Africa in *Minister of Health and others v. Treatment Action Campaign and others* is misplaced. In that case, the constitutional violation did not arise from a failure to add a service to the public health care system, but rather from a decision to provide a potentially life saving drug to only some users of the public system who were at risk, even though the cost of providing the drug was not a factor. The Court concluded that the decision was unreasonable, because it did not account

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[27] *Ibid.*, at 532-533, paras. 59-60 [Appellants' Authorities Tab 16]. See also: *Walsh*, *supra* note 10, at 353, paras. 37-38 [AGC Authorities Tab 9].

[28] Reasons of Saunders J.A., **Appellants' Record**, Vol. II at 193, para. 45.

[29] [1997] 3 S.C.R. 624 [*Eldridge*], at 689, para. 92 [Appellants' Authorities Tab 10].

for the differences between those who could not afford to pay for the drug and those who could.[30]

34. A proper discrimination analysis must take into account that, in s. 2 of the *Medicare Protection Act*, the purpose of the statute is stated to include the preservation of a "fiscally sustainable health care system". As the appellants say, the *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, regardless of ability to pay.[31]

35. The need to ensure the financial sustainability of the system inevitably means that distinctions have to be drawn between funded and non-funded services. The decision not to fund a particular treatment is inextricably linked to the legislature's duty to allocate limited health care funds among all members of the community in a fiscally responsible manner. While the validity of a given policy reason for limiting the provision of a benefit is a matter for consideration under s. 1 rather than s. 15(1) of the *Charter*,[32] the reality that not all claims on scarce health care resources can be met is a factor that cannot be ignored when assessing whether the decision not to fund a particular treatment manifests a lack of respect or loss of dignity.

36. The appellants' evidence was that the failure to fund the service sought by the claimants was related to a complex set of factors having nothing to do with a misapprehension of the claimants' actual circumstances or the perpetuation of stereotypes; rather, the decision not to fund the service was made with regard for controversy respecting the evolving nature and the efficacy of the treatment, budgetary allocations, and a focus in the British Columbia health care system on the funding of core medical services, particularly hospital and physician services.[33] The basis for the decision is relevant to the discrimination inquiry because, as McLachlin C.J., for the majority, said in *Gosselin v. Quebec (Attorney General)*, both purpose and effect

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30 [2002] (5) SA 721 (CC); 2002 (10) B. Const. L. R. 1033; [2002] ZACC 15 (CC) (S. Afr. Const. Ct.) [*Treatment Action Campaign*], at paras. 70-71 and 80-81 [AGC Authorities Tab 14].

31 **Factum of the Appellants**, para. 68.

32 *Eldridge*, *supra* note 29, at 680-681, para. 77 [Appellants' Authorities Tab 10].

33 **Factum of the Appellants**, para. 77.

influence the perception of a reasonable person in deciding whether human dignity has been affronted.[34]

37. The circumstances of this case include the fact that, until relatively recently, there was simply no treatment for autism or autism spectrum disorder. As regards the particular treatment sought by the claimants, Lovaas Autism Treatment, it was not until 1993, when a follow-up study to Dr. Lovaas' original study was published, that the endurance of the gains resulting from that treatment was said to have been established.[35] In 1995, one of the claimants, the mother of an autistic child, "began an energetic but unsuccessful campaign to advocate for government support of Lovaas Autism Treatment programmes",[36] and in 1998, this proceeding was commenced. Even so, by the time of Allan J.'s judgment on liability in July 2000 there was still "ongoing debate that appears to have occupied several thousand pages of print in medical and scientific journals"[37] as to the efficacy of Lovaas Autism Treatment. Allan J. made no attempt to assess the overall effectiveness of either this specific treatment or the more generic IBI.[38]

38. Indeed, as regards IBI treatment, Allan J. could only say that "[c]urrent research has established, with some certainty, the efficacy of early intervention in assisting many children to achieve significant social and educational gains."[39] The progress that had been made in this area prompted the governments of Ontario and Alberta, in 1999, to fund IBI for children aged 2 to 5, and in the same year the Surgeon General of the United States issued a report recognizing early Intensive Behavioural Intervention as "the treatment of choice." The governments of Newfoundland and Manitoba set up pilot projects to deliver either IBI or Lovaas Autism Treatment that were underway in July 2000, and the government of Prince Edward Island had decided to provide funding for up to 20 hours per week of home-based Lovaas Autism Treatment.[40]

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34 [2002] 4 S.C.R. 429 [*Gosselin*], at 470-471, para. 37 [AGC Authorities Tab 4].
35 Reasons of Allan J., July 26, 2000, **Appellants' Record,** Vol. I, at 77, para. 27.
36 *Ibid.*, at 74, para. 21.
37 *Ibid.*, at 88, para. 50.
38 Compare: Greschner and Lewis, *supra* note 21, at p. 509, 518 [AGC Authorities Tab 19].
39 Reasons of Allan J., July 26, 2000, **Appellants' Record,** Vol. I, at 89, para. 52 [underlining added].
40 *Ibid.*, at 95-100, paras. 69-82.

39. Prior to Allan J.'s judgment in July 2000, the government of British Columbia was in the course of designing and implementing a pilot project directed at delivering services to autistic children. Following the judgment, the pilot project was converted to a program ("P-CARD") that included early IBI for autistic children between the ages of 2 and 6, which was phased in and was scheduled to be fully operational by 2003.[41]

40. As of July 2000, then, progress had been made as a result of scientific research, and that progress was having an influence on medical and governmental opinion regarding the efficacy of treatments for autism. The government of B.C. was aware of the developments and was in the process of changing its approach.

41. In addition to the evolution of scientific and governmental opinion on the subject, the context in this case includes British Columbia's overall limitations on funding for behavioural modification treatments provided by non-physicians. The Province's decision not to provide funding for treatment under the Medical Services Plan was not limited to IBI, that is, it did not single out autistic children, but rather extended as well to other afflictions, including Attention Deficit Disorder, Hyperactivity Disorder, and Fetal Alcohol Syndrome. This clearly demonstrates that the decision not to fund IBI was not based on stereotypical beliefs about autistic children or a failure to appreciate their particular needs, but rather on broader policy considerations involving the type of treatment in question.

42. In light of all of the foregoing circumstances – the inherent limitations of the health care system, the consequent need to focus on the provision of core medical services, and the relatively recent emergence of IBI treatment – the decision not to fund IBI treatment should not be taken as evidencing a lack of respect for children suffering from autism. The context is not one of misapprehension of the claimants' needs or circumstances, or of the perpetuation of stereotypes, but derives from legitimate policy considerations that correspond to the claimants' actual needs. To put it in the language recently used by this Court in *Nova Scotia (Workers Compensation Board) v. Martin*, "a reasonable and dispassionate person, fully apprised of all the circumstances

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[41] Reasons of Allan J., February 6, 2001, **Appellants' Record**, Vol. I, at 142-143, paras. 20-22.

and possessed of similar attributes to the claimant, would [not] conclude that his or her essential dignity had been adversely affected" by the impugned discretionary decision.[42]

B. SECTION 1 OF THE *CHARTER*

43. **Overview:** The Attorney General of Canada focuses his submissions on the minimum impairment stage of the s. 1 analysis, and more particularly on the following considerations:

(a) the institutional competence of the legislature and the executive in allocating health care funds;

(b) the fiscal consequences of the Court of Appeal's decision;

(c) the consequences of court-ordered prioritizing of health care services; and

(d) the application of the *Convention on the Rights of the Child.*

(a) The institutional competence of the legislature and the executive

44. Determinations relating to the allocation of health care funds are polycentric in nature, that is, they require consideration of a multitude of factors. As this Court has recognized, these determinations call upon the institutional competence of the government to mediate among competing groups. A reviewing court should afford flexibility to the legislature and the executive in making these decisions, as these bodies are better placed to make such determinations.[43]

45. Institutional competence is a relevant consideration when dealing with the allocation of limited benefits amongst competing groups. This Court has understood that it is legislatures that are best placed to make this type of difficult policy decision.[44] In *McKinney v. University of Guelph*, this Court noted that there "are decisions of a kind where those engaged in the political

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[42] 2003 SCC 54 [*Martin*], at para. 85 [Appellants' Authorities Tab 19A].

[43] *M. v. H.*, [1999] 2 S.C.R. 3, at 60, para. 78 [AGC Authorities Tab 6]; *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 [*RJR-MacDonald*], at 342, para. 160 [AGC Authorities Tab 12].

[44] *Eldridge, supra* note 29 at 685, para. 85 [Appellants' Authorities Tab 10]; *M. v. H., supra* note 43, at 60, para. 78 [AGC Authorities Tab 6].

and legislative activities of Canadian democracy have evident advantages over members of the judicial branch."[45]

46. This caution was heeded by the majority of the Nova Scotia Court of Appeal in *Cameron*, in the context of a decision to allocate resources under the provincial health care scheme. Chipman J.A. concluded that the question of whether to fund a specific medical treatment was not within the Court's institutional competence:

> Here, it is the administrators of the policy who have drawn the line that excludes [two infertility treatments] from the category of insured services. As well, they have found it necessary to curtail or eliminate coverage for procedures that they had previously considered medically necessary and hence worthy of coverage. In the face of the tremendous pressures upon them, they must be "accorded some flexibility" in apportioning social benefits among the vast number of competing procedures and the conditions of patients that call from them.
>
> The policy makers require latitude in balancing competing interests in the constrained financial environment. We are simply not equipped to sort out the priorities. We should not second guess them, except in clear cases of failure on their part to properly balance the *Charter* rights of individuals against the overall pressing objective of the scheme under the *Act*.[46] [underlining added]

47. Decisions concerning which services are funded will inevitably exclude certain other services. The legislature and the executive, not the courts, are best positioned to make decisions concerning which services are medically necessary and should be funded by the province.

48. The determination of whether a provision is medically necessary, and what provisions should and should not be funded by a provincial government is an inherently complex decision, involving a number of countervailing interests that must be balanced. These include, but are not limited to, rapidly evolving medical and scientific information, demographics, cost and efficacy of treatment, and the availability and distribution of resources.

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[45] [1990] 3 S.C.R. 229 [*McKinney*], at 305, para. 104 [Appellants' Authorities Tab 18].

[46] *Cameron, supra* note 19, at 667 [AGC Authorities Tab 1].

(b) Cases from other jurisdictions

49. The inherent challenges in adjudicating claims to scarce health care resources are not unique to Canada. Other countries have also struggled with these issues, and specifically, with the issue of the institutional competence of the courts in the health care context. The following cases from the United Kingdom and South Africa illustrate that courts in these jurisdictions recognize that the special considerations underlying the allocation of health care funding require courts to adopt a cautious approach when adjudicating such claims.

50. In *R. v. Cambridge Health Authority, ex parte B*,[47] the English Court of Appeal (Civil Division) allowed an appeal from a judgment quashing the Regional Health Authority's decision not to fund further treatment of the claimant. The claimant was a 10-year old child who had been diagnosed with acute leukemia and had received a series of unsuccessful treatments. While there were competing medical opinions as to the feasibility of further treatment, the Authority refused to authorize any further treatment. The trial judge quashed the Authority's decision on administrative law grounds.

51. The English Court of Appeal overturned the trial judge's decision and held, *inter alia*, that the trial judge had intruded too deeply into the Authority's ability to allocate its resources. Bingham MR held that:

> It is common knowledge that health authorities of all kinds are constantly pressed to make ends meet. ... Difficult and agonizing judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make. In my judgment, it is not something that a health authority such as this authority can be fairly criticized for not advancing before the court.[48]

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[47] [1995] 2 All E.R. 129 (C.A.) [*Cambridge Health Authority*] [AGC Authorities Tab 15].

[48] *Ibid.*, at 137 [AGC Authorities Tab 15]. This dictum was adopted by the English Court of Appeal in *R. v. North West Lancashire Health Authority, ex parte A, D and G,* [2000] 1 W.L.R. 977 (C.A.) [AGC Authorities Tab 16], a case involving a decision not to fund gender reassignment surgery to the claimants, who were transsexuals. While the Court ruled against the Authority, it unanimously adopted *Cambridge Health Authority*, and, per Auld J., said at 991, para. 42: "It is natural that each authority, in establishing its own priorities, will give greater priority to life-threatening and other grave illnesses than to others obviously less demanding of medical intervention. The precise allocation and weighting of priorities is clearly a matter of judgment for each authority, keeping well

52. In South Africa, the Constitutional Court, in *Soobramoney v. Minister of Health (Kwazulu-Natal)*,[49] also addressed the issue of a court's institutional competence in the health care context. A patient suffering from irreversible renal failure alleged that the failure to provide him regular renal dialysis, which could prolong his life, violated his right to life and his right not to be refused emergency medical treatment under sections 11 and 27(3) of the 1996 Constitution.[50] The court unanimously dismissed the claim. For the majority, Chaskalson P. (as he then was) first determined that the claimant's case was properly addressed solely under the right to medical treatment pursuant to s. 27 of the Constitution. He then held that this entitlement under s. 27 was provided "within the available resources" of the state.[51] Having regard to the serious constraints on the state's resources, Chaskalson P. concluded that the failure to provide dialysis treatment did not violate the claimant's rights under s. 27.[52]

53. Both Chaskalson P. and Justice Albie Sachs, concurring, recognized the need for courts to be cautious when adjudicating competing claims for health care funding.[53] In his concurring reasons, Justice Sachs posited that traditional rights analyses must be adapted to account for the "special problems created by the need to provide a broad framework of constitutional principles governing the right of access to scarce resources and to adjudicate between competing rights

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in mind its statutory obligations to meet the reasonable requirements of all those within its area for which it is responsible." [underlining added]

49 [1998] (1) SA 765 (CC); [1997] (12) B. Const. L. R. 1696 (S. Afr. Const. Ct.) [*Soobramoney*] [AGC Authorities Tab 17].

50 Sections 11 and 27 of the *Constitution of the Republic of South Africa 1996, No. 108 of 1996*, provide as follows:

> 11. Everyone has the right to life.
>
> 27. (1) Everyone has the right to have access to health care services, including reproductive health care; sufficient food and water; and social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
> (3) No one may be refused emergency medical treatment.

51 *Soobramoney, supra* note 49, at para. 22 [AGC Authorities Tab 17].

52 *Ibid.*, at paras. 30-36 [AGC Authorities Tab 17].

53 *Ibid.*, *per* Chaskalson P. at para 29, *per* Sachs J. at paras. 57-58 [AGC Authorities Tab 17].

bearers."[54] He further observed that the issues raised in this case were not ones within the institutional competence of the courts:

> It is precisely here, where scarce artificial life-prolonging resources have to be called upon, that tragic medical choices have to be made.
>
> Courts are not the proper place to resolve the agonizing personal and medical problems that underlie these choices. Important though our review functions are, there are areas where institutional incapacity and appropriate constitutional modesty require us to be especially cautious. Our country's legal system simply "cannot replace the more intimate struggle that must be borne by the patient, those caring for the patient, and those who care about the patient." The provisions of the bill of rights should furthermore not be interpreted in a way which results in courts feeling themselves unduly pressurized by the fear of gambling with the lives of claimants into ordering hospitals to furnish the most expensive and improbable procedures, thereby diverting scarce medical resources and prejudicing the claims of others.[55]

54. The Constitutional Court repeated these concerns in its subsequent decision in the *Treatment Action Campaign* case. There, while the Court ultimately determined that it should intervene in order to overturn an unreasonable decision that failed to take account of differences, it still emphasized the need for a "restrained and focused role for the courts".[56]

(c) The financial costs of providing IBI treatment

55. Financial costs alone cannot justify a *Charter* infringement.[57] However, costs can and should be an influential consideration in the s. 1 analysis, especially where, as here, they are very substantial.[58] Governments must be afforded wide latitude to determine the proper distribution of limited resources in society. This is especially true where a legislature has to choose between disadvantaged groups in providing specific social benefits.[59]

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54 *Ibid.*, *per* Sachs J. at para. 54 [AGC Authorities Tab 17].
55 *Ibid.*, *per* Sachs J. at paras. 57-58 [footnotes omitted] [AGC Authorities Tab 17].
56 *Treatment Action Campaign, supra* note 30, at para. 38 [AGC Authorities Tab 14].
57 *Eldridge*, *supra* note 29, at 685, para. 85 [Appellants' Authorities Tab 10].
58 *Ibid.*; *Egan v. Canada,* [1995] 2 S.C.R. 513, *per* Sopinka J., at 572-573, paras. 104-105 [Appellants' Authorities Tab 8].
59 *Eldridge*, *supra* note 29, at 685, para. 85 [Appellants' Authorities Tab 10].

56. In *Eldridge*, this Court held that the government did not demonstrate that the failure to provide sign language interpretation services minimally impaired the rights of the hearing impaired. In holding that the failure to provide interpretation services was not justified, La Forest J. noted that the claimants were not seeking to have an additional treatment funded under the provincial health scheme but were rather claiming the proper provision to them of existing funded treatments:

> The appellants do not demand that the government provide them with a discrete service or product, such as hearing aids, that will help alleviate their general disadvantage. Their claim is not for a benefit that the government, in the exercise of its discretion to allocate resources to address various social problems, has chosen not to provide. On the contrary, they ask only for equal access to services that are available to all. The respondents have presented no evidence that this type of accommodation, if extended to other government services, will unduly strain the fiscal resources of the state.[60] [underlining added]

57. Moreover, La Forest J. noted that the cost of providing such services was "relatively insignificant", being estimated at $150,000 per year, or approximately .0025% of the provincial health care budget at that time.[61]

58. Neither of these factors that so influenced the *Eldridge* minimum impairment analysis are present here. In this case, the claimants do not seek access to a health care service that is already being provided to others covered by the publicly funded plan but instead assert a right to the inclusion of an additional service for them.[62] Further, the projected expenditure of funds in this case is not relatively nominal. The evidence is that IBI treatment for all autistic children in B.C. would cost between $50,960,000 to $76,440,000 per annum out of a total budget of just under $2 billion, or roughly 2.5 to 3% of the total Medical Services Plan budget in 1999-2000.[63]

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[60] *Ibid.*, at 689, para. 92 [Appellants' Authorities Tab 10].
[61] *Ibid.*, at 686, para. 87 [Appellants' Authorities Tab 10].
[62] Compare: Greschner and Lewis, *supra* note 21, at p. 522 [AGC Authorities Tab 19].
[63] Affidavit of Randi Mjolness, **Appellants' Record**, Vol. XVII at 3189, para. 71; Affidavit of Heather Davidson, **Appellants' Record**, Vol. XV at 2668, 2675-2677, paras. 13, 31-36.

(d) Court-ordered prioritizing of health care services

59. In *McKinney*, La Forest J., in addressing the question of whether mandatory retirement impaired the right to equality in a minimal fashion, urged a cautious approach, given the impact of the Court's ruling on the broader context of the organization of the workplace and society at large. He held that the rule of mandatory retirement formed "part of a web of interconnected rules mutually impacting on each other",[64] such that tinkering with the rule could have dramatic repercussions.

60. In the same vein, courts should not consider the decision on whether to fund a particular medical service without regard for the larger, overall context of the allocation of health care resources. Providing constitutional protection for a specific medical service assigns that service a higher priority in the distribution of limited government funds. The inevitable effect is not only a court-mandated reallocation of resources, but also a potential reduction of funding for other services. This unduly constrains government's ability to make decisions concerning the allocation of health care funds.

61. An even greater concern is that a determination by a court to impose a constitutional charge upon a government to fund a particular treatment imposes that obligation for an indeterminate period. A constitutional case for funding can only be driven by the particular circumstances of the litigants at a fixed point in time. Decisions to allocate resources in health care must, however, remain flexible and respond to changing needs and demands over time. The ability of governments to respond to these developments is seriously hampered if they must first make provision for court-mandated priorities, or bear the onus of returning to the courts to ask to be relieved of them, based on changed circumstances.

(e) The application of the Convention on the Rights of the Child

62. The Court of Appeal's reliance on the United Nations *Convention on the Rights of the Child*[65] did not advance its s. 1 analysis. While statutes should be interpreted, to the extent

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[64] *McKinney, supra* note 45, at 306, para. 107 [Appellants' Authorities Tab 18].

[65] Can. T.S. 1992 No. 3 [the *Convention*] [AGC Authorities Tab 20]

possible, in a manner consistent with Canada's international obligations,[66] Article 23 of the *Convention* requires State Parties to recognize the special needs of disabled children and to provide assistance "subject to available resources". The *Convention* does not impose positive obligations on state parties to fund particular medical services and the World Health Organization has recognized that universal coverage means "coverage for all, not coverage of everything".[67]

C. SECTION 7 OF THE *CHARTER*

63. This Court should decline to deal with s. 7 of the *Charter*. The claim in this case is one of alleged underinclusiveness of the provincial health scheme and ought properly to be analyzed under s. 15(1). If it is not discriminatory to decide against including a particular treatment in a provincial health care plan, then it is just as difficult here as it was in *R. v. Malmo-Levine*[68] to see what "manageable standard" would nevertheless require the funding of that treatment pursuant to s. 7.

64. This Court noted in *Gosselin* that s. 7 primarily protects against deprivations of life, liberty and security of the person that occur as a result of an individual's interaction with the administration of justice.[69] The issues raised in this case do not fall within the matters generally considered by the courts under s. 7.

65. In any event, the Court of Appeal was correct in concluding that the denial of funding for IBI treatment would not violate s. 7. Even accepting that the claimants' right to life, liberty or security of the person has been affected, the denial of funding for IBI treatment does not engage any legal principle and therefore does not violate any principle of fundamental justice. This

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66 *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 [*Foundation for Children, Youth and the Law*], at para. 31 [AGC Authorities Tab 2].

67 *World Health Report 1999: Making a Difference* (Geneva: World Health Organization), as cited by Barbara von Tigerstrom in "Human Rights and Health Care Reform: A Canadian Perspective" in *Health Care Reform and the Law in Canada: Meeting the Challenge* (Edmonton: The University of Alberta Press, 2002) 157, at p. 166 [AGC Authorities Tab 18].

68 2003 SCC 74 [*Malmo-Levine*], at para. 113 [Appellants'Authorities Tab 21].

Court has consistently affirmed that the principles of fundamental justice are legal principles, and are "found in the basic tenets of our legal system."[70] Absent any specific identification of the principle of fundamental justice that is alleged to have been violated in this case, no infringement of s. 7 can be made out.

D. THE COURT OF APPEAL'S REMEDY WAS NOT "APPROPRIATE AND JUST"

66. **Overview:** The remedy granted by the Court of Appeal under s. 24(1) of the *Charter* was not "appropriate and just" because: (a) the direction to fund a particular treatment and maintain court jurisdiction to supervise resulting disputes went beyond what was necessary (a declaration of right); (b) the remedy was not consistent with the infringement found by Allan J. (a failure to provide early IBI treatment for children up to age 6); and (c), in providing for an on-going role for the courts with respect to autistic children age 6 and older, it mandated a case-by-case extension of the health care benefit at issue beyond the range of the infringement found by Allan J.

(a) The proper remedy was a declaration of right

67. Both of the courts below found that the constitutional violation in this case did not arise from the underinclusiveness of the B.C. *Medicare Protection Act* but rather from "the Crown's overly narrow interpretation of it," as Allan J. put it.[71] Accordingly, both courts held that this case engages s. 24(1) of the *Charter* and not s. 52 of the *Constitution Act, 1982*. This conclusion appears to be consistent with this Court's reasoning in *Schachter v. Canada*.[72]

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69 *Gosselin, supra* note 34, at 489, para. 77 [AGC Authorities Tab 4], citing *New Brunswick (Minister of Health and Community Services) v. G. (J.)* [*G.(J.)*], [1999] 3 S.C.R. 46, at 79, para. 65 [AGC Authorities Tab 8]

70 *Malmo-Levine, supra* note 68, at para. 112 [Appellants' Authorities Tab 21].

71 Reasons of Allan J., July 26, 2000, **Appellants' Record,** Vol. I at 116, para. 126; Reasons of Saunders J.A., **Appellants' Record**, Vol. II at 184, para. 28.

72 [1992] 2 S.C.R. 679 [*Schachter*], at 717 and 719, paras. 84 and 87 [AGC Authorities Tab 13].

68. In her Order, Allan J. granted a declaration and added a direction to the Crown to "fund early intensive behavioural therapy for children with autism or autism spectrum disorder".[73] The Court of Appeal sustained Allan J.'s Order and went on to make additional mandatory orders in which jurisdiction was explicitly retained in the B.C. Supreme Court to resolve disputes concerning the duration of treatment of autistic children other than the infant claimants (thus enlarging the class of claimants to include autistic children six years of age and older), and Crown challenges to the efficacy, intensity and duration of treatment of any of the four infant claimants. This latter provision flowed from the Court of Appeal's further order that the Crown fund specific treatment for these four claimants: "treatment in the nature of that which they have or had been receiving provided that such treatment should still be useful."[74]

69. The remedy granted by Allan J., as augmented by the Court of Appeal, raises immediate questions as to its "appropriateness" under s. 24(1) of the *Charter*. It employs means (a direction to fund a particular treatment, and maintenance of court jurisdiction with respect to disputes as to the provision of that treatment) that involve an intrusion by the courts below into matters that are properly the responsibility of the other branches of government. In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, Iacobucci and Arbour JJ., for the majority of this Court, set out five broad guidelines for determining whether a s. 24(1) remedy was "appropriate and just", the second of which was whether the remedy "respect[s] the relationships with and separation of functions among the legislature, executive and judiciary."[75]

70. One of the principal ways in which the judiciary exhibits its respect for the roles of the other branches is by limiting the scope of its remedial orders as much as possible. As Sopinka J. said in *Osborne v. Canada (Treasury Board)*, courts "refrain from intruding into the legislative sphere beyond what is necessary".[76] The courts exercise this restraint because they understand that, particularly in the case of benefit regimes, the programs in question can be complex and

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[73] Order of Allan J., February 6, 2001, **Appellants' Record**, Vol. II at 165.

[74] Order of the Court of Appeal, October 9, 2002, **Appellants' Record**, Vol. II at 255-256.

[75] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 [*Doucet-Boudreau*], at paras. 55-58 [AGC Authorities Tab 3].

[76] [1991] 2 S.C.R. 69, at 104 [AGC Authorities Tab 11], quoted in *G.(J.)*, *supra* note 69, at 93, para. 102 [AGC Authorities Tab 8].

involve large sums of money.[77] In such circumstances, there may well be more than one way to implement remedial orders, hence the courts recognize that governments need to be afforded wide latitude to decide for themselves how best to discharge their constitutional obligations.

71. An example of this respectful approach that is particularly relevant to this case is this Court's decision in *Eldridge*. There, the Court declined to make a specific order for the funding of sign language interpreters and instead confined its remedy to a declaration of right. La Forest J. for the Court said:

> A declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this Court's role to dictate how this is to be accomplished.[78] [underlining added]

72. A declaration is usually the appropriate remedy in circumstances like the present because, as this Court has been willing to assume, "governments will comply with the declaration promptly and fully."[79] Nevertheless, as *Doucet-Boudreau* illustrates, there may be very unusual cases in which relief beyond a declaration is called for. In *Doucet-Boudreau*, the majority upheld a s. 24(1) remedy that directed the province to make best efforts to provide homogeneous French language facilities and programs by particular dates, and explicitly retained jurisdiction to hear reports from the province on the status of those efforts. The circumstances justifying resort to this unprecedented remedy were unique. The majority emphasized several contextual factors particularly associated with the s. 23 right being asserted, including its special remedial character, its collective nature and the fact that the general content of s. 23 is largely settled.[80]

73. In contrast here, s. 15(1) of the *Charter* does not have the same remedial character or collective aspect as s. 23. Further, the content of the asserted right in this case – the right to

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77 Compare *Gosselin*, *supra* note 34, *per* Bastarache J. (dissenting on other grounds) at 588-589, para. 292 [AGC Authorities Tab 4].

78 *Eldridge, supra* note 29, at 691, para. 96 [Appellants' Authorities Tab 10].

79 *Doucet-Boudreau*, *supra* note 75, at paras. 62 and 66 [AGC Authorities Tab 3]; *Mahe v. Alberta*, [1990] 1 S.C.R. 342, at 392-393, para. 96 [AGC Authorities Tab 7].

80 *Doucet-Boudreau*, *supra* note 75, at paras. 27-29, 63, 74 and 76 [AGC Authorities Tab 3].

expand the category of health care services funded on the basis of s. 15(1) – is far from clear and settled. On the contrary, it remains novel and, until now, largely unprecedented.

74. Most critically absent in this case is any finding by the courts below that the government resisted implementing a constitutional remedy. In her decision on remedies, Allan J. specifically found that while the claimants sought "to cast the government as intransigent, I would not, at this stage, interpret the steps taken by the Government since July 2000 as a reluctant or negative response to the Court's finding that it had breached the claimants' s. 15 equality rights."[81] Allan J. also recognized that the government had adopted pilot projects since the action was commenced that acknowledged the importance of, and provided funding for, early intervention, diagnosis and assessment of autism for children in the province. In the absence of a finding that the government was seeking to avoid or delay implementing its constitutional responsibilities, there was no basis in this case for the departure from the usual assumption that governments will comply with judicial declarations.

75. That is particularly so where, as here, a more extended remedy leaves virtually no scope for legislative discretion in the implementation of the remedy. The order of Allan J., as augmented by the Court of Appeal, precluded the consideration of other options that might have limited the impact of the judgment on other competing interests. The need for strategies that limit the impact of a judgment entailing large additional expenditures from the public purse is particularly compelling when it comes to demands upon scarce health care resources.

76. The remedy in this case should have been confined to a declaration of right. The courts below should have declined to make additional orders, and particularly to order the B.C. government to spend money to remedy the constitutional violation. As Justice Southin of the B.C. Court of Appeal has subsequently recognized, in circumstances like these an order to spend public money generally subverts the constitutional principle of parliamentary control of the

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[81] Reasons of Allan J., February 6, 2001, **Appellants' Record**, Vol. I at 147, para. 30.

public purse.[82] In addition, as this Court has stated, remedies that impose significant and substantial fiscal burdens on governments should be avoided.[83]

(b) The Court of Appeal's remedy is not consistent with the infringement found

77. In her decision on liability, Allan J. based her finding of infringement of the claimants' s. 15(1) rights on evidence of the efficacy of early intervention in assisting autistic children. Since early intervention was shown to be effective, Allan J. found that early intensive behavioural treatment was a "medically necessary" service,[84] and B.C.'s failure to include such treatment in its Medical Services Plan infringed the claimants' rights. In her subsequent decision on remedies Allan J. explained what "early" intervention meant:

> In *Auton #2*, I considered the most compelling argument for Early IBI, advanced by experts for both the petitioners and the Government, to be that autistic children have a "narrow window of opportunity" to benefit from early intensive treatment. That period of time extends from the time they are first diagnosed with autism (usually at age two or three) until the age of six, approximately.[85]

78. On that understanding of early intervention, Allan J. directed the Crown to fund early intensive behavioural therapy, and specifically stated that she had not determined whether a failure by the government to fund treatment after autistic children reached school age, that is, age six, would amount to a breach of their *Charter* rights.[86] Clearly, then, the infringement found by Allan J. was limited to the cases of autistic children between the ages of two and six.

79. However, the Court of Appeal expanded the remedy granted by Allan J. by providing that autistic children of school age could also seek access to funded IBI, and it further ordered the Crown to provide funds to four of the infant claimants (who had attained school age) "in the

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82 *R. v. Ho*, [2003] B.C.J. No. 2713, 2003 BCCA 663 (C.A.) [*Ho*], at para. 70 (application for leave to appeal pending, SCC No. 30167) [Appellants' Authorities Tab 20].

83 *Schachter*, *supra* note 72, at 709, para. 63 [AGC Authorities Tab 13]. See also: *Gosselin*, *supra* note 34, *per* Bastarache J. dissenting on other grounds, at 590-591, para. 297 [AGC Authorities Tab 4].

84 Reasons of Allan J., July 26, 2000, **Appellants' Record**, Vol. I at 89 and 106, paras. 52 and 102.

85 Reasons of Allan J., February 6, 2001, **Appellants' Record**, Vol. I at 149, para. 37.

86 Order of Allan J., February 6, 2001, **Appellants' Record**, Vol. II at 165, para. 1; Reasons of Allan J., February 6, 2001, **Appellants' Record**, Vol. I at 150-151, para. 42.

nature of that which they have or had been receiving ... if such treatment should still be useful."[87]

80. These two extensions of the remedy necessarily had to be based on a finding of infringement of the rights of autistic children aged 6 and beyond, but in making that finding the Court of Appeal did not identify any error of law in Allan J.'s decision to limit her grant of relief to autistic children between the ages of two and six. Indeed, it said that it agreed with her order "in its general application". More importantly, the Court of Appeal acknowledged that it had no basis in the evidence for making such a finding. The reasoning of Saunders J.A. was that:

> While I accept that the efficacy of treatment is unlikely to end at the crisp attainment of school age, issues of funding programs for children of school age may involve additional considerations not before the Court, either in evidence or submissions. As the duration of treatment is not amenable, in my view, to a broad direction applicable to all autistic children, I would direct that disputes concerning the duration of treatment should be decided through an appropriate dispute resolution process, or in the absence of such a process, in proceedings before the Supreme Court of British Columbia.[88] [underlining added]

81. It was not open to the Court of Appeal, in the absence of any demonstration of error of law on the part of Allan J. or of any evidence that undermined her conclusions, to change her finding on liability and to expand the range of the infringement she found. Consequently, there was no basis on which the Court of Appeal could extend the remedy beyond what Allan J. had ordered. The additional remedies granted by the Court of Appeal do not correspond with the infringement that was found and therefore are not "appropriate and just" remedies within the meaning of s. 24(1) of the *Charter*. As this Court explained in *Doucet-Boudreau*, an appropriate and just remedy is one that, among other things, "meaningfully vindicates the rights and freedoms of the claimants",[89] and the Court of Appeal's additional remedies do not do that. Instead, they simply obscure what the rights actually are.

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87 Reasons of Saunders J.A., **Appellants' Record**, Vol. II at 224-225, para. 92.
88 *Ibid.*, at 223-224, para. 90.
89 *Doucet-Boudreau, supra* note 75, at para. 55 [AGC Authorities Tab 3].

(c) The retention of continuing jurisdiction was improper

82. The Court of Appeal's extension of the remedy included provisions retaining jurisdiction in the B.C. Supreme Court to resolve disputes concerning the duration of treatment of autistic children other than the infant claimants, and Crown challenges to the efficacy, intensity and duration of treatment of any of the four infant claimants. The extension resulted from the Court of Appeal's apparent determination that the "window of opportunity" identified by Allan J. did not necessarily close at age six, hence all autistic children, not just those before the Court, should be able to bring forward constitutional claims for funding of treatment beyond age 6.

83. As submitted under the preceding heading, this aspect of the remedy exceeds the constitutional violation found at trial. In addition, by enlarging the scope of the violation, it renders the nature and extent of both the enlarged violation and the constitutional obligations flowing from that violation uncertain, because it accepts that the efficacy of treatment can only be determined on a case-by-case basis. The Court of Appeal, based on its feeling that treatment might, in individual cases, be effective beyond the "window of opportunity" established by the evidence, provided for ongoing court resolution of whether a particular child would or would not benefit from treatment and, as a consequence, whether the government was or was not constitutionally required to fund treatment for that child.

84. This approach would render any benefit scheme unmanageable. No one could ever be certain, in the absence of an adjudication by the courts, as to who was, or was not, entitled to benefits. The absence of a fixed standard would prevent governments from making accurate forecasts of likely costs, and, in the area of health care, would divert scarce resources into the litigation of claims rather than the provision of services. In addition, in adjudicating on health care claims, the courts would, as contemplated here by the Court of Appeal in the cases of the four infant claimants, be called upon to make determinations as to "the efficacy, intensity and duration of treatment", matters that lend themselves to assessment by provincial governments, in consultation with their medical professions and health practitioners. These are not competencies traditionally associated with the courts.

85. Significantly, the continuing jurisdiction to supervise disputes ordered by the Court of Appeal is broader than the reporting function approved by this Court in *Doucet-Boudreau*. If exercised, it would involve the B.C. Supreme Court in making further legal determinations that would alter its final judgment, as for example with respect to the appropriate upper age limit for treatment. This violates the *functus officio* doctrine that, as the majority in *Doucet-Boudreau* found, informs the determination of whether a remedy is "appropriate and just".[90]

86. The provision for continuing jurisdiction is also inconsistent with the language of s. 24(1), in that it grants a remedy to persons whose *Charter* rights have not yet been determined to have "been infringed or denied". The further proceedings contemplated by the Court of Appeal are intended to determine whether a claimant is constitutionally entitled to funded treatment, that is, whether he or she does have a *Charter* right that is being infringed by a failure to provide treatment. While the language of s. 24(1) does not entirely preclude prospective remedies, such remedies are only granted where there is a "high degree of probability" that a *Charter* infringement will occur,[91] and here the Court of Appeal could only speculate that, in general, "the efficacy of treatment is unlikely to end at the crisp attainment of school age".[92]

(d) Conclusion on Remedies

87. A meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied.[93] There was no basis in this case for concluding that the equality rights in issue could not have been meaningfully vindicated by a remedy that simply declared the government's failure to provide for early intervention treatment was contrary to s. 15(1). The implementation of an appropriate response should have been left to the legislature or executive. The grant of relief beyond a declaration of right was an unnecessary and unwarranted intrusion into the spheres of the legislative and executive branches which failed to respect the constitutional separation of powers.

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[90] *Doucet-Boudreau, supra* note 75, at paras. 74-80 [AGC Authorities Tab 3], where it was noted that the trial judge in that case did not violate this doctrine since he did not purport to assume jurisdiction to alter any final disposition of the case.

[91] *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441 [*Operation Dismantle*], at 458, paras. 35-37 [AGC Authorities Tab 10].

[92] Reasons of Saunders J.A., **Appellants' Record,** Vol. II at 223, para. 90.

E. CONCLUSION

88. Both Allan J. and the Court of Appeal failed to identify the precise benefit being sought by the claimants in this case and, as a consequence, they chose inappropriate groups for the purposes of the comparison required in a s. 15(1) analysis. They erroneously focused on whether the treatment sought by the claimants was "medically necessary" instead of on the type of treatment. A proper comparator group would be one that is receiving funded behavioural modification therapy comparable to IBI.

89. In the particular circumstances of this case, the decision by the Province not to fund early IBI is not an affront to the basic human dignity of autistic children and is therefore not discriminatory. In a context of scarce health care resources, where not every demand for treatment can be met, where all governments must establish priorities, and where, as here, there has been controversy respecting the evolving nature and the efficacy of the particular treatment sought, a policy decision not to fund that treatment cannot be seen as involving a misapprehension of the claimants' needs or circumstances, or the perpetuation of stereotypes.

90. Even if discrimination were to be found, the remedy in this case should have been confined to a declaration of right. The more extensive remedies granted by the courts below intrude unnecessarily into the spheres of the other branches of government, depriving them of the opportunity to assess how best to comply with the judgment. The extended remedies also provide relief that is inconsistent with the infringement found at trial, and require ongoing dispute resolution by the B.C. Supreme Court that will entail constant revision of the judgment under appeal. These are not characteristics of an "appropriate and just" remedy under s. 24(1) of the *Charter*.

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[93] *Doucet-Boudreau*, *supra* note 75, at paras. 23-25 and 55 [AGC Authorities Tab 3].

PART IV - COSTS

91. The Attorney General of Canada does not seek costs.

PART V - ORDER SOUGHT

92. The Attorney General of Canada submits that questions 1 and 3 should be answered in the negative, and that it is unnecessary to answer questions 2 and 4. The appeal should be allowed.

All of which is respectfully submitted this 30th day of March, 2004.

per Graham Garton, Q.C.

Michael H. Morris

Joseph K. Cheng

Counsel for the Attorney General of Canada

PART VI – TABLE OF AUTHORITIES

PART VII – STATUTES RELIED ON

Tab

1. *Canada Health Act,* R.S.C. 1985, c. C-6, ss. 9, 10
2. *Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982,* c. 11, ss. 1, 7, 15, 24, 52
3. *Constitution of the Republic of South Africa 1996,* No. 108 of 1996, ss. 11, 27
4. *Medicare Protection Act,* R.S.B.C. 1996, c. 286, ss. 1, 2

Comprehensiveness

9. In order to satisfy the criterion respecting comprehensiveness, the health care insurance plan of a province must insure all insured health services provided by hospitals, medical practitioners or dentists, and where the law of the province so permits, similar or additional services rendered by other health care practitioners.
1984, c. 6, s. 9.

Universality

10. In order to satisfy the criterion respecting universality, the health care insurance plan of a province must entitle one hundred per cent of the insured persons of the province to the insured health services provided for by the plan on uniform terms and conditions.
1984, c. 6, s. 10.

Intégralité

9. La condition d'intégralité suppose qu'au titre du régime provincial d'assurance-santé, tous les services de santé assurés fournis par les hôpitaux, les médecins ou les dentistes soient assurés, et lorsque la loi de la province le permet, les services semblables ou additionnels fournis par les autres professionnels de la santé.
1984, ch. 6, art. 9.

Universalité

10. La condition d'universalité suppose qu'au titre du régime provincial d'assurance-santé, cent pour cent des assurés de la province ait droit aux services de santé assurés prévus par celui-ci, selon des modalités uniformes.
1984, ch. 6, art. 10.

SCHEDULE B

CONSTITUTION ACT, 1982

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(*c*) freedom of peaceful assembly; and

(*d*) freedom of association.

Democratic Rights

Democratic rights of citizens

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Maximum duration of legislative bodies

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.

Continuation in special circumstances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

ANNEXE B

LOI CONSTITUTIONNELLE DE 1982

PARTIE I

CHARTE CANADIENNE DES DROITS ET LIBERTÉS

Attendu que le Canada est fondé sur des principes qui reconnaissent la suprématie de Dieu et la primauté du droit :

Garantie des droits et libertés

Droits et libertés au Canada

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

Libertés fondamentales

Libertés fondamentales

2. Chacun a les libertés fondamentales suivantes :

a) liberté de conscience et de religion;

b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

c) liberté de réunion pacifique;

d) liberté d'association.

Droits démocratiques

Droits démocratiques des citoyens

3. Tout citoyen canadien a le droit de vote et est éligible aux élections législatives fédérales ou provinciales.

Mandat maximal des assemblées

4. (1) Le mandat maximal de la Chambre des communes et des assemblées législatives est de cinq ans à compter de la date fixée pour le retour des brefs relatifs aux élections générales correspondantes.

Prolongations spéciales

(2) Le mandat de la Chambre des communes ou celui d'une assemblée législative peut être prolongé respectivement par le Parlement ou par la législature en question au-delà de cinq ans en cas de guerre, d'invasion ou d'insurrection, réelles ou appréhendées, pourvu que cette prolongation ne fasse pas l'objet d'une opposition exprimée par les voix de plus du tiers des députés de la Chambre des communes ou de l'assemblée législative.

Annual sitting of legislative bodies

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

5. Le Parlement et les législatures tiennent une séance au moins une fois tous les douze mois. Séance annuelle

Mobility Rights

Liberté de circulation et d'établissement

Mobility of citizens

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

6. (1) Tout citoyen canadien a le droit de demeurer au Canada, d'y entrer ou d'en sortir. Liberté de circulation

Rights to move and gain livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(*a*) to move to and take up residence in any province; and

(*b*) to pursue the gaining of a livelihood in any province.

(2) Tout citoyen canadien et toute personne ayant le statut de résident permanent au Canada ont le droit :

a) de se déplacer dans tout le pays et d'établir leur résidence dans toute province;

b) de gagner leur vie dans toute province. Liberté d'établissement

Limitation

(3) The rights specified in subsection (2) are subject to

(*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(3) Les droits mentionnés au paragraphe (2) sont subordonnés :

a) aux lois et usages d'application générale en vigueur dans une province donnée, s'ils n'établissent entre les personnes aucune distinction fondée principalement sur la province de résidence antérieure ou actuelle;

b) aux lois prévoyant de justes conditions de résidence en vue de l'obtention des services sociaux publics. Restriction

Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

(4) Les paragraphes (2) et (3) n'ont pas pour objet d'interdire les lois, programmes ou activités destinés à améliorer, dans une province, la situation d'individus défavorisés socialement ou économiquement, si le taux d'emploi dans la province est inférieur à la moyenne nationale. Programmes de promotion sociale

Legal Rights

Garanties juridiques

Life, liberty and security of person

7. 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.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale. Vie, liberté et sécurité

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives. Fouilles, perquisitions ou saisies

Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

9. Chacun a droit à la protection contre la détention ou l'emprisonnement arbitraires. Détention ou emprisonnement

Arrest or detention

10. Everyone has the right on arrest or detention

(*a*) to be informed promptly of the reasons therefor;

(*b*) to retain and instruct counsel without delay and to be informed of that right; and

10. Chacun a le droit, en cas d'arrestation ou de détention :

a) d'être informé dans les plus brefs délais des motifs de son arrestation ou de sa détention;

b) d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit; Arrestation ou détention

prosecution for perjury or for the giving of contradictory evidence.

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[Note: This section became effective on April 17, 1985. See subsection 32(2) and the note thereto.]

Official Languages of Canada

Official languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Official languages of New Brunswick

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

Advancement of status and use

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

Proceedings of Parliament

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

Proceedings of New Brunswick legislature

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

14. La partie ou le témoin qui ne peuvent suivre les procédures, soit parce qu'ils ne comprennent pas ou ne parlent pas la langue employée, soit parce qu'ils sont atteints de surdité, ont droit à l'assistance d'un interprète. Interprète

Droits à l'égalité

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques. Égalité devant la loi, égalité de bénéfice et protection égale de la loi

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques. Programmes de promotion sociale

[Note : Cet article n'a pris effet que le 17 avril 1985. Voir le paragraphe 32(2) et la note correspondante.]

Langues officielles du Canada

16. (1) Le français et l'anglais sont les langues officielles du Canada; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada. Langues officielles du Canada

(2) Le français et l'anglais sont les langues officielles du Nouveau-Brunswick; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions de la Législature et du gouvernement du Nouveau-Brunswick. Langues officielles du Nouveau-Brunswick

(3) La présente charte ne limite pas le pouvoir du Parlement et des législatures de favoriser la progression vers l'égalité de statut ou d'usage du français et de l'anglais. Progression vers l'égalité

17. (1) Chacun a le droit d'employer le français ou l'anglais dans les débats et travaux du Parlement. Travaux du Parlement

(2) Chacun a le droit d'employer le français ou l'anglais dans les débats et travaux de la Législature du Nouveau-Brunswick. Travaux de la Législature du Nouveau-Brunswick

after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

Language of instruction

23. (1) Citizens of Canada

(*a*) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(*b*) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

[Note: See also section 59 and the note thereto.]

Continuity of language instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(*a*) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(*b*) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Enforcement

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

présente charte et découlant de la loi ou de la coutume, des langues autres que le français ou l'anglais.

Droits à l'instruction dans la langue de la minorité

Langue d'instruction

23. (1) Les citoyens canadiens :

a) dont la première langue apprise et encore comprise est celle de la minorité francophone ou anglophone de la province où ils résident,

b) qui ont reçu leur instruction, au niveau primaire, en français ou en anglais au Canada et qui résident dans une province où la langue dans laquelle ils ont reçu cette instruction est celle de la minorité francophone ou anglophone de la province,

ont, dans l'un ou l'autre cas, le droit d'y faire instruire leurs enfants, aux niveaux primaire et secondaire, dans cette langue.

[Note : Voir l'article 59 et la note correspondante.]

Continuité d'emploi de la langue d'instruction

(2) Les citoyens canadiens dont un enfant a reçu ou reçoit son instruction, au niveau primaire ou secondaire, en français ou en anglais au Canada ont le droit de faire instruire tous leurs enfants, aux niveaux primaire et secondaire, dans la langue de cette instruction.

Justification par le nombre

(3) Le droit reconnu aux citoyens canadiens par les paragraphes (1) et (2) de faire instruire leurs enfants, aux niveaux primaire et secondaire, dans la langue de la minorité francophone ou anglophone d'une province :

a) s'exerce partout dans la province où le nombre des enfants des citoyens qui ont ce droit est suffisant pour justifier à leur endroit la prestation, sur les fonds publics, de l'instruction dans la langue de la minorité;

b) comprend, lorsque le nombre de ces enfants le justifie, le droit de les faire instruire dans des établissements d'enseignement de la minorité linguistique financés sur les fonds publics.

Recours

Recours en cas d'atteinte aux droits et libertés

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Irrecevabilité d'éléments de preuve qui risqueraient de déconsidérer l'administration de la justice

(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

General

Dispositions générales

Aboriginal rights and freedoms not affected by Charter

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

(*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

[Note: Paragraph 25(*b*) (in italics) was repealed and the new paragraph substituted by the *Constitution Amendment Proclamation, 1983* (No. 46 *infra*).]

Maintien des droits et libertés des autochtones

25. Le fait que la présente charte garantit certains droits et libertés ne porte pas atteinte aux droits ou libertés — ancestraux, issus de traités ou autres — des peuples autochtones du Canada, notamment :

a) aux droits ou libertés reconnus par la Proclamation royale du 7 octobre 1763;

b) aux droits ou libertés acquis par règlement de revendications territoriales.

b) aux droits ou libertés existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

[Note : L'alinéa 25*b*) (en italique) a été abrogé et remplacé aux termes de la *Proclamation de 1983 modifiant la Constitution* (n° 46 *infra*).]

Other rights and freedoms not affected by Charter

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Maintien des autres droits et libertés

26. Le fait que la présente charte garantit certains droits et libertés ne constitue pas une négation des autres droits ou libertés qui existent au Canada.

Multicultural heritage

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Maintien du patrimoine culturel

27. Toute interprétation de la présente charte doit concorder avec l'objectif de promouvoir le maintien et la valorisation du patrimoine multiculturel des Canadiens.

Rights guaranteed equally to both sexes

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Égalité de garantie des droits pour les deux sexes

28. Indépendamment des autres dispositions de la présente charte, les droits et libertés qui y sont mentionnés sont garantis également aux personnes des deux sexes.

Rights respecting certain schools preserved

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

Maintien des droits relatifs à certaines écoles

29. Les dispositions de la présente charte ne portent pas atteinte aux droits ou privilèges garantis en vertu de la Constitution du Canada concernant les écoles séparées et autres écoles confessionnelles.

Application to territories and territorial authorities

30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

Application aux territoires

30. Dans la présente charte, les dispositions qui visent les provinces, leur législature ou leur assemblée législative visent également le territoire du Yukon, les territoires du Nord-Ouest ou leurs autorités législatives compétentes.

"Primary production"

(5) The expression "primary production" has the meaning assigned by the Sixth Schedule.

«Production primaire»

(5) L'expression «production primaire» a le sens qui lui est donné dans la sixième annexe.

Existing powers or rights

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section."

Pouvoirs ou droits existants

(6) Les paragraphes (1) à (5) ne portent pas atteinte aux pouvoirs ou droits détenus par la législature ou le gouvernement d'une province lors de l'entrée en vigueur du présent article.»

Idem

51. The said Act is further amended by adding thereto the following Schedule:

Idem

51. Ladite loi est en outre modifiée par adjonction de l'annexe suivante :

"THE SIXTH SCHEDULE

Primary Production from Non-Renewable Natural Resources and Forestry Resources

1. For the purposes of section 92A of this Act,

(*a*) production from a non-renewable natural resource is primary production therefrom if

(i) it is in the form in which it exists upon its recovery or severance from its natural state, or

(ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil; and

(*b*) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood."

«SIXIÈME ANNEXE

Production primaire tirée des ressources naturelles non renouvelables et des ressources forestières

1. Pour l'application de l'article 92A :

a) on entend par production primaire tirée d'une ressource naturelle non renouvelable :

(i) soit le produit qui se présente sous la même forme que lors de son extraction du milieu naturel,

(ii) soit le produit non manufacturé de la transformation, du raffinage ou de l'affinage d'une ressource, à l'exception du produit du raffinage du pétrole brut, du raffinage du pétrole brut lourd amélioré, du raffinage des gaz ou des liquides dérivés du charbon ou du raffinage d'un équivalent synthétique du pétrole brut;

b) on entend par production primaire tirée d'une ressource forestière la production constituée de billots, de poteaux, de bois d'œuvre, de copeaux, de sciure ou d'autre produit primaire du bois, ou de pâte de bois, à l'exception d'un produit manufacturé en bois.»

PART VII

GENERAL

PARTIE VII

DISPOSITIONS GÉNÉRALES

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Primauté de la Constitution du Canada

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Constitution of Canada

(2) The Constitution of Canada includes

(*a*) the *Canada Act 1982*, including this Act;

Constitution du Canada

(2) La Constitution du Canada comprend :

a) la *Loi de 1982 sur le Canada*, y compris la présente loi;

(*b*) the Acts and orders referred to in the schedule; and

(*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

b) les textes législatifs et les décrets figurant à l'annexe;

c) les modifications des textes législatifs et des décrets mentionnés aux alinéas *a*) ou *b*).

Amendments to Constitution of Canada

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

(3) La Constitution du Canada ne peut être modifiée que conformément aux pouvoirs conférés par elle.

Modification

Repeals and new names

53. (1) The enactments referred to in Column I of the schedule are hereby repealed or amended to the extent indicated in Column II thereof and, unless repealed, shall continue as law in Canada under the names set out in Column III thereof.

53. (1) Les textes législatifs et les décrets énumérés à la colonne I de l'annexe sont abrogés ou modifiés dans la mesure indiquée à la colonne II. Sauf abrogation, ils restent en vigueur en tant que lois du Canada sous les titres mentionnés à la colonne III.

Abrogation et nouveaux titres

Consequential amendments

(2) Every enactment, except the *Canada Act 1982*, that refers to an enactment referred to in the schedule by the name in Column I thereof is hereby amended by substituting for that name the corresponding name in Column III thereof, and any British North America Act not referred to in the schedule may be cited as the *Constitution Act* followed by the year and number, if any, of its enactment.

(2) Tout texte législatif ou réglementaire, sauf la *Loi de 1982 sur le Canada*, qui fait mention d'un texte législatif ou décret figurant à l'annexe par le titre indiqué à la colonne I est modifié par substitution à ce titre du titre correspondant mentionné à la colonne III; tout Acte de l'Amérique du Nord britannique non mentionné à l'annexe peut être cité sous le titre de *Loi constitutionnelle* suivi de l'indication de l'année de son adoption et éventuellement de son numéro.

Modifications corrélatives

Repeal and consequential amendments

54. Part IV is repealed on the day that is one year after this Part comes into force and this section may be repealed and this Act renumbered, consequentially upon the repeal of Part IV and this section, by proclamation issued by the Governor General under the Great Seal of Canada.

[Note: On October 31, 1987, no proclamation had been issued under this section.]

54. La partie IV est abrogée un an après l'entrée en vigueur de la présente partie et le gouverneur général peut, par proclamation sous le grand sceau du Canada, abroger le présent article et apporter en conséquence de cette double abrogation les aménagements qui s'imposent à la présente loi.

[Note : Proclamation non encore prise au 31 octobre 1987.]

Abrogation et modifications qui en découlent

Repeal of Part iv.1 and this section

54.1 *Part iv.1 and this section are repealed on April 18, 1987.*

[Note: Added by the *Constitution Amendment Proclamation, 1983* (No. 46 *infra*).]

54.1 *La partie iv.1 et le présent article sont abrogés le 18 avril 1987.*

[Note : Ajouté par la *Proclamation de 1983 modifiant la Constitution* (n° 46 *infra*).]

Abrogation de la partie iv.1 et du présent article

French version of Constitution of Canada

55. A French version of the portions of the Constitution of Canada referred to in the schedule shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada.

[Note: On October 31, 1987, no proclamation had been issued under this section.]

55. Le ministre de la Justice du Canada est chargé de rédiger, dans les meilleurs délais, la version française des parties de la Constitution du Canada qui figurent à l'annexe; toute partie suffisamment importante est, dès qu'elle est prête, déposée pour adoption par proclamation du gouverneur général sous le grand sceau du Canada, conformément à la procédure applicable à l'époque à la modification des dispositions constitutionnelles qu'elle contient.

[Note : Proclamation non encore prise au 31 octobre 1987.]

Version française de certains textes constitutionnels

Constitution of the Republic of South Africa 1996, No. 108 of 1996, ss. 11, 27

Life

11. Everyone has the right to life.

...

Health care, food, water and social security

27. (1) Everyone has the right to have access to

a. health care services, including reproductive health care;
b. sufficient food and water; and
c. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

IMPORTANT INFORMATION

MEDICARE PROTECTION ACT

[RSBC 1996] CHAPTER 286

Contents

Section

Preamble

WHEREAS the people and government of British Columbia believe that medicare is one of the defining features of Canadian nationhood and are committed to its preservation for future generations;

WHEREAS the people and government of British Columbia wish to confirm and entrench universality, comprehensiveness, accessibility, portability and public administration as the guiding principles of the health care system of British Columbia and are committed to the preservation of these principles in perpetuity;

WHEREAS the people and government of British Columbia recognize a responsibility for the judicious

use of medical services in order to maintain a fiscally sustainable health care system for future generations;

AND WHEREAS the people and government of British Columbia believe it to be fundamental that an individual's access to necessary medical care be solely based on need and not on the individual's ability to pay.

Definitions

1 In this Act:

"appropriate disciplinary body" means the person or body having the power to suspend or cancel the right to practise as a practitioner under

(a) the *Chiropractors Act,* for a chiropractor,

(b) the *Dentists Act,* for a dentist,

(c) the *Medical Practitioners Act,* for a medical practitioner,

(d) [Repealed 1999-12-13.]

(e) the *Optometrists Act,* for an optometrist,

(f) the *Podiatrists Act,* for a podiatrist, or

(g) the governing Act, bylaws or rules, for a member of a health care profession or occupation prescribed for the purposes of paragraph (f) of the definition of "health care practitioner";

"appropriate licensing body" means the person or body having the power to grant the right to practise as a practitioner under

(a) the *Chiropractors Act,* for a chiropractor,

(b) the *Dentists Act,* for a dentist,

(c) the *Medical Practitioners Act,* for a medical practitioner,

(d) [Repealed 1999-12-13.]

(e) the *Optometrists Act,* for an optometrist,

(f) the *Podiatrists Act,* for a podiatrist, or

(g) the governing Act, bylaws or rules, for a member of a health care profession or occupation prescribed for the purposes of paragraph (f) of the definition of "health care practitioner";

"approved diagnostic facility" means a diagnostic facility approved under section 33;

"beneficiary" means a resident who is enrolled in accordance with section 7, and includes that

resident's spouse or child who is a resident and has been enrolled under section 7;

"benefits" means

(a) medically required services rendered by a medical practitioner who is enrolled under section 13, unless the services are determined under section 5 by the commission not to be benefits,

(b) required services prescribed as benefits under section 51 and rendered by a health care practitioner who is enrolled under section 13, or

(c) unless determined by the commission under section 5 not to be benefits, medically required services performed

(i) in an approved diagnostic facility, and

(ii) by or under the supervision of an enrolled medical practitioner who is acting

(A) on order of a person in a prescribed category of persons, or

(B) in accordance with protocols approved by the commission;

"board" means the Medical and Health Care Services Appeal Board established under section 41;

"chair", other than in Part 8 or with reference to a special committee, means the individual who is appointed under section 3 to chair the commission;

"child" means a person who

(a) is a child of a beneficiary or a person in respect of whom a beneficiary stands in the place of a parent and who

(i) is a minor, or

(ii) is older than 18 and younger than 25 years and is in full time attendance at a post secondary institution that is approved by the commission,

(b) does not have a spouse, and

(c) is supported by the beneficiary;

"commission" means the Medical Services Commission continued under section 3;

"diagnostic facility" means a facility, place or office principally equipped for

(a) prescribed diagnostic services, studies or procedures, or

(b) the taking or collecting of specimens for purposes of diagnosis, treatment or prevention of illness, injury or disease

and includes any branches of a diagnostic facility;

"enroll" means,

(a) in respect of a beneficiary, enrollment under section 7, and

(b) in respect of a practitioner, enrollment under section 13;

"former Act" means the *Medical Service Act,* R.S.B.C. 1979, c. 255;

"health care practitioner" means a person registered as

(a) a chiropractor under the *Chiropractors Act,*

(b) a dentist under the *Dentists Act,*

(c) [Repealed 1999-12-13.]

(d) an optometrist under the *Optometrists Act,*

(e) a podiatrist under the *Podiatrists Act,* or

(f) a member of a health care profession or occupation that may be prescribed;

"medical practitioner" means a medical practitioner as defined in section 29 of the *Interpretation Act;*

"payment schedule" means a payment schedule established under section 26;

"plan" means the Medical Services Plan continued under section 3;

"practitioner" means

(a) a medical practitioner, or

(b) a health care practitioner

who is enrolled under section 13;

"premium" means an amount prescribed under section 8;

"render" means perform personally by or under the personal supervision of the person to whom reference is being made and "personal supervision" in this context means

(a) in the case of a practitioner, personal supervision authorized by the commission in the circumstances, and

(b) in the case of a medical practitioner or health care practitioner who is not enrolled, personal supervision acceptable to the appropriate disciplinary body for the medical

practitioner or health care practitioner;

"resident" means a person who

(a) is a citizen of Canada or is lawfully admitted to Canada for permanent residence,

(b) makes his or her home in British Columbia, and

(c) is physically present in British Columbia at least 6 months in a calendar year,

and includes a person who is deemed under the regulations to be a resident but does not include a tourist or visitor to British Columbia;

"special committee" means a special committee established under section 4;

"spouse" means a resident who

(a) is married to another person, or

(b) is living and cohabiting with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender.

Purpose

2 The purpose of this Act is to preserve a publicly managed and fiscally sustainable health care system for British Columbia in which access to necessary medical care is based on need and not an individual's ability to pay.

Part 1 — Medical Services Commission

Commission and Medical Services Plan

3 (1) The Medical Services Commission is continued consisting of 9 members appointed by the Lieutenant Governor in Council as follows:

(a) 3 members appointed from among 3 or more persons nominated by the British Columbia Medical Association;

(b) 3 members appointed on the joint recommendation of the minister and the British Columbia Medical Association to represent beneficiaries;

(c) 3 members appointed to represent the government.

(2) The commission reports to the minister.

(3) The Medical Services Plan established under the former Act is continued and the function of the commission is to facilitate, in the manner provided for in this Act, reasonable access, throughout British Columbia, to quality medical care, health care and diagnostic facility services for residents of British Columbia under the Medical Services Plan.