File No. 29508

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

**BETWEEN:**

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

**APPELLANTS**
**(Appellants/Respondents on Cross-Appeal)**

**AND:**

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

**RESPONDENTS**
**(Respondents/Appellants on Cross-Appeal)**

**AND:**

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ATTORNEY GENERAL OF MANITOBA
ATTORNEY GENERAL OF QUEBEC
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ATTORNEY GENERAL OF CANADA
ATTORNEY GENERAL OF ALBERTA
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**INTERVENERS**

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# FACTUM OF THE INTERVENER ATTORNEY GENERAL OF NEW BRUNSWICK

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## PART I – FACTS

1. The Attorney General of New Brunswick (hereinafter "AGNB") accepts the facts as presented by the Appellants.

## PART II – ISSUES

2. The constitutional questions as formulated by Chief Justice McLachlin are attached to the present factum as Appendix "A".

3. The AGNB takes the position that 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, do not infringe s-s. 15(1) of the **Canadian Charter of Rights and Freedoms** (hereinafter "**Charter**").

4. The AGNB also takes the position that 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, do not infringe s. 7 of the **Charter**.

5. In the alternative, if any of the challenged provisions infringe ss. 7 or 15(1) of the **Charter**, the AGNB takes the position that the infringement is justified under s. 1.

## PART III – ARGUMENTS

6. If there is a subject matter that touches the heart of individuals it is the condition in which children find themselves, especially when it arises from circumstances out of their control. This feeling is universal and it reflects concerns for the general well-being and the treatment given to children, not only in the individual's own communities, but around the whole world. Children are the future and the simple thought that one of them might not be able to fully contribute to society because of nature's injustices attracts heartfelt sympathy from any objective observer.

7. Every party would agree that the situation in which the respondent children in this case find themselves is worthy of sympathetic, sensitive and human considerations. It is an element that adds to the difficulty of this case. The fact that a court can express some sympathy for a party found in a difficult position through no fault of her/his own however is not sufficient to raise a claim to a constitutional status.

> **Rudolf Wolff & Co. *v.* Canada**, [1990] 1 S.C.R. 695 at p. 703; **Rodriguez *v.* British Columbia (A.G.)**, [1993] 3 S.C.R. 519 at p. 615; **Law *v.* Canada (Minister of Employment and Immigration)**, [1999] 1 S.C.R. 497 at p. 562; **Gosselin *v.* Quebec (A.G.)**, [2002] 4 S.C.R. 429 at para. 55.

8. Another element that adds to the difficulty of this case is the inherent complexity of the discrimination analysis. As this Court recognized in **Andrews *v.* Law Society of British Columbia**, [1989] 1 S.C.R. 143 at p. 164, equality "is an elusive concept and, more than any of the other rights and freedoms guaranteed in the *Charter*, it lacks precise definition".

9. The analysis under s. 7 of the **Charter** is also becoming increasingly complex given the level of governmental involvement in the everyday life of each citizen following the event of the welfare state.

Discrimination Arguments

10. As this Court has recognized, distinctions and equal treatment can both be discriminatory. Discrimination can also follow a positive action or a failure to act. This makes a s. 15 analysis very complex and it renders difficult any attempt at generalization and the adoption of an exhaustive or all-inclusive formula to analyse discrimination claims. That being said, a body of case law now exists that should allow for some general guidelines.

11. In that regard, to assist the presentation of the arguments, it is possible to consider the judgments on the basis of the type of discrimination claim they present. Each case can usually be classified as falling in 1 of 3 categories: (1) direct discrimination; (2) adverse effect discrimination; or (3) affirmative action programs.

*a) The element of intent*

12. It seems that direct discrimination and affirmative action programs are rather similar in nature. The distinction between both can be said to essentially reside in the purpose of the challenged provisions. A public authority that purports to exclude individuals from the application of a program acts in a discriminatory fashion. The distinction can be based on legitimate or illegitimate grounds but essentially the public authorities design the program to serve a segment of the population. The distinction will be designed to exclude "unqualified" individuals from the programs. The main issue to be addressed in those cases then becomes whether the inclusion/exclusion is based on a legitimate (i.e. based on merit and the particular situation of the individuals) or illegitimate (i.e. based on a stereotypical conception) distinction or whether it is intended to assist disadvantaged individuals.

13. The element of intent would explain the opinion expressed by this Court that in certain situations, discrimination can be established by a simple consideration of the statute without recourse to extensive evidence (**Law**, supra at p. 545). Where the intent is clearly discriminatory, recourse to evidence is essentially superfluous. The element of intent should not be understood to mean an explicit intention to harm somebody; an explicit distinction reveals an intention to exclude notwithstanding the underlying motivation.

14. The difference between direct discrimination and affirmative action programs is that in the first instance the public authority excludes individuals from a program on the basis of a characteristic that is not relevant to its stated purpose while in the other situation the public authority purports to assist disadvantaged individuals.

15. On the other hand, adverse effect discrimination will usually arise where the public authorities have established a general program but a segment of the population does not have access to it because of its relative situation. Unlike the 2 other kinds of discrimination, it does not arise from an explicit intention to discriminate. In such cases, the public authorities purport to treat everybody similarly but because of particular individual situations, the public programs have checkerboard effects across the community (**Andrews**, supra at p. 173).

16. In this case, the Legislature created a social program purposefully limited to certain services. The choice to exclude certain treatments was deliberate. Consequently, this case is not one of adverse effect discrimination and the sole issue is to determine whether the definition of the program is valid.

*b) The harm done, exacerbated or remedied*

17. In order to assist the presentation of the arguments, it is also possible to consider the judgments through the lenses of disadvantages suffered by individuals. There are generally 3 sorts. For the purpose of the present discussion, they can be called "incapacities": (1) legal incapacities (i.e. created by the law); (2) natural incapacities (i.e. created by nature); and (3) social incapacities (i.e. created by social attitudes and stereotypes). They need not be formulated in the negative (**Vriend *v.* Alberta**, [1998] 1 S.C.R. 493 at p. 540). An example of the first type of incapacity would be an Act prohibiting women from voting or sitting in the assembly, an example of the second would be a quadriplegic's impossibility to climb stairs, and an example of the third would be social segregation. There can be a certain amount of overlapping among the 3 in the sense that some legal incapacities can reflect natural and social incapacities and thus reinforce them; natural and social incapacities however both exist outside of the law (**Symes *v.* Canada**, [1993] 4 S.C.R. 695 at p. 765). Another example of overlapping is the social attitudes that can stereotype individuals suffering from a natural condition (i.e. mental or physical disability).

18. The distinctions in the incapacities assist the arguments since a prohibition on direct discrimination will be directed at legal incapacities: it will correct a harm done. Affirmative action programs will address natural or social incapacities of individuals to allow them to fully participate in society: an existing harm is hence remedied. Affirmative action programs are not needed to redress legal incapacities since this sort can be unmade just as easily as they are made. Nevertheless, affirmative action programs can be said to create legal incapacities in the sense that people are explicitly excluded from the program in order to concentrate on the individuals in need of assistance. This has the effect of blurring the demarcation line between direct discrimination and affirmative action programs and it will

import cases dealing with natural or social incapacities into the realm of legal incapacities because the acts designed to assist disadvantaged individuals draw "legal" distinctions. In order to distinguish the 2 sorts of cases, the analysis then has to centre on the purpose of the challenged legislation.

19. It is important to note that not all legal incapacities are prohibited; mostly those that do not further the purpose of the public program, which purpose must not in itself be discriminatory (**Andrews**, supra at pp. 166-8; **Eldridge *v.* British Columbia (A.G.)**, [1997] 3 S.C.R. 624 at pp. 669-70).

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20. As for adverse effect discrimination, the AGNB submits that it will usually arise in cases involving natural or social incapacities: it will exacerbate an existing harm. There is no intent to discriminate; however, because of the particular natural or social situation of a group, it does not have equal access to the stated program. Adverse effect discrimination does not arise where the legislature explicitly intends to exclude individuals from a program, the issue then becomes one of direct discrimination or affirmative action.

21. Examples of legal incapacities can be found in **Andrews**, supra (non citizens cannot practice law), **McKinney *v.* University of Guelph**, [1990] 3 S.C.R. 229 (persons over 65
20 unable to claim age discrimination in employment), **Harrison *v.* University of British Columbia**, [1990] 3 S.C.R. 451 (persons over 65 unable to claim age discrimination in employment), **Miron *v.* Trudel**, [1995] 2 S.C.R. 418 (common law spouses not admissible to accident benefits under standard automobile policy), **Egan *v.* Canada**, [1995] 2 S.C.R. 513 (same-sex spouses not admissible to spousal allowance), **Benner *v.* Canada (Secretary of State)**, [1997] 1 S.C.R. 358 (child of a Canadian mother born before February 15, 1977 when the father is not Canadian unable to obtain citizenship without an application and its requirements), **Vriend**, supra (individuals unable to claim discrimination on basis of sexual orientation), **Law**, supra (able-bodied widow without dependent children under 35 unable to claim survivor's pension benefits), **M. *v.* H.**, [1999] 2 S.C.R. 3 (same-sex spouses unable to
30 claim spousal support), **Corbière *v.* Canada (Minister of Indian Affairs and Canadian North)**, [1999] 2 S.C.R. 203 (off reserve members unable to vote in band elections),

**Granovsky *v.* Canada (Minister of Employment and Immigration)**, [2000] 1 S.C.R. 703 (temporarily disabled persons unable to exclude periods of disability from the requirements to qualify for disability pension), **Lavoie *v.* Canada**, [2002] 1 S.C.R. 769 (citizens given preference in open competition for public service positions), **Nova Scotia (A.G.) *v.* Walsh**, [2002] 4 S.C.R. 325 (common law spouses unable to claim division of property pursuant to marital property legislation), **Gosselin**, supra (able-bodied individuals under 30 unable to obtain full social assistance without participating in a work or training program), **Trociuk *v.* British Columbia (A.G.)**, 2003 SCC 34 (unacknowledged fathers unable to have their particulars registered on the birth registration and to participate in their children's surname), and **Nova Scotia (Workers' Compensation Board) *v.* Martin**, 2003 SCC 54 (chronic pain sufferers unable to obtain full compensation for their disability). The case of **Stoffman *v.* Vancouver General Hospital**, [1990] 3 S.C.R. 483 (physicians unable to obtain admitting privileges after age 65), would also enter this category except that the majority's s. 15 analysis was obiter.

22. Other cases dealing with legal incapacities are **Reference re *Workers' Compensation Act, 1983* (Nfld)**, [1989] 1 S.C.R. 922 (limitation on judicial recovery of indemnity), **R. *v.* Turpin**, [1989] 1 S.C.R. 1296 (election of trial with judge alone or judge and jury), **Rudolf Wolff & Co.**, supra (action against Federal Crown must be initiated in Federal Court), **Dywidag Systems International, Canada Ltd. *v.* Zutphen Brothers Construction Ltd.**, [1990] 1 S.C.R. 705 (action against Federal Crown must be initiated in Federal Court), and **R. *v.* S.(S.)**, [1990] 2 S.C.R. 254 (alternative measures for young offenders). However, the incapacities in those cases were procedural in essence and not based on personal characteristics.

23. Examples of cases dealing with natural incapacities are **Eaton *v.* School District of Brant County**, [1997] 1 S.C.R. 241 (children with physical and learning disabilities), **Eldridge**, supra (persons with speech and hearing impairments), **Winko *v.* British Columbia (Forensic Psychiatric Institute)**, [1999] 2 S.C.R. 625 (accused suffering from mental illness), **Martin**, supra (employees suffering from chronic pain).

24. Examples of cases dealing with social incapacities are **Weatherall *v.* Canada (A.G.)**, [1993] 2 S.C.R. 872 (relative situation of women and frisk search in female penitentiary), **Symes**, supra (women bear a disproportionate burden of child care), **Thibaudeau *v.* Canada**, [1995] 2 S.C.R. 627 (women, who typically have the custody of the children, have to bear the tax burden associated with child support payments), **Vriend**, supra (homosexuality), **Law**, supra (adaptability of older individuals), **Lovelace *v.* Ontario**, [2000] 1 S.C.R. 950 (~~economic situation~~ social condition of aboriginal communities), **Gosselin**, supra (adaptability of older individuals).

10 25. As explained above, some of the cases dealing with natural or social incapacities have been imported into the realm of legal incapacities because their applicable statute draws distinctions in order to further their purpose of assisting people subject to such incapacities or reinforce a prejudice.

26. In each of those cases, the common thread is the following issue that had to be resolved by the Court: does the disputed action create a harm, purport to remedy an existing one or exacerbate another by failing to take into consideration the particular situation of a segment of the population?

20 27. This case presents a hybrid of legal incapacity with a natural incapacity. Although the condition of the Respondents derives from nature, the recovery of the money spent for their treatments is barred by legislation. The issue to be addressed is whether the legislative bar on the recovery of the costs of treatments harms the Respondents in a way that involves s. 15.

*c) Legal incapacities and legitimate distinctions*

28. Very early in its jurisprudence under s. 15, this Court has recognized that the ability to draw distinctions is crucial to the function of a legislative assembly and that the mere fact of a distinction does not automatically trigger s. 15 (**Andrews**, supra at pp. 164, 168-9). This
30 raises the important issue of determining what incapacities created by the law will be discriminatory and what others will not be. It brings us back to the earlier statement (at para.

19 above) that s. 15 will prohibit the distinctions that do not further the purpose of the public program, which purpose must not itself be discriminatory. Consequently, in its assessment of a public program under s. 15 of the **Charter**, a court of law has to look at both its end and the means chosen to accomplish it.

See **Corbière**, supra at pp. 259-60.

29. Once the purpose of a public program has been determined to be valid, the next question is to establish whether the means chosen to implement it further that objective in a non-discriminatory manner. For example, in the case of **Trociuk**, supra, although this court accepted the purpose of the legislation to be valid, it also concluded that the blanket exclusion was too wide. A similar conclusion derives from the case of **Martin**, supra, where an automatic exclusion of chronic pain sufferers from a workers' compensation regime was not sufficiently related to the particular needs and circumstances of the individuals.

30. If a legislative purpose is not discriminatory and the means chosen to achieve it are neither based on irrelevant personal considerations, then it is hard for an individual to claim that her/his human dignity is being affected negatively.

See **Winko**, supra at paras 88 & following.

31. The choice of means however will involve a certain amount of legislative judgment, especially in fields of social programs where exact scientific data does not allow for a conclusive determination. In **Reference re Anti-Inflation Act**, [1976] 2 S.C.R. 373, this Court has formulated the kind of test to be applied in such circumstances. If there is a rational basis to the determination made by the legislature, this Court will usually refrain from intervening in policy decisions.

32. Similar comments were made in **Irwin Toy Ltd. *v.* Quebec (A.G.)**, [1989] 1 S.C.R. 927 at pp. 993-4, and in **McKinney**, supra at pp. 286 & 305, in the context of the s. 1 analysis, except that the terms used refer to a "reasonable basis" for the legislative judgment instead of a "rational basis".

33. A similar approach has been adopted by the Supreme Court of the United States in cases involving Amendment XIV (equal protection clause) of that country's Constitution. In cases where Congress used its power to further the equal protection clause, the Supreme Court has limited its inquiry to whether there was a rational basis to the legislated action, even if it results in an invasion of the local states powers.

> See **Katzenbach *v.* Morgan**, 384 U.S. 641 (1966) (Brennan, J.); **Cardona *v.* Power**, 384 U.S. 672 (1966) (Douglas, J., dissenting); **Oregon *v.* Mitchell**, 400 U.S. 112 (1970).

34. This Court has stated on numerous occasions that distinctions based on merits, needs and the personal situation of the individuals will rarely be discriminatory, unlike those based on stereotypes and preconceived opinions. For example, in **Law**, supra at p. 530, it was written:

> **Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?**
>
> (Underlining added)

35. From the cases of **Reference re *Workers' Compensation Act, 1983*** **(Nfld)**, **Turpin**, **Rudolf Wolff**, **Dywidag Systems**, and **S.(S.)**, mentioned above, it is also possible to state that laws that distinguish on the basis of characteristics that are not personal will neither be discriminatory.

36. What must be determined in this case is whether the legislative definition of the medical services covered is legitimate and furthers the purpose of the program on the basis of relevant criteria.

*d) Application in this case*

37. This overview places into perspective the different kinds of discrimination, their operation and their particularities. While direct discrimination and affirmative action programs are premised on distinctions created by the law, adverse effect discrimination emanates from distinctions existing outside of the law. Hence, an intention to exclude exists in cases of direct discrimination and affirmative action programs while there is none with adverse effect discrimination. The distinction between direct discrimination and affirmative action programs is mainly that in the later case, the law is used to alleviate an incapacity existing outside of its boundaries.

38. The express wording of s-s. 15(1) makes it clear that the **Charter** is mainly concerned with incapacities created or exacerbated by the state, whether intentionally or not.

39. This Court has recognized that s-s. 15(1) of the **Charter** prohibits direct discrimination. It will also order governments or legislatures to act where an existing program has an adverse effect on a segment of the population on the basis of a natural or social incapacity related to one of the prohibited grounds of discrimination. So far however, this Court has shown reluctance to order governments or legislatures to create specific and autonomous programs to address natural or social incapacities. There are good reasons for that reluctance since it would render s-s. 15(2) of the **Charter** essentially superfluous: that provision would be pointless since there would be an enforceable right to affirmative action programs in s-s. 15(1). Although written in the context of a s. 1 analysis, the following comments are apposite (**McKinney**, supra at pp. 317-8 (La Forest, J.)):

> **In looking at this type of issue, it is important to remember that a Legislature should not be obliged to deal with all aspects of a problem at once. It must surely be permitted to take incremental measures. It must be given reasonable leeway to deal with problems one step at a time, to balance**

**possible inequalities under the law against other inequalities resulting from the adoption of a course of action, and to take account of the difficulties, whether social, economic or budgetary, that would arise if it attempted to deal with social and economic problems in their entirety, assuming such problems can ever be perceived in their entirety.**

40. As far as the present case is concerned, the Legislature has created a public program limited to certain services, with the result that the treatments requested are not being paid by Medicare. The issue to be resolved is whether the definition of the program is discriminatory. This case is similar to the situations addressed by this Court in **Egan**, **Law**, **Walsh** and **Gosselin**, supra, where the disputed legislation created a particular regime applicable in specific circumstances. The distinctions in those cases were based on personal characteristics however, contrary to what the present **Act** and **Regulation** do.

41. Where a public authority intends to create a specific program applicable in limited circumstances, then its definition potentially falls in the category of direct discrimination or affirmative action program, depending on its particularity. If the exclusion is not based on personal characteristics and the entitlement is based on considerations relevant to its proper and legitimate operation then it should be declared valid.

42. This Court has recognized that public authorities can create programs for specific situations and in itself that is not discriminatory (**Law**, supra; **Walsh**, supra). Access to the program however can't be impeded on the basis of irrelevant characteristics (**Egan**, supra; **Eldridge**, supra). There is no doubt in this case that the Respondents have access to the existing services and therefore adverse effect discrimination is not an issue. Unless the definition of the program itself is discriminatory, the AGNB submits that there is no constitutional obligation on governments to extend such a program to individuals who do not meet its admissibility criteria.

43. In this case, the admissibility criteria to the public program are not in themselves discriminatory or based on personal characteristics. The legislation does not provide treatments to all except autistic children; the definitions contained in the **Act** and **Regulation**

do not draw such distinctions. (The relevant provisions are reproduced in Appendix 4 and 5 of the Appellants' Factum.)

44. The purpose of the challenged provisions of the **Act** and **Regulation** is to set up a system of health care services delivered in a controlled environment. In order to accomplish this purpose, it must not only establish technical requirements, it must also maintain high standards for the treatments provided and the personnel delivering them. How the requirements are selected and set is a matter of legislative judgment that cannot be interfered with lightly.

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45. The services covered under the **Act** and **Regulation** are those that meet specific criteria. For example, the services are those that are medically required, rendered by a medical practitioner, a health care practitioner, or performed in an approved diagnostic facility, etc. The criteria are not based on personal characteristics, enumerated or analogous grounds. The definitions neither constitute a stereotypical application of presumed group or personal characteristics. As it was stated in **Miron**, supra at p. 485 (McLachlin, J.):

> **... in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s. 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics.**

20

(Underling added)

46. The AGNB respectfully submits that this case can be more appropriately compared to the **Reference re *Workers' Compensation Act, 1983* (Nfld)**, **Turpin**, **Rudolf Wolff**, **Dywidag Systems** and **S.(S.)**, supra, where there were legal distinctions but they were not based on personal characteristics.

30

47. It is important to recall that the children's autism spectrum disorder is a natural condition that exists outside of the law. Like everybody else however, the Respondents have access to the services provided by the Province. This distinguishes **Eldridge**, supra, where the issue was access to an existing program, not the creation of a new program for the claimants.

48. The definitions of "benefits" and "health care practitioner" do not denigrate the human dignity of the Respondents nor do they promote the view that they are less worthy of consideration and respect. The mere fact that the treatment they are seeking is not presently covered cannot be indicative of a devaluation of their human dignity, otherwise the human dignity of everybody whose treatment is not covered would also be affected. This would transform the current limited health care program into an unlimited one with an obligation to treat all medical conditions. It would soon bring the downfall of this important Canadian social program for lack of resources.

10 49. Consequently, if the Respondents are successful, it may have a tremendous impact on the health care system as we know it in Canada today. It will potentially mean that all individuals suffering from a medical condition, the treatment of which is not now being covered, could be constitutionally entitled to a publicly funded treatment, notwithstanding the type of treatment, the facilities within which it is offered and the personnel providing it. This has the potential of affecting the integrity of the entire system.

50. Courts of various Canadian jurisdictions have had the occasion to address the issue of whether the provincial governments are under the obligation to support services not already being offered. It generally has been decided in the negative although some turned on a s. 1
20 analysis. The AGNB respectfully submits that the same conclusion is compelled in this case.

> **Brown *v.* British Columbia (Minister of Health)**, [1990] B.C.J. No. 151 (B.C.S.C.); **Lexogest Inc. *v.* Manitoba (A.G.)**, [1993] M.J. No. 54 (Man C.A.); **Lexogest Inc. *v.* Manitoba**, [1994] M.J. No. 133 at paras 25 & 27 (Man. Q.B.); **Cameron *v.* Nova Scotia (A.G.)**, [1999] N.S.J. No. 297 (N.S.C.A.), leave to appeal refused on June 29, 2000; **Chaoulli *v.* Québec (P.G.)**, [2002] J.Q. No. 759 (Qc C.A.).

**Right to Life, Liberty and Security of the Person**

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51. The AGNB respectfully submits that the **Charter** essentially protects the citizens against the coercive powers of the state (**McKinney**, supra at p. 444 (Sopinka, J.)). The same argument would apply with more vigour to s. 7, the first provision of the **Charter** under the heading "Legal Rights". Pursuant to **R. *v.* Morgentaler**, [1988] 1 S.C.R. 30, it seems well

settled that if criminal sanction follows the reception of medical treatments necessary to safeguard the security interest of the person then s. 7 can find application.

52. Absent such sanction, the AGNB submits that s. 7 does not apply. Furthermore, there is no constitutional obligation on the state, under s. 7 of the **Charter** or anywhere else, to pay for medical or therapeutic treatments. To reach a different conclusion would contrast sharply with the weight of the authorities.

> See **Rodriguez**, supra; **Brown**, supra; **Lexogest Inc. (No. 1)**, supra; **Lexogest Inc. (No. 2)**, supra; **Cameron**, supra.

53. When considering **Charter** protections, it is crucial to keep in mind what Chief Justice Dickson wrote in **R. *v.* Big M Drug Mart Ltd**, [1985] 1 S.C.R. 295 at p. 344:

> **... it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore [...] be placed in its proper linguistic, philosophic and historical contexts.**

Or, as it was explained in **MacDonald *v.* City of Montréal**, [1986] 1 S.C.R. 460 at p. 487:

> **No interpretation of a constitutional provision, however broad, liberal, purposive or remedial can have the effect of giving to a text a meaning which it cannot reasonably bear and which would even express the converse of what it says.**

This is not to say that the interpretation given to s. 7 should be restrictive or formalist, only that if there is an ambiguity in its meaning it is the intent of the drafters that should prevail.

54. Also, as part of the purposive analysis of s. 7, it is necessary to consider the text of the other **Charter** provisions. The words of Chief Justice Dickson are again explicit on this point (**Big M Drug Mart**, supra at p. 344):

> **... the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*.**
>
> (Underlining added)

55. When the complete context of s. 7 is considered, the AGNB submits that it becomes relatively clear that it is most appropriately associated to the coercive powers of the state. To hold otherwise would render meaningless the reference to the "principles of fundamental justice" since their application outside of the judicial or law enforcement contexts is not obvious.

56. The fact that s. 7 is regrouped with ss. 8 to 14 under the heading "Legal Rights / Garanties juridiques" and each of these other protections involve the coercive powers of the state (judicial and law enforcement) is another consideration that is difficult to ignore. This Court has accepted that the (**Law Society of Upper Canada *v.* Skapinker**, [1984] 1 S.C.R. 357 at pp. 376-7)

> **... headings were systematically and deliberately included as an integral part of the *Charter* for whatever purpose. At the very minimum, the Court must take them into consideration when engaged in the process of discerning the meaning and application of the provisions of the *Charter*. The extent of the influence of a heading in this process will depend upon many factors including (but the list is not intended to be all-embracing) the degree of difficulty by reason of ambiguity or obscurity in construing the section; the length and complexity of the provision; the apparent homogeneity of the provision appearing under the heading; the use of generic terminology in the heading; the presence or absence of a system of headings which appear to segregate the component elements of the *Charter*; and the relationship of the terminology in the heading to the substance of the headlined provision. Heterogeneous rights will be less likely shepherded by a heading than a homogeneous group of rights.**
>
> **At a minimum, the heading must be examined and some attempt made to discern the intent of the makers of the document from the language of the heading. It is at best one step in the constitutional interpretation process. It is difficult to foresee a situation where the heading will be of controlling importance. It is, on the other hand, almost as difficult to contemplate a situation where the heading could be cursorily rejected although, in some situations, such as in the case of "Legal Rights" which in the *Charter* is at the head of eight disparate sections, the heading will likely be seen as being only an announcement of the obvious.**

57. In **New Brunswick (Minister of Health and Community Services) *v.* G.(J.)**, [1999] 3 S.C.R. 46 at para. 65, while explaining the position expressed in previous judgments, this Court recognized that

> **... the subject matter of s. 7 is the state's conduct in the course of enforcing and securing compliance with the law, where the state's conduct deprives an individual of his or her right to life, liberty, or security of the person. I hastened to add, however, that s. 7 is not limited solely to purely criminal or penal matters. There are other ways in which the government, in the course of the administration of justice, can deprive a person of their s. 7 rights to liberty and security of the person[.]**

58. In that regard, the circumstances of **B.(R.) *v.* Children's Aid Society of Metropolitan Toronto**, [1995] 1 S.C.R. 315, and **Winnipeg Child and Family Services *v.* K.L.W.**, [2000] 2 S.C.R. 519, would be similar to those in **G.(J.)**, supra. The main issue was the application of s. 7 to protect the parent-child relationship from the coercive powers of the state.

59. Scrutinizing the text of the **Charter** reveals that when the drafters intended to impose positive obligations on the state, it generally said so explicitly: s. 5, s-s. 10(*a*), 11(*a*), (*b*), s. 14, ss. 17, 18, 19, 20 and 23 of the **Charter**.

60. Although some of this Court's judgments have imposed positive obligations on the state under s. 7, it is interesting to note that these obligations have generally derived from the "principles of fundamental justice".

> See **R. *v.* Stinchcombe**, [1991] 3 S.C.R. 326; **G(J.)**, supra at pp. 80 to 89 & 96.

61. The prejudice to the Respondents in this case is essentially confined to their financial situation. The fact that the particular treatment they are seeking is not covered under the applicable legislation means that they have to disburse its costs. The state has at no time penalized or prohibited the Respondents from obtaining the treatments of their choice. The claim they raise is hence centred on pure economic interests, which this Court has been very reluctant to import within the scope of s. 7: **Siemens *v.* Manitoba (A.G.)**, 2003 SCC 3 at paras. 45-6.

62. In this case, the Respondents are not prohibited under pain of criminal sanction from receiving the treatments they are seeking. Hence, **Morgentaler** and **Rodriguez**, supra, find no application nor does s. 7 of the **Charter**.

**Justification under s. 1**

63. In the alternative, if this Court should find an infringement to a constitutional right, the AGNB submits that it is justified in a free and democratic society.

64. The issue of justification in this case raises 2 particular concerns. The first one deals with justification of a limitation that is imminently financial, although based on technical requirements, while the second derives from the inherent difficulties associated with justifying a general program of the sort here at play.

*a) Budgetary considerations*

65. This Court has stated on some occasions that budgetary considerations are not sufficient in themselves to establish the kind of pressing and substantial concerns necessary to begin to justify an infringement to a **Charter** right. Although the AGNB accepts as a general rule that budgetary considerations should not take precedence over the constitutional rights and freedoms of Canadians, it is respectfully submitted that there is room for discernment and nuance instead of discarding completely a particular sort of justification.

66. On the contrary, the AGNB submits that the jurisprudence of this Court shows a principled and sensible approach to the application of the general justification analysis: on many occasions, it accepted that s. 1 applies differently in different circumstances. Recently for example, the majority of this Court accepted that legislatures will be accorded little deference when they are dealing with the fundamental right to vote of Canadian citizens (**Sauvé v. Canada (Chief Electoral Officer)**, 2002 SCC 68 at paras 8, 9 & 14) or the fundamental freedom of expression (**Libman *v.* Quebec (A.G.)**, [1997] 3 S.C.R. 569 at para. 60).

67. This Court has also recognized that s. 1 will operate differently in the context of s. 11(*d*) and the right to a fair and public hearing by an independent and impartial tribunal: **R. v. Généreux**, [1992] 1 S.C.R. 259 at p. 313; **Reference Re Remuneration of Provincial Court Judges of Prince Edward Island**, [1997] 3 S.C.R. 3 at para. 137; and **Mackin v. New Brunswick (Minister of Justice)**, [2002] 1 S.C.R. 405 at para. 72.

68. Section 1 would also find a different application in cases dealing with s. 7: **Reference re *Motor Vehicle Act* (B.C.)**, [1985] 2 S.C.R. 486 at p. 518; **G.(J.)**, supra at para. 99.

10 69. All that to submit that this Court has usually been willing to look at the type of legislation and the type of constitutional protection involved. Consequently, s. 1 has also been applied contextually.

70. It is important to consider the wording of s. 1. In itself it is not restricted to particular types of concerns other than "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The phraseology is very broad and all encompassing. Nowhere does the explicit wording of s. 1 completely exclude budgetary considerations from potential "reasonable limits".

20 71. The AGNB would even respectfully submit that this Court did not go so far as to categorically exclude budgetary considerations as concerns that can be pressing and substantial under the first step of a s. 1 analysis. This Court has explicitly recognized that budgetary considerations can form the requisite objectives under the **Oakes** test, except that it used the term "pending bankruptcy" (**Généreux**, supra at p. 313; **Provincial Court Judges' Reference**, supra at para 137; **Mackin**, supra at para. 72). A concern for a pending bankruptcy is nothing but a concern for budgetary considerations, although focused on their importance.

72. If budgetary considerations less than pending bankruptcy are indeed excluded from a s.
30 1 analysis, it could lead to the somewhat odd conclusion that governments could see the

pending bankruptcy coming along but would not be allowed to act and respond until the threat becomes imminent, almost unavoidable.

73. In **R. v. Oakes**, [1986] 1 S.C.R. 103, this Court explained some values pertaining to a "free and democratic society". This is important because the principles of a free and democratic society are numerous.

74. For example, the right to vote is no doubt very important for a democratic society. Public choices are very difficult in complex societies and that right allows every member of the nation, through their representatives, to have a say in the sorts of social programs the nation gives itself. The basis upon which the choices are made involves a consideration of a plethora of elements. The cost of the programs can be one non-negligible item.

75. If the right to vote is so fundamental, it is surely because of the nature of the institutions it grants access to. It is the right that really gives the members of the nation the opportunity to shape and fashion the community they live in. It gives a real meaning to the participation that inevitably leads to the design of policies and social programs important for the community.

76. Furthermore, in our system of government, budgetary considerations cannot be brushed aside as a mere triviality. The kind of programs a population will give itself will inevitably rest on the economic means at its disposal. Nothing operates in a vacuum. A social program has to be financed and every cost incurred in its delivery will inevitably trickle down to the taxpayers and be reflected in the level of taxation.

77. To argue that those considerations are mere abnormalities would stand in stark contrast to the text of the Constitution itself. Section 53 (applicable to provinces by way of s. 90) of the **Constitution Act, 1867** is another very special kind of guarantee, even though not found within the confine of the **Charter**. It enshrines the democratic principle of "no taxation without representation" to make accountable the individuals responsible for managing the public purse. It certainly shows that budgetary considerations are never really far from the

mind of the taxpayers and by implication the elected representatives. To neglect those considerations would be to neglect our constitutional reality.

78. However, when discussing the financial implications associated with certain rights it is important to emphasize that they typically arise in claims that are institutional in nature. Fundamental freedoms for example should rarely trigger claims necessitating major investments, monetary disbursements or implementation costs from the public authorities. The freedom of association might allow public service employees to show unity when facing their employer and to obtain improved working conditions and hence have a financial impact on the public purse but the impact does not derive from the implementation of the protection. Consequently, in cases like those, the general principle that budgetary considerations can't serve to justify an infringement would remain applicable.

79. The AGNB submits that budgetary implications would mainly be applicable when certain rights raise institutional considerations. This, it is submitted, is somewhat supported by the judgments of this Court. In that regard, it is interesting to note that the budgetary considerations discussed above in relation to the "institutional dimension" of judicial independence indirectly support this. Faced with an institutional requirement, this Court accepted that a "pending bankruptcy" could serve as a reasonable limit.

80. There is little doubt that if this Court should order the provincial authorities to provide the kind of services requested by the Respondents, it will have important institutional implications. Not only will the provincial authorities have to increase funding in a particular sector of its activities, it might also have to re-organize its health care delivery system to provide services not previously covered or even sacrifice other public services. This situation is far from the one where the court can limit itself to a general declaration to refrain from raising barriers to the exercise of somebody's right: the implications are much different and financial in nature.

81. The financial resources at the disposal of provincial governments are not unlimited. Common sense therefore dictates that they can't provide for all possible treatments and

services imaginable that can improve, even marginally, the quality of life of every individual. Difficult policy choices must be made and some boundaries to the public programs must be drawn. Budgetary considerations and other factors play an important role in that definition. The sustainability of an important public program can and should qualify as a substantial and pressing societal concern worthy of s. 1 consideration.

82. Consequently, the AGNB submits that budgetary considerations should be relevant in cases of rights that are imminently financial or institutional. The wording of s. 1 does not in itself exclude those considerations but most importantly, related principles like "no taxation without representation" enshrined in s. 53 of the **Constitution Act, 1867** and responsible government are central to Canada's free and democratic society.

*b) Justification of an omission*

83. As this Court stated on several occasions, when it is time to justify an omission from a general program, "the first stage of the s. 1 analysis is properly concerned with the object of the legislation as a whole, the impugned provisions of the Act, and the omission itself": **M. v. H.**, supra at para. 82, inspired from **Vriend**, supra at pp. 554-5.

84. In this case, the Legislature defined a public program on the basis of professional and technical criteria with the result that the services claimed by the Respondents are not being funded by the public purse. The definition of the program is a conscientious attempt to provide a limited amount of services since the resources available are not unlimited. The services offered however are available without discrimination to everyone who needs them. The main issue to be addressed at this level is whether that decision to provide certain services to the exclusion of others is a reasonable limit as can be demonstrably justified in a free and democratic society.

85. The AGNB submits that in order to do this, it is necessary to consider the legislation as it exists and the Court must consider the legitimacy of the criteria as set in the **Act** and **Regulation**. The AGNB submits that if those criteria have a rational basis and are grounded

in a professional and technical reality, a court of law should not lightly interfere with their definition. To dilute such professional and technical criteria to "fit" a particular circumstance could lead to the complete transformation of the public program and its possible dismantlement. Therefore, a court of law would not be justified in solely considering an omission without first considering the operation of the program as a whole.

86. In that respect, this case must be distinguished from **Vriend**, supra, where the definition of the public program did not rest on professional and technical requirements. It should also be distinguished from **Eldridge**, supra, where the issue was access to the existing program and not the definition of the coverage *per se*.

87. For the remainder, the AGNB accepts the s. 1 analysis presented in the Appellants' Factum.

**Remedies**

88. If this Court should conclude that s. 7 or s. 15 of the **Charter** has been infringed in an unjustifiably manner, the AGNB respectfully submits that this case is not one proper for the attribution of damages and the decision of the lower courts in this regard should be revised. The Respondents have not established that their incapacity would have been eliminated had the services been offered. The Respondents have neither established that there was bad faith, malice or even indifference on the part of the public authorities.

89. The AGNB submits that in such circumstances, the appropriate remedy would be for this Court to declare the state of the law and suspend the declaration for a certain amount of time to allow the Legislature to assess and set up the novel kinds of services to be offered.

## PART IV – ORDER SOUGHT

90. The AGNB respectfully submit that the appeal be allowed.

RESPECTFULLY SUBMITTED at Fredericton , NB, this 27th day of February, 2004.

ATTORNEY GENERAL FOR THE PROVINCE OF NEW BRUNSWICK, Intervener

Per : _____

**Gaétan Migneault**
Solicitor and Agent of the Attorney General

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## PART V – TABLE OF AUTHORITIES

**PARAGRAPH NUMBER**

CASE LAW

## Appendix "A"

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**?

1. Est-ce que la définition des termes « benefits » et « health care practitioners » à l'art. 1 de la loi intitulée **Medical Protection Act**, R.S.B.C. 1996, ch. 286, et aux art. 17 à 29 du règlement intitulé **Medical and Health Care Services Regulation**, B.C. Reg. 426/97, violent le par. 15(1) de la **Charte canadienne des droits et libertés** du fait qu'elles n'incluent pas les services aux enfants autistiques fondés sur l'analyse behaviorale appliquée?

2. Dans l'affirmative, est-ce que cette violation constitue, au sens de l'article premier de la **Charte canadienne des droits et libertés**, une limite raisonnable prescrite par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique?

3. Est-ce que la définitions des termes « benefits » et « health care practitioners » à l'art. 1 de la loi intitulée **Medical Protection Act**, R.S.B.C. 1996, ch. 286, et aux art. 17 à 29 du règlement intitulé **Medical and Health Care Services Regulation**, B.C. Reg. 426/97, violent le par. 7 de la **Charte canadienne des droits et libertés** du fait qu'elles n'incluent pas les services aux enfants autistiques fondés sur l'analyse behaviorale appliquée?

4. Dans l'affirmative, est-ce que cette violation constitue, au sens de l'article premier de la **Charte canadienne des droits et libertés**, une limite raisonnable prescrite par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique?