Court 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
(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
(Appellants on Cross-Appeal)

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I N D E X

PART I

STATEMENT OF FACTS

A. OVERVIEW OF AUTISM SOCIETY CANADA'S POSITION

1. Autism Society Canada (ASC) supports the position of the Respondents and endorses the submissions in their factum.

2. In its own factum, ASC's submissions will focus on how the Respondents were also denied access to the Medicare system at a procedural level.

3. Once the state decides to provide a benefit, it is obliged to do so in a non-discriminatory manner. What flows from this principle is the corollary obligation of the government to institute appropriate procedures to ensure that these benefits are provided in a non-discriminatory manner. These procedures will necessarily include an analytical or methodological framework for decision-making that employs rational criteria, applied consistently and without reference to irrelevant personal characteristics.

4. ASC recognizes that the burden to prove discrimination under s. 15(1) of the *Charter* rests with the claimant. However, claimants will generally need to know what processes and criteria the government used in reaching the resource allocation decisions in question in order to advance an argument under s. 15(1). The government should therefore be required to provide cogent evidence of its decision-making processes and the criteria it examines when making funding decisions.

5. ASC submits that where the government does not provide such evidence, it is appropriate for the Court to make an inference that the government made its decision in such a way that the distinction in treatment accorded to the claimants amounts to discrimination for the purposes of s. 15(1), particularly where the claimants are members of a group that has been historically disadvantaged.

6. ASC recognizes that governments must establish priorities in allocating scarce health care resources. However, this type of prioritization cannot be arbitrary. The resource allocation decision-making process must also be transparent, as citizens are entitled to know who makes these decisions and the criteria that are considered in the decision-making process.

7. In the case on appeal, the British Columbia government has failed to provide evidence that it has such a framework for decision-making in place and that this framework was used in reaching the funding decision in dispute. The Appellants have provided no tangible evidence to demonstrate the "comprehensive and systematic" way in which the British Columbia government arrived at the decision not to fund the requested treatment. ASC submits that in the absence of such evidence, it is appropriate for the Court to make an inference that the distinction between the treatment accorded by the government to the Respondents as opposed to that accorded to adults with mental disabilities or to other children amounts to discrimination on the basis of mental disability, contrary to s. 15(1) of the *Charter.*

8. The Appellants have also failed to discharge the burden imposed on them under s. 1 of the *Charter*, which requires similar evidence of the process and criteria the British Columbia government used to reach its funding decision to be presented to the Court.

9. Finally, ASC takes issue with the proposition that the case on appeal does not involve principles of fundamental justice that are procedural in nature and further submits that the British Columbia's decision not to fund the requested treatment did in fact deny the Respondents the due process that they were entitled to under s. 7 of the *Charter*.

B. FACTUAL BACKGROUND

10. ASC adopts the facts as described in paragraphs 9-34 of the Respondents' factum. ASC also relies on the following additional facts.

11. Founded in 1976, ASC is a federation of all the provincial and territorial autism societies in the country. Thus, ASC is a national organization with pan-Canadian representation of the Canadian autism community.

12. When the Respondents originally requested that the British Columbia government fund effective autism treatment, they were informed in July 1998 that the government was "not in a resource position to respond to requests for funding."

> Reasons for Judgment of Allan J., dated July 26, 2000, Appellants' Record, Vol. I, p. 68 at para 6.

13. While the British Columbia government has since argued that it makes its health care resource allocation decisions on a "comprehensive and systematic basis", there is no clear or cogent evidence of what process or criteria were actually used by the British Columbia government in reaching this particular decision regarding the treatment requested by the Respondents.

> Reasons for Judgment of Saunders J.A., dated October 9, 2002, Appellants' Record, Vol. II, pp. 200-201, para 56.

14. The British Columbia government did not undertake its own cost-benefit study of the requested treatment. It also does not appear that the British Columbia government attempted to consider the effectiveness of the requested treatment until it commissioned a report to examine whether the treatment would result in "a cure" for autism. This report was specifically commissioned for the purpose of this litigation and not during the initial resource allocation decision-making process. Justice Allan also found that this report exhibited an obvious bias toward supporting the Crown's position in this litigation.

> Exh. A, Aff. of C. Green, A.R. Vol. XIX, p. 3467.
> Reasons for Judgment of Allan J., dated July 26, 2000, Appellants' Record, Vol. I, pp. 85-87 and 88 at paras 41-44 and 48.

15. The absence of any evidence of the resource allocation decision-making process of the British Columbia government in the case on appeal is consistent with the experience of a great number of families affected by autism/ASD who have sought similar funding for effective treatment in other Canadian provinces.

16. The problematic nature of this process was recognized in the 1994 Canadian Bar Association (CBA) Health Care Task Force Report. The results of the CBA Task Force's review of provincial legislation revealed that provinces simply classified services as "medically required" by regulation, without reference to any substantive or policy-based definition of that term. As the Task Force discovered, much of the decision-making in this area is within the discretion of provincial cabinets or medical commissions appointed by provincial governments. Analysis of what principles in fact governed the determination of medically required services was described as "sketchy". This was compounded by the fact that more often than not, the process was closed not only to public participation, but also to public view.

> Canadian Bar Association Task Force on Health Care, "What's Law Got to Do With It? Health Care Reform in Canada" (1994) at pp. 37; 40-41.
> **Book of Authorities of ASC, Tab C(1).**

17. Similar conclusions were reached in a 2002 survey of the resource allocation decision-making processes in three Alberta Regional Health Authorities (RHAs). Key decision makers reported that a clear process of setting priorities in the RHAs did not exist and that allocation of resources generally occurred on the basis of historical trends. Only twenty-two per cent of the key decision makers interviewed stated that the process worked well and many were critical of the lack of transparency in the resource allocation process.

> C. Mitton and C. Donaldson, "Setting Priorities in Canadian Regional Health Authorities: A Survey of Key Decision Makers" *Health Policy* 60 (2002) 39.
> **Book of Authorities of ASC, Tab C(4).**

18. The concerns of individuals affected by autism/ASD arising from the arbitrary nature of the way health care resources are allocated in Canada is evidenced by the large number of legal proceedings that have been commenced throughout Canada in the superior courts and in human

rights and other administrative tribunals by those seeking access to effective autism/ASD treatment.

PART II
ISSUES ON APPEAL

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

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

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

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

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

20. ASC submits that the case on appeal raises the additional issue of whether the British Columbia government's **interpretation and application** of the relevant legislation infringed the Respondents' rights under ss. 15(1) and/or 7 of the *Charter* and, if so, whether such infringements can be justified under s. 1. of the *Charter*.

21. While the remedy granted to the Respondents (as varied by the Court of Appeal) is also at issue in this appeal, ASC supports the Respondents' submissions on this issue.

PART III
ARGUMENT

A. INTRODUCTION

22. While ASC supports the position of the Respondents and endorses the submissions in their factum, ASC also submits that the failure of the British Columbia government to present evidence of the process and criteria it used to reach its funding decision in the case on appeal contributed to the breaches of the Respondents' *Charter*-protected rights as found by the Courts below.

B. SECTION 15 OF THE *CHARTER*

23. This Court has held that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

> *Law* v. *Canada*, [1999] 1 S.C.R. 497 at para 51.

24. This Court has also held that the rights enumerated in s. 15(1) should be interpreted by the courts in a broad and generous fashion, with the task of narrowing the *prima facie* protection thus granted to conform to conflicting social and legislative interests being left to the s. 1 analysis.

> *Miron* v. *Trudel*, [1995] 2 S.C.R. 418 at paras 130-131, *per* McLachlin J. (as she then was).

25. According to this Court in *Law* v. *Canada*, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:

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

2. Was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds?

3. Does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the Charter in remedying such ills as prejudice, stereotyping, and historical disadvantage?

Law v. *Canada*, *supra* at para 39.

26. The first inquiry addresses the question of differential treatment and therefore requires the court to compare the treatment of the claimants with that accorded to another appropriate comparator group. ASC submits that the Courts below correctly identified the appropriate comparator groups as either adults with mental disabilities or other children without autism/ASD.

27. The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1). This Court has held that legislation which effects differential treatment between individuals or groups will violate the fundamental purpose of s. 15(1) where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society.

Law v. *Canada, supra* at para 51.

28. In the case on appeal, the British Columbia government did not fund **any** effective treatment for autism/ASD for the Respondents.

> Reasons for Judgment of Saunders J.A., dated October 9, 2002, Appellants' Record, Vol. II, p. 209, para 66.

29. This is an important factor in determining whether the differential treatment accorded to the Respondents amounts to discrimination. In *Cameron*, Bateman J.A. disagreed that the Appellants had demonstrated that they were denied equal benefit of the law in a way that discriminates as contemplated by s. 15(1). At the same time, she noted that:

> This is not to suggest that policies excluding funding for certain treatments or procedures could never be discriminatory. If, for example, it was the government's policy not to fund **any** medical services for the infertile (assuming them to be "disabled"), without regard to the nature of the service, **it is likely that such a policy would be seen to promote the view that such persons were less worthy of recognition or value as a human being or as a member of Canadian society.**
>
> *Cameron* v. *Nova Scotia* (1999), 177 D.L.R. (4th) 611 at 683 (N.S.C.A.), leave to appeal to S.C.C. ref'd [1999] S.C.C.A. No. 531 [emphasis added].

30. ASC concedes that not all refusals to treat a health care problem will amount to discrimination under s. 15(1), particularly where alternative effective treatment is available. However, where, as here, the government's decision amounts to a refusal to fund **any** effective treatment for individuals affected by a **severe** condition, ASC submits that differential treatment amounting to discrimination is established.

> Reasons for Judgment of Saunders J.A., dated October 9, 2002, Appellants' Record, Vol. II, pp. 194-195, para 49.

31. ASC further submits that a refusal to treat a health care problem may amount to discrimination in circumstances where a claimant is denied access to the Medicare system at a procedural level.

32. This Court has held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner. ASC submits that what flows from this principle is the corollary obligation of the government to institute appropriate procedures to ensure that these benefits are provided in a non-discriminatory manner.

Eldridge v. *British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at 678.

33. ASC recognizes that the burden to prove discrimination under s. 15(1) of the *Charter* rests with the claimant. However, claimants will generally need to know what processes and criteria the government used in reaching the resource allocation decisions in question in order to advance an argument under s. 15(1).

34. Information of this nature is almost always within the sole knowledge of the government. It would not be burdensome for the government to make this information available to the public. Moreover, making this information publicly available would ensure that the process of resource allocation is transparent.

35. The government should therefore be required to provide evidence of its non-discriminatory decision-making processes and the criteria it examines when making funding decisions, particularly when dealing with historically disadvantaged groups.

36. ASC submits that where, as in the case on appeal, the government does not provide such evidence, it is appropriate for the Court to make an inference that the government made its decision in such a way that the distinction in treatment accorded to the Respondents amounts to discrimination for the purposes of s. 15(1).

37. The Appellants argue that it is neither appropriate nor accurate to say that the decision not to fund the requested treatment was based on the Petitioners' personal characteristics. The Appellants then state that this decision was not based on any aspect of their disability, but rather on the government's view of the appropriateness of the treatment for public funding.

Appellants' Factum, para 55.

38. Without some evidence of the nature of the decision-making process that was engaged and the criteria that were applied by the government, ASC submits that it is not reasonable to

expect the Respondents to be satisfied with the bare assurance that the government's decision not to fund the requested treatment "was not based on any aspect of their disability".

39. In a similar vein, the Appellants also argue that "there was no evidence in the Court below that the decision concerning behavioral therapy was made in any different manner from a countless number of similar decisions involving the allocation of health care funding".

Appellants' Factum, para 2.

40. This argument might be more persuasive if there actually was any evidence before the Courts below or this Court regarding the process that the British Columbia government uses in making its health care resource allocation decisions. It is worthy of note that even though the Appellants devoted eight paragraphs of their factum on this appeal to the description of facts under the headings "Statutory Context", "Budgetary Context" and "Allocation of Medical Benefits", no explanation of the decision making process (either specifically in the case on appeal or generally in the "countless number of similar decisions" that it has made) was provided.

41. ASC submits that in refusing to fund treatment for a demonstrated medical condition, governments should be required to justify their decisions by reference to the medical evidence or other objective criteria in order to prove that the reasons for the refusal are unrelated to any prejudice or stereotyping about the persons who requested the treatment.

D. Greschner, "How will the Charter of Rights and Freedoms and Evolving Jurisprudence Affect Health Care Costs?", Discussion Paper No. 20, Commission on the Future of Health Care in Canada (September 2002) at p. 8.
Book of Authorities of ASC, Tab C(2).

42. This justification exercise flows from the government's obligation once it decides to provide a benefit such as a universal health care system to do so in a non-discriminatory manner. However, individuals can only be assured that the government is in fact administering the

benefits under such a system in a non-discriminatory manner if it demonstrates that there are mechanisms in place to ensure that its resource allocation decisions are made in a constitutionally appropriate manner (*i.e.*, based on rational criteria that are applied consistently without reference to irrelevant personal characteristics).

43. The Appellants also state that the preparation of a comprehensive tariff necessarily embodies a "multitude of judgments about the value and need for particular services". ASC submits that governments should be required to articulate these judgments so that health care consumers can be satisfied that such resource allocation decisions are based on relevant and non-discriminatory criteria.

Appellants' Factum, para 65.

44. While the British Columbia government insists that its health care resource allocation decisions are made on a "comprehensive and systematic basis", it has yet to provide any evidence of the actual decision-making process that it employed when determining not to fund the treatment requested by the Respondents.

Reasons for Judgment of Saunders J.A., dated October 9, 2002, Appellants' Record, Vol. II, p. 200-201, para 56.

45. Similarly, while the Appellants are critical of the reasoning of the Courts below which they claim overlooks the fact that funding decisions "take into account many factors relating to geography, population demographics, history, medical science and budgetary limits imposed by the legislature", no evidence of the role these factors actually played in the decision not to fund the requested treatment in the case on appeal has been furnished by the Appellants.

Appellants' Factum, para 4.

46. In fact, the British Columbia government did not undertake its own cost-benefit study of the requested treatment. It also does not appear that the British Columbia government attempted to consider the effectiveness of the requested treatment until it commissioned a report to examine

whether the treatment would result in "a cure" for autism. This report was specifically commissioned for the purpose of this litigation and not during the initial resource allocation decision-making process.

Exh. A, Aff. of C. Green, A.R. Vol. XIX, p. 3467.
Reasons for Judgment of Allan J., dated July 26, 2000, Appellants' Record, Vol. I, pp. 85-87, paras 41-44.

47. Of note, the CBA Task Force also emphasized the importance of setting out criteria to be used in determining which services must be provided by the state. The CBA Task Force emphasized that these criteria might combine a consideration of clinical practice standards, assessment of outcomes effectiveness, economic constraints and ethical priority-setting.

CBA Health Care Task Force Report, *supra* at p. 42.
Book of Authorities of ASC, Tab C(1).

48. Without reference to this type of objective criteria used to make resource allocation decisions, persons who are denied funding cannot be assured that irrelevant personal characteristics were not considered in the decision-making process in a way that promotes the view that they are less worthy of recognition or value as human beings or as members of Canadian society. This is particularly true where the person seeking funding is a member of a group that has been historically disadvantaged, such as individuals affected by autism/ASD.

49. ASC submits that where, as in the case on appeal, the government does not provide such evidence, it is appropriate for the Court to make an inference that the distinction amounts to discrimination, contrary to s. 15(1) of the *Charter*.

C. SECTION 1 OF THE *CHARTER*

50. The applicable analysis under s. 1 was set out in *R.* v. *Oakes* and summarized succinctly as follows by Iacobucci J. in *Egan* v. *Canada*:

> First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violated must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the Charter guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. **In all s. 1 cases the burden is on the government to show on a balance of probabilities that the violation is justifiable.**
>
> *R.* v. *Oakes*, [1986] 1 S.C.R. 103.
> *Egan* v. *Canada*, [1995] 2 S.C.R. 513 at para 182 [emphasis added].

51. While a cost-benefit analysis is not relevant to the question of discrimination under s. 15, it can come into play when the government seeks to justify a breach of *Charter*-protected rights under s. 1. However, cost alone cannot justify a violation of the Respondents' s. 15 rights.

> *Cameron* v. *Nova Scotia, supra* at p. 38 (per Chipman J.A).
> *Schacter* v. *Canada*, [1992] 2 S.C.R. 679.
> *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.
> Reasons for Judgment of Allan J., dated July 26, 2000, Appellants' Record, Vol. I, p. 126, para 151.

52. The Appellants have argued that the reasoning in the Courts below constitutes a direct interference with the legitimate process of democratic government. However, when faced with such a "judicial interventionism" argument, it is important to recognize that what is really at issue in the case on appeal is the interpretation and application of the *Medicare Protection Act* and its regulations by the unelected members of the Medical Services Commission and other government bureaucrats, as well as by the Executive.

53. At the same time, ASC recognizes that the resource allocation decisions of government should be entitled to some degree of judicial deference. However, such deference is not a kind of "threshold inquiry" under s. 1. As Cory J. put it in *Vriend* v. *Alberta*, "the notion of judicial deference to legislative choices should not…be used to completely immunize certain kinds of legislative decisions from *Charter* scrutiny."

> *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493 at para 54.

Cited with approval by Iacobucci J. in *M.* v. *H.*, [1999] 2 S.C.R. 3 at para 78.

54. At the Court of Appeal, the Appellants reiterated the arguments made before Allan J. that the choice made by those administering health care services in the province was a rational allocation of resources. According to the Appellants, this choice was a necessarily complex administrative one that was made on a "comprehensive and systematic basis".

Reasons for Judgment of Saunders J.A., dated October 9, 2002, Appellants' Record, Vol. II, pp. 200-201, para 56.

55. However, the Appellants have provided no tangible evidence to demonstrate the "comprehensive and systematic" way in which they arrived at the decision not to fund the requested treatment. The burden imposed on the Appellants under s. 1 requires such evidence to be presented to the Court, particularly in order to demonstrate that the infringement minimally impairs the Respondents' rights.

Greschner, *supra* at p. 16.
Book of Authorities of ASC, Tab C(2).

56. This evidence could include objective criteria such as cost-benefit analyses, effectiveness studies, the severity of the illness and quality of life considerations.

57. ASC also submits that the Courts below should have required the British Columbia government under the s. 1 analysis to objectively demonstrate the "comprehensive and systemic basis" upon which the decision not to fund the requested treatment was made by providing the Respondents with clearly articulated reasons for this decision.

58. In the administrative law context, this Court has recognized that giving reasons "reduces to a considerable degree the chances of arbitrary or capricious decisions, reinforces public confidence in the judgment and fairness of administrative tribunals and affords parties to administrative proceedings an opportunity to assess the question of appeal".

Northwestern Utilities v. *Edmonton (City)*, [1979] 1 S.C.R. 684 at 706 (*per* Estey J.),

cited with approval in *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para 38.

59. ASC submits that the rationale behind requiring decision makers to furnish adequate reasons in the criminal, civil and administrative contexts should apply equally to the health care resource allocation decisions made by governments.

R v. *Sheppard*, [2002] 1 S.C.R. 869.
Young v. *Young*, (2003), 63 O.R. (3d) 112 (C.A.).
Nieberg v. *Ontario*, [2004] O.J. No. 1135 (Div. Ct.).

D. SECTION 7 OF THE *CHARTER*

60. The principles of fundamental justice that have been identified by the courts in considering s. 7 are both procedural and substantive in nature.

61. ASC takes issue with the Appellants that the case on appeal does not involve principles of fundamental justice that are procedural in nature.

Appellants' Factum, para 89.

62. Decisions which are likely to have a significant impact on an individual's health may fail s. 7 scrutiny where certain procedural safeguards were not in place in the decision-making process. These safeguards include the right to adequate notice of the decision, the right to respond and the right to be heard by a fair and impartial decision-maker.

Collin v. *Lussier*, [1983] 1 F.C. 218 (F.C.C.).
Singh v. *Canada*, [1985] 1 S.C.R. 177.
R. v. *Morgentaler*, [1988], 1 S.C.R. 30.
M. Jackman, "The Implications of Section 7 of the *Charter* for Health Care Spending in Canada", Discussion Paper No. 31, Commission on the Future of Health Care in Canada (October 2002).
Book of Authorities of ASC, Tab C(3).

63. According to Professor Jackman, such due process guarantees are designed to ensure not only that the decision-maker has all the information needed to make an accurate and appropriate decision, but also that the decision-making process itself respects the dignity and autonomy of the person whose life, liberty or security is at stake.

Jackman, *supra* at p. 11.

64. ASC submits that the British Columbia government's decision not to fund the requested treatment denied the Respondents the due process that they were entitled to under s. 7. The complete absence of procedural safeguards ensured that the government's denial of the Respondents' s. 7- protected rights was not made in accordance with the principles of fundamental justice.

65. The Appellants have conceded that if a breach of s. 7 is made out in the case on appeal, the Crown could not justify such a violation under s. 1.

Appellants' Factum, para 91.

E. CONCLUSION

66. The failure of the British Columbia government to present evidence of the process and criteria it used to reach its funding decision in the case on appeal contributed to the breaches of the Respondents' *Charter*-protected rights as found by the Courts below.

67. The Appellants provide no tangible evidence to demonstrate the "comprehensive and systematic" way in which the British Columbia government arrived at the decision not to fund the requested treatment. ASC submits that in the absence of such evidence, it is appropriate for the Court to make an inference that the distinction between the treatment accorded by the government to the Respondents as opposed to that accorded to adults with mental disabilities or to other children amounts to discrimination on the basis of mental disability, contrary to s. 15(1) of the *Charter*.

68. The Appellants also fail to discharge the burden imposed on them under s. 1, which requires similar evidence of the process and criteria the British Columbia government used to reach its funding decision to be presented to the Court.

69. The sheer number of cases where Canadian families have pursued remedies through the courts in response to governmental refusals to fund effective treatment for autism/ASD demonstrates how the absence of clearly articulated resource allocation decision-making processes and criteria leaves these individuals questioning whether these decisions are grounded in the view that they are less worthy of recognition or value as human beings or as members of Canadian society.

70. In any event, individuals should not have to pursue litigation in order to obtain information regarding the resource allocation decisions of their governments. Litigation is expensive and individuals rarely have sufficient personal resources to bring constitutional challenges. These individuals cannot rely on the Court Challenges program in these circumstances given that its mandate and funding only extend to the challenge of federal laws. In the context of litigation surrounding access to healthcare, claimants who may have the necessary resources to bring such a challenge are more likely to use these resources to buy the medical services they need rather than to pursue an uncertain appeal process through the courts. Litigation is also lengthy and therefore ineffective for individuals, such as the Respondents in the case on appeal, who require access to necessary treatment on a timely basis.

Greschner, *supra* at p. 19.

71. Finally, ASC submits that the case on appeal does involve principles of fundamental justice that are procedural in nature and further submits that the British Columbia government's decision not to fund the requested treatment did in fact deny the Respondents the due process that they were entitled to under s. 7 of the *Charter*.

PART IV
SUBMISSIONS ON COSTS

72. ASC makes no submissions on costs other than that the Court follow its usual practice not to award costs against or to this intervener.

PART V
NATURE OF ORDER REQUESTED

73. That the appeal from the decision of the British Columbia Court of Appeal be dismissed and the finding of an infringement of s. 15(1) of the *Charter*, not saved by s. 1, be upheld.

74. That the cross-appeal be allowed and:

(a) the remedy under s. 24(1) of the *Charter* be modified so that the Respondents be reimbursed for past treatment expenses from the date those expenses were incurred, not from the date of the declaration of the *Charter* breach herein; and

(b) there be a finding that s. 7 of the *Charter* has been infringed by the Appellants' refusal or failure to fund effective autism treatment and that this infringement is not saved by s. 1 of the *Charter*.

75. All without costs against or to this intervener.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED: April 15, 2004

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PART VI

TABLE OF AUTHORITIES

Paragraphs

A. CASE LAW

B. STATUTORY PROVISIONS

C. SECONDARY SOURCES

Canadian Bar Association Task Force on Health Care, "What's Law Got to Do With It? Health Care Reform in Canada" (1994).	16, 47
Greschner, D., "How will the Charter of Rights and Freedoms and Evolving Jurisprudence Affect Health Care Costs?", Discussion Paper No. 20, Commission on the Future of Health Care in Canada (September 2002).	41, 55, 70
Jackman, M., "The Implications of Section 7 of the *Charter* for Health Care Spending in Canada", Discussion Paper No. 31, Commission on the Future of Health Care in Canada (October 2002).	62, 63
Mitton, C. and C. Donaldson, "Setting Priorities in Canadian Regional Health Authorities: A Survey of Key Decision Makers" *Health Policy* 60 (2002) 39.	17