

GOLIATH ARISEN: TAKING AIM AT THE HEALTH CARE REGIME IN *AUTON*

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RÉSUMÉ

Tout récemment, la Cour suprême du Canada a été appelée à trancher la question de savoir si le refus du gouvernement de la Colombie Britannique à financer le traitement pour la condition ABA/IBI comme service de santé pour les enfants souffrant de l'autisme restreignait les droits à l'égalité des requérants garantis par la Charte canadienne des droits et libertés. Les pétitionnaires avaient demandé soit le financement ou un service direct pour l'intervention ABA/IBI comme service assuré sous le régime d'assurance-santé. Après avoir passé en revue le pouvoir décisionnel du ministère public et la nature du pouvoir décisionnel discrétionnaire, la Cour a conclu que le gouvernement n'a pas manqué à ses obligations constitutionnelles lorsqu'il a refusé de financer le service.

Dans cet article, l'auteure soutient que la Cour a commis une erreur dans son arrêt, du fait d'avoir limité indûment l'élément essentiel de la réclamation, d'avoir reconstitué et mal interprété les questions, et d'avoir ignoré les concepts d'invalidité conditionnés par la société qui sont axés sur les normes pour les non handicapés dans l'interprétation de la loi. Selon l'auteure, la Cour s'est hâtée de priver les demandeurs de l'effet correctif de la Charte. Le jugement qui en a résulté a eu pour effet de promouvoir les doctrines politiques établies au lieu d'adopter les principes de l'égalité sociale. Elle maintient que, de surcroît, la Cour a explicitement mis le ministère public à l'abri de responsabilités légales futures en vertu de la Charte lorsqu'il prend des décisions discrétionnaires portant sur la dépense de fonds publics. L'auteure conclut en affirmant que la Cour a rejeté une possibilité opportune et cruciale d'explorer et de développer une interprétation progressiste en droit relatif à l'égalité, abandonnant ainsi les enfants autistes dans la stagnation sociale.

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The ruling was a signal that governments no longer have to worry about being forced to pay for expensive programs by special-interest groups claiming discrimination.

—Canadian Press, 20 November 2004

INTRODUCTION

In 2004, the Supreme Court of Canada released its judgment in a significant case that touches upon the rights of every Canadian to publicly funded health care. In *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*¹ the disabled infant petitioners sought, by their litigation guardians, a determination that the *Canadian Charter of Rights and Freedoms*² guarantees equal receipt of, and equal access to, medically necessary treatment for their condition.

The petitioning families argued that available treatment enables a socially acceptable quality of life for persons living with disabilities (*i.e.* those whose abilities are different than those typically included in the social mainstream) and that it must be funded by the government in a manner equal to necessary treatment provided to “abled” persons (*i.e.* those whose abilities reflect the majority or “norm” of the social mainstream).

They sought a ruling to establish that a provincial government, when funding medical treatment, must not treat some persons unequally by excluding their medical needs where it funds medically necessary treatment for others.

The case wound its way up the appellate ladder until the Supreme Court of Canada pronounced in November 2004 that the claimants had failed to establish their claim.³ The Court concluded that the respondent families were seeking both a legal right to health care that was non-existent and an unwarranted expansion of the accessibility to health care services.

It was a surprising judgment in which the Court effectively further entrenched a historical division between the roles of the judiciary and the government where political decision making and the spending of public money are at issue. The Court was cautious, refraining from either brandishing the *Charter* as a sword or clasping it like a shield. Tragically, the double-edged effect of the judgment was to render the *Charter* powerless in the realm of political discretionary decision making where individual rights and needs collide with those of the collective, and, secondly, to frustrate the evolution of *Charter* law.

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1. *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2000] 78 B.C.L.R. (3d) 55, with supplementary reasons (2001), 197 D.L.R. (4th) 165 (B.C.S.C.). [*Auton* No. 1]
 2. *Canadian 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 [*Charter*].
 3. *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No. 71 [*Auton*].

I. INJUSTICE PROCLAIMED

The legal dispute emerged in 1999 when a group of British Columbia families banded together seeking a judgment from the British Columbia Supreme Court compelling the British Columbia government to fund applied behavioural analysis (ABA/IBI) treatment for their autistic children under the province's medicare scheme. The treatment was not offered as an insured medical service at that time although the petitioners had requested it.

Applied behavioural analysis has been alternately described as an intervention, a treatment, a therapy, and a form of education. It is known as intensive behavioural intervention (IBI) in Ontario, where it is provided by the Ministry of Children and Youth. Its characterization has been the subject of much controversy. In some provinces, like Ontario,⁴ the legal dispute is no longer about the benefit of the treatment. Rather, the debate is about equal access to an ABA/IBI program implemented by Ontario in 2001.⁵ In *Auton*, though, the efficacy of the treatment was key to the case.

Each of the petitioner children who brought the claim in *Auton* lives with autism—a medically diagnosed disability that falls under the medical rubric of autism spectrum disorders. It is a neurological dysfunction that impairs communication, and cognitive and social skills. Individuals with autism may be minimally affected, or they may experience significant barriers to their independence and participation in the community. The cause remains unclear and there is no cure.

Applied behavioural analysis is an instructional, interventionist program of an intensive nature that is designed to teach individuals living with autism the means of communication along with acquisition of basic living skills. Behavioural scientist O. Ivar Lovaas developed the technique in the early 1970s, conducting a well-known study on a select group of individuals with autism. Since then, ABA/IBI has been refined and utilized as a behavioural program in Canada, although delivered mainly as a method

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4. In Ontario, IBI is currently provided for by the Ontario government through the Intensive Early Intervention Program (IEIP). There are continuing legal disputes before the Superior Court and the Human Rights Tribunal of Ontario about issues of adequate funding, age limits for service, and sufficiency of service.
 5. On 4 March 2005 (post-*Auton*) Kitley J. of the Superior Court of Justice released the decision in *Wynberg v. R.* and *Deskin v. R.*, two cases that were tried over a period of four months. The issues were whether the government, which operated the ABA/IBI (IEIP) program for two- to five-year-olds, had discriminated against older autistic children on the grounds of age and disability by refusing them any service. The Court defined ABA/IBI as an “intervention” critical to the developmental needs of autistic children. Kitley J. declared that Ontario had discriminated against the Plaintiff children, violating their s. 15 *Charter* rights on the basis of age (by restricting the entitlement to the publicly funded ABA/IBI) and on the basis of disability (by failing to provide the intervention at school). The Court ordered the province to pay for the program for all children over six years who required it. Ontario has appealed the decision to the Court of Appeal. As a result of the litigation, there are enormous waiting lists for service.

of behavioural modification for patients residing in publicly funded care institutions until about 1998.

With this treatment, people who were once dependent on others could reach a level of independence that would keep them from institutional care. Independence for autistic individuals who have been diagnosed with a moderate to severe form of the disability is thus learned and generalized through an intensive, combined program of behavioural modification and cognitive stimulation.

From 2000 to date, ABA/IBI treatment has been publicly available through private purchase in several provinces. Instructor therapists are employed by small businesses that also engage the services of behavioural psychologists in a supervisory capacity. In many cases, a practising physician prescribes the treatment. The treatment is expensive, ranging from \$45,000 to \$75,000 per year for the optimum thirty-five hours of therapy per week. In the cases of some children, ABA/IBI is either recommended as necessary by a qualified psychologist, or prescribed, by a physician.

The characterization of ABA/IBI as a fundamental medical treatment was important to the families who petitioned to the court for a remedy because, they argued, the treatment is necessary to the health and well-being of their children. It is particularly effective and necessary in relation to:

- each child's ability to achieve his or her personal potential,
- the ability of the child to remain living at home with parents/guardians,
- the ability to enjoy the dignity of independent access to public services, including health care, education, and transportation, as well as the ability to more fully participate in his or her community, and
- the prevention of costly institutionalization, risk of harm, and loss of liberty to the autistic individual in the future.

The evidence of the claimants was that, without ABA/IBI treatment, individuals who are affected by moderate or severe forms of the condition are generally destined to lead lives dependent on others for most of their needs. As adults, many require either supported or institutionalized living accommodation, at significant cost to taxpayers. Often, there is stigma attached to the disability, and many individuals are mishandled within the confines of societal customs, rules, and practices, some finding their way into jails, psychiatric hospitals, and homeless shelters when supports are unavailable or non-existent.

From a legal rights perspective, the inability to communicate coupled with compelled dependence means that autistic individuals may be prevented by the state from fully exercising their constitutional and human rights under their own initiative—rights such as equality, liberty, autonomy, accommodation, freedom of expression, and freedom of religion. Where the state has the means to provide the tools for independence to those who lack it, the argument is that it is unconstitutional for the government to deny them this opportunity, particularly where the state inherently promotes such opportunities in society as a whole.

The interests of the families who brought the claim were rooted in much more ordinary desires: (1) to raise their children at home, as opposed to placing them—or having them placed involuntarily—in a publicly funded institution, and (2) to provide the best opportunity available to their children in which to reach their personal potential. The hope of ABA/IBI is that, with treatment, the young adult will be able to leave the parental home to exist at least semi-independently within the community.

At trial, the petitioners claimed that the government’s refusal amounted to discrimination based on the ground of disability and further, that it violated the child petitioners’ rights to life, liberty, and security of the person in a manner that did not accord with the principles of fundamental justice.

II. BULLS-EYE IN THE LOWER COURTS

Allan J. of the B.C. Supreme Court waded through voluminous evidence and entertained complex legal argument at trial. She found that ABA/IBI is a medically necessary treatment for autistic children, *i.e.* that it is essential to the health and well-being of the individual.⁶ In her view, the BC government violated the petitioners’ section 15 *Charter* rights to equality by denying a medically necessary service to a disadvantaged group, when medically necessary service is provided by the government in comparable circumstances to other citizens.

The direct discrimination, she said, was rooted in a systemic, stereotypical attitude, noting “the absence of treatment programs for autistic children must consciously or unconsciously be based on the premise that one cannot effectively treat autistic children ... [which is] a misconceived stereotype.”⁷

Allan J. found that the discrimination was not justified under section 1 of the *Charter*. She held that the “government was entitled to judicial deference in allocating finite resources among vulnerable groups” but that “this did not immunize its decision to deny funding for ABA/IBI from *Charter* review.”⁸

As a remedy, Allan J. issued a declaration, awarded nominal damages in the amount of \$20,000 to the adult petitioners, and directed the B.C. government to fund intensive behavioural therapy for children with autism. She left a window of discretion open to the government, stating that “it was up to the government, not the court, to determine the nature and extent of ABA/IBI therapy on appropriate professional advice.”⁹ Allan J. did not find it was necessary to consider section 7 of the *Charter*.

6. *Supra* note 3 at para. 13.

7. *Ibid.*

8. *Ibid.* at para. 14.

9. *Ibid.* at para. 15; also *Auton* trial, *supra* note 1 at para. 25.

The B.C. Court of Appeal upheld Allan J.'s decision on appeal by the B.C. government.¹⁰ The Court adopted the purposive and contextual approach as approved by the Supreme Court of Canada when determining *Charter* issues:

There is no doubt that not all refusals to treat a health care problem will be seen as discrimination. The complaint, here, however, is in the context of a severe condition which, untreated, will very likely lead to an adult life of isolation and institutionalization, and in which the individual's development has been so compromised that he or she will likely be unable to access service programs such as education, and likely will require one-on-one assistance to access other services such as health care for physical ailments.

...

It is also in the context of a treatment method which holds a realistic prospect of substantial improvement in communication and behavioural skills, no alternate treatment program offered, and the certain knowledge that other serious, and indeed less serious, conditions are treated by state funded therapies ... Here the complainants are greatly disadvantaged with the prospect that without treatment, they are likely to so remain for the duration of their lives.¹¹

Saunders J., in speaking for the Court, considered adverse effect discrimination, quoting La Forest J. in *Eldridge*, at paragraph 77:

This Court has consistently held, then, that discrimination can arise both from the adverse effects of rules of general application as well as from express distinctions flowing from the distribution of benefits. Given this state of affairs, I can think of no principled reason why it should not be possible to establish a claim of discrimination based on the adverse effects of a facially neutral benefit scheme. Section 15(1) expressly states, after all, that "[e]very individual is equal before and under the law and has the right to the equal protection *and* equal benefit of the law without discrimination ..." (emphasis added). The provision makes no distinction between laws that impose unequal burdens and those that deny equal benefits.

...

If we accept the concept of adverse effect discrimination, it seems inevitable, at least at the s. 15(1) stage of analysis, that the government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services.¹²

10. *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, (2002), 173 B.C.A.C. 114, 6 B.C.L.R. (4th) 201 [*Auton* No. 2].

11. *Ibid.* at para. 49; see also Factum of the Intervener Friends of Children with Autism [FOCA] at paras. 50–51; Joint Factum of the Interveners Women's Legal Education and Action Fund [LEAF] and Disabled Women's Network Canada [DWNC], at para. 27; and Factum of the Interveners Canadian Association of Community Living [CACL] and Council of Canadians with Disabilities [CCWD], at paras. 23 and 47.

12. *Ibid.* at para. 50.

Saunders J. concurred with the lower court that “the discrimination lay in “the failure of the health care administrators ... to consider the individual needs of the infant complainants by funding treatment.”¹³

The Court concluded that the government’s refusal created a “socially constructed handicap” that further entrenched the disadvantaged position of an already disadvantaged group. The Court agreed that a stereotypical attitude had informed the government’s decision because it was “a statement that their mental disability is less worthy of assistance than the transitory medical problems of others.”¹⁴

Stated Saunders J.,

I conclude that the failure of the health care administrators of the Province to consider the individual needs of the infant complainants by funding treatment is a statement that their mental disability is less worthy of assistance than the transitory medical problems of others. It is to say that the community was less interested in their plight than the plight of other children needing medical care and adults needing mental health therapy. This is a socially constructed handicap within the oversight, in my view, of s. 15 of the *Charter*.¹⁵

The appellate Court agreed with Allan J. that the government was unable to justify its actions under section 1 of the *Charter*. Balancing the importance of meeting the needs of autistic children who could benefit immensely from ABA/IBI treatment against the objective of allocating limited resources equally among multiple public demands, said the Court, ought to have resulted in granting the benefit to the children.

David had felled Goliath. But it was a transitory feeling of elation for the families. The B.C. government sought leave to appeal the decisions to the Supreme Court of Canada. On 19 November 2004 the Supreme Court of Canada released its decision, granting the appeal and dismissing the petitioners’ claim.

III. THE SUPREME COURT OF CANADA: GOLIATH—I, AUTON—O

The Supreme Court of Canada stated the constitutional questions as follows:

1. Do the definitions of *benefits* and *health care practitioners* in section 1 of the *Medicare Protection Act*, R.S.B.C. 1996, chapter 286, and sections 17–29 of the *Medical and Health Care Services Regulation*, B.C. Reg. 426/97, infringe section 15(1) or section 7 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 section 1 of the *Canadian Charter of Rights and Freedoms*?

13. *Ibid.* at para. 51.

14. *Ibid.*

15. *Ibid.*

The Supreme Court found in favour of the appellant B.C. Attorney General. McLachlin C.J. said that while one can sympathize with the families, the issue before the Court was “not what the public health system should provide [in terms of health care service], which is a matter for Parliament and the legislature”,¹⁶ but rather, the real issue was “whether the B.C. government’s failure to fund these services under the health plan amounted to an unequal and discriminatory denial of benefits under that plan, contrary to s.15 of the *Charter*.”¹⁷

The Court proceeded to apply the three-part *Law v. Canada (Minister of Employment and Immigration)* test to determine whether the claim could succeed. In order to establish discrimination, the Court was to consider:

- whether a law imposes differential treatment between the claimant and others, in purpose or effect;
- whether one or more enumerated or analogous grounds of discrimination are the basis for differential treatment; and
- whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.¹⁸

At the first stage of the test, the Court reviewed the legislative scheme that conferred authority on the B.C. government to make decisions relating to the provision of publicly funded benefits in the form of medical treatment, to determine whether differential treatment could be established in purpose or effect.

The Court noted that, in British Columbia, such decision making is guided by the provisions of both the *Canada Health Act*¹⁹ (*CHA*) and the *Medicare Protection Act*²⁰ (*MPA*) and its regulations.

McLachlin C.J., writing for a unanimous Court, concluded that the B.C. government was not obliged to provide, or to pay for, the costly treatment. A judicial review of the legislative scheme ascertained that the legislation did not promise that all Canadians would receive publicly funded health care services for all medically necessary treatment.²¹ Indeed, such limitations are an anticipated feature of the province’s legislative scheme.

The Court noted that the *CHA* stipulates that federal health care transfer payments will be allocated to provinces for medically necessary “core” services as long as they are delivered by a licensed physician or in a hospital. The *MPA*, said McLachlin C.J.,

16. *Supra* note 3 at para. 2.

17. *Ibid.*

18. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

19. *Canada Health Act*, R.S.C. 1985, c. C-6.

20. *Medicare Protection Act*, R.S.B.C. 1996, c. 286; and Medical and Health Care Services Regulation, B.C. Reg. 426/97, ss. 17–29.

21. *Supra* note 3 at para. 35.

confers the authority on the B.C. government to make discretionary decisions regarding all other “non-core” health care services, because these services are not statutorily covered by the *CHA*.

The Court held that the executive branch is thus free to target the social programs and benefits it desires to fund as a matter of public policy. This is not to say that the *Charter* has no jurisdiction over government action. When *providing* the designated benefits, governments must administer the benefits in a manner that both accords with *Charter* guarantees and does not offend *Charter* and human rights principles.²²

McLachlin C.J. identified a larger issue underlying the analysis at the first stage of the *Law* test. She noted that the issue of whether the legislative scheme was discriminatory on its face or by effect was a necessary consideration when determining differential treatment. The Court referred to historical decisions of the Court in which it was repeatedly held that Parliament and legislatures are not obliged to create benefits for the public.²³

Thus, the Court implied, there are no constitutionally guaranteed rights to receiving particular health care benefits. There is a legal right to receive *core* benefits from the government, if those benefits comply with *CHA* criteria, but there is no independent legal right to receive *non-core* benefits under the law. Further, if the courts obliged the government to provide non-core medical services to all disabled persons and people associated with other enumerated and analogous grounds then “a class of people legally entitled to non-core benefits would be created.” Stated McLachlin C.J., “This would effectively amend the scheme and extend benefits beyond what it envisions”.²⁴

The Court went on to consider whether the excluded benefit of ABA/IBI treatment was a benefit that the legislation had reasonably intended to include in its scheme. McLachlin C.J. characterized ABA/IBI treatment as a non-core health care service because the treatment was not provided by a practising physician or within a hospital. Thus, omitting ABA/IBI treatment as an insured non-core health benefit was properly a matter of choice within the lawful discretion of the B.C. government.

McLachlin C.J. pointed out that, in any event, the existence of a benefit must be established as a condition precedent to *Charter* review. Section 15(1) states,

Every individual is equal before and under the law and has the right to 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.²⁵

22. *Ibid.* at para. 41

23. *Ibid.* at paras. 1, 41.

24. *Ibid.* at para. 44.

25. *Supra* note 2, s. 15(1).

Charter review by the courts, she continued, is limited to a review of the by-product of the statute or regulation. The language of the *Charter* “confines s. 15(1) claims to benefits and burdens imposed by law.”²⁶ Moreover, there is a need for the benefit claimed or burden imposed to emanate from the law as result of language of section 15(1) as well as jurisprudence, she concluded.²⁷ The core issue to the Supreme Court, then, was whether the benefit claimed emanated from the law or was one conferred by law.²⁸

The Court concluded that the benefit claimed was funding for all medically necessary services. This was not a benefit provided by legislation. Moreover, it could not be demonstrated that the legislative scheme had a discriminatory purpose, objective, policy, or effect on the claimants.²⁹

This finding was enough to dispose of the claim, but because *Auton* was the first of its type to reach the Court, McLachlin C.J. proceeded to comment upon the second stage of the *Law* test, in *obiter*.

The second part of the *Law* test requires the Court to first determine the appropriate comparator group, and second, to ask whether the claimants were denied a benefit as compared with the people identified in the comparator group. Differential treatment might then be established by showing direct discrimination through a clear distinction or, by showing that the singling out of the claimant for inferior treatment on an enumerated or analogous ground had the adverse effect of indirectly discriminating, contrary to the *Charter*.³⁰

It was the Court’s view that the lower courts had erroneously defined the appropriate comparator group. Allen J. had, at trial, identified non-autistic children or mentally disabled adults as the comparators. She also noted that “as children and mentally disabled, [the petitioners] are doubly vulnerable.”³¹

Apparently, the lower Court had conducted a faulty legal analysis. McLachlin C.J. determined that the real comparators were members of non-disabled groups or members of a group who lived with a disability other than a mental disability *and* who requested or received funding for new treatments from the B.C. government under the non-core medical services branch of the legislative scheme.³²

The Court further determined that ABA/IBI was an emerging treatment, not eligible for inclusion in core services as provided for under the *CHA*, because ABA/IBI was

26. *Supra* note 3 at para. 28.

27. *Ibid.* at para. 29, 30.

28. *Ibid.* at para. 30.

29. *Ibid.* at paras. 46–47.

30. *Ibid.* at paras. 48, 57.

31. *Supra* note 1 at para. 129.

32. *Supra* note 3 at para. 58.

not delivered by a doctor or in a hospital.³³ The Court found that there was no evidence on record that would illuminate the actions of the B.C. government in responding to other requests for novel treatment by comparator groups. The petitioners were not treated differently as compared to other persons requesting emerging treatment, and the decision of the government did not differentiate the petitioners. As a result, the second stage of the *Law* test was not met—neither direct differential treatment nor differentiation by effect could be established.³⁴

The Court proceeded to answer the constitutional questions relating to breaches of the *Charter* in the negative. An examination under section 1 of the *Charter* was thus unnecessary.

IV. GOLIATH’S OFFENSIVE: SLINGING THE FATAL CATAPULT SHOT

The Supreme Court framed the case as a demand that the B.C. government provide a particular health service as a mandated benefit under the *CHA* or, alternatively, as a discretionary benefit under the provincial medicare scheme. Either way, the families were seeking a legal imperative compelling the B.C. government to provide an unproven health service, claiming that it would be unconstitutional to not provide it.

Adopting the position of the Attorneys General, the Court concluded that the families were making an unreasonable request of both the Court and the B.C. government. In their view, ABA/IBI treatment was not statutorily mandated, and the claimants could not individually compel the provincial government—which has the exclusive power to make discretionary political decisions about what kinds of medicare services to insure under its provincial medicare schemes—to provide ABA/IBI as a certain health service.

On appeal, the government continued to deny any form of discriminatory behaviour: numerous programs and services in B.C. were already provided for families of children with autism, such as infant development, supported child care, respite, occupational, physical, and speech/language therapy, and alternative behavioural support. In addition, autistic children are entitled to access basic and emergency health care of a universal kind in need, as offered to every resident of the province under the provincial medicare scheme. The *MPA*, the appellants argued, “is not structured or designed so as to effectively prevent the Petitioners from accessing the same services the [Act] makes available to all.”³⁵ The legislation could not directly discriminate or discriminate by effect against the petitioner children because it did not differentiate between the petitioners and others when there was no public health service available to others for which the children do not qualify.³⁶

33. *Ibid.* at paras. 59–62.

34. *Ibid.* at paras. 58–59.

35. Joint Factum of the A.G. (B.C.) and the Medical Services Commission (B.C.), at paras. 59–60.

36. *Ibid.* at para. 52.

The Attorney General conceded that “while the system is under-inclusive in that it fails to cover the petitioner’s therapy of choice”,³⁷ the problem was that the families were asking for an additional service in the form of the “gold standard” treatment—luxury as opposed to necessity. It wasn’t a matter of not wanting to provide it to the claimants, said the province. The government was restrained by finite resources that had to be allocated to all residents equally. If Ontario or other jurisdictions could provide ABA/IBI to their residents, it was because these other jurisdictions were financially capable of funding the treatment.

The substantive principle of law to be considered, said B.C., is that judicial intervention is always unwarranted where inferences of discrimination short-circuit the democratic processes of government. This includes the administrative and policy-based processes that balance efficacy and the allocation of scarce resources for competing health care needs.³⁸

“The reality,” said the B.C. Attorney General, “is that people diagnosed with a severe disability like autism, or fetal alcohol syndrome, or even a severe learning disability, will feel offended and wronged when treatment for their condition is not publicly funded.” Paraphrasing Allen J., the appellant said, “[T]hey will find no comfort knowing they too may be eligible for [cancer therapy or massage therapy]; they want treatment for their autistic condition as well”.³⁹

The decision to fund various treatments, said the Attorney General, “are not judgments about the worth of individuals in the sense contemplated by section 15; they are decisions made about the best way to allocate finite resources across a range of demands and opportunities to ensure the highest standards of health for the population of the province.”⁴⁰

The appellants warned that, if the government’s discretionary decision-making ability is destined to be “viewed through a judicial lens which converts any decision to deny, delay or disappoint into a moral judgment” and, further, is imbued with a “discriminatory animus”, then the Court will be pronouncing a constitutional right to particular health services for preferred groups of individuals. The consequences would be contrary to the core values of the Constitution: it would mean lower funding for health care services to others, “other allocations of resources that are not subject to judicial review”, and “new opportunities and obstacles overnight.”⁴¹

In its submissions, Ontario’s Attorney General stated that section 15(1) of the *Charter* does not authorize courts to wade into the “soft law”⁴² or policy pool of program creation.”⁴³ “While the establishment of such a new program may prove to be good

37. *Ibid.*

38. *Ibid.* at para. 68.

39. *Ibid.* at para. 80.

40. *Ibid.*

41. *Ibid.* at paras. 116–17.

public policy, nothing in the s.15 jurisprudence suggests a positive obligation on the state to establish a new program.”⁴⁴

Ontario claimed that the real issue was whether individuals could compel a provincial government to provide “a discrete service ... that will help alleviate ... general disadvantage”. This was not a case in which the claimants, like those in *Eldridge*,⁴⁵ were seeking “equal access to services that are available to all.”⁴⁶

Here, Ontario posited, the claimants were making an impossible bid for funding for “an entirely new service outside the parameters of the kinds of services funded by the existing health care system”.⁴⁷ Even if the treatment were beneficial, a medical “recommendation” by a health care practitioner did not raise the service to the level that would attract constitutional protection under the *CHA* or provincial legislation.⁴⁸

Ontario relied on an academic article written by Donna Greschner and Stephen Lewis to support its claim that constitutionality was a red herring, in which the authors post-trial asserted that “[*Auton*] is about seeking a bigger share of the resource pie; it does not engage basic questions of citizenship, the fundamental value captured by the principle of universality”.⁴⁹

The unassailable nature of the decision-making power attached to the allocation of public resources, B.C., declared, is rooted in Canada’s constitutional division of powers. Our national constitution confers upon the executive branch of provincial government the exclusive jurisdiction to make executive (legislative and administrative) decisions involving the expenditure of a province’s tax dollars.

There was no dispute between the parties that, if the government provided a public service and if a *prima facie* *Charter* violation by the government could be established

42. L. Pottie and L. Sossin, “Demystifying the Boundaries of Public Law: Policy, Discretion and Social Welfare” (2005) online: Discretionary Justice and Social Welfare <<http://www.library.utoronto.ca/justiceandsocial/demystifying.doc>>. According to the authors at p. 149, “soft law” describes the “guidelines, directives, and other informal instruments that influence discretionary decision-making”.

43. Factum of the Attorney General of Ontario, at para. 39.

44. *Ibid.* at para. 54.

45. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, in which the deaf claimants sought and obtained a declaration that the B.C. government’s refusal to fund sign interpreters for them violated their s. 15(1) *Charter* rights because the lack of interpretation services prevented them from accessing public health care.

46. *Supra* note 43 at para. 40.

47. *Ibid.* at paras. 41, 44.

48. *Ibid.* at para. 47.

49. *Ibid.* at para. 49. See D. Greschner & S. Lewis, “Auton and Evidence-Based Decision-Making: Medicine in the Courts” (2003) 82 Can. Bar Rev. 501.

in the delivery or allocation of that service, then it was incumbent upon the Courts to intervene when asked to determine *Charter* violations.

But in this case, the B.C. government had chosen to *not* provide ABA/IBI treatment as a medicare service. Therefore, said B.C., the legal doctrine of exclusivity and separation of powers precluded the Court from second-guessing the discretionary decision.

The claimants brought out the heavy artillery of *Granovsky*, *Law*, *Eldridge*, and *Vriend*—each a heavyweight in protecting the rights of the disabled and the disenfranchised. The impact was minimal, though, not much more than buckshot in the trees when fired up against the government's munitions of discretionary "benevolence."

The Supreme Court distinguished *Eldridge* and *Vriend* by refusing to frame *Auton* as an access to services case or as a case of simple under-inclusion.

V. INSTANT REPLAY: BEHIND GOLIATH'S BOB AND WEAVE

A. *The Tao of Disability Law*

We were warned. In 1998 Grant and Mosoff⁵⁰ envisaged such an objectionable outcome. Given the dichotomous judgments in *Eaton*⁵¹ and *Eldridge*, it was bound to happen, they predicted.

In *Eldridge*, the Supreme Court of Canada analyzed the issues of disability from the norm, which was inherently a position of ability, said the authors.⁵² The goal of the bench at that time was to accommodate the different abilities of the deaf claimants so as to facilitate access to public health services previously inaccessible. This would provide the claimants with an experience as close as possible to the experiences of the abled consumer.⁵³

The Court was faced with *Eldridge* shortly after *Eaton*. Emily Eaton was a child living with physical and mental disabilities. Her parents wanted to have her placed in a regular classroom environment with special education supports. Instead, the Court directed that she be placed in a segregated special education classroom, on an appeal from a decision of the Ontario Special Education Tribunal.⁵⁴

The *Eldridge* Court adopted the *Eaton* Court's "sink or swim" theory wherein the *Eaton* Court held that the attribution of stereotypical characteristic-based (*i.e.* race or gender) reasoning was an inappropriate test for disability claims. If one does not allow for the condition of disability, said the Court, one ignores the disability and forces the

50. I. Grant & J. Mosoff, "Hearing Claims of Inequality: *Eldridge v. British Columbia (A.G.)*" (1998) 10 C.J.W.L. 229.

51. *Eaton v. Brant County Board of Education* (1997), 142 D.L.R. (4th) 385 (S.C.C.).

52. *Supra* note 50 at 231.

53. *Ibid.*

54. *Supra* note 51.

individual to sink or swim in the mainstream environment. This was improper reverse stereotyping.⁵⁵

The Supreme Court believed that Emily Eaton would not be able to swim in the mainstream environment, even with available accommodation, and concluded she would surely sink. But in *Eldridge*, the Court believed that the deaf claimants could swim in the mainstream with available accommodation.

The difference in reasoning might be explained by the Court's distinguishing the nature of the benefits requested in each case. Grant and Mosoff describe it thus:

In *Eldridge*, the nature of the benefit (accessing the health care system) and the nature of the accommodation (the provision of interpreters) were both clear. Participating in the "social mainstream" meant using the health care system. In these circumstances, the accommodation would make the deaf patient indistinguishable from the hearing patient. The Court was able to find discrimination by emphasizing how the typical person experiences this benefit.⁵⁶

Grant and Mosoff claim that, in situations where the benefit is not so concretely defined as interpretive services in *Eldridge*, accommodating difference is a greater challenge. The benefit of general education is much less distinctive than sign-language interpretation service and thus becomes more problematic.

Emily Eaton was judicially excluded from the mainstream experience because she was perceived to be "too different from her abled peers".⁵⁷ The problem, according to Grant and Mosoff, was that Eaton "was so different from the typical child ... that the Court was unable to apply the same standard."⁵⁸ Because the judges could not imagine Eaton having an experience of life resembling the norm, Eaton was accommodated within a substitute system so as to facilitate interaction in an alternative social stream inclusive of those who are different from—and less privileged than—the norm.

Rather than recognize segregation as systemic differentiation of the kind engaging historical prejudices, the Court considered exclusionary accommodation as merely an adjustment to the education segment of the mainstream community, which—fortunately—responded to the best interests of Emily Eaton in the view of the judges.

Grant and Mosoff identify another fundamental difference between the *Eaton* and *Eldridge* judgments. In *Eldridge*, the Court construed a standard form of health care as attracting universal entitlement. The requested benefit of sign-language interpretation would permit access to standard health care to hearing-impaired persons who could then experience care similar to the mainstream population. This was a good thing.⁵⁹

55. *Supra* note 45 at 406.

56. *Supra* note 50 at 233.

57. *Ibid.*

58. *Ibid.* at 235.

59. *Ibid.* at 236.

In *Eaton*, the Court rejected the idea that there was a universal entitlement to a standard form of education. The requested benefit, *i.e.* placement in a regular classroom with special education support, might permit access to an education. But in *Eaton*, the Court instead adopted a paternalistic reliance on the opportunity for an alternative special education. The Court perceived that Emily Eaton would not be capable of an educational experience as close as possible to the experiences of mainstream pupils. The Court's decision would, in effect, "save" Eaton from being forced to sink within the mainstream classroom because she was too unlike the mainstream pupils. Yet, say the authors, it was the Court's stereotyping of Eaton's differences that "made the Court unable to apply the standard of education that applied to her more 'able' peers."⁶⁰

Grant and Mosoff point out that, if the Court had characterized the benefit in *Eaton* as access to mainstream education in order to prepare children to participate and function in the world, as it subsequently did in *Eldridge*, the discrimination question would have been answered differently.⁶¹

Thus, the Court's failure in *Eaton* to understand the importance of mainstream inclusion and its failure to recognize the pejorative emphasis on the "abnormal" in its desire to do the right thing poses a real danger to the achievement of full social participation for persons living with disabilities. The authors warned us about this potential step backwards and it has come to fruition.⁶²

In their submissions, the petitioners and the interveners supporting them made a claim of systemic discrimination by the government of B.C. The discrimination, they said, was evident in a pattern of neglect by the government such that the treatment of the underlying condition of autism was persistently avoided. As I will show later, the B.C. Court of Appeal emphatically embraced this position.

It was asserted that the effect on the claimants was that they felt excluded, disrespected, and lacking dignity. The *Law* test is generally perceived as insufficient to address this critical issue. As joint interveners Legal Education and Action Fund (LEAF) and Disabled Women's Network Canada (DAWN) observed,

The *Law* test includes a "checklist" of factors that are often applied in a mechanistic fashion, despite the Court's direction to the contrary. The focus on formalistic rules acts to decontextualize systemic inequality analyses. Moreover, some of the factors from *Law* can be improperly used to overemphasize a focus on the purpose rather than the effects of the law or policy in question.⁶³

60. *Ibid.* at 234.

61. *Ibid.*

62. *Ibid.*

63. Joint factum of LEAF and DAWN, at para. 6.

Systemic discrimination is harmful and engages the violation of human dignity. The concept of dignity is an element to be considered under the third branch of the *Law* test, if the analysis proceeds to that stage. According to LEAF and DAWN,

Discrimination can include experiences of exploitation, marginalization, powerlessness, cultural imperialism, violence, historical disadvantage, and exclusion from the mainstream of society. These experiences are indicia of inequality that are pertinent to the purpose of s. 15.

...

To fulfil the special role of s. 15, focus must be on the promotion of equality. The concrete power relations at the source of discriminatory behaviour must be examined to link more clearly the impugned law or (in)action to the relations of domination that perpetuate and rationalize the systemic inequality of oppressed groups. In this case the resulting experience of marginalization, powerlessness, non-disabled imperialism, and potential violence are all profound indicia of inequality and injury to dignity.⁶⁴

It was an issue that fell by the wayside because the claim never made it beyond the first stage of the legal test.

(i) **Soft Law**

In *Auton*, the claimants directed their *Charter* challenge to *the policy underlying the medicare scheme in B.C. and to the application of the policy* to the welfare of the child claimants.

Laura Pottie and Lorne Sossin declare that it is time to re-examine the boundaries separating judicial and executive roles and to question whether they “are tenable or desirable” in the context of social policy decisions.⁶⁵

The established legal relationship between political decision-making and judicial review is resistant to modification and hampers the maturation of *Charter* litigation, they state. For disadvantaged individuals who seek to exercise social welfare rights, the capacity to challenge soft law (in the form of government policy and policy instruments) is “illusory”.⁶⁶ Yet, argue Pottie and Sossin, policy is the very fabric of discretionary decision making, and the courts are not restricted in their judicial review of soft law with respect to *Charter* compliance.⁶⁷

In fact, they maintain, the Supreme Court’s academic differentiation between soft law instruments, legislation, and government action is regressive and “is not an answer to *Charter* applicability”.⁶⁸ The authors observe, “The Court’s deference and efficiency

64. *Ibid.* at paras. 49–50.

65. *Supra* note 42.

66. *Ibid.* at para. 81.

67. *Ibid.* at para. 23.

68. *Ibid.* at para. 39.

arguments are misplaced, since a refusal to review policy instruments leads only to more litigation, less effective remedies and protection of *Charter* rights, and potentially less deference to legislative choice of policy-implementing instruments.”⁶⁹

While deference and efficiency may have broad implications in law, “they are of particular concern in the social welfare context”,⁷⁰ where they may give rise to broader remedies of wider application. For those citizens who rely on social welfare for their well-being, broad remedies can ensure real substance and meaning to the intent and purpose of the *Charter*.

Pottie and Sossin quote La Forest J. in *Eldridge* in support of their position. A government policy is a decision writ large, they claim, and as such it ought to be consistent with *Charter* values.⁷¹ La Forest J. clearly confirms this view:

Thus, the limitations on statutory authority which are imposed by the *Charter* will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.⁷²

The characterization of a decision as being “policy” does not shield it from *Charter* scrutiny in *Auton*. The *Charter* applies to a wide range of government action. In fact, McLachlin C.J. and Bastarache J., in *Bell Canada* had already jointly concluded that policy guidelines are a form of law.⁷³ Just as the Court was able to direct the government to create a new benefit in *Eldridge*, it has embraced its jurisdiction to direct the government to adopt a new legal aid policy in the case of *G.J.*⁷⁴

Consider the effect of refusing to direct *Charter* remedies where they are appropriate and most effective, suggest Pottie and Sossin. Repetitive litigation will ensue. Forcing vulnerable claimants into court is not an answer, either. The result would be an unfair burden on the claimants who possess little in the way of resources, making litigation implausible.⁷⁵

In *Falkiner*,⁷⁶ a “spouse in the house” case in which the definition of *spouse* was challenged as unconstitutional, the Ontario Court of Appeal confirmed that the social welfare system must comply with the *Charter*. Social welfare decision makers are

69. *Ibid.*

70. *Ibid.*

71. *Ibid.* at para. 43.

72. *Supra* note 45, para. 21.

73. *Supra* note 42 at para. 48.

74. *Ibid.* at para 45. See *New Brunswick (Minister of Health and Community Services) v. G.J.*, [1999] 3 S.C.R. 46 at 102, in which the Law Society of New Brunswick’s policy to deny legal aid funding to parents subject to state custody applications was challenged.

75. *Ibid.* at para. 50.

76. *Falkiner v. Ontario*, [2002] O.J. No. 1771 (C.A.).

obliged to provide sufficient reasons for establishing the correctness and constitutionality of their decision—otherwise the decision is subject to judicial review.⁷⁷

Policy concerns underlying the *Auton* decision were identified by Saunders J. at Court of Appeal:

As in the *Eldridge* case, it is not the legislation itself, but a failure to give relevant effect to the legislation by appropriate policy and by appropriate legislative and administrative action which has raised the question of the violation of *Charter* rights. The application of the legislation is said by the petitioners to be wrongly under-inclusive and through being wrongly under-inclusive, a violation of their *Charter* rights.⁷⁸

The executive must be held to account for the discretionary decisions they make, “including the development and content of soft law”, state Pottie and Sossin.⁷⁹ The goal is not “to invite the courts to micro-manage the administrative process but rather to ensure the process itself accorded with the principles of fairness, reasonableness and the rule of law.”⁸⁰

(ii) Systemic Discriminatory Attitudes

The concept of systemic discrimination has been abundantly canvassed in Canadian human rights jurisprudence. In *C.N.R. v. Canada (Human Rights Commission)*,⁸¹ the Supreme Court described it as a pattern of practices or attitudes that have, whether by design or impact, the effect of limiting an individual’s or a group’s right to the opportunities generally available because of attributed rather than actual characteristics.⁸²

Ena Chadna and Laura Schatz have reviewed the notional frameworks of disability and they stress that “Canada continues to be rooted in the prejudicial economic notions of disability.”⁸³ The most prevalent and destructive model is economic:

In the economic model, an individual with a disability is seen as a person who embodies a cost and these costs pose an economic liability on the state. Since this cost must be factored into society-wide public policy decision on resource allocation, disability becomes a socially created category of dependency.⁸⁴

77. *Supra* note 42 at para 66. Also see *Nieberg (Litigation Guardian of) v. Ontario*, [2004] O.J. No. 1135.

78. *Supra* note 10 at para. 112.

79. *Ibid.*

80. *Ibid.*

81. [1987] 1 S.C.R. 1114 at para. 34, referring to the Abella Report.

82. *Ibid.*

83. E. Chadna & L. Schatz, “Human Dignity and Economic Integrity for Persons with Disabilities: A Commentary on the Supreme Court’s Decisions in *Granovsky* and *Martin*” (2004) 19 J. L. & Soc. Pol’y 94 at 97.

84. *Ibid.* at 98.

Public dependency is a negative trait and results in a state-induced attitude of charity and pity towards disabled individuals who are excluded from the mainstream and who are unable to achieve independence. In other words, say Chadna and Schatz, state benevolence is provided only to those who can establish the most need in terms of severity.⁸⁵ This “pervasive stereotype” results in the reinforcement of “a prevailing myth that persons with disabilities are not valuable contributors to society.”⁸⁶

In the case of children living with autism, the cost embodied is largely borne privately by the families of the children. It may be, too, that children are not typically valued as contributors to society until nearing the age of majority. Ironically, the claimants’ argument was that not even children who could establish the most severe forms of autism had their needs met by the province. Despite access being available (by means of their caregivers) to generalized health care, Allen J. noted, “[I]t is immediately obvious that none of those services, except [alternative behavioural support] even attempt to treat the condition of autism.”⁸⁷

The authors refer to the judgment of La Forest J. in *Eldridge* in which the Court evaluated systemic discrimination:

Persons with disabilities have been too often excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to individual stereotyping and relegated to institutions ... This historical disadvantage has been to a great extent shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the “equal concern, respect and consideration” that s. 15(1) of the *Charter* demands. Instead they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the mainstream has been conditional upon their emulation of able-bodied norms.⁸⁸

In *Law*, the Court explored the notion of human dignity, articulating it as a central objective of section 15. Said the Court,

It may be said 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 ...

...

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment.

...

It is enhanced by laws that are sensitive to the needs, capacities, and merits of different individuals ... Human dignity is harmed when individuals and groups are

85. *Ibid.*

86. *Ibid.* at 98, 99.

87. *Supra* note 1 at para. 53.

88. *Supra* note 45.

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 ... concerns the manner in which a person legitimately feels when confronted with a particular law.⁸⁹

Saunders J. candidly admonished the government for its failure to accommodate the dignity of the *Auton* claimants. The systematic avoidance strategies of the Crown belied an attitude of systemic disregard towards the petitioners, conduct that must, she implied, be the product of systemic discrimination. She stated,

The four adult petitioners were consistently denied or refused funding for Lovaas Autism Treatment for a significant period, measurable in years and not in months, from when they were first told by their medical advisors that the infant petitioners ought to be receiving Lovaas Autism Treatment, or the equivalent, and from when the four infant petitioners were first started on the treatment at the expense of the four adult petitioners, respectively.

After some time, during which the Crown was persistently asked to fund the treatments, the decision of the Supreme Court of Canada was handed down in *Eldridge*. In my opinion, a fair assessment of the effect of that case, by Crown officers and their legal advisers, should have made the Crown officers aware that in continuing to refuse to fund Lovaas Autism Treatment for the infant petitioners they were breaching the *Charter* rights of all four infant petitioners. A further year passed, and on 14 August, 1998 the petitioners started these proceedings. At that stage a refusal on the part of the Crown to fund Lovaas Autism Treatment for the four infant petitioners, who, through the adult petitioners, had asserted their *Charter* rights in circumstances not readily distinguishable from the circumstances in the *Eldridge* case, gave rise to what can be called either a state of inertia or a state of stubborn recalcitrance on the part of Crown officers, sufficient, in my opinion, in its prolonged obstructiveness, to engage the necessity for some form of financial award as part of an effective remedy under s-s.24(1) of the *Charter*.⁹⁰

At the Supreme Court, the government of Ontario exhibited just such a discriminatory approach. As noted *infra*, one might conclude that Ontario's caution about converting a decision to deny or delay into a moral judgment, imbued with a "discriminatory animus",⁹¹ reflects a pattern of arrogant disregard for the critical health care needs of citizens and signals the existence of an inappropriate desire to exercise state power with immunity.

One might also reasonably question how it is possible to deny or delay funding for a critical health need without making a moral judgment about who is most deserving of funding. Moreover, blustering about constitutionalizing particular health care benefits may be a red herring tactic, one might conclude, because the core values of the *Constitution* entrench an equal right to health care when health care is provided

89. *Supra* at note 18 at paras. 51, 53.

90. *Supra* note 10 at paras. 135, 136.

91. *Supra* note 43.

by the state, and the failure of providing for the health care need adversely affects one's dignity and ability to participate in, and contribute to, society.

The concept of discrimination tends to be amorphous. We know that discrimination occurs when a person suffers disadvantage or is denied opportunities available to other members of society because he or she has certain personal characteristics that are perceived to be different from the norm, and the person is consequently approached with apprehension. Explains Margot Young, "[T]he further away a claimant is from the mainstream, privileged norm, the more difficult it will be for her or him to persuade the Court it is the norm, not the individual, in which the fault lies."⁹²

(iii) Positive Obligations of the Crown

The Court in *Eldridge* steered away from commenting on whether section 15 obliges the government to identify and remedy systemic inequalities, observe Grant and Mosoff.⁹³ This stance would be, in part, a manifestation of the same legal doctrine of exclusivity espoused by the Court and the Attorneys General in *Auton* in which the Courts will carefully avoid breaching the executive and administrative boundaries that protect and shroud political decision-making.

Saunders J. of the B.C. Court of Appeal considered whether the B.C. government had a positive legal obligation to provide the benefit of ABA/IBI to the *Auton* petitioners. The government insisted that

the administration of the system does not discriminate against the infant petitioners because s. 15 is not intended to eliminate the functional limitations created by the affliction but rather that the prohibition of discrimination on an enumerated ground is intended to prevent socially constructed handicaps, which autism or ASD are not.⁹⁴

In response, Saunders J. held that the extent of the government's obligation under the health care scheme bears upon the root of discrimination.⁹⁵ She emphasized that, while not all refusals to treat a health condition will be discriminatory, this was a case where the primary needs of the children were not being met. Without disturbing the findings of Allen J. that ABA/IBI treatment was the only effective treatment for the children, she stressed that the absence of treatment

will very likely lead to an adult life of isolation and institutionalization, and in which the individual's development has been so compromised that he or she likely will be unable to access service programs such as education, and likely will require one-on-one assistance to access other services such as health care for physical ailments. It is also in the context of a treatment method which holds a realistic prospect of sub-

92. M. Young, "Sameness/Difference: A Tale of Two Girls" (1997) 4 *Review of Constitutional Studies* 150 at 165.

93. *Supra* note 50 at 232.

94. *Supra* note 10 at para. 46.

95. *Ibid.* at para. 48.

stantial improvement in communication and behavioural skills, no alternate treatment program offered, and the certain knowledge that other serious, and indeed less serious, conditions are treated by state funded therapies.⁹⁶

Allen J. at trial held that the social disadvantage borne by the children was directly related to their inability to benefit equally from the health care scheme provided by the government. She stated,

Here funding appropriate treatment for autism is entirely consistent with the ameliorative purpose of the health legislation. The Medical Services Plan is designed to assist people with health care needs. As stated in *Eldridge, supra*, the values of the health care system are to promote health, prevention and treatment of illness and disease and to realize those values through a publicly funded health care system. Having created a universal medicare system of health benefits, the government is prohibited from conferring those benefits in a discriminatory manner. In the case of children with autism, their primary health care need is, where indicated, early intensive behavioural intervention.⁹⁷

Bruce Porter, of the Centre for Equality Rights in Accommodation (CERA), criticizes the failure of the judiciary to recognize a positive obligation arising from the *Charter* in relation to social welfare rights:

Giving primacy to the court's role in ensuring that the needs of marginalized groups are not ignored by legislatures relies on a reaffirmation of the positive, remedial component of equality rights. The majority of the Court affirms for the first time in *Eldridge* and again in *Vriend* that section 15 guarantees "substantive" as well as "formal" equality.⁹⁸

While early *Charter* cases were assessed as circumscribing the limits of positive duties of the government, he says, these judicial findings were made within the model of formal equality, as opposed to substantive equality. The Court approached the issue with mounting conservatism and over time replaced this view "by comments suggesting that the issue of positive obligations had somehow been decided in the negative".⁹⁹

Porter points to a watershed moment when La Forest J., in *Eldridge*, took a solid run at the notion of positive obligations, effectively advancing the scope and application of the *Charter*:

In their effort to persuade this Court otherwise, the respondents and their supporting interveners maintain that section 15(1) does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action. Adverse effects only arise from benefit programs, they aver, when those programs exacerbate the disparities between the group claiming a section 15(1) violation and

96. *Ibid.* at para. 49.

97. *Supra* note 1 at para. 126.

98. B. Porter, "Beyond Andrews: Substantive Equality and Positive Obligations after *Eldridge* and *Vriend*" (1998) 9:3 Const. Forum Const. 71 at 73.

99. *Ibid.* at 74.

the general population. They assert, in other words, that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantages of those benefits.

In my view, this position bespeaks a thin and impoverished vision of section 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence.¹⁰⁰

La Forest J.'s adoption of the Court's majority decision in *Haig* that "a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of section 15" confirms the Court's interest in a progressive approach to equality rights.¹⁰¹

But the Court in *Eldridge* fell short of establishing a positive obligation rule to bind the government because it missed the point. The Court distorted the issue, says Porter, framing it as statutory under-inclusion. He adds that, in order to fit the case into the existing section 15(1) framework, the Court created "a kind of mythical 'legislative act' or 'decision of elected legislators'" that "exaggerated the case for judicial deference to the legislature." The discrimination at issue in *Eldridge*, he argues, "was not really tied in any direct way to an act of the Legislature or even to decisions of elected representatives not to act."¹⁰² Rather, the real issue was

that those who had the authority and the means to ensure that such services were provided ... simply ignored the needs of a marginalized group.

...

In other words, it would no longer be correct to state that the government has no obligation to provide maternity benefits but once provided, must do so without discriminating. The approach adopted by the unanimous Court in *Eldridge* suggests that a failure to provide for the needs of pregnant women would infringe section 15 because failing to provide for such a need would discriminate against women, who need the benefit, in comparison to men, who do not.

...

The violation of section 15 at issue in *Eldridge* did not arise when any particular legislation was passed and proclaimed or any particular decision made pursuant to the legislation. It was at the point when the need arose and government or its delegates failed to respond that a violation of section 15 occurred.¹⁰³

The *Eldridge* decision found that the government had a responsibility to address the need for interpreter services through various options and that the government had

100. *Ibid.* at 75.

101. *Ibid.*

102. *Ibid.* at 76.

103. *Ibid.* at 77–78.

failed to live up to that responsibility, states Porter. The Court has so far neglected to take a hard look at substantive equality rights:

The point of the purposive approach emerging from *Eldridge* is to focus on the inequality that needs to be remedied by the provision of a service or benefit rather than on the question of how the inequality is connected to an existing statute. Once it is accepted that a government has a responsibility to meet certain needs of disadvantaged groups, which the Court accepts in *Eldridge*, then the failure to meet these needs constitutes a violation of section 15 at the moment the need arises and is ignored.¹⁰⁴

Porter refers with pointed emphasis to Iacobucci J.'s frustration with the "daily gripings" about judicial intrusions under the *Charter*:

Indeed, hardly a day goes by without some comment or criticism to the effect that under the Charter courts are wrongfully usurping the role of legislatures. I believe this allegation misunderstands what took place and what was intended when our country adopted the Charter ...¹⁰⁵

B. The Auton Legacy: If You Can't Be a Good Example, At Least Be a Horrible Warning

The Goliath of government arose in *Auton*, mustering significant public resources to assert the "right" to a perceived powerful monopoly on discretionary decision making. Alas, the Supreme Court of Canada bowed to such persuasion. In my view, this was not a case about disability rights. Goliath might as well have brought the action, seeking an endorsement from the Court that the economic interests espoused at the will of bureaucratic administrators shall always supersede substantive equality rights.

It is difficult to reconcile the reasoning of the Supreme Court in *Auton* in light of the existing *Charter* jurisprudence and when one considers the persistent criticisms of academic legal theorists and practitioners.

It is odd that the Court has weighed in so heavily on the side of Goliath when the Court has reviewed the discretionary decisions of the government in the past and found discrimination. In *Eldridge* the Court did direct the government to create, to fund, and to provide a discrete new benefit to a particular group of citizens based on a critical need. It did determine what the government should provide in health care policy and services, even though the subject matter was a matter for the provincial legislature and spoke only to access to health care. However, the Supreme Court took great pains to distinguish *Auton* from the body of law that came before it.

In *Auton*, the government did not dispute the fact that many of the children, without effective intervention, would face institutionalization as adults at great cost to the state. While these children are young, any economic liability of the government is deferred

104. *Ibid.* at 78.

105. *Ibid.* at 72.

to the family. The political choice of refusing to fund effective intervention such as ABA/IBI can be viewed as an economic decision to merely defer the cost of caring for severely autistic individuals until such future time as they will need to depend on state care.

The government did not consider it necessary to factor the cost into social policy decisions on resource allocation in this case because parents bear the cost personally. Arguably, this is the legal obligation of parents.

Despite the fact that ABA/IBI intervention furthers social independence, the government may deceive itself with the view that it has avoided creating social dependency for these children. Factors such as its significant expense and the notion that the treatment was novel served to convince the government and the Court that the choice to refuse the benefit was sound (this despite the fact that other provincial governments were providing it).

The Court sidestepped the degree to which the source of the discrimination lay in the exercise of discretion rather than the scope and ambit of the medicare scheme. Of equal significance to the Court's determination—but absent from it—was the nature of the impugned policy, which dictated decisions about meeting the important needs of the disabled and approving new treatments under the medicare scheme and whether the *Charter* rights of the claimants were ever considered.

The Court mischaracterized the issue at the heart of the case, asking instead whether the government was obliged to meet a particular health need of the claimants under the legislative scheme. The Court found that it was not, because the medicare scheme was a discretionary regime created in law to permit the exclusion of some individuals and groups from the ambit of health care. The exercise of discretion in permitting such exclusions was a matter within the sole jurisdiction of the state.

The real issue, however, was whether the government failed to give relevant effect to both the remedial medicare scheme and the *Charter* by adopting inappropriate policy and improper administrative action. In doing so, when compared to its provision of less critical benefits to less vulnerable groups, did the government ignore the primary needs of a marginalized group, exclude them from the enjoyment of society's benefits, harm their dignity, and fail to rectify and prevent discrimination against them? Sadly, there also lacked any meaningful consideration of international law instruments about the rights of children, an absence that speaks more to the privilege of power than it does to the fundamental purpose of Canadian human rights law.

The Court erred in veering away from a purposive and contextual interpretation of section 15(1) to literally construe the notion of "benefit", contrary to the objectives of section 15(1). The prayer for relief of the families was misconstrued when the Court framed it as a request for all medically necessary services. Further, the Court narrowly constructed a comparator group to exclude the claimants. Both of these strategies provided justification to reject the claimants' position under the *Law* test.

In essence, the Court connected the alleged discrimination directly to the legislative scheme, which then was strictly interpreted. The result was that the Court ignored the actual source of the discrimination and declined to determine whether—in real life—the policy and its application had a discriminatory effect on the children.

Unfortunately, it appears that the Court engaged in a stereotypical characterization of the autistic children. If the Court perceived that they might never be able to “swim” in the social mainstream, there could be no immediacy to their situation—the need might never be concretely addressed, as the Court was able to do in *Eldridge*. This was not a matter of what the executive reasonably intended to *include* in its medicare scheme; the focus instead was on what could be reasonably *excluded* without attracting judicial review.

It may be, too, that the *Auton* case was too intimately connected with the difficult issues of social and economic rights that emerged with some clarity in the pre-*Auton* *Gosselin* case. If the fear of the Court is that these previously unaddressed rights will infringe upon and upset the democratic process, one would hope that the Court would be prepared to tackle the issue directly. The bob and weave strategy tends to subject groups such as autistic children to further disadvantage as well as to stigmatization as “special interest groups”. The impact is distasteful: special interest groups are rarely seen as equally deserving of concern and respect, and certainly not deserving of getting what they *want*.

This was a missed opportunity to advance the efficacy of the *Law* test, for application to matters that challenge discretionary decisions of government relating to the provision of social benefits, case by case.

Although this paper does not intend to focus on the failings of the *Law* test, which is a topic vigorously debated elsewhere, one might suggest that, to be consistent with section 15(1) of the *Charter*, the Court ought to have asked:

1. Do the claimants suffer social, political, and legal disadvantage in society?
2. Was there a primary need of the claimants identified by the government, which, if left unmet, would result in these claimants not having the resources to take equal advantage of all public benefits and enjoyment of society?
3. Was the failure to meet the need based on a stereotypical assumption or a perception that funding for the benefit was less worthy of attention than funding other established benefits?
4. If stereotyping was evident, what was the source of the discriminatory perceptions: were they based on the government’s policy statements, or did they emanate from the attitudes and actions of administrators?
5. If the government refuses to meet the identified need, will the denial result in a failure to rectify existing differentiation based on disability and a failure to prevent future discrimination against the claimants?

6.If government does not meet the identified need, will such decision promote a society in which the claimants are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect, consideration, and receipt of benefits for funding for their identified need?

For individuals who are not “abled”, it is incumbent on adjudicators to craft an individual remedy that is barrier-free, whether it be to place the person in the abled mainstream world or to adjust segments of mainstream community to reflect the world of the differently abled so that full social participation can be achieved.

The *Charter* is a constitutional instrument, encompassing the supreme rule of law. Pursuant to section 52 of the *Constitution Act*, the government is bound to consider and apply the *Charter* to its decision making. In *Auton*, the Court overlooked the prospect of ensuring that governments consider and apply the *Charter* to effect a just result. Litigation prevention, as it were.

VI. ASSESSING THE DAMAGE

When reviewing the case from a principled legal perspective, the only reasonable conclusion was that the claimants in *Auton* established that the legislative choice not to provide a particular benefit clearly demonstrated a policy and effect that offended the very principle the Court identified as key: that it is not open to Parliament or legislation to enact a law whose policy objectives and provisions single out a disadvantaged group for inferior treatment.¹⁰⁶

At the end of the day in *Auton*, the B.C. government, sibling provinces, and Attorney General of Canada persuaded the Court to carve out a particular *Charter*-free¹⁰⁷ zone of protection from accountability for human rights violations.

In *Auton*, the conceptual errors in reasoning and the subtle pattern of conservatism that typically unfolds in these types of cases—*i.e.* those that engage the rights of the societally disadvantaged—is unsettling. The Supreme Court of Canada unabashedly waded into social policy issues (as it has in the past) and decided *Auton* on social policy grounds while at the same time espousing the opposing view that social policy ought to be sorted out exclusively within the jurisdiction of the democratic process of government.

It is unfortunate that the unfounded fears of the constitutionalization of health care rights caused the Court such anxiety. This case was just one of many in a long line of *Charter* cases that deserved adjudication regarding *disability* rights on its individual facts and circumstances.

106. *Supra* note 3 at paras. 40–41.

107. “*Charter*-free zone” is respectfully attributed to Mary Eberts, of Eberts, Symes, Pinto, and Jull, in FOCA’s oral submissions to the Court.

It is not often that the Court gets it wrong. On occasion, the effect of the law can be harsh—some judgments of the Court have weighed in on the side of the greater general good in opposition to the compelling needs of a few. However, *Auton* ought not to have been one of those of cases.

A. *The Retreat*

The decision in *Auton* was a devastating blow to the respondent families. Families of individuals living with autism are now compelled to continue spending exorbitant amounts of personal funds to provide ABA/IBI treatment to their children. Those who can afford to provide the treatment privately amass crippling debt and risk financial ruin. The children of those who cannot afford treatment simply do without.

The secondary, collateral impact is disturbing. As ABA/IBI treatment practices have evolved and improved over the decade, the recognition that autistic children and youth respond so successfully to the therapy offers a rejuvenating prospect to these families. This is the treatment that provides their child's singular and best opportunity to achieve his or her unique personal potential, a potential embracing dignity and participation in society to its fullest extent. In many families, often otherwise stable adult relationships are rendered vulnerable and exposed to harm as the severe financial and emotional stress of paying for treatment takes its toll.

Contrary to what some might argue, families are not merely clinging to a vacuous hope of a cure. Hundreds of stories from families who have personally observed the fundamental transformation of their own children and the assessments of professionals formed the evidentiary basis for these legal proceedings. The evidence of the treatment's efficacy and value was gathered over a course of several years by lawyers representing the families in *Auton*, and the most credible and resounding factual proof was put squarely before the courts. Ontario and other provinces have publicly acknowledged its merit and provide ABA/IBI as a social service.

The prevailing social and political will appears to strongly support government funding for ABA/IBI treatment, where needed. The result of the judgment has been publicly portrayed as tragic, as evidenced by the media coverage following its release.

On 20 December 2004, Ipsos-Reid released the results of a survey commissioned by Families for Early Autism Treatment of British Columbia. The poll reported that 84 per cent of Canadians between the ages of eighteen and fifty-four years believed that the provinces should pay for the treatment.¹⁰⁸ Of the approximately 125,000 families (with 150,000 affected children among them) who live with and care for children and youth diagnosed with autism, more than 30,000 petitioned provincial, territorial, and federal governments between 2003 and 2004, for public funding of the treatment.¹⁰⁹

108. See "Canadians Back Autism Funding from Provinces" (20 December 2004) online: Ipsos-Reid Corporation <<http://www.ipsos-na.com/news/pressrelease.cfm?id=2505>>.

109. See website for the Autism Society of Canada at <<http://www.autismsocietycanada.ca>>; see also

At the time the Supreme Court entertained submissions in *Auton* in June 2004, there were over 180 similar legal actions (approximately 150 in Ontario alone), involving more than 1600 families proceeding before provincial courts or human rights tribunals. At the time of the release of the Supreme Court of Canada decision, a class action had been commenced in Ontario.

Since 2002, when the issue attracted national scrutiny, editorial columns and letters to the editor in national, provincially syndicated, and local papers have fed through a steady dose of the plight of families, gracing the front page of newspapers more than once.

In fact, several days before the Supreme Court's decision in *Auton* was released, the *Globe and Mail* had bluntly criticized Ontario's limited IBI program for its significant deficiencies as unearthed by the Ombudsperson's Office: "After years of ignoring the plight of autistic children, Ontario has at last allotted a sizable amount of money to care for them, but in such an incompetent, inefficient manner that it's tempting to wonder if the province really does care."¹¹⁰

Media comments were not restricted to the families—professionals who have a clinical interest in promoting the treatment have also entered the fray. In 2003, Dr. Garry Martin, a professor of psychology at the University of Manitoba who has written extensively in the area of autism, told the *Winnipeg Free Press*,

ABA/IBI-based therapy has been scientifically proven to give children with autism their best chance to carry on normal, productive lives: virtually all children benefit from it and approximately 50 per cent of children who begin their programs prior to the age of five function normally after treatment ... How better to spend public health dollars than on a program that provides meaningful measurable, lasting benefits—not just for children with autism and their families, but for all Manitobans committed to wise public spending and the preservation of the health care system?¹¹¹

It was no comfort to these families for the highest court in the land to turn them away from the door of opportunity with a meagre offering of sympathy, an expression lacking empathy and a word of advice: turn your attention to the democratic process for the remedy sought. Vote. Lobby members of Parliament. The disheartened collective response of British Columbia families is certain to be "Been there, done that."

The reality is that many of these families have lobbied government with tenacity since 1999, to no avail. Members of Parliament have supported them in the legislature. To these families, the courts were the arbiters of justice and failed them. They are worn

Scott Reid, "Reid Speaks Out for Autistic Kids," Conservative Party of Canada, online: <http://www.scottreid.ca/archive_2003.html>.

110. The Autism Society has kept a comprehensive list of media articles. See <http://www.aso-toronto.org/news/news_nov_04.htm>.

111. "Autism Therapy Offers Chance," Focus, *Winnipeg Free Press* (10 April 2003).

and despondent, viewing the political value judgments as fundamentally skewed in which less important benefits are routinely provided to others. In Canada, if you do not live in Alberta, Ontario, or Newfoundland (and in those provinces, if your child is over the age of six), your child will not receive any publicly funded treatment.

At minimum, one would have expected the Court to admonish the B.C. government for making a decision that toys with the boundaries of the *Constitution*, delivering a caution that befits its role as a supervisory court. Certainly, an *obiter* comment encouraging the government to “do the right thing” would have eased the fears of the claimants and others similarly situated, and pointed the government in the right direction.

B. Solidarity in Difference

In Ontario, the debate continues before the Court of Appeal, the Ontario Human Rights Commission, and the Ontario Human Rights Tribunal over the delivery of Ontario’s funded ABA/IBI program. In those cases, the issues are whether the delivery of the treatment should be restricted by an arbitrary determination of efficacy or age, and whether the education system should bear responsibility for providing IBI programs as a special education program in public schools.

Perhaps, when the Supreme Court has an opportunity to revisit this issue, as it most likely will, the finest legal minds of our nation will have the opportunity and conviction to avoid viewing the issues through the prism of historical jurisprudence and irrational considerations. Perhaps context and purpose will, finally, give real substance to the constitution.

ACKNOWLEDGEMENT

Many thanks to Professor Joan Gilmour, Osgoode Hall Law School, Jamie Hildebrand, Legal Aid Ontario, and my close colleagues for their generous assistance in reviewing and commenting on the content of the draft paper.