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HEALTH CARE AT THE SUPREME COURT OF CANADA

I: *AUTON (GUARDIAN AD LITEM OF)* v. *BRITISH COLUMBIA (ATTORNEY GENERAL)*

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4 August 2005

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TABLE OF CONTENTS

Page

CANADA

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BIBLIOTHÈQUE DU PARLEMENT

HEALTH CARE AT THE SUPREME COURT OF CANADA
I: *AUTON (GUARDIAN AD LITEM OF)* V. *BRITISH COLUMBIA (ATTORNEY GENERAL)*

INTRODUCTION

In June 2004, the Supreme Court of Canada heard two appeals relating to the Canadian health care system. At issue in *Auton (Guardian ad litem of)* v. *British Columbia (Attorney General)*(1) (hereinafter, *Auton*, 2004), which was heard on 8 June 2004, was whether the B.C. government's decision not to fund a particular type of autism therapy was contrary to the *Canadian Charter of Rights and Freedoms*. At issue in *Chaoulli* v. *Quebec (Attorney General)*(2) was whether Quebec legislation that prohibited individuals from purchasing private health insurance for health services covered under the provincial plan was contrary to the Quebec *Charter of Human Rights and Freedoms*(3) and/or the *Canadian Charter of Rights and Freedoms.*

This paper summarizes the *Auton* decisions at trial, on appeal, and on appeal to the Supreme Court of Canada. It also reviews reactions to the decision.(4)

THE FACTS

This case involves four children with autism whose parents sought, on their children's behalf, funding for an intensive applied behaviour analysis (ABA) therapy known as Lovaas therapy. Lovaas therapy costs between $45,000 and $60,000 per year, and the cost of therapy was paid for by the children's parents.(5)

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(1) 2004 SCC 78.

(2) 2005 SCC 35.

(3) R.S.Q., c. C-12.

(4) The decision in *Chaoulli* v. *Quebec (Attorney General)* will be reviewed in a subsequent publication.

(5) At the time of trial, one of the children's mothers was no longer able to afford paying for treatment.

While the provincial government did fund some programs for children with autism and their families through the Ministry of Health, the Ministry of Children and Families, and the Ministry of Education, it did not fund ABA/IBI (Intensive Behavioural Intervention) therapy for a number of reasons, including the cost of the therapy and the controversy surrounding the treatment's success. This treatment was funded in some other provinces to varying degrees.

THE JUDGMENTS

A. The Decision at Trial (British Columbia Supreme Court)

The parents of the children with autism sought a declaration that the Ministry of Health, the Ministry of Education and the Ministry of Children and Families' decisions not to fund Lovaas treatment violated sections 7 and 15(1) of the *Canadian Charter of Rights and Freedoms* as well as certain other statutes. They also sought an order requiring the Crown to pay the costs of treatment already incurred as well as the future costs of treatment. The petition was heard in April 2000.

Before determining that the provincial government had violated section 15(1), Madam Justice Allan reviewed the nature of autism, what treatments were used, what treatment services for autism were available in other provinces, and the controversy surrounding Lovaas therapy.

The trial judge dealt only with the claim against the Ministry of Health, as she considered the issue to be "primarily a health issue."[6] On that basis, she examined the provisions of the *Canada Health Act*[7] and the British Columbia *Medicare Protection Act*[8] that were relevant to the petitioners' claim. She concluded that "the legislative framework does not preclude the delivery of early intensive ABA treatment to autistic children, where appropriate, within B.C.'s medicare scheme" (*Auton*, 2000, para. 109).

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(6) *Auton (Guardian ad litem of)* v. *British Columbia (Attorney General)*, 2000 BCSC 1142 (hereinafter, *Auton*, 2000), para. 88.

(7) R.S. 1985, c. C-6. The *Canada Health Act* lists the criteria and conditions that provinces and territories must meet in order to receive the full cash contribution that they are eligible to receive from the federal government.

(8) R.S.B.C 1996, c. 286.

1. Charter Analysis

a. Section 15

Section 15 is the Charter's equality guarantee. That section reads:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In reviewing whether the Ministry of Health's failure to fund Lovaas treatment violated the infant petitioners' equality rights under the Charter, Madam Justice Allan adopted the three-step test articulated in *Granovsky* v. *Canada (Minister of Employment and Immigration)*:[(9)]

> (1) Does the impugned law draw a formal distinction between the claimant and others on the basis of one or more personal characteristics or fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively different treatment between the claimant and others on the basis of one or more personal characteristics?
>
> (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 subsection 15(1) of the Charter? (*Auton*, 2000, para. 112)

She then reviewed a number of decisions that examined section 15 in the context of disability claims. That led to a review of the purpose of the legislation, in which she noted that "[t]he Medical Services Plan is designed to assist people with health care needs" (*Auton*, 2000, para. 126). She found that the Crown's interpretation of the medicare legislation is discriminatory:

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(9) 2000 SCC 28.

> 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. In failing to make appropriate accommodation for their health care needs, the Crown has discriminated against them. *It is not the medicare legislation that is discriminatory or defective but the Crown's overly narrow interpretation of it*." (*Auton*, 2000, para. 126; emphasis added)

She also concluded that the failure to provide these programs is based on the premise that children with autism cannot be treated effectively, and that effective treatment was necessary to reduce their marginalization and exclusion (*Auton*, 2000, para. 127).

Madam Justice Allan noted that, for the purpose of determining whether discrimination had occurred, it was appropriate to compare autistic children to non-autistic children or mentally disabled adults. In comparing children with autism to these two groups, she found that children with autism were subject to differential treatment based on mental disability, which is one of the enumerated grounds listed in subsection 15(1) (*Auton*, 2000, para. 129).

b. Section 1

Having found that the infant petitioners' section 15 rights were infringed, the judge went on to determine whether the infringement was justified under section 1 of the Charter. That provision reads as follows:

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

She applied the test for section 1 articulated in the Supreme Court of Canada decision in *R.* v. *Oakes*.[10] That test relies on the following stages of analysis:

(1) Is the objective of the legislation pressing and substantial?

(2) Are the means chosen to achieve the objective reasonable and demonstrably justifiable in a free and democratic society?

   (a) Is there a rational connection between the violation of rights and the aim of the legislation?

(10) [1986] 1 S.C.R. 103 (S.C.C.).

(b) Is there a minimal impairment of the right?

(c) Is the effect of the measure proportional to its objective?

Madam Justice Allan concluded that the violation of section 15(1) was not justified under section 1:

> The exclusion of effective treatment for autistic children undermines the primary objective of the medicare legislation, which is to provide universal health care. The additional stated objective of the statute, to make "judicious use" of limited health care resources, does not justify a violation of the petitioners' section 15 rights. Further, the state's failure to accommodate the petitioners cannot be classified as a minimal impairment of their rights. It follows that the Crown's submissions, which characterize the objective of the medicare legislation as funding core medical services that do not include ABA, cannot withstand the scrutiny of a proportionality analysis. (*Auton*, 2000, para. 151)

c. Section 7

Because she had found a violation of section 15(1), Madam Justice Allan noted that it was not necessary to determine whether there was a violation of section 7. That section states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

2. Remedy

Liability for the Charter violation was addressed by Madam Justice Allan in additional reasons.[11] In those reasons, she:

- declared that the Crown's failure to provide the infant petitioners with effective autism treatment is a denial of their section 15(1) Charter rights;
- directed that the Crown fund early intensive behavioural therapy for children with autism; and
- awarded each adult petitioner monetary damages in the amount of $20,000 (*Auton*, 2001, para. 65).

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(11) *Auton (Guardian ad litem of)* v. *British Columbia (Attorney General)*, 2001 BCSC 220 (hereinafter, *Auton*, 2001).

B. The Decision on Appeal (British Columbia Court of Appeal)

The Crown's appeal from the finding of a section 15 infringement and the petitioners' cross-appeal relating to the remedies granted by the trial judge were heard at the British Columbia Court of Appeal on 20 and 21 February 2002. The cross-appeal sought reimbursement for all expenses incurred for intensive behavioural intervention therapy, as well as the following declaration:

> [T]hat the Respondents pay to the Petitioners their full expenses for future Lovaas Autism Treatment:
>
> (a) from the date of judgment herein and continuing as long as it is recommended by a medical practitioner or psychologist licensed to practice in British Columbia with the intensity recommended by such medical practitioner or psychologist; and
>
> (b) that the Respondents may, on 60 days' notice, apply to vary this judgment by application supported by a competing medical opinion from a medical practitioner or psychologist licensed to practice in British Columbia.(12)

In the Court of Appeal decision, Madam Justice Saunders (Justice Hall concurring) accepted the trial judge's assessment that intensive behavioural intervention was necessary medical care (*Auton*, 2002, para. 37) and that there was a violation of section 15(1) of the Charter:

> … 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. (*Auton*, 2002, para. 51)

Madam Justice Saunders also allowed the cross-appeal in part. Justice Lambert agreed that there was a violation of section 15(1), but dissented with respect to the remedies granted.

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(12) *Auton (Guardian ad litem of)* v. *British Columbia (Attorney General)*, 2002 BCCA 538 (hereinafter, *Auton*, 2002), para. 23.

In her analysis of section 1, Madam Justice Saunders examined the *parens patriae* jurisdiction[13] of the Court as well as the *Convention on the Rights of the Child, 1989*.[14] Referring to *parens patriae* jurisdiction, she stated that:

> The underlying thesis that the law works for the protection and advantage of children strongly argues against finding s. 1 justification for the discriminatory administration of the health care scheme at issue in this case. (*Auton*, 2002, para. 61)

With respect to the effect of the *Convention on the Rights of the Child*, she noted that "[t]he Convention has moral force relevant on an assessment of the application of s. 1 of the *Charter* to a breach of s. 15(1)" (*Auton*, 2002, para. 63).

She concluded that the Crown did not meet its burden of "establishing a rational connection between the objective and the measures, or proportionality between the deleterious and salutary effects of the measures" (*Auton*, 2002, para. 67).

With respect to the petitioners' claim that their section 7 rights had been violated, Madam Justice Saunders determined that such a violation was not established. The following is her summary of the petitioners' section 7 argument:

> The petitioners contend that the Crown breached the rights of the infant petitioners to liberty and security of the person contrary to the principles of fundamental justice. They refer to the children's likely loss of the benefits of education and the opportunity to make and articulate decisions. They refer to the high probability such children will be institutionalized with attendant loss of liberty. They also refer to the loss of physical integrity through self-injurious behaviours and lack of communication skills, along with loss of psychological integrity through loss of privacy, disruption of family life and stigmatisation. (*Auton*, 2002, para. 71)

She concluded that "the underinclusiveness of the health system, even as it relates to children, would not violate a principle of fundamental justice" (*Auton*, 2002, para. 73).

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(13) *Parens patriae* refers to the state's guardianship over those with a disability.

(14) United Nations General Assembly Resolution 42/25, 20 November 1989.

With respect to the petitioners' cross-appeal, Madam Justice Saunders modified the trial judge's order by directing the following:

- that the four infant petitioners are entitled to government-funded treatment in the nature of that which they have been receiving, if such treatment is still useful to them; and

- that the Crown fund such treatment, from the time of the order declaring a breach of the Charter rights, provided that the petitioners establish the usefulness by a written opinion from the child's family physician supported by a written opinion from an appropriately qualified pediatrician or psychologist, to continue until the medical view is that no further significant benefit in alleviating the autistic condition can reasonably be expected from a continuation of the treatment (*Auton*, 2002, para. 92).

She did not amend the quantum of damages awarded by the trial judge (*Auton*, 2002, para. 99). Justice Lambert would have substituted the "symbolic" damages award by calculating an amount of financial reimbursement (*Auton*, 2002, para. 137).

C. The Supreme Court of Canada Decision

The unanimous judgment that allowed the Attorney General's appeal was released on 19 November 2004. From the outset, Madam Chief Justice McLachlin (for the Court) pointed out that the case was about more than the funding of autism treatment:

> In the background lies the larger issue of when, if ever, a province's public health plan under the *Canada Health Act* … is required to provide a particular health treatment outside the "core" services administered by doctors and hospitals. (*Auton*, 2004, para. 1)

1. Charter Analysis

a. Section 15

McLachlin C.J. reviewed the analytical frameworks used in assessing whether there has been a violation of section 15(1), noting that "[w]hatever framework is used, an overly technical approach to s. 15(1) is to be avoided" (*Auton*, 2004, para. 25). She then listed the issues arising from the application of section 15(1) to the facts:

> (1) Is the claim for a benefit *provided by law*? If not, what relevant benefit is provided by law?

> (2) Was the relevant benefit denied to the claimants while being granted to a comparator group alike in all ways relevant to benefit, except for the personal characteristic associated with an enumerated or analogous ground?
>
> (3) If the claimants succeed on the first two issues, is discrimination established by showing that the distinction denied their equal human worth and human dignity? (*Auton*, 2004, para. 26)

With respect to the first issue, Madam Chief Justice McLachlin determined that the benefit claimed was funding for all medically required treatment (*Auton*, 2004, para. 30). She then reviewed the legislative framework that governs the provision of health care services. She noted that the *Canada Health Act* establishes that provinces must fund "core" services, which are delivered by medical practitioners. However, some medically necessary or required services, such as ABA/IBI therapy for autistic children, lie outside of these "core" services (*Auton*, 2004, para. 32). In addition to requiring funding for all core services, the *Canada Health Act* allows provinces to fund non-core medical services, which are services delivered by people other than physicians (*Auton*, 2004, para. 33). She concluded that "the legislative scheme does not promise that any Canadian will receive funding for all medically required treatment" and that "the law did not provide funding for ABA/IBI therapy for autistic children" (*Auton*, 2004, paras. 35, 36).

The Chief Justice then addressed the petitioners' argument that the Supreme Court of Canada decision in *Eldridge* v. *British Columbia (Attorney General)*[15] required that medical benefits be equally provided. She distinguished *Eldridge* from *Auton*:

> *Eldridge* was concerned with unequal access to a benefit that the law conferred and with *applying* a benefit-granting law in a non-discriminatory fashion. By contrast, this case is concerned with access to a benefit that the law has not conferred. For this reason, *Eldridge* does not assist the petitioners. (*Auton*, 2004, para. 38)

The Chief Justice continued:

> This Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner. (*Auton*, 2004, para. 41)

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(15) [1997] 3 S.C.R. 624. The Court in *Eldridge* concluded that the failure of the province to provide sign language interpreters as an insured benefit under the Medical Services Plan violated subsection 15(1) of the Charter.

Having determined that the claim was not for a benefit provided by law, she went on to consider whether, had she found that the claim *was* for a benefit provided by law, the petitioners would have established that discrimination occurred. To determine whether the benefit was denied to the claimants while being granted to a comparator group, the Chief Justice then reviewed the principles related to choosing an appropriate comparator group. She concluded that the appropriate comparator "is a non-disabled person or a person suffering a disability other than a mental disability … seeking or receiving funding for a non-core therapy important for his or her present and future health, which is emergent and only recently becoming recognized as medically required" (*Auton*, 2004, para. 55).

Having determined the appropriate comparator group, she then concluded that on the evidence, differential treatment was not established (*Auton*, 2004, para. 58):

> There is no evidence suggesting that the government's approach to ABA/IBI therapy was different than its approach to other comparable, novel therapies for non-disabled persons or persons with a different type of disability. In the absence of such evidence, a finding of discrimination cannot be sustained. (*Auton*, 2004, para. 62)

b. Section 7

The Chief Justice noted that because the trial judge had found a section 15 violation, she did not address section 7 (*Auton*, 2004, para. 65). The Chief Justice further noted that the section 7 issue "was raised only fleetingly in written and oral submissions before this Court" (*Auton*, 2004, para. 66), and that the petitioners did not clearly identify the principles of fundamental justice allegedly breached. She concluded that "the limited submissions before us do not permit us to conclude that the government's conduct in the case at bar infringed the petitioners' s. 7 rights" (*Auton*, 2004, para. 67).

RESPONSES TO THE DECISION

Responses to the Supreme Court's decision in *Auton* were mixed. Provincial Attorneys General that had intervened in the appeal supported the decision, while parents of children with autism were "devastated and outraged."[16] Legal professionals were split on the decision. Jamie Cameron, a law professor at the University of Toronto, stated that the Court "has shown appropriate institutional caution … in resisting the invitation to constitutionalize the health care system … [because] once the precedent is created, it would encourage other

(16) Janice Tibbets, "Top Court: Health Care Not a Right," *The National Post*, 20 November 2004.

claims."[17] Other academics disagreed with the Court's approach, and criticized the Chief Justice's analysis with respect to section 15 for too narrowly defining the comparator group.[18] John Arvay, a British Columbia lawyer, strongly disagreed with the Court's approach, and reportedly stated that "the laudable work the [Supreme] court has done in the past in areas such as gay and lesbian rights was seriously undermined by the *Auton* ruling."[19]

Despite the claim's defeat at the Supreme Court of Canada, the *Auton* case has nonetheless yielded a number of positive effects. For example, the trial and Court of Appeal decisions led to the expansion of a small pilot treatment program in British Columbia into policy.[20] That province now delivers autism intervention services through three programs: Autism Funding, Under Age 6; Autism Funding, Ages 6-18; and Early Intensive Behavioural Intervention (EIBI).[21] Under the first program, families are allocated up to $20,000 per year to purchase autism intervention. Under the program for children aged 6-18, families are allocated up to $6,000 annually; and under the EIBI program, some treatment and intervention services for children under age 6 are delivered through contracted agencies.

Another positive development resulting from *Auton*'s success at trial and at the Court of Appeal is that it mobilized people in other provinces to seek access to and funding of autism treatment.[22] It has also been suggested that the Supreme Court's rejection of the Charter claim in *Auton* has actually garnered public support for government funding of autism treatment and intervention.[23] An Ipsos-Reid poll taken after the decision was released reported that 84% of Canadians supported public funding for EIBI despite the Supreme Court's decision.[24] The decision has also mobilized parliamentarians: a number of petitions were presented in the House of Commons with respect to the issue, including petitions requesting that the *Canada Health Act* be amended to include IBI/ABA as medically necessary treatment.[25]

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(17) *Ibid.*

(18) Christopher P. Manfredi and Antonia Maioni, "Litigating Innovation: Health Care Policy and the *Canadian Charter of Rights and Freedoms*," paper delivered at the 2005 Annual Meeting of the Canadian Political Science Association, London, Ontario, 1-4 June 2005, p. 20.

(19) Kirk Makin, "Where's the Guarantee?" *The Globe and Mail* [Toronto], 16 April 2005.

(20) Manfredi and Maioni (2005), p. 23.

(21) British Columbia Ministry of Children and Family Development, Early Childhood Development, Provincial Autism Initiatives Branch, *Autism Programs: Policies and Procedures*, 2004, p. 7.

(22) Manfredi and Maioni (2005), p. 23.

(23) *Ibid.*, p. 24.

(24) *Ibid.*

(25) The most recent petition was presented by Charles Angus, MP, on 27 June 2005.

One of the comments made in the wake of the *Auton* decision was that it would "have an impact across Canada, hindering [other] lawsuits … [that seek] court orders forcing governments to pay for early intervention therapy."(26) However, this comment overlooks the fact that other claims for access to early intervention therapy are not necessarily based on such access as an entitlement under provincial medical insurance programs. For example, in *Wynberg* v. *Ontario*,(27) a March 2005 decision of the Ontario Superior Court of Justice, the plaintiffs' action was based in part on access to early intervention therapy as a right under the *Education Act*.(28) The plaintiffs in that case alleged, *inter alia*, that the actions of the provincial government in developing and implementing the Intensive Early Intervention Program (IEIP), which provided or funded IBI for children ages 2 to 5, were contrary to section 15 of the Charter in that they discriminated against the infant plaintiffs on the basis of age.(29) The plaintiffs also claimed that their section 7 Charter rights were violated. The government's primary defence was that the decision to limit the age at which children would receive early intervention therapy was based on financial constraints.

Following an extremely detailed review of the development and implementation of the IEIP, Madam Justice Kiteley found that discrimination had occurred, and that the actions of the government were not saved by section 1 of the Charter. She made the following Order:

> [T]hat the age criterion for the termination of benefits in the IEIP Guidelines discriminates against the infant plaintiffs on the basis of age, contrary to section 15 of the Charter …
>
> [T]hat the defendant's failure and/or refusal to provide or to fund Intensive Behavioural Intervention (IBI), based on an individualized assessment of the needs of each particular child and consistent with the description and criteria set out on pages 12 through 15 of the September 2000 Program Guidelines for Regional Intensive Early Intervention Program for Children with Autism … speech therapy, occupational therapy and appropriate educational services for the minor plaintiffs was at October, 2002 and since then in violation of the rights of the infant plaintiffs on the basis of disability contrary to section 15 of the Canadian Charter of Rights and Freedoms and in violation of the Ontario Education Act.(30)

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(26) Tibbets (2004).

(27) 2005 Carswell Ont 124 (hereinafter, *Wynberg*).

(28) R.S.O. 1990, c. E.2.

(29) *Wynberg*, para. 4.

(30) *Ibid.*, paras. 871-872.

Damages were awarded to compensate for the costs of past and future IBI/ABA, and were to be calculated from the latest of the following points in time:

> (a) 1 November 2002 (Justice Kiteley determined that in October 2002 "Cabinet re-committed itself to the IEIP cut-off of age 6 with the knowledge that more children were aging out than were being served in the IEIP, that there was a gap once these children reached school and with the knowledge that serious consequences could occur";(31)
>
> (b) the child was no longer eligible for the IEIP;
>
> (c) "the parent(s) of the child enrolled the child in public school, because IBI/ABA was not available without payment of fees, and the parents paid for IBI/ABA at home or at school;
>
> (d) the child reached the age where s/he was eligible to be enrolled in public school but the parent(s) declined to enrol the child because IBI/ABA was not available without payment of fees, and the parents paid for IBI/ABA at home or at private school."(32)

Wynberg demonstrates that, despite the decision in *Auton*, other attempts may be successful in securing access to and funding for intensive behaviour therapy for children with autism. The Superior Court may have determined that the Government of British Columbia's failure to provide and fund autism treatment under its provincial medical insurance program did not violate the Charter, but that decision relates to autism treatment as a health care right, as opposed to the other ways in which the right to ABA/IBI is being characterized. It should be noted, however, that the Government of Ontario is appealing Madam Justice Kiteley's decision,(33) which means that the future of funding for ABA/IBI for children over the age of 5 is, at least in Ontario, far from certain.

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(31) *Ibid.*, para. 792.

(32) *Ibid.*, para. 808.

(33) "Ontario will appeal autism ruling," CBC News, 5 April 2005, available at http://www.cbc.ca/story/canada/national/2005/04/04/autism-ruling050404.html.