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in the courts

British Columbia government's failure to fully fund IBI/ABA not discriminatory

Last week, the Supreme Court of Canada released its long-awaited decision in the case *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*. In its decision, the Supreme Court ruled that the British Columbia government did not discriminate against autistic children in the province when it failed to fully fund applied behavioral therapy.

At the time of the trial of the action, the provincial government provided funding for a number of programs for autistic children but did not fund ABA/IBI therapy for all autistic children between the ages of three and six "because of, *inter alia*, financial constraints and the emergent and controversial nature of this therapy." The trial judge held that the denial of funding violated the children's equality rights under s. 15 of the *Charter*; she ordered the province to fund early ABA/IBI therapy for children with autism and awarded a "symbolic" award of \$20,000 to each of the parent-petitioners. The Court of Appeal agreed with the trial judge that the government had discriminated against the children contrary to s. 15 of the *Charter*. The province appealed that decision to the Supreme Court of Canada.

The Supreme Court granted the province's appeal and overturned the lower court decisions. The Supreme Court found that the benefit claimed - funding for all medically required treatment - was not provided by law. The *Canada Health Act* and the provincial medical legislation did not guarantee a right to funding for all medical services, but only to those described as core services. Since non-core services, like IBI/ABA were not required by the legislation, they could not be considered to be "provided by law". Section 15 of the *Charter*, which prevents differential treatment under the law, only applies to "benefits and burdens imposed by law." Therefore, the refusal by the province to pay for the therapy was not the denial of a service provided by law in a discriminatory fashion.

The Supreme Court also considered whether, alternatively, if the treatment were deemed to be "provided by law", the province had discriminated against autistic children. The Court concluded that the province had not discriminated against the autistic children in any event. The legislative scheme itself was not discriminatory in providing funding for non-core services to some groups while denying funding for ABA/IBI therapy to autistic children. By its very nature, the scheme was a partial health plan and was not meant to meet all medical needs. Moreover, the government's exclusion of funding did not discriminate against the children on the basis of disability. The actions of the government had to be compared with its treatment of other persons with disabilities seeking emergent, non-core therapies. There was no evidence suggesting that the government's approach to ABA/IBI therapy was different than its approach to other comparable, novel therapies.

Finally, the Supreme Court held that, based on the submissions before it, it could not determine that the province had infringed the children's rights under s. 7 of the *Charter* (which provides for "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").

reminder of upcoming conference

Safe Schools & Special Education: Managing the Dilemmas

December 8, 2004 • Holiday Inn on King, Toronto, ON

In our November 2004 eBulletin, we announced the upcoming LexisNexis "Safe Schools & Special Education" conference to be held December 8th. The conference will be chaired by Jennifer Trépanier of our firm, and will provide educators with the tools necessary to handle the challenging situations presented in educating special needs pupils who raise safety concerns.

We are pleased to extend an offer of a \$50.00 discount off the registration fee by simply mentioning this eBulletin notice when you register. We also note that there are group discounts of 20% off the registration fee for two registrants, and 30% off for three registrants or more. Students may attend for just \$50.00.

We hope to see you at the conference. Registration information is available by calling 1-800-668-6481 or by visiting www.lexisnexis.ca and clicking on "LexisNexis Seminar Series" at the bottom of the page.