Landmark Case

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EQUALITY RIGHTS AND ACCESS TO HEALTH CARE: *AUTON* v. *B.C. (A.G.)*

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Auton (Guardian ad litem of) v. *British Columbia (Attorney General)* (2004)

Facts

Connor Auton is a child living in British Columbia who suffers from autism. Autism is a disease of the central nervous system that is much studied but little understood. Children who suffer from autism have trouble communicating, withdraw themselves from play and other kinds of group activities, and find themselves repeating behaviour as a kind of comfort. The symptoms of autism range from the mild to the severe.[1]

Since the cause and cure of autism remain unknown, many parents of autistic children seek treatment that is new and not fully scientifically tested. These treatments are often expensive because they involve intense activities with multiple caregivers. Connor's family wished to enroll him in "Lovaas therapy", an intensive kind of therapy for autistic children aged three to six that costs between $45,000 and $60,000 per year. While they were able to pay for this therapy for a while, they were eventually unable to afford it. Although they tried to approach British Columbia's government for help, it refused to fund Lovaas therapy for Connor and other children in Connor's situation. After years of unsuccessful pleas, the parents of four children, including Connor, sued several different departments of the British Columbia government on their behalf, including the Ministry of Health and the Ministry of Children and Families. The child and adult petitioners argued that the government's failure to fund the therapy for autism unjustifiably discriminated against them.

In response, the B.C. government argued that it was only obliged to fund "core" services provided by doctors and hospitals. If a disease or condition was not "core", the government *might* decide to fund its treatment, but was not required by law to do so.

In Canada, public health care is regulated by the federal *Canada Health Act.* While the *Canada Health Act* requires that "core" health services provided by physicians must be fully funded by the

[1] For a compelling fictional portrayal of the mind of an older child with autism, see Mark Haddon, *The Curious Incident of the Dog in the Night-Time* (Toronto: Vintage Canada, 2004).

provinces, it also allows each province to decide which "non-core" medical services it desires to fully or partially fund. In British Columbia, the provincial *Medicare Protection Act* names classes of "health care practitioners" whose services the province will partially fund. Many "medically necessary or required services" fall outside the *Medicare Protection Act,* including the Lovaas therapy sought by Connor and his family.

The Right to Equality and Freedom from Discrimination

The main argument put forward by Connor and the other petitioners was that the province's refusal to fund the treatment violated their right to equality under the *Canadian Charter of Rights and Freedoms*. The *Canadian Charter of Rights and Freedoms, 1982* is part of the Constitution of Canada and protects everyone against actions of the government that violate our fundamental freedoms. It applies to both the provincial and federal governments in both their legislative and administrative capacities.

One of the fundamental freedoms protected by the *Charter* is described in s. 15(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.

In an early case about s. 15 entitled *Law v. Canada (Minister of Employment and Immigration),* the Supreme Court of Canada described its purpose as follows:

> to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect, and consideration.

The Case in the Courts

After hearing the arguments of the applicants (Connor, the other children, and their families) and the respondent (the Attorney General of British Columbia, representing the government), Justice Allan, a trial judge at the Supreme Court of British Columbia, decided that the government's decision to fund other "medically necessary treatments" but not Lovaas therapy was **unconstitutional** because it breached s. 15.

In finding that the government's decision breached s. 15, the trial judge began by asking whether Lovaas therapy was "medically necessary" in the sense that it was "a medical service that is essential to the health and medical treatment of an individual". She found that it was.

Second, she looked at how the B.C. government funded such "medically necessary" therapies. In examining their decisions, she decided that the government did fund *other* medically necessary services to non-autistic children and mentally disabled adults.

This, in her view, was discrimination against a disadvantaged group mentioned in s. 15(1) of the *Charter* (the mentally disabled) compared to non-autistic children and mentally disabled adults. She felt that the funding decision reflected a "misconceived stereotype" about autistic children, namely that they were untreatable. She also decided that the breach could not be "saved" under s. 1 of the *Charter.*

Section 1 of the Charter

Whenever a court decides that the government has breached a fundamental right or freedom protected by the *Charter,* it must then decide whether the breach can be justified under s. 1 of the *Charter.* Section 1 reads:

> 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.

The courts have interpreted s. 1 as a kind of historical compromise between a strict American constitution, which permits no breaches of fundamental rights, and the old Canadian system, in which the only protections against violations of rights came from the interpretations of courts of an unwritten **common law** inherited from English law.

While the first half of s. 1 *guarantees* the rights set out in the rest of the *Charter,* including the right to equality described in s. 15, the second half of s. 1 allows the government to **justify** some breaches of *Charter* rights. As the courts have read this second half of s. 1, it requires the government to prove that:

1. The limitation on the right is **prescribed by law.** This means that the limitation is authorized by a law and is clearly set out so that everyone can understand it.

2. The limitation is **demonstrably justified in a free and democratic society.** This means that there is a pressing and substantial reason for the limitation and that the method of carrying out the objective affects the right as little as possible.

In the trial judge's view, the B.C. government had **not** met the s. 1 test. While she acknowledged that governments must make difficult decisions about how to spend their limited funds on the many vulnerable groups that exist in society, this was not enough for her. She looked at the B.C. medicare legislation and decided that its "primary objective" was "universal healthcare". To exclude these children from universal healthcare could never be demonstrably justified in a free and democratic society, as it put them outside the health protections everyone else takes for granted.

Remedy

In considering what **remedy** would be appropriate to repair the damage done by the breach, the trial judge crafted an unusual solution. Most courts are content to issue a **declaration** that the government's actions **breach the *Charter*** and cannot be **saved** by s. 1. The courts count on the government to respect the ruling and act quickly to respect the right. Other courts delay the effect

of their ruling to allow the government to plan a change to a regime that properly respects the *Charter.*

However, the trial judge in this case looked at the damage she felt was occurring on an ongoing basis, and decided that the only means of repairing the breach of autistic children's *Charter* right to equality was to order the government to fund the effective treatment of their condition. Accordingly, she issued a **declaration** that the failure to fund the treatment breached s. 15 of the *Charter,* but also **directed** (ordered) that the government fund early intensive behavioural therapy for children with autism, and **awarded** a "symbolic" fee of $20,000 to each of the parents as damages reflecting the financial and emotional burdens of bringing this case forward against the government.

Appeal to British Columbia Court of Appeal

The government of British Columbia disagreed with the judgment and **appealed** it to the British Columbia Court of Appeal. The three judges of the Court of Appeal who heard the case agreed with the trial judge that discrimination under s. 15 had taken place. In the court's opinion, the failure of the health care administrators of the province to consider the individual needs of the autistic children suggested that their mental disability was less worthy of assistance than the temporary medical problems of other citizens. This discrimination created a "socially constructed handicap" that worsened the position of an already disadvantaged group.

In the Court of Appeal's view, the government could not justify the discrimination under s. 1 of the *Charter.* It looked at the importance to the children of the therapy and at the potential benefits not only for the children, but also for the communities in which they lived. The Court of Appeal did modify the order of Justice Allan to direct that the child petitioners, but not autistic children generally, were each entitled to government-funded treatment for Lovaas specifically until it was of no further significant benefit to them. Accordingly, other autistic children would be left behind unless they sued for similar funding.

Appeal to the Supreme Court of Canada

Still unsatisfied with the results of the case, the B.C. government applied to have its case heard by the Supreme Court of Canada, the highest appellate court in this country. The Supreme Court hears only the most important appeals from all the provinces and territories. Its decisions are final: they cannot be appealed to any other court. A panel of seven judges heard the case on June 9, 2004, and released their written decision on November 19, 2004.

A unanimous court decided that both the trial judge and the Court of Appeal had erred in their analysis of the *Charter* by failing to look closely enough at the wording of s. 15 of the *Charter.* To explain their decision, it will help to reread s. 15:

> 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.

Chief Justice Beverly McLachlin, who wrote the **decision** for the court, stressed the words "of the law" in her reasons. While she acknowledged that the children did suffer from a mental disability, she also noted that the "specific promise" of s. 15 is "confined to benefits and burdens 'of the law'." If the benefits or burdens are *not* "of the law", the children cannot take advantage of the *Charter.*

Analysis of a Section 15 Equality Right Claim

To understand Chief Justice McLachlin's opinion, it is necessary to look carefully at how courts decide if there is discrimination under s. 15 of the *Charter.* The first step courts take in a s. 15 analysis is to **identify** the group claiming discrimination, in this case autistic children with a mental disability.

The second step courts take is to try to compare the group claiming discrimination against a group that is identical to it in every way *except for the personal characteristic* listed in s. 15. Thus, to gauge if the autistic children were discriminated against, the court must compare the treatment of the groups and determine if one group suffers a "greater disability in the substance and application of the law than others".

In her analysis, Chief Justice McLachlin asked a simple question: Does *the law* provide anyone with *all* medically necessary treatment? If it did, the autistic children could complain that they were discriminated against. If it did not, there would be no "promise" in the legislation that allow the children to make a s. 15 claim.

To make her point clearer, the Chief Justice drew a line between what a government can do and what it cannot. A government cannot pass a law whose purpose is to single out a disadvantaged group for inferior treatment. However, a government may decide *not to extend a particular benefit* to a disadvantaged group as long as the decision has no discriminatory purpose. In other words, there is **no obligation on the government** to create a particular benefit.

Looking at the *Canada Health Act* and the British Columbia *Medicare Protection Act,* the Chief Justice stated baldly that neither is designed to meet *all* medical needs. Rather, the purpose of each is to meet *some* medical needs, defined as "core" needs. She argued that if the autistic children's claim were upheld, it would create classes of people entitled to non-core benefits. This would not be restricted solely to autistic children, but would extend to care for the aged, or for women's care, or for the care of other groups protected under s. 15 of the *Charter.*

This argument suggests that the courts could create, in a single decision, vast obligations for the government, not only in health care, but also in other areas where the government provides some benefits. Behind the argument is possibly the fear that if this case succeeded, the government would be unable to fund all these new areas, and would either directly or indirectly ignore s. 15 of the *Charter,* creating chaos.

Another question raised in Chief Justice McLachlin's reasons is the **uncertainty** behind funding novel therapies. At the beginning of her decision, she builds a case explaining why a government might not want to commit the vast funds ($45,000 to $60,000 per year per patient) to a new therapy that is not scientifically proven. While the parents of the children would definitely want their

children to receive the therapy, this is because they have a strong personal interest in having their children succeed. If the therapy turns out to have little or no effect, the parents have lost little and the government a lot of money that it could have spent on other social problems.

At the core of the Supreme Court's reluctance to second-guess governmental decisions is the realization that governments have scarce funds and political accountability. If they make the wrong decisions about how to spend the limited funds, the voters can turn to another party. If a court makes the wrong decision, it cannot be voted out.

On the other hand, many critics fear that the courts' **deference** to funding decisions will risk **immunizing** all decisions by government, even if they have a purpose that appears in some ways to discriminate against a vulnerable group. This case demonstrates the difficulty courts encounter when they wade into the **policy** decisions of an elected government.

The Reaction to *Auton*

In essence, the split between the opinions of the different levels of courts is based on different views of what the right to "equality" obliges a government to do. Some people believe that the government must take a **positive obligation** to support equality. This means that the government must be active to ensure that all Canadians are treated equally: it cannot simply stand by and fund some disadvantaged groups while not funding others. Others believe that the government has only a **negative obligation** to avoid discriminating via its actions. For example, if the government decided to fund *all* medically necessary treatment, it could not then step back and say, "We will fund all medically necessary treatment except for that of autistic children."

Critics of the Supreme Court's decision in *Auton* argue that it adopted a **formalistic** view of the right to equality, even though Chief Justice McLachlin stated that it was important to go beyond formalism to a **substantive and contextual view** of the right to equality.

To understand the difference between a formalistic view of equality and a substantive and contextual view of equality, it is useful to look at a couple of examples:

- **Formal equality** accepts statutory definitions on their face, so long as everyone in a given category is treated equally. For example, a tax benefit for all white protestant males would be permitted because the benefit treated all white protestant males equally even though women or those of other races or religions were treated unequally. This was the kind of "separate but equal" equality rejected by the U.S. civil rights movement, which targeted racially segregated bathrooms and water fountains in the southern states on the grounds that it lessened the dignity of those people who were forced to use them.

- **Substantive and contextual equality** goes beyond the letter of the law to ask whether a government program or statute is a means of perpetuating inequality rather than alleviating it. In the case of *Vriend v. Alberta,* decided by the Supreme Court in 1998, a gay man who was fired because of his sexual orientation asked the courts to find that the Alberta human rights legislation discriminated against him because it did not protect gays and lesbians from work-related discrimination. The Alberta government argued that the law treated

those of all sexual orientations, gay or straight, equally as all would be protected if fired based on a protected ground, such as their race. The Supreme Court disagreed, asking how the law *actually affected* people like Mr. Vriend in all their social circumstances. While the law did not appear to discriminate, its effect clearly did as gay men and lesbians experience systemic and wide-spread discrimination because of their sexual orientation while straight people do not. Substantive equality requires that when a government passes legislation or offer services, it must address inequalities in the text of the law, as well as any social and historic inequalities.

The critics of *Auton* argued that while Chief Justice McLachlin praised the substantive and contextual method, she did not employ it. "Core services" simply describe *what* is funded, rather than a person's *need* for the service. When the courts are presented with a unique group with significant needs, equality advocates hoped that they would recognize their right to dignity and social inclusion as guaranteed by the *Charter.* In their view, the mere fact that no one has a right to *all* medically necessary treatment in British Columbia misses this point entirely. In their view, the court's approach was akin to earlier cases in which courts dismissed women's equality rights in relation to pregnancy simply because there was no "pregnant man" receiving better treatment. Such views fail to address the many important differences between people in society and to get at systemic inequality and exclusion of groups such as the autistic children in *Auton.* Essentially, the critics argued, the Supreme Court held that the government had a "right" to do nothing to meet the needs of an extremely disadvantaged group in society.

Classroom Discussion Questions

1. Where did the trial begin? To which courts was the case appealed?

2. What section of the *Charter of Rights and Freedoms* protected the accused's equality rights? Is the *Charter* an ordinary piece of legislation, or does it have special status?

3. What is the purpose of s. 15 of the *Charter?* Is it plain from the words in s. 15, or is it necessary to interpret their meaning in order to understand how the right to equality works.

4. In your opinion, what do the words "equal before and under the law" mean in s. 15?

5. What qualities unite the protected grounds in s. 15 (race, national or ethnic origin, colour, sex, age or mental or physical disability)? Are there other possible grounds that should be added to this list?

6. In s. 15, are the words "equal protection" and "equal benefit" synonymous? If not, explain how they differ and how courts should enforce this difference.

7. In your opinion, is the right to equality the same as the right to be free from discrimination? Describe how far you think these rights extend.

8. In your own words, explain why the Supreme Court reversed the decisions of the lower courts in *Auton.*

9. Do you feel that the Supreme Court followed a formalistic view of equality or a substantive view of equality? Support your conclusions with arguments and examples.

10. What distinguishes the powers of a court from the powers of a government? Should these powers overlap?

11. Describe the effect of s. 1 of the *Charter.* If the Supreme Court had found discrimination against the children under s. 15 of the *Charter,* would you have found it reasonable under s. 1?

Equality Right to Health Care: Worksheet

For each of these hypothetical cases, try to apply the structures of reasoning set out by the Supreme Court, bearing in mind the views of the lower courts and the critics of the Supreme Court, and reason whether:

1. An equality or freedom from discrimination right was breached;
2. The breach was justifiable under s. 1 of the *Charter*;

Scenario One: In 1988, the Government of Newfoundland signed a pay equity agreement with public sector unions. The purpose of the agreement was to recognize that female workers in the health care sector had been historically underpaid, and to remedy the underpayment. Less than three years later, and before any money had been received by the female health care workers, the same government introduced the *Public Sector Restraint Act,* 1991. The Act deferred the promised increase in wages for three years and stated that nothing would be paid on account of the three-year delay. The effect was to erase a pay equity obligation of approximately $24 million. The justification for the Act was that the government's budgetary deficit had ballooned unexpectedly to the point where the province's credit rating on international money markets was at risk. (For a real-life evaluation of a similar case, see the Supreme Court of Canada's decision in *Newfoundland (Treasury Board) v. N.A.P.E.,* [2004] 3 S.C.R. 381, decided October 28, 2004 and is available on the Court's website or through the OJEN website at www.ojen.ca.)

Scenario Two: Three part-time desk clerks at a government passport office became pregnant at approximately the same time. The passport office maintained a group insurance plan that provided benefits for loss of pay due to accidents and sickness for a maximum of twenty-six weeks. However, pregnant women would not receive benefits for ten weeks before the date of birth, the birth week, and six weeks afterwards. For these seventeen weeks, pregnant women would receive no benefits regardless of the reasons they missed work, even if those reasons related to a separate health problem. While the women could receive provincial unemployment insurance during this time, the benefits they would receive would be far less than the passport office's program. (For a real-life evaluation of a similar private-sector case, see the Supreme Court of Canada's decision in *Brooks v. Canada Safeway Ltd.,* [1989] 1 S.C.R. 1219, which was decided May 4, 1989 and is available on the Court's website or through the OJEN website at www.ojen.ca.)

Conclusion: After thinking about these different scenarios involving equality rights and the funding difficulties of government, describe ways in which the courts can set standards to honour equality rights while not second-guessing governments at every turn. Is there a way to give these standards "teeth" to prevent the authorities from pleading poverty in every instance? Last, if you could rewrite s. 15 of the *Charter* to create a fairer balance, how would you do so, and what safeguards would you put into the language to ensure it is not misunderstood by governments or the courts?