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**lawmatters**

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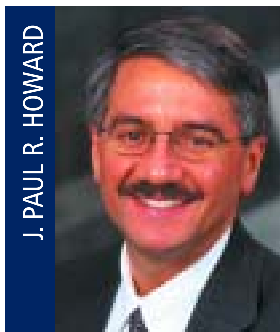
# *Auton*, Autism and Applying Precedents




Context is everything. Our common law system, derived from the centuries-old practice of English judges applying previously-decided rulings or "precedents" to new cases before them, is based on the notion that like cases should be treated alike. Our legal system, then, puts a premium on the ability to determine whether two cases are truly alike, that is, whether the inevitable differences in the factual matrix that make up each case are either sufficiently irrelevant such that the previous precedent should be deemed to govern the subsequent case, or so material that the application of the earlier ruling would be inappropriate in the later context. It demands an on-going skill that begins to plague students in their first year of law school, and distinguishes eminent jurists from their rather more mediocre colleagues.

But sometimes a decision appears in the eyes of interested parties so attractive, useful or "precedent-setting" in its perceived importance that the temptation to overlook relevant differences in factual context can be overwhelming.

That's where the very recent decision of the British Columbia Court of Appeal in *Auton v. British Columbia (Attorney General)*[1] comes in. There, the parents of four young children diagnosed with autism or autism spectrum disorder took the B.C. Government to court because it refused to fund the treatment of autism through early intensive behavioural intervention (IBI) or applied behavioural analysis (ABA). The parents had found their children's condition had significantly improved through the "Lovaas Method", a type of early IBI using one-on-one "intensive discrete trial training" repetitive therapy, pioneered by Dr. Ivar Lovaas at the University of California in the 1970s, but which can cost about $45,000 to $60,000 per year per child. When funding for the Lovaas treatment was refused by the B.C. Ministries of Health, Education and Children and Families, because the Government did not consider Lovaas to be a "medically required service" under the B.C. *Medicare Protection Act,* the parents commenced legal action, arguing that the Government's restrictive interpretation of the medicare legislation and its exclusion of Lovaas treatment as a covered benefit amounted to discrimination on the basis of disability and age, in contravention of their children's equality rights under section 15(1) of the *Canadian Charter of Rights and Freedoms.*

At first instance, the chambers judge found the B.C. Government liable for discrimination under the Charter. On appeal by the Government, the Court of Appeal, in a decision just released October 9, 2002, held that by failing to provide or fund early IBI treatment to autistic children, the Government breached its constitutional obligations to them because, according to the expert evidence before the chambers judge, early IBI treatment is "the only chance these children have to overcome the devastating effects of an autistic disorder". Significantly, the Court then issued a mandatory direction to the B.C. Government requiring it to start to fund early IBI for children with autism, including autism spectrum disorder – a direction that was specifically intended to benefit not simply the four infant petitioners before the Court but all similarly disadvantaged autistic children. Although the Court backed away from requiring the Government to fund, specifically, the Lovaas treatment sought by the parents (because it is but one method of early IBI and, the evidence indicated, *not* "the only effective model"), the Court held the four children were each entitled to "government funded treatment in the nature of that which they have been receiving, ... if such treatment should still be useful to them", with the Court retaining a limited supervisory role to ensure that the treatment provided is sufficient in its "efficacy, intensity and duration". As well, the novel award of "symbolic damages" by the chambers judge, in the amount of $20,000 for each of the four parents, was also

themselves specifically intended that their ruling should not apply to the education context. The chambers judge, who generally perceived the question as "primarily an issue of health, not education or social services", found that the expert medical evidence indicated that, age-wise, autistic children had a "narrow window of opportunity" to benefit from early IBI, and that the material "period of time extends from the time they are first diagnosed with autism (usually at age two or three) until the age of six, approximately".[5] No opinion was expressed on the appropriate treatment for school-age children, and the Court of Appeal explicitly held the chambers judge was correct to refrain from so opining.

Furthermore, both courts went out of their way to disavow expressly the education context from their consideration. The chambers judge clearly stated it was not "appropriate to determine here whether or not the Government will breach its obligations to autistic children by failing to accommodate their disabilities after they reach school age". The Court of Appeal agreed, and observed that "issues of funding programs for children of school age may involve additional considerations not before the Court, either in evidence or submissions".[6]

But then again, we have the same *Globe* article ascribing a statement to Mr. Stratas, who is certainly no novice in public law matters, that "since the therapy is really a form of education, the ruling [in *Auton*] also suggests that the court has recognized a right to state-provided special education for the mentally disabled". Quite apart from the fact that such a right already exists, with great respect (and giving Mr. Stratas the benefit of the doubt that his actual statement may have been misreported or misunderstood), the Court in *Auton* said nothing like that. In fact, it went out of its way to say it was *not* saying any such thing. But that's exactly my point.

1 *Auton v. British Columbia (Attorney General)*, 2002 BCCA 538. The full text of the decision is available on-line through the British Columbia Court of Appeal's home page at www.courts.gov.bc.ca. The interested reader can also find the two lower-court decisions of Madam Justice Allan at the Supreme Court's home page on the same website: see the decision on liability, released 26 July 2000, cited as 2000 BCSC 1142; and the decision on remedy, released 6 February 2001, cited as 2001 BCSC 220.

2 K. Makin, "Court tells B.C. to pay for therapy", *The [Toronto] Globe and Mail* (Thursday, 17 October 2002), p. A1.

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

4 Ontario Human Rights Commission, *Education and Disability: Human Rights Issues in Ontario's Education System – Consultation Paper* (July 2002), p. 9.

5 See 2001 BCSC 220 at para. 37; and 2000 BCSC 1142 at paras. 88 and 153.

6 See 2002 BCCA 538 at para. 90; and 2001 BCSC 220 at para. 42.

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Learning Community by Community *Continued from page 7*

## Examples in British Columbia

Over the past two years a growing number learning community partnerships, many of which include both Aboriginal and non-Aboriginal communities, have developed in rural B.C. With support from the Office of Learning Technologies of HRDC, bridges have successfully been built between the two cultural communities as well as between school and the non-formal learning settings that are so important to successful school performance. For example, priorities identified by many learning communities in B.C. have included

- Collaboration to enhance learning of parents and children from the pre-natal to pre-school period, building on substantial research on the Parents as First Teachers program that reveals both improved elementary performance and increased long-term parent involvement in the school and community;
- Expansion of external courses introduced in B.C. six years ago that grant high school credit for systematic learning experiences provided by a wide range of non-formal agencies such as 4-H clubs, music conservatories, cadets, and traditional Aboriginal dance groups; and
- Promotion of community service learning projects whereby students gain academic credit for applying academic concepts as they work with not-for-profit groups in their community and also learn new leadership and citizenship skills.

British Columbia's rural communities face serious challenges. The twin blows of unjust softwood lumber taxation by our U.S. free trade partners and major provincial government cuts to education, health and justice systems have hit rural B.C. particularly hard. Despite such bleak news, three case studies illustrate the bridges that have been built between Aboriginal and non-Aboriginal communities prepared to learn and work together towards a more sus-tainable and inclusive community future.

The first example is in the Upper Skeena, in the northwestern region of B.C. where over 70% of the population is Gitxsan First Nation. There, community service-learning projects have enabled students to apply academic concepts to a wide range of activities that have left a legacy for their communities (e.g. building recreation trails; a technology cafe for youth; and a *Book Bags for Babies* project involving school, health and literacy bodies). Gitxsan Evenings involving elders and youth interested in language and cultural education have built inter-generational bridges. A ground rescue technician training course has enabled a dozen teenagers to be prepared for future search operations and to gain academic credit for their training. These powerful experiential learning experiences have resulted in changed student attitudes and performance, and have both reduced school drop-out rates and developed future local leaders.

The second case is in the southwest corner of the Cariboo region where about 50% of the population is of the Upper St'at'imc First Nations. There the Lillooet Learning Communities Society has established three priorities:

- Strengthen Families and Communities through early learning initiatives that lead to improved early childhood education and