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Equality Rights and Social Benefit Programs

D. Geoffrey Cowper, Q.C.*

I. *AUTON*: WHAT DID IT DECIDE?

In *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*,¹ our courts faced a perfect storm created by colliding social, political, and legal forces. Socially, the families of children affected by autism have been engaged for a decade in lobbying and litigation to extend public funding for intensive behavioural therapy for their children. Politically, lobbying efforts have strained the capacity of existing government programs, hovered uneasily in policy territory that is both health and education and involves substantial unforeseen costs. Legally, families affected by this disorder refused to accept that government could decide whether or not to fund behavioural therapy and at what level. In their view, they had the same right to public funding for treatment of their children's illness as families facing childhood cancer.

The end result of the litigation in Canada was a case described by the Supreme Court as “the first case of this type to reach this Court”.² It was so described because in the view of the Supreme Court, the unanimous findings in the lower court had been built upon an incorrect premise that the provincial medicare scheme conferred a statutory right to public funding for all medically necessary services. The Supreme Court concluded to the contrary that the medicare scheme created a publicly funded insurance health plan with universal access to partial coverage defined broadly by reference to services provided by medical practitioners and hospitals. The Court concluded that outside these core medical services, the statute had granted administrative discretion as to whether to extend public funding for treatments such as intensive behavioural therapy or other professional disciplines such as behavioural therapy.

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¹ [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657, 2004 SCC 78.

² *Id.*, at para. 47.

The Court went on to consider whether the petitioners were wrongly excluded from funding under the statute as properly construed.

The Court found that the petitioners' central objection related to the delay in responding to reasonable demands for intensive behavioural therapy for funding for autistic children and in limiting that funding on financial and other grounds.

The Court concluded that the proper comparator group had to be established in relation to the executive or administrative consideration of extending the system to cover a non-core therapy rather than the extent of coverage for more conventional treatments:

People receiving well-established non-core therapies are not in the same position as people claiming relatively new non-core benefits. Funding may be legitimately denied or delayed because of uncertainty about a program and administrative difficulties related to its recognition and implementation. This has nothing to do with the alleged ground of discrimination. It follows that comparison with those receiving established therapies is inapt.³

In the result, the Court concluded that there was no denial of a benefit on an enumerated or analogous ground since there was no evidence suggesting the government's approach to ABA/IBI therapy was different than its approach to other comparable non-core therapies for non-disabled persons or persons with a different type of disability.⁴

In the result, the Court found it unnecessary to deal with whether the element of discrimination could have been said to exist on the facts, but reaffirmed that this would have been a necessary analysis in any such consideration.⁵

The perfect storm surrounding *Auton*⁶ raises the more general question of the intersection of equality rights and the development and administration of social programs. What room is there for an equality analysis in relation to these policy areas? In what respects must a legislature be sensitive to its obligations to extend equal benefit of the law and to avoid discrimination in the definition and delivery of these programs? How is the fact that the law provides for a social benefit rather

³ *Id.*, at para. 55.

⁴ *Id.*, at paras. 58-62.

⁵ *Id.*, at para. 63.

⁶ *Id.*

than a definition of a general legal right or obligation significant for an equality analysis?

In this paper, I address some of the criticisms made of the result and reasoning in *Auton*.⁷ I then address briefly the results and reasoning in other social benefit cases. That analysis suggests that the Court does not have a fixed approach to equality claims which arise in the context of social benefit programs. Rather, as in *Auton*,⁸ the Court appears consistently to prefer a more narrowly legal means of resolving the disputes rather than employing general questions of social policy and considering how equality analysis may facilitate or interfere with identified social objectives. In essence, the equality discussion is about making certain types of distinction impermissible. To the extent that the decided cases indicate a trend, the Court appears to have little hesitation when it is convinced that the use of the distinction in its context is arbitrary and unfair. Certainly, the result in *Chaoulli v. Quebec (Attorney General)*,⁹ argued the day before the *Auton*¹⁰ case, belies the concern that the Court has become unduly timid in its approach to the Charter.¹¹

II. OBJECTIONS TO *AUTON*

The criticisms expressed respecting the *Auton*¹² decision can be summarized as follows:

1. A Retreat to Formal Equality

It has been said the lower courts reviewed the facts in the spirit of substantive equality and did not let legal structures interfere with the conclusion that the government decisions in the case were discriminatory. The Supreme Court of Canada's reasoning on this view is an

⁷ *Id.*

⁸ *Id.*

⁹ [2005] S.C.J. No. 33, 2005 SCC 35.

¹⁰ *Supra*, note 1.

¹¹ *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.

¹² *Supra*, note 1. These criticisms have been extracted by me from public comments, discussions with other practitioners and the expressed concerns at various meetings held to discuss ramifications of the judgment.

approach that is formal and does not address the underlying reality of the case.

2. Comparator Group of Choice

The Court's selection of the comparator group that differed from that proposed by the petitioners is said to signal a retreat from the Court's previous injunctions to view the question of discrimination and the proper comparator from the perspective of the claimants with the result that the government's viewpoint is given undue weight.

3. It's All About Money

In the build-up and publicity surrounding the *Auton*¹³ appeal, the fear was expressed that the scale of the moneys involved, and the fiscal impact on funding for other disabilities had an artificial and illegitimate (if invisible) influence on the Court's judgment. I consider each of these criticisms in turn.

(a) Formal Equality

In the context of this debate, the phrase "formal equality" runs the risk of being used in only a pejorative and not descriptive sense. Finding the absence of a legal right to the benefit claimed does not constitute a refusal to go beyond the formal categories established by the statute.

The remarkable aspect of this criticism is that it fails to have regard to the fact that neither the respondents nor the intervenors in support of the judgments below argued with any force that the interpretation of the *Medicare Protection Act*¹⁴ adopted in the British Columbia courts was correct. Both the Supreme Court and Court of Appeal opinions expressly founded their view of the equality issues upon the conclusion that the right involved was funding for a medically necessary service within a universally funded medicare system.¹⁵ Neither court below addressed the

¹³ *Supra*, note 1.

¹⁴ R.S.B.C. 1996, c. 286.

¹⁵ *Auton (Guardian ad litem of) v. British Columbia (Minister of Health)*, [2000] B.C.J. No. 1547, 2000 BCSC 1142, at paras. 87-109, aff'd *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2002] B.C.J. No. 2258, 2002 BCCA 538, at paras. 37-39.

fact that the concept of universality in both the *Canada Health Act*¹⁶ and as referred to in the *Medicare Protection Act*¹⁷ refers to the access by insured persons to the publicly funded medicare system rather than the scope of services and medical procedures made available by the system itself. Rather, as held by the Supreme Court, both the *Canada Health Act*¹⁸ and the *Medicare Protection Act*¹⁹ consider the scope of services a question of comprehensiveness which in turn is defined by reference to the professions and institutions (principally doctors and hospitals) which make up Canada's medicare system.

(b) Comparator Group

The criticism that the Court failed to pay sufficient deference to the petitioner's selection of a comparator group depends in part on the proper view of the statutory structure. The comparator group proposed by the petitioners and adopted in the lower courts of children suffering from other illnesses or mentally handicapped adults disregarded the differences drawn by the statutory scheme between insured and uninsured therapies. In my view, the court has properly reaffirmed the overall principle that the legal structure and context of a comparative equality analysis is framed by the legislature and the relevant law.

What is unclear from the reasons is whether the relative recency of behavioural therapy was only of historical significance or had a more wide-ranging impact on the analysis. The statutes, of course, distinguish between insured and uninsured therapies. Chiropractic care has been shuffled in and out of the medicare system throughout its modern history, but is not recent. Nonetheless, it represents a therapy and service outside of the core of insured benefits. It is possible that a well-developed and established therapy might justify a different comparator group in reviewing the governmental decision to deny or otherwise ration access to the therapy. The Court has made it clear, nevertheless, that in such case the claimants would nevertheless have to prove the remaining element of discrimination:

¹⁶ R.S.C. 1985, c. C-6.

¹⁷ *Supra*, note 14.

¹⁸ *Supra*, note 16.

¹⁹ *Supra*, note 14.

[I]t would still be necessary to examine whether the distinction was discriminatory in the sense of treating autistic children as second-class citizens and denying their fundamental human dignity.²⁰

There seems little doubt that the British Columbia courts were strongly influenced by the dramatic needs of the claimant families. Here was a therapy which offered the prospect of improvement to children's lives, but which was costly and out of reach of the financial means of most Canadians. Further, it appears that the utility of this treatment is diminished or lost unless a child receives it in the first few years of diagnosis and for that reason the familiar delays of government in evaluating, preparing, and receiving approval for funding a new program were particularly upsetting to the affected families. Certainly, it should also be said that the atmosphere within which the utility of therapies for autistic children has been debated has become extraordinarily polarized. Some advocates of Lovaas therapy appear to regard almost any professional or governmental criticism of that therapy as rooted in ignorance and morally repugnant. However understandable, the charged atmosphere presented challenges for litigants, the counsel and the courts.

(c) *Fiscal Consequences*

The orders made in the British Columbia courts certainly presented a vivid example of social policy and social expenditures being dictated by the courts. However, the question of the fiscal significance of the orders below is not referred to in the Court's reasoning. The character of the administrative and legislative decision as to the scope of coverage under the provincially funded medicare scheme is referred to for its legal and not social policy significance. Given the tenor of submissions by government and intervenors alike, the Court's silence on the issues is clearly deliberate.

In my respectful view, the argument that the result in *Auton*²¹ flowed invisibly from the concerns about the financial significance of the results below are in part rooted in an oversimplification of the government's position. In a case involving much smaller amounts at stake, Mr. Justice Lambert in the Court of Appeal in *Eldridge v. British Columbia*

²⁰ *Supra*, note 1, at para. 63.

²¹ *Supra*, note 1.

(*Attorney General*)²² would have disallowed the constitutional claims in that case under section 1 of the Charter²³ on the basis that the allocation of health-care funding raised intractable problems that were incompatible with judicial decision-making. Thus, there are reasoned arguments which flow from the character of social policy decisions, and not from the scale of particular fiscal impacts.

III. WAS THERE DISCRIMINATION?

The Court concluded that it was able to dismiss the constitutional claims without addressing whether the claimants could have established the element of discrimination if they had been unable to overcome the first two obstacles to their claims.²⁴

Although this may well have been judicially prudent, the reasons in the courts below raised very interesting issues concerning the inference of discrimination in cases involving disability. Madam Justice Allan at trial had concluded that this was an instance of direct discrimination because the refusal to fund behavioural therapy in light of the evidence of its effectiveness could be only explained by a conclusion that autism was refractory and not amenable to treatment — a conclusion, which in her view, must have flowed from a stereotype about children suffering from autism. In the Court of Appeal, Saunders J.A. agreed, but added the further observation that the refusal to fund therapy acted to create a socially constructed handicap for these children.

Certainly these conclusions were amongst the most interesting in a very interesting case. The trial judge's reasons gave rise to the question of whether responsiveness to treatment is a legally relevant feature of disability just like its other characteristics, *i.e.*, inability to walk, inability to see, *etc.* Does a reluctance to acknowledge progress in treatment necessarily disclose a discriminatory motive or effect? If it may do so, when is it suspect and when does it reflect an honest disagreement over priorities or the results of treatment? Is an honestly held difference over the efficacy of treatment and the terms of delivery a foundation or an obstacle to a discrimination claim?

²² [1995] B.C.J. No. 1168, 7 B.C.L.R. (3d) 156 (C.A.), rev'd [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624.

²³ *Supra*, note 11.

²⁴ *Supra*, note 1, at para. 63.

There is no doubt that obtaining public funding for a relatively cost-free therapy is vastly easier than introducing one which involves substantial cost, unorthodox treatment, and a new category of health care or educational providers. In the *Auton*²⁵ case, this controversy was somewhat heightened by the fact that the claim was to the families' treatment of choice and a particular behavioural therapy. Indeed, one of the features of what has come to be known as the "autism wars" is a highly charged atmosphere within which professionals who subscribe to the Lovaas approach are at odds with those who consider it a promising, but not exclusive approach to autistic therapy.²⁶

The Court of Appeal's application of the concept of a "socially constructed handicap" is also interesting and challenging. Since it is a characteristic of autism that those suffering from it have difficulty engaging with other people and the main goal of all therapies is to require them to engage with the world, a failure of treatment may well result in a socially isolated and severely handicapped individual. Whether there is any logical distinction between withholding therapy and withholding funds for therapy, there can be little doubt that the outcome of the availability of therapy is important to the families of those suffering with autism. Is this, however, a "socially constructed handicap"?

IV. ARE SOCIAL BENEFIT PROGRAMS TREATED DIFFERENTLY?

The civil rights movement originated from concern over laws respecting fundamental issues of capacity and access. Thus, the common right to be free of any laws sustaining slavery arose from a fundamental conviction about the equal sovereignty and dignity of persons.²⁷ Similar civil rights claims relating to gender and sexual orientation easily fit within the same tradition, even where they concern equal access to social facilities or general statutory rights or programs.

The seminal decision of *Andrews v. Law Society of British Columbia*²⁸ concerned the equal capacity of landed immigrants and citizens to act as lawyers.

²⁵ *Supra*, note 1.

²⁶ Susan Sheehan, "The Autism Fight", *New Yorker*, 79:37 (1 December 2003) 76, 12p, 1c.

²⁷ Adam Hochschild, *Bury the Chains: Prophets and Rebels in the Fight to Free an Empire's Slaves* (Houghton Mifflin, 2005).

²⁸ [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143.

It is worth observing, however, that the defences in these various cases have all tended to flow from a sense of social principle. The institution of slavery was connected with a way of life and particular economy which was threatened by abolition.²⁹ The “peculiar institution” of segregation in the American South had deep-seated social roots, which flowed from the conviction that there were real (even if unreasoned) differences between blacks and whites which justified separate schools, separate washrooms and the like.³⁰ Certainly the differences between landed immigrants and citizens were regarded by the governments of the day as more than justifying the exclusion of non-citizens from qualifying to practice law.

Given this conference is, in part, dedicated to the 20th anniversary of the coming into force of the equality provisions, it is worth recalling that the Attorney General of British Columbia’s fundamental justification for the statutory exclusion of non-citizens was one of political philosophy: since lawyers played an important role in the legal system, and since laws are enacted by elected representatives who are accountable only to citizens, it is, therefore, only reasonable to restrict membership in the legal profession to citizens despite the ability of non-citizens to prove themselves otherwise qualified to practise law.

It is easy to forget how fervently this view was held only two decades ago. Indeed, after the restriction was struck down in the British Columbia Court of Appeal the initial reaction by the Law Society of British Columbia was to immediately ask for a special sitting of a five-judge panel to review the correctness of the reasons of McLachlin J.A., as she then was. Indeed, the Law Society and the Attorney General of British Columbia felt so strongly about the case that they asked for the co-operation of Mr. Andrews’ for the substitution of another petitioner so that the appeal would not become moot upon him being called to the Bar under the force of the Court of Appeal order,³¹ or upon becoming a citizen.

Ultimately, in my view, the result in *Andrews*³² was the product of a fundamental conclusion that the citizenship requirement was more sym-

²⁹ *Supra*, note 27.

³⁰ James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (Oxford: Oxford University Press, 2001).

³¹ Elizabeth Kinersly.

³² *Supra*, note 28.

bol than substance and did not have a foundation in any real difference between landed immigrants and Canadian citizens.

However viewed, the history of civil rights establishes that justifications based on social values may well be suspect and social understandings can and do operate as proxies for deliberate discrimination.

There is, however, also a sense in which some social and economic choices have qualities which are not amenable to the judicial method. There are some cases in which the character of the statutory benefit and the underlying social choice appears to have influenced the outcome. In *Law v. Canada*,³³ the differential impact was based on age in the context of survivors benefits provided under the Canada Pension Plan (“CPP”). The CPP then reduced survivors’ pensions for able-bodied surviving spouses without children such that the threshold age to receive benefits was 35 and that full benefits were only received at 45 and older. Although as we all know, the Court pronounced a unanimous decision and exhaustively restated the factors for analysis of discrimination claims, the Court upheld the use of an age-based standard to distinguish between potential claimants and their need for long-term income replacement. Indeed, the Court held that the clear ameliorative purpose of the pension scheme for older surviving spouses was a factor supporting the view that the CPP provisions do not violate essential human dignity. The Court found that Parliament is entitled to premise remedial legislation upon informed generalizations without running afoul of section 15(1) of the Charter³⁴ and being required to justify its position under section 1. The fact that younger persons had not had a history of exclusion and stereotyping supported the view that the statute’s refusal to condition benefits on individual circumstances rather than categories of age was not discrimination.

A similar analysis was conducted in *McKinney v. University of Guelph*³⁵ in the context of a challenge to the mandatory retirement policy within universities. In the context of assessing whether the mandatory retirement rule minimally impaired the rights of capable older

³³ *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497.

³⁴ *Supra*, note 11.

³⁵ [1990] S.C.J. No. 122, [1990] 3 S.C.R. 229, at paras. 67-68.

faculty, the Court referred back to the reasoning in *Irwin Toy*³⁶ as follows:

Minimal Impairment

In assessing proportionality and particularly the issue whether there has been a minimal impairment to a constitutionally guaranteed right, it must be remembered that we are concerned here with measures that attempt to strike a balance between the claims of legitimate but competing social values. In the case of broadly based social measures like these, where government seeks to mediate between competing groups, it is by no means easy to determine with precision where the balance is to be struck. As the majority of this Court observed in *Irwin Toy Ltd. v. Quebec (Attorney General)*, *supra*, at p. 993:

“Thus, in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck.”

The approach taken to these cases has been marked by considerable flexibility having regard to the difficulty of the choices, their impact on different sectors of society and the inherent advantages in a democratic society of the legislature in assessing these matters.

In *Lovelace v. Ontario*,³⁷ at the end of its analysis, the Court found that the exclusion of non-registered Aboriginal communities from a distribution of casino revenues flowed from the exercise of the province’s constitutional spending power and did not by that exclusion impair the “Indianness” of the non-registered communities.

The Court’s determination to decide these cases on bases other than judicial deference is also evidenced by the results in *Nova Scotia (Workers’ Compensation Board) v. Martin*; *Nova Scotia (Workers’ Compensation Board) v. Laseur*³⁸ and *Granovsky v. Canada (Minister of*

³⁶ *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927.

³⁷ [2000] S.C.J. No. 36, [2000] 1 S.C.R. 950, at paras. 110-11.

³⁸ [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504.

Employment and Immigration).³⁹ In *Granovsky*, the Court held that the differential drop-out provisions available to applicants who suffered from severe and permanent disabilities would not be subject to a comparison with persons who suffered recurring, but not permanent disability. Again, the Court found that there was no convincing human rights dimension to the complaint. The Court found that in framing subsidy programs, Parliament is called upon to target groups and that in doing so, drawing lines is an unavoidable feature. The Court declined to find that a legislative distinction as between groups of similarly disabled persons with respect to the qualification for public social programs was amenable to a discrimination analysis.

In *Martin*,⁴⁰ on the other hand, the Court took a very different view of a blanket exclusion from a benefits program on the basis of a selected disability. Justice Gonthier for the entire Court, found clear discrimination in the following reasoning:

By entirely excluding chronic pain from the application of the general compensation provisions of the Act and limiting the applicable benefits to a four-week Functional Restoration Program for workers injured after February 1, 1996, the Act and the FRP Regulations clearly impose differential treatment upon injured workers suffering from chronic pain on the basis of the nature of their physical disability, an enumerated ground under s. 15(1) of the *Charter*. In the context of the Act, and given the nature of chronic pain, this differential treatment is discriminatory. It is discriminatory because it does not correspond to the actual needs and circumstances of injured workers suffering from chronic pain, who are deprived of any individual assessment of their needs and circumstances. Such workers are, instead, subject to uniform, limited benefits based on their presumed characteristics as a group. The scheme also ignores the needs of those workers who, despite treatment, remain permanently disabled by chronic pain. Nothing indicates that the scheme is aimed at improving the circumstances of a more disadvantaged group, or that the interests affected are merely economic or otherwise minor. On the contrary, the denial of the reality of the pain suffered by the affected workers reinforces widespread negative assumptions held by employers, compensation officials and some members of the medical profession,

³⁹ [2003] S.C.J. No. 29, [2000] 1 S.C.R. 703.

⁴⁰ *Supra*, note 38.

and demeans the essential human dignity of chronic pain sufferers. The challenged provisions clearly violate s. 15(1) of the *Charter*.⁴¹

With respect to justification under section 1, Gonthier J.A. acknowledged the relevance of budgetary considerations as it related to deference to governmental choices. However, the blanket exclusion of people who would otherwise qualify for the benefits was found to place it outside of any acceptable concept of minimal impairment. In *El-dridge*,⁴² Lambert J.A. in the Court of Appeal concluded that the general framework set out by *Oakes*⁴³ was unduly restrictive when the court had to consider a discrimination claim which intersected with the polycentric nature of policy relating to social program benefits. His reasoning was as follows:

There is a national debate underway at the moment about the reduction of funds to be transferred from Canada to the Provinces in the future for Health, for Welfare, and for Education. There is a debate underway in each Province about the expenditure priorities for the reduced funds. In the allocation of scarce financial resources each Province will be required to make choices about spending priorities. Will medical equipment be bought for city hospitals or for small rural hospitals? Will the health care services in remote communities or in First Nations communities be improved? Is the best form of expenditure to raise the scale of payment for doctors and other health care workers? Should improved public facilities be provided for detection of cervical cancer, prostate cancer or breast tumours?

Some of the limits imposed under the *Medical and Health Care Services Act* and some of the financial allocation choices that I have mentioned have resulted and will result in adverse effects discrimination against people suffering from disabilities, including serious illness itself. But we do not have those cases before us. How can we say, in those circumstances, that expenditure of scarce resources on services that remedy infringed constitutional rights under s. 15, on the one hand, are more desirable than expenditures of scarce resources on things that cure people without affecting constitutional rights, on the other. And, indeed, how can we prefer the allocation of

⁴¹ *Id.*, at para. 5.

⁴² *Supra*, note 22, at paras. 57-59 (C.A.).

⁴³ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103.

scarce resources to services that remedy the infringed constitutional rights of one disadvantaged group over the allocation of scarce resources to services that remedy the infringed constitutional rights of a different disadvantaged group.

In my opinion the kind of adverse effects discrimination which I consider has occurred in this case should be rectified, if at all, by legislative or administrative action and not by judicial action. The evidence in this case disclosed that legislative or administrative action in relation to medical services for deaf people is being evaluated and considered. That evaluation and consideration can take into account many matters which were not in evidence before us. In those circumstances I have concluded that this is a case for judicial restraint and for deference under the Constitution and under s. 1 of the Charter to legislative policy and administrative expertise.

In the Supreme Court, the Court acknowledged that the application of the *Oakes* test requires close attention to context and that where the legislature is balancing competing interests and is engaged in social policy, the application of *Oakes* must be applied flexibly. In particular, the Court observed that social benefits often have to select between disadvantaged groups and the distribution of resources in society as an exercise that must be given wide latitude. Harkening back to the boundary between licence and review, the Court reaffirmed the observation in *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*⁴⁴ that a court would not give any government unlimited licence in disregarding Charter⁴⁵ rights and that a reasonable basis had to be demonstrated for concluding that the legislation had sought to minimally impair the Charter⁴⁶ right at issue. On the evidence before the Court in that case, the estimated cost of providing sign language translators for the whole of British Columbia was only \$150,000 or approximately 0.25 per cent of the budget.

However, the Court concluded in *Eldridge*⁴⁷ (as in *Martin*⁴⁸ and *Tétreault-Gadoury*)⁴⁹ that the blanket denial of benefits made it impossi-

⁴⁴ [1991] S.C.J. No. 41, [1991] 2 S.C.R. 22.

⁴⁵ *Supra*, note 11.

⁴⁶ *Id.*

⁴⁷ *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624.

ble to characterize a governmental decision as one which was the product of balancing competing social demands.

*Brooks v. Canada Safeway Ltd.*⁵⁰ is an interesting example of the Court expressing social policy in support of a discrimination claim when it concluded that imposing the cost of procreation upon women when only women can become pregnant when all in society benefited from procreation was discriminatory and unfair. Although not a Charter case, it was clear that the selection of pregnancy as a special state of health for the purposes of a disability or leave plan ran contrary to the view that “pregnancy is no different from any other health-related reason for absence from the work place”.⁵¹

There are some occasions where legislative decisions during the course of litigation makes it clear that there is no real debate concerning an arbitrary legislative distinction. *Schachter v. Canada*⁵² concerned leave benefits to adoptive fathers. Pending the appeal, the Act was amended to extend the same benefits to adoptive and natural fathers.

Development of work-fare programs for welfare dependent individuals was the social policy context for *Gosselin v. Quebec (Attorney General)*.⁵³ That decision has been more closely reviewed elsewhere by Professor Cameron in *Positive Obligations Under Sections 15 and 7 Under the Charter: Comment on Gosselin v. Quebec*.⁵⁴ For present purposes, however, the inferred social policy as between the majority of five and the dissenting judges is sharply at odds. Indeed, the majority went so far as to find that the denial of equal benefits to welfare recipients under 30 coupled with training and work programs affirmed the dignity and human worth of younger welfare recipients. Justice Bastarache in dissent noted that the record established that it was not in fact easier for persons under 30 to obtain jobs as opposed to their elders. Accordingly, he held that the distinction embodying the statute was based on a stereotypical view that young welfare recipients are better off

⁴⁸ *Supra*, note 38.

⁴⁹ *Supra*, note 44.

⁵⁰ [1989] S.C.J. No. 42, [1989] 1 S.C.R. 1219.

⁵¹ *Id.*, at 1237-38, para. 28.

⁵² [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679.

⁵³ [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429.

⁵⁴ 20 S.C.L.R. (2d) at 65.

than older recipients and that the old assumptions regarding the employability of young people no longer apply.

V. CONCLUSION

There appears to be no obvious direction, either of deference or interference, based upon the character of the underlying statutory program at issue.

However, the ascertainment of the underlying social policy embodied in the statutory provision certainly appears to be central to the conceptual landscape for any section 15 analysis.

The factual record in respect of social programs appears to have an unpredictable impact upon the reasoning. Thus, for example, the majority in *Gosselin*⁵⁵ appears to have reflected a majority view respecting the interests of younger welfare recipients which the dissent believed was based on outdated and stereotypical views which did not accord with the evidence in the record. In *Auton*,⁵⁶ the claimants unsuccessfully argued that proof of utility was conclusive evidence of discriminatory effect.

It is perhaps noteworthy that in both *Auton*⁵⁷ and the earlier decision of *Tétreault-Gadoury*,⁵⁸ the Court decided that preliminary conditions did not exist for the raising of a legitimate section 15 claim.

In the context of the overall jurisprudence of the Court, the outcome in *Auton*⁵⁹ is not surprising. The Court's careful assessment of the statutory context in which the claim was brought is a salutary reminder that the benefit or disadvantage imposed by the law is the starting point for all section 15 cases. For government, of course, the definition of statutory programs becomes of great importance. At the same time, the Court's decisions certainly support the view that blanket exclusions from otherwise universal programs will be carefully reviewed and struck down even where there may be a rational basis for the distinction. A government's plea that it must perform a balancing act between societal and individual interests clearly has resonance with the Court and has done for the last 20 years: however, it will not be allowed to be used as a

⁵⁵ *Supra*, note 53.

⁵⁶ *Supra*, note 1.

⁵⁷ *Id.*

⁵⁸ *Supra*, note 44.

⁵⁹ *Supra*, note 1.

disguise for irrational and arbitrary rejection of the right of an individual to equal benefit and protection under the law.

