

The Top Five - 2005

Each year Justice Stephen Goudge of the Ontario Court of Appeal identifies five cases that are of significance in the educational setting. This summary, based on his comments and observations, is appropriate for discussion and debate in the classroom setting.



Auton (Guardian ad litem of) v. AG of British Columbia, 2004 (S.C.C.)

http://www.lexum.umontreal.ca/csc-cc/en/pub/2004/vol3/html/2004scr3_0657.html

Charter rights and the B.C. Government's refusal to pay for special therapy for autistic children

The guardians of several pre-school autistic children brought a case forward on their children's behalf arguing that the B.C. Government's failure to fund a new and controversial behavioural therapy under B.C.'s public health care scheme was a violation of the children's equality rights under s.15 (1) of the *Canadian Charter of Rights and Freedoms*. Section 15 states that a person cannot be discriminated against on the basis of a number of protected grounds, including disability. The Government argued that it had to balance the needs of the autistic children with the needs of all children with special needs, and since the therapy was controversial and not medically necessary, the Government could not fund it in light of existing financial constraints.

The trial judge considered whether the treatment was "medically necessary" as a factor in determining if s. 15 of the *Charter* had been violated. Counsel for the children argued

that the autistic children's treatment should be paid for by the state, in the same way that the government funds other medical necessities for children their age. The trial judge found that the failure to fund the therapy violated the children's equality rights and ordered the province to fund the therapy and pay the children's parents for the expense of past treatment. The Court of Appeal upheld this judgment and increased the funding for these treatments.

The British Columbia Government appealed. In a unanimous decision, the Supreme Court of Canada found that the autistic children were not entitled to provincial funding for the therapy.

First, the Supreme Court found that funding for the therapy was not a benefit which the autistic children were automatically entitled to under the law. The *Canada Health Act* and B.C.'s health legislation do not promise that any Canadian will receive funding for all medically required treatment. Under the *Canada Health Act* and BC's health legislation all that is required is that the provincial government fund "core services" and

the provincial government has the discretion to provide full funding or partial funding for “non-core services”. Because the Supreme Court determined that therapy in question would fall under “non-core services”, it was not a benefit required by law, and the province was entitled to decide not to fund the treatment.

Second, the appellants were unable to show that they had been denied services based on their disability contrary to the *Charter*. The Court reiterated that the specific role of s. 15 of the *Charter* is to ensure that governments who provide benefits required by law do so on a non-discriminatory basis. In order to establish differential treatment under the *Charter*, there must be evidence that the person has been denied a benefit that the government has given to another individual or comparator group in the same set of circumstances. A comparator group is an individual or group that is similar to the person claiming discrimination in all ways except for the personal characteristic on which the discrimination claim is based. In order to establish discrimination, the appellants would have had to show that a non-disabled child, or a child of the same age with another kind of disability, had received provincial funding for a non-core therapy which was considered controversial and only recently recognized as medically necessary. The Court was unable to find a comparator group that had received funding for a similarly controversial and novel treatment to the one required by these children. There was no evidence presented that showed how the Province had responded to requests for new therapies from other people, or that the Province’s response to this new autism therapy was any different from its approach to other, novel therapies. Discrimination on the basis of disability therefore was not established.

In sum, there was no differential treatment under the law, because a right to the therapy did not exist under the law. The applicants were also unable to show that they had been denied treatment on the basis of their disability and that the Government had favored other groups by funding similar non-core controversial therapies. Consequently the government’s conduct did not infringe section 15 of the *Charter*.

*In a similar case in Ontario, the Superior Court found that the Province of Ontario was discriminating against children with autism based on age and disability by denying them this same therapy. This case is now on leave to appeal see: *Wynberg v. Ontario*, (2005) (ON S.C.) <http://www.canlii.org/on/cas/onsc/2005/2005onsc13356.html>