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Will the Supreme Court really dictate health policy to a government elected by the people? Stayed tuned, says KIRK MAKIN, because we're about to find out

By KIRK MAKIN
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At the age of 4, Miki spent her waking hours singing at the top of her lungs. She slept fitfully, flapped her arms like a bird and incessantly twirled toys and other objects -- classic symptoms of severe autism. ymptoms of severe autism.

Twelve years and thousands of hours of intensive and very expensive therapy later, Miki attends a fine-arts school in Langley, B.C., an d plays six musical instruments. Certain concepts still elude her, but where once she had no grasp of language and was transfixed with aberrant patterns, now she can express herself and comprehend most of what she hears

"She is not going to lose her autism diagnosis, but we do have a child who is very functional," says her mother, Sabrina Freeman, who credits a technique known as applied behavioural analysis for her daughter's progress.

A form of therapy developed in California by Norwegian-born psychologist Ivar Lovaas, ABA breaks down language and mental and physical tasks into components that are repeated until a child masters them. Most effective when children are young, it requires long hours of supervision and can cost up to $60,000 a year, a sum the B.C. government refuses to pay.

The province doesn't consider autism therapy a health-care necessity, but without it, Ms. Freeman says, her daughter probably would have been doomed to a life of institutionalized misery, self-mutilation and, perhaps, suicide.

For years, the Freemans footed the bill themselves. But the financial pinch worsened, and they also became appalled at the plight of autistic children unable to afford the therapy. So, in 1998, they joined several other families in launching what was destined to be a stunningly successful action under the Charter of Rights and Freedoms.

They persuaded the courts to order the province to pay up, but B.C. officials dug in their heels, both because of the big price tag and the spectre of copycat litigation on behalf of other treatments not covered by medicare.

So next week the two sides will appear before the Supreme Court of Canada for the final showdown in their six-year battle. As well, the court will hear a companion case that seems to be the flip side of the coin. Montreal doctor Jacques Chaouilli and a frustrated patient, George Zeliotis, hope to strike down a ban on paying privately for services that medicare does cover.

In each case, the ruling could shake the foundations of Canada's health-care system.

"What we have," says David Stratas, a constitutional-law expert in Toronto with the firm of Heenan Blaikie, "is a direct conflict between the legislatures, which are accountable to the people and make decisions as their traditional, core function, and the broad power of the courts to draw the line and do what is appropriate."

The fact that the hearings come during an election campaign with health-care spending a central issue only ups the ante, he adds.

Patrick Monahan, dean of York University's Osgoode Hall Law School, calls the cases "hugely important" and their juxtaposition "striking" because they "come at this health-care question from both directions."

The B.C. challenge centres on equality rights and the Quebec case invokes the right to life, liberty and security of the person, but they have one common feature: Both invite the judiciary to brush past dithering or cost-conscious politicians and bureaucrats to assume a direct role as custodians of health care.

The autism case accuses B.C. of outright discrimination. Lower-court judges have found the Lovaas treatment medically necessary and, in orders that bristle with indignation, instructed the province to contribute up to $20,000 a year for children under 6 and up to $6,000 a year after that.

The province has fought back with a vengeance, outraged by what it sees as a dangerous incursion into its budget-setting priorities. "Simplistic" funding orders endanger medicare, it warns, and change the balance of power in Canada. Plus there just aren't enough dollars available to remedy every affliction.

In a brief to the court, B.C. government lawyers Geoffrey Cowper and Lisa Mrozinski accuse the lower courts of assigning "a blunt, almost malevolent quality" to the mechanics of government. "By judicial fiat, [the rulings] avoid the necessarily uncomfortable and complex process of allocating limited health-care dollars amongst the many needy and meritorious users of the health-care system."

The province also says the cost will be between $50-million and $75-million. "Real choices often entail the onerous responsibility of saying no," the brief concludes.

In return, Ms. Freeman accuses the province of trying to spook the court by predicting a flood of copycat demands. She considers the attitude toward autism unique. "I challenge them to find another serious condition that isn't covered by the health-care system. There aren't any. And if there were, they would deserve to be funded."

No one involved in the suit wanted to spend years in costly litigation, Ms. Freeman says. "It was a last resort after being ignored for years. The political system really doesn't work for small, powerless minorities. And if the Supreme Court of Canada doesn't have jurisdiction to protect equality rights for the most vulnerable group in society, disabled children, why do we have a Supreme Court? And why do we have a constitution?"

After months of excruciating pain as he waited for a hip replacement, Mr. Zeliotis challenged Quebec's ban on private health-care insurance as a violation of his constitutional right to life, liberty and security of the person. He and Dr. Chaouilli are effectively asking if the court has the gumption to strike down laws that prevent those with the means to obtain private treatment from doing so.

"You could not have a starker collision than the one here," Heenan, Blaikie's Mr. Stratas says of the clash between an individual's rights and the role of government in designing social programs.

Dr. Chaouilli, 52, immigrated to Quebec from France in 1977. He began his quest to alter medicare after the province enforced a prohibition on emergency house calls. "I had some very sick and paralyzed patients," he explains. "Some of them couldn't even move." He refused to comply, was penalized and decided to opt out of medicare.

But that was no answer, either. Since private medical insurance is prohibited, only the wealthy could afford his services. Disgusted by what he considers a bureaucratic system that fails the needy, Dr. Chaouilli returned to medicare and launched a court action he says has cost about $600,000.

Many of his medical brethren "like to sit in their offices and make their money there," he says. "Doctors, generally speaking, are lazy. My patients are desperate. When I say I have to send them to a hospital emergency room, it is like a punishment. Some are very angry. They were begging me to go to court and break down this crazy system."

However, medicare proponents warn that commercial providers will inevitably skim off the most profitable procedures and the wealthiest patients, leaving the most costly and challenging work for the depleted public system.

"They are arguing for recognition of the right to make a choice that depends first and foremost on the individual's wealth," the federal government argues in a brief to the court. "No one, in this day and age, would dare suggest that the private health-care sector be left entirely to market forces."

Dr. Chaouilli insists that he is not out to kill medicare; he just wants to see a blend of "healthy competition between public and private providers."

His cause is supported by a group of private clinics in Vancouver that have added a wrinkle of their own: a "guarantee of timely treatment" to the Canada Health Act.

Other intervenors will suggest further options if the court is in an activist mood. "What we are trying to do is force changes," says Osgoode Hall's Mr. Monahan, co-counsel for a group of senators who recently scrutinized medicare. "There is a real impasse -- and this forces politicians to address it."

Unlike the autism case, the Quebec challenge has failed at each stop along the way to the Supreme Court. A united front presented by the litigants has also come apart. Dr. Chaouilli openly accuses Mr. Zeliotis, and his own lawyers, of polluting the case with recommendations such as permitting people to buy time in hospital operating rooms, which he fears will lead to accusations of "queue-jumping."

He also dismisses Prime Minister Paul Martin's campaign promises to fix the system. "These politicians are not honest intellectually," he says. "No wonder so many doctors leave the country."

Scientific studies and reports will play a big role in the cases. In the autism appeal, for example, B.C. will try to discredit the Lovaas therapy. The other side will insist that providing therapy early enough can prevent up to $2-million in social costs for an autistic child who ends up in an institution. If true, this seriously blunts the government's claim that it can't afford ABA.

Will the court pay silent heed to the campaign promises to fix medicare, and leave it to Parliament to make reforms? Will the judges wash their hands of the autism problem, saying governments are elected for just this type of decision?

In any event, a split seems likely, and the vote could be perilously close. Which, says Mr. Stratas, the constitutional law specialist, makes the next appointments to the court supremely important.

Two seats are about to come open, and "ironically, for those who consider the Supreme Court to be anti-democratic, who we choose in this close election may determine who fills the two vacancies on this narrowly divided court. And that could tip the balance in the complex cases to come."

For the time being, Ms. Freeman insists that she, her husband and Miki will happily take their chances with whoever occupies the bench next week. "I believe in the judiciary," she says. "So far, they have successfully ferreted out the truth."

Kirk Makin is The Globe and Mail's justice reporter.

Will the bench be at full strength?

An element of intrigue surrounds next week's hearings: No one seems to know whether two members of the court will show up.

Madam Justice Louise Arbour and Mr. Justice Frank Iacobucci are slated to retire at the end of the month, so at first glance their absence would seem to make sense.

But these are landmark cases, and both judges have played leading roles in interpreting the very Charter rights now at stake -- Judge Iacobucci on equality rights and Judge Arbour on the right to life, liberty and security of the person.

The two are allowed to take part in any ruling made within six months of their departure, but will they want to hear such critical cases so late in their tenures? Will Chief Justice Beverley McLachlin prod them to do so for fear that decisions made by seven judges instead of nine will seem less authoritative?

Toronto lawyer Mahmud Jamal, a Supreme Court specialist at Osler Hoskin and Harcourt, says a unanimous verdict by seven judges would be fine, but a split ruling "could leave the law in a state of uncertainty."

He also says the absence of the two "progressive" judges could put the Charter challenges in jeopardy. "Justice Iacobucci is known as a deft coalition-builder. His skill in forging a consensus on the court without opening a Pandora's box would be a significant loss. For the Charter claimants, getting four votes without Justices Iacobucci and Arbour could be harder than getting five votes with them."

In another twist, a 5-4 ruling the court made just last fall will loom large over what happens next week. The Doucet-Boudreau case dealt with a judicial order aimed at forcing improvements to French-language schools in Nova Scotia, and the court endorsed the idea that judges can actively supervise the way in which governments carry out their orders.

Observers agree that this ruling, written jointly by two members of the court, looks much like a dress rehearsal for the cases now at hand. But there may be one big hitch: Those co-authors were Judges Iacobucci and Arbour.