



Fighting autism too costly, top court told

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Allowing judges to order costly treatment for autistic children will destroy the ability of provinces to run their health-care systems, a procession of lawyers from seven provinces and the federal government warned the Supreme Court of Canada yesterday.

They accused B.C. judges of opening a monstrous fissure in the democratic process when they declared autism treatment constitutes a medical necessity the province is bound to provide under Charter of Rights equality guarantees.

"There is a terrific risk of the judiciary taking over health-care policy," B.C. lawyer Geoffrey Cowper told a seven-judge bench. "It would essentially create a constitutional right to publicly funded therapy. You would have a judicially mandated health policy."

Federal lawyer Graham Garton added: "This is not just a case about spending \$50-million to \$75-million a year in B.C. for a discrete therapy. It is about how the health-care system as a whole is to be treated. . . . Governments will have to have unlimited budgets in order to respond to that constitutional imperative."

However, a phalanx of intervenors supporting the order to fund autism argued that the B.C. judges did precisely what the Charter requires of them -- they came to the defence of a fearfully vulnerable group.

Coming the day after the court heard another landmark case involving the prohibition of private health insurance in Quebec, yesterday's appeal is seen as one of the most important cases the court has heard since the Charter came into being in 1982.

The debate returned repeatedly to one central issue: Would ordering treatment open a judicial door numerous other groups seeking treatment will crowd through? Would it effectively turn judges into being administrators of the entire health-care system?

The courtroom was packed with parents supporting two dozen B.C. children whose families won funding orders for \$20,000 to \$60,000 a year to pay for a technique of intensive behavioural therapy widely recognized as the only effective treatment. One of the parents, Sabrina Freeman, said her daughter Miki showed the signs of severe autism. But after 12 years of the therapy known as applied behavioural analysis, Miki is "very functional" and attends a fine-arts school.

The B.C. judges ruled that by failing to evaluate the therapy before they rejected it as ineffective, provincial bureaucrats discriminated against autistic children.

Most untreated autistic children are doomed to lives of isolation, social dysfunction and misery, said Mary Eberts, a lawyer for Friends of Children with Autism. "These children are the essence of a discrete and insular minority," she said.

Ms. Eberts condemned the B.C. government for saying autistic children are treated fairly because they have as much access to treatment for

cancer or a sore throat as normal children do.

"For these children, the same treatment amounts to unequal treatment, because it perpetuates a disadvantage," Ms. Eberts said. "We are here today because the executive and legislators of B.C. did not fulfill their proper role. Your decision will still leave that role open to governments in future cases."

A lawyer for the families, C.E. Hinkson, told the Supreme Court yesterday that the B.C. government's act deprived children of their potential to lead meaningful, independent lives. He said that 90 per cent of untreated children end up being institutionalized at an annual cost of at least \$500,000 -- a price tag that easily dwarfs the cost of providing treatment.

"To say to someone: 'I don't believe it's going to help you,' without doing some sort of analysis, is to perpetuate discrimination," Mr. Hinkson said.

However, Mr. Cowper said the province is under no obligation to fund therapies it does not consider proven, and that, in any event, not all effective treatments are funded.

Ontario lawyer Robert Charney warned the judges that \$33-billion of health-care costs are not currently covered under medicare plans -- items such as non-prescription drugs, physiotherapy or psychological services. He said a permissive ruling from the Supreme Court could trigger demands for public money to cover them.

"Courts should not attempt to manage health care on a case by case basis," Mr. Charney said.

"In the end, do these choices belong to courts or to government?" Mr. Justice Louis Lebel asked at one point, in evident frustration.

Elizabeth Shilton, a lawyer for the Canadian Association of Community Living, replied: "Courts have a duty to supervise the framework within which government make their decisions.

"This is not one of the hard cases. This is not a case where a type of treatment doesn't go far enough or long enough; or where it is not state-of-the-art or the most expensive form. This is a case of no treatment being offered at all. There is a treatment available -- it's just not there."

The court reserved judgment in the appeal.



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