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Reversal of Fortune: Litigating Health Care Reform in *Auton v. British Columbia*

Christopher P. Manfredi* and Antonia Maioni*

I. INTRODUCTION

In June 2004 the Supreme Court heard oral arguments in *Chaoulli v. Quebec (Attorney General)*¹ and *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*.² At issue in *Chaoulli* was the constitutionality of legal restrictions on the private provision of health care; at issue in *Auton* was the constitutionality of British Columbia's decision not to fund a specific treatment for autism within its public health care system. *Chaoulli* and *Auton* are the most visible manifestations of an increasingly common phenomenon: the use of rights-based litigation as an instrument of health care policy reform.³ Among the key issues that have already been litigated under the *Charter of Rights and Freedoms* are physician supply management, medical practice regulation, hospital restructuring, and the regulation and provision of specific treatment and services. Prior to 2004, the Supreme Court's contribution to this phe-

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¹ [2005] S.C.J. No. 33.

² [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657.

³ Martha Jackman, "The Regulation of Private Health Care Under the *Canada Health Act* and the *Canadian Charter*" (1995) 6 Const. Forum Const. 54; Martha Jackman, "The Right to Participate in Health Care and Health Resource Allocation Decisions Under Section 7 of the *Canadian Charter*" (1995/96) 4 Health L. Rev. 3; A. Braen, *Health and the Distribution of Powers in Canada*, Discussion Paper No. 2, Commission on the Future of Health Care in Canada (2002); Martha Jackman, *The Implications of Section 7 of the Charter for Health Care Spending in Canada*, Discussion Paper No. 31, Commission on the Future of Health Care in Canada (2002); Donna Greschner, *How Will the Charter of Rights and Freedoms and Evolving Jurisprudence Affect Health Care Costs*, Discussion Paper No. 20, Commission on the Future of Health Care in Canada (2002); Christopher Manfredi & Antonia Maioni, "Courts and Health Policy: Judicial Policy Making and Publicly Funded Health Care in Canada" (2002) 27 J. Health Pol. 211.

nomenon included nullifying the federal abortion law, modifying professional advertising regulations, upholding the criminal prohibition against assisted suicide, and establishing a constitutional right to sign language interpretation in the provision of health care services.⁴

With the exception of *Morgentaler*, which established an entirely new abortion regime that depends crucially on the widespread use of private clinics,⁵ the Supreme Court's health care decisions have operated largely at the periphery of this policy field. *Chaoulli* and *Auton* are different. The first potentially challenges the very existence of publicly funded health care, and the second challenges the plenary authority of provincial governments to determine the scope of their public health care systems. The cases thus speak to core questions about the organization and implementation of health care policy, as well as to the judicial process's institutional decision making capacity.

The cases also speak to broader questions about a cluster of related phenomena that falls under the rubric of "legal mobilization." These phenomena include the "process by which legal norms are invoked to regulate behavior;"⁶ the translation of desires into demands through "an assertion of one's rights;"⁷ and a "planned effort to influence the course of judicial policy development to achieve a particular policy goal."⁸ As a strategy for policy reform, legal mobilization ideally aims at establishing new legal rules that generate desirable policy consequences and strengthen the political position of the reform's advocates. Reality, however, is usually more complicated. Legal mobilization may fail to establish sought-for legal rule changes, yet desirable policy consequences may follow; desirable rules may emerge from litigation, but have no impact on policy or social conditions; unsuccessful legal mobilization may nevertheless strengthen a policy reform movement by energizing

⁴ *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (abortion); *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] S.C.J. No. 65, [1990] 2 S.C.R. 232 (professional advertising); *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (assisted suicide); *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 (sign language interpretation).

⁵ Christopher Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (Vancouver, B.C.: UBC Press 2004), at 181.

⁶ Richard O. Lempert, "Mobilizing Private Law: An Introductory Essay" (1976) 11 *Law & Soc. Rev.* 173.

⁷ Frances Kahn Zemans, "Legal Mobilization: The Neglected Role of the Law in the Political System" (1983) 77 *Am. Pol. Sci. Rev.* 690, at 700.

⁸ Susan E. Lawrence, *The Poor in Court: The Legal Services Program and Supreme Court Decision Making* (Princeton: Princeton University Press 1990), at 40.

individuals around particular causes; by contrast, successful mobilization may enervate a movement or energize a counter-movement.

Chaoulli and *Auton* are interesting examples of legal mobilization for several reasons. First, health care is arguably the single most important area of Canadian public policy: it consumes almost 10 per cent of GDP and is the largest single expenditure item in provincial budgets. Second, the cases offer differing visions of the direction health policy should take: *Chaoulli* seeks to expand private provision while *Auton* seeks to expand public coverage. Finally, one case involves an individual lone crusader (*Chaoulli*), and the other a group with roots in an organized social movement (*Auton*). Consequently, both cases provide a good empirical base for exploring three key questions about legal mobilization: How do cases such as these get into the judicial system? Under what conditions are such claims likely to be successful? What is the impact of winning — or losing — on the broader policy environment?

By the end of 2004, of course, only *Auton* had completed its journey through the Canadian legal system. After a series of victories in British Columbia, the province's "early autism treatment" movement saw its fortunes dramatically reversed by the Supreme Court. With *Chaoulli* still an unfinished story at the time of writing, this paper focuses exclusively on *Auton*. We begin with a brief overview of the legal mobilization literature and then turn to the case itself.

II. LEGAL MOBILIZATION AND POLICY REFORM

1. Choosing Litigation

The use of litigation as an instrument of socio-political reform traces its roots to the early 20th century, when the National Consumers' League engaged litigation to advance the interests of working women and children in the United States.⁹ However, credit for the systematic development of this type of litigation usually goes to two groups: the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP). Although both organizations oriented legal mobilization around a "leading case"

⁹ K. O'Connor & L. Epstein, "Rebalancing the Scales of Justice: Assessment of Public Interest Law" (1984) 7 Harv. J.L. & Pub. Pol'y 483.

approach,¹⁰ the NAACP initially took a more programmatic approach than did the ACLU. Indeed, the NAACP explicitly developed “a strategic plan for cumulative litigation efforts aimed at achieving specified social objectives.”¹¹

The NAACP turned to litigation because restrictive election laws and voting requirements, not to mention poverty and the legacy of slavery, ensured that African-Americans remained a “discrete and insular minority,”¹² unable to defend or advance their interests through normal democratic political participation. Thus, in 1915 the NAACP entered the judicial arena to defend the existing legal rights of African Americans, and in 1939 it established an independent Legal Defense and Education Fund (LDF) to undertake a systematic program of social reform through legal mobilization.¹³ These legal struggles achieved important victories against restrictive property covenants and segregated education, and in favour of voting rights. The crowning achievement, of course, was the U.S. Supreme Court’s unanimous declaration in 1954 that segregated public education violated the constitutional guarantee of equal protection.¹⁴ Indeed, *Brown* has been credited with making judicial activism possible,¹⁵ and with being “such a moral supernova in civil liberties adjudication that it almost single handedly justifies the exercise.”¹⁶ To be sure, these victories required further legal and political action to become even partially effective, but the NAACP’s apparent success came to define the method and potential of legal mobilization.

By the end of the 1960s, based largely on the NAACP’s experience, conventional wisdom held that the principal reason for legal mobilization was political disadvantage. According to this theory, litigation occurred when groups were systematically blocked from other avenues of political change. However, by the middle of the 1970s this conventional wisdom was under attack. In perhaps the most widely-cited article in the

¹⁰ Stuart Scheingold, *The Myth of Rights* (1974), at 173.

¹¹ Robert L. Rabin, “Perspectives on Public Interest Law” (1976) 28 Stan. L. Rev. 207, at 221.

¹² *United States v. Caroline Products Co.*, 304 U.S. 144, at 152-3 (1938).

¹³ C. Vose, *Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases* (1959), at 39, 44.

¹⁴ *Brown v. Board of Education*, 347 U.S. 483 (1954).

¹⁵ Cover, “The Origins of Judicial Activism in the Protection of Minorities” (1982) 91 Yale L. J. 1287.

¹⁶ Gold, “The Legal Rights Provisions: A New Vision or Déjà Vu?” (1982) 4 S.C.L.R. 107, at 108.

law and society literature, Marc Galanter argued that only repeat player (RP) litigants, with accumulated legal expertise and extensive legal resources, were likely to mobilize the law successfully to achieve long term programmatic objectives.¹⁷ Scholars identified other factors, such as diffuse financial support and longevity, as important in making litigation a feasible strategy.¹⁸ It became apparent, in venturing “beyond the political disadvantage theory,” that groups without political and economic resources were also unlikely to possess the legal resources necessary to sustain systematic litigation campaigns.¹⁹ Indeed, even the NAACP had political resources in the form of financial support from philanthropic organizations and influential, dedicated and hard-working individuals with ties to the majority political community.²⁰ These observations suggested that legal mobilization, which appears superficially to be the exclusive province of political outsiders, actually belongs as much, and perhaps more, to political insiders.²¹

2. Winning Cases

Whether seeking to press existing advantages, or mobilizing to overcome political disadvantage, organized group litigants face several strategic and tactical choices. The basic strategic choice is between direct sponsorship of test cases and participation as an intervener (or *amicus curiae*, to use American terminology). Direct sponsorship maximizes control of litigation but is expensive; intervener participation is less costly but provides far less control over the development of legal rules. From a strategic point of view, legal mobilization will be more successful to the extent that a social movement exercises centralized control, brings cases in the proper sequence, and identifies favourable venues. The principal tactical decision is to identify “winnable” cases

¹⁷ Marc Galanter, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change” (1974) 9 *Law & Soc. Rev.* 95.

¹⁸ Kim L. Scheppelle & Jack L. Walker, *Mobilizing Interest Groups in America: Patrons, Professions and Social Movements* (Sage Publications, 1991), at 161-68.

¹⁹ Susan M. Olson, “Interest Group Litigation in Federal District Courts: Beyond the Political Disadvantage Theory” (1990) 52 *J. Pol.* 854.

²⁰ Mark V. Tushnet, *The NAACP’s Legal Strategy Against Segregated Education, 1925-1950* (The University of North Carolina Press, 1987), at 2; Richard Kluger, *Simple Justice* (New York: Vintage Books, 1975), at 388-90.

²¹ Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (Albany: State University of New York Press, 2002).

and arguments. The incremental character of judicial policymaking means that the ultimate legal objectives of a litigation campaign can best be achieved through the gradual development of discrete rules that eventually form the basis for a new, over-arching, legal doctrine. In practical terms, this means that cases involving the easiest legal questions must be identified and litigated first, before moving on to those raising more problematic issues. Factual clarity and sympathetic plaintiffs are also important factors in winning individual cases.

3. Policy Impact

The 1960s ideal of legal mobilization as an instrument for improving the position of the politically disadvantaged also began to fade as scholars questioned whether the achievements of groups like the NAACP were more apparent than real. As Stuart Scheingold observed in 1974, “two decades after the *Brown* decision, [Americans] are still struggling inconclusively with school desegregation.” According to Scheingold, the “continued vitality of litigation,” despite the unfulfilled promise of *Brown*, could “be read as a triumph of myth over reality.”²² In his view, litigation could produce social reform at best indirectly, by contributing to a broader process of political mobilization in which interests are activated, organized and realigned.²³ Scheingold’s observations foreshadowed an important debate about legal mobilization between Gerald Rosenberg and Michael McCann, among others, during the 1990s. This debate opened with Rosenberg’s 1991 book, *The Hollow Hope*.²⁴ Rosenberg examined six areas (civil rights, abortion and women’s rights, environment, reapportionment, and criminal law) and posed this question: Did judicial decisions produce significant social reform? His findings were pessimistic, and he concluded that systematic institutional factors, including the limited nature of constitutional rights, limited judicial independence, and limited judicial implementation capacity, made legal mobilization an unreliable path to social reform.²⁵ Despite this pessimism, Rosenberg did recognize some conditions under which litigation might be effective. First, incentives must exist for key

²² S. Scheingold, *supra*, note 10, at 95.

²³ *Id.*, at 131.

²⁴ Gerald N. Rosenberg, *The Hollow Hope* (The University of Chicago Press, 1991).

²⁵ *Id.*, at 10.

actors to implement changes. Second, there must be costs associated with resisting change. Third, compliance is more likely where the possibility exists that social change can be implemented by parallel institutions. Finally, success will be higher where court orders can be used as leverage to extract additional resources.²⁶

In 1992 Michael McCann described *The Hollow Hope* as “bold, compelling, and important,” yet ultimately unconvincing.²⁷ Although McCann raised concerns about evidence, interpretation and conceptualization, he argued that Rosenberg’s approach missed the “constitutive capacity of law” in which “legal knowledge prefigures in part the symbolic terms of material relations and becomes a potential resource in ongoing struggles to refigure those relations.”²⁸ McCann’s own study of legal mobilization and the pay equity movement led him to conclude that legal mobilization provides important political payoffs, even in the absence of directly positive effects.²⁹ In particular, the mobilization of rights discourse by marginalized groups, according to McCann, can be a source of empowerment that facilitates long-term improvement in their disadvantaged status.³⁰ In response, Rosenberg argued that McCann’s “de-centered” approach missed important phenomena — such as union activism — that affected the degree of successful legal mobilization in the pay equity field.³¹ According to Rosenberg, a close analysis of McCann’s findings actually supported the central thesis of *The Hollow Hope* that “courts can help progressive forces, but only under conditions that both occur infrequently and are virtually determinative of change on their own.”³²

One of the most important lessons of the McCann-Rosenberg debate is that measuring either the success or influence of legal mobilization is extremely difficult. Success is not a simple concept, nor is it identical to influence. Success can mean favourable outcomes in individual cases, or the development of desired legal doctrine. Yet even accomplishing these two difficult objectives does not guarantee achieving the broader

²⁶ *Id.*, at 33-5.

²⁷ Michael W. McCann, “Reform Litigation on Trial” (1992) *Law & Soc. Inq’y* 720.

²⁸ *Id.*, at 733.

²⁹ Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (1994).

³⁰ *Id.*, at 292.

³¹ Gerald N. Rosenberg, “Positivism, Interpretivism, and the Study of Law” (1996) 21 *Law & Soc. Inq’y* 435, at 448.

³² *Id.*, at 454.

socio-economic and political changes at which legal mobilization aims. Moreover, case outcomes, doctrinal developments, and broader policy shifts may be entirely independent of group participation.

As this overview might suggest, one of the principal deficiencies of the legal mobilization literature is that it is based almost exclusively on the U.S. experience. American scholars — or at least American political scientists — have been notoriously indifferent to the comparative study of law, courts, constitutionalism, and judicial behaviour.³³ Although this indifference has diminished in recent years, it means that the American understanding of the role of law and courts in policy development and implementation is less rich than it could be. At the same time, scholars outside the United States can also be faulted for not paying sufficient attention to this phenomenon in their own political systems. For example, although scholarly interest in litigation by organized groups in Canada dates back at least 50 years,³⁴ recent studies have focused almost exclusively on litigation concerning gender equality and sexual orientation.³⁵ Moreover, there have been few systematic attempts to examine the policy impact of judicial decisions.³⁶ By studying cases like *Chaoulli* and *Auton*, it is thus possible to contribute to the legal mobilization literature in two separate ways. First, by focusing on a non-American case, the study leverages the techniques of comparative law to understand better the relationship among litigation, legal rules and social policy. Second, by locating these case studies within a well-established

³³ James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, "On The Legitimacy of National High Courts" (1998) 92 Am. Pol. Sci. Rev. 343. The Winter 1999 and Spring 2000 issues of *Law and Courts* (newsletter of the Law and Courts Section of the American Political Science Association) also have interesting discussions on the lack of comparative study among U.S. political scientists in this field.

³⁴ J.R. Mallory, *Social Credit and the Federal Power in Canada* (University of Toronto Press, 1954).

³⁵ Sherene Razack, *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto: Second Story Press, 1991); Dr. Ted Morton, *Morgentaler v. Borowski: Abortion, the Charter and the Courts* (McClelland & Stewart, 1992); M. Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality Seeking, 1971-1995* (Toronto: University of Toronto Press, 1999); Manfredi, *supra*, note 5. An important exception is Troy Riddell, "The Impact of Legal Mobilization and Judicial Decisions: The Case of Official Minority-Language Education Policy in Canada for Francophones Outside Quebec" (2004) 38 Law & Soc. Rev. 583.

³⁶ W.A. Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Toronto, New York and London: Oxford University Press, 1994); W.A. Bogart, *Consequences: The Impact of Law and Its Complexity* (Toronto: University of Toronto Press, 2002); D. Schneiderman & K. Sutherland, eds., *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997).

non-Canadian literature, the study extends knowledge of two vital, yet under-studied, phenomena in Canadian policy studies.

III. LITIGATING AUTISM TREATMENT REFORM

The *Auton* case entered the judicial process with a single litigation objective: to obtain a remedial order of mandamus requiring British Columbia to fund Lovaas Autism Treatment as a medically necessary service within its public health care system. In view of this objective, we adopt as a framework for analysis Phillip Cooper's model of remedial decree litigation, which consists of trigger, liability, remedy, and post-decree phases.³⁷ The trigger phase of remedial decree litigation includes both the general historical practices and specific triggering events that lead to the initiation of a case. The liability and remedy phases, in which rights violations are determined and remedies formulated to correct the violations, constitute the central components of remedial decree litigation. These phases may occur either simultaneously or as the subject of separate proceedings. The final step in remedial decree litigation is the post-decree phase, during which remedies are implemented, evaluated and refined. This phase is characterized by interaction between litigants and judges, with the degree of judicial involvement related to the extent of the constitutional violation, the organizational capacity for change, and the surrounding political culture. With this model providing our framework, we explore three key questions: How did this issue get into the legal process? Why did the claim succeed in lower courts? Why did it fail so dramatically in the Supreme Court?

1. Triggering Litigation

In 1987, Dr. O. Ivar Lovass published the results of a study measuring the effects of a particular form of "early intensive behavioral intervention" (EIBI) for the treatment of autism.³⁸ The study reported that 17 of 19 children who received an average of 40 hours per week of intensive individual therapeutic treatment demonstrated significant improvements

³⁷ Phillip J. Cooper, *Hard Judicial Choices: Federal District Court Judges and State and Local Officials* (Oxford University Press, 1988), at 16-24.

³⁸ O. Ivar Lovaas, "Behavioral Treatment and Normal Educational and Intellectual Functioning in Young Autistic Children" (1987) 55 J. Clin. Cons. Psych. 3.

in their social and communication skills. Moreover, nine of the children successfully completed first grade in regular classes and were no different from their peers with respect to IQ, adaptive skills, and emotional functioning. Six years later, Lovaas and two colleagues conducted a follow-up study, which suggested that the earlier treatment gains had been maintained and that eight of nine children were continuing to progress in regular classes without special support.³⁹

Because of the treatment's apparent success, intensity (40 hours per week over two to three years), and cost (approximately \$50,000 annually), the Lovaas studies triggered the establishment of a continent-wide movement to secure private and public funding for EIBI that became known as Families for Early (or, in some cases, "Effective") Autism Treatment (FEAT). Established in 1993 in northern California, the FEAT movement quickly spread across the United States and Canada. After engaging in individual advocacy for government funding of LAT for a year, Dr. Sabrina Freeman, a sociologist with an autistic daughter, founded a branch of FEAT in British Columbia in 1996 and became its executive director. Starting from the proposition that Lovaas Autism Treatment (LAT) "is an effective, scientifically supported treatment for young children with the neurological disorder of autism," FEAT BC's position from the outset was that the B.C. government's refusal to recognize LAT as a medically necessary service provided through the province's health care system contravened "several laws designed to protect the rights of the disabled."

Litigation was thus at the forefront of FEAT BC's campaign to change the government's policy toward LAT. Asserting that the "government of B.C. must recognize its legal obligation and financially support early, intensive and scientifically proven autism treatment for every child diagnosed with this condition," it explicitly invited lawyers "who want to change the discriminatory health care system in Canada" to contact the organization. Referring to litigation in the United States, FEAT BC stressed that "the force of law must also be brought to bear in Canada."⁴⁰ Most relevantly, in August of 1996 a decision by the Alberta Court of Queen's Bench held that "Lovaas-type programs" constituted a service for handicapped children within the meaning of the province's

³⁹ J.J. McEachen, T. Smith & O.I. Lovaas, "Long-term Outcome for Children with Autism Who Received Early Intensive Behavioral Treatment" (1993) 97 *Am. J. Ment. Ret.* 359.

⁴⁰ Online at: <http://www.featbc.org/legal_issues/> (last accessed 30 June 2005).

Child Welfare Act and ordered the director of child welfare services to fund 90 per cent of the therapy's cost.⁴¹

FEAT BC secured strong legal representation from Christopher Hinkson, a partner in the Vancouver law firm of Harper, Grey, Easton. Founded in 1907, Harper, Grey, Easton is a relatively small (approximately 50 lawyers) firm specializing in civil litigation. Designated as one of the leading 500 lawyers in Canada by Lexpert, Hinkson's practice includes medical malpractice, personal injury litigation, professional negligence, insurance, products liability and administrative law. From 1987 to 1995 he served as Vice Chairman/Director of the B.C. Medical Services Foundation. He is, in short, a highly experienced litigator with particular expertise in medical and health care issues, backed by a distinguished firm.

On March 30, 1998 FEAT BC issued a press release entitled "Malpractice in the B.C. Government," which criticized the government for refusing to fund the "one effective treatment" for autism. On July 30, 1998 a number of families received a joint letter from the deputy ministers of Education and Children and Families, informing them that the government was not "in a resource position" to fund LAT.⁴² Two weeks later, Connor Auton and his mother Michelle started class action proceedings on behalf of all children and their families who had been denied funding for LAT by the provincial government. Although the courts refused to certify the proceedings as a class action, the pleadings were amended to include three additional children and their parents, including Sabrina Freeman and her daughter Michelle Tamir. The petitioners sought a declaration from the court that the denial of funding for LAT contravened their constitutional rights under sections 7 and 15(1) of the *Canadian Charter of Rights and Freedoms*,⁴³ and also sought an order of mandamus requiring that the government compensate them for the costs of LAT already incurred and for the future costs of treatment.

⁴¹ *C.R. v. Alberta (Director of Child Welfare)*, [1996] A.J. No. 760, 43 Alta. L.R. (3d) 179 (Q.B.).

⁴² *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2000] B.C.J. No. 1547, 78 B.C.L.R. (3d) 55, at para. 6 (S.C.). [hereinafter "*Auton No. 1*"].

⁴³ Section 7 declares that: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except according to the principles of fundamental justice." Section 15(1) declares that: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

Both parties agreed, however, that the liability and remedy issues could be dealt with in separate proceedings.

2. Liability Proceedings

The liability phase of proceedings consisted of a 10-day trial before Marion Allan J. of the B.C. Supreme Court in April, 2000. The principal point of factual disagreement between the parties concerned the clinical effectiveness of LAT, which was the key issue underlying the legal claim that it should be considered “medically necessary.” The petitioners built their case in favour of LAT in two stages. Since all four children had received LAT at their parents’ expense, the first stage was to demonstrate that the treatment had made a difference in these specific cases. Although the government challenged the admissibility of physicians’ letters as evidence of progress under LAT, it did not dispute the parents’ own affidavits concerning improvements in behaviour and communication skills. Consequently, Allan J. declared that she was “satisfied on the basis of admissible evidence that the infant petitioners made significant gains as a result of the Lovaas Autism Treatment they received.”⁴⁴ The petitioners’ claims, of course, went further than this. They contended that their children’s experience simply affirmed the results of the 1987 and 1993 studies, indicating that LAT “is a medically necessary service insofar as it significantly improves the condition of these children.”⁴⁵

While not vigorously disputing the claim of positive outcomes in these specific cases, the government did question the general scientific validity of the two Lovaas studies. The government argued that two methodological flaws seriously undermined the Lovaas studies: the absence of random assignment into experimental and control groups and the failure to replicate the study.⁴⁶ In the government’s view, these flaws made it impossible to derive any general conclusions about the effectiveness of LAT from these studies. At best, it argued, the treatment could be considered experimental. In support of this position, the government commissioned a study by the Office of Health Technology

⁴⁴ *Auton No. 1, supra*, note 42, at para.18.

⁴⁵ *Id.*, at para. 29.

⁴⁶ According to one of the authors of the 1993 study, there have been no other controlled studies of EIBI programs for autistic children (*Auton No. 1, supra*, note 42, at para. 27).

Assessment Services and Policy Research at the University of British Columbia. The study concluded that, “while many forms of intensive behavioural therapy clearly benefit children with autism, there is insufficient, scientifically-valid effectiveness evidence to establish a causal relationship between a particular program of intensive, behavioural treatment, and the achievement of ‘normal functioning’.” The study based this conclusion on two findings: (1) the existence of only one published report of a controlled clinical trial the results of which the scientific community was reluctant to accept; and (2) lack of corroboration by independent researchers. The report advised that “randomized trials of alternative early intensive treatment programs are ethical and feasible,” and that such research “is required before effectiveness claims can form the basis of public funding decisions regarding alternative program options.”⁴⁷

Justice Allan was, to say the least, unimpressed by the report.⁴⁸ She suggested that its authors had misled the court about whether the report had been subjected to external peer review before being filed as an exhibit in the proceedings; she criticized the research team for not consulting health professionals supportive of LAT and for relying on a “single anecdotal comment” for a key finding; and she criticized the report for falsely asserting that Dr. Lovaas and his colleagues had claimed that LAT “cures” autism. In her view, the report added “little or nothing” to existing debates about the 1987 and 1993 studies and exhibited such “an obvious bias” towards the government’s position as to detract “significantly from its usefulness.” The only part of the report that she found valuable was its acknowledgment that “early intervention with behavioural treatment can help to alleviate autistic symptoms in many if not most autistic children.” Indeed, the expert witness testimony for both parties led her to conclude that there “are no effective competing treatments” for “those based on principles of ABA.”⁴⁹ Moreover, she determined that “early intensive behavioural treatment” should be considered a “medically necessary service” under the terms of both provincial and federal legislation.⁵⁰ She reached this conclusion by broadly defining a

⁴⁷ K. Bassett, C. Green & A. Kazanjian, “Autism and Lovaas Treatment: A Systematic Review of Effectiveness Evidence” British Columbia Office of Health Technology Assessment (2000), at ix.

⁴⁸ *Auton No. 1*, *supra*, note 42, at paras. 37-50.

⁴⁹ *Id.*, at paras. 49-52.

⁵⁰ *Id.*, at para. 102.

“medically necessary” service as “whatever cures or ameliorates illness.”⁵¹

Having made this determination, and finding that British Columbia was not providing such treatment, Allan J. turned her attention to whether this failure violated constitutionally guaranteed equality rights. Two prior Supreme Court of Canada decisions set the parameters of her discussion. First, in 1997 the Court had held in *Eldridge v. British Columbia* that British Columbia’s failure to provide a comprehensive system of publicly funded sign language interpretation for deaf patients denied those patients equal benefit of the law by limiting their ability to communicate effectively with health care practitioners.⁵² Second, in 1999 the Court had consolidated 10 years of jurisprudence to set controlling principles for the application of equality rights.⁵³ According to *Law v. Canada*, the purpose of section 15(1) is “to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.”⁵⁴

From *Eldridge*, Allan J. determined that, “having created a universal medicare system of health benefits, the government is prohibited from conferring those benefits in a discriminatory manner.” From *Law*, she concluded that, by “failing to make appropriate accommodation for their health care needs” on the premise “that one cannot effectively treat autistic children,” the government was discriminating against such children by perpetuating a “misconceived stereotype.”⁵⁵ She rejected the government’s claim that its decision was justified by — in fact, based on — a rational allocation of finite health care resources. Nevertheless, although she concluded that “the appropriate treatment is ABA or early intensive behavioural intervention” and that British Columbia “discriminates against the petitioners contrary to s. 15(1) by failing to accommodate their disadvantaged position by providing effective treatment for

⁵¹ *Id.*

⁵² *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624.

⁵³ *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497.

⁵⁴ *Id.*, at para. 51.

⁵⁵ *Auton No. 1*, *supra*, note 42, at paras. 126-27.

autism,”⁵⁶ Allan J. agreed with the province that she did not have jurisdiction to make a specific order requiring the province to provide LAT. Instead, she invited counsel for both parties to make additional submissions on the precise nature of an appropriate remedy for the constitutional violation.

Although favourable to FEAT BC, the trial court’s liability finding was not without difficulty. First, the court arguably focused on the wrong principle of the *Canada Health Act* when it defined the issue in terms of universality.⁵⁷ This principle is usually understood as requiring that all qualified provincial residents must receive insured services, not that all possible medical treatments be insured. Debates about the appropriate scope of insured services instead fall under the principle of comprehensiveness. Second, in broadening the definition of “medically necessary” the court departed from the *Canada Health Act*’s definition as encompassing services delivered in hospitals or by physicians.⁵⁸ Moreover, the court may have misinterpreted expert testimony in order to reach this broad definition. According to Allan J., the expert (Dr. Morris Barer) defined “medical treatment” as “whatever cures or ameliorates illness.”⁵⁹ It is unclear, however, whether Dr. Barer considered “medical treatment” and “medically necessary service” as interchangeable terms.

3. Remedy Phase

The remedy proceedings took place in November 2000, and Allan J. rendered her judgment in February 2001.⁶⁰ Part of these proceedings concerned the province’s initial efforts to comply with the liability ruling. Specifically, it had established the Provincial Centre for Autism and Related Disorders (P-CARD) to provide province-wide services, including EIBI, for at least 20 hours per week to all diagnosed autistic children less than six years of age by 2003. The petitioners objected to this program because of its age restrictions, limited number of treatment hours,

⁵⁶ *Id.*, at para. 156.

⁵⁷ Donna Greschner & Stephen Lewis, “Auton and Evidence-Based Decision Making: Medicare in the Courts” (2003) 82 Can. Bar Rev. 501, at 514.

⁵⁸ *Id.*, at 515.

⁵⁹ *Auton No. 1*, *supra*, note 42, at para. 102.

⁶⁰ *Auton (Guardian ad litem of) v. British Columbia (Minister of Health)*, [2001] B.C.J. No. 215, 84 B.C.L.R. (3d) 259 (S.C.) [hereinafter “*Auton No. 2*”].

and failure to include LAT. Justice Allan approached these objections cautiously, noting that the case “raises significant public policy issues as to the respective roles of the judiciary and the legislature.” “The issues raised by the petitioners,” she continued, “underscore the difficulties inherent in a process where the Court’s finding of unconstitutionality is designed to change governmental behaviour.” Recognizing the importance of judicial review, Allan J. nevertheless held that “the judiciary cannot dictate what treatment programmes should or should not be implemented, nor can it dictate how limited financial resources should be allocated.” She was unwilling to characterize the government’s compliance efforts as reluctant, negative or intransigent.⁶¹ In her view, it was too early to judge the efficacy of the P-CARD program, and therefore premature “to make an order of mandamus.”⁶² The result was a three-part remedy declaring a denial of equality rights, directing the Crown to fund early intensive behavioural therapy for children with autism, and awarding the adult petitioners in the case \$20,000 in monetary damages.

4. Postdecree Phase

From Allan J.’s courtroom, the case moved to the British Columbia Court of Appeal, where the government appealed the liability declaration and the petitioners cross-appealed on the treatment and damages issues.⁶³ The appellate court unanimously rejected the government’s appeal, holding that “the failure of the health care administrators of the Province to consider the individual needs of the infant complainants by funding treatment is a statement that their mental disability is less worthy of assistance than the transitory medical problems of others” and signaled that “the community was less interested in their plight than the plight of other children needing medical care and adults needing mental health therapy.”⁶⁴ The court also rejected the petitioners’ cross-appeal against Allan J.’s decision not to require funding for LAT specifically, agreeing with her conclusion that it was not the only effective form of EIBI that autistic children could receive.⁶⁵ It similarly rejected their

⁶¹ *Id.*, at paras. 26, 27, 30.

⁶² *Id.*, at para. 45.

⁶³ *Auton (Guardian ad litem of) v. British Columbia (Minister of Health)*, [2002] B.C.J. No. 2258, 6 B.C.L.R. (4th) 201 (C.A.) [hereinafter “*Auton No. 3*”].

⁶⁴ *Id.*, at para. 51.

⁶⁵ *Id.*, at paras. 83-84.

cross-appeal against her refusal to require treatment beyond the age of six. Although accepting “that the efficacy of treatment is unlikely to end at the crisp attainment of school age,” the appellate court held that “issues of funding programs for children of school age may involve additional considerations not before the Court, either in evidence or submissions.”⁶⁶ However, the court did direct that disputes about the duration of treatment be decided on a case-by-case basis in an appropriate dispute resolution process or in trial court proceedings, thus in principle expanding Allan J.’s remedy to include children over the age of six. The cross-appeal was successful with respect to the specific children involved in the original proceedings. Although the court was unwilling to impose a general policy on LAT or duration of treatment, it found that the children named in the original complaint were “entitled to government funded treatment in the nature of that which they have been receiving...to continue until the medical view is that no further significant benefit in alleviating the autistic condition can reasonably be expected from a continuation of the treatment.”⁶⁷

The province reacted to its appellate court loss in two ways. Most obviously, it applied for leave to appeal to the Supreme Court, which the Court granted on May 15, 2003. Less obviously, it sought to restrict the appellate court’s ruling to the four children named as parties. Not surprisingly, 23 families who had been part of the original class action application, and who had remained background participants in the *Auton* litigation, objected to the province’s action. They filed a petition in the British Columbia Supreme Court claiming the same remedy as the named *Auton* litigants, including monetary damages.⁶⁸ With the exception of monetary damages, the court agreed with these families and held that they, too, should receive government funded LAT until such time as it was no longer medically beneficial.

On June 9, 2004, the Supreme Court of Canada heard oral arguments in *Auton*. The case’s broad importance was evident in the fact that it attracted 19 interveners, including 10 governments (Canada, New Brunswick, Manitoba, Quebec, Ontario, Alberta, Saskatchewan, Newfoundland and Labrador, Prince Edward Island, and Nova Scotia), eight

⁶⁶ *Id.*, at para. 90.

⁶⁷ *Id.*, at para. 92.

⁶⁸ *Anderson (Guardian ad litem of) v. British Columbia (Attorney General)*, [2003] B.C.J. No. 1962, 2003 B.C.S.C. 1299.

organizations (Canadian Association for Community Living, Council of Canadians With Disabilities, Women's Legal Education and Action Fund, DisAbled Women's Network, Autism Society Canada, Families for Effective Autism Treatment of Alberta Foundation, Friends of Children with Autism, Families for Early Autism Treatment of Ontario), and one individual. Not surprisingly, the governments were all concerned about the case's implications for their capacity to set health care funding priorities. By contrast, the non-governmental organization interveners all urged the Court to uphold the lower court judgments. Interestingly, the individual intervener — Michelle Dawson, an adult autistic woman — urged the Court to reverse the earlier judgments on the grounds that those decisions, rather than the province's refusal to fund LAT, perpetuated a stereotype that autistic individuals are incapable of living fulfilling lives and are doomed to institutionalization.

The submissions on behalf of the *Auton* group sought to preserve the equality rights liability ruling and to expand the province's liability to encompass section 7 of the Charter. The factum thus argued that British Columbia was liable for the entire cost of providing LAT to the children named in the lower court proceedings. Consequently, the families asked the Court to order reimbursement of their LAT expenses from the date they were first incurred instead of from the date of the initial declaration of a Charter violation. For the families, therefore, the Supreme Court proceedings were less about public policy than about compensation for expenses incurred in securing therapy for their children which had been unconstitutionally denied them by the provincial government. This was apparent in oral argument, where Christopher Hinkson tried to focus the justices' attention on a specific instance of intransigent behaviour by government officials rather than on the broader implications of the litigation. Hinkson denied that he was asking the Court to substitute its health policy preferences for those of the province. All the families were demanding, he argued, was that bureaucratic funding decisions be transparent and non-arbitrary. For British Columbia, by contrast, the issues before the Court were very much about public policy. Indeed, British Columbia argued that the lower court judgments would "distort the process" of health care funding decisions by creating "a category of constitutionally mandated medical services."⁶⁹

⁶⁹ Factum of the Government of British Columbia, *Attorney-General of British Columbia v. Auton* (2004), at para. 5.

In oral argument the province submitted that decisions about refusing, delaying, or rationing services were polycentric decisions within the general discretion of government.

The Court delivered its judgment in *Auton* on November 19, 2004.⁷⁰ The unanimous decision, delivered by the Chief Justice, was a stunning legal defeat for FEAT BC. The Court reversed both lower court decisions, dismissed the petitioners' cross-appeal, and held unconditionally that British Columbia's refusal to fund LAT did not constitute discrimination under section 15. Although expressing sympathy for the petitioners and the lower court decisions in their favour, McLachlin C.J. was clear that the issue before the Court was *not* "what the public health system should provide," but whether "failure to fund" certain services under that system can be "an unequal and discriminatory denial of benefits."⁷¹ She drew a clear distinction, in other words, between decisions about what is included in the health care "basket" ("a matter for Parliament and the legislature") and the delivery of services authorized by law (to be done "in a non-discriminatory manner").

Four considerations — two factual and two legal — drove the Chief Justice's judgment. One factual consideration, referred to by the Chief Justice at three points in her judgment, was the "controversial" or "emergent" nature of the autism treatment under consideration.⁷² Indeed, she referred explicitly to Michelle Dawson's intervention against the therapy, and cited specific objections to it such as "its reliance in its early years on crude and arguably painful stimuli" and "its goal of changing the child's mind and personality."⁷³ The second factual consideration was the existence of some government funded programs for autistic children and their families.⁷⁴ "At the time of trial," she noted, "the government funded a number of programs for young autistic children, and appeared to be moving toward funding some form of early intervention therapy."⁷⁵ Although the Chief Justice suggested that, in retrospect, the government should have moved more quickly, she concluded that "it is difficult to say that the government in purpose or effect

⁷⁰ *Auton v. British Columbia*, [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657 [hereinafter "*Auton No. 4*"].

⁷¹ *Id.*, at para. 2.

⁷² *Id.*, at paras. 5, 11, 60.

⁷³ *Id.*, at para. 5.

⁷⁴ *Id.*, at para. 7.

⁷⁵ *Id.*, at para. 9. See also para. 59.

put autistic children and their families ‘on the back burner’.⁷⁶ By focusing on these facts — rather than on the tragic impact of autism, bureaucratic intransigence, personal economic sacrifice, or individual progress under LAT — the Chief Justice provided a relatively benign picture of the pre-*Auton* policy status quo.

However, it was in her legal analysis of the claim that the Chief Justice dealt her harshest blow to the claimants. In her view, their claim simply did not involve a benefit provided by law; moreover, even if it did, there was no discrimination in the decision not to fund LAT. On the first point, the Chief Justice concluded that nothing in the legislative framework of public health care “provides anyone with all medically required treatment.”⁷⁷ In her view, the legal benefit conferred by this framework was restricted to “core” medical services, which did not include EIBI therapy under either federal or provincial law. Although provinces have discretion to extend public funding to “non-core” services, she continued, there is no constitutional obligation to do so either generally or for specific services. A government, she stressed, is “under no obligation to create a particular benefit,” but is “free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner.”⁷⁸ From this perspective, EIBI autism therapy was simply outside the range of health services to which the claimants had a legal right — whether by statute or Constitution. There could not, therefore, be any violation of section 15(1) in a decision not to fund LAT.

Although the Chief Justice could have ended her inquiry there, she nevertheless considered whether there was any basis to the claim of discrimination in this case. On this point, she defined the comparator group in such narrow terms as to make a finding of discrimination virtually impossible. She rejected the suggestion that autistic children should be compared to non-disabled children or to adults with a mental illness.⁷⁹ Instead, she argued that the “appropriate comparator” is “a non-disabled person or a person suffering a disability other than a mental disability (here autism) seeking or receiving funding for a non-core therapy important for his or her present and future health, which is

⁷⁶ *Id.*, at para. 61.

⁷⁷ *Id.*, at para. 31.

⁷⁸ *Id.*, at para. 41.

⁷⁹ *Id.*, at para. 49.

emergent and only recently becoming recognized as medically required.”⁸⁰ The lower courts had erred, in other words, in comparing the claim for an “emergent” non-core therapy to funding for established therapies.⁸¹ Discrimination could only exist, she concluded, if the province had acted more quickly in funding equally emergent non-core therapies for non-disabled or physically (rather than mentally) disabled persons. Not only was there no evidence of such action, according to the Chief Justice, but the government’s conduct, “considered in the context of the emergent nature of ABA/IBI therapy...raises doubts about whether there was a real denial or differential treatment of autistic children.”⁸²

Despite her vindication of British Columbia’s position, the Chief Justice did not let its actions escape criticism altogether. She described the decision to transfer jurisdiction over child and youth mental health from the Ministry of Health to the Ministry of Children and Families as “inauspicious.”⁸³ She also concurred with the trial court’s finding that the government’s actions “did not meet the ‘gold standard of scientific methodology’.”⁸⁴ Nevertheless, she concluded that “there is no evidence suggesting that the government’s approach to ABA/IBI therapy was different than its approach to other comparable, novel therapies for non-disabled persons or persons with a different type of disability.”⁸⁵ Whatever the weaknesses of the government’s decision making process, they were not constitutional deficiencies.

5. Analysis

The emergence of a rights-based argument for public funding of Lovaas Autism Treatment in British Columbia was planned and strategic rather than accidental. FEAT BC was connected to an organizational network dedicated to ensuring accessibility to LAT through legal action.

⁸⁰ *Id.*, at para. 55.

⁸¹ *Id.*, at para. 56.

⁸² *Id.*, at para. 59.

⁸³ *Id.*, at para. 60.

⁸⁴ *Id.*, at para. 61, citing *Auton No. 1*, at para. 66. One should note that the trial court also recognized that the original Lovaas study also failed to meet the “‘gold standard’ for experimental studies” because it did not randomly assign children to the experimental and control groups. See *Auton No. 1*, at para. 38.

⁸⁵ *Id.*, at para. 62.

Its website referred readers to more than 20 U.S. and Canadian judgments — based primarily on statutes and administrative law — imposing obligations on public authorities to fund LAT. It proactively sought legal counsel to pursue its claim in court, and secured the participation of a highly qualified lawyer with specialized expertise in health-related litigation. FEAT BC's contribution to the movement was to raise the stakes beyond other Canadian autism litigation by framing its argument as a Charter claim. In this sense, *Auton* was not simply about getting access to a service, but about entrenching that service in such a way as to immunize it from shifting policy preferences or scientific evidence. Among the factors accounting for the case's initial success were sympathetic plaintiffs (autistic children and their struggling parents), good facts (evidence of family sacrifice and individual progress under the therapy), and a favourable venue (B.C. courts had established a track record of intervening in health care policy). These factors came together to link a broad definition of "medically necessary treatment" to fundamental statutory (universality) and constitutional (equality) principles.

Why were these factors ineffective in the Supreme Court of Canada? One answer, as discussed above, lies in the Chief Justice's alternative factual framing. She chose to emphasize the controversial and emergent nature of LAT, as well as the province's good faith (even if imperfect) efforts to provide EIBI to progressively larger numbers of autistic children. A second answer lies in her understanding of *Eldridge*, which differed from the trial court's understanding. According to the Chief Justice, *Eldridge* "did not assist the petitioners" because it concerned unequal access to a benefit already provided by law while their claim was for "access to a benefit that the law has not conferred."⁸⁶ Finally, although not cited in her judgment, the relevance of the Court's 2002 decision in *Gosselin v. Quebec* should not be underestimated.⁸⁷ In *Gosselin* a majority of the Court, led by the Chief Justice, held that a differential welfare regime for young adults (under 30) did not violate the Charter's equality rights. As the Chief Justice noted then, the issues raised by that case had "implications for the range of options available to governments throughout Canada in targeting welfare programs to address the particular needs and circumstances of individuals requiring

⁸⁶ *Auton No. 4*, at para. 38; *Eldridge*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624.

⁸⁷ *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429.

social assistance.⁷⁸⁸ Her judgment, easily transferable to other social programs, was that this range of options should not be unduly narrowed. Although narrowly decided, *Gosselin* was a good indicator of the Chief Justice's thinking on the issue.

The *Auton* case offers an important glimpse into both the promise and limitations of legal mobilization. Its ultimate resolution in the Supreme Court suggests the most obvious limitation: legal mobilization can fail to establish the desired legal rule. Certainly, the Court's unanimous rejection of the lower court rulings in *Auton* was an unambiguous reversal of legal fortunes for the LAT movement. Yet, even when the case was legally successful, it provided FEAT BC with mixed results. On the positive side, two courts recognized a constitutional right to government-funded EIBI treatment for autism, awarded monetary damages to four families, and granted compensation for incurred expenses and future autism treatment of their choice to 27 families. The decisions also led British Columbia to convert a small pilot program of treatment into full-fledged government policy, even as it appealed its legal losses. Finally, the victories supported legal mobilization outside B.C. as FEAT branches in other provinces, notably Ontario, began leveraging the B.C. judgments to press for extended EIBI funding. Indeed, 11 autism funding cases were decided in various provinces in 2003 and 2004.⁸⁹ On the negative side, FEAT BC never achieved its objective of obtaining a legal declaration that LAT is the only effective treatment for autism. Consistent with Rosenberg's observations, the B.C. courts were reluctant to exercise their full remedial authority in a social policy field outside their traditional area of expertise in legal procedure. The legal victories never provided the LAT movement with its ultimate goal.

Nor, however, did the Supreme Court defeat, as disappointing and deflating as it must have been, remove all of the energy from the movement. Governments still face significant, and potentially successful,

⁸⁸ *Id.*, at para. 12.

⁸⁹ *E.(G.) v. Alberta (Child Welfare Appeal Panel)*, [2003] A.J. No. 1277, 2003 ABQB 846; *Cucek v. British Columbia (Ministry of Children & Family Development)* (2003) BCHRT 44; *Clough (Litigation guardian of) v. Ontario*, [2003] O.J. No. 1074 (S.C.J.); *Lowrey (Litigation guardian of) v. Ontario*, [2003] O.J. No. 2009 (S.C.J.); *P. (M.) v. Chinook Regional Health Authority*, [2004] A.J. No. 32 (Q.B.); *K.(L.) v. Alberta (Child Welfare Appeal Panel)*, [2004] A.J. No. 89, 2004 ABQB 65; *Fleischmann (Litigation guardian of) v. Toronto District School Board*, [2004] O.J. No. 160 (S.C.J.); *Wynberg v. Ontario*, [2004] O.J. No. 1066 (S.C.J.); *Eisler (Litigation guardian of) v. Ontario*, [2004] O.J. No. 1864 (S.C.J.); *N.(R.) (Litigation guardian of) v. Ontario*, [2004] O.J. No. 3210 (S.C.J.); *Newfoundland & Labrador v. Sparkes*, [2004] N.J. No. 34 (Nfld. S.C.T.D.).

autism litigation. According to the Autism Society of Canada, there were more than 180 other cases, involving over 1,600 families, still pending in November, 2004.⁹⁰ Moreover, in January, 2005 the Ontario Superior Court granted an interlocutory injunction against the province, requiring it to continue funding EIBI treatment for two six-year-old boys despite the *Auton* ruling.⁹¹ The court distinguished the two cases on the grounds that Ontario provided funding through its Ministry of Community and Social Services rather than through the Ontario Hospital Insurance Plan. As such, the boys were being denied a benefit provided by law on the basis of age. Finding that the boys would suffer “irreparable harm” if withdrawn from treatment, the court held that it would be discriminatory to do so. In this sense, *Auton* may have simply shifted the focus of legal mobilization efforts from one constitutional arena to another.

Equally, and perhaps more importantly, the legal defeat may have favourably mobilized public opinion. Editorial reaction to the decision was generally to the effect that governments should fund the treatment whether constitutionally required to or not.⁹² Even the *National Post* — an outlet not generally known for its support of government spending, publicly-funded health care, or judicial activism — criticized provincial governments for not funding LAT and for undertaking costly court battles to avoid any obligation to do so.⁹³ An Ipsos-Reid poll reported in December, 2004 that 84 per cent of Canadians supported public funding for EIBI despite the Court’s decision,⁹⁴ and two MPs (Scott Reid (Con) and Tony Martin (NDP)) tabled petitions in Parliament supporting funding for EIBI. As McCann might argue, the six-year litigation campaign for autism funding brought the issue to public attention and shifted the policy advantage toward the movement behind it.

⁹⁰ Online at: <<http://www.autismsocietycanada.ca/docs/FINALAuton%20Decision.pdf>> (last accessed 30 June 2005).

⁹¹ *Bettencourt (Litigation guardian of) v. Ontario*, [2005] O.J. No.70 (S.C.J.).

⁹² *Globe and Mail* (16 November 2004), A18; *Globe and Mail* (20 November 2004), A26; *Vancouver Sun* (23 November 2004), A16.

⁹³ John Ivison, “Ottawa Has the Money to do The Right Thing,” *National Post* (20 November 2004), A6.

⁹⁴ Online at: <<http://www.ipsos-na.com/news/pressrelease.cfm?id=2505>> (last accessed 30 June 2005).

IV. CONCLUSION

The *Auton* story, at least as briefly rendered here, is in many ways consistent with both sides of the debate concerning legal mobilization. Although litigation ultimately failed to establish the sought-for legal rule, it nevertheless nudged public policy in the desired direction and strengthened the autism treatment reform movement by energizing its participants and raising public visibility. Consistent with McCann's position, the litigation effort succeeded in using legal arguments to reconstitute the policy debate about effective autism treatment. Moreover, the nature of the claimants meant that the effort did not generate a countermovement similar to what scholars have found in the case of abortion and gay rights litigation.⁹⁵ Nevertheless, *Auton* is also consistent with aspects of Rosenberg's argument. Although there was no organized countermovement, the lower court successes generated an article by two highly respected scholars — Donna Greschner and Stephen Lewis — that was highly critical of those lower court decisions. In addition, those successes opened the door to Michelle Dawson's intervention, which raised doubts about the universal acceptance of LAT as an appropriate treatment for autism. Institutionally, limited judicial independence and implementation capacity manifested itself in the form of remedial caution in the British Columbia courts, which meant that even legal victories did not translate directly into optimal policy change. Finally, the decision to invest six years and significant resources in a litigation campaign obviously entailed opportunity costs, the magnitude of which is difficult to measure.

What are the broader implications of litigating health care reform? In the specific case of autism treatment, the combination of *Auton* and the Ontario decisions suggest a number of possible consequences, none of which are intended or desirable. First, given that there is no constitutional obligation to fund ABA or EIBI, but that there may be a constitutional obligation to fund treatment indefinitely once programs are in place, current autism litigation may have a chilling effect on provincial innovation. Second, the current state of the law in Ontario may provide an

⁹⁵ Eva R. Rubin, *Abortion, Politics and the Courts: Roe v. Wade and its Aftermath* (Greenwood Press, 1982), at 161; Ellen Ann Andersen, *Out of the Closets and Into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (University of Michigan Press, 2005), at 218.

incentive for parents whose children have any kind of learning difficulty to encourage autism diagnoses in order to access these programs. Finally, as increased demand meets the reality of finite resources — in the form of money and qualified therapists — treatment waiting lists will lengthen. In each of these scenarios, the provincial response will undoubtedly generate even more litigation.

More generally, both *Chaoulli* and *Auton* are products of frustration with the inability of apparently unresponsive health care decision makers to provide a desired level of service. Although the desire of Canadians, frustrated by perceived bureaucratic and legislative inaction, to seek health care solutions from the courts is understandable, the benefits and costs of this path to policy change merit closer attention. The obvious benefit is that, when litigation is successful, courts may be able to order governments to act quickly and forcefully. Yet litigation is not without disadvantages. First, the articulation of policy demands in the form of constitutional rights can exclude alternative policy choices from consideration. Rights-based litigation aims at altering policy priorities in an especially powerful way because of the difficulty of reversing, or even modifying, the priorities set through it. In this sense, health care litigation may, in some circumstances, be understood as a sophisticated form of queue jumping because it posits that a particular health care need deserves a higher priority than it has because of its grounding in a constitutional right. Second, the adversarial nature of litigation is best suited to resolving concrete disputes between two parties by imposing retrospective remedies. Complex policy issues — like health care — involve multiple stakeholders, constantly changing facts and evidence, and predictive assessments about the future impact of decisions. Finally, rights-based litigation, particularly at the Supreme Court level, by definition imposes national solutions on inherently local problems. These solutions can ignore differences among provinces and suppress the provincial experimentation necessary to find innovative approaches to policy problems. Canadian health care faces a multitude of complex challenges, which requires careful consideration of the contribution that courts can make in meeting those challenges before embracing litigation as an instrument of reform in health care policy.