
Ontario Court of Appeal overturns *Wynberg* decision on autistic students

In *Wynberg v. Ontario*, a decision released on July 7, 2006, the Ontario Court of Appeal has reversed the decision of the Superior Court of Justice which held that Ontario had violated the equality rights of children with autism by limiting their eligibility to participate in the Intensive Early Intervention Program (IEIP) to children between the ages of two and five (see "[Ontario Court rules government discriminates based on age and disability in denial of programs to students with autism](#)" on our Publications page).

IEIP is an intensive behavioural intervention service for autistic children. The guidelines developed for the IEIP are based on expert evidence showing that intervention should begin as early as possible after identification or diagnosis, be intensive and directly delivered. To be effective, the intervention should range from 20 to 40 hours per week, and typically last for one to two years. The intervention is to be delivered by well-trained staff who are monitored and evaluated by highly trained experts. Ontario undertook a major training initiative to build capacity to deliver the IEIP. However, capacity was, and remains an issue.

In her judgment for the plaintiffs, the trial judge in the case had issued an order declaring that the criteria for eligibility for the IEIP discriminated on the basis of age under section 15 of the *Canadian Charter of Rights and Freedoms*, and that the Minister of Education breached his duty under subsection 8(3) of the *Education Act* in a manner that discriminated on the basis of disability by failing to ensure that IEIP and other therapies were provided to children age six and over. The judge had also ordered significant damages to cover past and future treatment. In allowing the government's appeal, the Court of Appeal held that Ontario's program was not discriminatory and did not breach the *Charter*. It held also that, even had the plaintiffs been successful, they would not have been entitled to the remedy of damages.

AGE DISCRIMINATION – DIFFERENTIAL, BUT NOT DISCRIMINATORY TREATMENT

The trial judge had found that beginning in October 2002, the equality rights of the plaintiff children were violated because the IEIP was provided to autistic children age two to five, but not to autistic children age six and over. The Court agreed that the provision of the IEIP to the younger children but not to the older group constituted differential treatment of the older children, but held that this differential treatment was not discriminatory. In arriving at this conclusion, the Court applied the jurisprudence developed by the Supreme Court of Canada in the 1999 judgment, *Law v. Canada (Minister of Employment and Immigration)*.

Law established that the key question in determining whether the equality guarantee in section 15 of the *Charter* has been contravened is whether the challenged government action demeaned the human dignity of the claimant. This determination is made having regard to four contextual factors surrounding the claim:

- pre-existing disadvantage, stereotyping, prejudice or vulnerability;
- the correspondence, or lack thereof, between the grounds on which the claim is based and the actual needs, capacity or circumstances of the claimant or those he or she is properly compared to;
- the ameliorative purpose or effect of the challenged law, program or activity upon a more disadvantaged person or group in society; and
- the nature and scope of the interest affected by the challenged governmental activity.

Further, the analysis of these contextual factors must be made in respect of the appropriate comparator group. In this case, the appropriate comparator group for the claim of age-based discrimination was autistic children between the ages of two and five, as they were eligible for the IEIP, but the plaintiffs were not.

The Court held that an analysis of the four contextual factors set out in *Law* did not support the claim of age discrimination, finding that:

- There was no basis for concluding that prior to the implementation of the IEIP, autistic children age six and over had historically suffered disadvantage because of their age, compared to autistic children age two to five, who were targeted by the program. If anything, the evidence suggested otherwise.
- The IEIP corresponded to the capacities and circumstances of autistic children in the targeted age group and was an exemplary program for them. These circumstances differed in important and relevant respects from those of autistic children age six and over. The IEIP simply did not correspond in the same way to the needs, capacities and circumstances of the claimant group.
- The targeting of the IEIP at autistic children age two to five was ameliorative in nature, and the exclusion of older children did not demean their human dignity.
- The IEIP was tailored to the circumstances of pre-schoolers. As such, it could not be as effective for older children, so the adverse impact of its denial to the claimant group was relatively muted.

Summing up its ruling on the claim of age discrimination, the Court stated that it did not believe that the claimants had shown that they had been deprived of their human dignity by the differential treatment:

“Keeping in mind that these factors are informative, not part of a mathematical calculus, the important assessment is whether the exclusion of autistic children age six and over from the IEIP deprives or demeans their human dignity. We do not think that the complainants have demonstrated such a denial.

Viewed from the perspective of a reasonable person in circumstances similar to those of the claimants, this program must be seen as carefully targeted to ameliorate the

disadvantage experienced by autistic children age two to five. It is fully focussed on their particular capacities and circumstances and their unique potential to benefit from it. Exclusion of the infant plaintiffs because of their age from a program so particularly designed to assist another disadvantaged group does not deny their human dignity or devalue their worth as members of Canadian society.”

DISCRIMINATION BASED ON DISABILITY – NO DIFFERENTIAL TREATMENT

The Court agreed with the trial judge that the appropriate comparator group for the claim of discrimination based on disability was other exceptional children in two of the five categories set out in the *Education Act*, the physical and communication categories. The claimants’ first task was to prove that they had been accorded differential treatment compared to exceptional children in these two categories, in terms of the obligation of the Minister of Education set out in section 8(3) of the *Education Act*, which provides in part:

“The Minister shall ensure that all exceptional children in Ontario have available to them, in accordance with this Act and the regulations, appropriate special education programs and special education services without payment of fees by parents or guardians resident in Ontario[...].”

In other words, the claimants had to prove that children in the comparator group had received the appropriate special education programs and services, while autistic children age six and over had not.

The Court held that there was no differential treatment of the claimant group for two reasons. First, it had not been demonstrated that the IEIP could even be delivered as a special program or service, as there were a number of elements of the IEIP that did not fit within the context of the public school system. For example, the IEIP contemplated some 20 - 40 hours per week of intervention, whereas the school week is only 25 hours long. As well, the IEIP is supposed to be delivered consistently throughout the calendar year, not just during the school year.

The second reason cited by the Court for holding that there was no differential treatment of the claimants based on their disability was that it had not been shown that the IEIP was the *only* appropriate program for autistic children. In this connection, the Court stated that the trial judge had moved from making an explicit finding that there was no evidence that existing services for autistic children provided appropriate special education, to an implicit finding that these services did not, in fact, provide appropriate special education. This conclusion, in the Court’s view, could not be sustained by the evidence, and represented a “palpable and overriding error” of the trial judge.

The other component of the differential treatment analysis involves determining whether the comparator group, exceptional children in the physical and communication categories, does in fact receive the benefits the claimants say have been denied to them. The Court stated that the evidence supporting the existence of appropriate special programs for the comparator group was “impoverished” at best, and that the claimants had not established this assertion as a fact.

Having found that there was no differential treatment of the claimants as against the comparator group of exceptional children, the Court did not have to consider whether the treatment of the claimants was discriminatory. However, it stated its view that had there been differential treatment, the evidence before the trial judge would not have been sufficient to establish that the differential treatment was discriminatory.

DAMAGES NOT AN APPROPRIATE REMEDY

As the Court had allowed the government's appeal, it followed that the damages awarded by the trial judge could not stand. However, the Court went on to express its views about the appropriateness of damage awards in cases such as this, and held that where a government action or law had been declared unconstitutional, damages were, in all but rare cases, an inappropriate remedy.

The first reason for this rule is that there can be no civil liability where the government action upon which this claim is based relates solely to its administration of a law or program that was valid throughout the relevant period of time, i.e. before the declaration by a court that the government action was unconstitutional. The Court stated that if government acts reasonably in light of the current state of the law, and it is only subsequently determined that the law is unconstitutional, there should be no civil liability for damages.

The second reason is the effect that the threat of liability for damages would have on government decision making.:

“The potentially vast scale of liability would interfere in another way with the proper functioning of government. If the government were liable in damages to all persons affected by action subsequently declared to be constitutionally inadequate, large sums of public funds would be diverted from public programs and institutions to private individuals as redress for past acts of government.”

Further, the Court stated, assessing damages in this context required too much speculation. For example, it was not certain whether the government would have even developed the IEIP had it known in advance that it would have to offer it to all school-age children with autism, and the impact of this requirement on its service and budgetary capacity. Finally, the Court expressed the view that awarding the claimants damages would not be equitable, as there was nothing to suggest that they should be given any priority over all other autistic children not before the Court.

The Court concluded by noting that in the circumstances of this case, damages were an inappropriate remedy. Had the plaintiffs been successful, the appropriate remedy would have been limited to a judicial declaration regarding the government's obligations:

“Absent bad faith, abuse of power, negligence or willful blindness in respect of its constitutional obligations, damages are not available as a remedy in conjunction with a declaration of unconstitutionality. As the trial judge made no such findings on the part of Ontario, it was an error in principle to award damages in conjunction with declaratory relief. It was a further error to grant damages on the basis that the Minister of Education had breached his statutory duty under s. 8(3) of the Education Act. The appropriate remedy for such a breach would be to direct the Minister to fulfill his duty.”

Accordingly, the government's appeal was allowed.

In Our View

This decision is yet another example of the deference shown by courts to the government's policy decisions where issues of resource allocation loom large. The approach to s. 15 of the *Charter* enunciated by the Supreme Court of Canada in *Law* can be seen as an attempt by the courts to structure the judicial approach to claims of discrimination in the provision of benefits by government, by introducing an additional stage of requiring that the differential treatment be shown to be discriminatory in nature.

Some have welcomed this development as a principled means of ensuring that substantive equality rights are protected by inquiring into issues such as prejudice, stereotyping and historical disadvantage. Others, however, have stated that the analytical framework adopted in *Law* is a barrier to equal treatment and once differential treatment based on a protected ground (such as age or disability) has been established, the burden should shift to the state to justify the way it has allocated the benefits claimed by the plaintiffs.

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