Update on Auton v. British Columbia: Wynberg v. Ontario

1. Wynberg v. Ontario [1] [Wynberg], parents of autistic children began a lawsuit against the Ontario government, arguing that the failure of the province to provide treatment for autistic children over age six violated the children's equality rights under s. 15(1) of the Canadian Charter of Rights and Freedoms. In 2006, the Ontario Court of Appeal reversed the decision of the Ontario Superior Court of Justice by ruling that the age limitation on the "Intensive Early Intervention Program" (IEIP) for autistic children was not discriminatory under s. 15(1). An appeal to the Supreme Court of Canada was dismissed on April 12, 2007.

The decision of the Ontario Court of Appeal develops the area of equality rights and disability. Wynberg follows the ruling of the Supreme Court of Canada in Auton (Guardian ad litem of) v. British Columbia (Attorney General) [2] [Auton], which restricts the use of s. 15(1) in the health care context.

The reasoning of the Ontario Court of Appeal in Wynberg is different from that of the Supreme Court of Canada in Auton. In Auton, the Supreme Court distinguished between "core" medical services and "non-core" services. The latter are only partially funded [3]. Some consider Auton to be "bad law" since the decision appears inconsistent with Eldridge v. British Columbia [4].

1. Wynberg, the Court of Appeal dismissed the claims of discrimination on the basis of age and disability by following the test for s. 15(1) established in Law v. Canada (Minister of Employment and Immigration) [5]. The Ontario Court of Appeal held that the age difference was not discrimination because IEIP was designed for children age two to five. Expert evidence was put before the Court that "this is the age cohort that is best able to benefit from an intensive intervention program. As the experts agreed, [this age cohort] present[s] a 'window of opportunity' that the claimant group does not"[6]. In addition, IEIP was designed specifically for pre-school age children who are not enrolled in school full-time. The program's organizational flexibility, time requirements, and opportunity for parental involvement implied that IEIP was not suitable for the regimented schedule of elementary school. Thus, the court held,

an "IEIP-type program could not work for [autistic children over six] as it does for [autistic children age 2 to 5]"[7].

The Ontario Court of Appeal also reversed the decision of the trial judge regarding the claim that IEIP discriminated on the basis of disability contrary to s. 15(1). The parents argued that the failure of the province to provide IEIP to autistic children over age six contradicted s. 8(3) of the Education Act, which required the province to ensure that "exceptional pupils" receive "appropriate" special education programs. The primary reason for reversing the trial judge's decision was the lack of evidence that IEIP was the only appropriate program for autistic children. The Court of Appeal found that IEIP was not the only appropriate program, and so found no basis for the parents' claim.

Cases

- Auton v. British Columbia.
- Wynberg v. Ontario.
- Eldridge v. British Columbia (Attorney General) http://www.canlii.org/en/ca/scc/doc/1997/1997canlii327/1997canlii327.html
- Law v. Canada (Minister of Employment and Immigration) http://www.canlii.org/en/ca/scc/doc/1999/1999canlii675/1999canlii675.html

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- Andre Picard, "National strategy is needed, Senate committee concludes." The Globe and Mail. (3 April 2007). A13.
- Tonda MacCharles & Debra Black, "Top Court won't hear autism case; Parents battled province to fund intensive therapy in school system." Toronto Star. (13 April 2007). A06.

Websites

- Autism Treatment Services of Canada http://www.autism.ca.
- Geneva Centre for Autism www.autism.net.

[1] Wynberg v. Ontario, 82 O.R. (3d) 561.

[2] Auton (Guardian ad litem of) v. British Columbia (Attorney General), [2004] 3 S.C.R. 657.

[3] Kaelen Onusko, “Equality Rights and Disability: Auton v. British Columbia”, online: Centre for Constitutional Studies.

[4] Eldridge v. British Columbia, [1997] 3 S.C.R. 624.

[5] Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497.

[6] Wynberg v. Ontario, 82 O.R. (3d) 561 at 59.

[7] Wynberg v. Ontario, 82 O.R. (3d) 561 at 76.