**The Charter trumps tradition**

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RIGHTS
HEADNOTE
The B.C. Court of Appeal overrules politicians and orders new medicare spending &gt;&gt; by TERRY O'NEILL

Would she be Spiderman, Buzz Lightyear, a bride, a doctor, a dog, a dinosaur or a bumblebee? In the frantic few days before Halloween, five-year-old Breanna Himmelright could not decide what costume to wear for her big night of trick-or-treating. One minute she favoured dressing up as a superhero, the next as a nectar-gathering insect. But despite the potential for maternal exasperation this indecision presented, mom Michelle Himmelright could only smile at her daughter's dithering-happy in the knowledge that were it not for some remarkably effective therapy, Breanna would be in no position to exhibit such normal little-girl behaviour.

That is because, less than two years earlier, the preschooler was diagnosed with autism. "She never would have chosen a Halloween costume," says Mrs. Himmelright, of Maple Ridge, B.C. "All she would have known or cared about was the candy. Choosing a costume-it wouldn't have had any meaning to her. Now, it does. And we're just excited she loves choosing it."

Mrs. Himmelright's four-year-old son, Griffen, is in the family's toy-strewn living room with his mom as she shares these thoughts with a visitor. He bounces from his mother's lap, to playthings on the floor, to a window seat and back to his mom in a matter of seconds. It is just past breakfast time, but Griffen does not have cereal or fruit on his mind. "Chicken and fries, chicken and fries, chicken and fries," he says over and over. They are his favourite McDonald's foods, Mrs. Himmelright explains, and little Griffen obsesses on them because, like his sister, he is autistic. Unlike his sister, however, his recovery is still a long way off.

Two children, two diagnoses of autism and two huge problems for young parents Justin and Michelle Himmelright-especially in a province such as B.C., whose medicare system does not fully fund the type of expensive early-intervention programs that provide the only hope of rescuing autistic children from their illness.

The family's fortunes were dramatically improved last month, however, when the B.C. Court of Appeal upheld an earlier Supreme Court of B.C. ruling which found the government's refusal, to fund the specialized educational programs, was a breach of the children's Charter rights. The appeal court directed the province to pay all the costs of a specific type of early-intervention treatment, an amount that could total up to $60,000 a year per child. Moreover, the judges said they would hold provincial bureaucrats personally accountable if their ruling was not followed to the letter.

The case adds to the growing list of recent Canadian decisions in which a court has directed a provincial government to spend money (see story page 29). The trend means, in effect, that Parliament and its bureaucratic appendices no longer have the age-old exclusive say over how the public's money is to be spent. Where once that ultimate power rested with elected politicians, it is now held by unelected judges.

Traditionalists are troubled by such a turn of events, but the writing has been on the wall for at least a generation. That is because the case is built on two pillars of modern Canadian life: the State's medicare system, which carries with it the explicit promise of universal access to taxpayer-funded medical services, and the Canadian Charter of Rights and Freedoms, which declares in section 15, "Every individual is equal before and under the law and has the right to the equal protection and equal benefits of the law without discrimination..."

In that light, the logic behind the autism case is simple: since the Charter deems everyone to be equal before the law, and since the law says we are all entitled to medicare protection, a government must be in breach of the Charter if it fails to provide a certain medical service. That, in essence, is what the litigants in the B.C. case argued. And that is what the judges ruled.

The B.C. government had started providing limited funding for autism treatment, to the tune of $1,667 a month per child, following the initial B.C. Supreme Court ruling last year. But, for families such as the Himmelrights, that total constituted less than half the needed funds. The difference, about $2,000 a month per child, came out of their own pockets.

In ruling in favour of the autistic children, Justice Mary Saunders observed the case "concerns the rights of children to receive state-funded health services to ameliorate the effects of a seriously disabling affliction." The case engaged consideration of the Charter, as well as of "modern standards of child protection evidenced, for example, in the United Nations' Convention on the Rights of the Child," she stated.

In support of their ruling, the judges also noted the B.C. government had passed, in 1996, the Medicare Protection Act (MPA), which, among other matters, declares, "the people and government of British Columbia believe that medicare is one of the defining features of Canadian nationhood and are committed to its preservation for future generations." That declaration is tempered by a passage recognizing the need "for the judicious use of medical services in order to maintain a fiscally sustainable health care system for future generations."
IMAGE PHOTOGRAPH
Son Griffen: `Chicken and fries, chicken and fries!'

Government lawyers had argued that a court ruling in favour of the four families behind the autism-funding challenge would have the effect of constitutionalizing a particular method of treatment (in this case, a specific type of early-intervention therapy known as Lovass Autism Treatment). This, in turn, would lead to a checkerboard effect in the medicare system. And from that would follow anarchy, as "some services will be de-listed, some new services added and other services will be constitutionally entrenched, regardless of their efficacy relative to other treatments of the same condition," the judges noted in a summary of the argument.

The court rejected all such Crown arguments. "The exclusion of effective treatment for autistic children undermines the primary objective of the medicare legislation," Madam Justice Saunders wrote, adding that the "judicious use" section of the MPA"does not justify a violation of the petitioners' section 15 rights."

Crown lawyers also appealed to the judges to give weight to "the age-old reluctance of the courts to allocate the scarce resources of the taxpayer." Indeed, they urged the jurists "to defer in this matter to the Crown, on the constitutional principle that the expenditure of funds is a parliamentary responsibility." Again, however, the Charter trumped tradition. "This consideration, eloquently expressed by counsel for the Crown, is not without weight," the judgment states. "However, the principle that government monies should be allocated only by the legislature, while strong, does not always prevail when the issue is compliance with the Constitution."

The court concluded, "Having created a universal medical system, the government is prohibited from conferring those benefits in a discriminatory manner." Besides ordering the province's Medical Services Commission to provide full funding for the Lovass treatment, the judges also awarded the parents named in the suit "symbolic" damages of $20,000 each.

Former B.C. health minister Jim Nielsen, now a civic politician, thinks governments, not courts, should decide on the provision of healthcare services. He says his experience as health minister in the Bill Bennett Social Credit government showed that the healthcare budget could quickly consume all provincial revenues. "Obviously, checks are needed," he says.

But Michael Lewis, president of the Autism Society of B.C., believes taxpayers should not be concerned about an unaffordable strain being put on the public purse as a result of the autism ruling. "I don't believe it is an issue," he says. "This litigation was not brought frivolously." Similar cases would also have to be strong enough to stand up in court.

Regardless, he argues, if the government had been doing "the right thing" in the first place, the issue would have not gone to court. "My take is, thank God we do have a court system and thank God we have a Charter, because these children's rights were being breached under the Charter," concludes Mr. Lewis, whose eight-year-old son is autistic. "These are fundamental tenets, in my mind, of being a Canadian."

Moreover, Sabrina Freeman, a founding member of Families for Early Autism Treatment of B.C., argues full funding for early intervention will actually save money in the long run. Without treatment, she says, an autistic child will cost the government $2 million over the course of his life. "They are the most high-need, in terms of when they are untreated, of any group," she points out. "They are violent, self-injurious-it can be a nightmare."

Still wary over bureaucratic foot-dragging on the funding issue, Ms. Freeman predicts the B.C. government will seek leave to appeal last month's ruling to the Supreme Court of Canada. B.C. Attorney General Geoff Plant said October 24 in an interview with this magazine that he had yet to decide on that. "We are still reading the decision and trying to make sure we understand its implications for public policy, particularly healthcare," Mr, Plant says. "If we reach a point in the analysis where we form the view that the issues are such that we think they should be looked at by the highest court in the country, we would make the decision to seek leave to appeal."

He stresses that if an appeal is launched, it would not be because he believes funding for autism treatment is unwarranted, "but because I have an interest in the question of the role of the court in judicially reviewing the healthcare-policy decisions that involve the expenditure of public funds-in short, the question is whether the Constitution requires the courts to make decisions telling government how to spend limited and precious healthcare dollars."

University of Calgary political scientist Rainer Knopff, co-author of The Charter Revolution and the Court Party, has argued repeatedly that the Constitution does not require courts to do so. To illustrate his point, he notes the Charter says every citizen of Canada has a right to vote, and yet children are not allowed to vote. Is that a Charter violation? Not necessarily. Would a judge be compelled to allow a six-year-old to vote, if one were to launch a Charter-based suit? No, he says.

Yet, such a commonsense approach often eludes Charter-obsessed judges, Prof. Knopff suggests. "I've been fighting some of these battles for years, and nobody pays any attention," he says, "so I think [these sorts of judgments are] going to be ongoing. A fact of life, for the foreseeable future." There are no easy solutions to the problem, but there is some hope because future courts might be inclined to be less activist.

On the national political scene, the Canadian Alliance is the only party to consistently express concern about the shift in power, away from Parliament and towards the courts, that the Charter has engendered. In fact, at its convention in Edmonton last spring, the party adopted a policy opposing judicial supremacy. Although widely criticized by liberals, the policy is actually similar to one backed by the Labour government in Great Britain, which in 1998 passed the Human Rights Act. Under it, the courts are empowered to protect citizens' rights, but they are not allowed to overrule Parliament. Instead, they merely can issue a "declaration of incompatibility" between government policy and human rights. Of course, Britain does not have a Charter.

The developing struggle between political tradition and court powers recedes into the background in the presence of a mother, such as Mrs. Himmelright, whose every waking moment seems devoted to restoring her children to health. Despite her near-complete recovery, Breanna still receives regular in-home treatment and is accompanied by a learning aide at kindergarten. "She does most everything there on her own now," Mrs. Himmelright says with a smile. "And she's learning, she's talking, she's making friends. She's doing things that we never thought she would do."

And that includes selecting a Halloween costume, which Breanna finally does just hours before trick-or-treating is to begin. This year she goes as a jack-o-- lantern.

There is a long road ahead for Breanna's younger brother, however. "He's still a handful," but early intervention has helped Griffen develop some language and play skills, and he is much more manageable. "He's able to understand what teachers at preschool say-- he's able to be at preschool," his mom enthuses.

Realistically, however, Griffen might never fully recover. But with the specialized instruction he is now receiving, he assuredly will be able to function in society. "He will be able to hold down a job. He will be able to take care of himself. He won't be living in an institution. And I don't think he'll ever live in a group home," Mrs. Himmelright says. "And that's very exciting."

SIDEBAR
Can't afford to pay? It doesn't matter

SIDEBAR
The B.C. Court of Appeal's decision to force the provincial government to pay for autism treatment is not the first of its kind in

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Canada; in 1997, a B.C. court cited constitutional considerations when it ruled the province must pay for sign-language interpretation services for deaf patients at hospitals. Nevertheless, the autism decision is seen by legal experts as one of the most significant of its type. As such, it will almost certainly lead to more spending-policy matters being decided by unelected judges.

That has certainly been the experience in the U.S., where the courts have long cited the Civil Rights Act in ordering various government agencies to spend money-even if they could not afford to do so. In Rockford, Illinois, for example, a federal court compelled the city's school board to spend tens of millions of dollars on educational programs to narrow the achievement gap between minority students (black and Hispanic) and whites. "As a result, Rockford has the third-highest property tax rate in the nation," Chronicles writer Scott P. Richert noted in an article last year.

Rights-based lawsuits, aimed at forcing governments to spend more money, were doomed to failure in Canada before the Charter became law two decades ago. Since then, Canadian litigation in this area has

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been slow to develop, but it is clearly gaining momentum, according to University of Calgary political scientist Ted Morton, co-author of The Charter Revolution and the Court Party.

The professor wrote in the October Fraser Forum that, activist judges in Ontario have already rolled back cost-cutting initiatives of the Harris government in three areas-health, welfare and labour relations. This, in turn, has forced the provincial government to spend more money than it wanted to.

These rulings have no discernible basis in the written rules of the constitution," Prof. Morton charged, "but are largely the creation of overheated judicial imagination and the political opposition to the Harris Common Sense Revolution." The political scientist warned that, because these Ontario decisions are now part of Canadian constitutional law, any other province contemplating similar budget-balancing initiatives can expect to be hauled into court.

"It doesn't take a weatherman to see which way the judicial wind is blowing," he concluded. "Unless or until this unaccountable, judicial law-making is reined in, it will be even more difficult to restore Canada's economic competitiveness-and thus Canadians' standard of living."

SIDEBAR
A mysterious barrier to normality

SIDEBAR
No one knows exactly what causes the mysterious mental illness known as autism. But the malady is widespread. Experts estimate

SIDEBAR
autism affects about one in every 1,000 children, but some say the number is high as one in 250.

Medical literature describes autism as a lifelong developmental disability that prevents individuals from properly understanding what they see, hear and otherwise sense. "Individuals with autism have to painstakingly learn normal patterns of speech and communication, and appropriate ways to relate to people, objects, and events, in a similar manner to those who have had a stroke," explains one U.S. Web site.

SIDEBAR
The key word above is "learn," because about 40% of children stricken with the disability can, indeed, learn how to function normally in society. Moreover, in a significant number of cases, they can become indistinguishable from their peers. But a doctor's diagnosis of their illness

SIDEBAR
must be made when they are young, and they then must receive treatment from experts trained in intensive instructional therapies.

But that, in turn, costs more money than an average low- or middle-- income family can afford to pay. Most U.S. states fund the needed early-intervention programs through social agencies or educational programs, but Canadian provinces deliver a patchwork of services. Alberta fully funds early-intervention programs through its medical services plan, up to $70,000 a year. B.C. has now been ordered by the courts to do likewise. Some funding is also available in Prince Edward Island and Ontario. And a funding lawsuit is pending in Quebec.

"If my child had cancer instead of autism, we wouldn't even be discussing funding, says Michael Lewis, president of the Autism Society of B.C. "In my mind, the analogy is, `I've got cancer and you're going to pay for none of my chemotherapy.' It is absolutely the antithesis of the social covenant and is clearly a breach of my, rights."

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