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COURT OF APPEAL FOR ONTARIO

GOUDGE, SIMMONS AND GILLESE JJ.A.

B E T W E E N :	)	
	)	
ROBYN WYNBERG and SIMON WYNBERG on their own behalf and in their capacity as joint litigation guardians of SEBASTIAN and NATHANIEL WYNBERG et al.	)	**Robert E. Charney Sarah T. Kraicer S. Zachary Green and Bruce C. Ellis for the appellant, respondent by way of cross-appeal**
	)	
Plaintiffs (Respondents, Appellants by way of cross-appeal)	)	
	)	**Mary Eberts**
- and -	)	**and Amy Britton-Cox for the Wynberg respondents,**
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO	)	**appellants by way of cross-appeal**
	)	
	)	**Scott C. Hutchison**
Defendant (Appellant, Respondent by way of cross-appeal)	)	**and Alice Mrozek for the Deskin respondents,**
	)	**appellants by way of cross-appeal**
	)	
	)	
A N D B E T W E E N:	)	**John A. M. Judge**
	)	**Vaso Maric**
MICHAEL SHANE DESKIN and NOAH SAMUEL DESKIN minors by their litigation guardian, Brenda Jill Deskin, BRENDA JILL DESKIN, STEVEN JOE DESKIN, SHELDON KOSKY, FRANCES KOSKY, and BETTY DESKIN	)	**and Robert Lattanzio for the intervener, The Canadian Association for Community Living and Community Living Ontario**
	)	
	)	
	)	
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	)	

Plaintiffs (Respondents, Appellant by way of cross-appeal)	)	
- and -	)	
HER MAJESTY THE QUEEN in Right of Ontario	)	
Defendant (Appellant, Respondent by way of cross-appeal)	)	
	)	**Heard: December 5, 6, 7, 8 and 9, 2005**

On appeal from the order of Justice Frances P. Kiteley of the Superior Court of Justice dated March 30, 2005.

TABLE OF CONTENTS

BY THE COURT:

INTRODUCTION

[1] Since September 2000, the Ontario government ("Ontario") has provided assistance to preschool autistic children who are between two and five years old through what it calls the Intensive Early Intervention Program (the "IEIP"). After a lengthy trial, the trial judge decided that the exclusion from this program of autistic children age six and over and the failure to provide it to them as a special education program in school, discriminates against them on the basis of age and disability, and therefore violates the equality guarantee in the *Charter of Rights and Freedoms*. Moreover, it is not a reasonable limit that can be justified in a free and democratic society.

[2] This is the appeal by Ontario from that decision. For the reasons that follow, we have concluded that the appeal must be allowed.

THE TRIAL

[3] These proceedings began as two separate actions although they were tried together. One was known as the Wynberg action and the other as the Deskin action. The actions sought relief on behalf of thirty-five autistic children and their parents. All of the children had turned six by the time the trial concluded on September 3, 2004. The infant plaintiffs were therefore all autistic children age six and over.

[4] In general terms, the expert witnesses called at the trial all agreed that autism, or autistic disorder, encompasses a spectrum of disorders characterized by pervasive difficulties in reciprocal social interaction, pervasive impairments in verbal and non-verbal interaction, and a pattern of restricted repetitive and unusual behaviours and interests. There is no doubt that it is a devastating paediatric disorder. This is brought home forcefully by the trial judge's description at para. 40 of her reasons of the personal stories she heard in evidence:

> Parents or other caregivers from more than half of the families gave evidence. Virtually every one of the parents described circumstances of the children that personalized the clinical descriptions in a manner that could only be described as heartbreaking.

[5] The trial judge described in detail the evolution of the IEIP. Prior to 1998, there were no publicly funded intensive services in Ontario for preschool children with autism. This began to change in 1998, in significant measure because of the efforts of Brenda Deskin, the mother of Michael Deskin. Michael had been diagnosed with autistic disorder in January of that year, at the age of thirty-five months. She brought this issue to

the attention of the senior officials in the provincial Ministry of Community and Social Services (MCSS), the Ministry of Education and the Ministry of Health, and supplied them with comprehensive and persuasive documentation.

[6] MCSS responded by beginning work on what would become the IEIP. It took the lead within the provincial government to develop a framework for the program and secure the necessary funding for it. By September 2000, MCSS had created, revised and released the IEIP Guidelines describing the program and setting out the criteria for it, and in that month, autistic children age two to five began to receive services through the IEIP in those regions of Ontario where service providers were ready to do so.

[7] In brief measure, the Guidelines describe the IEIP as follows: it is to provide intensive behavioural intervention services for autistic children to begin as early as possible after early identification or diagnosis. It is to be intensive and delivered as a direct service, which, to be effective, ranges from twenty to forty hours per week, typically lasting for one to two years. It is to be delivered by well-trained staff who are monitored and evaluated by highly trained experts. It is expected that systematic behavioural teaching methods will be used. One-to-one structured programming, which is usual at the outset, is to be used as appropriate. Other systematic methods are also to be used when appropriate for the child's skill level or stage of progress. The program will occur in a variety of settings and involve parents and caregivers directly in the child's treatment.

[8] However, as the IEIP unfolded, it became apparent that the need was greater than the capacity of the program. By October 2002, the shortage of professionals and therapists meant that the number of children turning six and becoming ineligible without ever having received this service exceeded the number being served by the program.

[9] It was also apparent by then that the education system was not responding to the special needs of these children when they entered school, through a special education program consistent with the Guidelines. The legislative provision in issue here is s. 8(3) of the *Education Act*, R.S.O. 1990, c. E.2, which obliges the Minister of Education to ensure that all "exceptional" pupils in Ontario (including those with autism) have available to them "appropriate" special education programs and services without payment of fees.

[10] The trial judge was required to decide a number of issues. Her main findings were as follows:

(1) Ontario has violated the equality rights of the infant plaintiffs on the basis of age because of the upper age limit of the IEIP;

(2) Ontario has violated the equality rights of the infant plaintiffs on the basis of disability in failing to provide a special education program for them consistent with the IEIP Guidelines;

(3) Ontario failed to justify the age discrimination violation under s. 1 of the *Charter* and did not attempt to do so for the disability discrimination violation; and

(4) declaratory relief and damages constitute the appropriate remedy.

[11] Ontario appeals each of these findings. The trial judge made three other findings that are appealed by the respondents:

(1) the parents of the infant plaintiffs have not demonstrated a violation of their equality right;

(2) neither the infant plaintiffs nor the adult plaintiffs have shown that their rights to life, liberty and security of the person under s. 7 of the *Charter* have been infringed by the special education regime provided by Ontario; and

(3) the negligence claim of the Deskin plaintiffs must fail.

[12] As we will elaborate, we have concluded that the appeal by Ontario from each of the first four findings must be allowed and the appeal by the Wynberg and Deskin plaintiffs from each of the other three findings must be dismissed. We will deal with each of these issues in turn. As we do so, we will elaborate the relevant facts and reasons of the trial judge and set out our own analysis in connection with each one.

THE LEGAL PRINCIPLES

[13] The first two issues raised by Ontario both concern questions of equality law. First, Ontario says that the trial judge erred in finding that, by limiting the IEIP to autistic children under six, it discriminated against the infant plaintiffs on the basis of age. Second, Ontario says that the trial judge erred in finding that it discriminated against the infant plaintiffs on the basis of disability by failing to provide them with a special education program consistent with the IEIP. Because both issues are set in the context of s. 15 of the *Charter*, it is helpful to outline the principles of equality law that must inform the analysis.

[14] Section 15(1) expresses the constitutional guarantee of equality in clarion language that by now is familiar:

> 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.

[15] The fundamental purpose of the guarantee is to protect against the violation of essential human dignity that may arise through disadvantage, stereotyping, or political or social prejudice. It seeks 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. This is the expression of the concept of equality articulated in the seminal case of *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 51.

[16] At para. 53, *Law* describes the concept of human dignity:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.

[17] The jurisprudence that begins with *Law* also makes clear that the inquiry mandated by s. 15(1) cannot be conducted as if it were the rigid application of a mathematical formula. Rather, it entails consideration of both the full context in which the claim for equality arises and the circumstances of the claimants.

[18] In *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357, the Supreme Court of Canada underlines that this contextual analysis is to proceed on a comparative basis, comparing the equality seeker with others who are similarly situated. The choice of the comparator group to whom the claimant should be compared must be carefully done. An assertion of the right to be treated equally must necessarily entail a comparison with the treatment accorded to others in the same circumstances. Writing for the Court, Binnie J. describes the centrality of the comparative approach at para. 1:

> A person asking for equal treatment necessarily does so by reference to other people with whom he or she can legitimately invite comparison. … A s. 15(1) claim will likely fail unless it can be demonstrated that the comparison, thus invited, is to a "comparator group" with whom the claimant shares the characteristics relevant to qualification for the benefit or burden in question apart from the personal characteristic that is said to be the ground of the wrongful discrimination [emphasis in original].

[19] Binnie J. also makes clear that the claimant makes the initial choice of the person or group to whom he or she wishes to be compared. The correctness of the choice, however, is a question for the court to determine. He explains the criteria for identifying the appropriate comparator group at para. 23.

> The appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the *Charter* or omits a personal characteristic in a way that is offensive to the *Charter*.

[20] The proper identification of the comparator group permits the court to proceed, on a comparative basis, to the three broad inquiries required to analyze a claim of discrimination. *Law* describes them this way: first, is the claimant accorded differential treatment under the law; second, is that treatment based on one of the prohibited grounds listed in s. 15(1) or a ground analogous to them; and third, does the differential treatment discriminate in a substantive sense.

[21] It is up to the claimant to demonstrate an affirmative answer to each of these three questions. In *Law*, the court described four contextual factors to which a claimant may be able to turn to demonstrate discrimination: (i) pre-existing disadvantage, stereotyping, prejudice or vulnerability; (ii) 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; (iii) the ameliorative purpose or effect of the impugned law, program or activity upon a more disadvantaged person or group in society; and (iv) the nature and scope of the interest affected by the impugned governmental activity.

[22] In *Hodge*, at para. 17, the Court emphasizes that each step in this inquiry proceeds on the basis of a comparison between the claimant and the appropriate comparator group.

[23] At paras. 59-60, *Law* also establishes that the inquiry must be undertaken from the perspective of a reasonable person in circumstances similar to those of the claimant. Ultimately, the question is whether, given those circumstances, the impugned state action demeans the human dignity of the claimant. It is this profound and fundamental value that the equality guaranteed by s. 15(1) protects.

[24] This framework of analysis is supplemented by s. 15(2) of the *Charter*. Because of the circumstances in which the discrimination claims arise in this case, this requires a brief outline as well. Section 15(2) reads as follows:

> Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[25] This subsection is dealt with by the Supreme Court of Canada in *Lovelace v. Ontario*, [2000] 1 S.C.R. 950. The Court found that s. 15(2) should be seen as an interpretive aid to s. 15(1), not an exemption from it. Section 15(2) confirms and advances the goal of substantive equality that underpins s. 15(1) by recognizing that ameliorative programs targeted at specific disadvantaged groups may significantly contribute to enhancing their human dignity. The Court also makes clear that a claim that such a program is discriminatory is properly assessed under s. 15(1), but that exclusion from a targeted ameliorative program is less likely to be associated with stereotyping or stigmatization or conveying the message that the excluded group is less worthy of recognition and participation in the larger society than might be the case with exclusion from a more comprehensive ameliorative program.

ISSUE ONE: THE AGE DISCRIMINATION CLAIM

a) The Relevant Facts

[26] The trial judge found that beginning in October 2002, the equality rights of the infant plaintiffs were violated because the IEIP was provided to autistic children age two to five, but not to autistic children age six and over.

[27] The trial judge reached this conclusion after tracing in detail the development of the IEIP as a government program in Ontario.

[28] In brief, she found that prior to approval by Ontario of the concept of the IEIP in April 1999, there were virtually no publicly funded services for autistic children of any age. She noted, however, that there were some limited services for older autistic children, such as publicly funded behaviour management in school and some limited

special education programs and services, although none of these services involved the intensive intervention technique of the IEIP.

[29] From the beginning, the proposed IEIP was targeted at autistic children age two to five. The government accepted the consensus of the experts in the field that the children in this age range presented a window of opportunity for this intensive intervention, responded best to it at that age, and should receive it as early as possible in their lives. In addition, it was presumed that at the mandatory school age of six, the education system would respond appropriately to the needs of autistic children.

[30] In September 2000, Ontario issued the Guidelines for the program. Ultimately the trial judge based her legal analysis on the IEIP as it was described at pp. 12-15 of the IEIP Guidelines. The following are its central elements, as reproduced at para. 180 of the trial judge's reasons:

> **Intensive Behavioural Intervention**
>
> For most children in the program, intensive behavioural intervention will be the cornerstone of their Individual Service Plan. The intensive behavioural intervention provided by regional programs must clearly incorporate state-of-the-art best practices.
>
> Regional programs are expected to develop the capacity to provide intensive behavioural intervention based on the principles described below, which are derived from research findings, expert opinion, and clinical practice guidelines developed in other jurisdictions. The program should have enough flexibility to allow the best use of local resources and expertise, and to exercise clinical judgment in developing particular parameters of intervention for particular children and families. At the same time, however, there is an expectation that regional programs will have a common philosophy and approach and will provide a common standard of service quality consistently across the province.
>
> Regional programs are expected to provide intensive behavioural intervention services which:
>
> - begin as early as possible after early identification or diagnosis;

- are "intensive" in nature (i.e., are a direct service for many hours per week, as discussed further below);

- flow from a thorough diagnostic, developmental, and functional assessment (as described above);

- are based on best available scientific evidence on efficacy, safety, and appropriateness;

- use systematic behavioural teaching methods to build up skills (including, when appropriate, discrete trial teaching in one-to-one structured programming using techniques of applied behaviour analysis such as positive reinforcement, task analysis, modeling, and prompting);

- use other systematic methods, when appropriate for the child's skill level or stage of progress, such as small group instruction, activity-based learning, and capitalize on naturalistic teaching opportunities across a variety of people and settings;

- include, from the outset, planning for generalization, independence, and flexibility in children's behaviour and skills as well as teaching functional, relevant skills they will need in natural settings;

- use a curriculum which is comprehensive in scope (i.e., it provides teaching in all areas including social, play, cognitive, language, self-help, and so on) and is developmental in sequence;

- include a particular focus on the social-communicative deficits and differences which are characteristic of autism, including a wide variety of techniques to promote joint attention, social interaction, and intentional communication, using a variety of expressive communication modalities as clinically appropriate (e.g., picture exchange, words, gestures, and so on) and encouraging a variety of

communicative functions to be developed (e.g., requesting, protesting, initiating, commenting, and so on);

- are individualized to reflect the child's developmental level, strengths and needs, likes and dislikes (i.e., the specific goals, the motivators and the teaching methods are chosen based on what is appropriate for the particular child);

- are data-based and monitored frequently using behaviour observation methods such as graphing, inter-observer reliability, and so on, so that clinical decisions are based on data (e.g., to determine when the child has progressed enough to have specific goals, specific methods of instruction, or larger program parameters adjusted and/or to make the transition to less formal training and/or a more natural setting);

- use an ethically sound, positive programming approach to treat any serious problematic behaviours (e.g., self-injury, aggression), based on a comprehensive biopsychosocial assessment, including but not limited to functional analysis; in accordance with the MCSS standards and other ethical and professional guidelines;

- are delivered by well-trained staff who are monitored and evaluated by highly trained experts;

- occur in a variety of setting(s) as discussed further below;

- involve the parents/caregivers directly in the child's treatment and give them the training they need to supplement the program at home (when possible and appropriate), manage their child's behaviour, and have meaningful and rewarding interactions with their children;

- include careful planning and support to help the child function in or make the transition to other settings, such as integrated child care or school, including teaching the child the "survival skills" needed for the next setting (e.g., participating in circle time, raising one's hand to get the teacher's attention);

- are coordinated and integrated with other services the child or family may need or desire;

- are sensitive to the family's values and preferences, cultural context, and language, including being available in French in designated areas; and

- do not include other unproven or experimental approaches including, but not limited to; the Developmental, Individual Difference, Relationship (DIR) model (also known as "floor time"), Sensory Integration Therapy, Music Therapy, Touch Therapy, Auditory Integration Training (AIT), Facilitated Communication (FC), the Miller Method, diet or hormone therapies.

…

Intensity

The number of hours of intensive behavioural intervention shown by research to be effective ranges from 20 to 40 hours per week in different studies. Within this range, the limited research available does not demonstrate any clear relationship between the amount of intervention and the child's outcome.

However, "intensity" is more than simply the number of hours a child spends in intervention. More importantly, it depends on the quality of intervention provided during those hours. Because of this, the program will not set a specific number of hours for intensive behavioural intervention. The intensity of each child's program should be a clinical decision

made by the regional program, based on the research, and taking into account the following factors:

- the child's age, tolerance for intervention, and other health factors (e.g., very young children may not be able to tolerate as many hours as somewhat older children);

- the child's developmental level, severity of autism and interfering behaviours (e.g., children with severe developmental delays, or very aloof children with high levels of stereotypies, may require a higher number of hours of intervention);

- the stage of therapy the child is at and rate of progress made (e.g., some children may begin with an intensive one-to-one program and then progress to a group setting with one-to-one services for only a few hours per week); and

- the level of family participation in the child's intensive behavioural intervention (e.g., families wanting to provide a certain number of hours themselves).

…

Setting(s)

Research indicates that highly effective early intensive behavioural intervention programs can be delivered in a variety of settings/models including segregated centre-based models, home-based programs, programs involving a progression from segregated to integrated settings, and several combinations (usually involving a home component).

Based on these findings, the program will not require any particular setting or program model. Instead, regional programs are expected to utilize a variety of settings based on clinical decisions which take into account the following factors:

- the child's age, tolerance for intervention, developmental level, severity of autism, interfering behaviours, and so on;

- the stage of therapy the child is at and rate of progress made (e.g., many children need to start with primarily one-to-one intervention and, as they progress and certain prerequisite skills are developed, can benefit from small group settings);

- the availability of options depending on their community and location;

- parents' values and priorities (e.g., some parents may prefer a primarily home-based model, others may prefer other options);

- the principle of having children placed in the most naturalistic, least restrictive setting in which the child can learn and function effectively (Note: integrated placements are not recommended until and unless children have mastered particular skills and appropriate supports are in place); and

- the principle of maximizing the benefits of setting(s) a child may already be in (e.g., if the child is appropriately placed in a supportive child care center, part of the intervention – particularly social skills development – could take place there, and be supplemented by some home-based individual work).

[31] With the issuing of the Guidelines, autistic children in the two to five age group began to receive services through the IEIP in those regions of Ontario where the service providers were ready to do so. Because it was a new program, a major training initiative was undertaken to build capacity to deliver the service. However, right from the start, capacity was, and remained, an issue. By June 2001, there was an emerging wait list problem, with children turning six and thus reaching the IEIP age cutoff before being able to access the program.

[32] The trial judge found that the *Charter* violations commenced as of October 2002. At that point, Ontario remained fully committed that the IEIP was a program targeted to help autistic children age two to five and was unavailable to autistic children six years of age and older. As well, the experts continued to share the view that the younger age group presented the window of opportunity. However, despite significant efforts to train instructor therapists and supervising therapists, and to identify supervising psychologists, capacity to deliver the service continued to fall short. Consequently, by October 2002, more children were aging out of the eligible years without receiving the service than were being served by the program. And the government was aware that the education system was not responding to the special needs of pupils with autism in a way that the trial judge found appropriate.

[33] Nonetheless, despite these problems with capacity, termination of eligibility at age six, and transition to school, the trial judge concluded that the IEIP was in many respects an exemplary program for autistic children age two to five. She also found that for school-age autistic children, by contrast with the two to five age group, there was only modest research about the efficacy of intensive intervention. The most that could be said is that the available research did not indicate that it is not effective for this older group. The clinical experience, however, was that it continues to be effective, albeit perhaps with less pronounced effect than for the younger age group.

[34] This is the factual context in which the trial judge began her consideration of the claim for age discrimination.

b) Our Analysis

[35] The fundamental assertion on behalf of the infant plaintiffs was that the implementation of the IEIP was done, not with the purpose of discriminating against autistic children age six and over, but that it has that effect.

[36] The proper comparator group was not an issue before the trial judge nor is it in this court. The infant plaintiffs, the claimants here, are autistic children six years of age and older. At trial and in this court, all counsel accepted that the appropriate comparator group is autistic children age two to five. The trial judge agreed, as do we. The groups are alike except for the personal characteristic of age, which is the basis upon which the comparator group is eligible to receive IEIP services while the claimants are not.

[37] Nor is there any dispute that the benefit received by the comparator group is provided by state action under law. The IEIP is a program that the Minister of Community and Social Services has discretion to undertake pursuant to s. 7(1)(a) of the *Child and Family Services Act*, R.S.O. 1990, c. C.11. It reads:

> 7(1) The Minister may,

> (a) provide services and establish, operate and maintain facilities for the provision of services.

[38] In implementing the IEIP pursuant to this subsection, the Minister is serving the paramount objective of the *Child and Family Services Act*, which is described in s. 1(1) as the promotion of the best interests, protection and well being of children.

[39] Thus, the first two stages of the inquiry mandated by *Law* are straightforward. Through the Minister's establishment of the IEIP for autistic children age two to five, the state imposes differential treatment on the claimants compared to the comparator group. This is done on the basis of age, an enumerated ground in s. 15(1) of the *Charter*.

[40] The important question that remains is whether this is discriminatory. Is its purpose or effect to demean the human dignity of the claimant group?

[41] Before turning to her discrimination analysis, the trial judge qualified her conclusion that the claimants were accorded differential treatment based on an enumerated ground. She found that this began only as of October 2002, because by then it was apparent to the Ontario government that the education system was not responding to the needs of autistic children age six and over, and more than half of the children for whom the IEIP was intended were aging out without receiving the service, thereby missing the window of opportunity. The trial judge concluded that it was therefore no longer reasonable to correlate age with eligibility. As a consequence, she found that the *Charter* violations (both age discrimination and disability discrimination) only commenced in October 2002.

[42] As part of their cross-appeal, the respondents argue that the trial judge erred by inserting this step into the equality analysis at this point. They say that the commencement date for the differential treatment on the enumerated ground of age must be when it first started, not when it ceased being reasonable. This was September 2000 when the IEIP began to deliver services, not in October 2002. They argue that the declarations issued at trial must be amended to provide for the earlier date, since it is the point at which the *Charter* violations commenced.

[43] Ontario argues that the finding of the trial judge should be read as part of her discussion of whether the differential treatment constituted discrimination. In particular, it says that this is part of the analysis of the correspondence factor described in *Law*.

[44] We cannot read the reasons of the trial judge as Ontario proposes. Her finding is that the differential treatment of the claimants based on age began only when it became unreasonable for eligibility to be limited to autistic children age two to five to the exclusion of those six and over. We agree with the respondents that the analysis called for in *Law* does not contemplate such a step in determining whether the claimants

experienced differential treatment on an enumerated ground. Indeed, even at the discrimination stage, the assessment focuses on the impact of the differential treatment on the human dignity of the claimants rather than whether the government actors had good reason to do what they did.

[45] We agree with the respondents that the differential treatment based on age began in September 2000, when the IEIP started to provide services. However, the crux of the equality inquiry is whether that differential treatment can be said to constitute discrimination.

[46] The answer to this question requires the comparative approach and the full contextual analysis described in *Law* to determine whether the claimants have established that their human dignity has been denied or demeaned by the differential treatment. Since *Law*, that analysis is now organized through the four contextual factors or considerations described in that case.

[47] The first of these is whether, prior to the differential treatment, the claimants suffered pre-existing vulnerability, stereotyping or prejudice because of the particular personal characteristic. In other words, are the claimants a disadvantaged group that is more vulnerable to this differential treatment because it builds on prior stereotyping based on the same characteristic?

[48] The trial judge concluded that this is so for the claimant group. She found that the age cutoff in the IEIP reflects and reinforces the stereotype that autistic children age six and over are virtually unredeemable.

[49] We cannot subscribe to that conclusion. There can be no doubt that, sadly, all autistic children, regardless of age, have historically suffered significant prejudice and disadvantage because of stereotyping and misconceptions about their human potential. Indeed, at trial, counsel filed the following agreed statement of fact:

> That persons with mental disabilities, including those with autism, have historically been a vulnerable and powerless group who have been stigmatized, and have suffered from prejudice, discrimination and stereotyping and may have been segregated from the rest of society.

[50] However, since the ground of discrimination underpinning this claim is age, this contextual factor must turn on whether the claimant group, namely autistic children age six and over, has suffered from historic disadvantage as a result of stereotyping on the basis of age, not because of autism.

[51] This was made clear by McLachlin C.J. in *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429. The claim advanced in that case was that a welfare scheme providing lesser benefits to those under thirty years of age discriminated against them compared to welfare recipients who were thirty and older. In applying this contextual factor the Chief Justice said this at para. 35:

> Given the lack of pre-existing disadvantage experienced by young adults, Ms. Gosselin attempts to shift the focus from age to welfare, arguing that all welfare recipients suffer from stereotyping and vulnerability. However, this argument does not assist her claim. The ground of discrimination upon which she founds her claim is age. The question with respect to this contextual factor is therefore whether the targeted age-group, comprising young adults aged 18 to 30, has suffered from historic disadvantage as a result of stereotyping on the basis of age. Re-defining the group as welfare recipients aged 18 to 30 does not help us answer that question, in particular because the 30-and-over group that Ms. Gosselin asks us to use as a basis of comparison also consists entirely of welfare recipients [emphasis in original].

[52] In this case, we can see 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 would seem to suggest otherwise. Prior to the IEIP, there were no publicly funded services for the younger age group but some limited ones for those six and over. Thus, the failure to implement the intensive intervention model of the IEIP for school-age autistic children, once the program was begun for the comparator group, cannot be said to reflect or reinforce pre-existing prejudicial attitudes towards older autistic children because of their age.

[53] Moreover, from its inception, the IEIP was targeted at the two to five age group. It was designed to take advantage of the window of opportunity that all experts agree these children present at that age. It was designed to meet their particular circumstances. The implementation of a program that is so centred on its target group carries no message that would worsen any mistaken preconception that, because of their age, autistic children age six and over are irredeemable compared to the younger group, even if such a pre-existing stereotype existed. In our view, because the focus of the program was entirely on helping the two to five age group, and because it is so tailored to their circumstances, it cannot be taken to say anything demeaning about older autistic children. In the language of *Lovelace, supra* at para. 73, the IEIP did not function "by device of stereotype" about autistic children age six and older.

[54] The second contextual factor described in *Law* is the correspondence, or lack thereof, between the ground on which the claim is based (namely the denial of the IEIP to the claimants because of age) and the actual needs, capacity or circumstances of the claimants compared to the comparator group.

[55] The trial judge's consideration of this factor is found at para. 586 of her reasons:

> While there is evidence that the needs, capacity or circumstances of the plaintiff children were taken into consideration in establishing entrance eligibility for IEIP, there is no evidence that they were considered in establishing exit eligibility. Indeed, experts such as Dr. Perry, Dr. Siegel and Dr. Newman agreed that decisions about the termination of ABA/IBI [a designation used by the trial judge to mean intensive behavioural intervention consistent with the IEIP Guidelines] ought to be clinical decisions made in response to the individual child's needs and circumstances. Therefore, I find that there is no correspondence between the ground of discrimination and the benefit claimed on the one hand, and the actual needs, capacity or circumstances of the plaintiff children on the other hand.

[56] In our view, this approach skews the analysis required by this factor. The trial judge's concern appears to be that the exit criterion for autistic children age two to five is age rather than individual clinical assessment. With respect, this is a concern about the use of age as a differentiator at all, not a concern that when age is in fact used, it is a basis to treat one group differently from another in a way that is discriminatory. In other words, it is not a concern about age discrimination. The claim is not that children in the two to five age group are improperly removed from the IEIP program because of age rather than individual assessment. That would not be a claim that because of their age they are treated differently than those of another age. Rather, the age discrimination claim is that compared to children in the two to five age group, those age six and older are not eligible to access the IEIP because of their age, whether they were ever previously in the program, aged out of it before receiving any services, or were not diagnosed until after they turned six. It is the circumstances of this older group that must be scrutinized here, and, as quoted above, the trial judge seems to acknowledge that the needs, capacities and circumstances of the claimant group were properly considered in limiting access to the program to those age two to five.

[57] If the trial judge's concern is taken to be that the complainant group should not be prevented from accessing the IEIP simply on the basis of age but only on the basis of individual clinical assessment, the words of McLachlin C.J. in *Gosselin*, *supra*, are

apposite. There the complaint was, in part, that the legislation used age, not individual assessment of need, to determine who should receive social assistance. The Chief Justice noted that an element of arbitrariness is inherent in any legislative distinction using age. This is because assessment based on age is not assessment based on individual circumstances. However, in grouping individuals, age is often properly used as a proxy for the abilities and circumstances of the group. The Chief Justice said this at para. 57:

> A final objection is that the selection of 30 years of age as a cut-off failed to correspond to the actual situation of young adults requiring social assistance. However, all age-based legislative distinctions have an element of this literal kind of "arbitrariness". That does not invalidate them. Provided that the age chosen is reasonably related to the legislative goal, the fact that some might prefer a different age – perhaps 29 for some, 31 for others – does not indicate a lack of sufficient correlation between the distinction and actual needs and circumstances.

[58] The full contextual analysis required by this second factor must examine the correspondence between the circumstances of each of the claimant group and the comparator group and the age differentiation that underpins the claim.

[59] Of fundamental importance is that from the beginning, the IEIP has been an ameliorative program targeted at autistic children age two to five. This is the age cohort that is best able to benefit from an intensive intervention program. As the experts agreed, they present a "window of opportunity" that the claimant group does not. Moreover, their circumstances are different from those of the claimant group in a second important respect: they are not in school. The core design of the IEIP was based on this circumstance, including its intensity as reflected in the hours per week, its emphasis on segregated rather than integrated settings, its variety of delivery sites, and the range of skilled personnel to be employed. None of these important features of the IEIP fit well in the circumstance of autistic children age six and older who are in full-time attendance at school.

[60] We therefore conclude that the IEIP corresponds to the capacities and circumstances of autistic children in the targeted age group. As the trial judge found, it is in many respects an exemplary program for them. These circumstances differ in important and relevant respects from those of autistic children age six and over. The IEIP simply does not correspond in the same way to the needs, capacities and circumstances of the claimant group. This makes it less likely that the differential treatment accorded to the younger group based on age constitutes discrimination against the older group.

[61] The third contextual factor described in *Law*, is the ameliorative purpose or effect of the impugned state action. If the state action can be described in this way but excludes some from its reach, the question is whether by doing so it demeans the human dignity of those excluded.

[62] The trial judge addressed this factor by applying the analysis in *Lovelace* and concluding that for two reasons this case, unlike *Lovelace*, is one of those "rare occasions" where a targeted ameliorative program is discriminatory.

[63] While we disagree with this conclusion, we agree with her starting point. As we have said, the IEIP is clearly an ameliorative program targeted at a specific disadvantaged group, namely autistic children age two to five. As in *Lovelace*, the claimant group (in this case, autistic children age six and older) is also a disadvantaged group. However, they are not excluded from a comprehensive ameliorative program, which would rarely escape the charge of discrimination: see *Law* para. 72 and *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 96. Rather they are excluded from an ameliorative program targeted at a disadvantaged group. In *Lovelace*, at para. 85, Iacobucci J. says that in such circumstances the focus of analysis is not on the fact that the comparator and the claimant groups are equally disadvantaged, but rather that the program in question was targeted at ameliorating the conditions of the specific disadvantaged group. He concluded that when this is so, exclusion from the program is less likely to demean the human dignity of those excluded even though they too are a disadvantaged group. He put it this way at para. 86:

> [O]ne must recognize that exclusion from a targeted or partnership program is less likely to be associated with stereotyping or stigmatization or conveying the message that the excluded group is less worthy of recognition and participation in the larger society.

[64] The trial judge offered two reasons why this case is different from *Lovelace* and that therefore this conclusion should not apply. With respect, we find both reasons flawed.

[65] First the trial judge found that, unlike this case, the program in issue in *Lovelace* was the product of a partnership between the Ontario government and the targeted disadvantaged group. As a related point, she found it important that both the complainant group and the comparator group in *Lovelace* already existed before the impugned program was created.

[66] In our view, these factors do not make this case different from *Lovelace* nor render its reasoning inapplicable. In *Lovelace*, the court found that the input of the targeted group in creating the program made it more likely that the result would correspond to the needs of that group. However, such input is clearly not a prerequisite for

correspondence. Careful tailoring by government can also produce a high degree of correspondence, which is what happened here. Both this case and *Lovelace* reflect a high degree of correspondence between the particular ameliorative program and the circumstances of the targeted group.

[67] Equally, this case is no different from *Lovelace* in that the claimant group and the comparator group both existed before the creation of the impugned program. Here there was, in fact, considerable trial time devoted to the historic treatment of both preschool autistic children and the somewhat different, though also unsatisfactory, experience of school-age autistic children.

[68] The second basis on which the trial judge distinguished *Lovelace* is that in that case the exclusion of the claimant group was not associated with a misconception as to their actual needs, capacities and circumstances. By contrast, here the trial judge found that the IEIP mistakenly assumed that the claimant group would have their needs met in school through the special education programs being offered. The trial judge thus found that the *Lovelace* conclusion, namely that exclusion from a targeted ameliorative program is less likely to be discriminatory, does not apply here.

[69] With respect, we read *Lovelace* differently. That case involved an ameliorative program, the First Nations Fund, that targeted band aboriginal communities but excluded the claimant group, namely non-band aboriginal communities, who are clearly another disadvantaged group. The Court concluded that the ameliorative purpose of the targeted program weighed against a finding that the exclusion of the claimant group constituted discrimination in part because that exclusion was not associated with a misconception about the actual needs, capacities and circumstances of the excluded group. It said this at para. 87:

> The First Nations Fund has, therefore, a purpose that is consistent with s. 15(1) of the *Charter* and the exclusion of the appellants does not undermine this purpose since it is not associated with a misconception as to their actual needs, capacities and circumstances.

[70] In our view, the Court was speaking of the kind of misconception it described at para. 71, namely one that reflects stereotyping of the excluded group because it unfairly portrays them or tends to demean their human dignity. If such a misconception is the basis for the exclusion, that would indeed undermine the purpose of s. 15(1) of the *Charter*. A misunderstanding that does not demean their human dignity would not undermine that purpose.

[71] In this case, the IEIP assumed that the needs of the claimant group would be met through appropriate special education programs. The trial judge found that this was

mistaken. However, assuming the trial judge is correct, in our view that does not constitute a misconception as that notion was used in *Lovelace*. It does not portray autistic children age six and over as not being disadvantaged or not having special needs. It does not unfairly portray them as having traits that they do not possess, nor does it tend to demean their human dignity. The mistaken premise therefore does not undermine the acknowledged ameliorative purpose of the IEIP, a purpose that is consistent with s. 15(1) of the *Charter*. It is not the sort of misconception referred to in *Lovelace*, and it is not a basis for refusing to apply the *Lovelace* conclusion.

[72] In short, we do not agree with the trial judge that this case is different and therefore an exception to the *Lovelace* proposition that exclusion from a targeted program makes less likely the conclusion that the excluded group is thereby subjected to discrimination. Rather we think that proposition applies in this case.

[73] The final contextual factor from *Law* which may be relevant in appropriate cases in determining whether the differential treatment constitutes discrimination is the nature and scope of the interest affected by the state action.

[74] Here the trial judge found that the denial of an IEIP-type program to autistic children age six and over deprives them of the skills they need for full membership in the human community. This is clearly an interest of fundamental importance.

[75] Our reservation about this conclusion is akin to that of the Court in *Lovelace* where it found the adverse impact on the fundamental self-governing interests of the complainant group to be remote because of the careful tailoring of the ameliorative program to the different circumstances of the comparator group: see *Lovelace* at para. 89.

[76] Here as well, the IEIP is carefully targeted to the special capacities of the children in the comparator group to receive assistance, which is exemplified by the window of opportunity they present because of their younger age. It is also tailored to their situation as preschoolers. In both respects the claimant group is quite differently situated. An IEIP-type program could not work for them as it does for the comparator group. What may well be needed is something that will be a different but equally exemplary program for them, as the IEIP is for the comparator group because of its careful tailoring. This would not be the IEIP but something that is tailored to meet the specific capacities and circumstances of autistic children age six and over. However, that is not this complaint, which is about seeking to access the IEIP.

[77] To summarize, the effect of this fourth contextual factor, the adverse impact of the denial of the IEIP on the claimants' ability to acquire necessary life skills, must be seen as considerably muted.

[78] Unlike the trial judge, we would therefore conclude that the claimants have failed to establish their claim of age discrimination. Of the four contextual factors that inform this analysis, three point away from a finding of discrimination and one is of only muted impact.

[79] 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.

[80] 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.

ISSUE TWO: THE DISABILITY DISCRIMINATION CLAIM

[81] The respondents' claim is that Ontario has violated the rights of the infant plaintiffs on the basis of disability contrary to s. 15 of the *Charter* because the Minister of Education has failed to ensure that they receive a special education program or service consistent with the IEIP Guidelines contrary to s. 8(3) of the *Education Act*.

a) The Legislation

[82] The trial judge found for the respondents and declared that Ontario's failure to provide or fund intensive behavioural intervention consistent with the IEIP Guidelines violated their guarantee of equality as it was a failure to provide "appropriate" educational services. To appreciate how she reached that conclusion it is helpful to outline the legislative scheme for special education in Ontario.

[83] With specified exceptions not applicable here, every child in Ontario is required by s. 21 of the *Education Act* to attend school, commencing in September once they have reached six years of age.

[84] In s. 1(1), the Act defines "exceptional pupils" as those children who have special education needs. It enumerates five different categories or exceptionalities. It also defines "special education programs" and "special education services" as the vehicles to meet the educational needs of these children. These definitions are as follows:

> "exceptional pupil" means a pupil whose behavioural, communicational, intellectual, physical or multiple

> exceptionalities are such that he or she is considered to need placement in a special education program by a committee, established under subparagraph iii of paragraph 5 of subsection 11(1), of the board,
>
> (a) of which the pupil is a resident pupil,
>
> (b) that admits or enrols the pupil other than pursuant to an agreement with another board for the provision of education, or
>
> (c) to which the cost of education in respect of the pupil is payable by the Minister;
>
> …
>
> "special education program" means, in respect of an exceptional pupil, an educational program that is based on and modified by the results of continuous assessment and evaluation and that includes a plan containing specific objectives and an outline of educational services that meets the needs of the exceptional pupil;
>
> "special education services" means facilities and resources, including support personnel and equipment, necessary for developing and implementing a special education program;

[85] The section of the Act that is central to this issue is s. 8(3):

> 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, and shall provide for the parents or guardians to appeal the appropriateness of the special education placement, and for these purposes the Minister shall,
>
> (a) require school boards to implement procedures for early and ongoing identification of the learning abilities

> and needs of pupils, and shall prescribe standards in accordance with which such procedures be implemented; and
>
> (b) in respect of special education programs and services, define exceptionalities of pupils, and prescribe classes, groups or categories of exceptional pupils, and require boards to employ such definitions or use such prescriptions as established under this clause.

[86] Section 11(1)5 gives the Minister the power to make regulations in connection with special education:

> (1) Subject to the approval of the Lieutenant Governor in Council, the Minister may make regulations in respect of schools or classes established under this Act, or any predecessor of this Act, and with respect to all other schools supported in whole or in part by public money,
>
> 5. governing the provision, establishment, organization and administration of,
>
> i. special education programs,
>
> ii. special education services, and
>
> iii. committees to identify exceptional pupils and to make and review placements of exceptional pupils.

[87] In general, however, the Minister of Education does not directly provide education programs to students. The limited exceptions are programs for children in correctional facilities, mental health centers, and Provincial and Demonstration Schools (which are residential schools for a limited number of those exceptional pupils who are deaf, blind or have severe learning disabilities). This reflects the broad scheme of the Act which provides for a decentralized system of local school boards managed by elected trustees to administer the educational system at the operational level.

[88] The Act requires boards to ensure that their exceptional pupils get the special education programs and services they need, either by providing them directly or by contracting with other boards to do so. Section 170(1)7 says this:

> (1) Every board shall,
>
> 7. provide or enter into an agreement with another board to provide in accordance with the regulations special education programs and special education services for its exceptional pupils.

[89] Section 171(1)4 permits a board to hire the staff it needs and to authorize its principals to use volunteers as they see fit for duties approved by the board. In virtually every case, the employment terms of board employees are set by collective agreements, which are binding the board as employer. The Ministry has no power over school board staff.

[90] In large part, the Minister interfaces with boards by passing regulations. Regulation 181/98 requires boards to establish special education committees for the identification and placement of their exceptional pupils. These are called Identification Placement and Review Committees (IPRC). The boards are also required to develop an individual educational plan (IEP) for each student with special education needs.

[91] Regulation 464/97 requires every board to have an advisory committee, which includes parental representation, to make recommendations to it about special education programs and services.

[92] Regulation 306/90 requires every board to establish a special education plan to meet the current needs of its exceptional pupils. The Ministry receives and reviews a report from each board every two years, and may require changes to ensure current needs are being met.

[93] In addition, the Ministry has developed province-wide standards for boards concerning the special education plans they must have and the individual education plans they must develop for each of their exceptional pupils.

[94] Finally, the Ministry's elaboration of the five categories that the Act provides for identifying exceptional pupils are set out at para. 340 of the trial judge's reasons:

> (1) The *behaviour* category includes students with a learning disorder that adversely affects educational performance and is accompanied by one or more criteria such as excessive fears or anxieties; (2) The *communications* category includes children with autism, those who are deaf and hard-of-hearing, those with language or speech impairments and those with a learning disability; (3) The *intellectual* category includes giftedness, mild intellectual disability and developmental

> disability and developmental disability manifested by a severe learning disorder in combination with other criteria; (4) The *physical* category includes children with such severe physical limitations as to require special assistance in learning situations and includes children with blind and low vision; and (5) The *Multiple* exceptionalities category which includes children with one or more of the above exceptionalities [emphasis in original].

b) The Trial Judge's Reasons

[95] From the beginning, the respondents' argument has been that if the equality rights of school-age autistic children are to be respected, Ontario must ensure that they receive, as a special education program or service, intensive behavioural intervention consistent with that being provided in the IEIP.

[96] The trial judge agreed with this and concluded her reasons for judgment with a declaration that Ontario's failure to provide or fund such intervention violates the equality rights of the infant plaintiffs and also violates the *Education Act*.

[97] The infant plaintiffs are all school-age children with autism. As the trial judge found, there can be no doubt that this claimant group is made up of "exceptional pupils" and hence entitled to the benefit of s. 8(3) of the Act. She ultimately concluded that Ontario has denied them the entitlement they claim, in violation of the Act and their equality rights. She found that Ontario did so by failing to ensure that they have available to them intensive behavioural intervention consistent with the IEIP Guidelines. It did so not with the purpose of discriminating against them but with that effect. As we read her reasons, the steps the trial judge took in reaching this conclusion are as follows.

[98] First, she accepted the evidence of Dr. Laredo-Marcovitz that the available research supports the conclusion that intensive behavioural intervention is the only scientifically supported and effective intervention for children with autism. The trial judge also accepted her conclusion that the research shows that the therapy must be intensive (ideally thirty to forty hours per week) and based on the circumstances of the individual child; it should be started at the earliest possible age; and it should be delivered consistently throughout the calendar year.

[99] Second, the trial judge found that intensive behavioural intervention would continue to benefit autistic children who have reached the age of six.

[100] Third, the trial judge appears to have implicitly concluded that none of the other possible interventions, including those that are available for autistic pupils in the Ontario schools, are effective enough to constitute "appropriate" special education programs or

services within s. 8(3) of the Act. In other words, only intensive behavioural intervention as provided by the IEIP is "appropriate."

[101] Fourth, the trial judge found that, although it had not done so formally in a memorandum, guide, or standard, the Ministry of Education had communicated a policy that intensive behavioural intervention would not be available in schools. In other words, the Ministry had constructed what the trial judge called a "policy barrier" to the use of this intervention.

[102] These steps led her to conclude that, contrary to s. 8(3) of the Act, the Minister has failed to ensure that autistic children of school age receive "appropriate" special education because they do not receive intensive behavioural intervention as provided in the IEIP. She said this at para. 486(h):

> [I]n general, the children did not have access to "appropriate special education programs and special education services without payment of fees" because the Minister failed to develop policy and give direction to the school boards to ensure that ABA/IBI services are provided to children of compulsory school age.

[103] The trial judge then turned to the question of the proper comparator groups. While she accepted typically developing children as an appropriate comparator group, she found that the respondents had failed to show that children with autism are denied a benefit compared to this proposed group.

[104] She also accepted two of the five categories of exceptional pupils as appropriate comparators, namely exceptional pupils in the communications category and exceptional pupils in the physical category. The trial judge then appears to have concluded that these comparator groups do receive "appropriate" special education programs and services. Although there is no express finding to this effect, it is required for the conclusion that the infant plaintiffs are subjected to differential treatment under s. 8(3) of the Act. In other words the claimants do not receive "appropriate" special education while these comparator groups do. The trial judge found that the ultimate consequence of this differential treatment is that children with autism do not have the opportunity to access learning that children in these comparator groups share.

[105] Finally, the trial judge went on to apply the four contextual factors required by the discrimination analysis. She ended her consideration of this claim, at para. 739, as follows:

> I conclude that the claimant group of children with autism has established discrimination by showing that the distinction on

> the basis of the enumerated ground of disability denied their equal human worth and human dignity. As indicated above, not all factors need to be established in order to conclude that discrimination has occurred. Here, three of the four contextual factors have been established in favour of the claimants.

[106] The declaration of the violation of the equality guarantee that concludes the reasons for judgment also includes reference to Ontario's failure to provide speech therapy and occupational therapy to the infant plaintiffs. The respondents described this in oral argument as a "parasitic" claim. That is, if the infant plaintiffs had not been forced to leave the school system but had been able to remain because it offered them intensive behavioural intervention consistent with the IEIP, they would have received the benefit of the speech therapy and occupational therapy available in the school system. The respondents seek only compensation for this denial, but acknowledge that this is dependent on the success of their claim for disability discrimination. Given our dismissal of that claim, it is unnecessary to make any further reference to the declaration concerning speech and occupational therapy. It must share the same fate as the disability discrimination claim.

c) Our Analysis

[107] We begin our analysis of the trial judge's disposition of this claim with the question of the proper comparator group, because it informs everything that follows. As indicated in *Hodge, supra*, each step in the s. 15(1) analysis must proceed on the basis of a comparison.

[108] While the claimants make the initial choice of those to whom they seek to be compared, the choice of the proper comparator is ultimately a matter for the court. The comparison required is to a comparator group with whom the claimants share characteristics relevant to qualification for the benefit or burden in question, apart from the personal characteristic that is said to be the ground of the wrongful discrimination: see *Hodge* at para. 1.

[109] Here the benefit sought is intensive behavioural intervention consistent with the IEIP. The claimants say that under s. 8(3) of the Act, the Minister must ensure that this is made available to them as exceptional pupils because it is the "appropriate" special education program or service for them in light of their particular disability. The essence of their claim as framed is that they have been wrongly left out of the statutory entitlement accorded by s. 8(3). They do not refer to or rely on any general statutory entitlement of all children, including typically developing children, to appropriate education programs and services from which they argue they are excluded.

[110] Since the claim is for "appropriate" special education to meet the needs of the infant plaintiffs, the personal characteristic that grounds the discrimination claim is the particular disability that characterizes the claimant group, namely, autism. The characteristic relevant to qualification for the benefit that a proper comparator group must share with the claimants is that they are exceptional pupils (with disabilities other than the one that grounds the claim) and are therefore eligible to receive their own "appropriate" special education programs and services.

[111] In light of the way this claim is framed, we therefore conclude that typically developing children must be rejected as the appropriate comparator group. They do not share the characteristics relevant to the qualification for the benefit claimed because they are not exceptional pupils and therefore do not qualify for appropriate special education programs or services.

[112] On the other hand, the comparator groups chosen by the trial judge, namely exceptional pupils in the communications category, and exceptional pupils in the physical category, do share with the claimants the characteristic of being exceptional pupils. Therefore, like the claimants, they are entitled to expect the Minister to ensure that they have available appropriate special education programs and services. Section 8(3) of the *Education Act* requires this. Thus, we agree that they are proper comparators for the purposes of the s. 15(1) analysis.

[113] The challenge this presents in this case arises from the way the trial unfolded. The evidence was concluded in July 2004. In the written submissions filed in August 2004, the respondents put forward their disability discrimination claim based on a comparison with "other children in Ontario" or "nonautistic children". In doing so, it appears they were relying on the lower court decisions in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657.

[114] On November 19, 2004, the Supreme Court of Canada allowed the appeal in *Auton* and reversed those decisions. This significantly altered the landscape relied on by the claimants.

[115] The trial judge invited counsel to re-attend in December for submissions in the light of this decision and related matters, and asked counsel for the plaintiffs to finalize the comparators on which they relied, bearing in mind the observations made by the Supreme Court.

[116] Presumably because of how the case had been framed to that point, counsel for the plaintiffs acknowledged that the evidence had not dealt extensively with other special needs pupils. As a result, in their written submissions to the trial judge on December 6, 2004, counsel for the plaintiffs made the following request:

> If this Court agrees with the Supreme Court of Canada [in *Auton*] that a comparative approach to the analysis of s. 8 of the *Education Act* must include consideration of what is done in special education for children with other forms of disability then the plaintiffs hereby seek leave to introduce such evidence.

[117] This request was denied. Instead, in January 2005, the trial judge allowed the plaintiffs to make new written submissions restricted to the question of appropriate comparator groups. In these submissions, counsel for the plaintiffs urged comparison with three possible comparator groups in addition to typically developing children. These were children with severe learning disabilities, children within the behavioural exceptionality, and children who are deaf, blind, or deaf/blind.

[118] In the result, the trial judge decided upon the two comparator groups we have referred to. Her description of those two groups is as follows at para. 726:

> [E]xceptional pupils in the communications category including those who are deaf and hard-of-hearing, those with language or speech impairments and those with a learning disability; and exceptional pupils in the physical category including children with blind and low vision.

[119] However, the result of this chronology is that the evidentiary record addressing the circumstances of the two comparator groups is very limited. This has important implications for the comparative approach that must be followed at each step of the s. 15(1) analysis. To reiterate those steps, we quote from Chief Justice McLachlin's majory judgment in *Gosselin, supra* at para. 17:

> To establish a violation of s. 15(1), the claimant must establish on a civil standard of proof that: (1) the law imposes differential treatment between the claimant and others, in purpose or effect; (2) one or more enumerated or analogous grounds are the basis for the differential treatment; and (3) the law in question has a purpose or effect that is discriminatory in the sense that it denies human dignity or treats people as less worthy on one of the enumerated or analogous grounds.

[120] The first step in the s. 15(1) analysis is for the claimants to show the required differential treatment. The claim here is that the Minister, acting under s. 8(3) of the Act, has accorded differential treatment to the claimants compared to the comparator groups. It is asserted that by failing to provide the claimants with intensive behavioural

intervention consistent with the IEIP Guidelines, the Minister has failed to ensure that they have available to them appropriate special education programs and services without payment of fee as required by s. 8(3). The claimants say that, by contrast, the Minister has ensured that the comparator groups receive appropriate special education programs and services.

[121] If these things are all properly established, the claimants will have demonstrated that they have been subjected to differential treatment and denied equal benefit of the law. However, for several reasons we must conclude that they have not been established in this case.

[122] First, it has not been demonstrated that the benefit claimed, namely intensive behavioural intervention consistent with IEIP Guidelines, could be delivered within the public school system as a special education program or service. The respondents must demonstrate this to successfully establish that, because they do not receive the benefit claimed, the claimants have not received the appropriate special education to which they are entitled under s. 8(3) of the Act.

[123] There are a number of core elements of the IEIP that would not fit within the context of the public school system. They would have to be changed for that to happen, with the consequence that if intensive behavioural intervention were to be delivered in that context, it could not be consistent with that provided in the IEIP.

[124] An important element of the IEIP is that the intervention begin as early as possible after early identification or diagnosis. The experts agree that this is essential. However, this would have to be changed to provide that intervention continues when the child reaches school age. Another is that the effective range of hours per week would have to be substantially reduced from the twenty to forty in the IEIP since, as the trial judge found, the school week is only twenty-five hours long, and no more than that could be provided and then only if the child did nothing else. As well, the IEIP contemplates consistent delivery throughout the calendar year. The trial judge found that the research shows this as being necessary if the program is to be effective, yet the school year runs only for ten months.

[125] The IEIP Guidelines also contemplate the involvement of parents or caregivers directly in the child's treatment, yet the Minister has no power to ensure that this would happen if intervention consistent with IEIP Guidelines was attempted within the public school system. The power to permit volunteers to take on duties rests with the school principal, not the Minister, and then only within the strict confines of what is permitted by the governing collective agreement. Finally, the presumption in the IEIP Guidelines is against integrated placements for the children until they have mastered particular skills. The presumption in the education system is the reverse. Regulation 181/98 provides that,

in placing each child requiring special education, the IPEC will first consider placement in a regular class.

[126] These are basic differences between what the IEIP Guidelines require and what the public school system can provide. To this extent, the claimants cannot show that intensive behavioural intervention consistent with the IEIP Guidelines can be provided within the public school system. When the Minister fails to provide or fund such intervention, he or she is therefore not failing to ensure that the claimants have available to them something that can be delivered within the public school system. For this reason the Minister is not failing to comply with s. 8(3) of the Act.

[127] It may be that, with changes, intensive behavioural intervention using a number of elements of the IEIP could be provided within the public school system. However that possibility presents a moving target and would depart from both the benefit claimed and the trial judge's order. Precision is important if the comparative analysis required by s. 15(1) is to be properly carried out. It is the benefit as claimed and ordered that we must evaluate.

[128] Our second reason for finding that the respondents have not established the required differential treatment arises from the trial judge's implicit finding that intensive behavioural intervention consistent with the IEIP is the only appropriate special education program or service for exceptional pupils with autism.

[129] Under s. 8(3), the Minister's obligation is to ensure that appropriate special education programs and services are made available to exceptional pupils in Ontario. This can entail an obligation to ensure that a group of exceptional pupils has available a particular special education program or a service only if it is the only appropriate program or service for that group. If there are alternatives, the Minister is not required by that section to ensure the availability of any specific program.

[130] The trial judge concluded that the Minister failed to live up to his or her obligation under s. 8(3) because he or she failed to provide or fund intensive behavioural intervention consistent with the IEIP. This finding must entail a conclusion that there is no other appropriate special education program or service available for this group and that only the benefit claimed qualifies as an appropriate special education program or service.

[131] In our view, this conclusion is not sustainable given both the evidence and the other findings of the trial judge. It represents a palpable and overriding error.

[132] There was evidence of other interventions that are provided in Ontario to exceptional pupils with autism. The trial judge acknowledged this fact but found that there was no expert or professional evidence that these other interventions are equally or

more efficacious than the one claimed. She also concluded at para. 534 of her reasons that in the absence of proper evaluations there are "many things we don't know about children with autism in the public school system" including the "efficacy/outcomes of [the] various special education programs and services" that are made available to them.

[133] At para. 535, she then concluded as follows:

> In the absence of such evaluation, I find that there is no evidence that the special education programs and services available to children with the exceptionality of autism provide an "appropriate" education.

[134] She went on in para. 536 to say this:

> Parents have no ability to collect data. Government has that ability. The data that has been provided is deficient. Whenever data is relevant to my task, I intend to draw an inference against the government.

[135] The move from the express finding that there is no evidence that existing available programs and services provide "appropriate" special education to the implicit finding that, in fact, they do not provide "appropriate" special education can only be explained on the basis that the trial judge drew an inference against Ontario on this point, since she had already made clear that because of the absence of evidence we do not know the efficacy of the available programs and services for autistic pupils.

[136] In our view, by proceeding in this fashion the trial judge effectively reversed the onus that rests on the claimants. To establish differential treatment, they are required to show that, unlike the comparator groups, they have been denied "appropriate" special education programs and services because they did not receive the particular intervention claimed. They can only do this if they show that the special education programs and services now available to them are not appropriate. The trial judge effectively reversed this and required Ontario to establish that the programs and services that are made available to the claimants are indeed appropriate. Because she reached her conclusion through the reversal of the proper onus of proof, the implicit finding that the claimed intervention is the only "appropriate" special education program or service for exceptional pupils with autism cannot stand.

[137] For both these reasons we conclude that the respondents are not able to demonstrate the first part of the comparison necessary to show that the claimants have been subjected to differential treatment under s. 8(3) of the Act. They have not established that the failure to provide intensive behavioural intervention consistent with the IEIP constitutes the Minister's failure to ensure the availability of appropriate special

education programs and services. They have not shown that the intervention claimed can be provided within the public school system or that it is the only appropriate special education program or service for exceptional pupils with their particular disability.

[138] Since the respondents have not shown that the Minister failed to comply with the obligation under s. 8(3), we need not decide whether the trial judge was correct in finding that the Minister's conduct in setting up a "policy barrier" constituted a failure to "ensure" as that term is used in s. 8(3). If the Minister's conduct did not constitute a failure to ensure, this would simply be another reason why the finding that the Minister failed to accord the benefit of s. 8(3) to the claimants is in error.

[139] The other part of the comparison inherent in the assertion of differential treatment advanced by the respondents is that, unlike the claimants, the comparator groups do receive the benefits to which they are entitled under s. 8(3). That is, the Minister ensures that they have available to them appropriate special education programs and services.

[140] Here the impoverished state of the evidence about the comparator groups and their experience with special education becomes starkly apparent. At para. 728, all that the trial judge is able to conclude about this is the following:

> The common denominator for pupils in the communications category and the physical category of exceptionalities is the need for interventions that allow them to *access* learning. The differences between children with autism and those in the communications category and physical category identified above are as follows. First, some children who are deaf, blind and deaf/blind have access to Provincial and Demonstration Schools designed to identify and respond to their needs. Even those who do not gain admission to the Provincial and Demonstration Schools have access to professionals who are specially trained to respond to the physical and communication impediments to their ability to *access* learning. That is not to say that children with autism want or need Provincial or Demonstration Schools; they are not asking for a "one-size-fits-all" approach. They want accommodations that are consistent with those afforded to other children in the comparator group. Second, children with speech and language deficits who have been identified in the pre-school province wide program experience a seamless transition to schools. For example, Ellerker spoke of the Toronto Preschool Speech and Language Services Transition to School Agreement that illustrates how the benefits of a pre-school program can be successfully continued into the school

> system. Using PSSLP as a comparison, the claimants have been denied a seamless transition to school with respect to IBI/ABA [emphasis in original].

[141] This falls short of an express finding that the respondents have established that the exceptional pupils who make up the comparator groups do have available appropriate special education programs and services. The trial judge's findings speak almost entirely about only some pupils in the two comparator groups – some who gain access to Provincial and Demonstration schools and some others who receive a transition program to facilitate entry into the public school system. The trial judge made no finding, nor could she have, that this is enough to constitute the appropriate special education programs and services needed by the exceptional pupils who make up the comparator groups as they make their way through the public school system. Thus, if we treat this part of the differential treatment analysis as a fact that the respondents must establish, we must conclude that they have fallen short.

[142] The respondents urged in oral argument that we presume, as a matter of law, that the Minister ensures that appropriate special education programs and services are available to the exceptional pupils in the comparator groups because that is the legal obligation under s. 8(3) of the Act. However, even if we were to do so, the respondents cannot demonstrate that they have been subjected to differential treatment under s. 8(3). This is so because, for the reasons we have given, they have not shown that the claimants are denied the appropriate special education programs and services to which they are entitled simply because they have not been provided with intensive behavioural intervention consistent with the IEIP Guidelines.

[143] Our conclusion that the respondents have not demonstrated the differential treatment necessary to establish their disability discrimination claim is sufficient to dispose of that claim. However, even if we had agreed with the trial judge that the respondents have shown that because of their particular disability the claimants are denied the appropriate special education program to which s. 8(3) entitles them while the comparator groups who have different disabilities are not so denied, the trial judge's analysis of whether this would constitute discrimination cannot be sustained, given the state of the record. There is simply not enough evidence to permit the contextual analysis comparing the situation of the claimants to that of the comparator groups in light of the factors described in *Law*. Indeed, the trial judge's finding of discrimination is not based on such an analysis.

[144] Thus, even assuming differential treatment to have been demonstrated, we do not think that the trial judge's discrimination analysis of the disability claim can be sustained. There was so little evidence about the comparator groups that we do not think a proper analysis could be done, using the four contextual factors and applying the necessary

comparative approach. The respondents' disability discrimination claim must therefore fail not only for want of a showing of differential treatment but for want of establishing that such differential treatment, if demonstrated, would constitute discrimination.

[145] In coming to our conclusion on the two equality claims, we have had the opportunity to review a great deal of the material assembled in this case and have heard detailed argument. We are left with profound admiration and respect for the struggle of the infant plaintiffs and that of their families to manifest their children's full potential. However, where the requirements of s. 15(1) are not met, the *Charter* cannot guarantee success in such a struggle, nor can it require the state to provide whatever assistance is needed to achieve that success, as compelling as that may be on moral or policy grounds. That remains the terrain of legislators.

[146] Rather, the law requires that the claimants demonstrate that the state has violated the equality guaranteed by s. 15(1) according to the jurisprudence that surrounds that concept. Regrettably, we must conclude that they have not done so, either for the claim of age discrimination or that of disability discrimination. The trial judge erred in deciding otherwise and we find that both claims must fail.

ISSUE THREE: SECTION 1 OF THE *CHARTER* AND THE IEIP

[147] After finding that the IEIP violated the s. 15(1) rights of the infant plaintiffs on the basis of age, the trial judge considered whether the violation was justified under s. 1 of the *Charter*. She first held that the IEIP was "prescribed by law". Thereafter, she applied the test from *R. v. Oakes*, [1986] 1 S.C.R 103 at 138-40, under the terms of which Ontario had the opportunity to justify the IEIP by showing that:

> (1) the objectives of the program are sufficiently pressing and substantial to override a constitutionally protected right; and
>
> (2) the means used (*i.e.* the age limit) are reasonably and demonstrably justified in proportion to the objectives. This inquiry involves determining whether the means are rationally connected to the objectives, whether they impair the protected right as minimally as possible and whether the effects are proportional to the objectives.

[148] The trial judge concluded that after October 2002, the objectives of the IEIP ceased to be pressing and substantial and the rational connection between age and eligibility ceased to exist. Consequently, she held that the infringement of s. 15 was not justified under s. 1 of the *Charter*.

[149] The respondents contend that the trial judge erred in finding that the IEIP is "prescribed by law". Ontario submits that the trial judge erred in failing to find that the

age cut-off in the IEIP was a reasonable limit under s. 1. We will deal first with the respondents' contention. Thereafter, we will consider the trial judge's conclusion in respect of s. 1, noting that an *Oakes* analysis is difficult as it is premised on an understanding that the impugned limit violates constitutional rights and freedoms, a premise that we have found does not apply. That said, we will explain why we have concluded that the trial judge erred in finding that, after October 2002, the objectives of the IEIP ceased to be pressing and substantial, and the rational connection between age and eligibility ceased to exist.

a) Prescribed by Law

[150] The trial judge concluded that as the Minister of Community and Social Services acted under the authority of s. 7(1) of the *Child and Family Services Act* in exercising his discretion to establish the IEIP, the program was "prescribed by law" and the government was entitled to an opportunity to justify the age limit contained in the IEIP as a reasonable limit.

[151] We agree. The s. 1 requirement that a limit be "prescribed by law" does not mean that the limit must be found in a statute or regulation. Rather, it means that the limit must be authorized by statute or regulation. This is evident from the reasoning in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

[152] In *Slaight Communications*, an employee who had been dismissed for inadequate job performance filed a complaint. An adjudicator appointed by the Minister of Labour pursuant to the *Canada Labour Code*, R.S.C. 1970, c. L-1 (the citation at the time of the decision) held that the employee had been unjustly dismissed and ordered the employer to provide a letter of recommendation for him. Although the order was held to constitute a limit on the employer's freedom of expression, the majority of the Supreme Court of Canada held that it was a reasonable limit pursuant to s. 1 of the *Charter*.

[153] Three decisions were written: the majority decision by Dickson C.J., and a dissenting judgment by each of Lamer J. (as he then was) and Beetz J. At pp. 1079 – 80, Lamer J. explained how to approach an order made by an administrative tribunal, saying:

> It would be useful, in my view, to describe the steps that must be taken to determine the validity of an order made by an administrative tribunal, which are as follows:
>
> First, there are two important principles that must be borne in mind:

— an administrative tribunal may not exceed the jurisdiction it has by statute; and

— it must be presumed that legislation conferring an imprecise discretion does not confer the power to infringe the *Charter* unless that power is conferred expressly or by necessary implication.

The application of these two principles to the exercise of a discretion leads to one of the following situations:

1. The disputed order was made pursuant to legislation which confers, either expressly or by necessary implication, the power to infringe a protected right.

   — It is then necessary to subject the legislation to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society.

2. The legislation pursuant to which the administrative tribunal made the disputed order confers an imprecise discretion and does not confer, either expressly or by necessary implication, the power to limit the rights guaranteed by the *Charter*.

   — It is then necessary to subject the order made to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society;

   — if it is not thus justified, the administrative tribunal has necessarily exceeded its jurisdiction;

   — if it is thus justified, on the other had, then the administrative tribunal has acted within its jurisdiction [emphasis in original].

[154] Both the majority and Beetz J. expressly approved of this reasoning. See *Slaight Communications* at pages 1048 and 1058, respectively.

[155] In this case, the Minister acted pursuant to the discretion conferred by s. 7(1) of the *Child and Family Services Act*, which reads as follows:

> 7. (1) The Minister may,
>
> (a) provide services and establish, operate and maintain facilities for the provision of services; and
>
> (b) make agreements with persons, municipalities and agencies for the provision of services,
>
> and may make payments for those services and facilities out of legislative appropriations.

[156] The reasoning in *Slaight Communications* in respect of administrative tribunals, set out above, can be usefully applied to the exercise of the Minister's power pursuant to s. 7(1). Section 7(1) confers an "imprecise discretion" on the Minister. The legislation in question does not confer, either expressly or by necessary implication, the power on the Minister to limit *Charter* rights. Thus, had we found that *Charter* rights had been infringed, it would have been necessary to subject the program (*i.e*. the IEIP) to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society.

[157] Much governmental action is undertaken by means other than statute or regulation. The trial judge recognized the difficulties that would arise if the choice of instrument by which the government enacts such a program were to determine whether the governmental action can be justified under s. 1. We agree with the reasoning of the trial judge at para. 641 of the reasons in this regard:

> It is attractive to conclude that the *CFSA* does not expressly or by implication allow the Minister to exercise the discretion in a manner that infringes the *Charter* and hence s. 1 is not engaged. If that route were taken, however, it would lead to a disconnect between s. 15(1) and s. 15(2) broadly encompassing government action subject to *Charter* scrutiny on the one hand, and s. 1 narrowly constraining the circumstances in which such government action can be justified on the other hand. That dichotomy does not seem fair. Furthermore, it would have the effect of forcing

> government to enshrine in legislation or regulation all programs where there might be an even remote prospect of a *Charter* violation in order to ensure access to a s. 1 justification. That would impede the ability of governments to respond to government priorities and would be inconsistent with a purposive approach.

[158] The trial judge's reasoning is consonant also with Supreme Court's approach to the scrutiny of government action taken pursuant to wide discretionary powers. In *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 at para. 52, Sopinka J. writing for the majority, said:

> This Court has shown a reluctance to disentitle a law to s. 1 scrutiny on the basis of vagueness which results in the granting of wide discretionary powers. Much of the activity of government is carried out under the aegis of laws which of necessity leave a broad discretion to government officials. See *R. v. Jones*, [1986] 2 S.C.R. 284, *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, and *R. v. Beare*, [1988] 2 S.C.R. 387.

[159] The Minister's authority to establish programs such as the IEIP is derived from s. 7(1) of the *Child and Family Services Act*. In creating the IEIP, the Minister exercised the discretion given to him by the legislation and, in our view, the IEIP is consequently "prescribed by law".

b) Pressing and Substantial Objectives

[160] The IEIP is the product of multiple government objectives. At para. 644 of the reasons, the trial judge set out the objectives that the Crown said underlie the IEIP. These are:

(a) to deliver intensive behaviour intervention to young children with autism at a time when evidence indicates that it will be most effective;

(b) to build capacity for the delivery of IBI in communities across Ontario;

(c) to recruit and train therapists to deliver IBI across the province;

(d) to allocate limited available resources in a manner that optimizes the program's benefits, and maximizes the potential outcomes for children with autism;

(e) to protect parents from the risk of being exploited by poorly trained and unsupervised therapists;

(f) to fill a gap in service identified for pre-school age children;

(g) to integrate the new program with existing services and programs.

[161] The trial judge found that all of the objectives, other than (d), were pressing and substantial before October 2002, but found that they ceased to be pressing and substantial objectives thereafter. In para. 648 of the reasons, the trial judge referred to paras. 128, 148 and 216 as the basis for concluding that the objectives, other than objective (d), were pressing and substantial until October 2002. She then concludes that the objectives, apart from objective (d), ceased to be pressing and substantial objectives in October 2002, but for reasons that remain unclear to us.

[162] In our view, the trial judge erred both in finding that the objectives, apart from objective (d), ceased to be pressing and substantial after October 2002 and that objective (d) had never been a pressing and substantial objective of the IEIP.

(i) Pressing and Substantial after October 2002

[163] We see no basis on which to conclude that the pressing and substantial objectives that underlay the IEIP from its inception ceased to be pressing and substantial after October 2002. The IEIP is designed to ameliorate the disadvantage of young children with autism. It is premised on complex psychological and scientific evidence, including evidence about the incidence of autism, the intensity and effectiveness of intervention, the costs and benefits of intervention, and when intervention is most effective. The evidence, including the testimony of the expert witnesses for the respondents, establishes the continuing importance of delivering intensive behavioural intervention to young children with autism at early ages. The age limit in the IEIP reflects a balancing of the interests of younger children with those of older children and the need to allocate scarce resources where they will be the most effective. Eliminating the age limit would lead to available resources being used for older children. Children in the targeted age group are already unable to obtain intensive behavioural intervention due to insufficient human resources. A further reduction in the available resources would defeat the important objective of providing intensive behavioural intervention to those whom, the experts agree, will benefit the most.

[164] The trial judge disregarded this evidence without explanation and in apparent contradiction of her own earlier finding of fact that, as of October 24, 2002, "the experts continued to share the consensus that intervention should be provided 'the earlier the better' in order to access the 'window of opportunity' in young children."

[165] In a case such as this, where the court is considering an allegedly under-inclusive government program based on an age limit, the court must consider the objectives that underlie the age limit in conjunction with the overall aims of the program. The Supreme Court of Canada has referred to this as "the tension of the objectives", recognizing that all legislation and particularly social benefits legislation, is the product of competing objectives that lead to certain compromises.

[166] Justice Bastarache explained in *M.* v. *H.*, [1999] 2 S.C.R. 3 at para. 333:

> If the tension of objectives is removed, then almost any exclusion that detracts from the ambit of the broad legislative goal will fail the s. 1 test, because, simply by virtue of being an exclusion, it cannot be rationally connected with the goal. Only when the specific purpose or objective of the exclusion is articulated are the tests under *Oakes*, *supra*, properly engaged. This is particularly true in cases involving the guarantee of equality. Unlike most legislation which infringes ss. 2 (a), (b), (d) and 7 to 14 of the *Charter*, the broad purposes of entitlement-granting legislation will seldom come into conflict with s. 15. Usually, the purposes are perfectly congruent and it is necessary to articulate the purpose of the limitation in order to identify the underlying tension between the legislative purpose and the *Charter*.

[167] In our view, the objectives of the IEIP remained pressing and substantial after October 2002. The age limit ensures that the IEIP is delivered to young children with autism at a time when the evidence indicates it will be most effective, and the age limit reasonably balances the competing social demands on limited human and financial resources.

(ii) Objective (d) – Allocation of limited resources

[168] In finding that objective (d) had never been a pressing and substantial objective, the trial judge observed that all of the objectives listed above, with the exception of (d), could be traced to the 1999 and 2000 Guidelines. She recognized that Jessica Hill, Assistant Deputy Minister for MCSS, had testified that when she introduced the intensive behavioural intervention concept, there was stiff competition for scarce resources but the trial judge noted that the articulation of objective (d) could not be found in the conceptual and design documentation.

[169] Jessica Hill's uncontradicted evidence was that "[t]here is fierce competition for the resources that exist in government," and that new initiatives, such as the IEIP, face a particularly difficult challenge for funding because they compete with pressures for

additional funding in existing program areas. The trial judge accepted this evidence but appears to have disregarded it on the basis that "the articulation of this objective cannot be found in the conceptual and design documentation" of the IEIP.

[170] The objective of allocating limited available resources in a manner that optimizes the program's benefits and maximizes the potential outcomes for children with autism is evident from many of the Cabinet documents that emphasize the shortage of trained professionals to provide services, the growing waiting lists for eligible children, and the time it would take to expand service capacity to provide intensive behavioural intervention to all children under the age of six.

[171] Moreover, the Supreme Court of Canada has recognized that the proper allocation of limited resources is an important government objective that requires the government to make difficult policy choices and that the government is in a better position than the court to make such choices. See, for example, *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927 at 989 – 990:

> The same can be said of evaluating competing credible scientific evidence and choosing thirteen, as opposed to ten or seven, as the upper age limit for the protected group here in issue. Where the legislature mediates between the competing claims of different groups in the community, it will inevitably be called upon to draw a line marking where one set of claims legitimately begins and the other fades away without access to complete knowledge as to its precise location. If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another.

[172] In light of Jessica Hill's uncontradicted evidence and that contained in Cabinet documents coupled with the government's recognized role in the allocation of scarce financial resources, we see no basis on which the trial judge could reject objective (d) as a pressing and substantial objective. In the circumstances, it was not open to the trial judge to reject objective (d) solely because it was not found in the formal documentation.

c) Means Reasonably and Demonstrably Justified

[173] As previously stated, the second limb of the *Oakes* test requires Ontario to show that the age limit is reasonably and demonstrably justified in proportion to the objectives of the IEIP. This inquiry involves an analysis of whether the age limit, as the means

chosen: (i) is rationally connected to the objectives; (ii) impairs the protected right as minimally as possible; and, (iii) has effects proportional to the objectives.

(i) Rational Connection

[174] The rational connection component requires that the measures limiting the right or freedom in question be rationally connected to the objectives. In our view, in light of the uncontradicted expert evidence, the age limit is rationally connected to objectives (a) and (d), set out above. As Dickson C.J. said, writing for the majority in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 at 925 – 26, "as long as the challenged provision can be said to further in a general way an important government aim it cannot be seen as irrational."

[175] The trial judge concluded that there was a rational connection between age and eligibility before October 2002 but held that, after that date, the rational connection ceased to exist because at that point "over half of the eligible children in the 'window of opportunity' were aging out before receiving service".

[176] The fact that a significant number of eligible children cannot receive the benefit of the program due to inadequate capacity does not cause the rational connection to cease to exist. We accept Ontario's submission that in October 2002, it was rational to increase the funding of intensive behavioural intervention services for pre-school age children to reduce the waiting lists rather than expand the eligibility of a program that was already oversubscribed. The conclusion reached by the trial judge greatly expands the number of children eligible for the benefit. This does not respond to the problem of inadequate capacity but, rather, redirects existing resources to older children. Given the shortage of qualified professionals, this will undoubtedly lengthen the waiting list for younger children, a result that is inconsistent with the government objectives of delivering intensive behavioural intervention to autistic children at an age when the evidence indicates it is most effective for them and of allocating available resources, human and financial, in a manner that optimizes the program's benefits.

(ii) Minimal Impairment

[177] Next, it must be determined whether the age limit minimally impairs the rights of the claimant group. At para. 684, the trial judge properly refers to the guidance on this matter provided by the Supreme Court in *R. v. Sharpe,* [2001] 1 S.C.R. 45 at para. 96:

> This Court has held that to establish justification it is not necessary to show that Parliament has adopted the least restrictive means of achieving its end. It suffices if the means adopted fall within a range of reasonable solutions to the problem confronted. The law must be reasonably tailored to

> its objectives; it must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account [emphasis in original, footnotes omitted].

[178] However, the trial judge found that the IEIP did not reconcile the interests of competing groups.

[179] In our view, the age limit in the IEIP is reasonably tailored to the government objectives of delivering intensive behavioural intervention to autistic children at an age when it will be most effective through optimal use of limited resources. None of the respondents' experts proposed an alternative means of allocating existing limited resources in order to optimize the program's benefits and maximize the potential outcome for children with autism. Those witnesses who advocated for the elimination of the age limit based their position on an ideal situation where there were no limits on available resources. However, the question is not whether more money could have been spent on a particular group for a particular service, or whether greater capacity for service could have been created. The question is whether the government had a reasonable basis for concluding that the age limit interfered as little as possible with the claimants' guaranteed right, given the government's pressing and substantial objective.

[180] At pp. 35-34 to 35-39 of *Constitutional Law of Canada*, looseleaf (Toronto: Thomson Carswell, 1997), Professor Hogg notes that the Supreme Court of Canada has recognized the need for some "margin of appreciation" in the minimal impairment analysis and has repeatedly indicated that courts are to give increased deference to legislative choices in certain circumstances. Citing *Irwin Toy, supra* at 993-94, he states:

> Among the considerations that are invoked by the Court in support of a degree of deference to the legislative choice are: where the law is designed to protect a vulnerable group (children, for example), where the law is premised on complex social-science evidence (about the effect of advertising, for example), where the law reconciles the interests of competing groups (mandatory retirement, for example) and where the law allocates scarce resources.

[181] Unlike the trial judge who accepted that the design of the IEIP was premised on complex social science evidence but found that none of the other considerations set out by Professor Hogg applied, we are of the view that each of the specified considerations applies in the present case.

[182] The program is designed to assist autistic children, a vulnerable group. It is premised on complex social science evidence, as the trial judge found. The IEIP recognizes the interests of all children with autism, whether they are children who are accessing the limited amount of available service, children who are waiting for service or children of school age, regardless of whether they have had the benefit of the IEIP. In terms of attempts to reconcile the interests of these different groups, the record shows that consideration was given to a number of alternatives to the age limit as a mechanism for allocating available limited resources. Proposals such as limiting the number of hours per week or limiting services to higher functioning children who are more likely to make the most improvement were rejected. Determining the most appropriate means of allocating available limited resources came down to the weighing of conflicting scientific evidence in an area where experts acknowledge there is still considerable uncertainty and legitimate disagreement among experts.

[183] Any method of distributing limited resources among a large population of needy and deserving individuals depends upon achieving a balance. The order below would lead to the situation where those children waiting for service will continue to wait until the current cohort of children no longer clinically requires treatment. While this too is a method that balances competing interests, it does not ensure that service is allocated to those children who can be expected to benefit the most, an explicit government objective which we have found to be pressing and substantial.

[184] The Supreme Court of Canada has held repeatedly that where the government has made a difficult policy choice regarding the claims of competing groups, or the evaluation of complex and conflicting research, or the distribution of public resources, or the promulgation of solutions which concurrently balance benefits and costs for many different parties, then the proper course of judicial conduct is deference. In *Irwin Toy, supra* at 993-94, 989-90, the majority held that when the legislature is mediating between claims of competing groups, it is forced to strike a balance without absolute knowledge about how balance is best struck. For the court to choose a different option than that selected by the legislature would be to replace one imprecise evaluation with another. In such cases, greater deference is to be afforded the choice of the legislature because an evaluation of what constitutes "as little as possible" is impossible to determine and often based on complex and conflicting social evidence. There are certain choices that the legislature is better suited to make, such as those based on policy judgments, competing claims between groups, or evaluation of complex and conflicting social science research. See also *M v. H., supra* at para. 79, where the Supreme Court reiterated these principles, explaining that the amount of deference accorded to the legislature's choice is "intimately tied up with the nature of the particular claim or evidence at issue".

[185] The age limit in the IEIP is the product of a difficult policy choice that engages each of those factors. In our view, the policy choices made by the government when it

established and developed the IEIP fell within the range of reasonable alternatives to provide an effective program across the province that balanced the needs of all autistic children. The age limit fits squarely within the framework of government action that mediates among competing interests and, accordingly, warrants deference by this court.

(iii) Overall Proportionality

[186] Finally, the court must weigh the salutary and deleterious effects of the measure in question. This involves determining whether the benefits achieved by means of the age eligibility requirement outweigh its deleterious effects.

[187] The trial judge recognized that the government, in creating the IEIP, was attempting to alleviate the hardship experienced by children with autism. However, she found that it was "questionable" whether the program accomplished that goal. She noted that over half of the children eligible for IEIP "age out" before receiving the benefit and that those who do receive the benefit are often cut-off before they are ready. The trial judge concluded that in both situations, "there may be little benefit to the children and the financial and human resources may be wasted."

[188] In our view, this analysis fails to reflect the most critical benefit that flows from the age limit, namely, that it ensures that existing limited resources are distributed to the children during the ages in which they will most benefit from the program. As the trial judge found and the experts agree, intervention should be provided 'the earlier the better' in order to access the window of opportunity in young children with autism. None of the experts proposed a better means of allocating the existing limited resources in order to optimize the program's benefits and maximize the potential outcome for children with autism. On the contrary, the evidence showed that, given limited program capacity, eliminating the age limit in the IEIP would increase the size of the waiting list for services, increase the typical age of new children entering the program and result in available resources being diverted to older children, thus reducing the opportunity for children under age six to receive intensive behavioural intervention at a time when it would be most effective. Indeed, that is the situation the respondents themselves would likely have been in had the age restriction not been in place. The evidence demonstrates that those respondents who were under age six when the IEIP began, benefited from the existence of the age limit because they were able to access the intensive behavioural intervention services from the IEIP when they were of preschool age. Had the IEIP not had an age limit of six years, it is likely that those respondents would still be on the waiting lists for services through the IEIP.

[189] By distributing the available resources as broadly as possible among those children who can benefit the most, in our view, the salutary effects of the age limit outweigh its deleterious effects.

[190] For the sake of completeness, we add that we see no need to engage in a similar analysis for disability discrimination. The trial judge did not address the issue of whether it would be justified under s. 1. Since we have found no s. 15 violation based on disability and the trial judge did not deal with s. 1 in this context, we have not addressed it either.

ISSUE FOUR: REMEDY

[191] Based on her finding of constitutional and statutory violations, the trial judge ordered that certain declarations would issue. She also ordered the appellant to pay damages to the infant respondents for past and future intensive behavioural intervention. She dismissed all of the other damage claims of the respondents. As we have concluded that the appeal should be allowed, it follows that the relief ordered is set aside. However, the issue of the availability of damages warrants comment.

[192] The general rule against combining declaratory relief with pecuniary damages was enunciated in *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 720. The Supreme Court reaffirmed the rule in *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, [2002] 1 S.C.R. 405. At paras. 78-81 of *Mackin*, the Court explains the rationale for the rule:

> [78] According to a general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional (*Welbridge Holdings Ltd. v. Greater Winnipe*g, [1971] S.C.R. 957; *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42). In other words "[i]nvalidity of governmental action, without more, clearly should not be a basis for liability for harm caused by the action" (K. C. Davis, *Administrative Law Treatise* (1958), vol. 3, at p. 487). In the legal sense, therefore, both public officials and legislative bodies enjoy limited immunity against actions in civil liability based on the fact that a legislative instrument is invalid. With respect to the possibility that a legislative assembly will be held liable for enacting a statute that is subsequently declared unconstitutional, R. Dussault and L. Borgeat confirmed in their *Administrative Law: A Treatise* (2nd ed. 1990), vol. 5, at p. 177, that:
>
> In our parliamentary system of government,

> Parliament or a legislature of a province cannot be held liable for anything it does in exercising its legislative powers. The law is the source of duty, as much for citizens as for the Administration, and while a wrong and damaging failure to respect the law may for anyone raise a liability, it is hard to imagine that either Parliament or a legislature can as the lawmaker be held accountable for harm caused to an individual following the enactment of legislation. [Footnotes omitted.]

[79] However, as I stated in *Guimond v. Quebec (Attorney General)*, *supra*, since the adoption of the *Charter*, a plaintiff is no longer restricted to an action in damages based on the general law of civil liability. In theory, a plaintiff could seek compensatory and punitive damages by way of "appropriate and just" remedy under s. 24(1) of the *Charter*. The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a *Charter* context. Thus, the government and its representatives are required to exercise their powers in good faith and to respect the "established and indisputable" laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded (*Crown Trust Co. v. The Queen in Right of Ontario* (1986), 26 D.L.R. (4th) 41 (Ont. Div. Ct.)).

[80] Thus, it is against this backdrop that we must read the following comments made by Lamer C.J. in *Schachter*, *supra*, at p. 720:

> An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with an action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available. [Emphasis added.]
>
> [81] In short, although it cannot be asserted that damages may never be obtained following a declaration of unconstitutionality, it is true that, as a rule, an action for damages brought under s. 24(1) of the *Charter* cannot be combined with an action for a declaration of invalidity based on s. 52 of the *Constitution Act, 1982* [all emphasis in original].

[193] In *Mackin*, the claim for damages in addition to declaratory relief was disposed of in two paragraphs. After finding no evidence of negligence, bad faith or abuse of power, the Supreme Court dismissed the claim for damages.

[194] While the rule against combining damages with declaratory relief has been articulated in cases where the declaration of invalidity is sought against legislation, we see no principled basis on which to limit the application of this rule to cases where a statute, rather than some other government action, is declared unconstitutional. Support for this view can be found in the above quoted passage from *Mackin*, in which the Supreme Court refers to the "exercise of their powers" and "government action", rather than legislation *per se*. Moreover, the reasons underlying the general prohibition against damages where declaratory relief is granted apply with equal force whether the declarations are made as a result of a challenge to legislation under s. 52 of the *Constitution Act, 1982* or, as in this case, where the challenge is to some action taken under legislation that is said to infringe a *Charter* right and relief is sought pursuant to s. 24(1) of the *Charter*.

[195] The first such reason is that where the government exercises discretionary statutory authority, the result of which is subsequently declared to be unconstitutional, the government does not owe a duty of care giving rise to liability. See *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957 at 968 – 69. In *Hislop v. Canada (Attorney General)* (2004), [2005] 246 D.L.R. (4th) 644 at para. 140 (Ont. C.A.), this Court held that the same principles for denying liability apply with equal force to damages claimed under s. 24(1) of the *Charter*:

> In our view, the same result must follow in respect of the s. 24(1) *Charter* claim to the full pension arrears. The difficulty lies with the fact that the government action upon which this claim is based relates solely to its administration of a law that was valid throughout the relevant period of time. There can be no civil liability at common law for this conduct: see *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, 138 D.L.R. (4th) 647. The result can be no different because the claim is made under s. 24(1) of the *Charter*. Hence, the comments referred to earlier that a remedy under s. 24(1) is available "where there is some government action, *beyond the enactment of an unconstitutional statute or provision*" (*Doucet-Boudreau, supra* at para. 43); where "the violative action … *falls outside the jurisdiction conferred by the provision*" (*Schachter, supra* at para. 88); or "in the event of conduct that is clearly wrong, in bad faith or an abuse of power" (*Demer, supra* at para 62) [all emphasis added by Ont. C.A.].

[196] A second reason for restricting the availability of damages is the effect that the threat of liability for damages would have on government decision-making. One of the primary functions of government is to advance society through the creation of new policies and programs. Potential liability for damages creates the risk of interfering with effective governance by deterring governments from creating new policies and programs. In *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, after referring to the rule that damages are generally unavailable where a law is declared unconstitutional, the Supreme Court of Canada affirmed that this concern applies in the *Charter* context. At para. 15, the Court quoted from an article by M. L. Pilkington entitled "Monetary Redress for *Charter* Infringement" in R. J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) 307 at 319-20:

> A qualified immunity for government officials is a means of balancing the protection of constitutional rights against the needs of effective government, or, in other words, determining whether a remedy is appropriate and just in the circumstances. A government official is obliged to exercise power in good faith and to comply with "settled, indisputable" law defining constitutional rights. <u>However, if the official acts reasonably in the light of the current state of the law and it is only subsequently determined that the action was unconstitutional, there will be no liability.</u> To hold the official liable in this latter situation might "deter his

> willingness to execute his office with the decisiveness and judgment required by the public good" [emphasis added by the Supreme Court].

[197] 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. This case illustrates this point in that the damages award creates an indefinite liability for Ontario to pay for privately purchased intensive behavioural intervention of the respondent families for so long as the private intensive behavioural intervention service providers consider it to be clinically required. This cost rises exponentially if the same benefit were extended to other similarly situated families, a point discussed below.

[198] This case illustrates two additional reasons that militate against the availability of damages in conjunction with declaratory relief. The first is that assessing the loss attributable to the respondents involves speculation. It is not known whether the government would have created the IEIP had it known that it would not be permitted to target the program towards pre-school children with autism. Ontario had to weigh multiple complex policy issues to establish the parameters of the IEIP, including the service capacity and budgetary resources available to the program, the choice of funding model and the prioritization of services or funding. In light of these considerations, the court cannot assume that the other parameters of the program would have remained the same even if the age limit had been removed. Therefore, it cannot be assumed that the respondents would have received any funding after 2002 much less in the amounts ordered by the trial judge.

[199] This concern was recognized by the Supreme Court in *Schachter*, *supra*, a case in which the Court was called upon to consider the appropriate remedy for a constitutionally underinclusive benefit program that accorded benefits to adoptive parents but not to natural parents. At pp. 725-26, the Supreme Court held that damages were not an appropriate remedy under s. 24(1) of the *Charter* in cases where it cannot be assumed that the claimant would have benefited from a constitutionally valid program:

> Further, this is not a case in which extending a remedy, for example damages, under s. 24(1) to the respondent would be appropriate. The classic doctrine of damages is that the plaintiff is to be put in the position he or she would have occupied had there been no wrong. In the present case, there are two possible positions the plaintiff could have been in had there been no wrong. The plaintiff could have received the

> benefit equally with the original beneficiaries, or there could have been no benefit at all, for the plaintiff or the original beneficiaries. The remedial choice under s. 24 thus rests on an assumption about which position the plaintiff would have been in. However, I have already determined which assumption should be made in the analysis under s. 52, and have determined that it cannot be assumed that the legislature would have enacted the benefit to include the plaintiff. Therefore, the plaintiff is in no worse position now than had there been no wrong.

[200] The Supreme Court held that it would not be appropriate to extend the benefit program to the natural parents. At p. 723, the Court recognized that it is not the function of the courts to make policy choices from a variety of constitutionally valid options:

> Here, the excluded group sought to be included likely vastly outnumbers the group to whom the benefits were already extended.
>
> Given the nature of the benefit and the size of the group to whom it is sought to be extended, to read in natural parents would in these circumstances constitute a substantial intrusion into the legislative domain. This intrusion would be substantial enough to change potentially the nature of the scheme as a whole. If this Court were to dictate that the same benefits conferred on adoptive parents under s. 32 [the impugned provision] be extended to natural parents, the ensuing financial shake-up could mean that other benefits to other disadvantaged groups would have to be done away with to pay for the extension. Parliament and the provincial legislatures are much better equipped to assess the whole picture in formulating solutions in cases such as these.

[201] A further reason that militates against the availability of a damages remedy, as illustrated by this case, is the need for the government to act equitably. Nothing in the record suggests that the respondents should be given priority over all other children with autism who are not before the court. Providing a remedy of financial indemnification for past and future intensive behavioural intervention expenses to the respondent families, who may be no more in need than the thousands of families of children with autism in Ontario who are not parties to this litigation, creates an unfairness for autistic children age six or older who are not parties to this proceeding.

[202] 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.

ISSUE FIVE: THE ADULT DISCRIMINATION CLAIMS

[203] In their cross-appeal, the adult respondents seek:

(i) a declaration that the failure or refusal to provide special education programs for their autistic children was a violation of their s. 15(1) rights and a violation of the Minister's statutory obligation in s. 8(3) of the *Education Act*; and

(ii) damages.

a) Alleged Section 15 and Section 8(3) Violations

[204] The claims of the adult respondents are derivative from that of the infant respondents. Accordingly, they cannot stand in a better position in this regard than the infant respondents. Thus, we would dismiss the cross-appeal in respect of alleged constitutional and statutory violations. We would add the following comments.

[205] In our view, the trial judge correctly rejected the argument that the adult respondents had been discriminated against on the basis of their "family status" as parents and grandparents of children with autism. With respect, however, we disagree with the trial judge's determination that being the parent of a child with autism is an analogous ground.

[206] In our view, *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627, does not support the proposition that family status is an analogous ground for the purposes of s. 15(1). In *Thibaudeau*, while McLachlin J. (as she then was) and L'Heureux-Dubé J. held, in separate dissenting reasons, that separated or divorced parents were an analogous ground, the claims of alleged discrimination depended on the parents' own status of being separated or divorced. With respect, we find it difficult to conceive of family status as constituting an analogous ground where the claim of the parents and grandparents is based not on their own characteristics or identity but, rather, on the characteristics or identity of the infant respondents.

b) Damages Claim

[207] As explained previously, in our view, damages are not an available remedy in the circumstances of this case. Furthermore, we see no error in the trial judge's finding that the adult respondents have not met the burden of proof necessary to attribute their alleged damages of lost income and lost working capacity to the actions or inactions of the government. Finally, in any event, to the extent that the adult respondents claim damages for past and future intensive behavioural intervention expenses, it appears fully duplicative of the damage claim of the infant respondents.

ISSUE SIX: THE LIFE, LIBERTY AND SECURITY OF THE PERSON CLAIMS

[208] As already noted, the trial judge made a finding that neither the infant plaintiffs nor the adult plaintiffs have shown that their s. 7 *Charter* rights to life, liberty and security of the person have been infringed by the special education regime provided by Ontario. Based on submissions that we will address in our analysis, the respondents appeal this finding. Before turning to our analysis, we will briefly review the trial judge's reasons relating to this issue.

a) The Trial Judge's Reasons

[209] The trial judge framed the issue before her as follows:

> 3 (a) Do the actions or inactions of the Minister of Education constitute a violation of the duty under s. 8(3) of the *Education Act* by failing or refusing to ensure that IBI (as described in the amended prayer for relief), speech therapy, occupational therapy and appropriate educational services are provided to children of compulsory school age, in a manner contrary to the infant and/or adult plaintiffs' rights under section 7 of the *Charter*?

[210] Section 7 of the *Charter* provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[211] After reviewing the parties' positions, the trial judge concluded that the special education regime established under the *Education Act* does not violate the respondents' s. 7 *Charter* rights, primarily because those rights are not engaged. She said at para. 755:

> I am not persuaded that the s. 7 rights to liberty and security of the person have been engaged for two reasons. First, as

> counsel for the plaintiffs conceded, special education programs and services are a benefit. I do not agree that a scheme that mandates participation in such a benefit could be perceived as "state coercion" even where the benefit is inappropriate and indeed, where it may be harmful. Second, consistent with the majority in the Supreme Court in *Gosselin*, the failure on the part of the state to take action, such as the failure by the Ministry of the Education to develop policy and give direction to the school boards to ensure that IBI/ABA services are provided to children in schools, is in a different category and does not warrant a novel application of s. 7. In the context of violating principles of fundamental justice, a positive state obligation to guarantee "appropriate special education programs and special-education services" is a far less intrusive category. Therefore, I find that there has not been a violation of the infant or adult plaintiffs' s. 7 rights.

b) Our Analysis

[212] In this Court, the respondents contend that their s. 7 rights are engaged in two ways. First, they submit that the trial judge's findings of fact demonstrate that because intensive behavioural intervention consistent with the IEIP Guidelines is the one program known to provide any hope to autistic children of becoming fully realized individuals, access to such programming is fundamental to the personhood and development of autistic children. Accordingly, the special education regime in place under the *Education Act* adversely impacts the infant respondents' liberty and security of the person interests by denying access to intensive behavioural intervention consistent with the IEIP Guidelines to school-age autistic children.

[213] In this regard, the respondents note that the liberty interest protected by s. 7 is a broad concept intended to vindicate individual autonomy and personhood, and includes the right to make certain essential life decisions about oneself. As stated by LaForest J. in *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at para. 66:

> Rather, as I see it, the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.

[214] Similarly, the right to security of the person extends to government conduct that places individuals at risk of serious mental suffering: *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 56; *Chaoulli v. Québec (Attorney General)*, [2005] 1 S.C.R. 791 at para. 116.

[215] In support of their claim, the respondents rely, in particular, on the following findings of the trial judge at paras. 332-33:

> I find that ABA/IBI is not emergent either for pre-school or for school-aged children. It is nationally and internationally regarded as an effective intervention for children with autism. There is consensus that the earlier it is commenced, the more effective it is likely to be. Some of the experts were more optimistic about the extent to which positive outcomes can be achieved, while others were more conservative. Without making a finding as to percentages, I find that most of the children who receive appropriate ABA/IBI will experience measurable gains (in the best outcome and moderate outcome categories) and few will see no measurable gains.
>
> Some of the experts spoke of other interventions.… However, I received no expert or professional evidence that any other intervention available in Ontario is equally or more efficacious.

[216] The respondents contend that by denying school-age children access to intensive behavioural intervention consistent with the IEIP Guidelines, the appellant is depriving autistic children of any reasonable expectation of success in life and of any realistic possibility of meaningful participation in the community. Moreover, for parents, having the ability to choose and provide the one program that will give their child a chance at success in life is central to the parent-child relationship.

[217] We are unable to accept the respondents' submissions. For reasons that we have already explained, in our view, the trial judge's implicit conclusion that intensive behavioural intervention consistent with the IEIP Guidelines is the only program that qualifies as an appropriate special education program or service for school-age autistic children constitutes a palpable and overriding error. Once this finding is set aside, there is no factual underpinning for the respondents' claims. In particular, without that finding, there is no basis for the respondents' claim that access to intensive behavioural intervention consistent with the IEIP Guidelines is fundamental to the personhood and development of school-age autistic children.

[218] Further, in our view, the existing jurisprudence does not permit us to interpret s. 7 of the *Charter* as imposing a constitutional obligation on the appellant to ensure that every school-age autistic child has access to specific educational services.

[219] We acknowledge that the Supreme Court of Canada has left open the possibility that one day s. 7 of the *Charter* may be interpreted as including positive obligations. For example, see *Gosselin*, *supra* at para. 83, where McLachlin C.J., speaking for the majority, stated:

> With due respect for the views of my colleague Arbour J., I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s. 7. I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances. However, this is not such a case. The impugned program contained compensatory "workfare" provisions and the evidence of actual hardship is wanting. The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support.

[220] However, to date, s. 7 has been interpreted only as restricting the state's ability to *deprive* individuals of life, liberty or security of the person. In this case, the appellant has chosen to provide the IEIP to children up to the age of six. We have concluded that this choice, standing alone, does not create a constitutional obligation on the appellant to provide the same or similar programming on a more widespread basis. Viewed in this context, the appellant's actions in failing to provide intensive behavioural intervention consistent with the IEIP Guidelines to school-age children do not amount to *depriving* the respondents of a constitutionally protected right and therefore do not contravene s. 7 as it is now understood.

[221] The cases on which the respondents rely do not assist them.

[222] *Chaoulli*, *supra*, involved a challenge to the provisions of a Quebec statute that prohibited residents from making private health insurance contracts. The appellants in *Chaoulli* did not seek an order requiring the government to fund their private health care or to spend more money on health care, or an order that waiting times for treatment be reduced; on the contrary, they sought the right to spend their own money to obtain insurance to pay for private health care services.

[223] No comparable issue arises in this case, as there is no law restricting the respondents' ability to spend their own money for intensive behavioural intervention services consistent with the IEIP Guidelines.

[224] *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 and *R.B. v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, arise in the context of child protection cases, where there is direct state interference in the parent-child relationship. There is no such direct state interference in this case.

[225] Finally, in *Gosselin*, *supra*, the Supreme Court of Canada rejected an argument that s. 7 of the *Charter* requires the provision of a minimum level of social assistance adequate to meet basic needs.

[226] The second way in which the respondents submit their s. 7 *Charter* rights are engaged involves a more traditional application of s. 7. As we have already noted, the *Education Act* creates a scheme of compulsory education for children between the ages of six and sixteen years old. The respondents contend that since the public school system is available free of charge, on a practical level, for most families with autistic children the compulsory education mandated by the *Education Act* must take place in the public school system.

[227] They argue that because autistic children are excluded from the IEIP on their sixth birthday and because, on a practical level, they are obliged to enter a school system that the trial judge found was indifferent or hostile to intensive behavioural intervention consistent with the IEIP Guidelines. Thus, the effect of the *Education Act* and the special education regime is to compel school-age autistic children to participate in special education programs that are at best useless and at worst harmful.

[228] The respondents contend that participation in such programs will inevitably cause profoundly negative impacts on the children's security of the person interests and on their parents' liberty interests. Moreover, for parents, the inability to choose, or direct their child into the one form of programming that will assist their child, creates a level of stress that engages the parents' liberty interests.

[229] We begin by noting that s. 21 of the *Education Act* does not create a mandatory requirement that school-age children attend public school; rather, under s. 21(2) school-age children are excused from attending public school if "receiving satisfactory instruction at home or elsewhere." In *Adler v. Ontario* (1994), 19 O.R. (3d) 1 (C.A.), aff'd [1996] 3 S.C.R. 609, this Court held, at p. 12, that the *Education Act* does not compel attendance at a public school:

> It is quite clear that s. 21 does not require the attendance of a child at a public school or a separate school under the jurisdiction of the appropriate board as defined by the Act. Indeed, the section does not mandate the attendance of a child at any school. Section 21(2) provides that a child is excused from attendance at a school (as defined by the statute) if the

> child is receiving satisfactory instruction at home or elsewhere…. Section 21 mandates compulsory education, but not compulsory school attendance at a non-denominational school.

[230] Since s. 21 of the *Education Act* does not compel the attendance of a child at a public school, we are unable to accept the proposition that economic realities dictate that school-age autistic children must attend public schools. Even if parents are unable to afford private school education, home-schooling remains an option for parents who do not wish their children to attend public schools. Given that s. 21 does not compel attendance at a public school, it cannot compel participation in programming that parents fear is harmful to their children.

[231] Nevertheless, based on the evidence adduced at trial of the cost of programming, we accept, as a matter of common sense, that many if not most parents of autistic children would be unable on their own to fund intensive behavioural intervention consistent with the IEIP Guidelines for their children. However, we have already concluded that the appellant's actions in failing to provide such programming to school-age children do not amount to *depriving* the respondents of a constitutionally protected right and therefore do not contravene s. 7 of the *Charter* as it is now understood. As the *Education Act* neither compels attendance at public school nor creates an impediment to parents educating their children at home or at a private school, we conclude that the s. 7 rights of the respondents are not engaged

[232] Further, even if the *Education Act* did compel attendance in the public school system, once the trial judge's implicit finding that intensive behavioural intervention consistent with the IEIP Guidelines is the only program that qualifies as appropriate special education program for autistic children is set aside, there is no factual underpinning for the respondents' claims. In particular, there is no basis for us to conclude that the *Education Act* and the special education regime adversely impact the respondents' s. 7 *Charter* rights by compelling school-age autistic children to participate in special education programs that are useless or even harmful.

[233] In conclusion, we agree with the trial judge that the respondents' s. 7 claim should be dismissed.

ISSUE SEVEN: THE NEGLIGENCE CLAIM OF THE DESKIN PLAINTIFFS

a) The Trial Judge's Reasons

[234] In relation to the Deskin plaintiffs' negligence claim, the trial judge found that Ontario does not have a private law duty of care to the Deskin plaintiffs. In particular, she concluded that any duty that Ontario owes is owed to the public as a whole and not to

specific individuals. Further, the decisions not to extend the IEIP beyond the cut off age of five and not to provide intensive behavioural intervention consistent with the IEIP Guidelines in the special education system are policy decisions for which liability does not lie in tort.

[235] The trial judge also held that even if Ontario has a private law duty of care, the Deskin plaintiffs failed to establish that what damages they may have suffered were caused by a breach of that duty. Finally, the trial judge said that, even if a negligence claim had been established, she would have been unable to assess damages because "the evidence did not distinguish between damages which arose as a result of having a child with autism and as a result of having a child with autism where the government had been negligent."

[236] The trial judge therefore dismissed the Deskin plaintiffs' negligence claim. The Deskin plaintiffs cross-appeal from that order.

b) Our Analysis

[237] Michael Deskin was born on February 16, 1995. When he was almost three years old, Michael was diagnosed with autism. Shortly after he was diagnosed, Michael's parents began a therapeutic program for him in their home. Even before Michael's formal diagnosis, Ms. Deskin, in particular, had already conducted extensive research relating to autism and its treatment. As part of that process she assembled what came to be known as the "Deskin binder" in which she identified and described intensive behavioural intervention as the treatment of choice for autism.

[238] Ultimately, the Deskin binder and Ms. Deskin's efforts at lobbying the government were a major catalyst in the creation of the IEIP. As part of her efforts, Ms. Deskin also became a leader in establishing The Learning Centre to help children with autism, and was the Chair of its Board of Directors.

[239] When the IEIP was announced in September 2000, Michael was almost six years old. However, because he qualified for the IEIP during his fifth year, he was eligible for a full year of services under the program. Accordingly, through the Direct Funding Option of the IEIP, the Deskins received almost $50,000 in funding retroactive to July 1, 2000.

[240] In January 2001, the Deskins enrolled Michael at The Learning Centre, where he remained until April 2002. IEIP funding for this program ended as of July 2001, and the Deskins themselves paid for Michael's tuition at the centre during the balance of this period.

[241] As a founder of The Learning Centre, Ms. Deskin was unhappy when the Board of Directors set the tuition at $50,000 and then indicated during the winter of 2001-2002 that fees would be raised to $55,000. Since Michael was no longer eligible for IEIP funding, the family was unable to afford the increases.

[242] According to the trial judge, the winter of 2001-2002 was extremely stressful for the Deskin family. By late March 2002, Ms. Deskin had concluded that the conflict between her and The Learning Centre was affecting Michael's program and she therefore removed him from the program. As noted by the trial judge, "[t]his unplanned transition had negative repercussions on Michael."

[243] During April 2002, the Deskins made efforts to enrol Michael in the public school system. Following an Identification and Placement Review Committee assessment, it was determined that Michael should be placed in a developmentally disabled classroom. After visiting the classroom and speaking to the principal, the Deskins concluded that the classroom environment was not suitable for Michael and that, in any event, there were not sufficient supports in place to enable Michael to successfully transition to school. Accordingly, the Deskins decided not to enrol Michael in the public school system, but rather, to continue with their home program.

[244] In November 2003, the Deskins moved from Toronto to Dundas, Ontario. Because Michael's parents had already testified at trial, Michael's grandparents provided evidence that this move occurred for financial reasons.

[245] According to the Deskins, Michael experienced regressions in his progress during two time frames that are relevant to this proceeding. The first regression occurred when he left The Learning Centre; Michael experienced a second regression when the family moved to Dundas. The Deskins indicated that during the period immediately following each of these transitions, Michael lost skills he had acquired and had to spend time regaining those skills as a result.

[246] The Deskin plaintiffs do not challenge the trial judge's finding that Ms. Deskin's activities in lobbying the government did not give rise to a duty of care. On appeal, however, the Deskin plaintiffs submit that, having made what was a true policy decision to provide intensive behavioural intervention in the manner described in the IEIP, Ontario had an obligation to implement that service in a non-negligent manner.

[247] In that regard, they argue this case is analogous to other decisions recognizing that a duty of care arises on the part of government actors in favour of users of government services. For example, see *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403; and *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2. Accordingly, they say that the trial judge erred in failing to recognize that a duty of care arose because Michael was a user of the IEIP and the special education system.

[248] Further, the Deskin plaintiffs claim that multiple operational failures occurred in implementing the IEIP. Those failures can be grouped into three broad areas: (i) developing capacity; (ii) the transition to school, and (iii) monitoring and evaluation of the program. Examples of failures in each broad area include the following:

(i) Developing Capacity

- Ontario failed to train sufficient numbers of staff to meet the needs of the program and it failed to recognize that there was significant capacity in the private sector that could have been used through the direct funding option;

- Ontario did not contemplate a recruitment strategy until 2002, and did not implement that strategy until 2003;

- Ontario failed to establish linkages with colleges and universities at the commencement of the program even though program guidelines called for that.

(ii) The Transition to School

- Changes made to the IEIP Guidelines stripped the Guidelines of the detail necessary to ensure transition was effective;

- Through inadvertence and failure to interact appropriately with the MCSS, the Ministry of Education decided to develop special education standards for children with autism without consulting the MCSS;

- Ontario failed to respond to reports that transitions to school were not occurring effectively.

(iii) Monitoring and Evaluation of the Program

- The IEIP Guidelines provided that monitoring would be undertaken to assess efficiency and continuous quality improvement within the program and that data would be collected to provide the basis for an in-depth study of the outcomes for children and families. The computer system designed to do such monitoring did not work;
- Ontario failed to conduct an external evaluation promptly as required by the Guidelines.

[249] The Deskin plaintiffs contend that although the trial judge made numerous findings concerning operational failures of the IEIP during the course of her reasons, when it came to the duty of care analysis, she erred in failing to make the distinction between what constituted policy decisions and what constituted operational decisions. As a result of that error, the trial judge failed to recognize that Ontario had a private law duty of care to the Deskin plaintiffs in relation to the implementation of the IEIP, and that it

was operational failures in the implementation of the IEIP that caused Michael, and therefore also his family, harm.

[250] The Deskin plaintiffs claim that their family has been impacted by government failures relating to the IEIP program and the special education system in three ways. First, as the government failed to provide a smooth transition to the public school system and failed to provide appropriate special education in that system, the Deskins had no choice but to continue funding Michael's home-based therapeutic program at their own expense. Second, as a result of the government's failure to provide a smooth transition to the public school system, Michael experienced regression in the two time frames referred to above. Third, as a result of having to continue to provide Michael with a home-based therapeutic program, Ms. Deskin was not able to spend time operating her business and therefore lost income.

[251] We are unable to accept the Deskin plaintiffs' submissions for three reasons.

[252] First, although they characterize their position on appeal as focusing on operational failures in implementing the IEIP, in our view, at the core of the Deskin plaintiffs' claim is the assertion that Ontario failed to provide intensive behavioural intervention consistent with the IEIP Guidelines for autistic children as part of the transition to school and as part of the special education program. Viewing the Deskin plaintiffs' claim in this light, we agree with the trial judge's conclusion that Ontario does not owe them a private law duty of care.

[253] The trial judge recognized this essential feature of the Deskin plaintiffs' claim in particular when dealing with the issue of whether policy reasons negate any duty of care that does exist. At paras. 844-45, she said:

> The initial decisions in April 1999 and August 1999 to limit eligibility in the IEIP to children 2 to 5 and the subsequent decisions in June 2001 and October 2002 not to extend the age in the IEIP were policy for which the government ought not to be exposed to liability.
>
> …
>
> The Minister did not develop policy and give direction to the school boards to ensure IBI/ABA services to children with autism. That was a policy decision which is not actionable in tort.

[254] Additionally, the Deskin plaintiffs have not linked the operational failures they rely on to the injuries they claim to have suffered. Again, in our view, the explanation for this disconnect is the fact that the Deskin plaintiffs' real complaint relates to Ontario's failure to provide intensive behavioural intervention consistent with the IEIP Guidelines for autistic children as part of the transition to school and as part of the special education program and not, as they characterize it, a series of operational failures in the implementation of the IEIP.

[255] We conclude that, rather than being a claim for operational failures in the implementation of a government program, the Deskin plaintiffs' claim relates to government decision-making about the scope of the IEIP and the services to be provided within the special education system. Viewed from that perspective, this case is not analogous to the cases on which the Deskin plaintiffs rely where a duty of care arose on the part of government actors in favour of users of government services.

[256] Given the nature of the Deskin plaintiffs' claim, we agree that the proper starting point for the analysis of whether a private law duty of care exists is to examine, as the trial judge did, the nature of any duties imposed under s. 7(1)(a) of the *Child and Family Services Act* and s. 8(3) of the *Education Act*. As already noted, s. 7(1)(a) of the *Child and Family Services Act* provided the Minister of Community and Social Services with the discretion to undertake the IEIP, whereas s. 8(3) of the *Education Act* sets out the scope of the Minister of Education's duty in relation to special education programs and services.

[257] In our view, the trial judge was correct in concluding that, to the extent each section creates duties, the duty created in each case is to the public as a whole, rather than to individual users of a program. Both sections contemplate the allocation of public funds and the balancing of competing interests. Moreover, because the decisions in issue involve government policy, a private law duty of care is negated under the second step of the *Anns* analysis: *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.). See, for example, *Cooper v. Hobart*, [2001] 3 S.C.R. 537; *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562.

[258] Second, we see no error in the trial judge's causation analysis. The record indicates that Michael received all of the funds to which he was entitled under the IEIP. After those funds were exhausted, Michael's parents continued his enrolment at The Learning Centre. After deciding to withdraw Michael from the Learning Centre, Michael's parents did not enrol him in the public school system; nor did they appeal his Identification and Placement Review Committee Placement. In these circumstances, we see no basis for concluding that any alleged operational failures in implementing the IEIP were the cause of any damages suffered by Michael or his parents.

[259] Third, we agree with Ontario's submissions that the Deskin plaintiffs have not linked the alleged operational failures on which they now seek to rely to the allegations of negligence that they pleaded at trial.

[260] Accordingly, we would not give effect to this ground of the cross-appeal.

DISPOSITION

[261] For the reasons given, we would allow the appeal and dismiss the cross-appeal.

COSTS

[262] The parties have not yet addressed the issue of costs. We invite the parties to make written submissions on the appropriate disposition of costs both at trial and in this Court. Those submissions should be no more than fifteen pages and filed within six weeks of the date of release of this decision.

RELEASED: July 7, 2006 ("STG")

"S. T Goudge J.A."
"Janet M. Simmons J.A."
"E. E. Gillese J.A."