PART I – STATEMENT OF FACTS

1. The Coalition defers to the parties for the facts related to the particular claimants.

PART II – QUESTIONS IN ISSUE

2. The Coalition's position on the questions in issue is that there is a violation of s.15 of the *Charter*, which is not saved by s. 1. The Coalition's submissions will not address the s. 7 issue.

PART III – STATEMENT OF ARGUMENT

Introduction to Section 15 of the *Canadian Charter of Rights and Freedoms*

3. This case concerns the provision of health services benefits, and in particular the exclusion from receipt of state funding of services related to autism. The substantive equality question is whether there are marginalized segments of the population whose most pressing health services needs are disproportionately not met. The government's refusal to include, within its definition of health benefits, services with respect to autism is a denial of substantive equality because funding is arbitrarily tied to specific service providers, namely doctors and hospitals.

4. Section 15's dual purpose is to prevent discrimination **and** to promote equality. Its purpose is:

> to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.
>
> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 51
> Section 15 of the *Canadian Charter of Rights and Freedoms*, *Constitution Act*, 1982, as enacted by the *Canada Act* 1981 (UK), 1982, c. 11

5. These goals are conjunctive. When the state fails to accord substantive equality based on a prohibited ground(s), this in itself should be sufficient to establish a breach of s. 15. Section 15 is aimed at preventing and remedying inequalities, ensuring that the state does not exacerbate existing inequalities. When government reinforces or ignores existing inequalities, it simultaneously disadvantages already marginalized groups, while increasing the relative advantage of dominant groups. Inequalities are measured by unequal effects, identified through

a substantive equality analysis. In the present case, it is the existing inequality of the disabled that is exacerbated by the government policy respecting the definition of health benefits.

Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 *The Canadian Bar Review* 299
Law Society of British Columbia v. *Andrews*, [1989] 1 S.C.R.143

6. A three step test was adopted in *Law* v. *Canada* for the analysis of s. 15 claims, but it was emphasized that the test is not a fixed and rigid formula. The *Law* test includes a 'checklist' of factors that are often applied in a mechanistic fashion, despite the Court's direction to the contrary. The focus on formalistic rules acts to decontextualize systemic inequality analyses. Moreover, some of the factors from *Law* can be improperly used to overemphasize a focus on the purpose rather than the effects of the law or policy in question.

Law v. *Canada (Minister of Employment and Immigration)*, *supra* at paras. 8, 88
M. v. *H*., [1999] 2 S.C.R. 3, at para. 46
Nova Scotia (Attorney General) v. *Walsh*, [2002] 4 S.C.R. 325, at para. 82 (L'Heureux-Dubé J. in dissent)
Catherine MacKinnon, "Difference and Dominance" in *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press: Cambridge, 1987) 32-45

7. Although the present case can be analysed according to the three step *Law* test, the Coalition submits that it is artificial to do so because the elements of the three steps are actually substantially intertwined. A holistic substantive equality analysis, as set out below, is more appropriate especially where the differential treatment step is complex and contested, as it is here. A full analysis of inequality requires an assessment of differential treatment that incorporates the interrelated concepts of grounds and discrimination. To disaggregate the analysis potentially jeopardizes the dual purpose of s. 15 to prevent discrimination and promote equality. Disaggregation has the potential to unnecessarily complicate the analysis, and/or to obscure the actual unequal effects. In contrast, a holistic substantive equality analysis promotes equality by paying close attention to the unequal effects that are revealed when examining the interrelationships among differential treatment, grounds, and discrimination.

Law v. Canada (Minister of Employment and Immigration), *supra* at para. 88

8. The s. 15 analysis below will proceed in the following manner. A review of disability in general, and autism in particular, is presented to provide the necessary context for a substantive equality analysis. A holistic substantive equality analysis is set out to demonstrate that the refusal to provide autism services amounts to differential treatment constituting discrimination

against the disabled. There is a breach of s. 15 because the delivery of health services primarily from doctors and hospitals is designed, for the most part, to meet the usual health concerns of the non-disabled population, typically neglecting the isolating and marginalizing effects of disability. Finally the *Law* framework is assessed and applied.

The Context for the Section 15 Analysis

9. The social perception of disability has historically determined the value placed upon the lives of persons with disabilities, and the degree of equality they enjoy within society. The characterization of disability as a negative attribute has traditionally defined the dominant social perception of disability, resulting in the isolation of the disabled from mainstream society.

> Rioux, Marcia, "New Research Directions and Paradigms: Disability is Not Measles", in Rioux, Marcia and Michael Bach, eds., *Disability Is Not Measles* (North York: Roeher Institute, 1994), at 1-7
> Bickenbach, Jerome E., *Physical Disability and Social Policy* (Toronto: University of Toronto Press, 1993), at 3-19
> Susan Wendell, *The Rejected Body: Feminist Philosophical Reflections on Disability*, (New York: Routledge, 1996), at 35-56
> *Granovsky* v. *Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703 at para. 30

10. Historically society has understood disability as a defect rooted in the individual, and has analyzed his/her difference in bio-medical terms. Pursuant to the traditional bio-medical model of disability, the only response to disability is the modification of the individual to fit the non-disabled world, or the segregation of disabled persons from mainstream society, often through institutionalization. Although bio-medical intervention may be apt in certain circumstances (as it is for non-disabled persons), it is inappropriate to assume that it is always, in itself, an adequate or appropriate response to disability. The bio-medical model assumes that disabilities are deficits of natural assets rather than socially ascribed deficits. This model is grounded in able-bodied imperialism, as the world view of the able-bodied continues to be imposed on persons with disabilities.

> Richard Devlin & Dianne Pothier, "Introduction: Towards a Critical Theory of Disitizenship" in Devlin & Pothier (eds.), *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law,* Forthcoming, UBC Press, 2004, at 14
> Marcia H. Rioux and Fraser Valentine, "Does Theory Matter? Exploring the Nexus between Disability, Human Rights and Public Policy" in Devlin & Pothier (eds.), *supra* at 2-11
> David Lepofsky, "*Charter*'s Guarantee of Equality: How Well Is It Working?" (1998) 16 Windsor Yearbook of Access to Justice 155 at 172

11. An excessive focus on bio-medicalization marginalizes disabled persons as the "other", and hinders societal reform that would provide for increased inclusion. The power of the dominant norm, i.e. the non-disabled norm, is further entrenched and valued by the pathologizing of difference. Because of the way in which society excludes and marginalizes persons with autism, both children and adults with autism experience extreme isolation, disadvantage and oppression if they do not receive health services support to enable their integration into society.

> *Auton* v. *British Columbia*, (C.A.), Appellant's Record, Volume 2, 166-254 at paras. 2, 3, 11, 12, 15, 49, 147; *Auton* v. *British Columbia* (trial decision), Appeallant's Record, Volume 1, 65-130 at para. 4, 147

12. It is important to recognize that not every condition requiring health services constitutes a disability. To contend otherwise, i.e. to equate any level of impairment with disability, would be to adopt a bio-medical model of disability inconsistent with a purposive interpretation of s. 15. A social model of disability, which focuses on exclusionary effects rather than just medically documented impairment, was recognized by this Honourable Court in *Eldridge* and *Granovsky*. A purposive interpretation of s. 15 must be focussed on countering such exclusionary effects. A substantial proportion of health services has nothing to do with disability because the particular conditions being treated do not result in a significant exclusion from full participation in Canadian society so as to require the protection of s. 15. Disability within s.15 is identified based on exclusionary effects.

> *Eldridge v. British Columbia (Attorney General),* [1997] 3 S.C.R. 624
> *Granovsky v. Canada (Minister of Employment and Immigration), supra*

13. The stigmatization and social exclusion of disabled persons has had devastating effects. Persons with disabilities experience conditions of serious socio-economic disadvantage in Canadian society. For example, they face unemployment rates of up to 52%, are over represented among the poor, are underrepresented among those who have graduated from post-secondary educational institutions, and about 60% have incomes below the Statistics Canada Low Income Cutoff. These effects can be compounded by sexism, racism and homophobia.

> M.D. Lepofsky , "Equal Access to Canada's Judicial System for Persons with Disabilities - A Time for Reform" (1995) 5 N.J.C.L. 183 at 187-188
> Gail Fawcett, *Bringing Down the Barriers: The Labour Market and Women with Disabilities in Ontario* (Ottawa: Canadian Council on Social Development, 2000) at 6-7 and 26-28

14. Women with disabilities face even greater disadvantage than men with disabilities. A disproportionate percentage of disabled women in Canada live in poverty, cannot access services available to other Canadians, are unemployed, and experience exposure to the criminal justice system, either as victims or as accused. Women with disabilities face an employment rate that is about 1/3 less than the rate for non-disabled women and about 15% less than that for men with disabilities. Women with disabilities are 40% more likely than men with disabilities to be outside of the labour force. When employed, the average income of women with disabilities falls significantly below that of non-disabled women, whose average employment income in turn falls significantly below that of men with disabilities. Women with disabilities experience violence at a rate disproportionate to that of any other group of women. The criminal law system acts to the systemic disadvantage of persons with disabilities; moreover, disabled women, in greater proportions than disabled men, are incarcerated in prisons.

> Dick Sobsey and Tanis Doe, "Patterns of Sexual Abuse and Assault" (1991) 9 Sexuality and Disability 243 at 248-9
> *In Unison: A Canadian Approach to Disability Issues* (appendix B), released October 27, 1998 Federal, Provincial, Territorial Ministers Responsible for Social Services (except for Quebec) available at: http://socialunion.gc.ca/pwd/unison/unison_e.html
> Fiona Sampson, "Globalization and the Inequality of Women with Disabilities (2003) 2 *Journal of Law and Equality* 16-33
> Yvonne Peters, "Federally Sentenced Women with Developmental and Mental Disabilities: A Dark Corner in Canadian Human Rights" (DAWN Canada: Ottawa 2003)

15. Although autism is more common amongst boys than girls, girls with autism, particularly as they grow older, may experience compounded and extreme discrimination because of their gendered disability. Not addressing the effects of autism will likely lead to lives of isolation and institutionalization for both male and female children. However, the negative effects will be compounded for girls with autism. For example, women with autism who are institutionalized are liable to experience one of the most serious forms of gendered disability discrimination - the physical and sexual abuse that is prevalent in institutions. Because of their gendered disability, women with certain disabilities are in some circumstances vulnerable in ways that neither non-disabled women nor disabled men would be vulnerable. Gendered disability discrimination is not the additive experience of sex plus disability discrimination; it is a distinct experience, more than the sum of its parts.

Auton v. *British Columbia* (trial decision) *supra*, at para. 10
Allison M. Schmidt, "Violence and Abuse in the Lives of Women with Disabilities" http://www.doug-lawson.com/dcac/ARTAbuse.htm, accessed December 24, 2003
Laurie E. Powers et al., "Barriers and Strategies in Addressing Abuse: A Survey of Disabled Women's Experiences" Journal of Rehabilitation, Jan-March, 2002, http://www.findarticles.com/cf_dls/m0825/1_68/83910976/print.jhtml
Dick Sobsey and Tanis Doe, *supra*

16. State failure to respond to autism also produces secondary effects that are pertinent to an equality analysis. Failing to respond to autism privatizes responsibility by placing it solely on parents, increasing the challenges associated with caring for and advocating on behalf of children with autism. Privatization generally has gendered effects. Given prevailing patterns of child care responsibilities, especially with respect to children with disabilities, such privatization impacts disproportionately on women as mothers and primary care givers. Privatization also disproportionately affects those who, for reasons of class or other economically disadvantaging factors, such as race and disability, have fewer resources to draw on to care for an autistic child. Thus state failure to provide autism services creates not only an inequality for the autistic children themselves, but also differential effects on families of children with autism.

Melanie Panitch, "Mothers of Intention: Women, Disability and Activism" in *Making Equality: History of Advocacy and Persons with Disabilities in Canada*, Deborah Stienstra and Aileen Wight-Felske, eds. (Concord, Ontario: Captus Press, 2003) at 261

17. To avoid social isolation of persons with autism, an expanded understanding of health services is required, one that is less restrictive than the traditional medical understanding. In accord with the social model of disability, the emphasis should be on removing barriers to participation rather than simply "modifying" the individual. This expanded understanding of health services must be informed by the perspective and voices of persons with autism. Moreover, it should challenge the current power and dominance of the doctors/hospitals paradigm, which defines disability as a deviation from the norm, and controls the provision of services based on medical professionals' own available skill set.

Institute for the Study of the Neurologically Typical, Home Page and DSN-IV The Diagnostic and Statistical Manual of 'Normal' Disorders, available at: http://isnt.autistics.org/ and http://isnt.autistics.org/dsn.html

The Section 15 Breach in the Present Case

Is there inequality?

18. It is important to appreciate the experience of inequality that constitutes a breach of s. 15. To promote equality, a substantive equality approach requires taking proper account of differential needs. In the present case, prior to the order of Allan J., the government provided no autism related services. It thus did not respond at all to the needs of autistic children. The evidence is clear that doing nothing for autistic children will likely lead to a life of marginalization, and often institutionalisation, with the result that valuable contributions to society will be foregone.

19. The exclusionary and marginalizing effects of the state failing to respond to autism is the crux of the inequality in this case. Autistic persons who do not fit societal norms experience the stigmatization of mental disability and are banished to the margins of society. The real effect of state failure to respond to autism is to convey the message that children with autism are just not worth society's time, effort and resources. State neglect is discriminatory because it devalues the relative worth of such children, and subjects them to social isolation. Although autism is more prevalent in males, the gendered disability effects on girls and women with autism is highly relevant to an equality analysis because of the compounded impact of discrimination on females with autism, as described above in paragraph 15.

20. The Coalition submits that the s. 15 breach is the refusal to provide autism related health services, and that compliance with s. 15 demands provision of such services in accordance with equality principles as set out below. The breach is not the refusal to fund Lovaas treatment specifically. The Coalition agrees with Allan J. at trial that this particular case does not involve a constitutional obligation to provide a specific treatment. Moreover, the nature of the record below, summary proceedings under the *Judicial Review Procedure Act*, did not permit an assessment of Lovaas treatment for its compliance with equality principles.

Auton v. *British Columbia* (trial decision), *supra* para. 7 and 50
Judicial Review Procedure Act, R.S.B.C. 1996, c. 241.

21. It is problematic under a substantive equality analysis to endorse a treatment that has the objective of "training" autistic "behaviour" out of the autistic child. The appropriate response to autism should be to enable full participation in society; the response should incorporate a

relational approach that facilitates inclusion without forced assimilation. A non-disabled person is as different from a disabled person as a disabled person is from a non-disabled person; the difference does not explain why the non-disabled world-view is the norm. The objective of autism related health services should not be to rid society of autism or autistic behaviour, but to ensure that autistic persons receive the equal respect and consideration to which they are entitled.

22. This Honourable Court has emphasized that s.15 requires a subjective/objective analysis. This poses a particular difficulty in this case because of the tender years of the infant petitioners at trial. In the lower courts there was no autistic voice in this litigation; the petitioners' voice in court has been that of the non-autistic parents. The Coalition cannot and does not purport to speak for autistic persons. The Coalition does, however, emphasize that there is a need on everyone's part to be cognizant of the perspective of persons with autism. Failure to do so risks ablest conceptions of autism and disability, and disrespect for persons with autism specifically and persons with disabilities generally. It is essential to avoid the "community prejudices", warned about in *Law*, as they apply to autism.

> *Law* v. *Canada (Minister of Employment and Immigration)*, *supra* at para. 61
> Dana Baker, “Autism as Public Policy” in Devlin & Pothier (eds.), *supra* at 10

23. Parental choice on behalf of disabled children can be deferred to only with caution. Although in general parents can and should be presumed to act in the best interests of their children, as a matter of constitutional principle, there are clear limits to parental choice. Decisions must respect the equality rights of children with disabilities and must conform to equality rights principles, as elaborated in paragraph 34 below.

> *E (Mrs.) v. Eve*, [1986] 2 S.C.R. 388
> *R.. v. Latimer*, [2001] 1 S.C.R. 3

24. The primary rationale for the government's exclusionary policy was that autism services are not medically insured because they are not provided by hospitals or doctors. This framework is drawn from the *Canada Health Act* which is incorporated into the B. C. *Medicare Protection Act*. The appellant relies on the statutory definition of medically insured services, which gives primacy to health services provided by hospitals and doctors. However, that very statutory framework is what is under challenge, and therefore that in itself cannot be the answer. The challenge is to the statutory framework that gives primacy to doctors and hospitals, and within

that paradigm, the challenge is to the refusal to exercise the available discretion to deviate from that statutory primacy.

> *Canada Health Act*, R.S.C. 1985, c. C-6.
> *Medicare Protection Act*, R.S.B.C. 1996, c. 286, preamble

25. A critical flaw in the appellant's position lies in its narrow conception of health services. A conception of health services that is focussed on hospitals and doctors is based on the "normal" (physical) ailments of the non-disabled. The design of the health services system around doctors and hospitals is geared to the usually temporary and/or curable conditions of the non-disabled. William Lahey has commented on the "institutional asymmetry" of the primacy accorded to hospitals and doctors' services.

> [T]he legal compartmentalization of our health care system obscures the nature of the premises and assumptions on which we implicitly rely when we make choices about (for example) funding for treatments that are outside the scope of medicare. These include a premise that medicine is generally superior to other responses to illness, suffering and disability, that curing is more important than caring (as well as prevention), that dealing with the episodic illness of the healthy is more important than dealing with chronic illness and disability, and that physical health takes priority over other dimensions of health, including mental health. Seen in this broader light, the *Auton* case is a manifestation of a decision-making dynamic that cuts across the Canadian health care system.
>
> William Lahey, "Canada's Health Care System: The Legal Framework for Financing, Delivery and Policy-Making", in Jocelyn Downie, William MacInnis and Karen McEwen, eds., *Dental Law in Canada* (forthcoming, Butterworths) at 79-80

26. The appellant's argument takes the hospitals and doctors framework as natural and inevitable, characterizing anything outside that framework as "extra" or "special". This leaves the norm unquestioned – in defiance of this Honourable Court's direction to challenge, as part of an equality analysis, what is assumed to be natural, inevitable, or the norm.

> *British Columbia (Public Service Employee Relations Commission)* v. *British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3
> Shelagh Day & Gwen Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996), 75 *Can. Bar Rev*. 433
> Margot Young "Sameness/Difference: A Tale of Two Girls" (1997) 4 Review of Constitutional Studies 150.
> Institute for the Study of the Neurologically Typical, *supra*

27. The government's failure to provide services to autistic children means that their health services needs are substantially unmet. It is no answer to say that autistic children can receive the same services from doctors and hospitals as do other children. Such a purely formal equality analysis has been rejected as inadequate by this Court. In *Vriend* it was held that it was no

answer to say that gays and lesbians were protected from, for example, race discrimination if they were in fact also vulnerable to, but not protected against, sexual orientation discrimination. That autistic children will receive treatment of, for example, broken bones is beside the point. That non-autistic children do not get autism services, which they do not need, does not nullify the inequality and discrimination of denying autistic children the autism services they do need. A substantive equality analysis requires taking account of differential need; it is not satisfied by treating everyone the same despite different circumstances. This Honourable Court in *Andrews* and in *Brooks* rejected the formal equality analysis adopted in *Bliss*.

> *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493, para. 98
> *Law Society of British Columbia* v. *Andrews, supra*
> *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219
> *Bliss* v. *Attorney General of Canada*, [1979] 1 S.C.R. 183.

28. The present case requires a distinction between the *Canada Health Act*'s principles of universality and comprehensiveness. Universality concerns the availability of insured services to all, whereas comprehensiveness concerns the list of insured services. Donna Greschner and Stephen Lewis' claim that only universality engages basic questions of citizenship is fundamentally flawed because it engages only in a formal equality analysis. Substantive equality requires an assessment of what "comprehensiveness" includes within insured services to determine if the most pressing health services needs of marginalized segments of the population are disproportionately not met, so as to amount to discrimination. The principle of comprehensiveness must be interpreted and applied in accord with the equality guarantees, and the list of insured services must be developed pursuant to the equality principles outlined in paragraph 34 below.

> Donna Greschner & Stephen Lewis, "*Auton* and Evidence-Based Decision-Making: Medicine in the Courts" (2003) 82 Can. Bar Rev. 501 at 514-5.

29. The comparative component of an equality analysis identifies reference points to illustrate the unequal effects of government policy. Care is required not to use the comparator requirement perversely to reinforce a discriminatory norm. In the present case the norm of tying insured services to hospitals and doctors must be scrutinized. That norm is not neutral, but is skewed in favour of the typical health services needs of the non-disabled. Although services from doctors and hospitals are subject to critique even in respect of the non-disabled population,

persons with disabilities, and especially persons with mental disabilities such as autism, are less likely to have their disability related health needs met by such services.

> [T]he priority that is given to physician and hospital services solely *because* they are physician and hospital services is questionable, particularly from the inequity this creates for Canadians with needs that are best or at least better addressed through other kinds of treatment. ... [The current] system can produce consequences that are inconsistent with the broader objectives of the *Canada Health Act*, "to protect, promote and restore the physical and mental well-being of residents of Canada". ... In the world of the twenty-first century, true fidelity to these principles would connect public funding to essentiality, not to whether or not the service was provided by doctors or in hospitals. (emphasis in original)
>
> William Lahey, *supra* at 87-88

30. State failure to fund autism services for children with autism is an example of a larger pattern. The courts below drew the comparison between autistic and non-autistic children; the Coalition suggests making the comparison between disabled and non-disabled persons more generally.

31. The difference in how health services needs of the non-disabled and disabled population are met in a system giving primacy to services from doctors and hospitals is not just a descriptive difference. The design of the current system to primarily meet the typical needs of non-disabled patients reflects the powerlessness of autistic persons in particular and the disabled more generally. The power to define the nature of insured health services lies with the dominant society, operating from a non-disabled perspective.

> Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca, New York: Cornell University Press, 1990) at 110-112
> Teri Hibbs & Dianne Pothier "Post-Secondary Education and Students with Disabilities: Mining a Level Playing Field or Playing in a Mine-Field?" in Devlin & Pothier (eds.), *supra* at 6-11

32. The power of the doctors/hospitals paradigm needs to be dislodged to allow for the provision of health services for all persons with autism on an equitable basis. The failure to disrupt the norm and to provide females with autism with the necessary health services to allow for their inclusion in society risks their social isolation and stigmatisation, placing them in increased danger, over males with autism, of experiencing violence and oppression.

33. The norm of the doctors/hospitals paradigm should be disrupted by requiring that services be provided on a non-discriminatory basis, in accordance with substantive equality principles.

There should be no arbitrary focus on the doctors/hospitals paradigm. Instead, a focus on essentiality of needs to further equality of outcomes is required. As with respect to minority language education rights, the role of the courts is to set the parameters of constitutional principles that must be observed, leaving the detailed implementation (subject to judicial oversight for compliance with the principles) to the executive branch of government.

Mahé v. Alberta, [1990] 1 S.C.R. 342

34. In order to avoid inequality and achieve substantive equality in accordance with the purpose of s. 15, the approach required is the application of equality rights principles to the provision of health services broadly defined. The Coalition submits that such legal principles include:

a. government policy must recognize an obligation to respond to differential needs in a contextual manner that avoids privileging of the dominant perspective, ensuring that the norm/reference is not the status quo;
b. the design of government policy must involve an authentic effort to move outside the non-disabled framework, such that government services promote inclusion without forced assimilation, i.e. there must be a commitment to non-pathologizing of difference;
c. the design of government policy must recognize an obligation to consult and consider options in good faith, listening to and taking into account the voices, lived experiences, and perspectives of the group affected (e.g: inclusion of adult autistic persons in this instance);
d. government funded services must involve a commitment to non-violent and non-coercive programs;
e. the government must commit financial and other resources in an equitable way.

35. The proceeding analysis demonstrates the utter failure of the government to apply these equality rights principles. The unequal effects of the doctors/hospital paradigm, which responds disproportionately to the needs of the non-disabled population, amounts to differential treatment that discriminates on the basis of disability. Thus autistic children are denied the ability to realize their full potential, which is a denial of substantive equality. This conclusion has been reached through an analysis that intertwines the concepts of differential treatment, grounds, and discrimination. Nevertheless, if the Court finds it necessary to disaggregate the analysis, this case meets all the requirements of the three step *Law* test, as argued below.

The *Law* Framework

(1) Differential treatment

36. As stated above, the focus on doctors/hospitals responds disproportionately to the needs of the non-disabled population instead of incorporating the equality principles set out above. The refusal to respond to the needs of autistic children fails to take into account the claimants' already disadvantaged position, including the particular oppression of females with autism, within Canadian society, resulting in substantively differential treatment between the claimants and others on the basis of disability and gendered disability. The differential treatment is grounded in the statutory framework giving primacy to hospitals and doctors, and reinforced by the administrative refusal to exercise the available statutory discretion to deviate from that primacy.

(2) Enumerated or analogous ground

37. Physical and mental disability are enumerated grounds in s. 15. Although the appellant does not concede that there is any distinction based on disability, he concedes that autism is a disability. The Coalition emphasizes that what makes autism a disability is not the neurological disorder *per se*, but how the social response to autism inhibits the participation of autistic persons in society. That is the proper focus for the social model of disability, which is necessary to give a purposive interpretation to the inclusion of disability within s. 15.

(3) Discrimination

38. The failure to cover autism related health services, and hence the failure to provide autism services in accordance with substantive equality principles, is discriminatory because state neglect treats autistic children as second class, thereby contributing to their oppression. State neglect further marginalizes an already marginalized group by refusing to respond to their needs. An analysis of the factors identified in *Law* support a conclusion of discrimination, incorporating an affront to human dignity.

(a) pre-existing disadvantage, stereotyping, prejudice, or vulnerability

39. This Honourable Court has previously recognized that persons with disabilities experience pre-existing disadvantage, stereotyping, prejudice, and vulnerability. There can be little doubt that persons with autism are especially subject to such experience. Moreover, as stated in paragraph 15, there are circumstances where women with autism are vulnerable to

oppression and violence where non-disabled women and men with autism would not be so vulnerable.

Eldridge v. British Columbia (Attorney General), supra
Granovsky v. Canada (Minister of Employment and Immigration),supra

(b) correspondence to needs capacities and circumstances

40. The requirement that non-discriminatory legislation or policy correspond to needs, capacities and circumstances, functions as a direction against a simplistic formal equality approach. The mere fact that everyone is treated the same is not equal treatment if some have differential needs or circumstances. If government policy does not respond to differential needs, capacities and circumstances, it does not conform to the guaranteed right to substantive equality. If government policy does respond to differential needs, capacities and circumstances it conforms to the guaranteed right to substantive equality.

41. This Honourable Court has repeatedly held that discriminatory intent is not necessary to a finding of a violation of s. 15. Whatever the government's intention, the present case represents an utter failure of government policy to correspond to the needs, capacities and circumstances of children with autism. As in *Martin*, the exclusion of coverage sends a message that autistic children are not equally valued and respected so as to warrant attention to their needs. Instead their needs are totally ignored. As stated in *Martin*:

> A classification that results in depriving a class from access to certain benefits is much more likely to be discriminatory when it is not supported by the larger objectives pursued by the challenged legislation.

Law Society of British Columbia v. *Andrews*, *supra*
Eldridge v. British Columbia (Attorney General), supra at para. 62
Vriend v. *Alberta*, *supra* at para. 93
Nova Scotia (Workers' Compensation Board) v. Martin, [2003] S.C.J. No.54 (QL) para. 94; 101
Isabel Grant & Judith Mosoff, "Hearing Claims of Inequality: *Eldridge v. British Columbia (A.G.)*" (1998) 10 Canadian Journal of Women and the Law 229

42. It is important to note that both the preamble and the purpose section of the *Medicare Protection Act* focus on the need for necessary medical care with no reference to who provides the service. The exclusion of autism services is not in keeping with this overall purpose.

Medicare Protection Act, R.S.B.C. 1996, c. 286, preamble & s. 2.
William Lahey, *supra* at 87-88

43. The needs, capacities and circumstances factor emphasizes the importance of differential effects to a substantive equality analysis. The appellant seeks to obscure the differential effects of its policy by emphasizing the general beneficial purpose of medicare. To so obscure specific discriminatory effects subverts the purpose of s. 15 by importing s.1 analyses.

> *Gosselin* v. *Quebec (Attorney General)*, [2002] 4 S.C.R. 429, at paras. 242-5, per Bastarache J. dissenting
> *Canadian Foundation for Children, Youth and the Law* v. *Canada (Attorney General,)* [2004] SCJ 6, para. 97, per Binnie J.

44. Similarly, to use this factor to import a relevance test into s. 15 is inappropriate because it is vulnerable to perpetuating discriminatory norms, and reintroducing formal equality.

> *Miron v. Trudel,* [1995] 2 S.C.R. 418 at para. 137, per McLachlin J.
> *Canadian Foundation for Children, Youth and the Law* v. *Canada (Attorney General) supra* at paras 98 and 99, per Binnie J.

(c) ameliorative purpose

45. The original point of this factor was to ensure that affirmative action programs are not vulnerable to challenge. That has no possible application here. If ameliorative purpose is too broadly invoked, the balance of benefits vs. harms happens in s. 15, inappropriately increasing the burden on the claimant. As with the previous factor, this factor should not be used to ignore unequal effects and to import an analysis of intent. If the previous factor is properly conceptualised, it subsumes the ameliorative purpose factor, since affirmative action takes into account differential needs, capacities, and circumstances. Treating ameliorative purpose as a separate factor risks misapplication and the improper importation of s. 1 justifications.

> *Canadian Foundation for Children, Youth and the Law* v. *Canada (Attorney General) supra* at para. 227, per Deschamps J.

(d) nature of the interest affected

46. The nature of the interest affected should be a key element in a discrimination analysis. It is crucial that it be the claimant's interest that is analysed. Here, the interest affected is far-reaching. At stake is the ability of the infant claimants to participate in society as full citizens. A life with dignity requires meaningful and secure participation in society to the extent possible and desired, including such things as education, employment, social activities, political participation, voting, etc. These are things the non-disabled population typically take for granted. For autistic children, and especially girls, intervention is necessary to facilitate and enable secure

participation in society, and to facilitate and enable the use of their talents and their contributions to society. Medical services to respond to autism are thus a dignity constituting benefit of substantial importance.

Denise Reaume, "Discrimination and Dignity" (2003) 63 La. Law Rev. 645

47. To deny a response to the needs of autistic children is to strike at the core of citizenship rights of participation. For females with autism, this denial is particularly localized and severe because of their increased vulnerability to oppression and violence. Full citizenship is not a mere status category, but depends on an inclusionary society. A society that ignores the needs of disabled females and males creates second class citizens, a regime of "disitizenship" and oppression that seriously undermines human dignity. It is in the interests of both the disabled and of society as a whole to value equality and full inclusion of all members.

In Unison: A Canadian Approach to Disability Issues – A Canadian Approach *supra* at p. 1
Richard Devlin & Dianne Pothier, "Introduction: Towards a Critical Theory of Discitizenship" in Devlin & Pothier (eds.), *supra* at 22-23
Marcia H. Rioux and Fraser Valentine, "Does Theory Matter? Exploring the Nexus between Disability, Human Rights and Public Policy" in Devlin & Pothier (eds.), *supra*, at 21-23

Human Dignity and the *Law* Test

48. The s. 15 discrimination analysis, and in particular the focus on injury to dignity, must support an effective and meaningful substantive equality analysis, and must ensure that the full purpose of s. 15 is realized. The s. 15 discrimination analysis should focus on the unequal effects of systemic disadvantage to ensure that s. 15 rights are properly protected and advanced.

June Ross, "A Flawed Synthesis of the Law" (2000) 11:3 *Constitutional Forum* 74
B. Baines, "*Law* v. *Canada:* Formatting Equality"(2000) 11:3 *Constitutional Forum* 65

49. To achieve s. 15's purpose of addressing inequality, a broad understanding of human dignity is necessary. A narrow conception risks ignoring significant manifestations of inequality if it fails to incorporate the full harm of discrimination. Confining affronts to human dignity to hurt feelings ignores the structural and systemic bases of discrimination. Discrimination can include experiences of exploitation, marginalization, powerlessness, cultural imperialism, violence, historical disadvantage, and exclusion from the mainstream of society. These experiences are indicia of inequality that are pertinent to the purpose of s. 15.

Iris Marion Young, *Justice and the Politics of Difference* (Princeton, New Jersey: Princeton University Press, 1990) at 48-65
Law Society of British Columbia v. *Andrews*, *supra* per McIntyre J. at para. 43, per Wilson J. at para. 5 and per La Forest J. at para. 68

50. To fulfil the special role of s. 15, focus must be on the promotion of equality. The concrete power relations at the source of discriminatory behaviour must be examined to link more clearly the impugned law or (in)action to the relations of domination that perpetuate and rationalize the systemic inequality of oppressed groups. In this case the resulting experience of marginalization, powerlessness, non-disabled imperialism, and potential violence are all profound indicia of inequality and injury to dignity.

51. Human dignity is a malleable concept. Care needs to be taken so that it is not used to undermine substantive equality. If the inquiry is focused on individual emotive feelings, or used to import s. 1 justification questions into s. 15, or used to validate similarly situated analyses, it will indeed undermine the purposes of s. 15. What is required instead is an analysis of inequality that challenges the norm and fulfils the unique purpose of s. 15 to promote substantive equality.

Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" *supra*
Sheilah Martin, "Court Challenges: *Law*", (Winnipeg: Court Challenges Program, 2002)
Dianne Pothier, "Connecting Grounds of Discrimination To Real Peoples' Real Experiences" (2001) 13 Canadian Journal of Women and the Law 37
Canadian Foundation for Children, Youth and the Law v. *Canada (Attorney General)* *supra* at para. 72
Denise Reaume, *supra*

Section 1 of the *Canadian Charter of Rights and Freedoms*

52. As with the *Law* framework in relation to s. 15, s. 1 should not be analysed in a formalistic manner. The s. 1 test is found in the language of s. 1, "a reasonable limit … in a free and democratic society"; the *Oakes* analysis is merely complementary. The understanding of what constitutes a "free and democratic society" under s. 1 needs to include a broad concept of democracy that incorporates an appreciation of principles such as equality, inclusion, and participation, and not just a "majority rules" approach.

Section 1 of the *Canadian Charter of Rights and Freedoms*, *supra*
RJR - MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199, at para 126, per McLachlin J.
R.. v. Oakes, [1986] 1 S.C.R. 103 at para. 64

53. In cases of underinclusiveness, this Honourable Court has held that both the purpose of the general statutory scheme as well as the purpose of the limitation/exclusion are relevant to the s.1 inquiry. Recently, however, Gonthier J., speaking for the entire Court in *Martin*, focused on the purpose of the limit.

> *Vriend* v. *Alberta*, *supra* at para. 109
> *Nova Scotia (Workers' Compensation Board) v. Martin*, *supra* at para. 107

54. In this case, the appellant acknowledges that financial considerations alone cannot constitute a s. 1 justification. Moreover it must be recognized that there are inherent costs of democracy and the protection of constitutional rights, e.g. the right to vote, the right to a speedy trial, etc.

> *Nova Scotia (Workers' Compensation Board) v. Martin*, *supra* at para.109

55. The appellant identifies the pressing and substantial objective as the fiscal sustainability of the health services system by focusing on core health services. While fiscal sustainability cannot be ignored, it must be recognized that governments make choices about what resources are devoted to health services. Moreover, the appellant's conception of "core" health services cannot go unchallenged. That conception privileges the status quo distribution of health services via an "institutionalized asymmetry" that is tied not to need but to who provides the service. This cannot be a legitimate objective because it is discriminatory against persons with disabilities. Any denial of services cannot be on the backs of the disadvantaged, marginalized, and oppressed.

> The Supreme Court has in any event held that cost is not a constitutionally permissible justification for discrimination under s. 1: *Schachter* v. *Canada*, [1999] 2 S.C.R. 679, at p. 709, 10 C.R.R. (2d) 1, at p. 20, per Lamer C.J.C. Cost/benefit analyses are not readily applicable to equality violations because of the inherent incomparability of the monetary impacts involved. Remedying discrimination will always appear to be more fiscally burdensome than beneficial on a balance sheet. On one side of the budgetary ledger will be the calculable cost required to rectify the discriminatory measure; on the other side, it will likely be found that the cost to the public of discriminating is not as concretely measurable. The considerable but incalculable benefits of eliminating discrimination are therefore not visible in the equation, making the analysis an unreliable source of policy decision-making.
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> *Rosenberg* v. *Canada (Attorney General)* [1998] 38 O.R. (3d) 577 (C.A.) at page 11
> Shelagh Day & Gwen Brodsky, *supra*
> Isabel Grant & Judith Mosoff, *supra*

56. As in *Vriend*, the appellant's argument does not pass the pressing and substantial objective requirement because the objective of protecting the status quo distribution is inherently discriminatory against the disabled. This is inconsistent with the values underlying a free and democratic society.

Vriend v. *Alberta*, *supra* at para.116

57. In the alternative, the appellant's argument fails the proportionality stage of the analysis. Although, in a sense, any refusal to fund is rationally connected to fiscal sustainability, the rational connection test cannot be so empty of content. The rational connection must also be tied to the general purpose of the statute. There is no rational connection between the provision of comprehensive health services and the exclusion of the most pressing needs of a disadvantaged and marginalized portion of the population such as persons with mental disabilities. In fact, the objective would be better achieved through their inclusion.

Vriend v. *Alberta*, *supra* at para. 119
Egan v. *Canada*, [1995] 2 S.C.R. 513, at para. 191, per Iacobucci J., dissenting
M. v. *H.*, *supra* at para. 116

58. In the further alternative, there is no minimal impairment in the present case. There was no attempt to prioritise health needs in accordance with *Charter* principles. The government's claim that the complex design of a health services system is not the proper role of the courts is a hollow one where, as in *Martin*, the government resorted to a simplistic and arbitrary cut-off amounting to a complete exclusion.

> However, even a brief examination of the possible alternatives, including the chronic pain regimes adopted in other provinces, clearly reveals that the wholesale exclusion of chronic pain cannot conceivably be considered a minimum impairment of the rights of injured workers suffering from this disability.

Nova Scotia (Workers' Compensation Board) v. Martin, *supra* at para. 112

59. Although it is not the role of the courts to micro-manage the health services system, it is their role to hold the government accountable for inequitable practices. Where there is no transparency to government decision-making, there can be no deference to policy choices.

Nova Scotia (Workers' Compensation Board) v. Martin, *supra* at para. 116

60. Finally, given the extreme nature of the breach, i.e. perpetuating the isolation, marginalization, and oppression of persons with autism, the deleterious effects of the exclusion

far outweigh any salutary effects. What are the safeguards or assurances for the disadvantaged, marginalized, and oppressed in times of fiscal restraint if not the protection of *Charter* rights?

Remedy

61. To achieve substantive equality, the appropriate remedy is a declaration that incorporates an order that the government provide services in accordance with the principles set out above in paragraph 34. The Court's role is to set out principles; detailed implementation is up to government, whose implementation is then subject to further *Charter* review for compliance with constitutional principles.

Eldridge v. British Columbia (Attorney General),supra
Mahé v. Alberta, *supra*
Doucet-Boudreau v. Nova Scotia (Attorney General), [2003] S.C.J. No. 63 (QL)

PART IV – SUBMISSIONS CONCERNING COSTS

62. The Coalition is not seeking costs in this matter and submits that no order for costs should be made against the Coalition.

PART V – ORDER REQUESTED

63. The Coalition respectfully requests:

(a) that the appeal should be dismissed; and
(b) that the government should be ordered to provide autism services for children in accordance with equality rights principles.

All of which is respectfully submitted this 13th day of April 2004.

COUNSELS' SIGNATURE

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