Court File No. 24896

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

ROBIN SUSAN ELDRIDGE, JOHN HENRY WARREN and LINDA JANE WARREN

APPELLANTS (PLAINTIFFS)

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF CANADA and MEDICAL SERVICE COMMISSION

RESPONDENTS (DEFENDANTS)

FACTUM OF THE INTERVENER THE ATTORNEY GENERAL OF MANITOBA

DEPARTMENT OF JUSTICE
Constitutional Law Branch
715 - 405 Broadway
Winnipeg, Manitoba
R3C 3L6

Deborah Carlson
Telephone: (204)945-0679
Facsimile: (204)945-0053

Solicitor for the Intervener
The Attorney General of Manitoba

GOWLING, STRATHY & HENDERSON
Barristers and Solicitors
2600 - 160 Elgin Street
Ottawa, Ontario
K1P 1C3

Henry S. Brown, Q.C.
Telephone: (613)232-1781
Facsimile: (613)563-9869

Ottawa Agent for the Intervener

(For names and addresses of solicitors for the parties see inside following title page)

HEENAN BLAIKIE
600 - 1199 West Hastings Street
Vancouver BC V6E 3T5

Lindsay M. Lyster
Tel: (604)669-0011
Fax: (604)669-5101

Solicitor for the Appellants

NELLIGAN POWER
1900 - 66 Slater Street
Ottawa ON K1P 5H1

Tel: (613)238-8080
Fax: (613)238-2098

Ottawa Agents for the Appellants

MINISTRY OF ATTORNEY GENERAL
Legal Services Branch
1001 Douglas Street
Victoria BC V8V 1X4

Harvey M. Groberman
Tel: (604)356-8848
Fax: (604)356-9154

Solicitor for the Respondents
Attorney General of British Columbia
and Medical Service Commission

BURKE-ROBERTSON
70 Gloucester Street
Ottawa ON K2P 0A2

Tel: (613)236-9665
Fax: (613)235-4430

Ottawa Agents for Respondents
Attorney General of British Columbia
and Medical Service Commission

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
239 Wellington Street
Ottawa ON K1A 0H8

Graham Garton
Tel: (613)957-4222
Fax: (613)954-0811

Solicitor for the Attorney General of Canada

WOMEN'S LEGAL EDUCATION AND ACTION FUND
415 Young Street
Toronto ON M5B 2E7

Jennifer Scott
Tel: (416)595-7170 ext. 228
Fax: (416)595-7191

B.C. PUBLIC INTEREST ADVOCACY CENTRE
815 - 815 West Hastings Street
Vancouver BC V6C 1B4

Judy E. Parrack
Katherine Hardie
Tel: (604)687-3063
Fax: (604)682-7896

Solicitors for the Interveners
Disabled Women's Network Canada and
Women's Legal Education and Action Fund

SCOTT & AYLEN
Barristers and Solicitors
Suite 1000 - 60 Queen Street West
Ottawa ON K1P 5Y7

Carole Brown
Tel: (613)237-5160
Fax: (613)230-8842

Ottawa Agents for the Interveners,
Disabled Women's Network Canada and
Women's Legal Education and Action Fund

ADVOCACY RESOURCE CENTRE FOR THE HANDICAPPED
255 - 40 Orchard View Blvd.
Toronto ON M4R 1B9

David Baker
Patricia Bregman
Tel: (416)482-8255
Fax: (416)482-2981

Solicitors for the Interveners,
Canadian Association of the Deaf,
Canadian Hearing Society and
Council of Canadians with Disabilities

GOWLING, STRATHY & HENDERSON
Barristers and Solicitors
2600 - 160 Elgin Street
Ottawa ON K1P 1C3

Tel: (613)232-1781
Fax: (613)563-9869

Ottawa Agents for the Interveners,
Canadian Association of the Deaf,
Canadian Hearing Society and
Council of Canadians with Disabilities

PUBLIC INTEREST LAW CENTRE
402 - 294 Portage Avenue
Winnipeg MB R3C 0B9

Arnie Peltz
Tel: (204)985-8540
Fax: (204)944-8582

Solicitor for the Intervener,
Charter Committee on Poverty Issues

GOWLING, STRATHY & HENDERSON
Barristers and Solicitors
2600 - 160 Elgin Street
Ottawa ON K1P 1C3

Tel: (613)232-1781
Fax: (613)563-9869

Ottawa Agents for the Intervener
Charter Committee on Poverty Issues

MINISTRY OF ATTORNEY GENERAL
7th Floor, 720 Bay Street
Toronto ON M5G 2K1

Janet Minor
Tel: (416)326-4137
Fax: (416)326-4015

Solicitor for the Intervener,
the Attorney General of Ontario

BURKE-ROBERTSON
Barristers and Solicitors
70 Gloucester Street
Ottawa ON K2P 0A2

Tel: (613)236-9665
Fax: (613)235-4430

Ottawa Agents for the Intervener,
the Attorney General of Ontario

ATTORNEY GENERAL OF NEWFOUNDLAND
Civil Law Section
5th Floor, East Block
Confederation Building
Prince Phillip Drive
St. John's NF A1C 5P7

Gale Welsh
Tel: (709)729-2864
Fax: (709)729-2129

Solicitor for the Intervener,
the Attorney General of Newfoundland

BURKE-ROBERTSON
Barristers and Solicitors
70 Gloucester Street
Ottawa ON K2P 0A2

Tel: (613)236-9665
Fax: (613)235-4430

Ottawa Agents for the Intervener,
the Attorney General of Newfoundland

Court File No. 24896

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

ROBIN SUSAN ELDRIDGE, JOHN HENRY WARREN and LINDA JANE WARREN

APPELLANTS (PLAINTIFFS)

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF CANADA and MEDICAL SERVICE COMMISSION

RESPONDENTS (DEFENDANTS)

INDEX

PART II

POINTS IN ISSUE

3. This Intervener intervenes in response to the constitutional questions stated in this matter:

1. Does the definition of "benefits" in s. 1 of the *Medicare Protection Act*, S.B.C. 1992, c. 76 infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* by failing to include medical interpreter services for the deaf?

2. If the answer to question 1 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

3. Do ss. 3, 5, and 9 of the *Hospital Insurance Act*, R.S.B.C., c. 180, and the Regulations enacted pursuant to s. 9 of that Act, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* by failing to require that hospitals in the Province of British Columbia provide medical interpreter services for the deaf?

4. If the answer to question 3 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

4. It is the position of this Intervener that neither the failure to include medical interpreter services for the deaf as a benefit under the *Medicare Protection Act* nor the absence of a requirement under the *Hospital Insurance Act* obliging hospitals to provide medical interpreter services for the deaf infringes s. 15(1) of the *Charter*. Alternatively, any limitation of rights under *Charter* s. 15(1) is justifiable as a reasonable limitation of the rights under *Charter* s. 1.

PART III
ARGUMENT

A INTRODUCTION

5. The claim of the Appellants in this case relates to difficulties that they have experienced, as deaf people, in communicating with doctors and other health care professionals. They argue that the failure to provide deaf interpreter services to facilitate these communications infringes their rights under s. 15(1) of the *Charter*. They choose, however, to focus their attack on the legislation establishing the funding system for those services, as opposed to the provision of the services themselves.

6. Difficulty in communication is something we all may face at one time or another, to a greater or lesser extent. Effectiveness of communication can be affected by many factors, including the relative ages, education and sophistication of the persons involved. Moreover, particularly in a multicultural nation such as Canada, language and cultural barriers can also pose barriers to effective communication. For the Appellants, however, the difficulty is caused by a physical disability that results in impaired communication, not just in interactions with health care providers, but in potentially every interaction with persons who do not understand American Sign Language ("ASL"). The Appellants' claim therefore has potentially enormous implications, not just in this area, but in respect of every benefit program implemented by government and every statutory right to receive public services.

B THE CONTEXT: S. 15(1) AND BENEFIT PROGRAMS

7. This Court has often stressed the need to consider the larger social, political and legal context in assessing equality and other *Charter* claims.

See, e.g.:

R. v. Turpin, [1989] 1 S.C.R. 1296 at 1331-32 *per* Wilson J.

Symes v. Canada, [1993] 4 S.C.R. 695 at 756 *per* Iacobucci J.

Thibaudeau v. Canada, [1995] 2 S.C.R. 627 at 675 *per* Gonthier J.

8. In this case, it is submitted, this broader context is particularly important, given that what is at issue is the scope, the structure and the content of statutory benefits. By structuring their claim in this manner, the Appellants invite this Court to inquire into economic and social policy in the exceedingly difficult, and politically controversial, area of public health care funding. In this context, the comments of La Forest J. in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 194 are particularly apt:

> ... it was never intended in enacting s. 15 that it become a tool for the wholesale subjection to judicial scrutiny of variegated legislated choices in no way infringing on values fundamental to a free and democratic society. Like my colleague, I am not prepared to accept that <u>all</u> legislative classification must be rationally supportable before the courts. Much economic and social policy-making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second guess policy decisions.
>
> . . . .
>
> Assuming there is room under s. 15 for judicial intervention beyond the traditionally established and analogous policies against discrimination discussed by my colleague, <u>it bears repeating that considerations of institutional functions and resources should make courts extremely wary about questioning legislative and governmental choices in such areas</u>. (emphasis added)

9. As the Respondents have stressed, one of the central preoccupations of the British Columbia government is maintaining the viability of the health care system as a whole, a system that is already under severe stress.

> Factum of the Respondents, para. 27
>
> Report of the British Columbia Royal Commission on Health Care and Costs, Exhibit 12, Case on Appeal, Vol. IV, p. 640

10. In that regard, it is submitted, the following remarks of Wilson J. in the *Andrews* case are relevant:

> If every distinction between individuals and groups gave rise to a violation of s. 15, then this standard might well be too stringent for application in all cases and might deny the community at large the benefits associated with sound and desirable social and economic legislation. (*Andrews v. Law Society of British Columbia, supra* at 154)

11. Similarly, Sopinka J. commented on the potential ramifications for government spending if the guarantee of freedom of expression in *Charter* s. 2(b) operated to require the government, having chosen to fund or consult one group, to fund other points of view:

> . . . I should add that it cannot be said that every time the Government of Canada chooses to fund or consult a certain group, thereby providing a platform upon which to convey certain views, that the Government is also required to fund a group purporting to represent the opposite point of view. Otherwise, the implications of this proposition would be untenable. . . . If this was the intended scope of s. 2(b) of the *Charter*, the ramifications on government spending would be far reaching indeed. (*Native Women's Ass'n of Canada v. Canada*, [1994] 3 S.C.R. 627 at 656)

12. Recently, in *Thibaudeau v. Canada, supra,* members of this Court acknowledged the complexity of assessing a *Charter* s. 15(1) claim in the special context of income tax legislation, the very essence of which involves making numerous distinctions between classes of taxpayers while attempting to reconcile a range of necessarily divergent interests.

> *Thibaudeau v. Canada, supra* at 702 *per* Cory and Iacobucci JJ. and at 675-76, *per* Gonthier J.:
>
> ...the ITA is subject to the application of the *Charter* just as any other legislation is: the special nature of the former clearly cannot be taken as a basis for maintaining that it is not subject to the latter. This was recently pointed out by my colleague Iacobucci J. in *Symes, supra,* at p. 753. I would add, however, that though it may not be relevant to determining whether the *Charter* applies to the ITA, the special nature of the latter is nonetheless a significant factor that must be taken into account in defining the scope of the right relied on, which here as we know is the right to "equal benefit of the law"
>
> And see:
>
> *Zurich Insurance Co. v. Ontario (Human Rights Commission),* [1992] 2 S.C.R. 321 at 338 *per* Sopinka J., holding that the determination of insurance rates and benefits does not fit easily within traditional human rights concepts.

13. Similarly, it is submitted, the fact that the issues raised by the Appellants in this case potentially have an enormous impact on legislative policy options and government spending decisions must be taken into account in considering the application of s. 15(1).

C APPLICATION OF THE CHARTER - THE DISTINCTION BETWEEN STATUTORY BENEFIT SCHEMES AND THE PROVISION OF SERVICES

14. Clearly, the provisions of both the *Medicare Protection Act* and the *Hospital Insurance Act* are amenable to *Charter* scrutiny. For the reasons that follow, however, it is

submitted that neither the definition of "benefits" under the former nor the failure to compel hospitals to provide medical interpreter services under the latter discriminates against the Appellants, contrary to *Charter* s. 15(1). On their face, these statutes simply provide for specified medical and hospital benefits that are available to all who meet the residency requirements.

15. It is further submitted that these statutes cannot be said to adversely impact upon the Appellants. Issues of adverse impact, it is submitted, arise from the manner in which a medical or hospital service is provided, and not from the legislation itself. It is necessary to distinguish between those effects wholly caused by or contributed to by an impugned provision, and those social circumstances that exist independently.

> *Symes v. Canada, supra* at 764-765, *per* Iacubucci J.
>
> *Fernandes v. Director of Social Services (Winnipeg Central)* (1992), 93 D.L.R. (4th) 402 (Man. C.A.) at 414, leave to appeal to S.C.C. refused 99 D.L.R. (4th) viii

16. Until a patient goes to see a doctor, or is in the process of receiving an insured medical or hospital service, there is no way to determine whether, or in what manner, the patient might be adversely affected in terms of his or her ability to access the funded service. To cite one illustration from this case, at one point Mrs. Warren went to a doctor who was fluent in ASL. She did not suffer an adverse impact despite the failure of the legislation to include medical interpreters as an insured benefit.

17. Given that the purpose of s. 15(1) is to protect human dignity by ensuring that all individuals are recognized at law as being equally deserving of concern, respect and consideration, it is the effect of the impugned distinction upon the claimant that is the prime concern under s. 15(1).

Egan v. Canada, [1995] 2 S.C.R. 513 at 584 and 603, *per* Cory and Iacobucci JJ.

Accordingly, it is submitted, it is necessary to focus the s. 15(1) debate, not on the intricacies of legislative or government funding for doctors, hospitals and other health care providers, but rather on the point at which the claimant comes into contact with the health care system, namely the point of service delivery. Where the service is provided by a governmental actor within the meaning of *Charter* s. 32(1), the equality guarantee in s. 15(1) will apply, with the issue becoming one of identifying the governmental obligation to accommodate the needs of the disabled.

18. In *Eaton v. Brant County Board of Education,* Sopinka J. made the following comments with respect to the scope of the s. 15(1) protections to persons with disabilities, and the role of society in accommodating differences:

> . . . it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. The discrimination inquiry which uses "the attribution of stereotypical characteristics" reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream movement. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability. (February 6, 1997, as yet unreported, at para. 67 *per* Sopinka J.)

19. The import of the *Eaton* decision, it is submitted, is that governmental entities within the meaning of *Charter* s. 32 face an obligation of reasonable accommodation under s. 15(1) in respect of differences related to disabilities. The concept of reasonable accommodation is, of course, well known and has evolved in the context of human rights legislation and jurisprudence. It is not yet clear what the scope of the obligation is under s. 15(1), and how this duty relates to the usual framework for s. 15 analysis, or the extent to which the related human rights concepts of undue hardship and the responsibility of claimants in facilitating accommodation will also find a place under s. 15.

20. In Manitoba, the provincial government provides deaf interpreter services, in respect of medical services provided by the government itself. However, in Manitoba as in British Columbia, deaf interpreter services are not included as an insured benefit as a component of health insurance legislation. In the case of individual services provided by private caregivers, it is submitted, those caregivers are subject to an obligation to reasonably accommodate the disabled, within the framework of human rights legislation. It is the persons involved in providing the service who are in the best position to provide, in a flexible manner, whatever "fine-tuning" is required to make their services reasonably accessible, including the provision of deaf interpreters where necessary to provide adequate medical care to individual patients.

> *The Human Rights Code*, C.C.S.M., c. H175, and see especially s. 9(1)(d), which incorporates failure to make reasonable accommodation in the *Code's* definition of discrimination

21. In that regard, it is submitted, physicians and other non-governmental health care providers face no greater obligations than any other service or business. The cost of providing reasonable accommodation may be viewed as an overhead expense, a part of the cost of doing business.

22. That there is government funding in respect of some of the services performed by health care providers does not negate their obligation of reasonable accommodation. By way of analogy, social welfare programs provide assistance to persons who lack the basic necessities, for such things as food, dental care and pharmaceuticals. The provision of this assistance, it is submitted, whether to the person in need or directly to the service provider, does not operate to relieve grocery stores, dentists or pharmacists of their obligations under human rights legislation, or to shift their responsibility to reasonably accommodate those recipients of social welfare benefits who happen to be deaf or otherwise disabled.

McKinney v. University of Guelph, [1990] 3 S.C.R. 229 at 274-275 *per* La Forest J.

Howard v. University of British Columbia (1993), 18 C.H.R.R. D/353 (B.C.H.R.C.)

23. This approach, it is submitted, is consistent with the approach taken in the cases referred to by the Appellants at paras. 79 and 80 of their factum. In *Howard v. University of British Columbia, supra*, for example, the British Columbia Human Rights Council found that the University of British Columbia discriminated against Mr. Howard in providing him with education services customarily available to the public, because it did not provide interpreter services. The tribunal rejected the University's argument that it should be absolved of responsibility because the issue was really one of government funding.

24. The evidence in this case failed to establish that the Appellants were denied medical services available to the hearing, because of their disability. They were found to have received adequate and appropriate medical treatment.

Reasons of Hollinrake, J.A., Case on Appeal, Vol III, p. 514, ll. 16-22

25. The issue of reasonable accommodation, therefore, does not appear to be directly relevant to the disposition of the appeal. The following submissions are provided, however, for the purpose of demonstrating that focusing directly on the provision of services provides a logically consistent and integrated approach to the application of equality rights of the disabled in relation to the government, under s. 15(1) of the *Charter*, and in relation to the private parties who perform the vast majority of medical services, under provincial human rights legislation.

26. Given the great variation in the needs of disabled individuals, accommodation is an issue that requires resolution on a case by case basis. As one commentator has observed:

> ... [T]here is no magic formula for accommodating all disabled students in one fell swoop. Disabilities vary from individual to individual. ... [T]he same disability can have a very different impact on different persons, depending on a myriad of factors, such as attitudes, internal and external resources, social support and general environment and the availability of training and accommodation techniques. (David Lepofsky, "Disabled Persons and Canadian Law Schools: The Right to the Equal Benefit of the Law School" (1991), 36 *McGill Law Journal* 636 at 638)

See also:

> Shelagh Day and Gwen Brodsky, "The Duty to Accommodate: Who Will Benefit" (1996), 75 Can. Bar Rev. (No. 3) 433 at 469:
>
> > Though it is similarly socially constructed as disadvantaging, compared to female sex or black race, disability is a category that includes not a few but a huge range of characteristics. It covers a wide spectrum of physical, emotional and intellectual capacities. There are many (dis)abilities and no one (dis)ability is monolithic. For example, there are many variations among people in their ability to see, and each person who is labelled blind is unique; one person who is blind may

use tapes to receive or convey information, another braille, another a computer.

27. It is submitted that the individual nature of what is required to reasonably accommodate the needs of a disabled person also supports the position that the inquiry as to whether there has been discrimination by reason of failure to reasonably accommodate, and the fashioning of an appropriate remedy in the event such a failure has been demonstrated, is more appropriately framed in terms of service provision to specific individuals rather than the alleged inadequacies of a legislative funding scheme. Including a particular service in a fee schedule, which is what the Appellants advocate, is a blunt, cumbersome and imprecise way to promote equality needs of disabled persons.

28. It is therefore respectfully submitted that the courts below correctly ruled that the impugned benefit program does not discriminate with respect to the funding of the medical services it includes as insured benefits. Issues relating to adverse impact on, and the reasonable accommodation of, the disabled in accessing such services arise in the context of the provision of the service, whether by government or private parties, and do not affect the validity of the funding program itself. Therefore, given that the funding programs established by the impugned legislation in the case at bar apply equally to deaf and otherwise disabled persons, as to all other qualified residents of the province, it is submitted that the impugned legislation does not violate *Charter* s. 15(1).

D CHARTER S. 1

29. This Intervener adopts the submissions of the Respondents at paragraphs 103 to 134 of the factum of the Respondents.

30. As the Respondents have stressed, in this context, there is no way to validly distinguish between requests to provide deaf interpreter services, and other requests to provide services to facilitate access to medical and hospital services, particularly in respect of claimants with other disabilities. The implications of the remedy sought by the Appellants, therefore, are in some ways similar those where an individual seeks an interlocutory exemption from the application of legislation. In *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, Beetz J. referred to the cascading effect of such applications:

> Depending on the nature of the cases, to grant an exemption in the form of a stay to one litigant is often to make it difficult to refuse the same remedy to other litigants who find themselves in essentially the same situation, and to risk provoking a cascade of stays and exemptions, the sum of which make them tantamount to a suspension case. (p. 146)

31. Similarly, it is submitted, the logical implications of the argument of the Appellants extend to affect the province's ability to ensure the fiscal sustainability of the health care system as a whole. It is submitted that, as in *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872 at 878, it is appropriate to address issues of s. 1 justification by reference to the broader principles that are given material application by the specific issues of the case.

E REMEDY

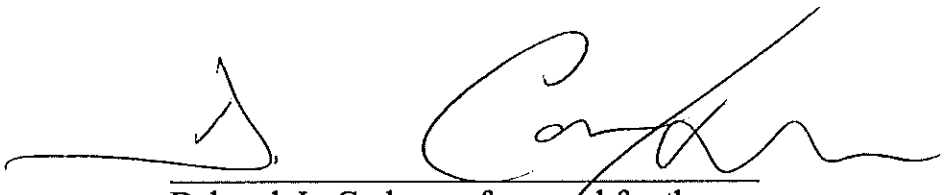
32. This Intervener adopts the submissions of the Respondents with respect to remedy.

PART IV

ORDER SOUGHT

33. This Intervener respectfully requests that the first and the third Constitutional Questions in this matter be answered in the negative. If it is necessary to answer the second and fourth questions, it is submitted they should be answered in the affirmative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Deborah L. Carlson, of counsel for the
Intervener the Attorney General of Manitoba

Dated at Winnipeg this 9th day of April, 1997

PART V

LIST OF AUTHORITIES

PAGE NO.

CASES:

ARTICLES:

LEGISLATION: