Court File No. 24896

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL
FOR BRITISH COLUMBIA)

B E T W E E N :

Robin Susan Eldridge, John Henry Warren
and Linda Jane Warren

Appellants
(Plaintiffs)

- and -

Attorney General of British Columbia
and Medical Service Commission

Respondents
(Defendants)

FACTUM OF THE INTERVENOR THE ATTORNEY GENERAL OF ONTARIO

ATTORNEY GENERAL OF ONTARIO
Constitutional Law Branch
7th floor, 720 Bay Street
Toronto, ON M5G 2K1

FAX: (416) 326-4015

JANET E. MINOR
TEL: (416) 326-4137

RICHARD J.K. STEWART
TEL: (416) 326-4468

Counsel for the Intervener,
the Attorney General of Ontario

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

TEL: (613) 566-2058
FAX: (613) 235-4430

ROBERT E. HOUSTON

Ottawa Agent for the Intervener,
The Attorney General of Ontario

TO:

HEENAN BLAIKIE
Barristers & Solicitors
600-1199 West Hastings St.
Vancouver, BC V6E 3T5

TEL: (604) 669-0011
FAX: (604) 669-5101

LINDSAY M. LYSTER

Counsel for the Appellants

NELLIGAN POWER
Barristers & Solicitors
1900-66 Slater St.
Ottawa, ON K1P 5H1

TEL: (613) 238-8080
FAX: (613) 236-2098

Ottawa Agent for the Appellants

AND TO:

ATTORNEY GENERAL OF BRITISH COLUMBIA
Legal Services Branch
6th fl., 1001 Douglas Street.
Victoria, BC V8V 1X4

TEL: (250) 356-8848
FAX: (250) 356-9154

HARVEY M. GROBERMAN
LISA J. MROZINSKI

Counsel for the Respondents

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

TEL: (613) 236-9665
FAX: (613) 235-4430

ROBERT I. HOUSTON

Ottawa Agent for the Respondents

AND TO:

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

TEL: (416) 482-8255
FAX: (416) 482-2981

DAVID BAKER
PATRICIA BREGMAN

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

GOWLING, STRATHY & HENDERSON
2600 - 160 Elgin St.
P.O. Box 466, Stn. "A"
Ottawa, ON K1N 8S3

TEL: (613) 232-1781
FAX: (613) 563-9869

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

AND TO:

PUBLIC INTEREST LAW CENTRE
402 - 294 Portage Ave.
Winnipeg, MB R3C 0B9

TEL: (204) 985-8541
FAX: (204) 985-8544

ARNE PELTZ
*
UNIVERSITY OF OTTAWA
Faculty of Law
57 Louis Pasteur St.
Ottawa, ON K1N 6N5

TEL: (613) 562-5800
FAX: (613) 562-5124

MARTHA JACKMAN

Solicitors for the Intervener,
Charter Committee on Poverty Issues

GOWLING, STRATHY & HENDERSON
Barristers & Solicitors
Ottawa, ON K1N 8S3

TEL: (613) 232-1781
FAX: (613) 563-9869

HENRY BROWN, Q.C.

Ottawa Agent for the Intervener,
Charter Committee on Poverty Issues

AND TO:

WOMEN'S LEGAL EDUCATION AND ACTION FUND
1800 - 415 Yonge St.
Toronto, ON M5B 2E7

TEL: (416) 595-7170 ext.228
FAX: (416) 595-7191

JENNIFER SCOTT
*
B.C. PUBLIC INTEREST ADVOCACY CENTRE
815 - 815 West Hastings St.
Vancouver, BC V6C 1B4

TEL: (604) 687-3063
FAX: (604) 682-7896

JUDY E. PARRACK
KATHERINE HARDIE

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

SCOTT & AYLEN
Barristers & Solicitors
1000 - 60 Queen St. W.
Ottawa, ON K1P 5Y7

TEL: (613) 237-5160
FAX: (613) 230-8842

CAROLE BROWN

Ottawa Agent for the Interveners,
DisAbled Women's Network Canada and
Women's Legal Education and Action Fund

AND TO:

DEPARTMENT OF JUSTICE, CANADA
British Columbia/Yukon Region
900 - 800 Howe St.
Vancouver, BC V6Z 2S9

DEPT. OF JUSTICE, CANADA
239 Wellington St.
Ottawa, ON K2P 0A2

TEL: (613) 957-4222
FAX: (613) 954-0811

GRAHAM GARTON

Counsel for the Intervenor,
Attorney General of Canada

AND TO:

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

TEL: (204) 945-0679
FAX: (204 945-0054

DEBORAH CARLSON

Solicitor for the Intervener,
The Attorney General of Manitoba

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

TEL: (613) 232-1781
FAX: (613) 563-9869

HENRY S. BROWN, Q.C.

Ottawa Agent for the Intervenor
The Attorney General of Manitoba

AND TO:

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

TEL: (709) 729-2864
FAX: (709) 729-2129

GALE WELSH

Solicitor for the Intervener,
The Attorney General of Newfoundland

BURKE-ROBERTSON
Barristers & Solicitors
70 Gloucester St.
Ottawa, ON K2P 0A2

TEL: (613) 236-9665
FAX: (613) 235-4430

ROBERT E. HOUSTON

Ottawa Agent for the Intervener,
The Attorney General of Newfoundland

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**FACTUM OF THE INTERVENOR
THE ATTORNEY GENERAL OF ONTARIO**

PART I - STATEMENT OF FACTS

1. The Attorney General of Ontario adopts the facts as found by the Trial Judge and reproduced in the reasons of Hollinrake, J.A. in the Court below.

Appeal Reasons, Case on Appeal, at 498-504.

2. For the purpose of this intervention, the Attorney General of Ontario accepts the characterisations of the Court below of the scope and objectives of the *Medical and Health Care Services Act*, S.B.C. 1992, c. 76 ["*MHCSA*"] and the *Hospital Insurance Act*, R.S.B.C. 1979, c. 180 ["*HIA*"]. In summary, the *MHCSA* provides that those who qualify as beneficiaries under the plan shall not be charged for services which are defined as benefits under the plan. The *HIA*

provides for the funding of hospitals for services provided to beneficiaries, the particular nature and extent of which is determined by each hospital. Government itself does not provide medical services.

Appeal Reasons, Case on Appeal, at 506-510.

3. Neither of these statutes require or contemplate the public funding of interpretive services for the deaf.

PART II - ISSUES ON APPEAL

4. In the context of the present case, the question and responses of the Attorney General of Ontario can be framed as follows:

A. Does the absence of funding for interpretive services for the deaf in either the *Hospital Insurance Act* or the *Medical Health Services Care Act* raise an issue that engages the provisions of s. 15 of the *Charter*?

No.

B. In the event that there is an infringement under s. 15 of the *Charter*, is the infringement justified under s. 1?

Yes.

PART III - ARGUMENT

A. SUMMARY OF THE POSITION OF THE ATTORNEY GENERAL OF ONTARIO

5. The challenged legislation is funding legislation, providing a benefit in the nature of

health insurance for medical services provided by non-government actors. Health care services are not provided by government. Funding of a service provided outside of government does not convert this service to government action.

6. For a finding of discrimination under s. 15, the effects complained of must be caused or contributed to by legislation. In this case, funding legislation does not cause or exacerbate the inequality complained of by the Appellants.

7. If any discrimination arises in the context of a failure to accommodate disability in this case, it arises at the level of the service provider and is thus properly addressed by individuals under the provincial human rights scheme.

B. THE *HOSPITAL INSURANCE ACT*

8. The *HIA* provides for the funding of hospitals for services provided to patients. The decision as to which services are included within hospital services funded under the *HIA* is left by statute to the discretion of each individual hospital, and is thus not subject to *Charter* scrutiny in accordance with the principles set out by this Court in *Stoffman* v. *Vancouver General Hospital*.

Stoffman v. *Vancouver General Hospital*, [1990] 3 S.C.R. 483.

9. It is submitted that any argument which would constitutionally oblige government to require hospitals to provide interpretive services for the deaf as a condition for funding constitutes an unprecedented departure from currently accepted equality rights principles under the *Charter*. Such an approach would blur the distinction between obligations that exist under the *Charter* with those imposed by human rights legislation, and it would require hospitals to adhere to the equality principles of *Charter* s. 15.

10. Finally, it is submitted that a determination of whether there is an obligation on the Provincial Government to compel hospitals to provide interpretive services for the deaf contravenes *Charter* s. 15 raises similar issues and constitutional principles to those relevant to an equality rights assessment of the absence of interpretive services for the deaf as a benefit under the *MHSCA*.

C. THE *MEDICAL HEALTH SERVICES CARE ACT*

11. As indicated, the *MHSCA* is a general funding statute which provides for public health insurance within British Columbia. It neither restricts nor prescribes the nature of medical or ancillary services available to beneficiaries, but rather sets up an insurance scheme by which certain medical expenses are publicly funded. While it is relatively comprehensive, it is not exhaustive and does not pay for all expenses that may arise in the context of health related matters.

12. The *MHSCA* sets out the extent of the coverage, providing a list of those medical expenses which are covered, those which are partially covered, and by omission those that are not. Services that are not provided by health care professionals are not funded under the plan.

13. The Appellants argue that the absence of interpretive services for the deaf within the list of those services funded under the plan constitutes an infringement of *Charter* s. 15 on the grounds of discrimination on the basis of disability.

1) Government Action as a Precondition for *Charter* Relief

14. The Appellants' complaint is about systemic disadvantage and inequality experienced by the deaf in society, and the failure of government to act to remedy this problem. They argue that the Province of British of Columbia has a positive obligation to provide funding for interpretive

services to the deaf. Section 32 of the *Charter* confines the application of the *Charter* to government action. Any disadvantage or inequality experienced by the appellants, however, is not due to "government action" as contemplated by s. 32 of the *Charter*.

McKinney v. *University of Guelph*, [1990] 3 S.C.R. 229, at 261.

15. In order for equality rights analysis under the *Charter* to be coherent, it is necessary to root the complaint to some law or statutory provision which itself creates or exacerbates inequality. In this regard, Iacobucci, J. stated in *Symes* v. *Canada*:

> We must take care to distinguish between the effects which are wholly caused or are contributed to by an impugned provision, and those social circumstances which exist independently of such a provision.

Symes v. *Canada*, [1993] 4 S.C.R. 695, at 764-765.

See also: *McKinney* v. *University of Guelph, supra*, at 261-263.

16. This central current of *Charter* interpretation is deeply entrenched in the s. 15 equality rights jurisprudence. In setting out the governing principles of s. 15 analysis in *Andrews* v. *Law Society of British Columbia*, McIntyre, J. delineated the scope of *Charter* scrutiny, and emphasized the fundamental distinction between the application of human rights legislation and the *Charter*. He stated:

> [Section 15] is not a general guarantee of equality; it does not provide for equality between individuals or groups within society in a general or abstract sense, nor does it impose on individuals or groups an obligation to accord equal treatment to others...
>
> To begin with, discrimination in s. 15(1) is limited to discrimination caused by the application or operation of law, whereas the Human Rights Acts apply to private activities.

Andrews v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143, at 163, 175.

17. This approach was repeatedly reiterated by this Court in the recent trilogy of cases addressing *Charter* s. 15. While divided on the definition of discrimination under s. 15(1), all members agreed that an absolute precondition for the *Charter* to apply in any equality rights context is the existence and operation of legislation which causes discrimination.

Miron v. *Trudel*, [1995] 2 S.C.R. 418, at 435 (per Gonthier, J.) and at 485 (per McLachlin, J.)

Egan v. *Canada*, [1995] 2 S.C.R. 513, at 531 (per La Forest, J.) and at 541, 543 (per L'Heureux-Dubé) and at 584 (per Cory, J.).

Thibaudeau v. *Minister of National Revenue*, [1995] 2 S.C.R. 627, at 681 (per Gonthier, J.) and at 642 (per L'Heureux-Dubé, J.) and at 710 (per McLachlin, J.).

18. In another instance, involving the discretion of an arm of government to adopt one particular measure over another, the Supreme Court of Canada confirmed the fundamental prerequisites for any equality rights deliberation under the *Charter*:

> The rights protected by s. 15(1) are all framed in terms of "the law" - equality before and under the law, and equal protection and benefit of the law. Therefore, it is necessary to determine whether the failure of the Attorney-General of Ontario to implement a programme of alternative measures can be considered "the law" for the purposes of a s. 15 challenge.

R. v. *S.(S.)*, [1990] 2 S.C.R. 254, at 284-285.

2) No Positive Obligation

19. Section 15 of the *Charter* is directed to ensuring that the government does not discriminate. It is recognized that this scrutiny applies equally in the realm of human rights

legislation as to other areas of government activity. But the analysis of the courts is consistently framed to reflect the fact that the scope of *Charter* review under s. 15 is limited to circumstances in which government has actually acted, and it cannot interfere with the legislative prerogative not to act in a given area.

> The *Charter* should serve to prevent overt discrimination in human rights legislation, but it should not be applied in such a manner as to discourage the use of such legislation by the provinces, or to interfere with a legitimate provincial legislative decision not to provide rights in a given area.

McKinney v. *University of Guelph, supra*, at 436 (L'Heureux-Dubé, dissenting, but not on this point)

Vriend et al. v. *Alberta (A.G.)*, unreported decision of the Alberta Court of Appeal, February 23, 1996, at 10-12, 14 (per McClung, J.A.) and at 3, 8 (per O'Leary, J.) (under appeal to the S.C.C.)

20. In short, from the very outset of the development of *Charter* jurisprudence, this Court has emphasised that the *Charter* is a specific and directed tool with a clearly articulated mandate. In the words of Dickson, J. (as he then was):

> It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action.

Hunter v. *Southam*, [1984] 2 S.C.R. 145, at 156 as quoted in *McKinney* v. *University of Guelph, supra*, at 261.

21. This Court has restated this principle, holding that "...s. 15 of the *Charter* does not impose upon governments the obligation to take positive actions to remedy the symptoms of systemic inequality..."

Thibaudeau v. *Canada, supra*, at 655.

22. Most recently, in an interim motion for relief in a case challenging the repeal of the Ontario *Employment Equity Act* for being in violation of s. 15, Mr. Justice MacPherson held that the challenge did not meet the very low threshold for a serious constitutional issue. After a review of the *Charter* s. 15 jurisprudence, he dismissed the motion concluding that the *Charter* is to ensure that government comply with the *Charter* when they make laws, not to require governments to enact laws to remedy societal problems, including problems of inequality and discrimination.

10

Decision of Macpherson, J. in *Ferrel v. Ontario (Attorney General)* (unreported decision dated December 29, 1995)(Ontario Court (General Division)), at 2

3) Application of the Charter to Legislation

23. The only government action in this case is funding legislation. Consequently, the only issue subject to *Charter* scrutiny is whether the funding in question is itself discriminatory contrary to s. 15.

20

24. It is not disputed that the *MHSCA* is itself subject to *Charter* scrutiny. It is submitted, however, that the impugned legislation draws no distinction relevant to *Charter* s. 15. On the contrary, it provides payment for a range of prescribed medical services, equally and without distinction, to the hearing and deaf communities.

4) Adverse Effect Discrimination

25. The Appellants' argument is that though the provincial funding of medical services is neutral on its face, it constitutes adverse effect discrimination because the needs of the deaf with

respect to the receipt of medical services are not accommodated.

26. Government action in this case, however, is the funding of medical services provided by hospitals or physicians and not the direct provision of such services. If any adverse impact is experienced by the Appellants in the receipt of medical services, that is attributable to the service provider, who may then be under a statutory duty to accommodate. Such a determination, however, is best left to individual assessment under provincial human rights legislation. Any adverse impact is not attributable to the funding legislation.

27. Adverse effect discrimination analysis stems from human rights law principles and the obligation to accommodate. In order to constitute discrimination, the law, rule or practice, while neutral on its face, must have a disproportionately negative impact or impose an unequal burden on members of a particular group by virtue of personal characteristics associated with them. This Court has found that adverse effect discrimination in the employment context arises where:

> ...a rule or standard which is on its face neutral, and which will apply equally to all..., but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes because of some special characteristics of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force... An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply.

Ontario Human Rights Commission v. *Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536, at 551.

Egan v. *Canada*, *supra*, at 586-587

28. In *Eaton* v. *Brant County Board of Education,* this Court considered the equality rights of a severely disabled child within the context of government provided education. The Court

recognized the centrality of the "accommodation of differences" to the "true essence of equality". In the case of disability, *Charter* s. 15 encompasses more than the elimination of discrimination by the attribution of stereotypical characteristics; it requires consideration of the true characteristics of this group so that they can be accommodated in order to ensure the greatest access to and integration with the rest of society.

> *Eaton* v. *Brant County Board of Education*, (unreported decision of the Supreme Court of Canada, February 6, 1997, File No. 24668), para 66.

10

29. In the *Eaton* case, the duty to accommodate is on the school board which provides the educating service. Unlike hospitals, school boards are themselves government actors within the meaning of *Charter* s. 32. physicians

30. Sopinka, J. explained the principles of accommodation to highlight the fact that different treatment did not always constitute a discriminatory distinction, but rather was consistent with the fundamental pillars of equality rights jurisprudence. As stated by McIntyre, J. in *Andrews* v. *Law Society of British Columbia*:

20

> ...every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality. This proposition has found frequent expression in the literature on the subject but, as I have noted on a previous occasion, nowhere more aptly than in the well known words of Frankfurter, J. in *Dennis* v. *United States*, 339 U.S. 162 (1950), at p. 184:
>
> > It was a wise man who said that there is no greater inequality than the equal treatment of unequals.

30 *Andrews* v. *Law Society of British Columbia*, *supra*, at 164.

31. Consequently, if any rule, law or practice which while neutral on its face imposes a disproportionately negative burden on a protected group, it may constitute adverse effect

discrimination. But as stated by Sopinka, J., while there has not been unanimity in this Court over all principles relating to the application of *Charter* s. 15, the one factor on which there is general agreement is:

> ...before a violation of s. 15 can be found, the claimant must establish that the impugned provision creates a distinction on a prohibited or analogous ground which withholds an advantage or benefit from or imposes a disadvantage or burden on, the claimant.

10 *Eaton* v. *Brant County Board of Education, supra*, para 62.

32. In the absence of funding, the Appellants would continue to confront accommodation issues at the level at which services are provided. Moreover, ~~they would face an even greater burden in that these costs would be on top of expenses for all other medical services currently covered under the existing scheme~~. They would not, however, have a complaint under the *Charter* since if there is a burden or disadvantage it flows from factors other than government activity, and the fact that they are hearing impaired. The existence or effect of the challenged legislation does not create inequality, nor can it be argued that it in any way increases a pre-
20 existing disadvantage of the Appellants. Rather it alleviates the financial burden on the Appellants, as it does for all beneficiaries covered by the plan.

> *McKinney* v. *University of Guelph, supra*, at 318.
>
> See also *Masse* v. *Ontario (A.G.)* (1996), 134 D.L.R. (4th) 20 (Ont. Div. Ct.), at 41 (per O'Driscoll, J.), leave to appeal to the Court of Appeal dismissed April 1996, leave to appeal to the Supreme Court of Canada dismissed December 5, 1996.

33. The Appellants argue at paragraph 59(1) of their factum that the Government may be
30 under no constitutional obligation to provide publicly funded medical services, but once it chooses to do so it must extend any funding to include interpretive services for the deaf. The extent to which this same reasoning would apply to other assistive services that may be required

by other groups protected by s. 15 is not made clear. It is submitted, however, that an overly broad adverse effects analysis focussed on an outcome of general or absolute equality at large, particularly when dealing with legislation providing payment for costs of services, can have negative consequences and substantially interfere in government's ability to take any action or make any policy choices with respect to social assistance, general expenditure or specific funding programmes.

Egan v. *Canada*, *supra*, at 572-575 (per Sopinka, J.).

10 34. Moreover, Professor Hogg has recognized that it is neither useful nor realistic to engage in *Charter* rights analysis that does not take into account the finite nature of resources available to address the satisfaction of competing demands made by different groups in society. This is important when government is called upon to justify the infringement of a right under s. 1 of the *Charter*, and it must also be a consideration in the development of a meaningful and implementable substantive rights interpretation. As Hogg notes, "all roads cannot be paved at once":

> It should also be noted that cost may have an impact on the content of some of the *Charter* rights, and thus be relevant to the first stage of
20 *Charter* review. What is entailed by the principles of fundamental justice may well vary from situation to situation, depending at least in part on the resources involved in providing hearing and appeal rights of differing extent. Similarly, the right to equal benefit of the law can hardly be defined without regard for the claims on resources of policies and programmes that compete with a challenged programme: all roads cannot be paved at once.

Peter Hogg, *Constitutional Law of Canada*, (1992) 3rd ed. (Supplemented), at 35-25.

30

5) Section 1

35. The Attorney General of Ontario adopts the position of the Respondents with respect to s. 1 of the *Charter*.

PART IV - ORDER SOUGHT

36. The Attorney General of Ontario requests that the appeal be dismissed, and that the first question be answered in the negative, and if it is necessary to answer the second question it should be answered in the affirmative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

April 17, 1997.

JANET E. MINOR

RICHARD J.K. STEWART

SCHEDULE "A" - LIST OF AUTHORITIES

Andrews v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143

Eaton v. *Brant County Board of Education*, (unreported decision of the Supreme Court of Canada, February 6, 1997, File No. 24668)

Egan v. *Canada*, [1995] 2 S.C.R. 513

Ferrel v. Ontario (Attorney General) (unreported decision dated December 29, 1995)(Ontario Court (General Division))

Masse v. *Ontario (A.G.)* (1996), 134 D.L.R. (4th) 20 (Ont. Div. Ct.)

McKinney v. *University of Guelph*, [1990] 3 S.C.R. 229

Miron v. *Trudel*, [1995] 2 S.C.R. 418

Ontario Human Rights Commission v. *Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536

R. v. *S.(S.)*, [1990] 2 S.C.R. 254

Stoffman v. *Vancouver General Hospital*, [1990] 3 S.C.R. 483

Symes v. *Canada*, [1993] 4 S.C.R. 695

Thibaudeau v. *Minister of National Revenue*, [1995] 2 S.C.R. 627

Vriend et al. v. *Alberta (A.G.)*, unreported decision of the Alberta Court of Appeal, February 23, 1996

SCHEDULE "B" - LIST OF STATUTES

Medical and Health Care Services Act, S.B.C. 1992, c. 76

Hospital Insurance Act, R.S.B.C. 1979, c. 180

SCHEDULE "C" - LIST OF BOOKS AND ARTICLES

Peter Hogg, *Constitutional Law of Canada*, (1992) 3rd ed. (Supplemented)