

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

AND:

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ATTORNEY GENERAL OF CANADA and
MEDICAL SERVICE COMMISSION

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FACTUM OF THE INTERVENOR
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**FACTUM OF THE INTERVENOR
CHARTER COMMITTEE ON POVERTY ISSUES (CCPI)**

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PART I
STATEMENT OF FACTS

1. The Charter Committee on Poverty Issues (hereafter "CCPI") is a national coalition of low income organizations and poverty law activists. CCPI adopts the Statement of Facts set out in the Appellants' Factum. CCPI wishes, however, to underscore certain facts relating to the economic circumstances of persons with disabilities.

2. Having a disability virtually doubles one's chances of living in poverty: just under 22 percent of people with disabilities live in poverty, as compared with 12.6 percent of people without disabilities. Over 25 percent of women with disabilities live in poverty, as compared with 14.2 percent for women without disabilities. For persons with hearing disabilities, the poverty rate is 20.2 percent.

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G. Fawcett, *Living with Disability in Canada: An Economic Portrait* (Québec: Human Resources Development Canada, Office for Disability Issues, 1996) at 131, 134.

3. In 1991, over 40 percent of the working-age population with disabilities received no employment income, as compared with 18.5 percent for people without disabilities. Of the working-age population with disabilities receiving employment income, 58 percent received an income of less than \$10,000. While people with disabilities are more likely to live in poverty and less likely to receive employment income, they are at the same time faced with additional costs for items and services related to their disability. These items and services include medication, special transportation, special aids and assistive devices, and modifications to their place of residence.

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Fawcett, *Living With Disability in Canada*, supra at 17, 148, 149.
Statistics Canada, *A Portrait of Persons With Disabilities* (Ottawa: Minister of Supply and Services Canada, 1995) at 46-49.
Statistics Canada: Special Tabulation, "Income From Employment by Disability Indicator", from *Health Activity Limitation Survey*, 1991(PUMF), March 21, 1997.

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PART II
POINTS IN ISSUE

4. Does the province of British Columbia's failure to provide for publicly funded interpretation services under the *Medicare Protection Act* and the *Hospital Insurance Act* violate the equality rights of the Deaf under section 15 of the *Canadian Charter of Rights and Freedoms*?

10 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

5. If the province's failure to provide publicly funded interpretation services violates the rights of the Deaf under section 15, can this violation be justified under section 1 of the *Charter*? If justification cannot be shown by the province, what is the appropriate remedy?

PART III
ARGUMENT

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A. Section 15 of the *Charter* as a source of positive obligation for governments

6. Beginning with its decision in *Andrews v. Law Society of British Columbia*, the Supreme Court of Canada has interpreted section 15 of the *Charter* as a guarantee of substantive rather than merely formal equality. As Justice McLachlin explains:

30 The *Andrews* decision ... pointed out the potential vacuity of formalistic concepts of equality and emphasized the need to look at the reality of how differential treatment impacts on the lives of members of stigmatized groups. The purpose of the *Charter* guarantee of equality, the Court affirmed, was not to guarantee some abstract notion of similar treatment for the similarly situated ... [but] rather to better the situation of members of groups which had traditionally been subordinated and disadvantaged.

B. McLachlin, J., "The Evolution of Equality" (July 1996) 54 *Advocate* (Van.) 559 at 564.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 170, McIntyre J.
Egan v. Canada, [1995] 2 S.C.R. 513 at 532, LaForest J.; at 543, L'Heureux-Dubé J.; at 584-5, Cory and Iacobucci JJ.

7. In *Rodriguez v. British Columbia (A.G.)*, Chief Justice Lamer notes, in relation to discrimination on the basis of disability in particular, "the absurdity of the argument that there is no discrimination where persons with disabilities receive the same treatment as the general public."

Rodriguez v. British Columbia (A.G.), [1993] 3 S.C.R. 519 at 550.

Y. Peters, "The Constitution and the Disabled" (1993) 2 *Health Law Review* 17 at 20-22.

8. In *Eaton v. Brant County Board of Education*, Justice Sopinka expands on how section 15 must be read if it is to provide genuine equality for persons with disabilities:

In the case of disability [elimination of discrimination by the attribution of stereotypical characteristics] is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them.

Eaton v. Brant County Board of Education, unreported, 6 February 1997, Supreme Court of Canada File No. 24668 at para. 67.

D. Pothier, "M'Aider, Mayday: Section 15 of the *Charter* in Distress" (1996) 6 *National Journal of Constitutional Law* 295 at 336-38.

9. In order to ensure the right to substantive equality under section 15 of the *Charter*, the Supreme Court has suggested that governments may be required to engage in positive action to ameliorate disadvantage. Speaking for the Court in *Schachter v. Canada*, Chief Justice Lamer pointed out that "[i]n some contexts it will be proper to characterize s.15 as providing positive rights."

Schachter v. Canada, [1992] 2 S.C.R. 679 at 721.

10. In the present case the Court must determine whether positive measures are required to meet the *Charter's* guarantee of equality -- specifically the right of those who are deaf to equal benefit of publicly funded health care services. CCPI urges the Court to reaffirm its commitment to substantive equality and to reiterate that section 15 does indeed place positive obligations on governments to address needs which are central to the enjoyment of equality.

11. The Court's approach to section 15 of the *Charter* has been guided by jurisprudence in the area of human rights, where it is now well established that equality provisions give rise to positive obligations on the part of both governments and the private sector. Beginning with the *Andrews* decision, the Court has expressly affirmed "the expanded concept of discrimination being developed under the various Human Rights Codes."

Andrews, supra at 170.

Reference Re Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313 at 349.

12. Under human rights legislation, a *de minimus* standard for assessing the extent of positive obligations has been rejected, and positive measures with significant cost consequences have been required to remedy discrimination. The equality guarantee in *Charter* s. 15 should not be read more narrowly than the provisions of Canadian human rights statutes.

Central Okanagan School District No. 23 v. Renauld, [1992] 2 S.C.R. 970 at 984-5.

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

13. An interpretation of section 15 which recognizes a positive duty to remedy inequalities in Canadian society is consistent with the constitutional obligations of both orders of government under section 36(1) of the *Constitution Act, 1982*. In the context of the present appeal, the government of British Columbia is constitutionally committed "to promot[e] equal opportunities for the well-being of Canadians" and to "provid[e] essential public services of reasonable quality to all Canadians."

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, s. 36(1).

14. The background documents to the constitutional proposals which culminated in section 36 of the *Constitution Act, 1982* make clear that the obligation to promote "equal opportunities for the well-being of Canadians" was based on a vision of Canada in which "economic, social and cultural development should be thought of primarily as the creation of opportunity of individual Canadians -- the opportunity to realize their full potential." In the health care field itself, it was stated that: "Equal opportunity involves ... the availability of essential public services such as health care services."

10

P.E. Trudeau, *The Constitution and the People of Canada: An Approach to the Objective of Confederation, the Rights of People and the Institutions of Government* (Ottawa: Supply and Services Canada, 1968) at 8.
P.E. Trudeau, *Income Security and Social Services: Working Paper on the Constitution* (Ottawa: Queen's Printer, 1969) at 100.

15. A reading of section 15 of the *Charter* which fails to recognize or impose positive obligations on governments to address the needs of the disadvantaged is also inconsistent with international human rights provisions which, as former Chief Justice Dickson has pointed out, "reflect the values and principles that underlie the *Charter* itself."

20

Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038 at 1056-57.

16. In 1976, after lengthy discussions with the provinces, Canada ratified the *International Covenant on Economic, Social and Cultural Rights*. In doing so Canada agreed as a matter of international law to take positive steps, applying the "maximum of available resources" to protect the right to health and other social and economic rights included under the *International Covenant*, and to ensure that disadvantaged individuals and groups in Canada are provided with the equal enjoyment of such rights, without discrimination.

30

International Covenant on Economic, Social and Cultural Rights, [1976] 3 C.T.S. 46; (1966) U.N.T.S. 3;, art. 2, 11 [hereafter *International Covenant*].

17. The U.N. Committee on Economic, Social and Cultural Rights, which monitors compliance with the *International Covenant*, has established that positive measures to reduce systemic disadvantage, including the disadvantage of persons with disabilities in particular, is required for compliance with the *International Covenant*:

10 The obligation of States parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required.

U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 5*, 11th Sess., 38th Mtg., U.N. Doc. E/C.12/1994/13 (1994) para. 9.

20 18. The U.N. Committee on Economic, Social and Cultural Rights makes clear that this responsibility survives even during periods of deep economic recession, where governments are faced with "severe resource constraints". Thus, "even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances."

U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 3*, 5th Sess., U.N. Doc. E/1991/23 (1990) para. 11, 12.

30 19. CCPI submits that these positive obligations imposed under international law are not mere government policy objectives. As former Chief Justice Dickson explains: "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified."

Reference re Public Service Employee Relations Act (Alberta), *supra* at 349.
Slaight Communications, *supra* at 1056-57.

20. In its second periodic review of Canada's compliance with the *International Covenant*, the U.N. Committee on Economic, Social and Cultural Rights examined a number of lower court decisions dismissing social welfare related claims under the *Charter*. The Committee expressed particular concern about the Canadian courts' characterization of social and economic rights "as mere 'policy objectives' of governments rather than as fundamental human rights." With a view to ensuring greater Canadian compliance with the *International Covenant*, the Committee directed one of its concluding recommendations specifically to the Canadian courts:

10 The Committee encourages the Canadian courts to continue to adopt a broad and purposive approach to the interpretation of the Charter of Rights and Freedoms and of human rights legislation so as to provide appropriate remedies against violations of social and economic rights in Canada.

U.N. Committee on Economic, Social and Cultural Rights, *Consideration of Reports: Canada*, 8th Sess., 5th & 6th Mtg., UN Doc. E/C.12/1993/19 (1993) para. 110 and 119.

21. When governments fail to act, thereby violating equality rights, the same level of scrutiny is required as in cases of direct state action. Otherwise, the *Charter* would be drained of meaningful content for most disadvantaged Canadians, including the poor and people with disabilities. CCPI submits that these are the claims which are most central to the purpose of section 15 as the Court enunciated it in *Andrews* and subsequent decisions: "to ensure ... a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."

20

Andrews, supra at 171.

B. Errors by the Court of Appeal in the approach to section 15 review

30 22. Consistent with a substantive approach to equality, CCPI submits that the section 15 analysis adopted by the Court of Appeal below should be rejected. Quoting from this Court's decision in *Symes*, the Court of Appeal attempted to distinguish between effects which result, in whole or in part, from an impugned legislative provision and social circumstances which exist

independently of the legislation at issue, and which therefore fall beyond the ambit of section 15. The Court of Appeal went on to rule that, since the need of the Deaf for interpretation services was not created by the provision of benefits under provincial health insurance legislation, it would be inappropriate to interpret section 15 to impose a "positive duty" on government to address this need.

Appeal Reasons, Hollinrake J.A., COA at 518-22.
Symes v. Canada, [1993] 4 S.C.R. 695 at 746.

10 23. There is no doctrinal or theoretical justification for adopting a lesser standard of judicial review in assessing discrimination in benefit-conferring legislation. Such an approach would have a dramatic impact on the rights of the most disadvantaged members of our society, those who often rely on this type of legislation for the most basic essentials of life. In addition, the manner in which the Court of Appeal applied the distinction between inequities caused by the legislation at issue and those which exist apart from the legislation is contrary to the substantive approach to equality adopted by this Court under both human rights legislation and the *Charter*.

20 24. In *Robichaud v. The Queen*, the Supreme Court established that human rights legislation "is directed to redressing socially undesirable conditions quite apart from the reason for their existence." Similarly, the Court has established that equality rights analysis under the *Charter* should not be restricted to the four corners of the impugned legislation, but should consider the broader social and historical context within which the legislation operates.

Robichaud v. Canada (Treasury Board), [1987] 2 S.C.R. 84 at 90.
R. v. Turpin, [1989] 1 S.C.R. 1296 at 1331-32.
Miron v. Trudel, [1995] 2 S.C.R. 418 at 488.

30 25. Section 15 review must necessarily involve consideration of the substantive impact of benefit conferring legislation on already disadvantaged individuals and groups. Section 15 requires the courts to ask not only whether benefit conferring legislation is the source of the disadvantage in question, but also whether it reflects and perpetuates that disadvantage. As Justice Sopinka explained in his decision in *Eaton*, referring to discrimination on the ground of

disability in particular:

[T]he purpose of s.15 of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage from mainstream society as has been the case with disabled persons.

Eaton, supra, para. 66.

10 26. CCPI submits that the Respondents' approach to section 15 review of benefit conferring legislation should also be rejected. The Respondents suggest that benefit conferring legislation should only be found discriminatory where it 'widens the gap' between a disadvantaged group and others.

Respondents' Factum, p. 22, para. 83.

20 27. CCPI submits that the object of section 15 is not simply to ensure that benefit conferring legislation does not worsen the plight of already disadvantaged individuals and groups in Canadian society. If the Respondents' analysis were to be adopted, benefit conferring legislation would rarely if ever be found constitutionally objectionable. Such legislation is generally designed to address a recognized social need: accessible health care, affordable housing, or income assistance, among other examples. As a consequence, benefit conferring legislation rarely widens, but instead may often simply reflect or maintain pre-existing disparities between disadvantaged groups and others.

28. Where a challenge is to a government benefit program already in existence, section 15 therefore requires that it be scrutinized by the courts to ensure that it is not discriminatory in the sense of depriving a disadvantaged individual or group of equal protection or benefit, irrespective of the initial source of disadvantage.

30

29. As will be argued in greater depth below, in order to meet its *Charter* obligations in the present case, the government is required to act affirmatively to ensure that persons who are deaf do in fact enjoy the same benefit of public health services as the hearing population. Identifying

deafness as the problem, or ensuring only that the Deaf are not worse off relative to the hearing than they were before medicare and hospital insurance legislation was introduced in British Columbia, clearly does not meet a substantive standard of section 15 review.

C. The right to equal benefit of health care services under section 15

30. Since the second World War, and with the advent of publicly subsidized health insurance regimes in all provinces and territories in the late 1960s, Canadian citizens and governments alike have come to consider equal access to health care as a basic right of social citizenship. As Justice Wilson states in *Stoffman v. Vancouver General Hospital*: "government has recognized for some time that access to basic health care is something no sophisticated society can legitimately deny to any of its members." This expectation is reinforced by the provisions of section 36(1) of the *Constitution Act, 1982*.

Stoffman v. Vancouver General Hospital, [1990] 3 S.C.R. 483 at 544.

M. Jackman, "The Right to Participate in Health Care and Health Resource Allocation Decisions Under Section 7 of the Canadian Charter (1995/96) 4 *Health Law Review* 3 at 4-5.

20 National Forum on Health, *Canada Health Action: Building on the Legacy - Synthesis Reports and Issues Papers* (Ottawa: National Forum on Health, 1997) at 5.

31. An interpretation of the *Charter* which guarantees equal access to health care services is also consistent with Canada's international human rights obligations. Article 25(1) of the *Universal Declaration of Human Rights*, provides that: "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including ... medical care..."

30 *Universal Declaration of Human Rights*, UN GA Res. 217 A (III), 3rd Sess., Supp. No. 13, U.N. Doc. A/810 (1948) at 71.

32. Article 12(1) of the *International Covenant on Economic, Social and Cultural Rights* recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical

and mental health." Article 12(2)(d) of the *International Covenant* sets out States parties' obligations to take all steps necessary for "the creation of conditions which would assure to all medical service and medical attention in the event of sickness."

International Covenant, supra, art. 12.

33. The view that "Canadian constitutional structures are fully in compliance with ... international human rights instruments such as the United Nations General Assembly 1948 *Universal Declaration of Human Rights* and the 1966 Covenants" was confirmed by the Canadian government itself in its recent argument in the *Reference Relating to the Secession of Quebec*.

Factum of the Attorney General of Canada In the Matter of a Reference by the Governor in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada, p. 71, para. 195.

34. In British Columbia, the *Medicare Protection Act* and the *Hospital Insurance Act* provide the framework for the delivery of universal publicly funded health care services. These statutes do not, however, provide for interpretation services for the Deaf as a publicly funded health care benefit, or otherwise ensure the availability of interpretation.

35. The Respondents submit that interpretation services for the deaf are analogous to other "ancillary" services for which no funding is provided under provincial health insurance legislation. In his dissenting opinion, Justice Lambert addresses this argument as follows:

... I do not think that the provision of translation services between English and American sign language to allow full and effective communication between a deaf patient and his or her doctor, in those situations where that standard of communication is required in order to discharge the doctor's professional obligations to his or her patient, is merely ancillary to medical care or treatment in the same way that transportation to and from the doctor is merely ancillary to medical treatment. Indeed, I think that effective communication through translation services is an essential and integral part of the medical care and treatment itself in those cases where it is required in order for the doctor to comply with his or her professional obligations.

Appeal Reasons, Lambert J.A., COA at 528.

See also Pothier, "M'Aider, Mayday: Section 15 of the *Charter in Distress*", *supra*, at 336.

36. The provincial government has itself recognized the importance of doctor-patient communications and concedes that sign language interpretation is necessary in some cases. In the words of counsel for the government: "... no one will be quarrelling with the idea that communication between doctor and patient are particularly important areas of communication. No one will suggest that the services of an interpreter might not be desirable in many if not all or most of those situations."

Opening statement of H.M. Groberman, COA, p. 223, ll. 35-46.

Testimony of Peter van Rhoenan, COA, p. 229, ll. 31-37, p. 246, ll. 20-35.

37. As Justice Lambert held, without access to interpretation services, the Deaf are unable to fully and properly communicate with physicians, nurses and other health care providers. Without interpretation services, persons who are deaf are therefore at heightened risk of non- or misdiagnosis of their medical conditions. They are also less likely to receive timely and appropriate care, including counselling and preventive care.

Testimony of Dr. Tildesley, COA p. 79, ll. 13-25; p. 80, ll. 19-30.

Testimony of Dr. Gibb, COA p. 120, ll. 9-23, p. 122, ll. 9-15, ll. 27-40.

Reasons for Judgment at Trial, COA p. 455, l. 25 - p. 456, l. 14; p. 458, ll. 3-13; p. 459, l. 16 - p. 460, l. 8.

38. In *Rodriguez*, Justice McLachlin declared: "It is part of the persona and dignity of the human being that he or she have the autonomy to decide what is best for his or her body." On this reasoning, the Supreme Court has recognized that the right to consent to medical treatment is constitutionally protected. Since persons who are deaf may not, in the absence of interpretation services, receive a complete and fully understandable explanation of the range of treatment options available, their constitutional right to consent to treatment may also be compromised in the absence of interpretation services. This risk is particularly great in emergency situations, as illustrated by Plaintiff Linda Warren's experience during the premature

birth of her twin daughters.

Rodriguez, supra, at 588-89, Sopinka J.; at 618, McLachlin J.

B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315 at 370, LaForest J.

Testimony of Linda Warren, COA p. 27, l. 9 - p. 28, l. 33.

Testimony of Dr. Gibb, COA p. 457, ll. 3-17.

- 10 39. A reading of the *Charter* to ensure access by persons who are deaf to interpretation services as a fundamental component of their right to equal access to health care is reinforced by Canada's international undertakings in the field of disability rights. The United Nations *Standard Rules on the Equalization of Opportunities for Persons with Disabilities* provides that persons with disabilities are entitled to medical services at the "same level" as that provided to other members of society. In recognition of the basic importance of interpretation services to deaf people, the Standard Rules also establish that "sign language interpretation should be provided to facilitate the communication between deaf persons and others." The Standard Rules have been accepted by the U.N. Committee on Economic, Social and Cultural Rights as "a particularly valuable reference guide in identifying more precisely the relevant obligations of
- 20 States parties under the Covenant."

Standard Rules on the Equalization of Opportunities For Persons With Disabilities, UN GA Res. 48/96, UN GAOR, Sess. 48, UN Doc. A/RES/48/96 (1994), Rule 2, para. 3, Rule 5, section b, para. 7.

U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 5*, 11th Sess., 38th Mtg., UN Doc. E/C.12/1994/13 (1994) para. 7.

- 30 "The Committee on Economic, Social and Cultural Rights", *Human Rights Fact Sheet No. 16*, U.N. Centre for Human Rights (1996) at 28, 29.

40. In short, interpretation services are necessary in order for persons who are deaf to receive the same level of health and medical care as enjoyed by hearing persons within the publicly funded health care system. As Professor Diane Pothier has described it: "the unavailability of

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sign language interpretation is not ... the provision of universal health care but rather the provision of able-bodied health care." CCPI submits that this legislative omission constitutes discrimination on the basis of disability, contrary to section 15 of the *Charter*.

Pothier, "M'Aider, Mayday: Section 15 of the *Charter* in Distress", *supra* at 338.

D. The denial of interpretation services is not justified under section 1 of the *Charter*

10 41. Unconstitutional provisions in social welfare legislation should not be treated differently or subjected to a lesser level of section 1 scrutiny because of the potential implications for government spending. As Chief Justice Lamer states in his judgment for a majority of the Court in *Schachter*: "This Court has held, and rightly so, that budgetary considerations cannot be used to justify a violation under section 1."

Schachter, supra at 709.

20 42. Chief Justice Lamer's statement echoes earlier remarks by Justice Wilson in *Singh v. Minister of Employment and Immigration* that *Charter* guarantees would be illusory if section 1 could be used by governments to justify rights violations on the basis of financial cost or administrative convenience.

Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177 at 218-19.

43. Justice Wilson's observation is particularly true from the point of view of the poor and of people with disabilities who, as suggested above, often rely on government benefit programs to meet basic needs. For such groups, the vindication of their equality and other *Charter* claims will often have significant implications for government spending.

30 44. The evidence submitted at trial indicates that the government's primary objective in refusing to include interpretation services for the Deaf as a publicly funded health benefit was a desire to limit provincial health care costs. In particular, evidence shows that the government

was motivated by the fear that providing medical interpretation services for the Deaf might lead to more costly demands for interpretation services by non English-speaking groups.

10 45. Even if some account may be taken of cost savings objectives under section 1, CCPI submits that, in the present case, the Respondents have failed to demonstrate that the means chosen to achieve these objectives are rational within the meaning of the *Oakes* test. As the evidence presented at trial makes clear, the cost of providing interpretation services represents a modest expenditure relative to total provincial health care spending. Moreover, without interpretation services, persons who are deaf are at heightened risk of having their medical conditions misdiagnosed, of requiring more frequent and lengthy physician and hospital visits, of receiving inadequate preventive care, and of receiving care which is inappropriate or delayed. Providing interpretation services may well reduce rather than increase provincial health care expenditures. Under section 1, government bears the onus of proof, and in this case, the province has failed to establish that public funds were actually saved.

46. In its recent report, the Federal Task Force on Disability Issues pointed out that governments, such as the provincial government in the present case, are often unable to demonstrate that their decisions to refuse to meet the needs of the disabled are in fact rational:

20 Neither our public consultations, nor our own research, nor the information provided by government departments proves, in a definitive way, that the cost of inclusion outweighs the many real, quantifiable and intangible benefits. On the contrary, an initial program design that accommodates people with disabilities and that links to other programs will have a reasonable cost and might save money ... Arguments that justify postponing action due to the cost of accommodating disability usually exaggerate all these costs without providing definitive proof.

30 Federal Task Force on Disability Issues, *Equal Citizenship for Canadians with Disabilities: The Will to Act* (Ottawa: Human Resources Development Canada, 1996) at 13.

47. Not only are the means chosen by the government to meet its objectives in the present case irrational, they do not impair the equality rights of the Deaf "as little as possible". The government has failed to make any provision whatsoever for interpretation services. Rather than

exercising legislative judgment to determine how best to allocate resources in order to ensure equality for the Deaf in the health care system, a management committee of government has simply denied funding, in order to avoid the risk of future spending.

10 48. CCPI submits that a defence based on budget allocation decisions will only succeed where the decisions are made consistently with a recognition of the rights and needs of disadvantaged groups and meet a rigorous standard of review, comparable to the standard of the "maximum of available resources" to which Canada is bound under international law. Such a defence cannot be successful where the government's failure to act deprives an historically disadvantaged group of equal access to a program, such as health care, which enjoys a privileged status within our political, social and constitutional structure, both pursuant to section 36 of the *Constitution Act, 1982* and by virtue of Canada's international human rights commitments.

20 49. At the outset of their argument, the Respondents characterize the Applicants' claim as an invitation to the Court "to put itself in the invidious position of dictating, on a piecemeal basis and without the advantages available to the legislative and executive branches of government, what policies best meet social needs." The Respondents argue that the approach advanced by the Applicants is "beyond the scope of judicial power" and would lead to "a fiscal Pandora's box".

Respondents' Factum, p. 9, para. 32.

50. CCPI strongly disagrees. It is in the areas of government actions relating to basic social needs that the most serious violations of human rights affecting the most disadvantaged constituencies are likely to occur. It is precisely in these areas where the Court's protective role is most necessary. In too many cases, judicial deference in social and economic policy areas has resulted in unreasoned rejection of *Charter* claims brought by disadvantaged plaintiffs, most notably those of the poor and of persons with disabilities.

30 M. Jackman, "Open Justice or "Just Us"?: The Poor, the Courts and the Charter" in Y.-M. Morissette, W. MacLauchlan & M. Ouellette, eds., *Open Justice/La transparence dans le système judiciaire* (Montreal: Canadian Institute for the

Advancement of Justice/Éditions Thémis, 1995) 281 at 284-91.

51. Lower courts have reverted to a formal approach to equality, such as the one adopted by Court of Appeal in the present case, in order to avoid dealing with rights claims which might involve spending by government. These courts have suggested that everyone is being treated the same; that the law is conferring a benefit rather than a disadvantage; or that any alleged disadvantage is due not to the effects of government law or policy, but rather to social circumstances, personal choices, individual failings, the market, or even nature.

10 Jackman, "Open Justice or "Just Us"? The Poor, the Courts and the Charter",
supra at 286-88.

52. Rights violations which result from inequities or inadequacies in benefit conferring legislation are often a reflection, and even a predictable outcome, of the under-representation of the affected groups within the political process. It is precisely the role of the courts to address the unconstitutional effects of these democratic distortions through *Charter* review. As John Hart Ely wrote, in articulating the approach to rights review adopted by the Court in *Andrews*: "The whole point of the approach is to identify those groups in society to whose needs and wishes elected officials have no apparent interest in attending. If the approach makes sense,
20 it would not make sense to assign its enforcement to anyone but the courts."

J.H. Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980)
at 151, cited in *Andrews, supra*, at 152.

53. In refusing to deal with positive rights claims or to address rights violations in benefit conferring legislation because of a reluctance to interfere with government decision-making in times of fiscal restraint, the courts are effectively compounding the political marginalization of disadvantaged groups, such as the poor and people with disabilities, within the political process. In the case of section 1 as in the case of section 15 review, the *Charter* imposes on the courts
30 a clear responsibility to provide an equal level of scrutiny to benefit-conferring as to other forms of legislation, and to accord an equal level of respect to positive as to other more traditional rights claims.

54. In the present case, CCPI submits that the government's cost saving objectives are not only inequitable in terms of their impact of persons who are deaf, they are illegitimate and irrational within the meaning of section 1 also. CCPI therefore submits that the province's failure to provide interpretation services for the Deaf as a publicly funded health benefit should be found unconstitutional.

E. The appropriate remedy

10 55. CCPI submits that in order to remedy the *Charter* violation in the present case, the Court should declare that the province's failure to provide interpretation services to the Deaf as a publicly funded health service is unconstitutional, and order the government to act expeditiously to remedy this rights violation.

56. In his judgment in *Schachter*, Chief Justice Lamer suggests that while budgetary considerations cannot justify a rights violation under section 1 of the *Charter*, they are relevant at a remedial level. As he explains: "Any remedy granted by a court will have some budgetary repercussions whether it be a saving of money or an expenditure of money ... the question is not whether courts can make decisions that impact on budgetary policy, it is to what degree they can appropriately do so."

20

Schachter, supra at 709.

57. In deciding how a discriminatory benefit program should be remedied, Chief Justice Lamer identifies two over-arching considerations: the intrusiveness of the remedy under consideration in terms of the objective of the impugned legislation, and the compatibility of the remedy with the overall objectives of the *Charter*. CCPI submits that the proposed declaration would not be unduly intrusive and is compatible with *Charter* objectives.

Schachter, supra at 700-01.

30

58. The government's objective in establishing a publicly funded hospital and health insurance

plan is to ensure that British Columbians have access to needed medical and hospital services without financial or other barriers. This is in fact a condition of federal funding towards the provincial health insurance system. Declaring that interpretation services must be provided as a publicly funded service would ensure that persons who are deaf have the same access to, and receive the same benefit of, the public health care system as hearing persons.

Canada Health Act, R.S.C. 1985, c. C-6, s. 7, 12.

10 59. A declaratory order of this nature is also compatible with the overall objectives of the *Charter*. In *Schachter*, Chief Justice Lamer cites the Nova Scotia Court of Appeal's decision in *Attorney General of Nova Scotia v. Phillips* as an example of how the overall objectives of the *Charter* should influence the choice of remedial response. In *Phillips*, the Nova Scotia court chose to strike down the legislation, thereby depriving sole support mothers of support, instead of reading sole support fathers into the legislation. Chief Justice Lamer commented as follows: "[T]he nullification of benefits to single mothers does not sit well with the overall purpose of s.15 of the *Charter* ... While s. 15 may not absolutely require that benefits be available to single mothers, surely it at least encourages such action to relieve the disadvantaged position of persons in those circumstances."

20 *Schachter*, *supra* at 701-02.
Nova Scotia (Attorney General) v. Phillips (1987), 34 D.L.R. (4th) 633 (N.S.C.A.).

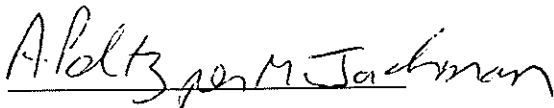
60. CCPI submits that the proposed declaration is a remedial response which is consistent with the overall objectives of the *Charter*. Such a declaration respects the constitutional right of persons who are deaf to the equal benefit of publicly funded health care services, while recognizing that, in view of its institutional competence in this area, the provincial government should be accorded a degree of latitude in determining the most effective means of remedying this rights violation.

PART IV
ORDER REQUESTED

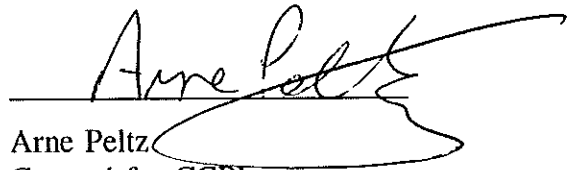
61. CCPI requests that the Court issue a declaratory order (1) that the province's failure to provide interpretation services for the deaf as a publicly funded health service is unconstitutional, and (2) that the provincial government must act expeditiously to remedy this violation.

10 All of which is respectfully submitted on behalf of the intervenor, the Charter Committee on Poverty Issues.

Dated March 27, 1997, at Winnipeg, Manitoba, and Ottawa, Ontario.



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