Court 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

AND:

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

RESPONDENTS

FACTUM OF THE INTERVENERS, CANADIAN ASSOCIATION OF THE DEAF, CANADIAN HEARING SOCIETY and COUNCIL OF CANADIANS WITH DISABILITIES

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PART I - STATEMENT OF FACTS

1. The interveners accept the facts as set out in paragraphs 1 through 56 of the appellants' factum.

The Need for Medical Interpreting

2. Deaf people are the same as hearing people in every respect except they cannot hear. Society has erected barriers which prevent the full participation and equality of Deaf people on the basis of their different method of communication.

Affidavit of Henry Vlug, paragraph 14 and Appendix D, Factum of the Interveners, Tab A.

Harlan Lane, The Mask of Benevolence, Vintage Books: 1993 p. 5-13 and 103-120, Book of Authorities of the Interveners, Tab 29.

3. The provision of interpreting services has enabled many Deaf people to understand and be understood by hearing persons, and to overcome many of the barriers and negative stereotypes which arose because of miscommunication.

Affidavit of Henry Vlug, paragraphs 13 and 15 and Appendices A and B, Factum of the Interveners, Tab A.

Oliver Sacks, Seeing Voices: A Journey into the World of the Deaf, U. of Calif. Press: 1989, p. 8-11, Book of Authorities of the Interveners, Tab 33.

4. Within the health care system, Deaf people who require but are denied the intervention of a sign interpreter can be misdiagnosed. Miscommunication can result in unnecessary or improper treatments, assessment of Deaf persons as incompetent to consent to treatment and inappropriate involuntary admissions to psychiatric facilities. Inaccurate labels such as mentally disabled, autistic, suffering behaviourial problems or lacking in language skills can be attached to the person.

Trial Court, Reasons for Judgment COA Vol. III at 460.

Affidavit of Henry Vlug, Appendix C, Factum of the Interveners, Tab A.

Affidavit of Iris Boshes paragraph 13, Factum of the Interveners, Tab B.

Harlan Lane, The Mask of Benevolence, supra, p.108-109, Book of Authorities of the Interveners, Tab 29.

Karen Peltz Strauss, "Doctor, Can You Check My Vital Signs?", (1986) Gallaudet Today p.7, Book of Authorities of the Interveners, Tab 34.

The Structure of Health Service Delivery in British Columbia

5. The Ministry of Health is responsible for the funding of health care in the province of British Columbia.

Trial Court Reasons for Judgment, COA Vol. III, p. 461-2.

6. The Ministry's role is not simply a passive one. It actively manages and directs health care services.

> The Ministry of Health Act gives the Minister of Health broad powers, including power over all health related matters assigned to the Minister under any act or by Cabinet that are not assigned by law or order-in-council, to another body. The Act names the Ministry of Health as the body to manage and direct health care services on behalf of British Columbians.
>
> *COA Vol. IV. p. 595, Exhibit 12 The Report of the British Columbia Royal Commission on Health Care and Costs.*

7. Most decisions about health care service delivery, including financial decisions, are made centrally. While delegation of this authority could have occurred, all financial decisions continue to be made by the Ministry of Health.

> The Ministry of Health is not organized to encourage the people it funds, nor those it serves, to participate in the health care system. While some planning at the local level does take place in BC, there is no designated policy for delegating planning authority to communities. And, while proposals for operating budgets and new services come from hospitals and community agencies, all the monetary decisions occur in Victoria.
>
> *COA Vol. IV, p. 594-5, Exhibit 12, supra*

8. The Ministry communicates its demands and expectations to those delivering health care services at the local level through a bureaucratic and centralized system of-decision-making with the intention that one set of rules apply to the whole province.

> The Ministry of Health is a bureaucracy.
>
> In the beginning, responsibility, accountability and authority for decision-making followed a chain of command from top to bottom (vertical line management). ...
>
> As the Ministry has grown, it has become more and more difficult for the senior managers within the system to communicate their demands and expectations to the field. To compensate for this, the ministry has centralized decision-making and applied one set of rules to the whole province.
>
> The Ministry believes that this management style promotes equality.
>
> *COA Vol. IV, p. 595, Exhibit 12, supra*

The Funding of Medical Interpreter Services in British Columbia

9. Prior to 1990 a voluntary agency, the Western Institute for the Deaf and Hard of Hearing (WIDHH) provided medical interpreter services for Deaf persons in British Columbia who were unable to speak and were therefore unable to communicate with their medical practitioners. These services were wholly funded through charitable donations.

When the WIDHH experienced a severe funding crisis it was compelled to terminate this service.

COA Vol. II p. 306-08, Exhibits 3(1) and 3(4).

10. When the Executive Committee of the Ministry of Health learned that the medical interpretation services for the Deaf were being terminated, it considered four options. None of the options involved delegating responsibility for the funding of medical interpretation services to doctors or hospitals. The Committee's decision was to refuse funding for medical interpreter services for the Deaf. It decided that a favourable decision "would set a precedent that might be followed by further requests from the ethnic communities where the language barrier might also be a factor."

COA Vol. II, p. 306-09, Exhibits 3(1) and 3(2).

11. When contacted by a physician about the WIDHH decision to terminate medical interpreter services, and the impact this would have on the care of a Deaf patient, the Minister of Health responded

> Traditional supports by families or special programs through community agencies have been the source of available assistance. When resources are limited, difficult decisions have to be made in identifying priorities for funding support.

Since WIDHH had been the community agency providing this service, the Minister apparently was indicating that responsibility for the cost of medical interpreter services lay with Deaf people and their families.

COA Vol. II p. 303-4, Exhibit 2.

COA Vol II. p. 306-308, Exhibits 3(1) and 3(4) ***Briefing Note*** *and* ***Discontinuation of Interpreter Services for Medical Appointments for the Deaf and Hard of Hearing***.

PART II - POINTS IN ISSUE

12. (a) Whether the province of British Columbia violated s. 15(1) of the Canadian Charter of Rights and Freedoms by failing to make provision for interpreters for Deaf people who require them while receiving medical services under the Medical and Health Care Services Act and the Hospital Insurance Act;

(b) Whether the Canadian Charter of Rights and Freedoms applies to the benefits insured under the Hospital Insurance Act and the Medical and Health Care Services Act;

(c) If the failure to make provision for interpreters violates s. 15(1) of the Charter whether this denial of equal benefit of the law is a reasonable limit which is demonstrably justified under s. 1 of the Charter; and

(d) Remedies

PART III - ARGUMENT

A. Equal Benefit of the Law

(i) General Principles

13. This is a case which will establish whether insured medical services, including the means of effective communication with a health care provider, are benefits of the law to which Deaf persons are entitled to equal access under s. 15 (1) of the Charter of Rights and Freedoms.

14. The Court has held that the concept of discrimination under s. 15 of the Charter "will be of the same nature and in descriptive terms will fit the concept of discrimination under the Human Rights Acts".

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 176, Book of Authorities of the Interveners, Tab 2.

15. It is well established in both human rights and Charter cases that policies or legislation which are neutral in their general application may nevertheless violate equality rights if they have a discriminatory impact on a particular individual or group. If the

effect is discriminatory, innocent general purpose or intent will not remove it from the application of s. 15 of the Charter.

> ***Andrews v. Law Society of British Columbia*, *supra*, *at 167 and 173-74, Book of Authorities of the Interveners, Tab 2.***
>
> ***Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd.*, *[1985] 2 S.C.R. 536 at 546, 551, Book of Authorities of the Interveners, Tab 15.***
>
> ***Rodriguez v. R.*, *[1993] 3 S.C.R. 519 at 544-49, Book of Authorities of the Interveners, Tab 17.***
>
> ***Action Travail des Femmes v. Canadian National Railway*, *[1987] 1 S.C.R. 1114 at 1134-38, Book of Authorities of the Interveners, Tab 1.***

16. The purpose of s. 15(1) of the Charter includes the amelioration of the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society. This Court has recognized persons with disabilities suffer from discrimination of this kind.

> ***Eaton v. Brant County Board of Education*, *February 6, 1997, paragraph 66 - 67, Book of Authorities of the Interveners, Tab 8.***

17. Accommodation of differences has been described as "the essence of true equality".

> [I]t 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.
>
> ***Andrews v. Law Society of British Columbia*, *supra*, *at pp. 167 - 169, Book of Authorities of the Interveners, Tab 2.***
>
> ***Eaton v. Brant County Board of Education*, *supra*, *at paragraph 67, Book of Authorities of the Interveners, Tab 8.***

(ii) Effective Communication and the Need for Sign Interpreters

18. Full bilateral communication between doctor and patient is a necessary part of medical treatment. Without effective communication a Deaf patient would not receive equal benefit from health care services, in fact, may receive no benefit at all.

> Every Ontario citizen is entitled to health services. For Deaf and Hard of Hearing citizens, the service is meaningless and possibly dangerous without provision of interpreter services. There is currently no mechanism for physicians or other health care professionals to charge OHIP for interpreted services. This makes accepting Deaf and Hard of Hearing patients unattractive. Some hospitals pay the fee for service, though currently only 40 per cent make the effort to allocate funds for this purpose in their budgets. These inequalities do not promote full and equal access to health services.

***Provincial Review of Visual Language Interpreting Services, Intervention for Blind-Deaf Persons and Test-Based Services for Deaf and Hard of Hearing Services Summary Document*, Ministry of Colleges and Universities, April 1992 at p. 28, Book of Authorities of the Interveners, Tab 35.**

19. Worse still, health care in the absence of effective communication may actually be harmful. The trial court below found that miscommunication between a Deaf person and her doctor could lead to a misdiagnosis. Deaf people are routinely stereotyped as mentally retarded, autistic or dangerously mentally ill. The discriminatory consequences of these stereotypes are compounded when a misdiagnosis legitimizes them. If a Deaf patient misunderstands the nature of the medical care which has been prescribed, she may fail to take precautionary measures or misuse medications.

Trial Court Reasons for Judgment COA, Vol. III pp. 460 and 485

Elizabeth Ellen Chilton, "Ensuring Effective Communication: The Duty of Health Care Providers to Supply Sign Language Interpreters for Deaf Patients", (1996) 47 Hastings L.J. 871 at 871 - 875, Book of Authorities of the Interveners, Tab 27.

*Sy Dubow, "**Mental Health**", in Sy Dubow et al (eds), **Legal Rights of Hearing Impaired People**, Gallaudet College Press: 1982 at pp. 72 - 87, Book of Authorities of the Interveners, Tab 28.*

20. Without effective communication, a Deaf patient's right to autonomy and self-determination within the health care system would be lost. This Court has repeatedly held that everyone has the right to decide what is to be done to one's own body by giving or withholding consent to treatment.

Ciarlariello v. Schacter, [1993] 2 S.C.R. 119 at 135, Book of Authorities of the Interveners, Tab 7.

21. If a patient does not understand the information necessary to give an informed consent, such as the nature and consequences of a treatment, it may indicate that the patient is incapable of giving a consent. The responsibility for establishing communication lies with the doctor. Further investigation may reveal that the person is capable, but the doctor's attempts at communication have been ineffective.

*Ellen Picard and Gerald Robertson, **Legal Liability of Doctors and Hospitals in Canada**, (3rd ed.) Carswells: 1996 p. 62, Book of Authorities of the Interveners, Tab 31.*

22. Sign interpreters are essential tools if Deaf persons are to have access to public services. Judge Abella (as she then was) stated:

> ...a strong argument can be advanced that just as ramps are necessary for those with mobility handicaps to have access to the courts, so Deaf interpreters are necessary if the Deaf are to have access to the courts...
>
> I have no hesitation in recommending that interpreters be provided at no expense to clients who have communications disabilities much as I would have no hesitation in recommending that ramps be provided at no expense to clients

> who have mobility disabilities. The indispensable tools should be freely available.

*Judge Rosalie S. Abella, **Access to Legal Services by the Disabled**, Queen's Printer for Ontario: 1983 at pp. 55 and 110 - 111, Book of Authorities of the Interveners, Tab 26.*

23. It is submitted that the majority of the Court of Appeal erred in concluding that the inequality of forcing Deaf people to pay for the interpreters they require to communicate with their health care provider "exists independently of the legislation...". This Court has rejected the "pregnant person" analysis of the Bliss case, and the "similarly situate" test upon which it was based. As Sopinka J. stated in Eaton v. Brant County Board of Education (supra):

> "Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather 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. (para. 69)"

***Eaton v. Brant County Board of Education**, February 7, 1997, paragraphs 67 - 69, Book of Authorities of the Interveners, Tab 8.*

Court of Appeal Reasons for Decision, COA, Vol. III, p. 519.

***Miron v. Trudel**, [1995] 2 S.C.R. 418 at 490 - 491, Book of Authorities of the Interveners, Tab 13.*

***Brooks v. Canada Safeway Ltd.**, [1989] 1 S.C.R. 1219 at p. 1243 - 44, Book of Authorities of the Interveners, Tab 4.*

Andrews v. Law Society of British Columbia, *supra*, *at pp. 167 - 70, Book of Authorities of the Interveners, Tab 2.*

Bliss v. Attorney General of Canada, *[1979] 1 S.C.R. 183 at p. 190, Book of Authorities of the Interveners, Tab 3.*

24. While there appears to be no Canadian jurisprudence on the duty to accommodate by ensuring effective communication in a medical setting, there is in analogous situations. A trial may not have the life or death consequences of a medical emergency, but a person's liberty may be at stake. This Court has described as "Kafkaesque", the prospect of a trial in which the accused is physically present, but unable to understand the proceedings. While the obligation under s. 14 of the Charter differs from that under s. 15 (1) in that actual prejudice need not be demonstrated, s. 15(1) has been linked to the right to an interpreter.

R. v. Tran, *[1994] 2 S.C.R. 951 at 965 and 974 - 975, Book of Authorities of the Interveners, Tab 16.*

25. The Tribunal de Droits de la Personne in Quebec has held that a rent review tribunal must reasonably accommodate a Deaf litigant by providing sign language interpretation.

Le Centre de la Communité Sourde Du Montréal Métropolitan Inc. v. Régie du Logement, *May 6, 1996, Book of Authorities of the Interveners, Tab 11.*

26. This Court has recognized the importance of accommodating communication needs in the education of Deaf children. The British Columbia Council of Human Rights has imposed a duty on a university to accommodate a Deaf student by providing sign language interpreter services. Across the country, Deaf education involves the use of sign language. In Ontario, American Sign Language ("ASL") and La langue des Signes Québecois ("LSQ") are recognized, along with English and French as the official languages of education.

Eaton v. Brant county Board of Education, *supra, paragraph 69, Book of Authorities of the Interveners, Tab 8.*

Howard v. University of British Columbia, *(1993), 18 C.H.R.R. D/353, Book of Authorities of the Interveners, Tab 10.*

Education Act, *R.S.O. 1990, c. E. 2 as amended, s. 11(21.1), 264(1.1), 297(1)(c.1) and (3), 309(1) and 325(2)(c.1), Book of Authorities of the Interveners, Tab 20.*

27. In the United States, hospitals and other health care facilities receiving federal government financial assistance such as health care clinics and nursing homes have been under a statutory obligation to ensure "effective communication" between persons with hearing impairments and medical staff since 1977. In 1990, this obligation was extended to privately-owned and operated commercial facilities, including "the professional office of a health care provider", under Title III of the Americans with Disabilities Act ("ADA").

*Karen Peltz Strauss, **"Doctor, Can You Check My Vital Signs?"**, supra, at pp. 8 - 9, Book of Authorities of the Interveners, Tab 34.*

*Elizabeth Ellen Chilton, **"Ensuring Effective Communication: The Duty of Health Care Providers to Supply Sign Language Interpreters for Deaf Patients"**, supra, at pp. 876 - 880, Book of Authorities of the Interveners, Tab 27.*

28. The statutory concept of "effective communication" has been elaborated upon in regulations which emphasize that the need for a sign interpreter will depend on a number of factors which boil down to whether the Deaf patient was able to receive and convey necessary information. For example, under Title II of the ADA, the following rule applies to services offered by state and local governments:

> Although in some circumstances a notepad and written materials may be sufficient to permit effective

> communication, in other circumstances they may not be sufficient. For example, a qualified interpreter may be necessary when the information being communicated is complex, or is exchanged for a lengthy period of time. Generally, factors to be considered in determining whether an interpreter is required include the context in which the communication is taking place, the number of people involved, and the importance of the communication.

*Department of Justice, **Regulations** (28 C.F.R. Subpart E Communications Section 35.160), Book of Authorities of the Interveners, Tab 25.*

29. As indicated in paragraphs 83 to 87 of the appellants' factum, an extensive jurisprudence has developed concerning the communication rights of Deaf persons under the ADA.

*Elizabeth Ellen Chilton, **"Ensuring Effective Communication: The Duty of Health Care Providers to Supply Sign Language Interpreters"**, supra, at pp. 882 - 893, Book of Authorities of the Interveners, Tab 27.*

B. Application of the Charter to the Health Care Insurance Plan

30. This case concerns the administration and funding of health care services through the British Columbia health care insurance plan which operates generally under the Ministry of Health Act, R.S.B.C. 1979, c. 273. The plan's hospital services are delivered pursuant to the Hospital Insurance Act, R.S.B.C. 1979, c. 180. Doctors' services are delivered pursuant to the Medical and Health Care Services Act, S.B.C. 1992, c. 76. The province directly delivers some health services, for example in provincial psychiatric hospitals pursuant to the Mental Health Act, R.S.B.C. 1979, c. 256.

Book of Authorities of the Interveners, Tabs 24, 21, 22 and 23, respectively.

31. The respondent has acknowledged, and the courts below have found that doctors' services are "a benefit of the law" which is subject to review pursuant to s. 32 of the Charter.

32. The majority in the Court of Appeal held that hospital services are not benefits of the law which are subject to the Charter, relying on this Court's decision in Stoffman v. Vancouver General Hospital. It is submitted that Stoffman can be distinguished for the reasons which follow, allowing the application of s. 15(1) of the Charter to the province's health care insurance plan.

> ***Stoffman v. Vancouver General Hospital**, [1990] 3 S.C.R. 483, Book of Authorities of the Interveners, Tab 18.*
>
> ***Court of Appeal Reasons for Decision**, COA, pp. 510 - 512*

33. There is no statutory obligation on a physician or hospital to treat any particular patient. The province, however, is committed to meeting the health care needs of its citizens. The mechanism through which it fulfils this obligation involves the interaction of several pieces of legislation. The nature of the obligation is most clearly identified in the Canada Health Act, R.S.C. 1985, c. C-6, which binds the province. Portions of the Act have been incorporated by reference into the province's own legislation.

> ***Canada Health Act**, R.S.C., 1985, c. C-6, s. 4, 5 and 13 - 21, Book of Authorities of the Interveners, Tab 19.*
>
> ***Medical and Health Care Services Act**, S.B.C. 1992, c. 76, s. 4(2), Book of Authorities of the Interveners, Tab 22.*

34. The Canada Health Act was enacted in 1984 to:

"...protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate **reasonable access to health services without financial or other barriers**"

Canada Health Act, s. 3, Book of Authorities of the Interveners, Tab 19.

35. In order to qualify for the federal cash contribution, the province must provide a health care insurance plan which satisfies criteria set out in the Act.

(a) public administration - It must be administered and operated by a public authority which is appointed or designated by the province and which is responsible to it. (s. 8)

(b) comprehensiveness - It must insure all insured health services provided by hospitals and medical practitioners, amongst others. (s. 2, 9, 12(d))

(c) universality - It must entitle one hundred per cent of the insured persons in the province to services on uniform terms and conditions. (s. 10, 12(1))

(d) portability - The Act Provides detailed criteria regarding coverage for persons entering, temporarily absent from the province or visiting from another province. (s. 11)

(e) accessibility - It must provide for health services on a basis that does not impede or preclude, either directly or indirectly, whether by charges made to insured persons or otherwise, reasonable access to those services. (s. 12(1)(a))

36. Where required for effective communication, medical sign language interpretation is an accommodation. As such it is part of the insured medical service to which a Deaf patient is entitled. It is not a separate or ancillary service.

37. The province is obliged to ensure that insured services are actually provided. Unlike a private insurer which issues cheques if insured services are provided, the province is under a positive duty to ensure that insured services are available.

38. In circumstances where a Deaf patient requires a medical sign interpreter one of four things could happen:

(a) the interpreter is provided by the service provider at no charge to the Deaf patient;

(b) the interpreter is provided by the service provider, but the Deaf person is charged for the service;

(c) the interpreter is not provided by the service provider, and must be provided by the Deaf persons at her own expense; or

(d) the interpreter is not provided by the service provider and the Deaf patient is treated without the means of effectively communicating with the provider.

In the first case, no Charter issue would arise, whether the interpreter was paid by the service provider, the province or a charitable organization. In both the second and third cases a "user charge" or "extra-billing" would be applied, in violation of both provincial legislation and the Canada Health Act. In the final case the patient would not be receiving the insured service to which she was entitled.

***Canada Health Act**, s. 2, 13 - 21, Book of Authorities of the Interveners, Tab 19.*

***Hospital Insurance Act**, s. 13, Book of Authorities of the Interveners, Tab 21.*

***Medical and Health Care Services Act**, s. 16, Book of Authorities of the Interveners, Tab 22.*

39. This is a case where medical interpreter services had previously been provided to Deaf persons. The service stopped when the charitable organization upon which doctors and hospitals relied was no longer able to provide medical interpreter services. To the knowledge of the respondent, following termination of the WIDHH service, Deaf patients were no longer being provided with medical sign interpreters when receiving insured medical services. In addition to potential violations of provincial human rights legislation, Deaf patients were being subjected to "user charges" and "extra-billing" or alternatively were being denied insured services. This occurred on a systemic basis. The province's inaction was more than a failure to exercise its regulatory authority, it was a discriminatory failure to ensure the availability of services which it was obliged to provide to Deaf British Columbians.

40. The appellants seek to restrain a wrongful violation of a public right because they are prejudiced by the province's failure to provide the means of ensuring they can effectively communicate with their health care providers. Even if their entitlement is not against the province as submitted above, they can maintain this action in order to compel the respondent to ensure the lawful provision of service pursuant to its own legislation and s. 15(1) of the Charter.

> ***Finlay v. Canada (Minister of Finance)**, [1988] 2 S.C.R. 607 at 623 - 624 and 631 - 636, Book of Authorities of the Interveners, Tab 9.*

41. In this case the Minister was aware that Deaf persons required sign interpreters in order to have effective communication with their health care providers. He knew that they were being denied effective communication with their health care provider unless the Deaf person paid for their own interpreter. The Ministry, which provides 100% of the funding for insured health services, decided that funding of medical interpreter services,

either directly or through the doctor or hospitals providing the insured service, was not a "priority".

42. This Court has recognized, in an employment context, that a trade union may not be able to hire, fire or manage the workplace, but it can have substantial influence over the employer's exercise of those powers to accommodate its employees. Allocating responsibility for accommodations can therefore involve "a multi-party inquiry." This common sense approach has been summarized in the words, "[d]iscrimination in the workplace is everybody's business."

> *M. David Lepofsky, " A Report Card on the Charter's Guarantee of Equality to Persons with Disabilities - After Ten Years - What Progress? What Prospects?", N.J.C.L. (forthcoming) at p. 58, Book of Authorities of the Interveners, Tab 30.*
>
> ***Central Okanagan School Dist. No. 23 v. Renaud**, [1992] 2 S.C.R. 970 at 982-85, Book of Authorities of the Interveners, Tab 6.*
>
> ***OPEIU, Local 267 v. Domtar Inc. and Ontario Human Rights Commission**, (1992), 8 O.R. (3d) 65 at 72 (Div. Ct.), Book of Authorities of the Interveners, Tab 14.*

43. It is the Ministry of Health, through the *Hospital Insurance Act* which defines the benefits to which patients are entitled and establishes the funding levels for providers. In a comment on this case, it has been said that severing this connection creates a "catch-22 situation":

> Had the Eldridge applicants filed a human rights complaint against an individual physician or hospital for failing to provide an interpreter, they would be ensnared in a "catch-22". Both the doctor and the hospital would presumably try to claim that they cannot afford to provide this help, due to the lack of provincial funding. The government would argue that it has no obligation to provide the funding. If judicially endorsed, this catch-22 would thwart the shared fundamental objectives of the disability equality guarantees in Charter s. 15 and human rights statutes.

As in Renaud, it would be necessary to pierce the veil and identify who is really responsible for the failure to accommodate. This would be particularly true where the defence to be asserted would be the "undue hardship" of accommodating the needs of Deaf patients, and the province had virtually total control over the health care providers ability to pay.

*M. David Lepofsky, **supra**, at p. 58, Book of Authorities of the Interveners, Tab 30.*

44. Also relevant to this decision are the following:

(a) the responsibility of a funder for knowingly funding health services which discriminate against Deaf and hard of hearing persons;

(b) a medical interpreter service which is funded and managed by the province, as opposed to individual doctors and hospitals would have enhanced efficiency, availability, and capacity to anticipate emergencies and to maintain standards;

(c) the Minister's decision not to delegate responsibility for ensuring effective communication with Deaf patients to the health care provider; and

(d) the adverse impact on the health of Deaf persons of requiring them to litigate against their health care providers.

45. Health care is one of the most valued social programs in Canada. It is intended to be universally available, with no one relegated to receiving second class services. Judge Rosalie Abella (as she then was) has stated:

> It is unacceptable for any society to develop services intended for everyone's benefit to which some people have limited or no access. What can possibly justify the exclusion of any person from what most members of society feel are indispensable amenities? If the service was created for all and it exists for most, it cannot be allowed to be unavailable to a remaining few. To accept the absence of universal accessibility in a service meant to be universally accessible,

> is to accept as given that society is entitled to be arbitrary in the allocation of primary services.

Whatever individual remedies may be available to Deaf residents of British Columbia under the Human Rights Act, provincial health legislation or the Canada Health Act, it is submitted the issue of equal entitlement to health care is a matter of pressing concern which warrants use of the Charter of Rights and Freedoms.

> *Judge Rosalie S. Abella, **Study of Access to Legal Services for the Handicapped**, supra, pp. 2 - 3, Book of Authorities of the Interveners, Tab 26.*

C. Section 1

46. The interveners adopt the appellant's submissions at paragraphs 104 to 128 of their factum.

D. Remedy

47. This Court has held that systemic discrimination is more pervasive in Canada than intentional discrimination. It follows that systemic remedies are required to remove these barriers.

> ***Canada (Human Rights Commission) v. Taylor**, [1990] 3 S.C.R. 892 at 931, Book of Authorities of the Interveners, Tab 5.*

48. It is submitted that a purposive approach to the remedy issue in this cases, would seek to prevent future discrimination by ensuring that "effective communication" occurs between Deaf patients and their health care providers and yet would leave the respondent with the flexibility necessary to fashion a response which is suited to the circumstances. Rather than reading out or into a particular piece of legislation, it is submitted that a declaration is the appropriate remedy in this case.

> ***Mahe v. Alberta**, [1990] 1 S.C.R. 342 at pp. 392 - 393*

Kent Roach, Constitutional Remedies in Canada, Canada Law Book: 1995 at pp. 12, 340 - 480, Book of Authorities of the Interveners, Tab 32.

PART IV - NATURE OF THE ORDER SOUGHT

49. The interveners request that the appeal be allowed and that the decision of the British Columbia Court of Appeal be overturned. Further, the interveners ask the Court for the following:

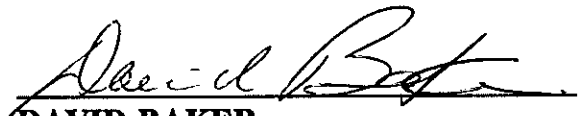
(a) a declaration that the appellants have been deprived by the respondents of their s. 15(1) right to equal benefit of medical services by reason of having been deprived of the means of effective communication with their health care providers, and that this violation of s. 15(1) is not a reasonable limit pursuant to s. 1 of the Charter; and

(b) a declaration that the respondents ensure the provision of the means of effective communication between Deaf patients and their health care providers as part of the province's health services insurance plan; and

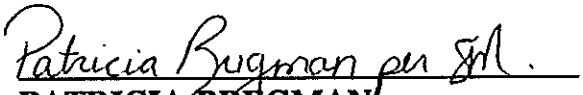
(c) such further and other relief as this Honourable Court deems just.

All of which is respectfully submitted on behalf of the interveners, the Canadian Association of the Deaf, The Canadian Hearing Society and the Council of Canadians with Disabilities.

Dated March 24, 1997 at Toronto, Ontario



DAVID BAKER



PATRICIA BREGMAN

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

PART V

TABLE OF AUTHORITIES

Cases:

Cases (Continued):

Pages

Statutes:

Other Material:

Pages

Judge Rosalie S. Abella, Access to Legal Services by the Disabled Queen's Printer for Ontario: 1983 . . . . . 9, 19

*Elizabeth Ellen Chilton, "**Ensuring Effective Communication: The Duty of Health Care Providers to Supply Sign Language Interpreters for Deaf Patients**", (1996) 47 Hastings L.J. 871* 8, 12

*Sy Dubow, "**Mental Health**", in Sy Dubow et al (eds.), **Legal Rights of Hearing Impaired People**, Gallaudet College Press: 1982* 8

*Harlan, Lane, **The Mask of Benevolence**, Vintage Books: 1993* 2

M. David Lepofsky, "A Report Card on the Charter's Guarantee of Equality to Persons with Disabilities - After Ten Years - What Progress? What Prospects?", N.J.C.L. (forthcoming) 17, 18

*Ellen Picard and Gerald Robertson, **Legal Liability of Doctors and Hospitals in Canada**, (3rd ed.) Carswells: 1996* 9

*Kent Roach, **Constitutional Remedies in Canada**, Canada Law Book: 1995* 20

*Oliver Sack, **Seeing Voices: A Journey into the World of the Deaf**, U. of Calif. Press: 1989* 1

*Karen Peltz Strauss, "**Doctor, Can You Check My Vital Signs?**", Gallaudet Today* 2, 12

***Provincial Review of Visual Language Interpreting Services, Intervention for Blind-Deaf Persons and Test-Based Services for Deaf and Hard of Hearing Services Summary Document**, Ministry of Colleges and Universities, April, 1992* 7

Court File No. 24896

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

B E T W E E N:

ROBIN SUSAN ELDRIDGE

Appellants
(Appellants)

-and-

JOHN HENRY WARREN AND LINDA JANE WARREN

Appellants
(Appellants)

-and-

ATTORNEY GENERAL OF BRITISH COLUMBIA

Respondent
(Respondent)

-and-

ATTORNEY GENERAL OF CANADA

Respondent
(Respondent)

-and-

MEDICAL SERVICES COMMISSION (B.C.)

Respondent
(Respondent)

AFFIDAVIT OF HENRY VLUG

I, Henry Vlug, of the City of Vancouver, **MAKE OATH AND SAY AS FOLLOWS:**

1. I am a past-president and current representative of the Canadian Association of the Deaf ("CAD") and as such have knowledge of the matters to which I hereinafter depose.

I - THE INTERVENTION

2. CAD seeks to intervene in this appeal together with the Canadian Hearing Society ("CHS") and the Council of Canadians with Disabilities ("CCD") because the appeal raises issues of fundamental importance to Deaf people.

3. If leave is granted to CAD, CHS and CCD will be jointly represented by legal counsel, will file a joint factum and present joint oral arguments.

4. Oral and written submissions will be made on the following issues:

(a) whether sign language interpretation is essential to the effective medical care of most Deaf people;

(b) whether the province of British Columbia's (the "province") failure to fund medical sign language interpretation services violates the s. 15(1) rights of Deaf people under the Canadian Charter of Rights and Freedoms ("Charter"); and

(c) whether the province's violation of the s. 15(1) rights of Deaf people can be justified under s. 1 of the Charter.

II - BACKGROUND AND INFORMATION ABOUT CAD

5. CAD was formed in 1940. It is the national advocacy organization of Canada's 260,000 profoundly Deaf citizens. CAD is committed to ensuring Deaf citizens get

the education employment and opportunities we need to be able to take responsibility for ourselves.

6. CAD is an umbrella organization which includes most organizations of Deaf people in the country. Deaf organizations at the local, provincial and regional levels have affiliated with CAD, ensuring it represents the views of the grass-roots Deaf population. Its Ontario affiliate, the Ontario Association of the Deaf (OAD) was established in 1886 and is one of the oldest continuously operating voluntary organizations in North America. CAD represents Canada's Deaf citizens at the World Federation of the Deaf.

7. CAD is governed by a Board of Directors. One director is elected to represent each province. In addition, up to four more may be selected for their special expertise. All directors must be Deaf citizens of Canada. Affiliated organizations vote on CAD's policies. Affiliated organizations must be composed of at least 51 per cent Deaf members and directors.

8. The activities of CAD include:

- providing consultation and information on Deaf needs and interests to the public, business, media, educators, governments and others;
- conducting research and collecting data regarding Deaf issues, issuing reports on these studies and providing expertise on them;
- assisting Deaf organizations and service agencies across the country; and
- maintaining and making available a major library and resource centre on deafness in the Ottawa office.

9. In order to fulfill its mandate to consult and inform on the needs and interests of Deaf people, CAD has produced a series of Position Papers about issues facing the Deaf community. Attached hereto and marked as Exhibits A, B, C, and D, are Papers on "Language", "Interpreting", "Health Care and Interpreting" and "Human Rights".

10. CAD or its affiliate, the Greater-Vancouver Association of the Deaf (GVAD), have initiated or intervened in a series of cases before the Canadian Radio-Television and Telecommunications Commission (CRTC) involving the communication rights of Deaf people.

11. In a case involving the issue of telephone set compatibility with hearing aids, CAD and several other groups jointly represented by the Advocacy Resource Centre for the Handicapped were successful before the CRTC. Telecom Decision CRTC 89-7 reversed the Commission's earlier decision that telephones did not require an inexpensive "flux coil" which permitted people with hearing aids to use them. It held that it was in the public interest that the Government legislate compliance of federally regulated telephone companies. In the interim, it amended the telephone Certification Standards issued by the Department of Communications.

12. In 1979, the Cable Parliamentary Channel (CPAC) began to provide sign language interpretation of Question Period in the House of Commons. Since that time, GVAD has filed complaints and intervened in several television license review applications before the CRTC seeking an order requiring broadcasters to "closed" caption a significant amount of their programming. By switching on the decoder

required by American law to be in each television set, a Deaf viewer can see a written transcript of the audio portion of captioned programs.

III - Deaf People as A Disadvantaged Minority

13. All studies of Deaf people have proven we are "normal" in every respect except that we cannot hear. Nevertheless, the history of Deafness is the history of Deaf people struggling to overcome the stigma, stereotyping and neglect to which they have been subjected by the rest of society. For centuries, Deaf people were considered to be beasts who were unworthy of rights or respect. Even today, there are many countries in which Deaf people are denied an education, or the right to own or inherit property, to vote or to marry.

14. Society has developed in a way that sets up barriers against the full participation and equality of Deaf people because of our different communication mode.

15. The formalization of signed communication into a language and the establishment of schools for the Deaf represented important breakthroughs. Finally, the skills and abilities of Deaf people began to be recognized. The Associations of the Deaf were established by the first alumni from these schools. At its second bi-annual convention in 1888, the members of the OAD were told by the province's Minister of Education, the Honourable Mr. Ross, that he was "surprised to see all the members so respectable and intelligent looking".

IV - DELAYS IN BRINGING THIS APPLICATION

16. The Canadian Disability Rights Council (CDRC), of which the CAD had been a member, was an intervenor in this cases in the courts below. Since the CDRC is no longer in operation, the CAD is concerned that the Deaf community and the broader disability community will not be represented when the case is argued before the Court.

17. CAD recognizes that the usual time for seeking leave to intervene has expired. Nevertheless, CAD seeks the indulgence of the Court to intervene at this stage, and CAD decided to seek leave to intervene on October 18, 1996. Thereafter, legal counsel was retained and communication with representatives of CCD and CHS commenced with a view to make a joint application for intervener status.

18. It is my understanding that the respondent has not yet filed its appeal materials. Furthermore, if leave to intervene is granted, I am of the belief that CAD, CHS and CCD are prepared to ensure that our joint factum will be delivered in accordance with the schedule ordered by this Court. Therefore, none of the parties or other intervenors will be prejudiced or inconvenienced by the extension of time required to bring this motion.

V - LEGAL ARGUMENT IF LEAVE TO INTERVENE IS GRANTED

19. If leave to intervene is granted, CAD, CHS and CCD will argue that:

(i) the Charter of Rights and Freedoms (the Charter) applies to the Provincial Legislature's funding of medical services for residents of British Columbia under the Medical and Health Care Services Act, S.B.C. 1992, c.76 and the Hospital Insurance Act, R.S.B.C. 1979, c.180;

(ii) Deaf persons who require sign interpreters in order to have equal access to publicly funded medical services are a group which has experienced the stereotyping and prejudice so as to bring them within the class of persons this Court has stated is entitled to the protection of s.15(1) of the Charter;

(iii) the failure of the Government to provide interpreters for Deaf patients receiving publicly funded medical services is a denial of equal benefit of the law and discriminatory under s.15(1) of the Charter;

(iv) the violation of s.15(1) is not a reasonable limit pursuant to s.1 of the Charter.

VI - CONCLUSION

20. The CAD therefore requests that its application for leave to intervene be granted. The CAD will not seek any order as to costs, either in respect of this application, or its intervention in the appeal.

21. The CAD respectfully asks this Court for the opportunity to file a joint factum with CHS and CCD, not exceeding 20 pages in length, and to jointly address the Court in oral intervention in this appeal.

22. I make this affidavit in support of CAD's motion for leave to intervene, and for no other purpose.

SWORN before me at)
the City of Vancouver in the)
of)
on December , 1996.)

HENRY VLUG

A Commissioner for taking Affidavits

This is Exhibit A referred to in the affidavit of Henry Vlug sworn before me, this day of 19

A COMMISSIONER, ETC.

LANGUAGE

The issue: **Dozens of manual-gestural "languages" and sign systems are in use in North America, particularly in the schools for the Deaf.**

The CAD's position: **The Sign Languages of the Deaf are the only true Sign Languages and must be given the same status and respect as any other legitimate language.**

The natural language of Deaf people is Sign Language. In Canada there are three legitimate Sign Languages: American Sign Language (ASL), la Langue des Signes du Quebec (LSQ), and Maritimes Sign Language (MSL). The capitalized term "Sign Language" refers only to these and to the true Deaf languages of other countries (British Sign Language, French Sign Language, etc.)

These Sign Languages have been recognized internationally as legitimate languages with their own grammar, syntax, and vocabulary. In the United States, ASL is the third most widely-used language after English and Spanish. A number of Canadian provinces have formally recognized Sign Language as the language of Deaf people and as a language of instruction in the Deaf schools.

Several varieties of sign systems (pseudo sign "languages") have been developed by hearing people, such as Seeing Exact English, Signed English, Cued Speech, Manually Coded English, and others. These are systems rather than languages because they were artificially invented instead of naturally developed. They are pseudo-"languages" and sign systems in that they deform the true Sign Language in order to make it conform to the grammar and syntax of a verbal language (English or French). The Canadian Association of the Deaf considers such sign systems to be a form of cultural oppression.

Another "invention" which has been used widely in schools for the Deaf in North America is Total Communication. This is not a language; it is a philosophy or theory of learning. It advocates using any and all methods for teaching children who are deaf: Sign Language, sign systems, speech, lipreading, hearing aids, etc. The principle behind Total Communication is to use whatever method best meets the needs and abilities of the deaf child. In practice, however, the method actually used tends to be chosen to meet the teachers' personal needs which are guided by their own preferences and skills. Since most teachers in Deaf schools are hearing, they naturally tend to prefer oral-based methods instead of Sign Language. Therefore the Canadian Association of the Deaf considers Total Communication to be simply another oral method, and does not support it.

The Canadian Association of the Deaf advocates the concept of using whatever method best meets the needs and abilities of the deaf child. We believe that the best method for prelingually deaf and early-deafened children is Sign Language, their natural language and the one they learn most easily, comfortably, and naturally. We insist that qualified Deaf teachers must be hired to teach Sign Language, just as qualified Francophones are almost always hired to teach the French language in regular schools.

The Sign Languages of Deaf people are true languages and must be given the same status and respect as any other language.

APPROVED: 2ND JULY 1994

FOR FURTHER INFORMATION CONTACT:
The Canadian Association of the Deaf
205 - 2435 Holly Lane
Ottawa, Ontario
K1V 7P2
(613)526-4785 V/TTY
(613)526-4718 Fax

This is Exhibit B referred to in the
affidavit of Henry Vlug
sworn before me, this
day of ..... 19.....

A COMMISSIONER, ETC.

INTERPRETING

The Issue: **There is a lack of interpreters and a lack of understanding of their role.**

The CAD's position: **Qualified professional interpreting is a right that assists hearing people in communicating with Deaf people.**

Most Deaf Canadians use English or French as their second language after Sign Language. Most hearing Canadians cannot use Sign Language as their second or third language after English and/or French. Interpreters help hearing people overcome their language barrier in order to communicate with Deaf people.

The Canadian Association of the Deaf considers it appropriate for hearing people to provide the services of a qualified interpreter in any circumstances involving communication with Deaf people. This is a human right to communication as well as simply good sense in ensuring that both the hearing and the Deaf person clearly understand the information being communicated.

The Canadian Association of the Deaf supports the use only of qualified professional interpreters and members of the Association of Visual Language Interpreters of Canada (AVLIC). We do not consider family, friends, acquaintances, social workers, teachers, ministers, or other so-called "experts" to be either qualified or professional interpreters (unless, of course, they actually are AVLIC-certified interpreters as a second job). In situations of high importance, such as legal cases or academic examinations, we particularly insist upon the use only of interpreters whose skills have been certified under the Canadian Evaluation System (CES).

There are a number of weaknesses in the interpreting field which concern the Canadian Association of the Deaf. These include: not enough interpreters (particularly well-qualified ones) to meet the demand for their services; too few training programs, some of which have rather low standards for passing students; and insufficient funding for interpreter services, which causes many requests for their services to be turned down for financial reasons. If access and equality are to mean anything for Deaf people, these problems must be given higher priority than they have received so far from federal and provincial governments and by other funding bodies.

We support the right of Deaf people to reject the services of interpreters they consider incompetent or incompatible, and to demand specific interpreters with whom they are comfortable. In a similar vein, the Deaf person has the right to determine which language will be used by the interpreter (ASL/LSQ, pseudo sign languages, sign systems, Sign with or without oral interpreting, etc.); the interpreter does not have the right to force an unwanted form of language upon the Deaf person.

We urge the further development, recognition, training, and use of Deaf relay interpreters to assist both the hearing interpreter and the Deaf person in ensuring full understanding and communication. We also urge greater recognition and use of Deaf Culture intervenors, who must

be Deaf persons capable of adapting information to make it comprehensible and accurate within the norms and values of the Deaf Culture. The life-or-death importance of their role is dramatically illustrated by the story (reprinted in *Deaf Life* magazine, May 1994) of a Deaf man who was told by his doctor that he was HIV positive. Since a Deaf Culture intervenor was not provided to place this information within a Deaf context, the man understood the "positive" to mean he was free of disease, and he proceeded to have unprotected sex with several other people. A Deaf Culture intervenor could have prevented this unfortunate and fatal misunderstanding.

Interpreters are bound by the Code of Ethics adopted by the Association of Visual Language Interpreters of Canada (AVLIC) and are expected to maintain confidentiality as well as professional decorum and standards.

Interpreters, excepting only Deaf interpreters and Deaf intervenors, are not to be considered experts or consultants on Deaf issues. They simply provide their skills in communication facilitation between the Deaf and the hearing. Expertise on Deaf issues and Deaf Culture can be provided only by the Deaf themselves.

Interpreting, as a profession, is very young, having been developed only over the last quarter of the twentieth century.

The Canadian Association of the Deaf and the Deaf people of Canada greatly value interpreters and enjoy a mutually supportive and enriching relationship with them.

APPROVED: 2ND JULY 1994

FOR FURTHER INFORMATION CONTACT:
The Canadian Association of the Deaf
205 - 2435 Holly Lane
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35

This is Exhibit C referred to in the affidavit of Henry Klug sworn before me, this ... day of ... 19 ...

A COMMISSIONER, ETC.

HEALTH CARE AND MEDICAL INTERPRETING

The Issue: **Deaf people are being denied Sign Language interpreters for medical appointments and treatments. Deaf people are still being misdiagnosed as having other disabilities, including mental incompetence, when in fact they are merely Deaf.**

The CAD's position: **Interpreting must be guaranteed for Deaf medical needs, regardless of where the funding eventually comes from. Deaf people should not be diagnosed as incompetent without being provided with appropriate communication services and without being assessed by Deaf experts sensitive to Deaf culture and norms.**

The Canadian health care system is one of the best in the world. For the most part, it succeeds in providing the best possible medical attention for all people regardless of their social or financial circumstances. However, funding cutbacks and the trend towards decentralizing health care have placed the principles of the Canadian health care system in jeopardy.

Most provinces and hospitals are refusing to fund or provide Sign Language interpreters for Deaf clients and patients. As a result, Deaf people's lives are being placed in great danger and they are being subjected to tremendous stress in not being able to understand what might be wrong with their health.

The Canadian Charter of Rights prohibits discrimination of services such as health care on the basis of disability. Refusal to provide vital interpreting services in medical situations is clearly a violation of this right.

The Canadian Association of the Deaf is aware of cases of life-threatening situations in which Deaf people were refused interpreting services; when inquiries were made, the federal government, the provincial government, the municipal government, the hospitals and the medical personnel all "passed the buck" and essentially refused to accept responsibility. The Canadian Association of the Deaf considers this "buck-passing" to be a violation of the principles of the health care system. The priority for medical services should be to immediately provide the service -- in this case, interpreting -- and argue over the funding elsewhere. Lives are at risk, and Deaf lives are no less valuable than hearing lives.

The failure to respond appropriately to the communication needs of Deaf people extends to other elements of health care. Deaf people are still routinely misdiagnosed as mentally disabled, autistic, suffering behavioral problems, or "lacking in language skills" when the truth is that they have not been provided with appropriate means through which to communicate with medical personnel. The almost total lack of Deaf people in medical positions (there is only one Deaf doctor in the country) makes this problem worse.

Where a Deaf person is assessed as incompetent, he/she is very unlikely to be consulted as to treatment, and equally unlikely to be provided with treatment and information in a format he/she can understand, i.e. with the assistance of certified Sign Language interpreters, or in written English or French appropriate to their level of skill in that language.

The Canadian Association of the Deaf recommends that:

1.Hospitals and medical personnel be required to provide certified qualified Sign Language interpreters to assist in communications during all consultations and treatments with Deaf persons unless specifically declined by the Deaf individual;

2.Both the federal and the provincial governments must ensure that adequate funding will be provided for medical interpreting services;

3.All hospitals must acquire a minimum quantity of appropriate devices for loan to Deaf patients including TTYs, flashing alarms, and caption decoders;

4.No Deaf person should be assessed without first being provided with qualified communication services such as Sign Language interpreting, as well as objective assessment by an expert in Deaf cultural and behavioral norms;

5. Health care and treatment programs designed specifically for Deaf clients (such as Toronto's-CONNECT Consulting Services) must be established in all provinces with guaranteed-operational funding provided by all government;

6. Deaf Awareness training and information courses must mandatory in all medical schools and training facilities; the courses must be designed-and taught by Deaf persons;

7. Every effort must be made by governments, schools, universities, and medical associations to encourage or recruit Deaf medical trainees and students, and to adapt their curricula to ensure the full participation of such students and trainees.

APPROVED: 2ND JULY 1994

FOR FURTHER INFORMATION CONTACT:
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205 - 2435 Holly Lane
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This is Exhibit D referred to in the affidavit of Henry Klug sworn before me this day of 19

A COMMISSIONER, ETC.

HUMAN RIGHTS

The Issue: **The human rights of Deaf people are still routinely violated in virtually all countries including Canada.**

The CAD's position: **Deaf people have the same rights as hearing people; violations cannot be tolerated.**

The history of the Deaf is a history of human rights abuses. Even before the time of Ancient Greece, Deaf people were considered beasts incapable of reason and unworthy of rights or respect. It was not until the 13th century that Deaf people were allowed to marry in the Western world. Today, most Third World countries still forbid Deaf people to be educated, to own or inherit property, to vote, and to marry. The Sign Language of the Deaf is still banned from the schools of many countries, even some schools in Canada and the United States.

All studies of Deaf people in the late twentieth century --linguistic, mental, psychological, physiological, and so on -- have proven that Deaf people are "normal" in every respect except that they cannot hear. Inability to hear does not justify violations of a person's basic human rights.

Any human right that applies to the general populace must also apply to Deaf people. These include: the right to food, clothing and shelter; the right to dignity and respect; the right to quality education to the highest level desired; the right to communication and information; the right to freedom and justice; and the right to equality and access.

Society has developed in a way that sets up barriers against the full participation and equality of Deaf people on the basis of their different communication mode. The onus is on society to remove those barriers. These include, but are not limited to: captioning and/or interpretation of broadcast information and entertainment; technical and human assistance to access telecommunication services and systems; education provided in the most enabling environment and in the language best suited to the Deaf persons's needs, skills, and preferences; the provision of devices required for the safety and comfort of Deaf people (including visual signal devices); acceptance, respect, and understanding of the different needs, language, behaviour and values of Deaf people;and equal opportunity for employment.

These and similar rights are protected in Canada by the Canadian Charter of Rights and Freedoms and by human rights legislation both federally and provincially.

The Canadian Association of the Deaf is aware that in Canada most violations of the human rights of Deaf people are not deliberate and intentional but result from systemic discrimination, inappropriate priorities, and plain ignorance. The consequences; however, are the same: discrimination against Deaf people on the basis of their deafness. The "unintentional" nature of the discriminatory act does not justify it.

Deaf people are human beings and have the same "right to rights" as anyone else.

APPROVED: 2ND JULY 1994

FOR FURTHER INFORMATION CONTACT:
The Canadian Association of the Deaf
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(613)526-4718 Fax

1. I am the Assistant Executive Director for the Canadian Hearing Society ("CHS") and as such have knowledge of the matters to which I hereinafter depose.

I THE INTERVENTION

2. CHS seeks to intervene in this appeal, together with the Canadian Association for the Deaf ("CAD") and the Council for Canadians with Disabilities ("CCD") because the appeal raises issues of national importance to Deaf people. If leave is granted, CAD, CHS and CCD will have joint legal counsel, file a joint factum, and make a joint oral argument.

3. Oral and written submissions will be made on the following issues:

(a) whether sign language interpretation is essential to the effective medical care of most Deaf people;

(b) whether the province of British Columbia's (the "province") failure to fund medical sign language interpretation services violates the s. 15(1) rights of Deaf people under the Canadian Charter of Rights and Freedoms ("Charter"); and

(c) whether the province's violation of the s. 15(1) rights of Deaf people can be justified under s. 1 of the Charter.

II. BACKGROUND AND INFORMATION ABOUT CHS

4. CHS was founded in 1940. According to its mission statement, the organization seeks to provide services that enhance the independence of Deaf, deafened and hard of hearing people, and encourage prevention of hearing loss. To this end, CHS provides direct services to Deaf, deafened and hard of hearing people, advocates their interests; and promotes their rights. This mission is carried out in accordance with principles that have been set out by the Board of Directors. The

CHS strives to develop high quality and cost effective services in consultation with national, provincial, regional and local consumer groups and individuals. The CHS's mission statement and principles are provided from a document entitled "Organization and Funding Data 1996/97", the relevant portion of which is attached hereto and marked as Exhibit "A" to my Affidavit.

5. CHS consists of its head office in Toronto, 12 regional branches and 11 sub/area offices. CHS is administered by a Board of Directors composed of 12 regional representatives and 18 "members-at-large". The regional Directors represent local boards each comprised of at least 6 members, 1/3 of which must be Deaf, deafened or hard of hearing. The "members-at-large" include representatives from consumer groups, professions, or the community at large, at least 1/3 of which must be Deaf, deafened or hard of hearing. CHS annually serves approximately 73,800 clients. In addition, CHS produces the Magazine Vibes which it delivers to approximately 5,000 members.

6. Two services that CHS provides, which would be of particular relevance to the matters before the Court, are the Ontario Interpreter Services ("OIS") and Sign Language Services ("SLS"). OIS provides American Sign Language ("ASL")/English interpreter service for essential services out of the 12 regional offices and three of the sub-offices. SLS provides standardized curriculum for ASL classes. In addition, the CHS operates a specialized mental health service for Deaf persons called "Connect". Connect is fully funded by the Ontario Ministry of Health.

7. In a case involving the issue of telephone set compatibility with hearing aids, CHS and several other groups jointly represented by the Advocacy Resource Centre for the Handicapped were successful before the CRTC. Telecom Decision CRTC

89-7 reversed the Commission's earlier decision that telephones did not require an inexpensive "flux coil" which permitted people with hearing aids to use them. It held that it was in the public interest that the Government legislate compliance of federally regulated telephone companies. In the interim, it amended the telephone Certification Standards issued by the Department of Communications.

8. The CHS together with 9 other disability organizations launched 9 complaints alleging systemic discrimination in employment under the Canadian Human Rights Act. Two of these complaints were resolved with a settlement. The remainder are ongoing.

9. In 1986, CHS applied to the CRTC for an order requiring Bell Canada to provide a 24 hour, 7 day-per-week TDD message relay service ("MRS") in Ontario and Quebec. The CRTC granted CHS's application and the MRS commenced operation in May 1987. The service enables Deaf persons using a telecommunications device for the deaf to communicate with a hearing person using a regular telephone through an operator.

III DEAF PEOPLE DISADVANTAGED IN HEALTH CARE SYSTEM

10. As a service provider, CHS learned of the major obstacles faced by Deaf persons in the health care system. There is only one deaf doctor in the country, so virtually all care is provided by hearing professionals. Since few of them can communicate using sign language, major difficulties can arise.

11. Interpreter services for Deaf people require the actual physical presence of an interpreter with the doctor and the patient . In this sense interpreter services for the deaf differ from language interpretation which can be provided on the telephone.

AT & T offers a language interpretation service which provides 24 hour a day, 7 day a week service in over 140 languages. Unfortunately, it is not yet possible to provide sign language interpretation for the Deaf in a comparably cost effective way.

12. The OIS interpreter service of the CHS is funded by the Ontario government. It provides medical sign interpretation free of charge to Deaf persons receiving medical care from doctors. It is also made free of charge to Deaf patients in hospital, whether or not hospitals agree to reimburse OIS.

13. CHS took a particular interest in mental health because our experience and the medical literature clearly demonstrated the harm which could result from miscommunication, including: misdiagnosis, inappropriate involuntary admissions to psychiatric facilities and compounding pre-existing mental health problems.

14. CHS together with other voluntary organizations serving the Deaf community worked to establish the Deafness Clinic at the Clarke Institute for Psychiatry in Toronto. More recently, with funding from the Ontario Ministry of Health, we established a specialized mental health service called "Connect". Services, including interpreter services, are available to Deaf people living in Metropolitan Toronto free of charge. Its mandate is to make generic mental health services accessible to Deaf patients.

IV DELAYS IN BRINGING THIS APPLICATION

15. The Canadian Disability Rights Council (CDRC), of which the CHS had been a member, was an intervenor in this case in the courts below. Since the CDRC is no longer in operation, the CHS is concerned that the Deaf community and the broader disability community will not be represented when the case is argued before the Court.

16. CHS recognizes that the usual time for seeking leave to intervene has expired. Nevertheless, CHS seeks the indulgence of the Court to intervene at this stage, and CHS decided to seek leave to intervene on September 10, 1996. Thereafter, legal counsel was retained and communication with CCD and CAD commenced with a view to make a joint application for intervener status.

17. It is my understanding that the respondent has not yet filed its appeal materials. Furthermore, if leave to intervene is granted, I am of the belief that CAD, CHS and CCD are prepared to ensure that our joint factum will be delivered in accordance with the schedule ordered by this Court. Therefore, none of the parties or other intervenors will be prejudiced or inconvenienced by the extension of time required to bring this motion.

V LEGAL ARGUMENT IF LEAVE IS GRANTED

18. If leave to intervene is granted, CAD, CHS and CCD will argue that:

(i) the Charter of Rights and Freedoms (the Charter) applies to the Provincial Legislature's funding of medical services for residents of British Columbia under the Medical and Health Care Services Act, S.B.C. 1992, c.76 and the Hospital Insurance Act, R.S.B.C. 1979, c.180;

(ii) Deaf persons who require sign interpreters in order to have equal access to publicly funded medical services are a group which has experienced the stereotyping and prejudice so as to bring them within the class of persons this Court has stated is entitled to the protection of s.15(1) of the Charter;

(iii) the failure of the Government to provide interpreters for Deaf patients receiving publicly funded medical services is a denial of equal benefit of the law and discriminatory under s.15(1) of the Charter;

(iv) the violation of s.15(1) is not a reasonable limit pursuant to s.1 of the Charter.

VI CONCLUSION

19. The CHS therefore requests that its application for leave to intervene be granted. The CHS will not seek any order as to costs, either in respect of this application, or its intervention in the appeal.

20. The CHS respectfully asks this Court for the opportunity to file a joint factum with CAD and CCD, not exceeding 20 pages in length, and to jointly address the Court in oral intervention in this appeal.

21. I make this affidavit in support of CHS's motion for leave to intervene, and for no other purpose.

SWORN before me at)
the City of Toronto, in the)
Municipality of Metropolitan Toronto)
on December 20 , 1996.)

Iris Boshes

Iris Boshes

David Baker

A Commissioner for taking Affidavits

Appendix "A"

THE CANADIAN HEARING SOCIETY

Organization and Funding Data 1996/97

A
Iris Bosko
30 Jan
December 1996
Donald Baker
etc.

contents:

REVISED NOVEMBER 1996

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THE CANADIAN HEARING SOCIETY

Organization Profile and Fact Sheet - 1996/97

INCORPORATED in 1940 to impartially serve and support deaf, deafened and hard of hearing people, parents of deaf and hard of hearing children, and to educate the hearing public.

- Board of Directors composed of 12 regional representatives and 18 "members at large" (i.e. representatives from consumer groups, professions or the community at large). Six members of the executive committee can be elected from within that number.
- Of the "members at large", at least 1/3 must be deaf, deafened or hard of hearing.
- Commitment to consumer involvement in new initiatives, program development and evaluation.

Headquarters in Toronto, (12 regional branches and 11 sub/area offices)

- 75 staff at head office
- 171 staff in other locations including Toronto region

Services in province of Ontario only:

- Access services for part-time students
- American Sign Language (ASL) classes and teacher training
- Audiology and Speech Language Pathology
- Employment and Vocational Rehabilitation Services
- French Language Services
- General Social Services Counselling
- Hearing Aid Program
- Hearing Help Classes
- Home Support Services to seniors with hearing loss
- Interpreter Services (sign and oral)
- Language and Life Skills training
- Management training for deaf, deafened and hard of hearing people
- Mental health services
- Noise education
- Technical Devices Program

Services in Ontario and throughout Canada:

- Support of consumer groups in advocacy
- Consultation and training
- Mail order assistive devices and educational materials
- Public education and multilingual information

1996/97 budget of $15.45 million is funded by:

38.25%	Ontario government service contracts
32.49%	Non-profit based product sales programs
10.69%	United Ways
6.74%	Fundraising
3.69%	CHSF, Sertoma Foundation and other donors
2.69%	Federal and municipal grants
2.27%	Miscellaneous income
1.70%	Service fees
1.48%	Trillium Foundation

THE CANADIAN HEARING SOCIETY

Mission Statement

The Canadian Hearing Society provides services that enhance the independence of deaf, deafened and hard of hearing people, and encourage prevention of hearing loss.

Principles of Service

We will strive to develop high quality and cost-effective services in consultation with national, provincial, regional and local consumer groups and individuals.

In addition, we value the right to freedom of choice and self-identification by persons who are deaf, deafened, or hard of hearing and respond with professionalism and sensitivity towards their individual issues, cultural identity and values.

To achieve our purpose, The Canadian Hearing Society (CHS) works to ensure:

Accessibility	Deaf, deafened and hard of hearing people should have equal and equitable access to all aspects of life including employment, education, recreation, housing and social services. Similarly, CHS services should be accessible to the multicultural community it serves.
Advocacy	CHS is committed to promoting the rights of deaf, deafened, and hard of hearing people.
Awareness	CHS should provide individuals and community organizations with as much knowledge as possible to promote informed decision-making and program development. This includes information about hearing health care, Deaf culture and issues relevant to the deaf, deafened and hard of hearing communities, etc.
Consumer Involvement	Deaf, deafened and hard of hearing people should be involved in the planning and decision-making processes for all services relevant to their lives.
Independence	CHS services support deaf, deafened and hard of hearing people in achieving individual, maximum independence and facilitating self-help.
Respect	CHS is committed to respecting the variety of perspectives and cultural outlooks of all deaf, deafened and hard of hearing individuals.
Service Options	CHS encourages the availability of service options so that deaf, deafened and hard of hearing individuals and their families can select the program best suited to their needs.
Quality Services	CHS is committed to providing its services to an optimum level.
Employment Equity	Consistent with its ambition to advocate full access for deaf, deafened and hard of hearing persons and to reflect the racial and ethnic diversity at large, CHS is committed to internal employment equity.

THE CANADIAN HEARING SOCIETY

Summary of Programs and Activities Supported by CHS

CHS supports the aims of deaf, deafened and hard of hearing consumers with a wide variety of services and activities. Some of these are provided throughout the province, while others are confined to certain regions because of an isolated need or scarce resources. Some of the most common activities in which CHS is currently involved are:

Audiology	assessing auditory system function and nonmedically managing persons with auditory and related communicative difficulties.
CHS Equity Training Program (CET)	training to provide deaf, deafened and hard of hearing individuals with education, skills and hands-on experience to ready them for future management positions.
CONNECT Services	providing specialized mental health and counselling services for deaf, deafened and hard of hearing people and their families.
Educational Support Services (ESS)	providing part-time students who are deaf, deafened or hard of hearing with the support services they require to take credit courses at post-secondary institutions in Ontario.
Employment Services	working with deaf, deafened and hard of hearing individuals to enable them to access employment opportunities.
General Social Services	providing personal counselling in a variety of areas for deaf, deafened and hard of hearing individuals.
Hearing Aid Program	dispensing, fitting, repairing and maintaining hearing aids; offering advice and making referrals.
Hearing Care Counselling	providing at home assistance in hearing health care services to older (55 years and up) people with a hearing loss.
Information Services	raising consumer and public awareness of issues related to deafness and hearing loss.
- Advocacy	providing information to government and to the public in support of projects that promote the rights of deaf, deafened and hard of hearing individuals.
- Community Development	working with consumers and the community to improve services available to deaf, deafened and hard of hearing individuals.
Interpreter Services (OIS)	providing access to Visual Language interpreters.
Life Skills and Literacy	training individuals with limited language abilities in areas of literacy and life skills.
Sign Language Services	co-ordinating ASL classes and training Sign Language Instructors.
Speech Language Pathology	providing assessment, training and support for communication improvement to deaf, deafened and hard-of-hearing persons with speech and language difficulties (perception and expression).
Technical Devices	marketing devices which enable better communication for deaf, deafened and hard of hearing individuals.

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Court File No. 24896

ROBIN SUSAN ELDRIDGE, JOHN HENRY WARREN and LINDA JANE WARREN	-and-	ATTORNEY GENERAL OF BRITISH COLUMBIA ATTORNEY GENERAL OF CANADA and MEDICAL SERVICE COMMISSION
Applicant		Respondents

SUPREME COURT OF CANADA
Appeal from the Court of Appeal for the Province of British Columbia

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AFFIDAVIT OF IRIS BOSHES
SWORN DECEMBER 20, 1996

ADVOCACY RESOURCE CENTRE FOR THE HANDICAPPED
40 Orchard View Boulevard
Suite #255
Toronto, Ontario
M4R 1B9

Phone: (416) 482-8255
Fax: (416) 482-2981

David Baker
Solicitor for the Interveners

Court File No. 24896

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

B E T W E E N:

ROBIN SUSAN ELDRIDGE

Appellant
(Appellant)

-and-

JOHN HENRY WARREN AND LINDA JANE WARREN

Appellants
(Appellants)

-and-

ATTORNEY GENERAL OF BRITISH COLUMBIA

Respondent
(Respondent)

-and-

ATTORNEY GENERAL OF CANADA

Respondent
(Respondent)

-and-

MEDICAL SERVICES COMMISSION (B.C.)

Respondent
(Respondent)

AFFIDAVIT OF CATHERINE FRAZEE

I, CATHERINE FRAZEE of the City of Toronto, **MAKE OATH AND SAY AS FOLLOWS:**

1. I am a member of the Human Rights Committee and a representative of the Council for Canadians with Disabilities, ("CCD") and as such have knowledge of the matters to which I hereinafter depose.

I. THE INTERVENTION

2. CCD seeks to intervene in this appeal together with The Canadian Hearing Society ("CHS") and The Canadian Association of the Deaf ("CAD") because the appeal raises issues of national importance to persons with disabilities. If leave is granted, CCD, CHS and CAD will have joint legal counsel, file a joint factum and make a joint oral argument.

3. Oral and written submissions will be made on the following issues:

(a) whether sign language interpretation is essential to the effective medical care of most Deaf people;

(b) whether the province of British Columbia's (the "province") failure to fund medical sign language interpretation services violates the s. 15(1) rights of Deaf people under the Canadian Charter of Rights and Freedoms ("Charter"); and

(c) whether the province's violation of the s. 15(1) rights of Deaf people can be justified under s. 1 of the Charter.

II. BACKGROUND AND INFORMATION ABOUT CCD

4. CCD was formerly called the Coalition of Provincial Organizations of the Handicapped ("COPOH"). It was founded in 1976 and incorporated in 1978. The name change occurred on January 1, 1994. CCD remains a national, not-for-profit umbrella organization which represents people with a variety of disabilities.

5. CCD consists of 8 provincial member groups and 5 national disability organizations which in turn represent approximately 163 local organizations. CCD is accountable to a membership of several hundred thousand Canadians with disabilities. The member organizations of CCD are:

PROVINCIAL MEMBER GROUPS

- British Columbia Coalition of People with Disabilities

- Confederation des Organismes Provinciaux de Personnes Handicappes du Quebec (COPHAN)
- Consumer Organization of Disabled People of Newfoundland and Labrador
- Manitoba League for the Physically Handicapped (MLPH)
- Nova Scotia League for Equal Opportunities (LEO)
- P.E.I. Council of the Disabled
- The Alberta Committee of Citizens with Disabilities (ACCD)
- Saskatchewan Voice of People with Disabilities

NATIONAL DISABILITY ORGANIZATIONS

- Canadian Association of the Deaf
- DisAbled Women's Network-Canada (DAWN-Canada)
- National Network on Mental Health
- National Educational Association of Disabled Students
- Thalidomide Victims Association of Canada
- People First of Canada

6. CCD is administered by a Council of Representatives consisting of one designate from each member group plus a national chairperson and two members at large.

7. CCD was established by people with disabilities to create a voice for disabled Canadians to promote full participation and equal opportunity of people with disabilities in Canadian society. CCD has the following specific mandate:

- to improve the status of persons with disabilities;
- to promote self-help for persons with disabilities;
- to provide a democratic structure for disabled persons to voice concerns;
- to monitor federal legislation affecting persons with disabilities;
- to promote policies determined by disabled persons in Canada;
- to share information and co-operate with disabled persons' organizations in Canada and in other countries; and
- to establish a positive image of disabled persons in Canada.