No. 24896

IN THE SUPREME COURT OF CANADA

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

BETWEEN:

ROBIN SUSAN ELDRIDGE, JOHN HENRY WARREN
and LINDA JANE WARREN

Appellants
(Plaintiffs)

- and -

ATTORNEY GENERAL OF BRITISH COLUMBIA
and MEDICAL SERVICE COMMISSION

Respondents
(Defendants)

- and -

ATTORNEY GENERAL OF CANADA

Intervenor

FACTUM OF THE ATTORNEY GENERAL OF CANADA

Lindsay M. Lyster
Heenan Blaikie
Barristers & Solicitors
600 - 1199 West Hastings Street
Vancouver, B.C.
V6E 3T5

Counsel for the Appellants

Nelligan Power
Barristers & Solicitors
1900 - 66 Slater Street
Ottawa, Ontario
K1P 5H1

Ottawa Agents for the Appellants

Harvey M. Groberman
Lisa J. Mrozinski
Ministry of Attorney General
Legal Services Branch
6th Floor, 1001 Douglas Street
Victoria, B.C.
V8V 1X4

Counsel for the Respondents

Burke-Robertson
Barristers & Solicitors
70 Gloucester Street
Ottawa, Ontario
K2P 0A2

Ottawa Agents for the Respondents

Judith Bowers, Q.C.
Simon Fothergill
Department of Justice, Canada
British Columbia/Yukon Region
900 - 840 Howe Street
Vancouver, B.C.
V6Z 2S9

Counsel for the Attorney General of Canada

Department of Justice, Canada
239 Wellington Street
Ottawa, Ontario
K1A 0H8

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PART I

STATEMENT OF FACTS

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

Appeal Reasons, Case on Appeal at 498-504.

2. The Attorney General of Canada was named as a Defendant in the trial proceedings, where the case was dismissed. The Attorney General of Canada did not participate in the appeal before the Court below.

3. On February 27, 1997 an extension of time was granted for the Attorney General of Canada to intervene in the proceedings before this Court.

PART II

ISSUES ON APPEAL

4. The Attorney General of Canada frames the issues on appeal in the manner set forth in the factum filed on behalf of the Respondent Province. The issues, together with the position of the Attorney General of Canada, are as follows:

A. Does the Appellants' challenge to the *Hospital Insurance Act* raise an issue that engages the *Charter*?

No.

B. If so, does the failure of the Respondent Province to compel hospitals to provide medical interpreting services free of charge to deaf patients infringe s. 15 of the *Charter*?

In some circumstances, yes.

C. Does the failure of the Respondent Province to include medical interpreting services for deaf patients as a benefit under the *Medicare Protection Act* infringe s. 15 of the *Charter*?

In some circumstances, yes.

D. If there is an infringement of s. 15 of the *Charter*, is the infringement demonstrably justified in a free and democratic society pursuant to s. 1 of the *Charter*?

Yes.

E. If there is a finding of a *Charter* violation, which is the appropriate remedy?

A declaration of unconstitutionality, with the declaration suspended for a period of time to allow the Respondent Province to address issues of policy and cost.

PART III

ARGUMENT

5. With respect to the first issue on appeal, the Appellants' challenge to the *Hospital Insurance Act* does not raise an issue that engages the *Charter*. The Attorney General of Canada adopts the argument set forth at paragraphs 39 to 45 of the factum filed on behalf of the Respondent Province.

6. With respect to the second issue on appeal, if the Appellants' challenge to the *Hospital Insurance Act* does raise an issue that engages the *Charter*, then for the reasons stated below, in some circumstances the failure of the Respondent Province to compel hospitals to provide medical interpreting services free of charge to deaf patients infringes s. 15 of the *Charter*. However, the infringement is a reasonable limit prescribed by law which can be demonstrably justified in a free and democratic society pursuant to s. 1 of the *Charter*.

C. Does the failure of the Respondent Province to include medical interpreting services for deaf patients as a benefit under the *Medicare Protection Act* infringe s. 15 of the *Charter*?

7. In some circumstances, the failure of the Respondent Province to include medical interpreting services for deaf patients as a benefit under the *Medicare Protection Act* infringes s. 15 of the *Charter*.

8. The *Medicare Protection Act* (formerly the *Medical and Health Care Services Act*) and its administration provide that those who qualify as beneficiaries shall not be charged by their doctors for those services which are defined as benefits under the plan. The *Medicare Protection Act* defines "benefits" as follows:

"benefits" means

(a) medically required services rendered by a medical practitioner who is enrolled under section 12, unless the services are determined under section 4 by the commission not to be benefits,

(b) required services prescribed as benefits under section 45 and rendered by a health care practitioner who is enrolled under section 12, or

(c) medically required services performed in accordance with protocols agreed to by the commission, or on order of the referring practitioner, who is a member of a prescribed category of practitioner, in an approved diagnostic facility by, or under the supervision of, a medical practitioner who has been enrolled under section 12, unless the services are determined under section 4 by the commission not to be benefits.

Medicare Protection Act, S.B.C. 1992, c. 76, s. 1.

9. The *Charter* provides in s. 15(1):

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, enacted by the *Canada Act 1982* (U.K.), c. 11.

10. While there has not been unanimity in the judgments of this Court with respect to all the principles relating to the application of s. 15 of the *Charter*, there is general agreement that before a violation of s. 15 can be found, the claimant must establish that the impugned law creates a distinction on a prohibited or analogous ground which withholds an advantage or benefit from, or imposes a disadvantage or burden on, the claimant.

Eaton v. *Brant County Board of Education*, unreported, February 6, 1997, Supreme Court of Canada File No. 24668 (*per* Sopinka J.) at paragraph 62.

11. In *Miron* v. *Trudel*, [1995] 2 S.C.R. 418, McLachlin J. stated at page 485:

> The analysis under s. 15(1) involves two steps. First, the claimant must show a denial of "equal protection" or "equal benefit" of the law, as compared with some other person. Second, the claimant must show that the denial constitutes discrimination. At this second stage, in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s. 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics. If the claimant meets the onus under this analysis, violation of s. 15(1) is established. The onus then shifts to the party seeking to uphold the law, usually the state, to justify the discrimination as "demonstrably justified in a free and democratic society" under s. 1 of the *Charter*.

12. In *Egan* v. *Canada*, [1995] 2 S.C.R. 513, Cory and Iacobucci JJ. approached s. 15 as follows (at page 584):

> The first step is to determine whether, due to a distinction created by the questioned law, a claimant's right to equality before the law, equality under the law, equal protection of the law or equal benefit of the law has been denied. During this first step, the inquiry should focus upon whether the challenged law has drawn a distinction between the claimant and others, based on personal characteristics.
>
> Not every distinction created by legislation gives rise to discrimination. Therefore, the second step must be to determine whether the distinction created by the law results in discrimination. In order to make this determination, it is necessary to consider first, whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15(1) or which is analogous to those enumerated, and second, whether that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available to others.

Distinction based on Personal Characteristic

13. The first stage of the s. 15 analysis involves a determination of whether the impugned law establishes an inequality by drawing a distinction (intentionally or otherwise) between the Appellants and others, based upon a personal characteristic.

14. In recommending medical treatment a doctor must inform the patient about any material risks, and about any special or unusual risks, and must answer any questions posed by the patient about the risks involved. Corresponding duties requiring careful communication may arise in the course of medical examination and diagnosis:

> It is now undoubted that the relationship between surgeon and patient gives rise to a duty of the surgeon to make disclosure to the patient of what I would call all material risks attending the surgery which is recommended. The scope of the duty of disclosure was considered in *Hopp* v. *Lepp*, [[1980] 2 S.C.R. 192] at p. 210, where it was generalized as follows:
>
> > In summary, the decided cases appear to indicate that, in obtaining the consent of a patient for the performance upon him of a surgical operation, a surgeon, generally, should answer any specific questions posed by the patient as to the risks involved and should, without being questioned, disclose to him the nature of the proposed operation, its gravity, and any material risks attendant upon the performance of the operation. However, having said that, it should be added that the scope of the duty of disclosure, and whether or not it has been breached are matters which must be decided in relation to the circumstances of each particular case.
>
> *Reibl* v. *Hughes*, [1980] 2 S.C.R. 880 at 884.

15. In situations where full and effective communication is required in order to discharge a doctor's professional obligations, the provision of medical interpreting services for deaf patients is necessarily incidental to the provision of medically required services.

16. The majority in the Court below did not reject the proposition that, in some circumstances, the failure to include interpreting services for deaf patients as a benefit may constitute a breach of s. 15. Instead, the majority found that the evidence had failed to establish that, because of their hearing impairment, for all practical purposes deaf patients are denied the medical services available to the hearing.

Appeal Reasons, Hollinrake J.A., Case on Appeal at 514.

17. In *Egan* v. *Canada*, *supra* at 531, La Forest J. stated at page 531:

> ... the respondent contends that the appellants have suffered no prejudice ... I would simply dispose of this argument on the ground that, while this may be true in this specific instance, there is nothing to show that this is generally the case with [those who share the personal characteristic in question], which is the point the respondent must establish.

18. If the Court is satisfied that the impugned law has an adverse effect upon some deaf people in some circumstances, then it should not be concerned if the effect is not felt by all deaf people in all circumstances. An adverse effect felt by a sub-group may still give rise to a breach of s. 15 of the *Charter*.

Symes v. *Canada*, [1993] 4 S.C.R. 695 at 769;
Janzen v. *Platy Enterprises*, [1989] 1 S.C.R. 1252 at 1288-1289;
Brooks v. *Canada Safeway*, [1989] 1 S.C.R. 1219 at 1247.

19. In circumstances where full and effective communication is required in order to discharge a doctor's professional obligations, the failure of the Province to include medical interpreting services for deaf patients as a benefit under the *Medicare Protection Act* amounts to a failure to offer medically required services as a benefit to deaf people. In those circumstances, the *Medicare Protection Act* draws a distinction between deaf people and those who can hear.

Discrimination: Enumerated or Analogous Ground

20. The second stage of the inquiry is the determination whether the distinction can be said to result in "discrimination". In order to make this determination, it is necessary to consider first, whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15(1) or which is analogous to those enumerated.

21. Deafness, as a physical disability, is an enumerated ground under s. 15 of the *Charter.*

Discrimination: Limiting Access to Benefits

22. In *Eaton* v. *Brant County Board of Education*, *supra*, Sopinka J. observed as follows (at paragraphs 66 and 67):

> The principles that not every distinction on a prohibited ground will constitute discrimination and that, in general, distinction based on presumed rather than actual characteristics are the hallmarks of discrimination have particular significance when applied to physical or mental disability. Avoidance of discrimination on this ground will frequently require distinctions to be made taking into account the actual personal characteristics of disabled persons. In *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at p. 169, McIntyre J. stated that "the accommodation of differences ... is the true essence of equality". This emphasizes that the purpose of s. 15(1) 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 by exclusion from mainstream society as has been the case with disabled persons.
>
> The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this 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. 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. The discrimination inquiry which uses "the attribution of stereotypical characteristics" reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of the disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is the recognition of actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability.

23. Although the state does not have a positive obligation to ameliorate the position of groups within Canadian society who have suffered disadvantage, if the state elects to confer a benefit then it must be conferred without discrimination.

> *Native Women's Association of Canada* v. *Canada*, [1994] 3 S.C.R. 627 at 654-655;
>
> *Haig* v. *Canada*, [1993] 2 S.C.R. 995 at 1041-1042.

24. In circumstances where full and effective communication is required in order to discharge a doctor's professional obligations, the failure of the Province to include medical interpreting services for deaf patients as a benefit under the *Medicare Protection Act* denies deaf people coverage for those medical services which are defined as benefits under the plan. The treatment accorded to deaf people therefore limits their access to benefits and advantages available to others under the plan.

25. The Court below erred in holding that medical interpreting services for deaf patients are ancillary to medically required services as defined in the *Medicare Protection*

Act. In circumstances where full and effective communication is required in order to discharge a doctor's professional obligations, medical interpreting services for deaf patients are encompassed within the definition of medically required services.

26. As previously noted, avoidance of discrimination frequently requires distinctions to be made taking into account the actual personal characteristics of disabled persons. One purpose of s. 15(1) of the *Charter* is to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society, as has been the case with disabled persons.

27. In circumstances where full and effective communication is required in order to discharge a doctor's professional obligations, the failure of the Province to include medical interpreting services for deaf patients as a benefit under the *Medicare Protection Act* is *prima facie* contrary to s. 15 of the *Charter*.

D. If there is an infringement of s. 15 of the *Charter*, is the infringement demonstrably justified in a free and democratic society pursuant to s. 1 of the *Charter*?

28. The *Charter* provides in s. 1:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

29. In order to determine whether a limitation upon a right or freedom is justified under s. 1, the two central criteria identified in *R.* v. *Oakes*, [1986] 1 S.C.R. 103 must be considered. First, the objective of the limiting measure must be of sufficient importance to warrant overriding a protected right or freedom. Second, the means chosen to achieve the objective must be proportional, that is, the means must:

(a) be rationally connected to the objective;

(b) impair the right or freedom in question as little as possible; and

(c) be such that the deleterious effects do not outweigh the salutary effects and are proportional to the objective.

30. The application of the *Oakes* test requires that close attention be paid to the context in which the impugned legislation operates.

> *Ross* v. *New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at 872.

31. Where the legislation under consideration involves the balancing of competing interests and matters of social policy, this Court has stated that the *Oakes* test should be applied flexibly, and not formally or mechanistically.

McKinney v. *University of Guelph*, [1990] 3 S.C.R. 229;
Irwin Toy Ltd. v. *Québec*, [1989] 1 S.C.R. 927;
Egan v. *Canada*, *supra* at 539, 540, 573-575.

Important Objective

32. The objectives of the *Medicare Protection Act* involve the funding and accessibility of medical care. But an analysis of the objectives of the *Medicare Protection Act* reveals a variety of interests. The Appellants suggest (at paragraph 109 of their factum) that the objective of the legislation is "to provide reasonable access to quality medical care to all British Columbians." (Emphasis added.) A laudable goal, but a goal which does not stand alone. For example, the preamble to the statute recognizes the need for "judicious use of medical service in order to maintain a fiscally sustainable health care system." (Emphasis added.) The Respondent Province (at paragraph 109 of its factum) says the "objective of the [*Medicare Protection Act*] can best be stated as being to fund a core of medical services." (Emphasis added.) The objective, it is suggested, of the *Medicare Protection Act* is to ensure reasonable access to medical care by maintaining a fiscally sustainable health care system.

33. Financial considerations alone certainly cannot justify *Charter* infringements. However, an infringement may be justified where the very purpose of the legislation is jeopardized without appropriate allocation of scarce resources. In other words, if the objective of providing reasonable access to health care is threatened by shrinking fiscal resources, an infringement of a *Charter* right may be justified. In *McKinney*, *supra*, this Court stated at page 288:

> These (university research facilities) have been acquired over the years by the expenditure of significant private and public funds and there is a need not only to encourage the best use that can be made of them but also to adopt policies to give access to as many as can benefit from, and contribute to, society by their use. The majority in *Irwin Toy* v. *Québec (Attorney General)*, *supra*, made it clear that the reconciliation of claims not only of

competing individuals or groups but also the proper distribution of scarce resources must be weighed in a s. 1 analysis.

Rational Connection

34. The Province is required to allocate limited public funds to satisfy an ever-increasing number of demands. To accomplish this, the legislative scheme provides that certain services will be funded and others will not. Restricting funding to services provided by physicians and other health care professionals is rationally connected to the objective of ensuring reasonable access to medical care by maintaining a fiscally sustainable health care system.

Minimal Impairment

35. In situations where there are competing interests, scarce resources, and no clear policy answer for the division of limited funding, the courts have recognized that deference must be shown to the choices of government. The question is whether government had a reasonable basis for concluding that the impugned legislation impaired the protected right as little as possible, given the important objective of the legislation.

McKinney v. *University of Guelph*, *supra* at 286, 304, 305, 313-315;
Irwin Toy v. *Québec*, *supra* at 993, 994.

36. It must be remembered that a cornerstone of our democratic system is that governments are chosen as representatives of the population. Parliaments and Legislatures, acting under an electoral mandate, are responsible for the expenditure of public funds. By necessity, this exercise of fiscal governance involves the difficult balancing of competing interests.

37. Funding decisions in the context of health care will have an impact on the *Charter* rights of some groups. To an extent, all health care funding decisions favour some

disadvantaged groups over others. The Supreme Court of Canada has recognized that governments may be required to choose between disadvantaged groups, and that such choices are legitimate and must be given appropriate judicial deference.

Tétreault-Gadoury v. *Canada*, [1991] 2 S.C.R. 22 at 43-44.

38. In *Egan* v. *Canada, supra*, Sopinka J. stated at page 572:

> I agree with the Attorney General of Canada that government be accorded some flexibility in extending social benefits and does not have to be pro-active in recognizing new social relationships. It is not realistic for the Court to assume that there are unlimited funds to address the needs of all. A judicial approach on this basis would tend to make a government reluctant to create any new social benefit schemes because their limits would depend on an accurate prediction of the outcome of court proceedings under s. 15(1) of the Charter. The problem is identified by Professor Hogg in *Constitutional Law of Canada* (3rd ed. 1992), at pp. 911-12 where he states:
>
> > It seems likely that virtually any benefit programme could be held to be under-inclusive in some respect. The effect of *Schachter* [[1990] 2 F.C. 129 (C.A.)] and *Tétreault-Gadoury* [[1991] 2 S.C.R. 22] is to subject benefit programmes to unpredictable potential liabilities. These decisions by-pass the normal processes by which a government sets its priorities and obtains parliamentary approval of its estimates.

39. Sopinka J. further stated at 575-576:

> With respect to minimal impairment, the legislation in question represents the kind of socio-economic question in respect of which the government is required to mediate between competing groups rather than being the protagonist of an individual. In these circumstances, the Court will be more reluctant to second-guess the choice which Parliament has made. ... I would conclude, as La Forest J. did in *McKinney*, that I am "not prepared to say that the course adopted by the Legislature, in the social and historical context through which we are now passing, is not one that reasonably balances the competing social demands which our society must address." (at p. 314)