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 Interpreting2. 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. Remedy47. 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

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PART V

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