Robin Susan Eldridge, John Henry Warren and Linda Jane Warren *Appellants*

v.

The Attorney General of British Columbia and the Medical Services Commission *Respondents*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Manitoba, the Attorney General of Newfoundland, the Women's Legal Education and Action Fund, the Disabled Women's Network Canada, the Charter Committee on Poverty Issues, the Canadian Association of the Deaf, the Canadian Hearing Society and the Council of Canadians with Disabilities *Interveners*

Indexed as: Eldridge *v.* British Columbia (Attorney General)

File No.: 24896.

1997: April 24; 1997: October 9.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law -- Charter of Rights -- Equality rights -- Physical disability -- Publicly funded medicare -- Medicare not providing for sign language interpreters -- Whether, and in what manner, the Charter applies to the decision not to provide sign language interpreters for the deaf as part of the publicly funded scheme for the provision of medical care -- Whether not providing for this service under Acts establishing medicare and hospitalization infringing s. 15(1) equality rights of disabled -- If so, whether legislation saved under s. 1 -- Appropriate remedy if Charter violation found -- Canadian Charter of Rights and Freedoms, ss. 1, 15(1) --Hospital Insurance Act, R.S.B.C. 1979, c. 180 (now R.S.B.C. 1996, c. 204), ss. 3(1), 5(1), 9, 10(1), 29(b) -- Medical and

Health Care Services Act, S.B.C. 1992, c. 76 (now the Medicare Protection Act, R.S.B.C. 1996, c. 286), ss. 1, 4(1)(c), (j), 6, 8.

Medical care in British Columbia is delivered through two primary mechanisms. Hospital services are funded under the *Hospital Insurance Act* by the government which reimburses them for the medically required services provided to the public. Funding for medically required services delivered by doctors and other health care practitioners is provided by the province's Medical Services Plan (established and regulated by the *Medical and Health Care Services Act*). Neither program pays for sign language interpretation for the deaf.

Each of the appellants was born deaf and their preferred means of communication is sign language. They contend that the absence of interpreters impairs their ability to communicate with their doctors and other health care providers, and thus increases the risk of misdiagnosis and ineffective treatment.

The appellants unsuccessfully sought a declaration in the Supreme Court of British Columbia that the failure to provide sign language interpreters as an insured benefit under the Medical Services Plan violates the s. 15(1) of the *Canadian Charter of Rights and Freedoms*. A majority of the Court of Appeal dismissed an appeal from this judgment. The constitutional questions before this Court queried: (1) whether the definition of "benefits" in s. 1 of the *Medicare Protection Act* infringed s. 15(1) of the *Charter* by failing to include medical interpreter services for the deaf, (2) if so, whether the impugned provision was saved under s. 1 of the *Charter*, (3) whether ss. 3, 5 and 9 of the *Hospital Insurance Act* and the Regulations infringed s. 15(1) by failing to require that hospitals provide medical interpreter services for the deaf, and (4) if the answer to 3 is yes, whether the impugned provisions were saved under s. 1. Also at issue were whether, and in what manner, the *Charter* applies to the decision not to provide sign language interpreters for the deaf as part of the publicly funded scheme for the provision of medical care and, if a *Charter* violation were found, what the appropriate remedy would be.

Held: The appeal should be allowed. The first and third constitutional questions were answered in the negative. It was not necessary to answer the second and fourth constitutional questions.

The *Charter* applies to provincial legislation in two ways. Firstly, legislation may be found to be unconstitutional on its face because it violates a *Charter* right and is not saved by s. 1. Secondly, the *Charter* may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it. The legislation remains valid but a remedy for the unconstitutional action may be sought pursuant to s. 24(1) of the *Charter*.

In the present case the question whether the alleged breach of s. 15(1) arises from the impugned legislation itself or from the action of entities exercising decision-making authority pursuant to that legislation must be explored. The failure of the *Medical and Health Care Services Act* to provide expressly for sign language interpretation as a medically required service does not violate s. 15(1) of the *Charter*. The legislation simply does not, either expressly or by necessary implication, prohibit the Medical Services Commission from determining that sign language

interpretation is a "medically required" service and hence a benefit under the Act. It is the decision of the authority which has been delegated the power to determine whether a service qualifies as a benefit that is constitutionally suspect, not the statute itself. The discretion accorded to the Medical Services Commission does not necessarily or typically threaten the equality rights set out in s. 15(1) of the *Charter*. This possibility that the Commission can infringe these rights in the exercise of its authority is, however, incidental to the purpose of discretion, which is to ensure that all medically required services are paid for by the government.

The *Hospital Insurance Act* should be read in conformity with s. 15(1). Hospitals are left with substantial discretion as to how to provide the services listed in the legislation. No individual hospital is required to offer all of the services set out in s. 5(1) of the Act. Further, individual hospitals are given considerable discretion by the Act as to how the services they decide to provide are delivered and they are not precluded from supplying sign language interpreters. The fact that this Act does not expressly mandate the provision of sign language interpretation does not render it constitutionally vulnerable. The potential violation of s. 15(1) inheres in the discretion wielded by a subordinate authority, not the legislation itself.

Legislatures may not enact laws that infringe the *Charter* and they cannot authorize or empower another person or entity to do so. Even though a legislature may give authority to a body that is not subject to the *Charter*, the *Charter* applies to all the activities of government whether or not they may be otherwise characterized as "private" and it may apply to non-governmental entities in respect of certain inherently governmental actions. Governments, just as they are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other "private" arrangements, should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities.

Two important points must be made with respect to this principle. First, the mere fact that an entity performs what may loosely be termed a "public function", or the fact that a particular activity may be described as "public" in nature, will not be sufficient to bring it within the purview of "government" for the purposes of s. 32 of the *Charter*. In order for the *Charter* to apply to a private entity, it must be found to be implementing a specific governmental policy or program.

The second important point concerns the precise manner in which the *Charter* may be held to apply to a private entity. First, it may be determined that the entity is itself "government" for the purposes of s. 32. This involves an inquiry into whether the entity whose actions have given rise to the alleged *Charter* breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be characterized as "government" within the meaning of s. 32(1). In such cases, all of the activities of the entity will be subject to the *Charter*, regardless of whether the activity in which it is engaged could, if performed by a non-governmental actor, correctly be described as "private". Second, an entity may be found to attract *Charter* scrutiny with respect to a particular activity that can be ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, the quality of the act at issue, rather than the quality of the actor, must be scrutinized.

Hospitals, in providing medically necessary services, carry out a specific governmental objective. The *Hospital Insurance Act* is not simply a mechanism to prevent hospitals from charging for their services. Rather, it provides for the delivery of a comprehensive social program. Hospitals are merely the vehicles the legislature has chosen to deliver this program.

A direct and precisely defined connection exists between a specific government policy and the hospital's impugned conduct. The alleged discrimination --the failure to provide sign language interpretation -- is intimately connected to the medical service delivery system instituted by the legislation. The provision of these services is not simply a matter of internal hospital management; it is an _expression of government policy. The Legislature, upon defining its objective as guaranteeing access to a range of medical services, cannot evade its obligations under s. 15(1) of the *Charter* to provide those services without discrimination by appointing hospitals to carry out that objective. In so far as they do so, hospitals must conform with the *Charter*.

As well, the Medical Services Commission, in determining whether a service is a benefit under the *Medical and Health Care Services Act*, implements a government policy, namely, to ensure that all residents receive medically required services without charge. There is no doubt that in exercising this discretion the Commission acts in governmental capacity and is subject to the *Charter*.

As deaf persons, the appellants belong to an enumerated group under s. 15(1) -- the physically disabled. There is also no question that the distinction drawn between the appellants and others is based on a personal characteristic that is irrelevant to the functional values underlying the health care system -- the promotion of health, the prevention and treatment of illness and disease, and the realization of those values through a publicly funded health care system.

The only question in this case is whether the appellants have been afforded "equal benefit of the law without discrimination" within the meaning of s. 15(1) of the *Charter*. On its face, the medicare system applies equally to the deaf and hearing populations. The appellants' claim, nevertheless, is one of "adverse effects" discrimination, protection against which is provided by s. 15(1) of the *Charter*.

A discriminatory purpose or intention is not a necessary condition of a s. 15(1) violation. A legal distinction need not be motivated by a desire to disadvantage an individual or group in order to violate s. 15(1). It is sufficient if the effect of the legislation is to deny someone the equal protection or benefit of the law.

Adverse effects discrimination is especially relevant in the case of disability. In the present case the adverse effects suffered by deaf persons stem not from the imposition of a burden not faced by the mainstream population, but rather from a failure to ensure that deaf persons benefit equally from a service offered to everyone. Once it is accepted that effective communication is an indispensable component of the delivery of a medical service, it is much more difficult to assert that the failure to ensure that deaf persons communicate effectively with their health care providers is not discriminatory. To argue that governments should be entitled to provide benefits

to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence.

Section 15(1) makes no distinction between laws that impose unequal burdens and those that deny equal benefits. The government will be required (at least at the s. 15(1) stage of analysis) to take special measures to ensure that disadvantaged groups are able to benefit equally from government services. If there are policy reasons in favour of limiting the government's responsibility to ameliorate disadvantage in the provision of benefits and services, those policies are more appropriately considered in determining whether any violation of s. 15(1) is saved by s. 1 of the *Charter*.

The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field. It is also a cornerstone of human rights jurisprudence that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation. In s. 15(1) cases this principle is best addressed as a component of the s. 1 analysis. Reasonable accommodation, in this context, is generally equivalent to the concept of "reasonable limits". It should not be employed to restrict the ambit of s. 15(1).

The failure of the Medical Services Commission and hospitals to provide sign language interpretation where it is necessary for effective communication constitutes a *prima facie* violation of the s. 15(1) rights of deaf persons. This failure denies them the equal benefit of the law and discriminates against them in comparison with hearing persons. Although the standard set is broad, this is not to say that sign language interpretation will have to be provided in every medical situation. The "effective communication" standard is a flexible one, and will take into consideration such factors as the complexity and importance of the information to be communicated, the context in which the communications will take place and the number of people involved. For deaf persons with limited literacy skills, sign language interpretation can be surmised to be required in most cases.

The application of the *Oakes* test requires close attention to the context in which the impugned legislation operates. In the present case, the failure to provide sign language interpreters would fail the minimal impairment branch of the *Oakes* test under a deferential approach. It was, therefore, unnecessary to decide whether in this "social benefits" context, where the choice is between the needs of the general population and those of a disadvantaged group, a deferential approach should be adopted. At the same time, the leeway to be granted to the state is not infinite. Governments must demonstrate that their actions infringe the rights in question no more than is reasonably necessary to achieve their goals. In the present case, the government has manifestly failed to demonstrate that it had a reasonable basis for concluding that a total denial of medical interpretation services for the deaf constituted a minimum impairment of their rights.

Moreover, it is purely speculative to argue that the government, if required to provide interpreters for deaf persons, will also have to do so for other non-official language speakers,

thereby increasing the expense of the program dramatically. The possibility that a s. 15(1) claim might be made by members of the latter group cannot justify the infringement of the constitutional rights of the deaf. The appellants ask only for equal access to services that are available to all. The respondents have presented no evidence that this type of accommodation, if extended to other government services, will unduly strain the fiscal resources of the state. The government has not made a "reasonable accommodation" of the appellants' disability nor has it accommodated the appellants' need to the point of undue hardship.

The appropriate and just remedy was to grant a declaration that this failure is unconstitutional and to direct the government of British Columbia to administer the *Medical and Health Care Services Act* and the *Hospital Insurance Act* in a manner consistent with the requirements of s. 15(1). A declaration, as opposed to some kind of injunctive relief, was the appropriate remedy because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It was appropriate to suspend the effectiveness of the declaration for six months to enable the government to explore its options and formulate an appropriate response.

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Attorney General of Canada, [1979] 1 S.C.R. 183; *Re Saskatchewan Human Rights Commission and Canadian Odeon Theatres Ltd.* (1985), 18 D.L.R. (4th) 93, leave to appeal refused, [1985] 1 S.C.R. vi; *Howard v. University of British Columbia* (1993), 18 C.H.R.R. D/353; *Centre de la communauté sourde du Montréal métropolitain inc. v. Régie du logement*, [1996] R.J.Q. 1776; *Bonner v. Lewis*, 857 F.2d 559 (1988); *R. v. Oakes*, [1986] 1 S.C.R. 103; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199.

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APPEAL from a judgment of the British Columbia Court of Appeal (1995), 7 B.C.L.R. (3d) 156, 59 B.C.A.C. 254, 98 W.A.C. 254, 125 D.L.R. (4th) 323, [1995] B.C.J. No. 1168 (QL), dismissing an appeal from a judgment of Tysoe J. (1992), 75 B.C.L.R. (2d) 68, [1992] B.C.J. No. 2229 (QL). Appeal allowed.

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Martha Jackman and *Arne Peltz*, for the intervener the Charter Committee on Poverty Issues.

David Baker and *Patricia Bregman*, for the interveners the Canadian Association of the Deaf, the Canadian Hearing Society and the Council of Canadians with Disabilities.

The judgment of the Court was delivered by

//La Forest J.//

1 LA FOREST J. -- This appeal raises the question whether a provincial government's failure to provide funding for sign language interpreters for deaf persons when they receive medical services violates s. 15(1) of the *Canadian Charter of Rights and Freedoms*. The appellants assert that, because of the communication barrier that exists between deaf persons and health care providers, they receive a lesser quality of medical services than hearing persons. The failure to pay for interpreters, they contend, infringes their right to equal benefit of the law without discrimination based on physical disability.

Factual Background

2 Medical care in British Columbia is delivered through two primary mechanisms. Hospital services are funded by the government through the *Hospital Insurance Act*, R.S.B.C. 1979, c. 180 (now R.S.B.C. 1996, c. 204), which reimburses hospitals for the medically required services they provide to the public. Funding for medically required services delivered by doctors and other health care practitioners is provided by the province's Medical Services Plan, which is established and regulated by the *Medical and Health Care Services Act*, S.B.C. 1992, c. 76 (now known as the *Medicare Protection Act*, R.S.B.C. 1996, c. 286). Neither of these programs pays for sign language interpretation for the deaf.

3 Until 1990, the Western Institute for the Deaf and Hard of Hearing, a private, non-profit agency, provided free medical interpreting services for deaf persons in the Lower Mainland of British Columbia. This program was funded entirely from private sources without any contribution

from the provincial government. In September 1990, the Institute discontinued the service because it no longer had sufficient funds to pay for it.

4 Prior to cancelling the program, the Institute made two requests of the Ministry of Health for funding. At the time, it had contracts with a number of government departments to provide sign language interpreters in connection with various services. The Institute requested similar funding for the provision of interpreters in the medical setting, suggesting that sign language interpretation be covered as an insured benefit under the Medical Services Plan. The first request was made in 1989 and was declined out of hand. The second request was made in May 1990 after the Institute had decided that it could no longer fund the service. The cost of the proposed program, which would have extended throughout the province, was estimated to be $ 150,000 per year. The Ministry turned down the request on the basis that it would strain available resources and create a precedent for the funding of similar services for the non-English speaking immigrant community.

5 Each of the appellants was born deaf. Their preferred means of communication is sign language. They contend that the absence of interpreters impairs their ability to communicate with their doctors and other health care providers, and thus increases the risk of misdiagnosis and ineffective treatment. One of the appellants, Robin Eldridge, suffers from a number of medical conditions, including diabetes. She sees a general physician and a specialist a number of times per year. Neither of these doctors knows sign language. She has also been a patient in hospital on several occasions. The hospitals did not provide her with sign language interpreters. Prior to its termination, she used the Institute's free medical interpreting service. Subsequently, she hired an interpreter when she had surgery in hospital. She testified that she would continue to hire interpreters for important medical situations but could not afford to hire one for every visit to the doctor or hospital. She finds visiting her doctors without an interpreter very stressful and confusing since, in her view, she cannot communicate adequately with them. Her specialist testified that he was satisfied with the level of communication when a sign language interpreter was present. In the absence of an interpreter, he explained, he was unsure about the accuracy of information conveyed by Ms. Eldridge. Communication with her in these circumstances, he stated, was inhibited and frustrating.

6 The other appellants, John and Linda Warren, see their doctor frequently. Although they had planned to hire an interpreter for the birth of their twin daughters, they were unable to procure one in time as the girls were born prematurely. Linda Warren testified that in the absence of an interpreter, the birth process was difficult to understand and frightening. During the birth, the nurse communicated to her through gestures that the heart rate of one of the babies had gone down. After the babies were born, they were immediately taken from her. Other than writing a note stating that they were "fine", no one explained their condition to her.

7 The Warrens' physician, who does not know sign language, testified that communication by written notes is time consuming, impractical and has the potential to result in harm in some circumstances. Adequate communication, she related, is particularly critical for childbirth. If the doctor can communicate with the patient so that the patient is able to help with the delivery, she explained, complications are less likely to occur and the patient is less apt to have a traumatic birth. In her view, writing notes is not effective in these circumstances; an interpreter is necessary

for proper communication. At the time of the trial, the Warrens were expecting another child and wished to have an interpreter present at the birth. They stated that they would not be able to afford one for this purpose or for other visits to their doctor.

8 At trial, the appellants adduced expert testimony explaining that many deaf persons are severely limited in their ability to read and write. The average deaf person, one expert related, has a grade three literacy level. Evidence was also led indicating that miscommunication between deaf persons and their doctors may lead to misdiagnosis. It was also noted that in Alberta and Manitoba the provincial government funds interpreting services for the deaf giving the highest priority to medical interpretation.

9 The respondents presented evidence relating to the budgetary process of the Ministry of Health and the structure of the Medical Services Plan. The government, witnesses explained, does not provide any services directly. Rather, it pays for the provision of medical services by the medical and health care practitioners on a fee-for-service basis. The Plan covers most health services; however there are a number of services that are not included or are funded only in part. These include the services of clinical psychologists, occupational therapists, speech therapists, nutritional counsellors and dentists. Moreover, the province does not pay for such medically related expenses as artificial limbs, hearing aids, or wheelchairs and provides only limited funding for prescription drugs.

10 Hospitals in British Columbia are funded through lump sum "global" payments that they are for the most part free to allocate as they see fit. They are rarely ordered by government to provide specific services. In those instances, they are generally required to fund the service out of their global budgets. The government does provide some funding for specific programs, such as heart transplantation, but this is infrequent.

Judicial History

11 The appellants filed an application in the Supreme Court of British Columbia seeking, *inter alia*, a declaration that the failure to provide sign language interpreters as an insured benefit under the Medical Services Plan violates s. 15(1) of the *Charter*. Tysoe J. dismissed the application ((1992), 75 B.C.L.R. (2d) 68), finding that this failure did not infringe s. 15(1). He determined that sign language interpretation is ancillary to medically required services in much the same way as is transportation to a doctor's office. Any disadvantage suffered by the deaf, he concluded, is not the result of the government's failure to provide such services, but is rather the result of a limitation that exists outside the legislation.

12 In Tysoe J.'s view, the *Charter* does not require governments to implement programs to assist disabled persons. If the government provides a benefit, he stated, s. 15(1) requires that it be distributed equally. There is no obligation, however, to provide the benefit in the first place. He thus concluded that while it is desirable that deaf persons have interpreters for medical procedures and that the cost be borne by society if they cannot afford to pay, s. 15(1) does not demand this result.

13 On appeal to the British Columbia Court of Appeal (1995), 7 B.C.L.R. (3d) 156, the majority (Hollinrake and Cumming JJ.A.) held that the lack of interpreting services in hospitals is not discriminatory because the *Hospital Insurance Act* does not provide any "benefit of the law" within the meaning of s. 15(1) of the *Charter*. Writing for the majority, Hollinrake J.A. noted that the extent of the services provided by each hospital is subject to its own decision as to how to spend the global grant received from government. The absence of interpreters, he thus found, results not from the legislation but rather from each hospital's budgetary discretion. Because hospitals are not "government" within the meaning of s. 32 of the *Charter*, he concluded, their failure to provide interpretation does not engage s. 15(1).

14 He next determined that the *Medical and Health Care Services Act* did not violate s. 15(1) of the *Charter* because it did not create a distinction between the deaf and hearing populations. The proper approach to the application of adverse effects analysis to benefit-conferring legislation, he held, was to focus on the impact of the legislation on the disadvantaged group. In considering this impact, he opined, a distinction must be drawn between effects attributable to the legislation and those that exist independently of it. In the absence of legislation, deaf people would be required to pay their doctors in addition to translators in order to receive equivalent medical services to hearing persons. The legislation removes the responsibility of both hearing and deaf persons to pay their physicians. The inequality resulting from the fact that the deaf remain responsible for the payment of translators, in his view, exists independently of the legislation. Thus, he concluded that the legislation provided the benefit of free medical services equally to the hearing and deaf populations.

15 Lambert J.A., in contrast, held that the legislation violated s. 15(1). He noted that many deaf patients, including the appellants, have difficulty communicating by writing. As a result, cases will arise where doctors will be unable to discharge their professional obligations without the aid of an interpreter. Because effective communication is an integral part of medical care, he concluded, sign language interpretation should not be considered a merely ancillary service. In his view, it is no answer to say that before the benefit was enacted, deaf persons were at a disadvantage and that this burden has not been increased by the provision of the benefit. The proper question is whether the law confers a benefit to which the disadvantaged group does not have the same access as others. He thus concluded that the *Medical and Health Care Services Act* discriminated against the appellants where they seek to obtain medical services that require, for the discharge of the practitioner's professional obligations, effective communication between the practitioner and the patient, and where effective communication can only be achieved through the provision of translation services.

16 Lambert J.A. found, however, that this infringment was justified under s. 1 of the *Charter*. He noted the *Medical and Health Care Services Act* does not ensure comprehensive health care coverage. It does not provide for a number of products and services that are required by disabled persons, such as artificial limbs, hearing aids and wheelchairs. In the allocation of scarce financial resources, he stated, governments must make choices about spending priorities. In these circumstances, he held, courts should defer to legislative policy and administrative expertise.

17 Leave to appeal to this Court was granted ([1996] 2 S.C.R. vi) and the following constitutional questions were stated:

1 Does the definition of "benefits" in s. 1 of the *Medicare Protection Act*, S.B.C. 1992, c. 76, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* by failing to include medical interpreter services for the deaf?

2 If the answer to question 1 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

3 Do ss. 3, 5 and 9 of the *Hospital Insurance Act*, R.S.B.C. 1979, c. 180, and the Regulations enacted pursuant to s. 9 of that Act, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* by failing to require that hospitals in the Province of British Columbia provide medical interpreter services for the deaf?

4 If the answer to question 3 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

Issues

18 There are four principal issues to be considered in this appeal. First, it must be determined whether, and in what manner, the *Charter* applies to the decision not to provide sign language interpreters for the deaf as part of the publicly funded scheme for the provision of medical care. Second, the Court must decide whether this decision constitutes a *prima facie* violation of s. 15(1) of the *Charter*. Having found such a violation, it must be determined whether it is saved by s. 1. After concluding that it is not, an appropriate remedy must be crafted.

Application of the *Charter*

19 There are two distinct *Charter* "application" issues in this case. The first is to identify the precise source of the alleged s. 15(1) violations. As I will develop later, in my view it is not the impugned legislation that potentially infringes the *Charter*. Rather, it is the actions of particular entities -- hospitals and the Medical Services Commission -- exercising discretion conferred by that legislation that does so. The second question is whether the *Charter* applies to those entities. In my view, the *Charter* applies to both in so far as they act pursuant to the powers granted to them by the statutes. I deal with each of these questions in turn.

The Sources of the Alleged Charter Violations

20 Section 32(1)(*b*) of the *Charter* reads as follows:

32. (1) This Charter applies

. . .

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

There is no question, of course, that the *Charter* applies to provincial legislation; see *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573. There are two ways, however, in which it can do so. First, legislation may be found to be unconstitutional on its face because it violates a *Charter* right and is not saved by s. 1. In such cases, the legislation will be invalid and the Court compelled to declare it of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*. Secondly, the *Charter* may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it. In such cases, the legislation remains valid, but a remedy for the unconstitutional action may be sought pursuant to s. 24(1) of the *Charter*.

21 The s. 32 jurisprudence of this Court has for the most part focused on the first type of *Charter* violation. There is no doubt, however, that the *Charter* also applies to action taken under statutory authority. The rationale for this rule flows inexorably from the logical structure of s. 32. As Professor Hogg explains in his *Constitutional Law of Canada* (3rd ed. 1992 (loose-leaf)), vol. 1, at pp. 34-8.3 and 34-9:

Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.

The sentiment of Lord Atkin in speaking of a constitutional prohibition addressed solely at the legislative branch is also apposite: "The Constitution", he wrote, "is not to be mocked by substituting executive for legislative interference with freedom"; see *James v. Cowan*, [1932] A.C. 542 (P.C. Australia), at p. 558.

22 The question in the present case, then, is whether the alleged breach of s. 15(1) arises from the impugned legislation itself or from the actions of entities exercising decision-making authority pursuant to that legislation. The proper framework for determining this question was set out by Lamer J. (as he then was) and approved by a majority of this Court in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. In that case the Court was faced with determining the constitutionality of orders issued by an adjudicator under the *Canada Labour Code*, R.S.C. 1970, c. L-1, that were alleged to violate an employer's s. 2(*b*) right to freedom of _expression. The Code endowed the adjudicator with a broad discretion to remedy the consequences of an unjust dismissal. There being no question that the *Charter* applied to the adjudicator, the only issue was whether it was the legislation or the order that potentially infringed the *Charter*. In determining this question, Lamer J. (as he then was) stated that legislation conferring a discretion must be interpreted, in so far as possible, consistently with the *Charter*. He explained as follows, at p. 1078:

As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1. Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so.

23 Following this schema, it is first necessary to decide whether the legislation impugned in the present appeal can be interpreted in conformity with the *Charter*. In *Slaight*, it was clear that the legislation granted the adjudicator a broad discretion. It was thus easy to conclude that it did not, either expressly or by necessary implication, confer a power to infringe the *Charter*. In the present case the task is more difficult. Indeed, in the court below the argument proceeded on the basis that the legislation was under-inclusive; that it violated s. 15(1) by failing to include medical interpreter services for the deaf in the definition of "benefits", in the case of the *Medical and Health Care Services Act*, and "general hospital services", in the case of the *Hospital Insurance Act*.

24 During the hearing before this Court, however, counsel for the appellants proposed an alternative argument akin to the framework set out in *Slaight*. She suggested that both statutes could be read to conform with s. 15(1). Under this theory, it is not the legislation that is constitutionally suspect, but rather the actions of delegated decision-makers in applying it. In my view, this is the correct approach to the *Charter* application issue in this case. In order to understand how I reach this conclusion, it is necessary to consider the statutory context of this appeal in some depth. With the exception of hospitals, which are the responsibility of the provinces by virtue of s. 92(7) of the *Constitution Act, 1867*, health is not a matter assigned solely to one level of government; see *Schneider v. The Queen*, [1982] 2 S.C.R. 112, at pp. 141-42 (*per* Estey J.). It is generally agreed, however, that the hospital insurance and medicare programs in force in this country come within the exclusive jurisdiction of the provinces under ss. 92(7) (hospitals), 92(13) (property and civil rights) and 92(16) (matters of a merely local or private nature); see Hogg, *supra*, at p. 6-16, and the Canadian Bar Association Task Force on Health Care, *What's Law Got to Do with It? Health Care Reform in Canada* (1994), at p. 15.

25 This has not prevented the federal Parliament from playing a leading role in the provision of free, universal medical care throughout the nation. It has done so by employing its inherent spending power to set national standards for provincial medicare programs. The *Canada Health Act*, R.S.C., 1985, c. C-6, requires the federal government to contribute to the funding of provincial health insurance programs provided they conform with certain specified criteria. (The constitutionality of this kind of conditional grant, I note parenthetically, was approved by this Court

in *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 567.) The purpose of the Act is set out in ss. 3 and 4 as follows:

3. It is hereby declared that the primary objective of Canadian health care policy is 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.

4. The purpose of this Act is to establish criteria and conditions in respect of insured health services and extended health care services provided under provincial law that must be met before a full cash contribution may be made.

26 Sections 5 and 7 require the federal government to contribute to provincial insurance schemes where certain conditions are met:

5. Subject to this Act, as part of the Canada Health and Social Transfer, a full cash contribution is payable by Canada to each province for each fiscal year.

7. In order that a province may qualify for a full cash contribution referred to in section 5 for a fiscal year, the health care insurance plan of the province must, throughout the fiscal year, satisfy the criteria described in sections 8 to 12 respecting the following matters:

(*a*) public administration;

(*b*) comprehensiveness;

(*c*) universality;

(*d*) portability; and

(*e*) accessibility.

The condition of "comprehensiveness" is of particular importance to this appeal. Its meaning is delineated in s. 9:

9. In order to satisfy the criterion respecting comprehensiveness, the health care insurance plan of a province must insure all insured health services provided by hospitals, medical practitioners or dentists, and where the law of the province so permits, similar or additional services rendered by other health care practitioners. [Emphasis added.]

The phrase "insured health services" is defined in s. 2 of the Act to mean, *inter alia*, "hospital services" and "physician services" provided to insured persons. "Hospital services" are further described as including a number of specific services such as accommodation, nursing services and access to diagnostic and treatment facilities, so long as such services are "medically necessary for the purpose of maintaining health, preventing disease or diagnosing or treating an injury, illness or disability". The definition of "physician services" does not list any specific benefits.

It states only that they consist of "any medically required services rendered by medical practitioners". The Act does not define the phrases "medically necessary" or "medically required".

27 At the time of trial, the provision of medical treatment by doctors and other health care practitioners in British Columbia was governed by the *Medical and Health Care Services Act*. (It is now known as the *Medicare Protection Act*.) Its structure accords with the criteria set out in the *Canada Health Act*. Sections 6 and 8 of the *Medical and Health Care Services Act* entitle residents of the province to the benefits provided by the Act:

6. (1)A resident who wishes to be enrolled as a beneficiary on his or her own behalf, or on behalf of his or her spouse or children, must apply to the commission in the manner required by the commission.

(2)The commission must, after determining that the applicant, the spouse of the applicant and each of the applicant's children named in the application are residents, enroll as beneficiaries those covered by the application who are residents, effective not more than 3 months after receipt of the application.

8. (1)A beneficiary is, subject to sections 9 (1), 10, 13 and 14, entitled to have payment made for a benefit that he or she has received, in accordance with amounts in a payment schedule, less any applicable patient visit charge. [Emphasis added.]

"Benefit" is defined in s. 1 of the Act as follows:

1. In this Act

. . .

"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. . . . [Emphasis added.]

28 Notably, the Act does not list the services that are "medically required" such that they qualify as "benefits" under the Act. With the exception of certain specialized services listed as

"insured services" under the *Medical Service Act Regulations*, B.C. Reg. 144/68, s. 4.09, as amended, the legislation does not specify the benefits it provides. Section 4.04 of the Regulations does expressly state, however, that certain services, such as those provided solely for legal, industrial or insurance purposes, as well as telephone advice and cosmetic procedures, are not insured. Sign language interpretation is not included. In the usual course, the determination of what constitutes a benefit is left to the discretion of the Medical Services Commission, a nine-member panel composed of representatives from the government, the British Columbia Medical Association and health care consumers. Pursuant to s. 4(1)(j) of the Act, the Commission is authorized to "determine whether a service is a benefit or whether any matter is related to the rendering of a benefit". Conversely, s. 4(1)(c) empowers it to determine the services that are "not benefits under [the] Act". The only limit on the Commission's discretion is set out in s. 4(2), which cautions that its powers must not be exercised "in a manner that does not satisfy the criteria described in section 7 of the *Canada Health Act*".

29 Assuming that the failure to provide sign language interpreters in medical settings violates s. 15(1) of the *Charter* in some circumstances, I do not see how the *Medical and Health Care Services Act* can be interpreted as mandating that result. The legislation simply does not, either expressly or by necessary implication, prohibit the Medical Services Commission from determining that sign language interpretation is a "medically required" service and hence a benefit under the Act. Indeed, the appellants assert in relation to the s. 15(1) issue that sign language interpretation, where it is necessary for effective communication, is integrally related to the provision of general medical services. Their theory, about which I will have more to say later, is that the failure to provide sign language interpreters violates s. 15(1) because it prevents deaf patients from benefiting equally from the provision of medical services in comparison to hearing patients. If this is correct, then the *Charter* demands that free sign language interpretation be provided as part of any medical service offered to the general public, at least where the service requires a level of communication that only an interpreter can ensure. Under this approach, the legislation must be interpreted to include sign language interpretation as a "medically required service" in these circumstances. It is clear, therefore, that the failure to provide expressly for sign language interpretation in the *Medical and Health Care Services Act* does not violate s. 15(1) of the *Charter*. The Act does not list those services that are to be considered benefits; instead, it delegates the power to make that determination to a subordinate authority. It is the decision of authority that is constitutionally suspect, not the statute itself.

30 I pause to emphasize that not every conferral of statutory discretion may be interpreted consistently with the *Charter*. Some grants of discretion will necessarily infringe *Charter* rights notwithstanding that they do not expressly authorize that result; see, e.g., *Re Ontario Film & Video Appreciation Society and Ontario Board of Censors* (1984), 5 D.L.R. (4th) 766 (Ont. C.A.), affirming (1983), 147 D.L.R. (3d) 58 (Ont. Div. Ct.). In such cases it will generally be the statute, and not its application, that attracts *Charter* scrutiny; see June M. Ross, "Applying the Charter to Discretionary Authority" (1991), 29 *Alta. L. Rev.* 382. In the present case, however, the discretion accorded to the Medical Services Commission to determine whether a service qualifies as a benefit does not necessarily or typically threaten the equality rights set out in s. 15(1) of the *Charter*. It is possible, of course, for the Commission to infringe these rights in the course of

exercising its authority. That possibility, however, is incidental to the purpose of discretion, which is to ensure that all medically required services are paid for by the government.

31 The situation is more complicated in the case of the *Hospital Insurance Act*. Section 3(1) of the Act states that "every qualified person or beneficiary is entitled to receive the general hospital services provided under this Act". Unlike the *Medical and Health Care Services Act*, the *Hospital Insurance Act* defines the services it provides with some precision. Mirroring the definition of "hospital services" in the *Canada Health Act*, s. 5(1) of the *Hospital Insurance Act* describes the "general hospital services" that are to be provided by acute care hospitals as follows (equivalent provisions list services for extended care and out-patient facilities):

5.(1)The general hospital services provided under this Act are

(a)for qualified persons requiring treatment for acute illness or injury: the public ward accommodation, necessary operating and case room facilities, diagnostic or therapeutic Xray and laboratory procedures, anaesthetics, prescriptions, drugs, dressings, cast materials and other services prescribed by regulation;

. . .

but do not include

(d)transportation to or from the hospital,

(e)services or treatment that the minister, or a person designated by him, determines, on a review of the medical evidence, the qualified person does not require, or

(f)services or treatment for an illness or condition excluded by regulation of the Lieutenant Governor in Council. [Emphasis added.]

32 It could be argued that by including a list of the services to be provided in hospitals that does not include sign language interpretation, the *Hospital Insurance Act* implicates s. 15(1) of the *Charter*. In my view, however, it is preferable to read the Act in conformity with s. 15(1). Though the statute entitles beneficiaries to a specific list of services, hospitals are left with substantial discretion as to how to provide them. This discretion operates in two ways. First, it is clear from the regulations enacted pursuant to s. 29(b) of the Act that no individual hospital is required to offer all of the services set out in s. 5(1). Those regulations state that the hospital services to be provided shall include "such of the following services as are recommended by the attending physician and as are available in or through the hospital to which the person is admitted" (emphasis added); *Hospital Insurance Act Regulations*, B.C. Reg. 25/61, as amended, ss. 5.1, 5.7 and 5.8. Generally speaking, the province does not fund specific procedures or services. Instead, it provides hospitals with a global, lump sum payment intended to reimburse them for those listed services that they do in fact provide. This is clear from s. 10(1) of the Act, which reads as follows:

10. (1) There shall be paid annually to every hospital from the hospital insurance fund a sum determined by the minister to reimburse the hospital, in whole or in part, for the cost of rendering to beneficiaries those general hospital services authorized by this Act the hospital is required by the minister to provide for beneficiaries admitted for treatment, excluding those sums payable to the hospital under section 5 (4) and section 14.

As stated by the court below, at p. 168, "[t]he extent of the services to be provided by each hospital is thus subject to the hospital's own decision as to how to spend the global grant they receive for general hospital services. . . ."

33 Second, the Act gives individual hospitals considerable discretion as to the manner in which the services they decide to provide are delivered. Nothing in the legislation precludes them from supplying sign language interpreters. Hospitals have the authority, for example, to provide a sign language interpreter for a diagnostic X ray procedure where one is required in order to ensure its efficacy. Like the *Medicare Protection Act*, moreover, the *Hospital Insurance Act* (in s. 5(1)(d)) and *Regulations* (in s. 5.22) specifically list services, such as transportation to or from hospital, *in vitro* fertilization and cosmetic procedures, that are not covered by the scheme. Sign language interpretation is not included in these lists.

34 Consequently, the fact that the *Hospital Insurance Act* does not expressly mandate the provision of sign language interpretation does not render it constitutionally vulnerable. The Act does not, either expressly or by necessary implication, forbid hospitals from exercising their discretion in favour of providing sign language interpreters. Assuming the correctness of the appellants' s. 15(1) theory, the *Hospital Insurance Act* must thus be read so as to require that sign language interpretation be provided as part of the services offered by hospitals whenever necessary for effective communication. As in the case of the *Medical and Health Care Services Act*, the potential violation of s. 15(1) inheres in the discretion wielded by a subordinate authority, not the legislation itself.

The Application of the Charter to the Medical Services Commission and Hospitals

35 Having identified the sources of the alleged s. 15(1) violations, it remains to be considered whether the *Charter* actually applies to them. At first blush, this may seem to be a curious question. As I have discussed, it is a basic principle of constitutional theory that since legislatures may not enact laws that infringe the *Charter*, they cannot authorize or empower another person or entity to do so; *Slaight*, *supra*. It is possible, however, for a legislature to give authority to a body that is not subject to the *Charter*. Perhaps the clearest example of this is the power of incorporation. Private corporations are entirely creatures of statute; they have no power or authority that does not derive from the legislation that created them. The *Charter* does not apply to them, however, because legislatures have not entrusted them to implement specific governmental policies. Of course, governments may desire corporations to serve certain social and economic purposes, and may adjust the terms of their existence to accord with those goals. Once brought into being, however, they are completely autonomous from government; they are empowered to exercise only the same contractual and proprietary powers as are possessed by

natural persons. As a result, while the legislation creating corporations is subject to the *Charter*, corporations themselves are not part of "government" for the purposes of s. 32 of the *Charter*.

36 Legislatures have created many other statutory entities, however, that are not as clearly autonomous from government. There are myriad public or quasi-public institutions that may be independent from government in some respects, but in other respects may exercise delegated governmental powers or be otherwise responsible for the implementation of government policy. When it is alleged that an action of one of these bodies, and not the legislation that regulates them, violates the *Charter*, it must be established that the entity, in performing that particular action, is part of "government" within the meaning of s. 32 of the *Charter*.

37 Perhaps the fullest discussion of the meaning of "government" in s. 32 is found in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, and its companion cases, *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451, *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, and *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570. There, this Court was asked to decide whether the mandatory retirement policies adopted by certain institutions (universities, colleges and hospitals) were subject to *Charter* review. In confirming and elaborating upon the view taken by McIntyre J. in *Dolphin Delivery*, *supra* (*viz*., that the *Charter* applies only to Parliament, the provincial legislatures and entities that constitute part of the executive or administrative branches of government, and not to private activity), a majority of the Court in *McKinney*, *Harrison* and *Stoffman* found that the *Charter* did not apply on the facts, since the institutions whose policies were impugned were not themselves part of the apparatus of government in the sense required by s. 32(1), nor were they putting into place a government program or acting in a governmental capacity in adopting those policies.

38 In *Douglas*, however, the same majority found that the *Charter* did apply to the mandatory retirement policy at issue, on the ground that Douglas College was, in light of its constituent Act, simply an emanation of government. I described the differences between *McKinney* and *Harrison*, on the one hand, and *Douglas*, on the other, at pp. 584-85 of the latter case:

> As its constituent Act makes clear, the college is a Crown agency established by the government to implement government policy. Though the government may choose to permit the college board to exercise a measure of discretion, the simple fact is that the board is not only appointed and removable at pleasure by the government; the government may at all times by law direct its operation. Briefly stated, it is simply part of the apparatus of government both in form and in fact. In carrying out its functions, therefore, the college is performing acts of government, and I see no reason why this should not include its actions in dealing with persons it employs in performing these functions. Its status is wholly different from the universities in the companion cases of *McKinney* . . . and *Harrison* . . . which, though extensively regulated and funded by government, are essentially autonomous bodies. Accordingly, the actions of the college in the negotiation and administration of the collective agreement between the college and the association are those of the government for the purposes of s. 32 of the *Charter*. The *Charter*, therefore, applies to these activities.

39 This Court's approach to *Charter* application was further elucidated in *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211. There, the principal issue was whether a provision of a collective agreement compelling the appellant to pay union dues despite his non-membership in the respondent union violated the *Charter* guarantees of freedom of _expression and association, in so far as the dues were being used to pay for specific political purposes chosen by the union. In addressing whether that provision was subject to the *Charter*, I found for the majority that the appellant's employer, the Ontario Council of Regents for Colleges of Applied Arts and Technology, was, in virtue of the terms of its empowering Act, an emanation of the provincial government. On this basis, I held that the *Charter* applied to the provision in question. Comparing the case to *Douglas*, I remarked as follows, at pp. 311-12:

> [*Douglas*], like the present appeal, involved a collective agreement between the college and the Association (a union under the applicable legislation). There the Minister of Education by statute exercised a degree of control over the college that closely matched that exercised by the Ministry over the Council in the present case. It is true that in *Douglas* the college's constituent Act expressly described it as an agent of the Crown, whereas here the Act simply gives the Minister power to conduct and govern the colleges and in this endeavour the Minister is to be "assisted" by the Council. But the reality is the same. The government, through the Minister, has the same power of "routine or regular control", to use the _expression of the majority of this Court, in *Harrison* . . . and *Stoffman*
> . . ., companion cases to *Douglas*.

40 In *Douglas* and *Lavigne*, the argument was made that even if the entities in question were generally part of "government" for the purposes of s. 32, the *Charter* should not apply to the "private" or "commercial" arrangements they engage in. In each case, the Court rejected this contention, holding that when an entity is determined to be part of the fabric of government, the *Charter* will apply to all its activities, including those that might in other circumstances be thought of as "private". The rationale for this principle is obvious: governments should not be permitted to evade their *Charter* responsibilities by implementing policy through the vehicle of private arrangements. I put the matter thus in *Lavigne*, at p. 314:

> It was also argued that the *Charter* does not apply to government when it engages in activities that are . . . "private, commercial, contractual or non-public (in) nature". In my view, this argument must be rejected. In today's world it is unrealistic to think of the relationship between those who govern and those who are governed solely in terms of the traditional law maker and law subject model. We no longer expect government to be simply a law maker in the traditional sense; we expect government to stimulate and preserve the community's economic and social welfare. In such circumstances, government activities which are in form "commercial" or "private" transactions are in reality expressions of government policy, be it the support of a particular region or industry, or the enhancement of Canada's overall international competitiveness. In this context, one has to ask: why should our concern that government conform to the principles set out in the *Charter* not extend to these aspects of its contemporary mandate? To say that the *Charter* is only concerned with government as law maker is to interpret our Constitution in light of an understanding of government that was long outdated even before the *Charter* was enacted.

See also *Douglas*, at p. 585.

41 While it is well established that the *Charter* applies to all the activities of government, whether or not those activities may be otherwise characterized as "private", this Court has also recognized that the *Charter* may apply to non-governmental entities in certain circumstances; see generally Robin Elliot, "Scope of the Charter's Application" (1993), 15 *Advocates' Q.* 204, at pp. 208-9. It has been suggested, for example, that the *Charter* will apply to a private entity when engaged in activities that can in some way be attributed to government. This possibility was contemplated in *McKinney*, where I stated the following, at pp. 273-74:

Though the legislature may determine much of the environment in which universities operate, the reality is that they function as autonomous bodies within that environment. There may be situations in respect of specific activities where it can fairly be said that the decision is that of the government, or that the government sufficiently partakes in the decision as to make it an act of government, but there is nothing here to indicate any participation in the decision by the government and . . . there is no statutory requirement imposing mandatory retirement on the universities. [Emphasis added.]

I commented further on as follows, at p. 275:

I, therefore, conclude that the respondent universities do not form part of the government apparatus, so their actions, as such, do not fall within the ambit of the *Charter*. Nor in establishing mandatory retirement for faculty and staff were they implementing a governmental policy. [Emphasis added.]

The idea that certain activities of non-governmental entities may be viewed as the responsibility of government was further elucidated in my reasons in *Lavigne* where, after discussing *McKinney*, *Harrison*, *Douglas* and *Stoffman*, I stated as follows, at p. 312:

The majority in the above cases relied solely on the element of control in determining what fell within the apparatus of government, although it made clear that government may, in some circumstances, be subject to *Charter* scrutiny in respect of activities in the private sector where the government could be said to have some responsibility for that activity. [Emphasis added.]

42 It seems clear, then, that a private entity may be subject to the *Charter* in respect of certain inherently governmental actions. The factors that might serve to ground a finding that an activity engaged in by a private entity is "governmental" in nature do not readily admit of any *a priori* elucidation. *McKinney* makes it clear, however, that the *Charter* applies to private entities in so far as they act in furtherance of a specific governmental program or policy. In these circumstances, while it is a private actor that actually implements the program, it is government that retains responsibility for it. The rationale for this principle is readily apparent. Just as governments are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other "private" arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities. In *McKinney*, I pointed to *Slaight*, *supra*, as an example of a situation where action taken in furtherance of a

government policy was held to fall within the ambit of the *Charter*. I noted, at p. 265, that the arbitrator in that case was "part of the governmental administrative machinery for effecting the specific purpose of the statute". "It would be strange", I wrote, "if the legislature and the government could evade their *Charter* responsibility by appointing a person to carry out the purposes of the statute"; see *idem*. Although the arbitrator in *Slaight* was entirely a creature of statute and performed functions that were exclusively governmental, the same rationale applies to any entity charged with performing a governmental activity, even if that entity operates in other respects as a private actor; see A. Anne McLellan and Bruce P. Elman, "To Whom Does the Charter Apply? Some Recent Cases on Section 32" (1986), 24 *Alta. L. Rev.* 361, at p. 371.

43 Two important points must be made with respect to this principle. First, the mere fact that an entity performs what may loosely be termed a "public function", or the fact that a particular activity may be described as "public" in nature, will not be sufficient to bring it within the purview of "government" for the purposes of s. 32 of the *Charter*. Thus, with specific reference to the distinction between the applicability of the *Charter*, on the one hand, and the susceptibility of public bodies to judicial review, on the other, I stated as follows, at p. 268 of *McKinney*:

> It was not disputed that the universities are statutory bodies performing a public service. As such, they may be subjected to the judicial review of certain decisions, but this does not in itself make them part of government within the meaning of s. 32 of the *Charter*. . . . In a word, the basis of the exercise of supervisory jurisdiction by the courts is not that the universities are government, but that they are public decision-makers. [Emphasis added.]

In order for the *Charter* to apply to a private entity, it must be found to be implementing a specific governmental policy or program. As I stated further on in *McKinney*, at p. 269, "[a] public purpose test is simply inadequate" and "is simply not the test mandated by s. 32".

44 The second important point concerns the precise manner in which the *Charter* may be held to apply to a private entity. As the case law discussed above makes clear, the *Charter* may be found to apply to an entity on one of two bases. First, it may be determined that the entity is itself "government" for the purposes of s. 32. This involves an inquiry into whether the entity whose actions have given rise to the alleged *Charter* breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be characterized as "government" within the meaning of s. 32(1). In such cases, all of the activities of the entity will be subject to the *Charter*, regardless of whether the activity in which it is engaged could, if performed by a non-governmental actor, correctly be described as "private". Second, an entity may be found to attract *Charter* scrutiny with respect to a particular activity that can be ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly "governmental" in nature -- for example, the implementation of a specific statutory scheme or a government program -- the entity performing it will be subject to review under the *Charter* only in respect of that act, and not its other, private activities.

45 In the present case, the controversy over the *Charter*'s application centres on the question of hospitals. The respondents argue that if the failure to provide sign language interpreters does not flow from the Act but rather from the discretion of individual hospitals, then s. 15(1) is not engaged because the *Charter* does not apply to hospitals. Hospitals, they say, are not "government" for the purposes of s. 32 of the *Charter*. In their view, this result flows from a straightforward application of this Court's decision in *Stoffman*, *supra*.

46 The foregoing analysis, however, establishes that it is not enough for the respondents to say that hospitals are not "government" for the purposes of s. 32 of the *Charter*. In *Stoffman*, the Court found that the Vancouver General Hospital was not part of the apparatus of government and that its adoption of a mandatory retirement policy did not implement a government policy. *Stoffman* made it clear that, as presently constituted, hospitals in British Columbia are non-governmental entities whose private activities are not subject to the *Charter*. It remains to be seen, however, whether hospitals effectively implement governmental policy in providing medical services under the *Hospital Insurance Act*.

47 There is language in *Stoffman* that could be read as precluding the application of the *Charter* in the circumstances of the present case. There, I wrote, at p. 516, that "there can be no question of the Vancouver General's being held subject to the *Charter* on the ground that it performs a governmental function, for . . . the provision of a public service, even if it is one as important as health care, is not the kind of function which qualifies as a governmental function under s. 32". That statement, however, must be read in the context of the entire judgment. I determined only that the fact that an entity performs a "public function" in the broad sense does not render it "government" for the purposes of s. 32 and specifically left open the possibility that the *Charter* could be applied to hospitals in different circumstances. Indeed, later in the same paragraph I qualified my position in the following manner:

> I would also add that this is not a case for the application of the *Charter* to a specific act of an entity which is not generally bound by the *Charter*. The only specific connection between the actions of the Vancouver General in adopting and applying Regulation 5.04 and the actions of the Government of British Columbia was the requirement that Regulation 5.04 receive ministerial approval. In light of what I have said above in regard to this requirement, a "more direct and a more precisely-defined connection", to borrow McIntyre J.'s phrase used in *Dolphin Delivery*, would have to be shown before I would conclude that the *Charter* applied on this ground.

48 As this passage alludes to, the hospital's mandatory retirement policy, which was embodied in Medical Staff Regulation 5.04, was a matter of internal hospital management. Notwithstanding the requirement of ministerial approval, the Regulation was developed, written and adopted by hospital officials. It was not instigated by the government and did not reflect its mandatory retirement policy. Hospitals in British Columbia, moreover, exhibited great variety in their approaches to retirement. That each of these policies obtained ministerial approval reflected the large measure of managerial autonomy accorded to hospitals in this area.

49 The situation in the present appeal is very different. The purpose of the *Hospital Insurance Act* is to provide particular services to the public. Although the benefits of that service are

delivered and administered through private institutions --hospitals -- it is the government, and not hospitals, that is responsible for defining both the content of the service to be delivered and the persons entitled to receive it. As previously noted, s. 3(1) states that every person eligible to receive benefits is "entitled to receive the general hospital services provided under this Act". Section 5(1) defines "general hospital services" to include various services normally available in hospitals. As the definition of "hospital" in s. 1 makes clear, moreover, hospitals are required to furnish the general hospital services specified in the Act. While no single hospital makes all of these services available, the net effect of the Act is to entitle every qualified person to receive, and to require hospitals to supply, a complete range of medically required hospital services. Indeed, if the legislation did not assure this, it would run afoul of the *Canada Health Act*. It is also apparent that while hospitals are funded on a "lump sum" and not a "fee-for-service" basis, they are not entirely free to spend this money as they choose. This is apparent from s. 10(1) of the Act, which mandates the annual payment of a sum "determined by the minister to reimburse the hospital . . . for the cost of rendering to beneficiaries those general hospital services authorized by this Act the hospital is required by the minister to provide for beneficiaries", as well as from s. 15(3)(c), which authorizes the minister to make "payments to hospitals for the service provided for under this Act" and s. 13(1), which provides that payments to a hospital "for services rendered by it . . . shall be deemed to be payment in full for the services. . . ."

50 The structure of the *Hospital Insurance Act* reveals, therefore, that in providing medically necessary services, hospitals carry out a specific governmental objective. The Act is not, as the respondents contend, simply a mechanism to prevent hospitals from charging for their services. Rather, it provides for the delivery of a comprehensive social program. Hospitals are merely the vehicles the legislature has chosen to deliver this program. It is true that hospitals existed long before the statute, and have historically provided a full range of medical services. In recent decades, however, health care, including that generally provided by hospitals, has become a keystone tenet of governmental policy. The interlocking federal-provincial medicare system I have described entitles all Canadians to essential medical services without charge. Although this system has retained some of the trappings of the private insurance model from which it derived, it has come to resemble more closely a government service than an insurance scheme; see Canadian Bar Association Task Force on Health Care, *supra*, at p. 9.

51 Unlike *Stoffman*, then, in the present case there is a "direct and . . . precisely-defined connection" between a specific government policy and the hospital's impugned conduct. The alleged discrimination -- the failure to provide sign language interpretation -- is intimately connected to the medical service delivery system instituted by the legislation. The provision of these services is not simply a matter of internal hospital management; it is an _expression of government policy. Thus, while hospitals may be autonomous in their day-to-day operations, they act as agents for the government in providing the specific medical services set out in the Act. The Legislature, upon defining its objective as guaranteeing access to a range of medical services, cannot evade its obligations under s. 15(1) of the *Charter* to provide those services without discrimination by appointing hospitals to carry out that objective. In so far as they do so, hospitals must conform with the *Charter*.

52 The case of the Medical Services Commission is more straightforward. It was not contested that the *Charter* applies to the Commission in exercising its power to determine whether a service is a benefit pursuant to s. 4(1) of the *Medical and Health Care Services Act*. It is plain that in so doing, the Commission implements a government policy, namely, to ensure that all residents receive medically required services without charge. In lieu of setting out a comprehensive list of insured services in legislation, the government has delegated to the Commission the power to determine what constitutes a "medically required" service. There is no doubt, therefore, that in exercising this discretion the Commission acts in governmental capacity and is thus subject to the *Charter*. As there is no need to do so, I refrain from commenting on whether the Commission might be considered part of government for other purposes.

Section 15(1) of the *Charter*

53 Having concluded that the *Charter* applies to the failure of hospitals and the Medical Services Commission to provide sign language interpreters, it remains to be determined whether that failure infringes the appellants' equality rights under s. 15(1) of the *Charter*. That provision states:

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.

I emphasize at the outset that s. 15(1), like other *Charter* rights, is to be generously and purposively interpreted; see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156, *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at pp. 336 and 344, *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 509, *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 175, *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, at p. 1480, and *Reference Re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 179. As Lord Wilberforce proclaimed in *Minister of Home Affairs v. Fisher*, [1980] A.C. 319 (P.C., Bermuda), at p. 328, a constitution incorporating a bill of rights calls for "a generous interpretation avoiding what has been called `the austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to"; see also *Hunter*, at p. 156.

54 In the case of s. 15(1), this Court has stressed that it serves two distinct but related purposes. First, it expresses a commitment -- deeply ingrained in our social, political and legal culture -- to the equal worth and human dignity of all persons. As McIntyre J. remarked in *Andrews*, at p. 171, s. 15(1) "entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration". Secondly, it instantiates a desire to rectify and prevent discrimination against particular groups "suffering social, political and legal disadvantage in our society"; see *R. v. Turpin*, [1989] 1 S.C.R. 1296, at p. 1333 (*per* Wilson J.); see also Beverley McLachlin, "The Evolution of Equality" (1996), 54 *Advocate* 559, at p. 564. While this Court has confirmed that it is not necessary to show membership in a historically disadvantaged group in order to establish a s. 15(1) violation, the fact that a law draws a distinction on such a ground is an important *indicium* of

discrimination; see *Miron v. Trudel*, [1995] 2 S.C.R. 418, at para. 15 (*per* Gonthier J.) and at paras. 148-149 (*per* McLachlin J.), and *Egan v. Canada*, [1995] 2 S.C.R. 513, at paras. 59-61 (*per* L'Heureux-Dubé J.).

55 As deaf persons, the appellants belong to an enumerated group under s. 15(1) -- the physically disabled. While this fact is not contested, it is nonetheless relevant. As Wilson J. held in *Turpin*, the determination of whether a law is discriminatory is a contextual exercise. It is important, she explained, at p. 1331, "to look not only at the impugned legislation . . . but also to the larger social, political and legal context".

56 It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions; see generally M. David Lepofsky, "A Report Card on the *Charter*'s Guarantee of Equality to Persons with Disabilities after 10 Years -- What Progress? What Prospects?" (1997), 7 *N.J.C.L.* 263. This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the "equal concern, respect and consideration" that s. 15(1) of the *Charter* demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms; see Sandra A. Goundry and Yvonne Peters, *Litigating for Disability Equality Rights: The Promises and the Pitfalls* (1994), at pp. 5-6. One consequence of these attitudes is the persistent social and economic disadvantage faced by the disabled. Statistics indicate that persons with disabilities, in comparison to non-disabled persons, have less education, are more likely to be outside the labour force, face much higher unemployment rates, and are concentrated at the lower end of the pay scale when employed; see Minister of Human Resources Development, *Persons with Disabilities: A Supplementary Paper* (1994), at pp. 3-4, and Statistics Canada, *A Portrait of Persons with Disabilities* (1995), at pp. 46-49.

57 Deaf persons have not escaped this general predicament. Although many of them resist the notion that deafness is an impairment and identify themselves as members of a distinct community with its own language and culture, this does not justify their compelled exclusion from the opportunities and services designed for and otherwise available to the hearing population. For many hearing persons, the dominant perception of deafness is one of silence. This perception has perpetuated ignorance of the needs of deaf persons and has resulted in a society that is for the most part organized as though everyone can hear; see generally Oliver Sacks, *Seeing Voices: A Journey Into the World of the Deaf* (1989). Not surprisingly, therefore, the disadvantage experienced by deaf persons derives largely from barriers to communication with the hearing population.

58 With this context in mind, I turn to the specific elements of the appellants' s. 15(1) claim. While this Court has not adopted a uniform approach to s. 15(1), there is broad agreement on the general analytic framework; see *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, at para. 62, *Miron*, *supra*, and *Egan*, *supra*. A person claiming a violation of s. 15(1) must first

establish that, because of a distinction drawn between the claimant and others, the claimant has been denied "equal protection" or "equal benefit" of the law. Secondly, the claimant must show that the denial constitutes discrimination on the basis of one of the enumerated grounds listed in s. 15(1) or one analogous thereto. Before concluding that a distinction is discriminatory, some members of this Court have held that it must be shown to be based on an irrelevant personal characteristic; see *Miron* (*per* Gonthier J.) and *Egan* (*per* La Forest J.). Under this view, s. 15(1) will not be infringed unless the distinguished personal characteristic is irrelevant to the functional values underlying the law, provided that those values are not themselves discriminatory. Others have suggested that relevance is only one factor to be considered in determining whether a distinction based on an enumerated or analogous ground is discriminatory; see *Miron* (*per* McLachlin J.) and *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627 (*per* Cory and Iacobucci JJ.).

59 In my view, in the present case the same result is reached regardless of which of these approaches is applied; for similar reasoning, see *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 (*per* Iacobucci J. for the Court). There is no question that the distinction here is based on a personal characteristic that is irrelevant to the functional values underlying the health care system. Those values consist of the promotion of health and the prevention and treatment of illness and disease, and the realization of those values through the vehicle of a publicly funded health care system. There could be no personal characteristic less relevant to these values than an individual's physical disability.

60 The only question in this case, then, is whether the appellants have been afforded "equal benefit of the law without discrimination" within the meaning of s. 15(1) of the *Charter*. On its face, the medicare system in British Columbia applies equally to the deaf and hearing populations. It does not make an explicit "distinction" based on disability by singling out deaf persons for different treatment. Both deaf and hearing persons are entitled to receive certain medical services free of charge. The appellants nevertheless contend that the lack of funding for sign language interpreters renders them unable to benefit from this legislation to the same extent as hearing persons. Their claim, in other words, is one of "adverse effects" discrimination.

61 This Court has consistently held that s. 15(1) of the *Charter* protects against this type of discrimination. In *Andrews*, *supra*, McIntyre J. found that facially neutral laws may be discriminatory. "It must be recognized at once", he commented, at p. 164, ". . . that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality"; see also *Big M Drug Mart Ltd*., *supra*, at p. 347. Section 15(1), the Court held, was intended to ensure a measure of substantive, and not merely formal equality.

62 As a corollary to this principle, this Court has also concluded that a discriminatory purpose or intention is not a necessary condition of a s. 15(1) violation; see *Andrews*, at pp. 173-74, and *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at pp. 544-49 (*per* Lamer C.J.); see also *Ontario Human Rights Commission v. Simpsons-Sears Ltd*., [1985] 2 S.C.R. 536, at p. 547. A legal distinction need not be motivated by a desire to disadvantage an individual or group in order to violate s. 15(1). It is sufficient if the effect of the legislation is to deny someone the equal protection or benefit of the law. As McIntyre J. stated in *Andrews*, at p. 165, "[t]o

approach the ideal of full equality before and under the law . . . the main consideration must be the impact of the law on the individual or the group concerned". In this the Court has staked out a different path than the United States Supreme Court, which requires a discriminatory intent in order to ground an equal protection claim under the Fourteenth Amendment of the Constitution; see *Washington, Mayor of Washington, D.C. v. Davis*, 426 U.S. 229 (1976), *Village of Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252 (1977), and *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

63 This Court first addressed the concept of adverse effects discrimination in the context of provincial human rights legislation. In *Simpsons-Sears*, the Court was faced with the question of whether a rule requiring employees to be available for work on Friday evenings and Saturdays discriminated against those observing a Saturday Sabbath. Though this rule was neutral on its face in that it applied equally to all employees, the Court nevertheless found it to be discriminatory. Writing for the Court, McIntyre J. commented as follows, at p. 551:

A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." . . . On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.

See also *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, and *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970. I note that in *Andrews*, McIntyre J. made it clear that the equality principles developed by the Court in human rights cases are equally applicable in s. 15(1) cases. The definition of adverse effects discrimination set out in *Simpsons-Sears*, moreover, has been expressly adopted in the context of s. 15(1); see *Egan*, *supra*, at para. 138 (*per* Cory J.).

64 Adverse effects discrimination is especially relevant in the case of disability. The government will rarely single out disabled persons for discriminatory treatment. More common are laws of general application that have a disparate impact on the disabled. This was recognized by the Chief Justice in his dissenting opinion in *Rodriguez*, *supra*, where he held that the law criminalizing assisted suicide violated s. 15(1) of the *Charter* by discriminating on the basis of physical disability. There, a majority of the Court determined, *inter alia*, that the law was saved by s. 1 of the *Charter*, assuming without deciding that it infringed s. 15(1). While I refrain from commenting on the correctness of the Chief Justice's conclusion on the application of s. 15(1) in that case, I endorse his general approach to the scope of that provision, which he set out as follows, at p. 549:

Not only does s. 15(1) require the government to exercise greater caution in making express or direct distinctions based on personal characteristics, but legislation equally applicable to everyone is also capable of infringing the right to equality enshrined in that provision, and so of having to be justified in terms of s. 1. Even in imposing generally applicable provisions, the government must take into account differences which in fact exist between individuals and so far as possible ensure that the provisions adopted will not have a greater impact on certain classes of persons due to irrelevant personal characteristics than on the public as a whole. In other words, to promote the objective of the more equal society, s. 15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons.

65 The Court elaborated upon this principle in its recent decision in *Eaton*, *supra*. Although *Eaton* involved direct discrimination, Sopinka J. observed that in the case of disabled persons, it is often the failure to take into account the adverse effects of generally applicable laws that results in discrimination. He remarked, at paras. 66-67:

The principles that not every distinction on a prohibited ground will constitute discrimination and that, in general, distinctions based on presumed rather than actual characteristics are the hallmarks of discrimination have particular significance when applied to physical and 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 essence of true 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 a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable

accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability.

66 Unlike in *Simpsons-Sears* and *Rodriguez*, in the present case the adverse effects suffered by deaf persons stem not from the imposition of a burden not faced by the mainstream population, but rather from a failure to ensure that they benefit equally from a service offered to everyone. It is on this basis that the trial judge and the majority of the Court of Appeal found that the failure to provide medically related sign language interpretation was not discriminatory. Their analyses presuppose that there is a categorical distinction to be made between state-imposed burdens and benefits, and that the government is not obliged to ameliorate disadvantage that it has not helped to create or exacerbate. Before attempting to evaluate these assumptions, it will be helpful to relate the reasoning of the courts below in more detail.

67 As previously noted, both the trial judge and majority of the Court of Appeal determined that, while the access of deaf people to medical services is limited to a certain extent by their communication handicap, this limitation does not result from the denial of any benefit of the law within the meaning of s. 15(1) of the *Charter*. They were able to come to this conclusion because of the manner in which they characterized sign language interpretation. Interpretation services, they held, are not medically required. Rather, they are "ancillary services", which, like other non-medical services such as transportation to a doctor's office or hospital, are not publicly funded.

68 Having determined that sign language interpretation is a discrete, non-medical "ancillary" service, the courts below were able to conclude that the appellants were not denied a benefit available to the hearing population. As the majority of the Court of Appeal explained, prior to the introduction of a universal medicare system, deaf and hearing persons were each required to pay their doctors. When necessary for effective communication, deaf persons were also obliged to pay for sign language translators. The Medical Services Plan, the court observed, removes the responsibility of both hearing and deaf persons to pay their physicians. Deaf persons, of course, remain responsible for the payment of translators in order to receive equivalent medical services as hearing persons, as they would be in the absence of the legislation. In the court's view, however, any resulting inequality exists independently of the benefit provided by the state.

69 While this approach has a certain formal, logical coherence, in my view it seriously mischaracterizes the practical reality of health care delivery. Effective communication is quite obviously an integral part of the provision of medical services. At trial, the appellants presented evidence that miscommunication can lead to misdiagnosis or a failure to follow a recommended treatment. This risk is particularly acute in emergency situations, as illustrated by the appellant Linda Warren's experience during the premature birth of her twin daughters. That adequate communication is essential to proper medical care is surely so incontrovertible that the Court could, if necessary, take judicial notice of it. As Professor Pothier observes, for the hearing population "conversation between doctor and patient is so basic to the provision of medical services that it is taken for granted"; see Dianne Pothier, "M'Aider, Mayday: Section 15 of the *Charter* in Distress" (1996), 6 *N.J.C.L.* 295, at p. 335.

70 The centrality of communication to the delivery of medical services is particularly evident in the context of negligence law. The duty of disclosure commands physicians to inform patients fully of the risks involved in treatment and answer their questions regarding such risks; see *Reibl v. Hughes*, [1980] 2 S.C.R. 880, at p. 884, and *Hopp v. Lepp*, [1980] 2 S.C.R. 192, at p. 210. Physicians cannot discharge this obligation without being able to communicate effectively with their patients. In the absence of sign language interpretation, there may well be cases where it will be impossible for doctors to treat deaf persons without breaching their professional responsibilities.

71 If there are circumstances in which deaf patients cannot communicate effectively with their doctors without an interpreter, how can it be said that they receive the same level of medical care as hearing persons? Those who hear do not receive communication as a distinct service. For them, an effective means of communication is routinely available, free of charge, as part of every health care service. In order to receive the same quality of care, deaf persons must bear the burden of paying for the means to communicate with their health care providers, despite the fact that the system is intended to make ability to pay irrelevant. Where it is necessary for effective communication, sign language interpretation should not therefore be viewed as an "ancillary" service. On the contrary, it is the means by which deaf persons may receive the same quality of medical care as the hearing population.

72 Once it is accepted that effective communication is an indispensable component of the delivery of medical services, it becomes much more difficult to assert that the failure to ensure that deaf persons communicate effectively with their health care providers is not discriminatory. In their effort to persuade this Court otherwise, the respondents and their supporting interveners maintain that s. 15(1) does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action. Adverse effects only arise from benefit programs, they aver, when those programs exacerbate the disparities between the group claiming a s. 15(1) violation and the general population. They assert, in other words, that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits.

73 In my view, this position bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence. It has been suggested that s. 15(1) of the *Charter* does not oblige the state to take positive actions, such as provide services to ameliorate the symptoms of systemic or general inequality; see *Thibaudeau*, *supra*, at para. 37 (*per* L'Heureux-Dubé J.). Whether or not this is true in all cases, and I do not purport to decide the matter here, the question raised in the present case is of a wholly different order. This Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner; see *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, at pp. 1041-42, *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, at p. 655, and *Miron*, *supra*. In many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons; see *Miron*, *Tétreault-Gadoury*, and *Schachter v. Canada*, [1992] 2 S.C.R. 679. Moreover, it has been

suggested that, in taking this sort of positive action, the government should not be the source of further inequality; *Thibaudeau*, at para. 38 (*per* L'Heureux-Dubé J.).

74 The same principle has been applied by this Court in its interpretation of the equality provisions of provincial human rights legislation. In *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, the Court found that an employer's accident and sickness insurance plan, which disentitled pregnant women from receiving benefits for any reason during a certain period, discriminated on the basis of pregnancy and hence sex. In so holding, it resoundingly rejected the reasoning of *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183, at p. 190, which had held that the inequality resulting from a similar benefit program was "not created by legislation but by nature".

75 In support of the view that the state has no obligation to remedy pre-existing disadvantage in providing benefits to the general population, the respondent relies on this Court's decision in *Symes v. Canada*, [1993] 4 S.C.R. 695. There, the appellant, a self-employed mother, argued that the wages paid to her nanny were business expenses and that the section of the *Income Tax Act*, R.S.C. 1952, c. 148, that did not allow her to deduct the full cost of these expenses discriminated against her on the basis of sex. The Court rejected this argument, holding that the distinction created between persons who incur child care expenses and those who do not is not related to sex, despite the fact that women are responsible for a disproportionate share of the social costs of child care. Writing for the majority, Iacobucci J. held that the appellant had not proven that the actual expenses of child care were borne disproportionately by women. He thus concluded that the appellant had not demonstrated an adverse effect that was created or contributed to by the legislation. He stated the following, at pp. 764-65:

> If the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved. We must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision.

76 While this statement can be interpreted as supporting the notion that, in providing a benefit, the state is not required to eliminate any pre-existing "social" disadvantage, it should be remembered that it was made in the context of determining whether the legislation made a distinction based on an enumerated or analogous ground. In *Symes*, the appellant was unable to show that the allegedly adverse effect created by the legislation was suffered by members of such a group. There was no relationship, in other words, between the benefit provided by the government and the social disadvantage suffered by women in child-rearing. In the present case, in contrast, the alleged adverse effect is suffered by an enumerated group. The social disadvantage borne by the deaf is directly related to their inability to benefit equally from the service provided by the government. As a result, I do not believe that *Symes* is helpful to the respondent.

77 This Court has consistently held, then, that discrimination can arise both from the adverse effects of rules of general application as well as from express distinctions flowing from the distribution of benefits. Given this state of affairs, I can think of no principled reason why it should

not be possible to establish a claim of discrimination based on the adverse effects of a facially neutral benefit scheme. Section 15(1) expressly states, after all, that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination . . ." (emphasis added). The provision makes no distinction between laws that impose unequal burdens and those that deny equal benefits. If we accept the concept of adverse effect discrimination, it seems inevitable, at least at the s. 15(1) stage of analysis, that the government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services. As I will develop below, if there are policy reasons in favour of limiting the government's responsibility to ameliorate disadvantage in the provision of benefits and services, those policies are more appropriately considered in determining whether any violation of s. 15(1) is saved by s. 1 of the *Charter*.

78 The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field. In *Re Saskatchewan Human Rights Commission and Canadian Odeon Theatres Ltd.* (1985), 18 D.L.R. (4th) 93 (Sask. C.A.), leave to appeal refused, [1985] 1 S.C.R. vi, the court found that the failure of a theatre to provide a disabled person a choice of place from which to view a film comparable to that offered to the general public was discriminatory. Similarly, in *Howard v. University of British Columbia* (1993), 18 C.H.R.R. D/353, it was held that the university was obligated to provide a deaf student with a sign language interpreter for his classes. "[W]ithout interpreters", the Human Rights Council held, at p. D/358, "the complainant did not have meaningful access to the service". And in *Centre de la communauté sourde du Montréal métropolitain inc. v. Régie du logement*, [1996] R.J.Q. 1776, the Quebec Tribunal des droits de la personne determined that a rent review tribunal must accommodate a deaf litigant by providing sign language interpretation. Moreover, the principle underlying all of these cases was affirmed in *Haig*, *supra*, where a majority of this Court wrote, at p. 1041, that "a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of s. 15".

79 It is also a cornerstone of human rights jurisprudence, of course, that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation. The obligation to make reasonable accommodation for those adversely affected by a facially neutral policy or rule extends only to the point of "undue hardship"; see *Simpsons-Sears*, *supra*, and *Central Alberta Dairy Pool*, *supra*. In my view, in s. 15(1) cases this principle is best addressed as a component of the s. 1 analysis. Reasonable accommodation, in this context, is generally equivalent to the concept of "reasonable limits". It should not be employed to restrict the ambit of s. 15(1).

80 In my view, therefore, the failure of the Medical Services Commission and hospitals to provide sign language interpretation where it is necessary for effective communication constitutes a *prima facie* violation of the s. 15(1) rights of deaf persons. This failure denies them the equal benefit of the law and discriminates against them in comparison with hearing persons.

81 I acknowledge that the standard I have set is a broad one. Given the nature of the evidentiary record before this Court, however, it would not be appropriate to elaborate it in any detail. Some guidance can be provided, however (and I stress that it is guidance -- not authoritative pronouncement), by the experience in the United States under the *Rehabilitation Act*, 29 U.S.C. § 794 (1997), and the *Americans with Disabilities Act*, 42 U.S.C. §§ 12182-12189 (1997). Regulations enacted pursuant to those statutes require health care providers to supply appropriate auxiliary aids and services, including qualified sign language interpreters, to ensure "effective communication" with deaf persons; *Code of Federal Regulations*, 45 C.F.R. § 84.52(c) (1997); 28 C.F.R. § 36.303(b) and (c) (1997). While the term "effective communication" is not defined in the legislation, it has been held to mean that a deaf individual "actually understood" the content of the communication; see *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988), at pp. 563-64. One would suppose that it would also entail that deaf persons be able to inform medical staff of the basic circumstances surrounding their illness or injury; see Elizabeth E. 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 p. 883.

82 This is not to say that sign language interpretation will have to be provided in every medical situation. The "effective communication" standard is a flexible one, and will take into consideration such factors as the complexity and importance of the information to be communicated, the context in which the communications will take place and the number of people involved; see 28 C.F.R. § 35.160 (1997). For deaf persons with limited literacy skills, however, it is probably fair to surmise that sign language interpretation will be required in most cases; see Chilton, at p. 886, and the many studies there cited.

83 Finally, I note that it is not in strictness necessary to decide whether, according to this standard, the appellants' s. 15(1) rights were breached. This Court has held that if claimants prove that the equality rights of members of the group to which they belong have been infringed, they need not establish a violation of their own particular rights. In *Egan*, *supra*, the government contended that, given the net benefit available to them pursuant to other legislation, a homosexual couple was not negatively affected by the denial of a spousal allowance under the *Old Age Security Act*, R.S.C., 1985, c. O-9. In rejecting this submission, I commented as follows, at para. 12:

> . . . 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 homosexual couples, which is the point the respondent must establish.

Similarly, Cory J. stated in *Egan*, at para. 153, that the "appellants must demonstrate that homosexual couples in general are denied equal benefit of the law, not that they themselves are suffering a particular or unique denial of a benefit" (emphasis in original). That being said, it is fair to say that the absence of a publicly funded sign language interpretation service discriminated against the appellants by denying them the equal benefit of the British Columbia health care system. The evidence at trial established that, generally speaking, the quality of care received by the appellants was inferior to that available to hearing persons.

Section 1 of the *Charter*

84 I come now to possible justification under s. 1 of the *Charter*, which reads:

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.

In order to justify a limitation of a *Charter* right, the government must establish that the limit is "prescribed by law" and is "reasonable" in a "free and democratic society". In *R. v. Oakes*, [1986] 1 S.C.R. 103, this Court set out the analytical framework for determining whether a law constitutes a reasonable limit on a *Charter* right. A succinct restatement of that framework can be found in the reasons of Iacobucci J. in *Egan*, at para. 182:

First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.

It is not necessary to consider each of these elements in this case. Assuming without deciding that the decision not to fund medical interpretation services for the deaf constitutes a limit "prescribed by law", that the objective of this decision -- controlling health care expenditures -- is "pressing and substantial", and that the decision is rationally connected to the objective, I find that it does not constitute a minimum impairment of s. 15(1).

85 This Court has recently confirmed that the application of the *Oakes* test requires close attention to the context in which the impugned legislation operates; see *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 78. The Court has also held that where the legislation under consideration involves the balancing of competing interests and matters of social policy, the *Oakes* test should be applied flexibly, and not formally or mechanistically; see *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 737, *McKinney*, *supra*, *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at pp. 999-1000, *Cotroni*, *supra*, at p. 1489, *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, at p. 222 (*per* L'Heureux-Dubé J.), *Egan*, *supra*, at para. 29 (*per* La Forest J.) and at paras. 105-106 (*per* Sopinka J.), and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 63 (*per* La Forest J.) and at paras. 127-138 (*per* McLachlin J.). It is also clear that while financial considerations alone may not justify *Charter* infringements (*Schachter*, *supra*, at p. 709), governments must be afforded wide latitude to determine the proper distribution of resources in society; see *McKinney*, at p. 288, and *Egan*, at para. 104 (*per* Sopinka J.). This is especially true where Parliament, in providing specific social benefits, has to choose between disadvantaged groups; see *Egan*, at paras. 105-110 (*per* Sopinka J.). On the other hand, members of this Court have suggested that

deference should not be accorded to the legislature merely because an issue is a "social" one or because a need for governmental "incrementalism" is shown; see *Egan*, at para. 97 (*per* L'Heureux-Dubé J.) and at paras. 215-16 (*per* Iacobucci J.). In the present case, the failure to provide sign language interpreters would fail the minimal impairment branch of the *Oakes* test under a deferential approach. It is, therefore, unnecessary to decide whether in this "social benefits" context, where the choice is between the needs of the general population and those of a disadvantaged group, a deferential approach should be adopted.

86 At the same time, the leeway to be granted to the state is not infinite. Governments must demonstrate that their actions infringe the rights in question no more than is reasonably necessary to achieve their goals. Thus, I stated the following for the Court in *Tétreault-Gadoury*, *supra*, at p. 44:

> It should go without saying, however, that the deference that will be accorded to the government when legislating in these matters does not give them an unrestricted licence to disregard an individual's *Charter* rights. Where the government cannot show that it had a reasonable basis for concluding that it has complied with the requirement of minimal impairment in seeking to attain its objectives, the legislation will be struck down.

87 In the present case, the government has manifestly failed to demonstrate that it had a reasonable basis for concluding that a total denial of medical interpretation services for the deaf constituted a minimum impairment of their rights. As previously noted, the estimated cost of providing sign language interpretation for the whole of British Columbia was only $150,000, or approximately 0.0025 percent of the provincial health care budget at the time. This figure was based on an extrapolation from the services then being provided by the Western Institute for the Deaf and Hard of Hearing in the Lower Mainland area. Although there was little evidence presented of the precise content of this service, it was not suggested that its extension throughout the province would not have fulfilled the requirements of s. 15(1). In these circumstances, the refusal to expend such a relatively insignificant sum to continue and extend the service cannot possibly constitute a minimum impairment of the appellants' constitutional rights.

88 The respondents argue, however, that the situation of deaf persons cannot be meaningfully distinguished from that of other non-official language speakers. If they are compelled to provide interpreters for the former, they submit, they will also have to do so for the latter, thereby increasing the expense of the program dramatically and placing severe strain on the fiscal sustainability of the health care system. In this context, they contend, it was reasonable for the government to conclude that they impaired the rights of deaf persons as little as possible.

89 This argument, in my view, is purely speculative. It is by no means clear that deaf persons and non-official language speakers are in a similar position, either in terms of their constitutional status or their practical access to adequate health care. From the perspective of a patient, there is no real difference between sign language and oral language if there is no ability to communicate with a physician. But from the perspective of the state's obligations, there may very well be. In the present case, the only relevant constitutional provisions are ss. 15(1) and 1 of the *Charter*. In a case involving a claim for medical interpretation for hearing patients, in contrast, the

analysis would be more complicated. In such a case, it would be necessary to consider the interaction between s. 15(1) and other provisions of the Constitution, specifically those related to the language obligations of governments. Moreover, the respondents have presented no evidence as to the potential scope or cost of an oral language medical interpretation program. It is possible that the nature and extent of any reasonable accommodation required for hearing persons under s. 1 would differ from that required for deaf persons. Thus, any claim for the provision of such a program, whether based on national origin or language as an analogous ground, would proceed on markedly different constitutional terrain than a claim grounded on disability.

90 Further, it is apparent that deaf persons stand in a special position in terms of their ability to communicate with the mainstream population. As I have discussed, it is extremely difficult for many deaf persons to acquire a high level of proficiency in oral languages, whether in spoken or written form. Moreover, it is apparent that the deaf have particular difficulties in obtaining the service of persons in the community who understand sign language. There is no evidentiary basis from which to assess whether non-official language speakers stand in a similar position. So, without wishing to minimize the difficulties faced by hearing persons whose native tongues are neither English nor French, it is by no means clear that the communications barriers they face are analogous to those encountered by deaf persons. As a result, the success of a potential s. 15(1) claim by members of the latter group cannot be predicted in advance. The possibility that such a claim might be made, therefore, cannot justify the infringement of the constitutional rights of the deaf.

91 The respondents also contend that recognition of the appellants' claim will have a ripple effect throughout the health care field, forcing governments to spend precious health care dollars accommodating the needs of myriad disadvantaged persons. "Virtually everyone in the health care system who is denied a service", they submit, "will either be medically disadvantaged or could argue that a medical disadvantage will arise from the lack of service." Similarly, in his concurring opinion in the Court of Appeal, Lambert J.A. observed that many of the medical services and products required by the disabled are not publicly funded. In these circumstances, he asserted, governments must have the freedom to allocate scarce health care dollars among various disadvantaged groups.

92 These arguments miss the mark. If effective communication is integrally connected with the provision of health care -- a point that Lambert J.A. accepted --then the fact that there are number of medical services that benefit disabled persons that are not covered by medicare is immaterial. The appellants do not demand that the government provide them with a discrete service or product, such as hearing aids, that will help alleviate their general disadvantage. Their claim is not for a benefit that the government, in the exercise of its discretion to allocate resources to address various social problems, has chosen not to provide. On the contrary, they ask only for equal access to services that are available to all. The respondents have presented no evidence that this type of accommodation, if extended to other government services, will unduly strain the fiscal resources of the state. To deny the appellants' claim on such conjectural grounds, in my view, would denude s. 15(1) of its egalitarian promise and render the disabled's goal of a barrier-free society distressingly remote.

93 Viewed in this light, it is impossible to characterize the government's decision not to fund sign language interpretation as one which "reasonably balances the competing social demands which our society must address"; see *McKinney*, *supra*, p. 314. It should be recalled that the Ministry of Health decided not to fund the interpretation program even in part. Other options, such as the partial or interim funding of the program offered by the Western Institute for the Deaf and Hard of Hearing, or the institution of a scheme requiring users to pay either a portion of the cost of interpreters or the full amount if they could afford to do so, were either not considered or were considered and rejected. In this sense, the present case is similar to *Tétreault-Gadoury*, *supra*, where the Court found that the denial of unemployment insurance benefits to persons over 65 violated s. 15(1) and could not be saved under s. 1 of the *Charter*. Writing for the Court, I found that one of the reasons that this denial failed the minimal impairment test was that persons over 65 were not entitled to any benefits. "Even allowing the government a healthy measure of flexibility in legislating in this area", I stated, at p. 47, "the complete denial of unemployment benefits is not an acceptable method of achieving any of the government objectives set forth above. . . ." That being said, I do not wish to be understood as intimating that the alternative measures I have adverted to would survive s. 1 scrutiny. I refer to them solely for the purpose of demonstrating that the government did not attempt to institute a scheme that would constitute a lesser limitation on deaf persons' rights.

94 In summary, I am of the view that the failure to fund sign language interpretation is not a "minimal impairment" of the s. 15(1) rights of deaf persons to equal benefit of the law without discrimination on the basis of their physical disability. The evidence clearly demonstrates that, as a class, deaf persons receive medical services that are inferior to those received by the hearing population. Given the central place of good health in the quality of life of all persons in our society, the provision of substandard medical services to the deaf necessarily diminishes the overall quality of their lives. The government has simply not demonstrated that this unpropitious state of affairs must be tolerated in order to achieve the objective of limiting health care expenditures. Stated differently, the government has not made a "reasonable accommodation" of the appellants' disability. In the language of this Courts' human rights jurisprudence, it has not accommodated the appellants' needs to the point of "undue hardship"; see *Simpsons-Sears*, *supra*, and *Central Alberta Dairy Pool*, *supra*.

Remedy

95 I have found that where sign language interpreters are necessary for effective communication in the delivery of medical services, the failure to provide them constitutes a denial of s. 15(1) of the *Charter* and is not a reasonable limit under s. 1. Section 24(1) of the *Charter* provides that anyone whose rights under the *Charter* have been infringed or denied may obtain "such remedy as the court considers appropriate and just in the circumstances". In the present case, the appropriate and just remedy is to grant a declaration that this failure is unconstitutional and to direct the government of British Columbia to administer the *Medical and Health Care Services Act* (now the *Medicare Protection Act*) and the *Hospital Insurance Act* in a manner consistent with the requirements of s. 15(1) as I have described them.

96 A declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this Court's role to dictate how this is to be accomplished. Although it is to be assumed that the government will move swiftly to correct the unconstitutionality of the present scheme and comply with this Court's directive, it is appropriate to suspend the effectiveness of the declaration for six months to enable the government to explore its options and formulate an appropriate response. In fashioning its response, the government should ensure that, after the expiration of six months or any other period of suspension granted by this Court, sign language interpreters will be provided where necessary for effective communication in the delivery of medical services. Moreover, it is presumed that the government will act in good faith by considering not only the role of hospitals in the delivery of medical services but also the involvement of the Medical Services Commission and the Ministry of Health.

Disposition

97 I would allow the appeal. Costs are awarded to the appellants from the respondents throughout. I would answer the constitutional questions as follows:

1 Does the definition of "benefits" in s. 1 of the *Medicare Protection Act*, S.B.C. 1992, c. 76, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* by failing to include medical interpreter services for the deaf?

No.

2 If the answer to question 1 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

Given my response to question 1, it is not necessary to answer this question.

3 Do ss. 3, 5 and 9 of the *Hospital Insurance Act*, R.S.B.C. 1979, c. 180, and the Regulations enacted pursuant to s. 9 of that Act, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* by failing to require that hospitals in the Province of British Columbia provide medical interpreter services for the deaf?

No.

4 If the answer to question 3 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

Given my response to question 3, it is not necessary to answer this question.

Appeal allowed with costs.

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