Court File No. 24896

IN THE SUPREME COURT OF CANADA
(Appeal from the Court of Appeal for the Province of Ontario)

BETWEEN:

Robin Susan Eldridge, John Henry Warren
and Linda Jane Warren

Appellants (Applicant)

- and -

The Attorney General of British Columbia
and the Medical Services Commission

Respondents (Respondent)

- and -

WOMEN'S LEGAL EDUCATION AND ACTION FUND and
the Disabled Women's Network Canada

Intervener

INTERVENER'S FACTUM

PART I - THE FACTS

1. The DisAbled Women's Network Canada and the Women's Legal Education and Action Fund (the "Coalition") adopt the facts as set out in the Appellants' factum.

PART II - POINTS IN ISSUE

2. The issues in this appeal are whether the exclusion of sign language interpretation from funding under the *Medicare Protection Act* and the *Hospital Insurance Act* contravenes s. 15(1) of *Canadian Charter of Rights and Freedoms* (the "*Charter*"), and whether the contravention is justifiable under s. 1 of the *Charter*.

> *Medicare Protection Act*, S.B.C., 1992, c.76 [formerly the *Medical and Health Care Services Act*]
> *Hospital Insurance Act*, R.S.B.C., 1979, c.180

3. The Coalition adopts the arguments set out in the Appellants' factum at paragraphs 61 to 68 relating to the applicability of the *Charter* to the *Hospital Insurance Act*. In the alternative, and for the reasons set out below, when interpreted and applied in a manner consistent with s. 15 of the *Charter*, ss. 3, 5 and 9 of the *Hospital Insurance Act* must include sign language interpretation for Deaf persons as an integral part of "general hospital services".

PART III - ARGUMENT

4. The Coalition submits that: (a) communication is an integral part of all health care services; while an effective means of communication is routinely available to hearing patients, it is denied to Deaf patients under the impugned legislation; (b) when analyzed in its social and historical context, the exclusion of sign language interpretation from funding under the impugned legislation has a discriminatory impact on Deaf persons contrary to s. 15(1) of the *Charter*; and (c) the violation of s. 15(1) has not been and cannot be justified under s. 1 of the *Charter*.

ISSUE ONE - SECTION 15(1) OF THE *CHARTER*

A. SOCIAL CONTEXT

(a) Social Construction of Disability

5. The history of people with disabilities in Canada is a history of exclusion, marginalization and social devaluation. Persons with disabilities have been excluded from the labour force, denied access to the most basic opportunities for social interaction and advancement and, in many cases, relegated to institutions.

> M. D. Lepofsky, "A Report Card on the *Charter's* Guarantee of Equality to Person with Disabilities After Ten Years - What Progress? What Prospects? (forthcoming in *National Journal of Constitutional Law*) at 3-5
> S. A. Goundry & Y. Peters, *Litigating for Disability and Equality Rights: The Promises and the Pitfalls* (1994) at 4-5

6. At the heart of the historical disadvantage of persons with disabilities is the fundamentally ableist notion of disability as defect and of disabled persons as unfortunate victims. Disability is constructed as an aberration, abnormality or flaw. One consequence of this is that persons with disabilities are not afforded either equality, or the respect which such equal status attracts. Instead, persons with disabilities are subjected to paternalistic attitudes of pity and charity, and their entry into and positions within the social mainstream are conditional upon their emulation of non-disabled norms rather than as a matter of right.

> Goundry & Peters, *supra*, at 5-6
> Lepofsky, *supra*, at 4

7. Disability has been socially constructed as a negative characteristic inherent in the individual. This construct "places responsibility for any and all disability-related barriers on the individual rather than on the social institutions which have excluded persons with disabilities by maintaining barriers to their full participation". For example, in a barrier-free world, persons who use wheelchairs would not experience mobility-related disadvantage.

Goundry & Peters, *supra*, at 3, 5 and 6
Lepofsky, *supra*, at 2-6

S. Wendell, "Toward a Feminist Theory of Disability" (1989) 4 *Hypatia* 104 at 109-112
D. Pothier, "Miles To Go: Some Personal Reflections on the Social Construction of Disability" (1992) 14 *Dalhousie Law Journal* 526 at 526 and 535
A. Asch & M. Fine, "Introduction: Beyond Pedestals" in A. Asch and M. Fine, eds., *Women with Disabilities: Essays in Psychology, Culture, and Politics* (Philadelphia: Temple University Press, 1988) 1 at 5-7

8. The pervasive subjugation of persons with disabilities has profoundly negative implications for disabled persons in social, economic, political and legal domains. Structural barriers arising from the values and norms which exclude and derogate persons with disabilities have caused serious socio-economic disadvantage. Statistics from 1991 indicate that persons with disabilities, when compared with non-disabled persons, have less education, are more likely to be outside of the labour force, face much higher unemployment rates, and are concentrated at the bottom end of the pay scale when employed. About 60 percent of persons with disabilities have incomes below the Statistics Canada Low-Income Cutoff.

Minister of Human Resources, *Persons with Disabilities: A Supplementary Paper* (Ottawa: Minister of Supply and Services Canada, 1994) at 3-4
Statistics Canada, *A Portrait of Persons With Disabilities* (Ottawa: Minister of Industry, Science and Technology, 1995) at 46-49

9. Women with disabilities experience even more severe socio-economic disadvantage. In 1991, women with disabilities faced an employment rate that was about one-third less than the rate for non-disabled women and about 15 percent less than the rate for men with disabilities. The poverty rate experienced by women with disabilities is higher than that for both women generally and for men with disabilities. In addition to greater socio-economic disadvantage, women with disabilities face additional manifestations of discrimination including higher rates of violence and ascriptions of weakness and passivity.

Minister of Human Resources, *supra*, at 4
M. Fine & A. Asch, "Disabled Women: Sexism without the Pedestal", in M. J. Deegan and N. A. Brooks, eds. *Women and Disability: The Double Handicap* (New Brunswick: Transaction Books, 1985) 6 at 7
T. Doe, "The Social Construction of Deaf Women" (1996), 12 *Women's des femmes* 45 at 47

10. Persons who are Deaf have similarly been subject to marginalization and stigmatization on the basis of disability. Many Deaf persons object to the notion that deafness is an impairment; they identify as

members of the Deaf community which has its own language and culture. But that fact does not justify the compelled exclusion of Deaf persons from opportunities and services designed for and otherwise available to the non-disabled population. Because society is organized as though everyone can hear, communication barriers are at the heart of the disadvantage experienced by Deaf persons.

Wendell, *supra*, at 119

L. McCulloch, *Access to Health Care: Report on a Consultation Process with Deaf, Hard of Hearing, and Deaf-Blind Communities* (Minister of Health, May 1994) at 6 and 17

S.D. Rutherford, "The Culture of American Deaf People" (1988) 59 *Sign Language Studies* 129

(b) Importance of Communication to Health Care

11. Communication is integral to the provision of health care. Effective communication is an interactive process requiring information to flow between patients and health care providers. The medical process requires "precise communication". Health care providers' collection and understanding of their patients' descriptions of historical information and current symptoms are essential to appropriate diagnoses. Communication problems may prevent physicians from reaching a diagnosis.

R. M. DiMatteo, "The Physican-Patient Relationship: Effects on the Quality of Health Care" (1994) 37 *Clinical Obstetrics and Gynecology* 149 at 149-150

P. Freeling, "The Doctor-Patient Relationship in Diagnosis and Treatment: in D. Pendleton & J. Hasler, eds, *Doctor-Patient Communication* (London: Academic Press, 1983) 161 at 165

J. Jaspers et al., "The Consultation: A Social Psychological Analysis" in D. Pendleton & J. Hasler, eds., *ibid*. 139 at 139-141

L. J. DiPietro, C.H. Knight and J.S. Sams, "Health Care Delivery for Deaf Patients: The Provider's Role" (1981) 126 *American Annals of the Deaf* 106 at 109

12. Effective communication is essential to patients' understanding of health issues, health care options and the ultimate advice given, as well as to their subsequent adherence to the instructions of their health care providers. Studies indicate a positive correlation between effective communication and patient health, including improved recovery from surgery, decreased use of medications, shorter hospital stays, fewer complications, improved physiological changes and better management of chronic conditions.

DiMatteo, *supra*, at 157-158

Jaspers, *supra*, at 140-141

13. The centrality of communication to the doctor-patient relationship is apparent when the issue of informed consent is considered. The duty to obtain informed consent requires all physicians to fully inform patients of any material risks involved in treatment, and answer patients' questions regarding such risks. Physicians cannot discharge this obligation without being able to effectively communicate with their patients. Miscommunication may lead to medical complications, and may form the basis of medical malpractice claims.

> E. E. Chilton, "Ensuring Effective Communication: The Duty of Health Care Providers to Supply Sign Language for Deaf Patients" (1996) 47 *Hastings Law Journal* 871 at 873 and 887-888
> *Schanczl* v. *Singh*, [1988] 2 W.W.R. 446 (Alta. Q.B.)
> *Hopp* v. *Lepp*, [1980] 2 S.C.R. 192
> *Reibl* v. *Hughes*, [1980] 2 S.C.R. 880

14. Effective communication has taken on increased significance in recent years as patients begin to move towards more collaborative relationships with their health care providers and take more active roles in their health, by assuming more responsibility for and taking more interest in health education, promotion and preventative care. A more involved role in the patient-physican relationship can only be attained with effective communication.

> B. M. Korsch, "Current Issues in Communication Research" (1989) 1 *Health Communication* 5 at 6-8
> DiMatteo, *supra*, at 154-156

(c) Communication Barriers Between Deaf Persons and Health Care Providers

15. American Sign Language ("ASL") is the language of the Deaf population. In the United States, approximately 85 percent of Deaf people use ASL in order to communicate and it is third most used language after English and Spanish.

> M. Lotke, "She Won't Look At Me" (1995) 123 *Annals of Internal Medicine* 54 at 55
> G. Becker & J.K. Jauregui, "The Invisible Isolation of Deaf Women: Its Effect on Social Awareness" in M. J. Deegan & N.A. Brooks, eds., *supra*, at 26-27
> T.G. MacKinney et al., "Improvements in Preventive Care and Communication for Deaf Patients: Results of a Novel Primary Health Care Program" (1995) 10 *Journal of General Internal Medicine* 133 at 133
> McCulloch, *supra*, at 11

16. ASL is a "visual language that is expressed through handshapes and movements, facial expressions and body position". It has no written form and is not based on English. The language includes finger spelling and signs for specific words. Signs are the most common element of the language. ASL has its own grammatical structure, vocabulary and idioms.

P. Golden & M. Ulrich, "Deaf Patient's Access to Care Depends on Staff Communication" (1978) 52 *J.A.H.A.* 86 at 87
Becker, *supra*, 26-27

17. Few doctors are fluent in ASL and, as a result, they cannot communicate directly with most Deaf patients. This barrier to communication is the "single most critical factor affecting health care delivery" for Deaf persons. Without interpreters, Deaf persons have no effective means to convey information to health care providers, receive instructions and recommendations, or give informed consent to medical treatment.

DiPietro, *supra*, at 106 and 108
Chilton, *supra*, at 886-888
A. Nemon, "Deaf Persons and Their Doctors" (1980) 14 *Journal of the Rehabilitation of the Deaf* 19 at 19

18. The lack of ASL interpretation has negative effects on health care which compound over the lives of Deaf persons. Studies indicate that 90 percent of Deaf children are born to hearing parents. Without ASL interpretation, communication about Deaf children's illnesses occurs between hearing parents and hearing health care providers, to the exclusion of Deaf children. Unlike hearing children, Deaf children will not learn basic names for their own body parts and, by adulthood, may lack information as to their own medical histories.

DiPietro, *supra*, at 107
Nemon, *supra*, at 21
McCullogh, *supra*, at 16 and 36-37

19. Deaf persons are "at risk for poor health care resulting from problems in physician-patient communication". Studies show that approximately 45 percent of Deaf patients who have seen doctors without interpreters have medical problems that remain undiagnosed. Conversely, the quality of health care for Deaf persons improves when ASL interpretation is available. Studies show that when Deaf patients use sign language interpreters, they are more satisfied with the health care received, and have better health outcomes, including higher rates of compliance with preventative care recommendations.

G. Reisman, J. Scanlon & K. Kemp, "Medical Interpreting for Hearing-Impaired Patients" (1977) 237 *Journal of the American Medical Association* 2397 at 2397-2398
E. McEwen & H. Anton-Culver, "The Medical Communication of Deaf Patients" 26 *Journal of Family Practice* 289 at 289
MacKinney et al., *supra,* at 136

20. ASL interpretation is the only means of effective two-way communication between health care providers and most Deaf persons. A reciprocal relationship is necessary if health care services are to be effective. Without ASL interpretation, health care providers and Deaf persons attempt communication in a variety of ways. These methods include lipreading, exchanging written notes and the use of family members. Each of these methods, however, is highly problematic, especially in the medical setting.

DiPietro, *supra,* at 106 and 107-109

21. Lipreading is one-way communication: Deaf persons read the lips of health care providers, but health care providers have no way of receiving information from Deaf persons. Furthermore, each Deaf person has a different level of skill with respect to lipreading. Studies show that even the best lipreaders only understand approximately 26-30 percent of what is being said. Forty to sixty percent of all sounds and lip formations in the English language look like other sounds and only 30 percent of English sounds are visible on the lips. Other factors, such as unfamiliar terminology, anxiety, stress, fatigue, accents, inappropriate and inadequate lighting, distance from the person, and facial hair, make lipreading problematic. Finally, there must be constant facial exposure for lipreading to be at all effective and this is often not possible during medical procedures.

Golden, *supra,* at 86
DiPietro, *supra,* at 108
Chilton, *supra,* at 890-891
McCullogh, *supra,* at 16
Lotke, *supra,* at 55
S.L.H. Davenport, "Improving Communication with Deaf Patients" (1977) 4 *Journal of Family Practice* 1065 at 1066

22. The exchange of written notes, although the most frequently used method in the medical setting, is also ineffective as it generally occurs in the English language. Only 12 percent of the Deaf population is fluent in English. The average pre-lingual Deaf person (the person is either born Deaf or loses her hearing before language is acquired) reads English at a grade three to six level regardless of the

intelligence level of the person. Although deafness may affect a person's ability to learn English, it does not affect the person's "ability to formulate and comprehend ideas". The exchange of written notes is time consuming and impractical, often resulting in abbreviated messages that further miscommunication. The exchange of written notes is unworkable in situations such as emergency care and child birth.

D.A. Ebert & P.S. Heckerling, "Communication with Deaf Patients: Knowledge, Beliefs, and Practices of Physicians" (1995) 273 *Journal of the American Medical Association* 227 at 228
Golden, *supra*, at 86 and 87
DiPietro, *supra*, at 108
Chilton, *supra*, at 889-890
McCullogh, *supra*, at 17

23. Studies show that friends and family are used as interpreters in 19 percent of health care situations involving Deaf persons. The use of friends and family members as interpreters is inappropriate because patient confidentiality and privacy are compromised. These individuals also lack impartiality and may edit or modify what is being said to spare the patient's feelings. Family members are unlikely to have the necessary skills to interpret complicated and unfamiliar terminology. This is especially true when children are used to interpret for their Deaf parents.

Ebert, *supra*, at 228-229
Chilton, *supra*, at 893
Nemon, *supra*, at 23
MacKinney, *supra*, 137
DiPietro, *supra*, at 109

24. Problems associated with alternative attempts at communication are exacerbated by misconceptions about Deaf persons, including negative assumptions about their intelligence. Doctors are often uncomfortable dealing with Deaf persons because communication is difficult and unfamiliar.

Davenport, *supra*, at 1065
DiPietro, *supra*, 111

25. In addition to the communication barriers experienced by Deaf persons in the health care context, Deaf women experience the particular health care needs of women, including obstetrical and gynaecological care, which brings them into frequent contact with the health care system. As well, women's culturally-defined responsibilities for child care means that they must also communicate with

their children's health care providers. In 1991, twice as many women as men contacted their physicians on 10 or more occasions. In that same year, women also experienced higher hospitalization rates.

DiMatteo, *supra*, at 153

Statistics Canada, *Women in Canada: A Statistical Report* (Ottawa: Ministry of Industry, 1995) at 36, 37, 46 and 47

The Boston Women's Health Book Collective, *The New Our Bodies, Ourselves* (New York: Simon & Schuster, 1992) at 652

26. The situation of Deaf women in our society means, moreover, that this group has less access to publicly disseminated information about women's health care concerns when compared to hearing women. For example, accessible information about preventative health care for women, birth control, violence against women, and child rearing is frequently lacking. Many Deaf women express a profound sense of frustration and powerlessness because of the communication barriers they experience. As greater access to health care information and services takes place, the isolation and exclusion of Deaf women will be reduced.

Becker, *supra*, at 31-33

Doe, *supra*, at 46

S. Tudiver, "Manitoba Voices: A Qualitative Study of Women's Experiences with Technology in Pregnancy" in Royal Commission on New Reproductive Technologies, *Prenatal Diagnosis: Background and Impact on Individual Research Studies* (Ottawa: Minister of Supply and Services Canada, 1993) 347 at 377 and 386

B. THE PROPER ANALYTICAL FRAMEWORK UNDER SECTION 15

(a) The Guarantee of Substantive Equality

27. This Honourable Court has repeatedly emphasized that the rights guaranteed under the *Charter* are to be purposively and generously interpreted. This Court has also recognized that inherent human dignity is at the heart of individual rights in a free and democratic society. Section 15, more than any other *Charter* right, expresses our commitment to the equal human dignity and worth of all persons.

Hunter v. *Southam Inc.*, [1984] 2 S.C.R. 145 at 155-56 per Dickson J. (as he was then)

R. v. *Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 336 and 344 per Dickson J. (as he was then)

Miron v. *Trudel*, [1995] 2 S.C.R. 418 at 486-487 and 494 per McLachlin J.

Egan v. *Canada*, [1995] 2 S.C.R 513 at 543 per L'Heureux-Dubé J. and at 584 per Cory J.

28. The constitutional guarantee of equality entails "the promotion of a society in which all are secure in the knowledge that they are recognized at law as equal human beings, equally capable, and equally deserving".

Egan v. *Canada*, *supra*, at 545 per L'Heureux-Dubé J.
See also:
Andrews v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 171 per McIntyre J.

29. The overall purpose of s. 15 of the *Charter* is to remedy or prevent discrimination against groups subject to historical disadvantage. This Court recently confirmed the remedial nature of s. 15 in the context of disability. Mr. Justice Sopinka for the Court in *Eaton* stated:

> ...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.

Brant County Board of Education v. *Eaton* (6 February 1997), Unreported Decision, Court File No. 24668 (S.C.C.) at para. 66 per Sopinka J.
See also:
Andrews, *supra*, at 154 per Wilson J.
R. v. *Turpin*, [1989] 1 S.C.R. 1296 at 1333 per Wilson J.
R. v. *Swain*, [1991] 1 S.C.R. 933 at 992 per Lamer C.J.

30. The manifestations of discrimination that result in the exclusion from mainstream society and the attribution of stereotypical characteristics are mutually reinforcing and operate together to foster the belief that the exclusion results from "natural forces" rather than from social and historical inequities. This belief must be challenged in the course of the s. 15 analysis; otherwise, the exclusion of the disadvantaged group from the mainstream may appear to be justified.

Bliss v. *Attorney General of Canada*, [1979] 1 S.C.R. 183 at 190 per Ritchie J.
Canadian National Railway Co. v. *Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 at 1139 per Dickson C.J.
Brooks v. *Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 at 1242-1244 per Dickson C.J.

31. The interplay between the social construction of disability and the exclusion of persons with disabilities was evident in *Eaton*. As this Court recognized, "[e]xclusion 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". Access and integration for persons with disabilities requires challenging both the exclusionary impact of mainstream values and norms and the erroneous assumption that persons with disabilities are incapable of performing or participating in mainstream society.

Brant County, supra, at para. 67 per Sopinka J.

32. The attainment of substantive equality under s. 15 therefore requires close attention to social and historical context. With respect to disability, there is a particular risk that, if examined out of context, the discriminatory effect of the law will be rendered invisible.

Andrews, supra, at 164 per McIntyre J.
Turpin, supra, at 1331-32 per Wilson J.
Egan, supra, at 586 per Cory J.
Goundry & Peters, *supra*, at 18

33. Most importantly, the goal of substantive equality must form the basis of the s. 15 analysis. Substantive equality demands an approach inclusive of *all* perspectives to ensure that the impact of the law is neither less beneficial nor more burdensome to disadvantaged groups. As the Chief Justice stated in *Rodriguez*, "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".

Rodriguez v. *British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at 549 per Lamer C.J. (dissenting on other grounds)

34. In the context of disability, equality includes the right of individuals and groups to participate in a society free of barriers, barriers which give "disability" its meaning. As this Court recognized in *Eaton*, equality for persons with disabilities may be achieved, in part, by "accommodating" the disability through the identification and removal of structural and institutional impediments.

Brant County, supra, at paras. 66-67 per Sopinka J.
Andrews, supra, at 169 per McIntyre J.

Miron, supra, at 494 per McLachlin J.
Lepofsky, *supra,* at 13

35. Equality under s. 15 entails much more than simply "accommodating" persons with disabilities into existing societal norms and structures leaving unscrutinized those norms and structures themselves. Substantive equality challenges the very existence of mainstream structural and institutional barriers, including the socially constructed notions of disability which inform them. For persons with disabilities, equality means the right to participate in an inclusive society. It does not mean merely the right to participate in a mainstream society through the adoption of non-disabled norms.

S. Day & G. Brodsky, "The Duty to Accommodate: Who Will Benefit?" 7 *The Canadian Bar Review* 433 at 462-463

36. Equality under s. 15 must be distinguished from the "duty to accommodate" developed under human rights legislation. Decision makers in respect of human rights complaints rarely interpret the duty to accommodate as an obligation on those responsible for the discrimination to effect proactive institutional change in order to root out and remedy the underlying causes of systemic discrimination which lay at the heart of most individual complaints.

37. The "duty to accommodate" is antithetical to the meaning of substantive equality as its interpretation proceeds from and leaves intact the mainstream perspective, only making concessions to the disadvantaged group. Its frame of reference falls far short of full inclusion. In order to achieve what s. 15 demands, equality must not be defined by the perspectives, experiences, wants or desires of those privileged groups in society precisely because it is those groups who are least well situated to recognize and eliminate the discriminatory undertones of their own thoughts and actions.

38. Where a law is challenged as discriminatory, it is no answer under s. 15 to say that the government has attempted to accommodate the needs of the individual or group making the s. 15 claim. The only issue under s. 15 is whether the impact of the law is discriminatory on the basis of prohibited grounds of discrimination.

(b) Breach of Section 15

39. Section 15 provides a framework for the "unremitting protection" of equality rights; equality issues arising under this section cannot be resolved through a fixed rule or formula. In order to achieve the goal of s. 15 - the attainment of full equality- the main consideration must be the impact of the law on the individuals or groups affected.

Andrews, supra, at 165 and 168 per McIntyre J.
Turpin, supra, at 1326 per Wilson J.
Egan, supra, at 548 per L'Heureux-Dubé J. and at 603 per Cory J.

40. Under an effects-based approach, the Court must consider which group or groups are affected by the impugned law, and whether the impugned law has a discriminatory impact on the basis of group characteristics recognized as enumerated or analogous grounds of discrimination.
The discriminatory impact of the law must be assessed from the perspective of members of the disadvantaged group claiming the *Charter* right and not from the point of view of the state. The absence of an intention to discriminate is an irrelevant consideration.

Andrews, supra, at 174 and 182 per McIntyre J.
Rodriguez, supra, at 549 per Lamer C.J.
Miron, supra, at 485 per McLachlin J.
Egan, supra, at 548 per L'Heureux Dubé J. and at 604 per Cory J.
Thibaudeau v. *Canada,* [1995] 2 S.C.R. 627 at 710 per McLachlin J.

41. An effects-based approach avoids the requirement of characterizing the discrimination as direct or adverse effect, a categorization which is not required by s. 15, and which has been subject to criticism in the human rights context. Moreover, it acknowledges that "the form of the impugned distinction is irrelevant as distinctions can be created by omission or commission, overinclusion or underinclusion, differential or same treatment". Indeed, the present case could be characterized as either direct or adverse effect, depending on how the issue is framed. It is neither necessary nor fruitful to agonize over this characterization as it makes no difference to the proper analysis under s. 15, which covers all types of discrimination.

Goundry & Peters, *supra,* at 19
Day & Brodsky, *supra,* at 457-459

42. An effects-based approach under s. 15 is crucial to the eradication of disability-based discrimination. In particular, an effects-based approach exposes the discrimination which results when the legislature enacts a law applicable to all without taking into account the perspective of persons with disabilities and, hence, the possible impact of the law on this already disadvantaged group. In the context of benefit conferring legislation, there is a serious risk that the legislation will be less beneficial or more burdensome for already disadvantaged groups if the benefit is formulated solely from the perspective of the privileged group.

> *Rodriguez*, *supra*, at 549-551 per Lamer C.J. (dissenting on other grounds)
> Goundry & Peters, *supra*, at 19 and 23

43. Thus, in the context of benefit conferring legislation, the impact of the impugned law must be assessed from the perspective of the disadvantaged group in light of the true purpose or essence of the benefit being conferred. To advance substantive equality under the *Charter*, the purpose or essence of the benefit being conferred must be formulated in a broad and purposive manner. A narrow interpretation may result in the discriminatory impact being rendered invisible and the equality claim being defeated.

> *Canadian Odeon Theatres Ltd.* v. *Saskatchewan Human Rights Commission and Huck* (1985), 39 Sask. R. 81 at 93-96 (C.A.) per Vancise J.A.
> *Brooks*, *supra*, at 1237 per Dickson C.J.
> *Rodriguez*, *supra*, at 552-554 per Lamer C.J. (dissenting on other grounds)
> *Egan*, *supra*, at 588-595 per Cory J.
> *Battlefords and District Co-operative Ltd.* v. *Gibbs* (31 October 1996), Unreported Decision, Court File No. 24342 (S.C.C.) at paras. 22-25, 33-34 and 39-40 per Sopinka J.

C. APPLICATION OF THE ANALYTICAL FRAMEWORK TO ELDRIDGE

44. In this case, the benefit conferred is government funding of medically required services under the *Medicare Protection Act* and general hospital services under the *Hospital Insurance Act* and the Regulations thereunder (collectively referred to as "Health Care Services").

45. Interpreted broadly and purposively, the true purpose or essence of Health Care Services is to foster health. The government seeks to achieve this purpose by ensuring the provision of Health Care

Services to all residents of British Columbia regardless of their ability to pay. The universal funding of Health Care Services recognizes that cost is a barrier to health care.

Freeling, *supra*, at 162

46. While Health Care Services may not encompass a comprehensive range of health related services, communication is an integral part of each Health Care Service provided. Indeed, the scope of the services available does not alter the simple fact that, as discussed above, communication is fundamental both to health care and to its purpose of fostering health.

47. From the perspective of hearing persons who take communication with their health care providers for granted, it is easy to overlook the fact that communication is an integral part of every Health Care Service rendered by health care providers. Hearing persons do not receive communication as a distinct service; rather, an effective means of communication is routinely available to hearing persons as a part of all Health Care Services.

48. From the perspective of Deaf persons, it is clear that the benefit of Health Care Services was formulated from a non-disabled perspective in that an integral part of the benefit, namely an effective means of communication, is denied to the Deaf population. The denial of a fundamental aspect of the benefit brings into stark contrast the differential impact on Deaf and hearing persons in their receipt of Health Care Services. For Deaf persons, Health Care Services are underinclusive in realizing the purpose of fostering health.

49. The exclusion of sign language interpretation from funding under Health Care Services has a discriminatory impact on Deaf persons. Deaf persons receive inferior health care compared to that provided to hearing persons. In order to receive the same quality of health care, Deaf persons bear the sole burden of paying for the means to communicate with their health care providers despite the fact that the system was intended to make ability to pay irrelevant. The impact of the benefit is both less beneficial and more burdensome on the basis of disability.

50. The failure to fund sign language interpretation perpetuates the systemic disadvantage faced by Deaf persons in a non-inclusive society. The economic disadvantage experienced by Deaf persons as a group, and in particular by Deaf women, makes it difficult, if not impossible, for them to bear the burden of paying to receive the same quality of health care that is provided to hearing persons. Moreover, the failure to fund sign language interpretation compounds the lack of information available to Deaf persons on health prevention, treatment and health care options. This result is exacerbated for Deaf women who are more likely to assume primary responsibility for the health care of their children.

51. The Coalition submits that the majority of the Court of Appeal erred by failing to challenge the exclusionary impact of Health Care Services designed for and otherwise available to the hearing population. The majority of the Court of Appeal determined that the government accorded the same treatment to hearing and Deaf persons and, accordingly, that it had not violated s. 15. The majority's decision ignores the fact that only the hearing population can derive the full benefit of the Health Care Services provided under the impugned legislation, and therefore embodies a formal equality approach which has been rejected by this Court.

> Pothier, Dianne, "M'Aider, Mayday: Section 15 of the *Charter* in Distress" (1996) 6 *National Journal of Constitutional Law* 295 at 337

52. Had the Court of Appeal applied the correct analytical framework, it would not have focused solely on the funding of Health Care Services, but would have considered the true purpose or essence of Health Care Services. As the purpose of Health Care Services is to foster the health and well being of all individuals in British Columbia regardless of their ability to pay, these Health Care Services cannot be adequately provided in the absence of effective communication. Since few health care practitioners use ASL, effective communication and, hence, equality for Deaf persons, demands the funding of sign language interpretation.

ISSUE TWO - SECTION ONE OF THE *CHARTER*

53. Section 1 has a dual function: it constitutionally guarantees *Charter* rights and freedoms, and explicitly states the criteria against which limitations on those rights and freedoms must be measured.

The analysis under s. 1 requires a flexible approach to the *Oakes* test and, in particular, requires that conflicting values must be placed in their factual and social context.

> *R.* v. *Oakes*, [1986] 1 S.C.R. 103 at 135-136 per Dickson C.J.
> *R.* v. *Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 768-769 per Dickson C.J.
> *R.* v. *Keegstra*, [1990] 3 S.C.R. 697 at 735-738 per Dickson C.J.
> *RJR-MacDonald (Attorney General)* v. *Canada*, [1995] 3 S.C.R. 199 at 327 and 330-331 per McLachlin J. and at 270-271 per La Forest J. (dissenting)
> *Ross* v. *New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at 871-872 per La Forest J.

54. In this case, the relevant contexts are health care and disability. Health has been defined as "the extent to which an individual or group is able, on the one hand, to realize aspirations and satisfy needs; and, on the other hand, to change or cope with the environment". Health care, a social institution, is maintained in order to "enhance the participation of individuals and groups in society". Viewed in this light, health is intrinsically related to the inherent dignity of the human person.

> The Report of the British Columbia Royal Commission on Health Care and Costs *Closer to Home* (Victoria: Crown Publications, 1991) at iv
> *Oakes, supra,* at 136 per Dickson C.J.

55. The nature of the right infringed is, as discussed above, equal benefit of Health Care Services. Because communication is an integral part of health care, the funding of interpreter services for Deaf persons cannot be viewed as involving a choice among discrete Health Care Services. Nor does it engage competing rights of different sectors of society. Hence, deference to the legislature is inappropriate in this case.

> *RJR MacDonald, supra,* at 331-333 per McLa chlin J.
> *Ross, supra,* at 876 per LaForest J.

56. Indeed, the failure to provide interpreter services for Deaf persons runs contrary to the purpose of fostering health through the funding of Health Care Services by the government. The decision not to fund fails to recognize that communication lies at the core of Health Care Services and that, as a result, the effect of the decision is contrary to the values such as equality and dignity which are essential to a free and democratic society.

> *Oakes, supra,* at 136 per Dickson C.J.
> *Ross, supra,* at 871 per LaForest J.

(a) Pressing and Substantial Objective

57. When applying the s. 1 analysis to benefit conferring legislation, it is especially important to recall that "[t]he objective relevant to the s. 1 analysis is the objective of the infringing measure". An approach which focuses on the objective of the legislation as a whole would always result in the first part of the *Oakes* test being met. This result would be inconsistent both with the function of s. 1 to guarantee rights and the test required by s. 1 that the limitation be justified.

RJR MacDonald, supra, at 327 per McLachlin and at 268 per La Forest J. (dissenting)
See also:
Oakes, supra, at 138 per Dickson C.J.
Edwards Books, supra, at 768 per Dickson C.J.
Ross, supra, at 879 per La Forest J.

58. Budgetary considerations cannot be used to justify a violation under s. 1. While the Respondents concede that saving money will never justify a rights infringement, they assert that a rights infringement "may be justified where the very sustainability of laudable objectives is contingent upon finding an appropriate allocation of limited resources". This assertion, if correct, would justify any infringement since logic requires that an "appropriate allocation of limited resources" is needed to sustain any spending program.

Singh et al. v. *Minister of Employment and Immigration,* [1985] 1 S.C.R. 177 at 218-219 per Wilson J.
Schachter v. *Canada,* [1992] 2 S.C.R. 679 at 709 per Lamer C.J.
Egan, supra, at 609 per Iacobucci J. (dissenting)
Respondents' Factum at para. 113

59. If budgetary considerations are relevant to the s. 1 analysis at all, the government would have to demonstrate that the cost implications would be so prohibitive as to be inimical to a collective goal of fundamental importance. In other words, the Respondents would have to demonstrate that the very sustainability of the health care system is contingent upon the rights violation being justified.

Singh, supra, at 220 per Wilson J.
Oakes, supra, at 136 per Dickson C.J.

(b) Rational Connection

60. The evidence of cost implications "should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit". To meet this standard, the evidence would have to account for the fact that the failure to provide sign language interpretation has cost implications for the health care system. The Respondents' assertion that the onus lay on the plaintiffs to raise the issue of off-setting costs is untenable. The Respondents are the only party in a position to measure these cost-savings and, indeed, bear the onus of proving that the *Charter* violation is justified.
Oakes, supra, at 136-138 per Dickson C.J.

See also:
RJR MacDonald, supra, at 328-329 per McLachlin J. and at 268 per LaForest J. (dissenting)
Egan, supra, at 609 per Iacobucci J. (dissenting)
Miron, supra, at 485 per McLachlin J.

61. The Respondents also raise the cost of other potential *Charter* violations and, in particular, the cost of providing interpreter services for non-English speaking communities. These issues are not before the Court, are speculative, and are entirely irrelevant to the Respondents' attempt to justify violating the equality rights of Deaf persons by failing to fund sign language interpretation.

(c) Minimal Impairment

62. Although government may face difficult choices in the allocation of scarce resources, it must choose among the range of constitutionally permissible choices. Where the service denied is integral to the benefit conferred under the legislation, there is only one permissible choice. Here, the one permissible choice is to fund interpreter services for Deaf persons. If that choice is not implemented, the costs of fiscal restraint would be disproportionately borne by a group already experiencing disadvantage in our society.

Pothier, "M'Aider, Mayday", *supra*, at 342-343

(d) Proportionality

63. The government has not demonstrated that any collective value is furthered by the infringement of equality rights in this case. Indeed, the values essential to a free and democratic society demand that the rights violation be remedied. The refusal to provide interpreter services for the Deaf in the context of health care has a profoundly discriminatory impact that strikes at the dignity and well-being of all Deaf persons in B.C. The negative effects of this *Charter* violation are so disproportionate to the minimal costs of providing the service as to make justification impossible.

PART IV - NATURE OF THE ORDER SOUGHT

64. The Coalition asks that the appeal be allowed and a declaration issued that the *Medicare Protection Act* and the *Hospital Insurance Act*, and the Regulations thereunder, and any other legislation pursuant to which such health care services are provided, be interpreted, applied and administered in a way that would include funding of sign language interpretation for Deaf persons.

All of which is respectfully submitted on behalf of the Coalition, the DisAbled Women's Network Canada and the Women's Legal Education and Action Fund.

Dated March 21, 1997, at Toronto, Ontario

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Jennifer Scott

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Judy Parrack

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Katherine Hardie