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IN BRIEF

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Disability and Health Care: The *Eldridge* Case

Introduction

Most Canadians agree on one thing when it comes to their health-care system: they are deeply concerned for its future and believe the direction of the health system ought to be a chief priority for federal politicians.(1) Before proceeding, the distinction between health and health care should be highlighted: health-care services are only one component under the much broader concept of health.

Access to these services is essential for all Canadians, especially for persons with a disability. In fact, the maxim of access to all services for all persons lends itself easily not only to health, but to the myriad of services offered by the federal and provincial governments. The relationship between health and disability can be relatively simple, such as attending routine examinations, or it can prove to be more complex, such as providing access to medical services for *all* persons. Access is the foremost issue embodied in the 1997 Supreme Court of Canada case, *Eldridge* v. *British Columbia (Attorney General)*.(2) This document will briefly explain the case and its implications on the delivery of social programs in the future.

To provide a clearer context, it is important to know that a growing number of Canadians (approximately 16%) are living with some type of physical or mental disability.(3) As well, because the disability rate increases with age, the growth of an aging population will place special demands on Canada's health system. At some point, most – if not all – Canadians will face disability as a result of old age; such disabilities can include restrictions on one's hearing, vision or mobility. Furthermore, disability issues have the potential to involve all citizens, regardless of gender, age or ethnicity.

Still the Leader? The Federal Government's Role

Today, the federal government plays a complicated role in the field of disability policy. It is simultaneously an authority with a mandate for direct program delivery, an advocate for the disabilities constituency, and a target for political lobbying and legal action. To illustrate, Health Canada and Veterans Affairs Canada administer health-related programs to Aboriginal persons and veterans, respectively. A noteworthy point is that those veterans returning from World War I were the impetus for the federal government to legislate the country's first disability programs and services.

More recently, the *Canadian Charter of Rights and Freedoms*(4) has opened a new avenue for policy change and advocacy. The work of disability interest groups is no longer geared strictly to Parliament, the executive or the bureaucracy; interest groups now look primarily to the judiciary for policy change. The Charter has provided interest groups with a new tool to help them make an impact on the policy process or, in some way, modify the policy outcome. The rights outlined in the Charter have strengthened, in particular, those groups who previously felt marginalized in the public policy process. With an additional venue to choose from, interest groups' plans of action have been altered to incorporate all branches of government.

The *Eldridge* Case: Access to Equal Medical Services

On 9 October 1997, the Supreme Court of Canada released its decision on *Eldridge*,(5) a case concerning the availability of equal medical treatment for persons who are deaf. The delivery of adequate health care across the country is critical, and the adoption of the *Canada Health Act*(6) in 1984 can be seen as an attempt to legislate this effect. In fact, during the early stages of the *Eldridge* case, the *Canada Health Act* was cited as one of the pieces of faulty legislation.

This initial action was subsequently dropped, however, as no representative of the federal government appeared at the appeal. Such a move is significant because challenges to the *Canada Health Act* by a third party have never made it to the courtroom.[7]

Provision of equal medical services to people who are deaf or hearing impaired is the core of *Eldridge* v. *British Columbia (Attorney General)*.[8] In 1991, 30% of the disabled population aged 15 and over had a hearing disability.[9] According to 1991 statistics, people with hearing impairments are the third-largest group of disabled persons, with mobility and agility disabilities being first and second, respectively.[10]

The appellants, Robin Eldridge and John and Linda Warren, were born deaf. All three preferred to communicate through sign language and, until 1990, each obtained these services free of charge. The Western Institute for the Deaf and Hard of Hearing (WIDHH) had provided sign language for both the Warrens and Ms. Eldridge when they visited their doctors or the hospital.[11] This program was funded entirely from private sources without any contribution from the British Columbia provincial government.

In September 1990, the Institute discontinued the service because it no longer had sufficient funds to pay for it. In the end, the British Columbia provincial government refused two requests by the WIDHH to provide funding and also refused to provide an alternative.[12] The appellants contended: "…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."[13] Ms. Eldridge and Mr. and Mrs. Warren applied to the Supreme Court of British Columbia seeking, among other things, a finding that showed "failure to provide sign language interpreters as an insured benefit under the *Medical Services Plan* violates s. 15(1) of the Charter."[14] Section 15(1) – known as the equality clause – provides for the equal treatment of several groups, including mental and physical disability:

> 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.[15]

The Winding Path of Litigation

The case, which originated in British Columbia, was heard first at the B.C. Supreme Court. The case was dismissed in 1992 as Justice Tysoe reasoned: "sign language interpretation is ancillary to medically required services in much the same way as is transportation to a doctor's office."[16] Justice Tysoe continued by stating "the Charter does not require governments to implement programs to assist disabled persons."[17]

An appeal was sent to the British Columbia Court of Appeal where, again, the case was dismissed in 1995. Writing for the majority, Justice Hollinrake ruled that the absence of interpreters "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)."[18]

The Main Issues

The question posed in the *Eldridge* case was whether sign interpreters were integral to the provision of equal access to medical services for people who are deaf and hearing disabled. The case needed to address the following issues:

- Was signing needed for deaf persons to properly communicate with physicians and health-care providers?
- In cases where Charter obligations apply to the institution as if the government delivered the service directly, do the same Charter obligations apply to non-governmental bodies where institutions are given authority by government to implement a government program or policy? [19]
- Did the government discriminate under s. 15 by failing to provide interpretation services for persons who are deaf?

The Supreme Court justices ruled unanimously in favour of the appellants. In the court's decision, Justice La Forest pointed out that two distinct applications of the Charter had to be evidenced. The first application involved sourcing the alleged s. 15(1) violations. The second application meant deciding if the Charter applied to the entities that provided health-care services, i.e., hospitals.

The Decision of the Supreme Court of Canada

The court's findings are as follows:

- Hospitals in British Columbia are non-governmental entities and therefore not everything a hospital does is subject to the Charter.[20]
- Both of the following B.C. Acts – the *Hospital Insurance Act*[21] and the *Medical and Health Care Services Act*[22] – were found to be the sources of the alleged violation of s. 15(1) of the Charter.
- Failure to provide sign language interpreters – who are, in fact, necessary for effective communication for the procurement of medical services – is a violation of equality rights under s. 15(1) of the Charter.
- This violation could not be saved under the Charter's reasonable limits provision of s. 1.

A Remedy for the Health System

In the event of finding fault with legislation, the Court must put forward a remedy to offset further problems from the flawed legislation, as required under s. 24 of the Charter. The Supreme Court's proposed remedy was a declaration that the government of British Columbia amend the legislation, specifically the *Medical and Health Care Services Act* and the *Hospital Insurance Act*, to correspond to the final decision. In addition, the Court suspended the declaration for six months to give the government enough time to study alternative courses of action. The changes sought were to ensure that sign language interpreters are available when necessary for effective communication in a health-care setting. On 1 October 1998, both the *Hospital Insurance Act* and the *Medicare Protection Act* were updated to reflect the provision of interpreter services for medical services for persons who are deaf and hearing impaired.

The Implications of *Eldridge*

Adherence to the remedy proposed by the Supreme Court of Canada did not remain strictly within the province of British Columbia, but rather applied across the country. So although the case originated in B.C., the Supreme Court's decision was relevant to the other provinces which were therefore obligated to make legislative changes reflecting the Court's decision. How each province decided to implement the Court's proposed remedy varied from province to province. Obviously, in light of the substance of the case, corrections were made to the delivery of health-care and medical services. Nova Scotia, for one, amended its existing legislation covering an array of services offered by a variety of government departments. For example, if a person wishes to apply for a permit to hunt and an interpreter is required, one will be made available.

The actual changes that have occurred as a direct result of the *Eldridge* case are certainly noteworthy. The decision has allowed for definite assistance to be given to those who are deaf and hard of hearing. The case's high profile allowed attention to be given to the barriers faced by persons who are deaf and hard of hearing. At the trial, intervener status on behalf of persons with disabilities was granted to four groups: the Disabled Women's Network of Canada (DAWN); the Canadian Association of the Deaf (CAD); the Canadian Hearing Society (CHS); and the Council of Canadians with Disabilities (CCD). As interveners, these groups offered arguments highlighting the plight of persons with disabilities and the obstacles faced by members of this group in a world largely designed for able-bodied people. For those who are deaf, the use of interpreter services in settings such as doctor's offices, classrooms and courtrooms is a welcome and necessary addition to these otherwise common environments.

As well as the groups representing disability interests, additional interveners were permitted access to the Court to present arguments on behalf of other marginalized groups. The Women's Legal Education and Action Fund (LEAF) and the Charter Committee on Poverty Issues presented their cases, presumably illustrating the potential offered by the *Eldridge* case for the way their groups are treated in society. Women and the poor, like disabled persons, face obstacles to the proper functioning of their lives, even in the most mundane or ordinary of places. Workplace and social environs present problems, but so too do medical, educational and government settings. When a woman does not have access to safe child delivery because she is deaf, or when a deaf person does not receive decent medical treatment because he cannot afford an interpreter, the safety and well-being of these people are compromised. The amount of overlap among societal groups – women, the poor, persons with disabilities – is common. Both the case itself and the implications of its decision reflect the truth of this situation.

Varied interests argued the case and varied interests would, potentially, be affected by the decision. The implications of the *Eldridge* decision could carry over into the provision of other services, such as covering the Lovaas treatment for autistic children under government insurance. Indeed, the Supreme Court's decision holds added potential in its application to other services and programs offered by the federal and provincial governments.