ELDRIDGE v. BRITISH COLUMBIA: DEFINING THE EQUALITY RIGHTS OF THE DISABLED UNDER THE *CHARTER*

BY MARY CORNISH and FAY FARADAY*

* Based on paper presented to the Osgoode Hall Law School Conference "1997 Constitutional Cases -- An Analysis of the 1997 Constitutional Decisions of the Supreme Court of Canada", Toronto, Ontario April 17, 1998.

The Supreme Court of Canada's late 1997 decision on s. 15(1) equality rights, *Eldridge v. British Columbia (Attorney General)*[1], addresses two key issues in the evolution of *Charter* jurisprudence: 1) to what extent are decisions made by private entities subject to *Charter* review and 2) to what extent are governments obliged to provide the disabled with equal access to public services. In *Eldridge*, the claimants challenged the failure by hospitals and the BC Medical Services Commission to provide sign language interpreters for deaf persons seeking medical services.

Writing for a unanimous nine-judge court, LaForest J. found that even though they are private entities, the *Charter* applies to hospitals to the extent that they are implementing a specific government policy, here providing BC residents with medically required services free of charge. The Court ruled that the hospitals' and Commission's failure to fund sign language interpretation for deaf persons violated s. 15(1) where such translation was necessary for effective communication in delivering medical services. Finding that the violation was not saved under s. 1, the Court suspended the declaration of unconstitutionality for six months to enable the government to formulate an appropriate response.

Background Facts

Medical services in British Columbia are funded in two ways. First, under the *Medical and Health Care Services Act* provincial residents are entitled, free of charge, to "benefits" that are "medically required

CAVALLUZZO HAYES SHILTON McINTYRE & CORNISH
Barristers & Solicitors
474 Bathurst Street, Suite 300
Toronto, ON M5T 2S6
Ph: 416-964-1115 Fax:416-964-5895
Email: inquiry@chsmc.com
For further information contact
Mary Cornish (416-964-5524)

services". The *Act* grants the Commission discretion to determine what constitutes a funded "benefit".

Second, the *Hospital Insurance Act* describes the general services to be provided by acute care hospitals. But each hospital, which is a private corporation, has discretion to decide which of these services it will provide and how the services will be delivered. The province funds hospital services by giving each hospital a lump sum payment which the hospital can allocate, in its discretion, towards the services it actually does provide.

Neither the Commission nor the hospitals exercised their discretion to fund sign language interpreters for deaf persons seeking medical care.

Section 32: Application of the *Charter*

The Court ruled that neither provincial statute prohibited the funding of sign language interpreters and each statute could be interpreted consistently with the *Charter*. Accordingly, any violation of s. 15(1) lay in the discretion wielded by the two subordinate bodies authorized to act under the legislation: the Medical Services Commission and the hospitals.

The Court set out two governing principles. First, just as government cannot pass unconstitutional laws, it cannot authorize or empower other entities to act in ways that violate the *Charter*. Second, governments should not be permitted to evade their *Charter* responsibilities or escape *Charter* scrutiny by delegating the implementation of their policies and programmes to private entities.[2]

The Court ruled, then, that a private entity may be subject to the *Charter* in respect of certain "inherently governmental actions". However, the *Charter* will apply to private entities in so far as they act in furtherance of or act to implement a *specific* government programme or policy.[3] It is not enough that the entity perform a public purpose. Where a private actor is implementing a specific government programme, it will be subject to the *Charter* only in respect of that act and not its other private activities.

On the facts in *Eldridge*, the Court found that the provincial legislation established a comprehensive social programme. Hospitals were merely the vehicles through which the Legislature chose to deliver the programme. The government remained responsible for defining both the content of the services to be delivered and the persons entitled to receive them. The Court ruled that "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 to the *Charter*."[4] Similarly, the Court found that the Commission implements the government policy of ensuring that all residents receive medically required services without charge and was likewise subject to the *Charter*.

Eldridge broadens the range of entities and activities that can be subject to *Charter* scrutiny. In the current context where the "privatization" of government services holds considerable political cache, the decision could help employees and recipients of "governmental" services to prevent an erosion of their *Charter* rights. To the extent that government retains effective power to set the agenda of the "privatized" entities, *Eldridge* will enable individuals to hold government accountable under the *Charter*.

Finally, to the extent that the *Eldridge* analysis contributes to a functional understanding of what constitutes government, governmental services and government control, it could assist in other non-*Charter* contexts, for example related employer applications, where the actions of a private entity are highly regulated and/or controlled by government and a party seeks to share or transfer liability to the body (government) which is effectively responsible and accountable for an impugned course of action.

Section 15: Equality Rights

The Court's s. 15(1) analysis in *Eldridge* was less groundbreaking, but nevertheless significant for the evolution of equality jurisprudence. While the legal test under s. 15(1) remains unsettled, the Court has drawn together a number of previously articulated general principles to illustrate what governments must do in practice to comply with their s. 15(1) obligations.

First, the Court overturned the formal analysis employed by the majority at the B.C. Court of Appeal which essentially had held deaf persons responsible for the unequal burden they experienced. The Court of Appeal majority suggested that in the absence of the legislation, deaf persons would have to pay their doctors as well as their interpreters. For the deaf and hearing populations alike the legislation removed the obligation to pay their doctors. The inequality which arose because deaf persons continued to pay their translators exists independently of the legislation and so was beyond the reach of the *Charter*.[5]

By contrast, the Supreme Court of Canada's analysis is firmly situated within a detailed examination of the social, political and legal environment experienced by deaf persons. The Court recognized the "unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization"[6] and that "their entrance into the social mainstream has been conditional on their emulation of able-bodied norms".[7] The disadvantage experienced by deaf persons derives largely from barriers to communication with the hearing population and because society generally has been organized as though everyone can hear.

The Court stated that while the Court of Appeal's approach has a "certain formal, logical coherence … it seriously mischaracterizes the practical reality of health care delivery".[8] The Supreme Court identified the "benefit of the law" at issue in *Eldridge* more broadly, and with an eye on the substantive equality outcome, as being the provision, without charge, of medical care. This concept clearly encompassed the ability to communicate effectively with one's health care provider. The Court ruled that rather than being ancillary to the benefit, communication is "indispensable" to the delivery of medical services. For the hearing population, effective communication is routinely available, free of charge, as part of every health care service. However, under the present system, to receive the same quality medical care as the hearing population, deaf persons must pay for the means of communication even though the system intended to make ability to pay irrelevant.[9]

The Court's analysis in this case[10] will assist *Charter* claimants rebutting the arguments of those who resist their claims. The case's history illustrates in practical terms how a dispute can be characterized at the front end to either preclude or secure *Charter* protection. *Eldridge*'s contextual analysis affirms s. 15(1)'s commitment to secure in substance the *Charter*'s fundamental objective of guaranteeing for all equal treatment without discrimination.

Second, after reiterating that the *Charter* protects against adverse impact discrimination and that substantive equality sometimes requires that some people be treated differently than others, the Court ruled that in introducing the benefit programme at issue the government had a responsibility to ensure that the benefit was equally accessible to all. While not addressing the obligation of positive state action under the *Charter* generally, the Court ruled that once

the state provides a benefit, it must do so equally and achieving a constitutionally sound result may require it to take positive measures. The government had argued that it 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. However, the Court chastened the government stating that "this position bespeaks a thin and impoverished vision of s. 15(1)" which is belied by the thrust of the Court's equality jurisprudence.[11] To comply with s. 15(1), then, the government had to take positive action and special measures to ensure that disadvantaged groups were actually able to benefit equally from government services and benefits.[12] Any limitations on the obligation to accommodate disadvantaged groups must only be assessed under s. 1 when determining if a *Charter* violation can be justified.

Based on the record, the Court concluded that the failure to provide free sign language interpretation for deaf BC residents where necessary for effective communication in the delivery of medical services violated s. 15(1). This however may not require interpreters in all medical situations as the standard of "effective communication" is flexible, taking into consideration the complexity and importance of the information to be communicated, the context in which the communications take place and the number of persons involved.[13]

This analysis places on government a clear and positive obligation to ensure that in drafting legislation it must have an expansive understanding of what constitutes the "benefit of the law". Moreover, in confirming the *Charter*'s objective of securing *substantive* equality, the Court places on government a positive obligation to design its benefits in a manner that incorporates the long-standing human rights principles of accommodation to ensure that the benefit is in practice accessible to disadvantaged groups.

This obligation to prevent adverse effects discrimination is especially relevant to the disabled as the Court noted that discrimination often arises not from singling out the disabled for special treatment, but from the exact reverse -- the government's failure to understand and address the adverse effects on the disabled caused by laws of general application.

Eldridge, then, is significant for equality seekers because it more concretely articulates the government's positive obligations under the *Charter*. The decision may also be helpful in spurring the government to take its constitutional obligations seriously in the course of designing its legislative schemes to comply with the *Charter*. If the decision can help equality seekers ensure that legislation is designed consistently with the government's proactive obligations to consider accommodative measures, it may help provide a practical solution while preempting the need to bring expensive and time-consuming litigation.

Vriend v. Alberta
Sexual Orientation Discrimination

Since its decision in *Eldridge*, the Supreme Court of Canada has released another groundbreaking equality rights case, *Vriend v. Alberta*[14], which ruled that the failure to include sexual orientation as a prohibited ground of discrimination in Alberta's human rights legislation violated s. 15(1) of the *Charter* and was not justified. The Court declared that the legislation should be read

as if it expressly prohibited discrimination on the basis of sexual orientation.

As in *Eldridge*, the Court confirmed that identifying discrimination requires a contextual analysis which acknowledges the social reality of discrimination faced by disadvantaged groups. In this context, a legislative omission -- a failure to specifically address the situation of that group -- can violate substantive equality. As in *Eldridge*, where legislation is enacted the government must design the legislation so that disadvantaged groups can access the benefit of the law. The Court has left open the question of whether the government has a proactive obligation to enact legislation to rectify discrimination.

The Court also stressed that the government's deliberate choice not to provide equality protection in the face of clear evidence that discrimination against a group exists "sends a strong and sinister message" that could well be "tantamount to condoning or even encouraging discrimination against lesbians and gay men".

These two rulings will provide strong support for equality rights claimants in the future and will assist equality seekers in their legislative reform efforts by reinforcing government's obligation to take its *Charter* obligations seriously at the front end when designing legislation.

1. 151 D.L.R. (4th) 577 (SCC)

2. *Eldridge, supra* at 605, 606.

3. *Eldridge, supra* at 608.

4. *Eldridge, supra* at 611.

5. *Eldridge, supra* at 591.

6. *Eldridge, supra* at 613.

7. *Eldridge, supra* at 613.

8. *Eldridge, supra* at 619.

9. *Eldridge, supra* at 620.

10. *Eldridge, supra* at 618-620.

11. *Eldridge, supra* at 621.

12. *Eldridge, supra* at 621-624.

13. *Eldridge, supra* at 625.

14. *Vriend v. Alberta*, unreported decision of the Supreme Court of Canada (2 April 1998).