

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

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The Supreme Court of Canada's latest decision on section 15(1) equality rights, *Eldridge v. British Columbia (Attorney General)*, addresses two key issues in the evolution of *Charter* jurisprudence: first, to what extent are decisions made by private entities subject to *Charter* review, and second, 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 B.C. Medical Services Commission to provide sign-language interpreters for deaf persons seeking medical services.

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Writing for a unanimous nine-judge court, Justice La Forest 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 B.C. 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 section 15(1), where such translation was necessary for effective communication in delivering medical services. Finding that the violation was not saved under section 1, the Court suspended the declaration of unconstitutionality for six months to allow 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 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. However, each hospital, as 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 that 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 section 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 first issue was whether decisions by hospitals or the Medical Services Commission constitute the type of "government action" that attracts scrutiny under section 32 of the *Charter*.

The Court articulated 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 programs to private entities.

The Court reviewed its previous jurisprudence regarding the *Charter's* application. On one hand, it had ruled that because government had the power of routine or regular control over community colleges as instruments of its education policy, these col-

leges were "government" for the purposes of section 32 and were subject to *Charter* review. Where an entity was part of "government", the *Charter* applied to all its activities including those that might otherwise be considered private.

On the other hand, the Court ruled that neither universities nor hospitals were part of the apparatus of "government", and in adopting mandatory retirement policies they were not implementing government programs or policies. Accordingly, on the facts these institutions were found not to be subject to the *Charter*.

However, the Court left open the possibility that in some circumstances and with respect to some activities, hospitals, universities, or other private entities could be subject to review for compliance with the *Charter*. *Eldridge* required that the Court address this issue squarely for the first time and accordingly, through its decision, the Court has now clarified when private entities can be subject to the *Charter*.

The Court articulated 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 programs to private entities.

The Court ruled that a private entity may be subject to the *Charter* in respect of certain "inherently governmental actions". One cannot compile in the abstract a comprehensive list of factors which might identify activities as "governmental". However, the *Charter* will apply to private entities

insofar as they act in furtherance of or act to implement a specific government program or policy. It is not enough that the entity perform a public purpose; rather, it must be implementing a specific governmental policy or program. Where a private actor is implementing a specific government program, he/she will be subject to the *Charter* only in respect of that act and not its other private activities.

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.

On the facts in *Eldridge*, the Court found that the provincial legislation established

a comprehensive social program. Hospitals were merely the vehicles through which the Legislature chose to deliver the program. 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*". 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*.

For the first time, the Court has articulated a rationale and a means for finding that in some circumstances private entities will be subject to the *Charter*. In so doing, the Court has acknowledged the reality that there is no hard and fast division between government and the private sector. It affirmed that we expect government to do more than act as a traditional law maker; we also expect government to stimulate and preserve the community's economic and social welfare. Where the government acts to do so, its *Charter* obligations follow.

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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. One example is 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 section 15(1) analysis in *Eldridge* was less groundbreaking, but nevertheless significant for the evolution of equality jurisprudence. While the legal test under section 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 section 15(1) obligations.

First, the Court followed a contextual analysis to overturn 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 obli-

gation to pay their doctors. The inequality which arose because deaf persons continued to pay their translators exists independently of the legislation and so is beyond the reach of the *Charter*.

By contrast, the Supreme Court of Canada's contextual 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", and that "their entrance into the social mainstream has been conditional on their emulation of able-bodied norms". 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". 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

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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.

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The Court's application of the contextual analysis in this case and its deconstruction of the positions advanced by the courts below will assist *Charter* claimants in 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 either to preclude or to secure *Charter* protection. *Eldridge's* contextual analysis affirms section 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 program 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. To comply with section 15(1), 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. Any limitations on the obligation to accommodate disadvantaged groups must only be assessed under section 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 B.C. residents where necessary for effective communication in the delivery of medical services violated section 15(1). This, however, may not require interpreters in all medical situations; 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.

[I]n 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 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—from 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.



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