



Case Law

Supreme Court Declares Failure to Provide Sign Language Interpretation during Medical Care Unconstitutional

By Rino A. Stradiotto

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Recently, the Supreme Court of Canada heard a series of specific constitutional questions on legislative enactments and regulations regarding the delivery of medical care in British Columbia.

The Court answered the individual questions and dealt with the broader issues of the application of the Charter of Rights to public hospitals and the provision of interpreting services to patients. The decisions in this case, handed down by the Court in October of 1997, are applicable to the delivery of health-care services in public hospitals in all Canadian provinces.

The Court granted a declaration that where sign language interpreters are necessary for effective communication in the delivery of medical services, the failure to provide them is unconstitutional, as it constitutes a denial of Section 15(1) of the Charter and is not a reasonable limit under Section 1. The unanimous decision of the Supreme Court of Canada was written by Mr. Justice La Forest.

The precise constitutional questions presented to the Court in this case concerned the definition of “benefits” in Section 1 of the *Medicare Protection Act*, R.S.B.C. 1996, c. 286 and various sections of the *Hospital Insurance Act*, R.S.B.C. 1979, c. 180 and regulations enacted pursuant to this Act. The Court found that in both cases the legislative provisions referred to did not infringe the Charter.

In coming to its conclusion, the Court stated that it is sufficient if the effect of the legislation is to deny someone the equal protection or benefit of the law. Although the legislation itself may not be constitutionally suspect, the actions of delegated decision makers in applying it must be considered as this is the correct approach to the interpretation of the Charter.

FACTS OF THE CASE

There were two applicants in this case, each of whom was born deaf. One suffered from several medical conditions, including diabetes. The other applicants were a husband and wife who testified that, in the absence of an interpreter, the wife’s birth process was difficult to understand and frightening.

In common, the appellants asserted that because of the communication barrier that exists between deaf persons and healthcare providers, deaf persons receive a lesser quality of medical services than hearing persons. The failure of government to pay for interpreters, they contended, infringed their right to enjoy equal benefit of the law without discrimination based on physical disability.

The Court analyzed the manner in which medical care is delivered and funded in British Columbia. Prior to this case, the BC Ministry of Health had turned down a request for funding of interpreters in the medical setting, determining instead that the cost of sign language interpretation would be covered as an insured benefit. This decision was made on the rationale that funding for sign-language interpretation would strain available resources, and create a precedent for funding similar services for the non-English speaking immigrant community.

THE COURT’S INTERPRETATION

The Court concluded that hospitals in British Columbia are funded through lump sum “global” payments and they are for the most part free to allocate these funds as they see fit. However, with the exception of hospitals, which are the responsibility of the provinces by virtue of Section 92(7) of the *Constitution Act*, 1867, health is not a matter assigned solely to one level of government. The Court confirmed that the hospital insurance and medical programs in force in this country come within the exclusive jurisdiction of the provinces under Sections 92(7) (hospitals), 92(13) (property and civil rights), and 92(16) (matters of a merely local or private nature). The Court concluded that this has not prevented the federal parliament from playing a leading role in the provision of free universal medical care throughout the nation, which it has done by employing its inherent spending power to set national standards for provincial medical 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 speci-

fied criteria. The criteria described in Sections 8 to 12 of the *Canada Health Act* concern the following matters:

- (a) public administration;
- (b) comprehensiveness;
- (c) universality;
- (d) portability; and
- (e) accessibility.

In order to satisfy the criteria respecting comprehensiveness, the healthcare insurance plan of a province must cover all insured health services provided by hospitals, medical practitioners or dentists, or, where the province's law so permits, similar or additional services rendered by other healthcare practitioners.

In British Columbia 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 healthcare consumers. The *Hospital Insurance Act* of British Columbia provides that every qualified person or beneficiary is entitled to receive the general hospital services provided under the *Act*, and spells out the services. The Court concluded that although the *Act* entitles beneficiaries to a specific list of services, hospitals are left with substantial discretion as to how to provide them. The extent of the services provided by each hospital was found to be subject to the hospital's own decision as to how to spend the global grant they received for general hospital services. The *Hospital Insurance Act* gives individual hospitals considerable discretion as to the manner in which the services they decide to provide are delivered. It was in this statutory context that the Court made its decision. Since the statutory context is similar in other provinces, the manner in which the Court made its decision in this case would make the decision applicable to other Canadian provinces.

The Court concluded 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." While the Charter applies to all the activities of government, whether or not these activities may be characterized as "private," the Court recognized that the Charter may apply to non-governmental entities in certain circumstances. For example, the Charter will apply to a private entity engaged in activities that can in some way be attributed to government.

HOSPITALS AS GOVERNMENT AGENTS

The Court found that the purpose of the *Hospital Insurance Act* was to provide particular services to the public. Although the benefits of the 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. 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. Thus, the Court concluded, in providing medically necessary services, hospitals carry out a specific governmental objective. Hospitals are merely the vehicles the legislature has chosen to deliver its comprehensive social program of health services. The interlocking federal/provincial medicare system entitles all Canadians to essential medical services without charge.

The Court concluded that 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 the Charter to provide those services without discrimination by appointing hospitals to carry out that objective. Insofar as they do so, hospitals must conform with the Charter.

The Court distinguished the circumstances in this case from those in the case of *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, in which the Court found that the Charter did not apply to public hospitals. In the *Stoffman* case, members of the medical staff challenged the constitutionality of the mandatory retirement-age provision in the hospital's by-laws.

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THE RIGHTS OF THE PHYSICALLY DISABLED

The Court concluded that deaf persons belong to an enumerated group under Section 15(1) of the Charter - the physically disabled. The Court found that it is sufficient if the effect of the legislation is to deny someone the equal protection or benefit of the law. 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.

The Court stated that effective communication is quite obviously an integral part of the provision of medical services.

Where it is necessary for effective communication, sign-language interpretation should not therefore be viewed as an “ancillary service.” 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 healthcare providers is not discriminatory. Once the State provides a benefit it is obliged to do so in a non-discriminatory manner; in many circumstances, this will require governments to take positive action.

Discrimination can arise both from the adverse effects of rules of general application and from express distinctions flowing from the distribution of benefits. The Court stated that 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 conclusion, the Court found therefore that the failure of the BC Medical Services Commission and hospitals to provide sign-language interpretation, where it is necessary for effective communication, constitutes a prima facie violation of the Charter rights of deaf persons. The failure denies them the equal benefit of the law and discriminates against them in comparison with hearing persons. The Court went on to acknowledge that the standard it set was a very broad one, and took the precaution of stating that it was not saying that sign-language interpretation would have to be provided in every medical situation. Having said this, the Court went on to state that it was probably fair to surmise that sign-language interpretation would be required in most cases.

In considering whether the government was justified for refusing to fund sign-language interpretation under Section 1 of the Charter, the Court concluded that the government had 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. The Court noted that the estimated cost of providing sign-language interpretation for the whole of British Columbia was only \$150,000 or approximately 0.0025% of the provincial healthcare budget at the time.

It was argued before the Court that the situation of deaf persons could not be meaningfully distinguished from that of other non-official-language speakers and that if there was an obligation to provide interpreters for the deaf, they would also have to be provided for other non-official-language speakers, thus increasing the expense of the program dramatically and placing a severe strain on the fiscal sustainability of the healthcare system. In response to this contention, the Court stated that it was by no means clear that deaf persons and non-official-language speakers are in a similar position, in terms either of their constitutional status or of their practice access

to adequate healthcare. 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. By contrast, in a case involving a claim for medical interpretation for hearing patients, the analysis, the Court concluded, would be more complicated. The Court went on to state that it is possible that the nature and extent of any reasonable accommodation required for hearing persons under Section 1 would differ from that required for deaf persons and, further, that it is apparent that deaf persons stand in a special position in terms of their ability to communicate with the mainstream population. The Court concluded:

“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 potential s. 15(1) claims by members of the latter group cannot be predicted in advance.”

Thus, the Court left it open to determine whether the failure to provide interpretive services for non-official-language speakers would constitute a violation of the Charter. The Court was quite specific in stating that, with respect to deaf persons, the failure found to constitute a violation of the Charter concerned circumstances where sign-language interpreters were necessary for effective communication in the delivery of medical service.

The Court suspended the effectiveness of its declaration for six months to enable the government to explore its options and formulate an appropriate response. However, the Court made it clear that in fashioning its response, the government should ensure that, after the period of suspension, sign-language interpreters will be provided where necessary for effective communication in the delivery of medical services. ¶



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