Landmark Case

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EQUALITY RIGHTS
ELDRIDGE v. *BRITISH COLUMBIA (ATTORNEY GENERAL)*

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Eldridge v. British Columbia (Attorney General)

Facts

Robin Eldridge and John and Linda Warren live in British Columbia. They are deaf and prefer to communicate through sign language. After a not-for-profit agency stopped providing free medical interpretation in 1990, they were unable to receive a similar service from the government. Without interpretation they had difficultly communicating with their doctors. They were concerned that this could increase the risk of misdiagnosis and ineffective treatment. For example, Linda gave birth to twins without an interpreter and found the process difficult to understand and frightening.

They started a court process by filing an **application** in the Supreme Court of British Columbia. They sought a **declaration** that the failure to provide sign language interpreters under the Medical Services Plan violates s. 15(1) of the **Charter**.

> **15.** (1) 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.

Medical and Health Care Services Act

In order to understand their claim, it is necessary to understand how health services are funded in British Columbia. First, the Medical Services Plan (established and regulated by the *Medical and Heath Care Services Act*) funds medically required services delivered by doctors and health care practitioners outside of hospitals. Second, the *Hospital Insurance Act* sets out how hospitals are reimbursed for medically required services provided to the public.
The **applicants** argued that this plan should fund sign language interpretation for hard of hearing individuals, under the two statutes.

The trial judge concluded that the *Charter* does not require governments to implement programs to assist persons with disabilities too. If the government provides a benefit, then s.15(1) requires

only that the benefit be *distributed* equally. There is no obligation to provide a benefit in the first place.

Appeal to the British Columbia Court of Appeal

The applicants were not pleased with this result, so they appealed the decision to the British Columbia Court of Appeal. The Majority dismissed the appeal. It held that:

1. The *Medical and Health Care Service Act* did not violate s. 15 because it did not create a distinction between the deaf and hearing populations. Neither deaf nor hearing individuals have to pay for physicians. While deaf individuals have to pay for interpreters, this inequality exists independently of the legislation. The legislation therefore provides the benefit of free medical services equally to the hearing and deaf populations; and

2. the *Hospital Insurance Act*, did not violate s. 15 because hospitals have the discretion to choose how to spend the grant received from the government. There was no discrimination, as the absence of sign language interpretation did not flow from that legislation, but from each hospital's decision whether or not to provide sign language interpretation. As hospitals are not private, and not run by the **government**, their failure to provide interpretation does not raise *Charter* protections.

In **dissent** on the first point, Justice Lambert concluded that effective communication is an integral part of medical care, so sign language is not merely an **ancillary service**. He disagreed with the Majority that there was no discrimination, because the deaf were disadvantaged before the benefit was provided. The proper question is whether the law provides a benefit to which the disadvantaged group does not have the same access as others. He concluded that there was discrimination. However, he held that under s.1 of the *Charter* this violation of the *Charter* was justified because The *Medical and Health Care Services Act* does not ensure **comprehensive** health care coverage. In the **allocation of scarce financial resources**, governments must make choices about spending priorities.

Appeal to the Supreme Court of Canada

Leave to appeal was granted and the Supreme Court of Canada heard the case. The Supreme Court of Canada decided that the lower courts had not focused on the real problem. It drew a distinction between legislation the *Charter* violates and a Charter violation by a **delegated decision-maker** applying that legislation (See worksheet 2). That is to say that, the violation could arise out of an unconstitutional decision made by a person empowered by legislation to apply the legislation, rather than arising out of the wording of the legislation itself.

In this case, the legislation itself was consistent with the *Charter.* Nothing in the legislation prevented hospitals or medical practitioners from providing sign language interpretation. In the case of the *Medical and Health Care Services Act*, the legislation did not specify which services were medically required. Rather, the Medical Services Commission had the **discretion** to decide whether medical sign language interpretation was a "benefit". Similarly, the Supreme Court agreed with the Majority from the Court of Appeal that while the *Hospital Insurance Act* entitled beneficiaries to a specific list of services, each individual hospital had discretion over which particular services it

would provide and how it would provide them. A hospital could exercise this discretion to include the provision of sign language interpretation or not.

Once the court had decided that the real problem was with the decisions not to fund sign language interpretation, rather than with the legislation, the court had to determine if the "government" made those decisions. If not, the *Charter* would not apply.

The Court of Appeal had concluded that hospitals are not part of the government and therefore not governed by the *Charter*. However, the Supreme Court of Canada disagreed, finding that the *Hospital Insurance Act* provided for hospitals to deliver a comprehensive social program. The government remained responsible for defining the content and the persons entitled to receive medical services. In fact, the provincial legislature was required to provide these services under an agreement with the federal government for funding health services called the *Canada Health Act.* Justice La Forest concluded that health care services, including those provided by hospitals, have become a "keystone tenet of governmental policy". Accordingly, the failure to provide sign language was not just a matter of internal hospital management, but also an expression of government policy, and therefore the *Charter* scrutiny.

The court also concluded that the Medical Services Commission is part of the government because it implements a government policy in deciding whether a service is a benefit under the *Medical and Health Care Service Act*. Accordingly, the *Charter* governs these decisions as well.

Equal Benefit of the Law

Having determined that the *Charter* applied, the Court then turned to examine the key question in dispute: whether Mr. Eldridge and the Warrens had been afforded "equal benefit of the law without discrimination" within the meaning of s. 15(1) of the *Charter*. Justice La Forest explained that **on its face**, the medicare system applies equally to the deaf and hearing populations. It does not make an explicit "distinction" based on disability by singling out deaf persons for different treatment. Both deaf and hearing persons are entitled to receive certain medical services free of charge. However, he accepted the argument that deaf people were unable to benefit from this legislation to the same extent as hearing persons, or that they suffered **"adverse effects" discrimination**. The adverse effects suffered by deaf persons resulted from a failure to ensure that they benefited equally from a service offered to everyone. It was irrelevant that the government had no discriminatory intent or purpose in violating s. 15(1).

Justice La Forest disagreed with the Court of Appeal that sign language interpretation is an ancillary service. Rather, effective communication is an integral part of the provision of medical services. It is the means by which deaf persons receive the same quality of medical care as the hearing population.

He also disagreed with the assumption that there is a categorical distinction between state-imposed burdens and benefits, and that the state is not obliged to **ameliorate** disadvantage it did not create. He did not agree with the British Columbia government (who were the **respondents** both at the B.C. Supreme Court and at the Supreme Court of Canada) and the other provincial governments who **intervened** in the case that governments should be entitled to provide benefits

to the general population without having to ensure that disadvantaged members of society have the resources to take full advantage of those benefits.

Justice La Forest clearly stated that he was not deciding the bigger issue of whether or not the *Charter* obliges the government to take **positive actions** to ameliorate **systemic** or general inequality. Rather, once *the government does provide a benefit, it must do so in a non-discriminatory manner.*

A *Prima Facie* Violation

The Court concluded that the failure of the Medical Services Commission and hospitals to provide sign language interpretation where it is necessary for effective communication constituted a ***prima facie* violation** of the s. 15(1) rights of deaf persons. This failure denied them the equal benefit of the law and discriminated against them in comparison with hearing persons. The Court concluded that interpretation should be provided when necessary for "effective communication". This is a flexible standard that considers factors such as the complexity and importance of the information to be communicated, the context in which the communications will take place and the number of people involved. For deaf persons with limited literacy skills, sign language interpretation will be required in most cases.

Once the s.15 infringement was established, the Court considered whether the infringement was justified under s. 1.

In this case, the government could not meet even the first step of the ***Oakes* Test**, the test for determining if an infringement is justified under s. 1. The Oaks test requires that the government be able to demonstrate that their actions infringe the rights in question no more than is reasonably necessary to achieve their goals. In this case the government was unable to demonstrate that a total denial of medical interpretation services for the deaf constituted a **minimal impairment** of rights.

In particular, the Court recognized that while financial considerations alone do not justify a breach of the *Charter,* and governments must be able to determine the proper distribution of resources. In this case, the estimated cost of providing sign language interpretation was $150,000 a year, or 0.0025 percent of the health care budget at the time. By denying medical interpretation services for the deaf, and refusing to spend this small amount, the government of British Columbia did not "minimally impair" the rights of deaf people. In reaching this conclusion, Justice La Forest rejected the government's argument that if it provided medical sign language interpretation, it would have the great expense of providing language interpretation to those individuals who do not speak English or French. He stated that this argument was speculative and that the deaf stand in a special position in terms of their ability to communicate with the mainstream population.

The Remedy

The remedy ordered by the Court to fix the problem was to grant a declaration that the failure to provide medical sign language interpretation is unconstitutional and to direct the government of British Columbia to administer the *Medical and Health Care Services Act* and the *Hospital Insurance*

Act in accordance with the requirements of s. 15(1) of the *Charter.* The effect of the declaration was suspended for six months to allow the government time to choose an appropriate response.

Justice La Forest explained that in many circumstances the government would have to take positive action or special measures to ensure that disadvantaged groups are able to benefit equally from government services.

Classroom Discussion Questions

1. Who were the applicants in this case? Who were the respondents?

2. Read all of the bolded words in this summary. Do you understand what they mean? As a class, prepare a glossary or list of definitions for these terms.

3. What courts heard this case and in what order?

4. Compare the positions of the trial judge, the majority at the Court of Appeal, the minority at the Court of Appeal and the Supreme Court. Who do you agree with and why?

5. Does Justice La Forest conclude that sign language is itself a benefit (a medically required service), or must it be insured as a means of making sure that medically required services are provided equitably?

6. Based upon your understanding of *Eldridge*, does this case establish a right to health care – a right to receive necessary health services - in Canada? Do you think that there should be such a right? Why?

7. Justice La Forest concluded that to interpret s. 15(1) as narrowly as the British Government proposed to do, "bespeaks a thin and impoverished vision of s. 15(1)". What do you think Justice La Forest meant by this statement?

8. Justice La Forest issued a declaration, but suspended it for six months. Why do you think that it was suspended for six months? Once a law or a decision has been found to be unconstitutional, do you think that it is appropriate to suspend that decision for a period of time? What is the rationale in favour of such a suspension?

9. If deaf individuals have a right to interpretation for medical purposes, should non-English and non-French speakers have a right to an interpreter for medical purposes? What does Justice La Forest say on this issue? Do you agree?

10. Interpretation services for the deaf and hard of hearing are not only protected by s. 15 of the *Charter.*

    Section 14 of the *Charter* states that

    > A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

    - Why do you think that the *Charter* contains special recognition for the right of the deaf to an interpreter in the context of court proceedings?

11. Do you think that sign language interpretation should be extended to all other government services and, if so, on what basis? See the recent decision in *Canadian Association of the Deaf v. Canada*, 2006 FC 971 (CanLII) at: http://www.canlii.org/ca/cas/fct/2006/2006fc971.html

12. Deaf and hard of hearing individuals do not all use sign language to communicate. Brainstorm or research other methods of communication available to these individuals. Who should determine what type of communication services the government must provide to the deaf and hard of hearing?

13. Research the development of new technologies to assist deaf and hard of hearing individuals (ex. TTX, real-time translation, etc). Do these technologies offer cheaper or simpler solutions?

Eldridge v. *British Columbia (A.G)*: Worksheet 1

Equality Rights: Equal Benefit of the Law

Section 15(1) of the *Charter* states:

> **15.** (1) 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.

There are four ways that individuals are equal under s.15.

1. they are equal before the law;
2. are equal under the law;
3. they have equal protection of the law;
4. and equal benefit of the law;

Equality before the law is equality of treatment in the administration and enforcement of the law.

Equality under the law is equality in the substance of the law.

Equal benefit of the law ensures that all individuals benefit equally in effect from the law.

Equal protection of the law ensures that the all individuals gain equal protection from the law.

Think of an example for each type of "equality". For example, the fact that both you and I face the same court procedure when we are accused of a crime is an example of equality before the law. Hint – you may find that some examples work for more than one kind of equality.

Adverse-effect Discrimination

Eldridge was one of the first *Charter* cases to focus on the meaning of equal benefit of the law. The Court interpreted equal benefit of the law to mean that when the government provides a benefit, it must do so in a non-discriminatory manner. The government may be required to take certain actions to ensure that everyone has equal access to that benefit.

In reaching this conclusion, the Court favoured formal equality over substantive equality. Substantive equality is an important principle in Canadian equality law. It states that it is not enough for a law to apply identically to all Canadians. A law that applies equally to everyone may impact some individuals more than others. This is adverse impact discrimination. Only by ensuring that in reality everyone receives equal treatment is substantive equality achieved.

A good example of the problems with a formal equality approach is the pre-*Charter* case, *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183. In *Bliss*, a pregnant woman was denied unemployment benefits to which she would have been entitled had she not been pregnant. Her claim that this practice violated the equality guarantees of the *Canadian Bill of Rights* on the basis of sex discrimination was dismissed as all pregnant persons were treated equally. The Court stated that the source of inequality was created by nature, not legislation. This case is no longer considered to be valid in Canada. The difficulty with Bliss is that while all pregnant people were treated the same, the reality was that only women were denied unemployment benefits. In effect, the law discriminated on the basis of sex, even if it did not mention sex specifically. Similarly, in *Eldridge*, the government did not pay for sign-language interpretation for anyone. It could therefore be argued that it did not treat deaf people differently than others. However, as deaf people were the only ones who required sign language in order to speak with their doctors, in effect, the denial of this essential service discriminated against them on the basis of disability.

Can you think of other examples in which a general law or decision would cause adverse-effect discrimination to people with disabilities? to women? to children and youth? To people of one religion?

In his judgment, Justice La Forest mentions that in the United States, the government must have a discriminatory intent to breach the 14th Amendment of the American Constitution (which is the US equality provision). In order to make a finding of adverse-effect discrimination in Canada, it is not necessary that the government intended to discriminate. Do you think that the approach in Canada or the United States is preferable?

Adverse-effect Discrimination and People with Disabilities

Justice La Forest spoke at length about the historic treatment of disabled individuals in Canada. He explained that their exclusion and marginalization has been shaped to a great extent by the notion that disability is an abnormality or a flaw, by paternalistic attitudes of pity and charity, and by a belief that "entrance into the social mainstream has been conditional upon their emulation of able-bodied norms". He explained that many deaf individuals do not see their deafness as impairment or something wrong with them, but rather see themselves as part of a distinct community of people that has its own language (sign language) and culture. However, the dominant or common perception is that deafness is about silence.

While individuals may be born with physical impairments, it is because society does not accommodate their needs that they become disabled. For example, the inability of a person in a wheelchair to get into a building is because of the impairment of being unable to walk or being in a wheelchair. Rather, a person becomes "disabled" when society fails to provide a ramp or make the building accessible. By understanding that society builds upon natural impairment to create conditions of disability it is easier to make the connection between government inaction and discrimination against persons with disabilities.

Questions

1. What does it mean that a disability is a "social construction"?

2. What is meant by "entrance into the social mainstream has been conditional upon their emulation of able-bodied norms"?

3. In your own words, how does this judgment portray people with disabilities? What does it tell us about what it means to be "disabled"?

4. Based on its reasoning, how do you think the majority in the Court of Appeal understands disability?

5. What are the images of people with disabilities in the media? What do they tell us about what it means to be "disabled"?

6. Based on your reading of *Eldridge*, are there any policies your class or school should put into place in order to prevent adverse-impact discrimination against students with disabilities?

Adverse-Effect Discrimination and Access to Government Resources

In dissent at the Court of Appeal, Justice Lambert concluded that while there was adverse-effect discrimination, that this infringement of the *Charter* was justified under s.1 of the *Charter*. He concluded that the *Medical and Health Care Services Act* did not provide for comprehensive health care coverage (for example it did not provide for artificial limbs, hearing aids etc). In the allocation of scarce resources, governments must make choices about spending priorities and the courts should defer to legislative policy and administrative expertise in this area.

In reality, the government has a limited budget. It is therefore controversial for Courts to get involved in telling the government how to distribute scarce resources, financial or otherwise.

This is often explained as negative versus positive rights. Most areas of rights litigation deal with what have traditionally been called negative rights. These are rights to be free from state interference (ex. the right to be presumed innocent until proven guilty, freedom of speech, and freedom of religion). Positive rights place an obligation upon the state to do something. While the governments do spend money to protect negative rights – such as in paying for a lawyer for some accused persons – typically government-spending issues are associated with positive rights. In *Eldridge*, the Court acknowledged that the government had a positive obligation, once it had established a benefit, to ensure that the benefit was equally accessible to all Canadians.

Do you think that there is a difference between positive and negative rights?

Exercise

Read the following two statements:

Courts should be cautious about getting involved in issues of government policy. The government has to balance the needs of diverse groups of people. If a court determines that the government must fund services for one group of Canadians, then it is just taking money away from another group of Canadians. The legislature is an elected body that should make these difficult decisions.
Protecting the rights of people means going beyond their rights to a fair trial or to fair speech. Part of the courts' duty under the Charter is to protect minority groups by ensuring that the less powerful gain access to government resources. The courts are not micromanaging government by ensuring that government programs foster basic human rights to health and welfare.

1. Choose which statement best reflects your views of the role of the court. Find a partner who has the opposite view. Debate the merits of your position with your partner.

2. As a class, make a list of arguments for and against the court getting involved in the distribution of government benefits.

Follow-Up Activity:

Search your local library or the Internet for 1 or 2 reasonable sources about the *Charter*. Do the authors support the court getting involved in the allocation of government resources?

**See OJEN Landmark Case: Auton v. B.C. (A.G.) – Equality Rights and Access to Health Care*

Eldridge v. *British Columbia (A.G)*: Worksheet 2

Legislation and Delegated Decision-Making

There are two ways that the *Charter* can be infringed. It can be infringed by legislation and it can be infringed by the actions of a delegated decision-maker in applying legislation.

> **Legislation** is the laws passed by the federal and provincial parliaments. It includes federal laws like the *Criminal Code* and provincial laws like the *Education Act.* What are other examples of legislation?

Often legislation speaks at a general level, as it is impossible for the government to decide how every small part of the law must be implemented, or the government may not have expertise in areas that are technically complex. One way to deal with making more specific decisions is to use regulations, which set out how a law will be implemented in more detail. Another option is for the government to decide on a person who is in a good position to make more specific decisions under that law, and to grant that person decision-making authority.

In this case, the government of British Columbia decided that rather than specifying in the *Medical and Health Care Services Act* the list of services that are "medically required" it would delegate that authority to the Medical Services Commission. This panel has greater expertise and flexibility to make these decisions. Similarly, rather than micro-manage aspects of managing a hospital, the legislature decided to give lump sum grants of money to hospitals in return for the provision of services, and delegated the authority to determine how to spend that money.

It can be difficult to know whether legislation or a delegated decision-making body is the source of a potential *Charter* breach. In *Eldridge*, the parties originally challenged the constitutionality of the *Medical and Health Services Act* and only raised the issue of delegated decision-making once the case reached the Supreme Court of Canada. Even that Court only concluded that the breach occurred at the decision-making level after carefully reading the legislation. However, generally, if a government action is based on a general rule that is widely applicable and must be applied without the exercise of discretion, then any breach is found within the legislation itself. If a particular decision rests upon specific facts or relates only to particular individuals or a class of individuals, and there is an aspect of discretion (the decision is based on judgment or weighing individual factors) then the breach stems from the actions of a delegated decision-maker.

Exercises

A. In the following situations is it **more likely** that legislation or a delegated decision-making body has potentially breached the *Charter?* If you conclude that a delegated decision-making body caused a potential breach, list potential bodies that might have made that decision.

1. A student is suspended for wearing religious clothing in contravention of a school's dress policy.

2. An individual is arrested for using marijuana, even though he claims that that he was using the marijuana for medical purposes as he is suffering from chronic pain.

3. A 16 year old is told that she cannot vote when she attempts to do so at her local poling station.

4. Police systematically stop young men of a particular ethnicity who are driving expensive looking cars.

5. Movie theatres in Ontario are prohibited from showing the Harry Potter movie because it deals with the subject of witchcraft.

6. Students are forced to attend school even if they do not want to.

B. Imagine that you work for the provincial government. You are drafting a new law to fund community initiatives aimed at youth crime prevention. The government wants to delegate authority to a body to choose the projects that will receive the funding and to administer the fund. Answer the following questions:

1. Why do you think that the government might want to delegate authority?

2. Who do you think should be the decision maker(s)? Why? (think about what sort of people you might want involved in the decision making process)

3. What sort of guidelines might you put in your law about the kind of projects that can receive funding? Remember, the more guidelines you write, the more you can limit the discretion of the decision-making body. You can decide if you want the body to have a lot of flexibility, and therefore a lot of discretion, or if there are important uniform considerations you want applied. For example, under the *Health Insurance Act*, hospitals have a wide range of discretion in how they spend the lump sum payments they receive from the province as they must be able to make day to day management decisions. However, the Medical Services Commission cannot fund any services – its discretion is limited to interpreting "benefits" as being "medically required services". An example of a limit to discretion you could put in your law is that the designated decision-maker could only provide funding to agencies that consult with youth in designing their programs.

4. Are there any guidelines you should include in your law to ensure that the programs are accessible to youths with disabilities?

5. How else could you ensure that the needs of youth with disabilities are considered?

Eldridge v. *British Columbia (A.G)*: Worksheet 3

Application of the *Charter* to "Government"

As we saw in *Eldridge,* before a court can decide if there has been a breach of the *Charter*, it must determine that the *Charter* is applicable.

The *Charter* only applies to the relationship of the individual citizen and the government.

Every day, private individuals in Canada may deprive each other of the "right to life, liberty and security of the person" through acts of violence and violate the "right to equality" through discriminatory conduct or hate speech. They may be held responsible for what they have done under the *Criminal Code,* the *Human Rights Code* or workplace discrimination policies. However, they have not breached the *Charter.*

Like any piece of legislation, the *Charter* has a section that sets out its scope of application. Section 32(1) of the *Charter* states that it applies:

> *a)* to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> *b)* to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Read this provision carefully.

1. Who/what is subject to *Charter* scrutiny?

2. What does "in all matters within the authority of Parliament" mean?

3. Why is the government of Canada responsible for matters relating to the Yukon Territory and the Northwest Territories?

4. Do you think that the *Charter* is applicable to the laws of Nunavut? Why then is Nunavut not included in the *Charter*?

5. What do you think is the rationale for the *Charter* only applying to the governments and not private individuals or businesses?

6. What other laws protect people's rights in the private sector?

THE TEST

Justice La Forest explained that there are two ways that the *Charter* can be found to apply to an entity for the purposes of s.32. First, when an entity is determined to be "part of the fabric of government", the Charter will apply to all of its activities, including those that might be considered "private". This determination will be made on the basis of whether a body is by "its very nature" or in "virtue of the degree of governmental control exercised over it" characterized as government for the purposes of s. 33(1).

Second, the *Charter* will apply to private entities in respect of inherently government actions, including when they act in furtherance of a specific governmental programme or policy. In these cases, it is the government that retains responsibility for these programmes or policies. The focus of the analysis is upon the nature of the activity rather than upon the nature of the body. Non-governmental actions will not attract *Charter* scrutiny.

Questions

1. Why does it matter if delegated decision-makers are subject to the *Charter*?

2. What are some of the services we receive from the government?

3. What are some examples of "private" activities that either a government or non-agency can carry out?

4. Do you find the terms "its very nature", "in virtue of the degree of governmental control exercised over it" and "inherently government actions" helpful in explaining what is governmental? What do you think they mean?

5. Based on Justice La Forest's test, what agencies do you think could be considered part of the government and why? (Example, the police enforce the law and protect the public. Even if they are privatized, they implement a core government responsibility. The government closely regulates them. We do not want police forces that are not accountable in the manner of the government.)

6. What kinds of programs might attract *Charter* protection even if they are delivered by agencies that are otherwise not subject to the *Charter?* For example, we have learned that when hospitals deliver health services for which they are paid by the government under the *Health Insurance Act*, they are acting in furtherance of a particular government policy of providing healthcare. (Hint: see question 2)

7. Do you think schools are part of the government? Should the *Charter* apply to the actions of school boards, principals or teachers? Does the *Charter* apply at school? (See OJEN Landmark Case - R. v. M. (M.R.) (1998): School Searches and Privacy)

Eldridge v. *British Columbia (A.G)*: Worksheet 4

Essential and Ancillary Services – Giving Meaning to Social Policy Legislation

Often broad social policy goals are contained within legislation. Delegated decision-makers and at times the courts give meaning to these policy goals. A good example is the definition of benefits under the *Medical and Health Care Services Act*, which states that (government provided) benefits are "medically required services …" It was up to the Medical Services Board to determine what precise medical services are required.

The idea of medically required and ancillary medical services is a difficult one. Even the B.C. Court of Appeal and Supreme Court of Canada disagreed on whether sign language interpretation was medically required or an ancillary service. There are no objective criteria to determine what is medically required or ancillary. In *Eldridge* the court placed one limit on the discretion of the Medical Service Board – in order to comply with the *Charter*, the term "medically required services" had to include medical interpretation for the deaf where necessary for effective communication.

Exercise

Imagine you are on a body that has been given the power to decide what services are "educationally required services" that must be provided to high school students in the province. What services or classes provided at your school do you think are essential to education and what services do you think are ancillary? It may be helpful if your class first brainstorms different services offered by your school and you then put each service in one category or the other. With a partner check your answers and see whether you agree or disagree. What criteria did you use to decide that something was an educationally required service? Did your partner use the same criteria? As in *Eldridge*, are there any equality concerns you should take into consideration in reaching your conclusion? Consider the needs of students who don't speak English, students with disabilities, students who live in poverty. Are different services required to provide them with the same quality of education?

Social Science Evidence

When the court was faced with determining whether sign language was "medically required" versus "ancillary", it did not have the same medical expertise as the Medical Services Board to assist it in reaching this decision. However, judges are experts in the rules of court, including hearing evidence reach an informed decision. Judges often hear from expert witnesses on a topic. The Court in Eldridge accepted the general evidence and the expert testimony as establishing that for deaf persons with limited literacy skills, sign language will be required in most cases for effective treatment.

Expert evidence is the evidence of individuals that the court has accepted as having particular expertise in an area beyond the knowledge of the court. These individuals are allowed to state their opinions on the meaning of the evidence whereas regular witnesses can only share their personal observations.

1. What questions could you ask your teacher or principal, as an expert on education, to determine if it is "educationally required" to teach drama at school? To provide counseling services? To offer a lunch program? To have a basketball team?

The court was also prepared in this case to recognize the fact that "adequate communication is essential to proper medical care is surely so incontrovertible that the Court could, if necessary, take judicial notice of it."

2. What do you think "judicial notice" means?

3. What are examples of other facts that a judge could accept without evidence, on judicial notice?

4. What other techniques have you learned for giving meaning to broad language in social policy legislation? Hint – what have you learned about statutory interpretation?