

## LEGAL ANALYSIS

### *Canadian Charter of Rights and Freedoms*

The equality rights section 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.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(Emphasis added)

The enforcement section partially states;

**24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

I come now to possible justification under s. 1 of the *Charter*, which reads:

**1.** *The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In order to justify a limitation of a Charter right, the government must establish that the limit is "prescribed by law" and is "reasonable" in a "free and democratic society". In *R. v. Oakes*, [1986] 1 S.C.R. 103, the Supreme Court of Canada set out the analytical framework for determining whether a law constitutes a reasonable limit on a *Charter* right. A succinct restatement of that framework can be found in the reasons of Iacobucci J. in *Egan*, at para. 182:

First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the Charter guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.

The Current State of Equality Law

The first substantive equality rights case to be decided by the Supreme Court of Canada was *Andrews*<sup>1</sup>. The Court stated that the enumerated grounds and other possible grounds for discrimination mentioned in section 15(1) were to be interpreted in a “broad and generous manner”. *Andrews* stood for the propositions as follows;

(1) Does the law create a distinction based on an enumerated or analogous ground?

(2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

As an aside, justificatory factors must be considered under the saving provision in section 1, not under the equality provision in subsection 15(1). The onus of proof in a section 1 analysis shifts to the Crown.

In *Kapp*<sup>2</sup>, a recent leading s. 15 *Charter* case, the Supreme Court of Canada left no doubt that *Andrews* is henceforth considered the leading case on section 15(1). *Andrews*, the Court asserted in *Kapp*, “set the template for this Court’s commitment to substantive equality<sup>3</sup>.”

#### Other Legal Statutes and Precedents

- International law (*United Nations Convention on Rights of Persons with Disabilities* Article 13 on Access to Justice)
- The Objectives of the *Accessibility for Ontarians with Disabilities Act* (AODA)
- The Ontario Human Rights Commission’s *Policy and Guidelines on the Duty to Accommodate Persons with Disabilities*

#### Deaf and Hard of Hearing Cases

Now that we have established the current *Charter* framework, we now turn to how specific cases involving services to deaf and hard of hearing individuals have been decided.

i) *Howard v. University of British Columbia*

One of the early human rights cases involving services to the deaf was *Howard*<sup>4</sup>, which was a human rights case under the *British Columbia Human Rights Code*. In *Howard*, Howard, a Deaf student required sign language interpreters to obtain a teaching

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<sup>1</sup> *Andrews v. Law Society (British Columbia)* [1989] 1 S.C.R. 143

<sup>2</sup> *R. v. Kapp* 2008 SCC 41

<sup>3</sup> para. 17 of *Kapp*

<sup>4</sup> *Howard v. University of British Columbia* (1993) 18 C.H.R.R. D/353 [B.C. Human Rights Tribunal]

certificate, but was turned down by the University. The University argued that it provided services not customarily provided to the public, and in any event, the University allocated funding for interpreters from a lump sum provided by the provincial government; thus the government was responsible.

In response, the tribunal decided that the University provided educational services, and hence was a service customarily available to the public. There was a finding of discrimination as the deaf student was adversely impacted by the lack of interpreters in the classroom, a burden not shared by other students. As for the source of funding, the tribunal ruled that the funding for interpreters was a matter of control within the University. There was no evidence to determine undue hardship for the University.

The remedy ordered was that the University provide access for Mr. Howard by providing him with a sign language interpreter.

ii) *Eldridge v. British Columbia*<sup>5</sup>

This is by far the most important *Charter* case for the deaf and hard of hearing, even if we did not limit it to a category of provision of services.

The failure to provide sign language interpreters constitutes discrimination in the provision of a benefit. On its face, the medicare system in British Columbia 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, the *Charter* protects against adverse effects discrimination, and it is this form of discrimination that is especially relevant in the case of disability. The government will rarely single out disabled persons for discriminatory treatment. More common are laws of general application that have a disparate impact on the disabled. In this case, the lack of funding for sign language interpreters renders the three individuals unable to benefit from the legislation to the same extent as hearing persons. Interpretation services should not be conceived of as “ancillary services”, which, like other non-medical services such as transportation to a doctor's office or hospital, are not publicly funded. 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 be viewed as the means by which deaf persons may receive the same quality of medical care as the hearing population. Once the state provides a benefit, it is obliged to do so in a non-discriminatory manner. If the concept of adverse effect discrimination is accepted, it seems inevitable, at least at the s. 15(1) stage of analysis, that the government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services.

The evidence clearly demonstrated that, as a class, deaf persons receive medical services that are inferior to those received by the hearing population. Given the central place of good health in the quality of life of all persons in our society, the provision of

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<sup>5</sup> [1997] 3 S.C.R. 624 [Supreme Court of Canada]

substandard medical services to the deaf necessarily diminishes the overall quality of their lives. The government had simply not demonstrated that this state of affairs must be tolerated in order to achieve the objective of limiting health care expenditures. The government had not made a “reasonable accommodation” of the disability of the three individuals; it has not accommodated their needs to the point of “undue hardship”.

Citing the standard of effective communication, the Court stated<sup>6</sup>;

“This is not to say that sign language interpretation will have to be provided in every medical situation. The ‘effective communication’ standard is a flexible one, and will take into consideration such factors 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, however, it is probably fair to surmise that sign language interpretation will be required in most cases...”

The court also stressed the universality of health services<sup>7</sup>;

“The appellants do not demand that the government provide them with a discrete service or product, such as hearing aids, that will help alleviate their general disadvantage. Their claim is not for a benefit that the government, in the exercise of its discretion to allocate resources to address various social problems, has chosen not to provide. On the contrary, they ask only for equal access to services that are available to all. The respondents have presented no evidence that this type of accommodation, if extended to other government services, will unduly strain the fiscal resources of the state. To deny the appellants' claim on such conjectural grounds, in my view, would denude s. 15(1) of its egalitarian promise and render the disabled's goal of a barrier-free society distressingly remote.”

In *Eldridge*, the Supreme Court of Canada imported the "accommodation to the point of undue hardship" analysis, from human rights jurisprudence, into the test for s. 1 of the *Charter*. That makes it harder for s. 15 violations to be justified under s. 1.

iii) *Hussey v. British Columbia (Ministry of Transportation and Highways)*<sup>8</sup>

The Deaf complainant was a driver for a group home van which required a certain class of licence. When he applied for such a licence, the motor vehicle licencing office informed him that because he was deaf he would not be able to obtain the licence. He launched a human rights complaint under the laws of British Columbia.

The tribunal found that the Government of British Columbia had adopted the standard of refusal of licences to deaf drivers rationally, and had adopted such a policy in good faith. However, the tribunal ordered the Superintendent to assess the Deaf complainant individually.

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<sup>6</sup> See para. 82

<sup>7</sup> See para. 92

<sup>8</sup> [1999] B.C.H.R.T. No. 63 [B.C. Human Rights Tribunal]

iv) *Vlug v. Canadian Broadcasting Corporation*<sup>9</sup>

This decision is probably among the top three legal decisions for the deaf and hard of hearing in Canada, due to its wide latitude given to the concept of reasonable accommodation.

Vlug, a Deaf lawyer, launched a *Canadian Human Rights Act* complaint against the CBC when he found captioning to be poor on a few programs carried by the CBC. The Canadian Human Rights Tribunal found for Vlug in all areas of captioning on television, stating that CBC has to caption everything from “sign on” to “sign off”.

With respect to a prima facie case for discrimination, the tribunal ruled that television program customarily available to the public were not accessible to Vlug by reason of his disability. It was not enough that Vlug enjoyed some captioned programs on CBC; it was shown that he was unable to watch some programs because they were not captioned.

CBC had implemented a gradual approach to captioning, increasing it steadily over the years. Applying the *Grismer* test, the tribunal found that CBC had demonstrated that both it adopted that standard rationally in compliance with its statutory and licensing requirements, and that it adopted such a standard in good faith.

However, the tribunal found that CBC failed to show that the standard was reasonably necessary for the objective of fully captioning for the deaf and hard of hearing community, given that CBC could not demonstrate an undue hardship defence.

Added the tribunal,

“Even access to television commercials cannot be characterized as trivial: whether we like it or not, advertising has a significant place in the fabric of popular culture. Further, one must not confuse an argument as to the potential triviality of the service with the importance of the right in issue, in this case, Mr. Vlug’s right to be free from discrimination on the basis of a disability.”

Finally, the tribunal awarded Vlug \$10,000 for pain and suffering.

v) *CAD v. Canada*<sup>10</sup>

A national Deaf agency, the Canadian Association of the Deaf, and three individual Deaf applicants launched a joint application against the Government of Canada for failing to provide access while they all, in some shape or form, received federal government services or sought to meet with the federal government.

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<sup>9</sup> *Vlug v. Canadian Broadcasting Corporation* (2000) 38 C.H.R.R. D/404 (C.H.R.T.) [Canadian Human Rights Tribunal] The parties settled in October 2002, ending an appeal by the Canadian Broadcasting Corporation to the Federal Court of Canada. In essence, the CBC agreed to abide by the Tribunal’s decision, only leaving out paid advertising from third party advertisers as content it could not control.

<sup>10</sup> 272 D.L.R. (4th) 55 (2006) (Federal Court of Canada)

The issue in that case was the revision of the federal government's guidelines concerning access through sign language interpreters. The guidelines were formerly broad, but upon the change, they limited the provision of interpreter services to public events organized by the federal government, or among federal employees only. These rules foreclosed deaf members of the public accessing government services.

The court found the new guidelines resulted in differential treatment based on disability, an enumerated ground under section 15 of the *Charter*, and this differential treatment amounted to discrimination. Consideration of the relevant contextual factors revealed that deaf persons have suffered from discrimination, vulnerability and pre-existing disadvantage. The guidelines' failure to take into account the actual needs of deaf persons who may deal with the federal government in private situations resulted in adverse effects discrimination and infringed their human dignity.

Further, the court stated that while the policy recognized and sought to meet the needs of deaf individuals employed by or seeking employment with the federal public service, it neglected the needs of other Canadians who may come into contact with the federal government in the administration of its programs. This under-inclusiveness amounted to discrimination as it drew a distinction between deaf and hearing individuals meeting with government officials. The nature of the interests affected was central to the dignity of deaf persons. If they cannot participate in government surveys or interact with government officials, they are not able to fully participate in the democratic process and functioning of government.

Section 15 of the *Charter* was thus violated, and this violation was not justified under section 1. A declaration was the appropriate remedy under section 24(1) of the *Charter* as there were various options available to the government that could rectify the unconstitutionality of the current system.

vi) *Simpson v. Canada*<sup>11</sup>

Jasmin Simpson, who has multiple disabilities, took nine years to complete both an undergraduate degree and a master's degree in social work, although the regular program nominally takes five years to complete. Simpson is both deaf and legally blind, and uses sign language as her primary communication. As well, she has lupus, which required acute hospitalization during her studies. At the end of her program, she owed nearly twice as much debt as compared to non-disabled students.

The Ontario Superior Court held that the federal government's administration<sup>12</sup> of her student loan—while the court agreed that the student loan program itself is not inherently discriminatory—violated her *Charter* rights as a person with a disability. The court ordered that Simpson did not need to pay off the debts that arose from the discriminatory procedures followed by the student loan program, while upholding that she still had to pay the other debts under that program.

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<sup>11</sup> 2020 O.N.S.C. 6465 [Ontario Superior Court]

<sup>12</sup> Through the Canada Student Loans Program.

As stated by the court,

However, the obligation falls to the governments of Canada and Ontario (as well as other affected provincial and territorial governments), and not the Court, to fashion appropriate and responsive administrative mechanisms to ensure that the operation of the [Canada Student Loans Program] redresses the adverse effects for others in Ms. Simpson's situation, whether through existing programs, policies and discretionary authority, or through new measures.

vii) *Smirnov v. Canada*<sup>13</sup>

A Deaf industrial painter applied, through a foreign worker category, to emigrate to Canada, which required official language proficiency through language tests. Since Smirnov, a Deaf Russian national, was English-based (as a second language), he communicated primarily in American sign language when in Canada.

However, his skill in written English and reading English was not sufficient to pass the minimum standards required in each test. He submitted American sign language test results (being tested by the Canadian Hearing Society) that showed impressive results in receptive and expressive American Sign Language (equivalent to spoken English). However, while he attempted to substitute these two sign language results to replace the discriminatory categories of "speaking" and "listening," the court held that such argument was irrelevant because he failed the written and reading tests. All four such language tests were required. Smirnov attempted to show a *Charter* violation due to the deficiency of his Deaf school in Moscow, his childhood city, arguing that his poor schooling as a Deaf child and teenager directly impacted his ability to acquire written English as a second language, but the court ruled that much more factual evidence was required to be submitted to make out a *Charter* violation. The Deaf immigrant lost this case.

This case shows the importance of challenging government policy that is inherently discriminatory (i.e. requiring speaking and hearing as mandatory tests for foreign workers to emigrate) yet showing how difficult it is to compile an evidentiary basis without substantial funds for litigation.

viii) *Simsler v. Tax Court of Canada*<sup>14</sup>

Simsler, a Deaf lawyer, sought to have captioning (CART) available to him during court proceedings after requesting it prior to the litigation. After refusing, stating that it was the responsibility of Simsler's employer, the Department of Justice, the Tax Court of Canada settled, and implemented new policy requiring captioning (CART) or signed language interpreting to be available "to a deaf, deafened, or hard of hearing party or witness, lawyer, or articling student ..."

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<sup>13</sup> 2013 F.C. 5444 [Federal Court of Canada]

<sup>14</sup> Complaint filed in 2000 with the Canadian Human Rights Commission, settled the same year without filing in court.

Simser had sought such a directive, because he argued that Deaf lawyers could also work for a private law firm, which might not be so willing to hire Deaf lawyers due to the cost of providing accessibility in the courts for the Deaf lawyer's litigation work, or the Deaf lawyer would have his or her own law firm, and thus, the accessibility cost would be a burden on the Deaf law firm's profitability. The best solution was to have the court, a public service, pay for it, as it was providing the service.

While this is not a court case, it was a public settlement that led other courts and tribunals to also provide the funds for accessibility, upon request.

ix) *Simser v. Canada*<sup>15</sup>

The issue in this case was the taxation of the Bursary for Students with Disabilities, a grant conferred upon students with disabilities by the Government of Canada. Simser argued in court that since he only received the grant because he was Deaf, the grant income should be tax-free, otherwise he was burdened by extra tax payable. If he were not Deaf, he would not have applied, or even qualified, for this grant, and would not have been subject to extra tax.

He challenged the laws based upon infringement of his *Charter* rights, under the ground of disability.

Ultimately, the Federal Court of Appeal ruled against Simser, saying despite its namesake, the bursary was first and foremost income to the recipient, and therefore earned no special exemption from taxation. The court ruled that the burden was upon the law school to provide accessibility to the law student, such as Simser, and the burden existed mainly to provide income to Simser. Simser lost in court, and the tax imposed remained untouched.

However, the lawsuit prompted an important change to the *Income Tax Act*, the disability support deduction, in amending section 64, introducing the new provision. This meant, had this deduction existed at the time Simser attended law school, he could have deducted the costs of real-time captioning, and hence end up paying no income tax on the student bursary.

x) *Churchill v. Newfoundland and Labrador School District*<sup>16</sup>

A Deaf boy, Carter Churchill, had difficulty obtaining qualified, experienced American Sign Language instructors and teacher's assistants during his primary years in his local school. By way of background, there exists no Deaf school in the province, having been closed down years ago, in 2010. On his behalf, his parents launched a human rights complaint against his school board.

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<sup>15</sup> 247 D.L.R. (4th) 603 (FCA) (2004) [Federal Court of Appeal]

<sup>16</sup> 2023 Canlii 16071 [Newfoundland and Labrador Human Rights Tribunal]



In its findings, the tribunal determined that Churchill was not properly accommodated during his Kindergarten to Grade 3 academic years inclusive, whereas due to improvements implemented gradually over time, he was accommodated during his Grades 4 to 6 academic years.

It was in Grade 4 that the district school board implemented a Deaf and Hard of Hearing classroom, a satellite classroom that addressed Churchill's needs, along with more properly qualified education staff who were better skilled in American Sign Language. Thus, this tribunal case outlines a continuum of accessibility, and it is up to the court (or tribunal) to determine from the facts where the optimal level of accessibility arises.

xi) *Malkowski v. Ontario Human Rights Commission*<sup>17</sup>

Malkowski, a former Deaf Member of Provincial Parliament in the Legislature of Ontario, filed for a court order that declared the *Building Code* of Ontario under-inclusive for not mandating closed-captioning equipment in movie theatres. The Court disagreed, saying that they could not decide the issue, because Malkowski had brought about his application under the *Human Rights Code* instead of the *Canadian Charter of Rights and Freedoms*. The Court held that while the two pieces of legislation had similar aims, the Charter superseded legislation, while the *Human Rights Code* did not have the power to allow judges to overwrite legislation.

This case has been extensively quoted as to the division of powers regarding human rights legislation and to the supremacy of the *Charter*.

xii) *Fusca v. Municipal Property Assessment Corporation*<sup>18</sup>

The owner of a newly built home, in Markham, applied for a lower property tax bill because of expenses spent on a visual alarm system that was comprehensive of the entire home, wired into every room. He was deaf, so this alarm system enabled him to be aware of any alarm through flashing lights installed into every room. The statute, the Assessment Act, allowed for lower property taxes if the home was originally constructed in a way that accommodated a disability. The government agency said his changes were renovations rather than original construction, and claimed that his disability-related expenses did not qualify, so Fusca took this agency to court. The court agreed, saying the evidence was clear that Fusca ordered the home constructed with this disability-related adaptation in mind from the beginning. He was entitled to the lower property taxes.

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<sup>17</sup> 55 Admin L.R. (4th) 311 (2006) [Ontario Superior Court]

<sup>18</sup> (2007) 33 M.P.L.R. (4th) 129 [Ontario Superior Court]