Date: 20060811

Docket: T-1720-04

Citation: 2006 FC 971

Ottawa, Ontario, August 11, 2006

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

**THE CANADIAN ASSOCIATION OF THE DEAF,
JAMES ROOTS, GARY MALKOWSKI, BARBARA LAGRANGE
AND MARY LOU CASSIE**

Applicants

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This case is about access to government by the hearing disabled. The applicants submit that the federal government's Guidelines for administration of its Sign Language Interpretation Policy deny deaf and hard of hearing Canadians the opportunity to fully participate in government programs. They seek a declaration that the individual applicants' rights under

section 15 of the *Canadian Charter of Rights and Freedoms*[1] were violated on the basis of disability and that professional sign language interpretation services are to be provided and paid for by the Government of Canada, upon request, where a deaf or hard of hearing person accesses services from the Government of Canada or seeks input in government decision-making.

[2] At first impression, the applicants' case presents difficulties, not the least of which is that they seek judicial review in one application of alleged acts of discrimination on different occasions by various persons, some unidentified, employed by several departments. Only two of the fact situations presented concern events of a similar nature involving the same agency**.** Moreover, the timeliness of the application has been called into question, the standing of the corporate applicant is challenged and the justiciability of the process by which the government seeks input into the policy development process is in issue. Nonetheless, I have reached the conclusion that they have established a breach of the *Charter* and are entitled to a remedy.

BACKGROUND

[3] The Sign Language Interpretation Policy, as deposed by Alain Wood, Director of Interpretation and Parliamentary Translation, Translation Bureau, Department of Public Works and Government Services Canada, ("PWGSC"), emerged from efforts to fully integrate deaf or hard of hearing people into the public service by facilitating their entry into government positions, and by assisting them to carry out their duties. These efforts included providing interpretation services for exams at the Public Service Commission, for competitions and

[1] Part I of the *Constitution Act*, 1982, Being Schedule B to the Canada Act, 1982 (U.K.), 1982, c.11 (the "*Charter*").

interviews and upon hiring, for training and in the work-place. The policy was extended to communications with deaf or hard of hearing Canadians at events organized by departments and agencies.

[4] This is outlined in a letter, dated May 4, 1987, attached as an exhibit to Mr. Wood's affidavit, from the then Acting Assistant Secretary, Human Resources Division, Treasury Board of Canada Secretariat, to all Directors of Personnel in the federal government to advise them of the sign language interpretation service available from the Official Languages and Translation Branch of the Secretary of State Department, as it was then constituted.

[5] As a result of a reorganization and transfer of responsibilities between departments in 1993, the Official Languages and Translation Branch became the Translation Bureau of the Department of Public Works and Government Services Canada ("PWGSC").

[6] The May 4, 1987 letter indicated that the Translation Branch had been providing sign language interpretation to hearing impaired federal government employees since 1982 and that consideration was being given to making changes to the Sign Language Interpretation Policy to reflect the recommendations of an external advisory committee. The letter states that "[t]he department also provides the [sign language interpretation] service…to the general public at conferences and other meetings where representatives of the federal government are active participants." [Underlining added].

[7] Accompanying the letter was a document intended to advise departments of the services then available to hearing-impaired persons. It is common ground between the parties that this document accurately describes the Sign Language Interpretation Policy as it was in May 1987 and that the policy remains in place today. The scope of the policy, however, is in question.

[8] The 1987 policy statement recognizes sign language as an independent language and that sign language interpretation is a linguistic service rather than a social service to aid disabled persons. The same high standards of interpretive skills and ethical practices required of spoken language interpreters were to be expected of the sign language interpreters employed by the Branch on a freelance contract basis. The use of freelance interpreters was intended to encourage the development and growth of interpretation as a profession in the public and private sectors.

[9] The statement sets out information about the interpretation services available from the Translation Branch in question and answer format. In reference to the question of when the sign language interpretation service provided by the Translation Branch could be used, the document states, "[t]his service is intended for any hearing impaired person in Canada who must deal in person with a representative of the federal government. This includes job interviews, meetings, federal commissions, etc." [Underlining added].

[10] It appears that the 1987 statement served as a guideline for the administration of the policy until the current guidelines came into effect on August 1, 2001. Apart from the underlined portions cited in the above paragraph, the prior guideline limited the provision of the sign language interpretation service to hearing impaired members of the public seeking employment

with the public service or attending formal meetings such as commissions, committees, conferences and boards of inquiry. However, it appears that in practice the service was made available for any meeting at which a government official was present and a deaf of hard of hearing person was participating. In fiscal year 1997-1998, this was done on 300 occasions.

[11] Beginning in 1998, the Translation Bureau began to more strictly interpret its mandate under the policy. By fiscal year 2004-05, interpretation services for private meetings between members of the public and government officials were provided for just 34 events. In contrast, the total number of visual and tactile interpretation services provided has remained fairly constant at between 2, 217 events in 1998-1999 and 2, 372 in 2003-2004 indicating an increase in services provided to deaf or hard of hearing public servants.

[12] The current guidelines state that the Conference Interpretation Service of the Translation Bureau provides visual interpretation for the federal public service. Visual interpretation is defined as American Sign Language, Langue des signes québécoise, English and French oral interpreting and deaf-blind intervenor service. The guidelines say that these services are provided to hearing, hearing-impaired or deaf federal public servants who, in the performance of their duties, must communicate with each other.

[13] Under the August, 2001 guidelines, the Bureau’s visual and tactile interpretation services are provided to the general public for public events conducted by the federal government such as committees, conferences, hearings, information sessions on legislation, regulations and policies, public consultations, seminars and symposiums.

[14] With the stricter application of the policy, the provision of interpretation services for meetings between hearing-impaired citizens and federal officials that do not fall within the scope of the Bureau's mandate became the responsibility of individual departments and agencies.

[15] Under the current regime, interpretation services must be requested by the official meeting the hearing-impaired citizen. While individual departments or agencies may use the Bureau's services on a fee-for-service basis, these services will not be provided if the interpreters are required to respond to needs that the Bureau is mandated to meet. If the Bureau cannot provide the services, the departments and agencies must contract for them with the private sector or non-governmental agencies. The Bureau maintains lists of such businesses or agencies to assist departments to find interpreters.

[16] It appears, from a letter dated November 22, 2001 to the Minister of PWGSC from applicant James Roots, submitted as an exhibit to Mr. Roots' affidavit, that the decision to strictly apply the policy caught both government departments and representatives of the hearing disabled communities off-guard. While the Translation Bureau had been warning their "clientele" since 1998 that this was forthcoming, departments and agencies were ill-prepared to provide interpretation services for meetings with hearing-impaired persons. Most had no process in place for booking interpreters or budget allocated for the purpose. Where formerly it took 48 hours to arrange an interpreter through the Bureau, considerable delay was experienced in arranging funding and finding an interpreter if the Bureau could not provide the service. As a result, events did not take place or deaf persons were unable to attend them, including meetings with Members of Parliament, because of the lack of interpretation services.

Specific Allegations of Discrimination

[17] The applicants have described several incidents in support of their contention that they have been discriminated against in the denial of interpretation services. The respondent, in general, takes issue with the facts alleged by the applicants and denies that interpretation services were unreasonably withheld.

[18] These incidents can be summed up as follows:

- Denial of access to the policy development process;
- Denial of opportunities to contract with the federal government; and
- Denial of opportunities to participate in the Statistics Canada Labour Force Survey.

1. Denial of access to the policy development process

[19] This allegation stems from efforts by the corporate applicant, the Canadian Association of the Deaf ("CAD"), to participate in informal consultations with the federal government. The CAD is a national organization and the primary advocacy group for Deaf Canadians, defined as persons with moderate to profound hearing loss who identify with the use of sign language, and affiliate with deaf culture. The CAD submits that its role as a representative of Deaf Canadians has been adversely affected by the implementation of the new Guideline.

[20] James Roots is the Executive Director of CAD. He is deaf and communicates primarily thorough sign language. In his affidavit, he states that as Executive Director, he personally

received accommodation for his deafness from the federal government during the years it applied the initial Guidelines for the Sign Language Interpretation Policy. He points out that, in general, deaf people have fewer job opportunities and lower literacy skills. This is supported by a 1998 study attached to his affidavit of which he is the co-author, prepared with the support of Human Resources and Development Canada ("HRDC"). As a result of these disparities, he says, many deaf people have come to depend upon the Government of Canada for rectifying inequalities in their access to the same opportunities enjoyed by other Canadians.

[21] Mr. Roots says that he was surprised to discover, in or about October 2001 that the Translation Bureau, applying the new Guidelines, would no longer accommodate deaf or hard of hearing persons in private meetings and would only facilitate public events. In a letter dated November 22, 2001 to the PWGSC Minister of the day, Mr. Roots describes, in general terms, the adverse effects this had on the efforts of his organization and others representing the deaf and hard of hearing to do business with the federal government.

[22] The specific example of alleged discrimination described by Mr. Roots arose in relation to an HRDC project to develop policies and legislation respecting homeless people which took place between December 2001 and February 2002. CAD staff anticipated being involved in informal discussions with HRDC officials in this process as they had been previously on other policy development projects. Interpreters were requested for this purpose.

[23] An exchange of e-mail messages attached to Mr. Roots' affidavit indicates that at least one meeting in December 2001 was facilitated with interpretation services provided by an Ottawa-based firm retained by HRDC. On February 5, 2002, in response to a request for a

further meeting to discuss a request by CAD for funding, an HRDC official responded that it would not be possible at that time. Her message states that "…we are under severe budgetary constraints and are not allowed to expend any funds that are not directly related to approved priorities…right now, I cannot get an interpreter. I believe we can after April 1, 2002 but not right now." The reference to April 1, presumably, was to the start of the next fiscal year and the availability of a fresh budget. The official offered to continue to do preparatory work with CAD by e-mail until April 1st.

[24] Based on this event and his experience in general since 2001, Mr. Roots states that he believes that departments and agencies are refusing to pay for interpretation services for budgetary reasons notwithstanding that it is their responsibility to provide them now that the Translation Bureau has "off-loaded" this mandate. Moreover, even where interpretation is provided by those on the Bureau's list of private sector or local organizations, the quality of the interpretation is not assured. The result, he believes, is that deaf Canadians who want to meet with representatives of the federal government are not being accommodated for their disability.

[25] The respondent objects to the reception of Mr. Roots' evidence on the grounds that the CAD lacks standing and because his affidavit covers matters beyond his personal knowledge and thus does not conform to Rule 81 of the *Federal Courts Rules*. I will address the hearsay question here and deal with the standing question as an issue below.

[26] The requirement that affidavits be confined to personal knowledge does not necessarily exclude hearsay evidence so long as it is sufficiently reliable in accordance with the principled approach developed by the Supreme Court of Canada with respect to the admission of oral

testimony. That approach has been adopted by the Federal Court of Appeal for the admissibility of hearsay by way of affidavit evidence: *Ethier v. Canada (Commissioner of the R.C.M.P.)*, [1993] 2 F.C. 659, 151 N.R. 374.

[27] The hearsay in this instance stems from information received from a project officer employed by the CAD who worked under the immediate supervision of Mr. Roots. I am satisfied that Mr. Roots received the information from a first-hand source and that it is credible and trustworthy. The reliability of the evidence is also confirmed by the respondent's affidavit evidence in response to interrogatories which verifies the accuracy of the e-mails attached to Mr. Roots' affidavit. The accuracy of this account was not disputed.

[28] This evidence, while admissible, does not establish that HRDC refused as a general practice to provide interpretation services for meetings with representatives of the deaf or hard of hearing communities. But it does support the applicants' contention that the provision of such services was not considered a priority by the department for which resources would be allocated. The e-mail exchange occurred in the context of an invitation from HRDC to participate in consultations in the development of public policy. The applicants submit that while they may not have a right to be consulted in the development of federal policy, when invited to participate by government they have a right to equal treatment. A hearing Canadian representing another non-governmental organization would not have been denied a meeting in the same circumstances I think that is an inescapable conclusion from the evidence.

2. Denial of opportunities to provide contract services to the Government.

[29] Gary Malkowski is deaf and employed as the Vice-President of Consumer and Business Relations at the Canadian Hearing Society. He communicates primarily through sign language. Two hearing career consultants employed by Veterans Affairs Canada, Joyce Montagnese and Bobbi Cain contracted with Malkowski and another deaf Canadian Hearing Society employee, Donald Prong, to organize and facilitate at a career planning workshop for deaf and hard of hearing federal civil servants from October 16-21, 2001 in Toronto. Interpreters were provided at the October workshop by the Translation Bureau to allow Cain and Montagnese to follow and evaluate the proceedings. A similar workshop was conducted in Halifax in December 2001.

[30] Mr. Malkowski deposes that, based on the success of the Toronto event, Cain and Montagnese discussed with him and Mr. Prong the possibility of their leading a similar workshop for hearing civil servants. To present at such a workshop, Malkowski and Prong would require sign language interpreters. Mr. Malkowski states that Montagnese subsequently informed him that the visual language interpretation policy of the Government of Canada had changed and would not accommodate his request for sign language interpreters. The result, Mr.Malkowski states, is that he and Mr. Prong were denied professional opportunities that would have been available to hearing professionals in a similar context.

[31] Mr. Malkowski alleges that Ms. Montagnese informed him through e-mail messages that her department would not authorize the expense of interpreters because of the impact on its budget and that she had tried elsewhere to find funds without success. These e-mail messages were not entered into evidence.

[32] The respondent's affidavit evidence differs significantly from Mr. Malkowski's account. Ms. Montagnese states that she was involved with three events conducted in the fall and winter of 2001-2002 including the career planning event described above. Mr. Malkowski was also hired to facilitate the second event, a sensitization seminar arranged for hearing managers of deaf government employees so as to enable such managers to understand and deal with the challenges faced by their deaf and hard of hearing employees. Interpreters were retained as needed for four preparatory meetings.

[33] For the seminar itself which took place on February 13, 2002, Mr. Malkowski was asked to select a suitable interpreter and the interpreter's invoice was paid by the department. Another seminar for deaf federal employees about preparing for competitions was held on February 27, 2002. That was the last such event Ms. Montagnese was involved with. Copies of related e-mails and invoices are attached to her affidavit.

[34] Ms. Montagnese states that following these events there was some discussion with Mr. Malkowski about presenting at a possible interdepartmental employment equity conference to be held in May 2004. The conference was never held due to a lack of interest among prospective participants. She says that the cost of interpretation services was not a consideration in cancelling the event. In response to a written examination question, Ms. Montagnese denied under oath that she told Mr. Malkowski that the Department of Veterans Affairs could not afford the cost of interpreters for him to present to an audience of hearing federal civil servants and denied that she was ever told by another department that they did not have the funds for such a purpose.

[35] While it is not clear from the evidence that Mr. Malkowski and Mr. Prong were expressly denied further contract opportunities with the federal government, it is apparent that the opportunity to enter into such arrangements would be limited by the availability of resources to provide visual interpretation services.

3. Denial of opportunities to participate in the Statistics Canada Labour Force Survey.

[36] The Labour Force Survey is conducted under the authority of the *Statistics Act*, S.C. 1970-71-72, c.15 and is designed to measure the current state of the Canadian Labour Market. Participants are selected at random and are advised in letters sent or delivered to their homes that the information obtained through the survey is used by Statistics Canada to measure the month to month changes in the level of employment and unemployment in Canada and to provide key measures of the state of the nation's economy. To ensure completeness and accuracy, full participation is said to be "extremely important" and is required for a six month period. An interview of participants is conducted each month.

[37] Survey instruments such as the Labour Force Survey are important to deaf Canadians. As evidenced by Mr. Roots' study, conducted with the support of HRDC in 1998, deaf persons are subject to much higher levels of unemployment than other Canadians. Only 20.6% of deaf Canadians are fully employed; 41.9% are underemployed; and 37.5% are unemployed: 9.9% have no formal education. By comparison, relying on the study's figures, 60.9% of all Canadians are fully employed and only 8.1% are unemployed. Among the conclusions reached in the study

was of a need for training programs targeted to disabled Canadians to accommodate the particular communication and cultural differences of deaf people.

[38] Barbara Lagrange is a deaf woman who uses sign language as her primary communication method. She has difficulty with reading and writing the English language. In or about November 2002, she was invited to participate in the Statistics Canada Labour Force Survey through letters dropped off at her home in Thunder Bay, Ontario by a Statistics Canada field interviewer, Marilyn Wallace.

[39] Ms. Lagrange subsequently contacted Ms. Wallace through the aid of a Teletype Telephone for the Deaf (TTY) phone. They had two TTY phone conversations one Friday afternoon. Ms. Lagrange typed her part of the conversations and Ms. Wallace's oral responses were typed by an operator and read by Ms. Lagrange at her end. This produces a verbatim account but the accuracy of the record is dependent upon the skill of the operator. Ms Lagrange printed and retained a partial record of the two conversations which is attached as an exhibit to her affidavit. She agreed that Ms. Wallace could come to her home on the following Sunday afternoon for the survey interview. This was to have been part of a six month commitment to record information respecting Ms. Lagrange's employment status, a fact that was not immediately apparent to her.

[40] The evidence of Ms. Lagrange and Ms. Wallace with respect to the content of their telephone conversations, via TTY, and the subsequent events is conflicting. Unfortunately, the printed record of the TTY conversations is not very legible. What is clear, I believe, is that in the first conversation Ms. Wallace initially agreed to Ms. Lagrange's request that she retain the

services of a Canadian Hearing Society interpreter to conduct the interviews. In the second conversation Ms. Wallace told Ms. Lagrange that Statistics Canada would not pay for an interpreter and that, in any event, in her view it would not be necessary to have an interpreter to answer the questions. Ms. Wallace denies that she told Ms. Lagrange at any time that Statistics Canada would not pay for an interpreter but that meaning is what the TTY operator conveyed to Ms. Lagrange, as indicated by the printed record. Ms. Wallace deposes that she tried to retain the services of an interpreter but was told that one would not have been available for two weeks. She says that she was advised by her supervisor to try alternatives. It is clear from the record that she pressed Ms. Lagrange to agree to proceed without an interpreter.

[41] At their first scheduled meeting, two days later on a Sunday, Ms. Wallace went ahead with the interview using her notebook computer screen to show Ms. Lagrange the questions and to confirm her answers. Ms. Lagrange was not comfortable with that procedure because of her difficulty with English and the meeting was cut short. Ms. Lagrange later learned from a colleague that the survey was meant to be repeated over six months and was distressed by that news.

[42] In a subsequent telephone discussion, conducted through an interpreter, Ms. Lagrange tried to insist on having an interpreter present for the subsequent interviews and when that did not succeed, to have her name removed from the survey list. She then refused to meet again. Ms. Wallace says that she was advised by her supervisor not to attempt any further interviews with Ms. Lagrange and told to complete the remaining months of the survey by simply driving by Ms. Lagrange’s home to confirm that she appeared to still be living there.

[43] Ms. Lagrange deposes that she felt like a second class citizen as a result of this incident and afraid that if she gave a wrong answer to a government survey, because of the lack of a qualified interpreter, she could be fined or penalized.

[44] The respondent's evidence from the manager for the November 2002 field surveys is to the effect that if a member of the public who is deaf or hard of hearing asked for an interpreter, Statistics Canada field staff would have provided that person with a choice of alternatives including the use of a lap-top computer to enable them to see what was being written down, the use of a TTY line to conduct the interview or proxy responses from other members of the household. Statistics Canada would also offer to hire an interpreter, or, if the subject wished to have their own interpreter present, pay for the service.

[45] Evidence of an incident similar to that experienced by Barbara Lagrange was provided by Mary Lou Cassie of Halifax. Ms. Cassie is deaf-blind and requires an intervenor for many of her activities of daily living. An intervenor uses sign language and touch in order to communicate with Ms. Cassie to assist her with daily life, but cannot be used for complex communication as the intervenor is only trained to assist with basic functions. For complex communications, Cassie requires a professional sign language interpreter.

[46] Ms. Cassie received a letter from Statistics Canada in or around December 2002 requesting her to contact Statistics Canada about participating in a survey. Cassie instructed her intervenor to phone Statistics Canada to arrange for an interview and to request that a sign language interpreter attend. Two persons from Statistics Canada subsequently visited, without an interpreter, and insisted on using the intervenor to conduct the interview. Ms. Cassie told her

intervenor to refuse the interview as she required a sign language interpreter and the two persons left. Statistics Canada made no further attempt to accommodate Ms. Cassie through sign-language interpreters. The respondent was unable to identify anyone from Statistics Canada who recalled these events.

[47] This evidence indicates to me that Ms. Lagrange and Ms. Cassie were not treated with the dignity and respect that they deserved and that the practices of Statistic Canada's interviewers in the field can result in the denial of equal treatment for Canadians who are deaf or hard of hearing, notwithstanding the agency's stated policies and procedures.

ISSUES

[48] As noted in the introduction, the respondent has raised a number of preliminary objections to consideration of this application. The issues that the Court must consider are:

1. Standing of the CAD as a party to the application;
2. Whether the application is improperly constituted because;
    a. judicial review is sought for more than one decision; or because,
    b. the application has been brought out of time;
3. Whether the Court should decline to consider the matter on discretionary grounds, namely;
    a. that the subject matter of the application is not justiciable; or,
    b. that the application is moot or premature;
4. Whether s.15 of the *Charter* has been breached; and if so,
5. What is the appropriate remedy?

ANALYSIS

1. Standing of CAD to bring this application

[49] CAD, as a corporate body, has no capacity to claim relief in its own right under s.15 of the *Charter* as it is not an individual having the right to the protection and equal benefit of the law. The respondent submits that CAD should also be denied standing to seek declaratory relief as it is not directly affected by the matter in respect of which relief is sought as required by section 18.1(1) of the *Federal Courts Act*. CAD seeks to be accorded public interest standing.

[50] The respondent acknowledges that the lack of standing to directly pursue remedies as an interested party does not preclude the granting of public interest standing but argues that the court should deny the association's request to be granted that status. The respondent submits that whether a right to informal consultations with government employees concerning policy has been denied, this is not a right recognized at law.

[51] CAD submits that as an organization which represents the interests of deaf Canadians, it is entitled to claim s.15 protection on their behalf. In support of that argument, CAD cites the decision of the Supreme Court of Canada in *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627, 119 D.L.R. (4th) 224 in which the Court implicitly recognized the right of an organization to advance a s.15 challenge to government action on behalf of aboriginal women.

[52] As stated by the Supreme Court in *Canada (Minister of Justice) v. Borowski*, [1981] 2 S.C.R. 575, 130 D.L.R. (3d) 588, [*Borowski*] to establish public interest standing, three things must be demonstrated:

1. there is a serious issue to be tried;
2. the claimant is directly affected or has a genuine interest in the subject-matter; and
3. there is no other effective means available in which the issue may be brought before the Court.

[53] CAD asserts that the first two parts of the test established in *Borowski* are clearly met. There is a serious issue to be tried and CAD, as representative of the deaf community, must have a genuine interest in the subject matter. As for the third part of the test, the applicants submit that there is no other reasonable and effective manner in which the question of accommodation for participation in federal policy making may be brought to the Court as it is a role sought by non-governmental organizations and not by their individual members or officers. It was CAD that attempted to provide input to federal government decision-making, not James Roots personally. CAD is the entity that represents the interests of deaf and hard of hearing Canadians and has negotiated with the federal government as to access.

[54] The respondent does not dispute that there is a serious issue to be tried or that CAD has a genuine interest in the subject matter. However, it contends that there is another effective means by which this matter may be placed before the Court. There are other applicants who are directly affected by the matters at issue who may assert these claims. On this basis alone, the respondent submits, this court should refrain from exercising its discretion to accord party status to CAD: *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R. 236 at 252, 88 D.L.R. (4th) 193

[*Canadian Council of Churches*]; *Maurice v. Canada* (1999), 183 F.T.R. 9, paras. 14-15, [1999] F.C.J. No. 1962 (QL) (F.C.T.D.) [*Maurice*].

[55] In the *Canadian Council of Churches* decision, public interest standing was denied a church group seeking to challenge the validity of the *Immigration Act, 1976*, S.C. 1976-77, c. 52, as am. by S.C. 1988, c. 35 and c. 36. The Supreme Court held that a balance must be struck between ensuring access to the courts and preserving judicial resources. Public interest standing was not required when it could be shown that the legislation in question could be attacked by a private litigant; in that case by any directly affected refugee claimant. While the principles for granting such standing, as set out in *Borowski* should be given a liberal and generous interpretation, they should not be expanded.

[56] In *Maurice*, Justice Reed of the Federal Court Trial Division granted a motion to remove the Métis Society of Saskatchewan as a plaintiff in an action against the government where there were private litigants and the Society was not a necessary party to have the issues litigated. This was without prejudice to the Society to seek intervener status or to become involved in a representative capacity.

[57] In this case, it is clear that the application would not have been brought without CAD's initiative and resources. I am satisfied that the association is a necessary party to have the issues litigated, particularly with respect to the question of involvement in the policy development process. It seems to me that none of the individual litigants, with the possible exception of Mr. Roots, would be able to pursue that claim. Moreover, in so far as asserting the s.15 rights of individual deaf Canadians are concerned, CAD plays a role analogous to that of the Native

Women's Association, as was at least implicitly, recognized by the Supreme Court. I am, therefore, granting CAD public interest standing for the purpose of this application. If I am wrong in that respect, I would have granted the association intervener status.

2. Is the Application Improperly Constituted?

(a) Multiplicity of Proceedings

[58] The respondent contends that the applicants have consolidated the challenge of four separate matters into this single judicial review application contrary to Rule 302 of the *Federal Court Rules, 1998.*

[59] Rule 302 of the *Federal Court Rules, 1998* states:

Unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought	Sauf ordonnance contraire de la Cour, la demande de contrôle judiciaire ne peut porter que sur une seule ordonnance pour laquelle une réparation est demandée.

[60] The respondent cites a recent decision of this Court which held that it is a contravention of Rule 302 for an applicant to challenge two decisions within one application unless it can be shown that the decisions formed part of a 'continuing course of conduct': *Khadr (Next Friend of) v. Canada (Minister of Foreign Affairs)* (2004), 266 F.T.R. 20, 2004 FC 1145.

[61] The appropriate remedy where Rule 302 has been breached is for an extension of time to be granted to allow the applicant to file *nunc pro tunc* one or more applications for judicial

review in place of the one filed earlier: *Pfeiffer v. Canada (Superintendent of Bankruptcy)* (2004), 322 N.R. 62, 2004 FCA 192.

[62] The applicants submit that this Court has recognized that section 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 may encompass an on-going situation where a number of decisions are taken: *Puccini v. Canada*, [1993] 3 F.C. 557, 65 F.T.R. 127 (F.C.T.D.).

[63] While the actions of three separate government departments have been called into question, and four individuals were independently affected by their decisions, the applicants submit that the facts of each case are similar, and that the departments are all arms of the respondent Crown. The type of relief sought is the same for all applicants, namely a declaration that the applicants' rights under section 15 of the *Charter* have been violated, and that sign language services must be provided where the nature of the communication requires such access. The decision-making by each government department was essentially the same: due to budgetary reasons or lack of commitment, the interpreter services were denied. There was no exercise of power under a statute; rather the decisions or omissions were operational in nature.

[64] The applicants cite *Truehope Nutritional Support Ltd v. Canada (Attorney General)* (2004), 251 F.T.R. 155 at paras. 18-19, 2004 FC 658 [*Truehope*] in which the Court stated that the "distinctions between the two decisions as argued by the respondents do not outweigh the similarities, the distinctions are not so complex as to create confusion and to require two separate judicial review applications be made, given the similarities, would be a waste of time and effort."

In this case, the applicants assert that it would be unreasonable to ask them to split their application for judicial review into four separate matters.

[65] *Truehope* was a motion for leave to file an amended Notice of Application to seek judicial review of two decisions in the same application. The decisions, although separate in time, involved the same decision maker (i.e., the same government branch, albeit different officials) and the same subject matter. The factual underpinnings, save for the date, and legal arguments would be the same. Accordingly the motion was granted.

[66] In this case, the commonality among the four applicants is that their situations arose out of the application of the same set of guidelines for the provision of interpretation services. While each incident involved its own facts and decision-makers (different government departments and different employees), the heart of the matter is the application of the same policy to the same interested community. Accordingly, I agree that it would be unreasonable to split the application.

(b) Is the application out of time?

[67] Section 18.1(2) of the *Federal Courts Act* states that an application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated. The section also allows the Court to fix or allow an extension of time before or after the expiration of the 30 days.

[68] The respondent submits that the applicants have failed to file their application within this time limit and failed to seek an extension of time by motion in accordance with the requirements

of Rule 8 of the *Federal Court Rules, 1998.* In order to obtain the unusual, discretionary remedy of a time extension under subsection 18.1(2), an applicant must both justify the delay in commencing an application within the thirty day period, and establish a reasonable chance of success on the merits.

[69] To justify the delay, the applicant must show evidence of a stated intent to commence an application within the thirty day period. There must be a continuing intention to bring an application for judicial review, and, at a bare minimum, the applicant must show that there is, at least, an arguable case: *Council of Canadians v. Canada (Director of Investigation and Research, Competition Act)* (1996), 124 F.T.R. 269 (F.C.T.D.) aff'd (1997), 212 N.R. 254 (F.C.A.).

[70] Each of the factual circumstances alleged occurred more than two years prior to the commencement of this application on September 2, 2004, long after the material facts needed to commence the application were known to the applicants. The applicants' explanations for the delay do not provide a sufficient or persuasive explanation for the nearly two-year delay in commencing the proceedings, in the respondent's view.

[71] The applicants' submit that their claims are not out of time because they are not seeking review and reconsideration of final decisions, but rather redress for systemic acts of discrimination that by their very nature, are continuing. The denial of sign language interpretation was purely administrative, and did not constitute "decisions or orders" subject to the time limitation of 18.1(2) of the *Federal Courts Act*. The only remedy sought is declaratory

relief. Thus, it is appropriate to bring an application for judicial review, and the nature of declaratory relief allows the Court to waive the 30-day requirement.

[72] I accept the applicants' contention that where the judicial review application is not in respect of a tribunal's decision or order, the 30-day limitation does not apply. As stated by the Federal Court of Appeal in *Sweet v. Canada* (1999), 249 N.R. 17 at para. 11, [1999] F.C.J. No. 1539 (QL) concerning a "double-bunking" policy in a correctional institute "[t]hat policy is an ongoing one which may be challenged at any time; judicial review, with the associated remedies of declaratory, prerogative and injunctive relief is the proper way to bring that challenge to this Court."

[73] Unreasonable delay in bringing an application may, however, bar the applicant from obtaining a remedy: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1. This has been applied by this Court in *Larny Holdings v. Canada (Minister of Health)* (2002), 222 F.T.R. 29 at para. 20, 2002 FCT 750 (F.C.T.D.). In determining whether delay is "undue", courts consider the length of the delay and any justification that the applicant offers for it, as well as any impact judicial intervention would have on public administration and on the rights of third parties.

[74] The justification offered for the delay in this case by counsel for the applicants is that it was caused by the difficulties inherent in soliciting examples and evidence of the guideline's impact on members of the deaf and hard of hearing community. Assembling the evidence necessary to make a case that the effect of a change of interpretation of a policy was

discriminatory is not easily done in a short time. Moreover, the respondent has failed to provide evidence as to how the Crown has been prejudiced by the delay. In the circumstances, I am satisfied that the delay in this case was not unreasonable.

3. Discretionary Grounds

a. Justiciability

[75] The respondent submits that although framed as a challenge to the discriminatory implementation of a government program, the applicants' purpose, at least in part, is to seek judicial review of the policy decision to transfer responsibility for the procurement and payment of visual interpretation services from the Translation Bureau to individual government departments. The respondent submits that the applicants, in effect, are asking the court to prescribe the manner in which the federal government provide such services. To that extent, the relief sought would be outside the proper scope of the Court's role and inconsistent with the institutional character of the judiciary. The Court is not in a position to determine such matters of policy. To the extent that the applicants assert such a challenge this application is not, therefore, justiciable.

[76] In order to be justiciable a matter must be properly before the court and capable of being disposed of. Judicial review is not restricted to decisions or orders that a decision-maker was expressly charged to make under the enabling legislation. The word 'matter' found in s.18.1 of the *Federal Courts Act, 1998* is not so restricted but encompasses any matter in regard to which a remedy might be available under s.18 or s-s 18.1(3): *Morneault v. Canada (Attorney General)*, [2001] 1 F.C. 30, 189 D.L.R. (4th) 96 (F.C.A.).

[77] If I considered that the purpose of the application was to seek a reversal of the government's decision to transfer the responsibility for provision of sign language interpretation services from the Translation Bureau to individual department's and agencies, I would agree with the respondent that this is a non-justiciable policy decision outside the scope of the Court's mandate. But that is not how I see the matter.

[78] The applicants submit that they are not asking for the Court to prescribe the manner in which the government provides translation services, but rather to declare what the scope of such services should be. They allege that the current scope of the guidelines infringes the individual applicants' rights under section 15 of the *Charter* as there is a failure to accommodate their disabilities. This is a justiciable issue.

b. **Is the application moot or premature?**

[79] The respondent submits that this application for judicial review is moot or premature. The visual interpretation policy of the federal government already provides the relief sought. The applicants have brought forward isolated examples in respect of which it is alleged that interpretation services were not provided. On close examination of the facts, the respondent submits, these allegations are not borne out. However, even if it could be said that there was a denial of reasonable accommodation, these were isolated instances during the period of transition between the old and new guidelines. Any determination of an infringement of *Charter* s.15 should be based upon the application of the policy and guidelines now and not as it was during the transition period.

[80] The applicants submit that the case is neither moot nor premature. The visual interpretation policy, as it is currently applied, does not provide the relief sought - that sign language interpretation will be provided and paid for by the Government of Canada where a deaf person accesses services or seeks input in government decision-making.

[81] An examination of the implementation guide at page 41 of the respondent's record indicates that visual interpretation services are to be provided to the general public for public events such as hearings, information sessions on legislation and policies, public consultations etc. In other circumstances, it is the responsibility of the applicable department to arrange translation services. It does not provide that departments are required to provide interpretation services when deaf individuals seek to access services or provide input into government policy in non-public forums such as private meetings. Moreover, there is no indication that such services will be provided by departments at the conclusion of a transition period.

[82] I find that the application is neither moot nor premature. Contrary to the respondent's submission, the relief sought is not already available nor does it appear that it will be forthcoming. The Policy and Guidelines primarily serve the interests of public servants, not members of the public who are engaged in programs offered by the federal government or seek input into federal policy development.

4. Has *Charter* s. 15 been breached?

[83] Section 15(1) of the *Charter* provides:

> 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.

[84] The issue in this case is whether the guarantee of "…equal benefit of the law without discrimination …based on …physical disability" has been infringed. A threshold question is whether, as the Supreme Court held in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R 657, 2004 SCC 78, the applicants have established that there was a denial of a benefit or an imposition of a burden which emanates from law.

[85] The provision of sign language interpretation for the federal government is the responsibility of the Translation Bureau of the Department of Public Works and Government Services. The Bureau is established by the *Translation Bureau Act*, R.S.C., c. T-13 and the provision of sign language interpretation is an activity of the Bureau under section 4(1) of the 1985 Act. The obligation to provide sign language interpretation arises from the *Canadian Human Rights Act*, S.C. 1976-77, c. 33 which applies to Her Majesty in right of Canada and prohibits the denial of access to any good, service, facility or accommodation on the basis of disability. I conclude, therefore, that the Sign Language Interpretation Policy and Guidelines "emanates from law" and satisfies the threshold requirement recognized in *Auton* for a s.15 analysis.

[86] Any analysis in exploring the applicability of section 15(1) of the *Charter* must be guided by the test set out in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 88, 170 D.L.R. (4th) 1. As well, the decision of the Supreme Court in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577 [*Eldridge*], is of

particular importance in this application. In *Eldridge* the Supreme Court ruled in favour of deaf persons seeking accommodation thorough sign language interpreters for hospital services that they received. The Court held that effective communication was an integral part of the provision of medical services and that failure to provide interpretation was discriminatory.

[87] In *Law*, at paragraph 88, the Supreme Court set out the process for analysing a section 15 *Charter* claim.

General Approach

> (1) It is inappropriate to attempt to confine analysis under s. 15(1) of the *Charter* to a fixed and limited formula. A purposive and contextual approach to discrimination analysis is to be preferred, in order to permit the realization of the strong remedial purpose of the equality guarantee, and to avoid the pitfalls of a formalistic or mechanical approach
>
> ***
>
> (3) Accordingly, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:
>
> (A) Does the impugned law
>
> (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or
>
> (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> (B) Is the claimant subject to differential treatment based on one or more

enumerated and analogous grounds?

and

(C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

Purpose

(4) In general terms, the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

***

Context

(7) The contextual factors which determine whether legislation has the effect of demeaning a claimant's dignity must be construed and examined from the perspective of the claimant. The focus of the inquiry is both subjective and objective. The relevant point of view is that of the reasonable person, in circumstances similar to those of the claimant, who takes into account the contextual factors relevant to the claim.

***

(9) Some important contextual factors influencing the determination of whether s.15(1) has been infringed are, among others:

(a) Pre-existing disadvantage, stereotyping, prejudice or vulnerability experienced by the individual or group at issue…the existence of these pre-existing factors will

favour a finding that s.15(1) has been infringed.

(b) The correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity or circumstances of the claimant or others […]

(c) The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society...

Does the impugned law draw a formal distinction between the claimant and others on the basis of one or more personal characteristics or fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantially different treatment between the claimant and others on the basis of one or more personal characteristics?

[88] The starting point for the consideration of an equality analysis is the establishment of an appropriate comparator group. As stated by Justice Binnie in *Hodge v. Canada (Minister of Human Resources Development)* [2004] 3 S.C.R. 357, 2004 SCC 65 at paragraph 23 and cited by my colleague Justice Konrad W. von Finckenstein in *Veffer v. Canada (Minister of Foreign Affairs)*, 2006 FC 540, [2006] F.C.J. No. 675 at paragraph 27:

> The appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought …

[89] In this case the applicants propose, as a comparator group, members of the public who are not deaf and who conduct meetings or receive public services at all levels of the government of Canada and its agencies. The individual applicants claim they were treated differently than their hearing counterparts because they were not able to access the communication required for such meetings or services. Thus, they were unable to have meetings at all, or their access to public services was compromised. In contrast, members of the public who can hear are able to

conduct meetings and contribute valuable input to the government for its decision-making or consultation functions. Hearing members of the public are also able to receive public services from the federal government without communication barriers. These distinctions are based upon disability. I am satisfied that the proposed choice of comparator group is appropriate.

[90] The crux of the applicants' case is that the change in the guidelines, which resulted in the failure to provide interpretation services, is so under-inclusive as to be discriminatory. The Sign Language Interpretation Policy, dated May 4, 1987, states that the service is "intended for any hearing-impaired person in Canada who must deal in person with a representative of the federal government. This includes job interviews, meetings, federal commissions, etc." However, the effect of the current guideline is to restrict the scope of the policy so as to deny hearing-impaired Canadians reasonable accommodation for their disabilities.

[91] The original implementation guidelines stated that visual interpretation services are provided to federal public servants

1. Who, in the performance of their duties, must communicate with the hearing-impaired; or

2. Who are themselves hearing-impaired and must communicate in the performance of their duties with those who do not know visual language.

[92] The practical effect of the original guideline, while directed to federal public servants, was to accommodate the needs of members of the public who are hearing-impaired and require visual interpretation in their dealings with the federal government.

[93] The revised guidelines emphasize that visual interpretation services are provided to "hearing, hearing-impaired or deaf federal public servants who, in the performance of their duties must communicate with each other." The needs of the hearing-impaired public dealing with the government have been left to each department or agency to address. As the applicants' evidence discloses, the effect has been to deny interpretation services to members of the public where required to allow them to participate meaningfully in government programs.

[94] The current guidelines make no provision for interpretation for individuals engaged in private meetings with the government and are less inclusive than the policy on its face, or the former guidelines. Interpretation is no longer provided for public servants who, in performing their jobs, communicated with the hearing-impaired, other than at one of the enumerated public forums, unless the department concerned pays for it. Meetings between representatives of the hearing-impaired communities and officials would not be covered, nor would any other non-public event. It is this limiting of the availability of sign language interpretation which the applicants submit violates their rights under section 15 of the *Charter*.

[95] Substantive equality requires that the different needs and circumstances of claimants be taken into account. As stated by the Supreme Court in *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37 at para. 60

> …there are many other situations where substantive equality requires that distinctions be made in order to take into account the actual circumstances of individuals as they are located in varying social, political, and economic situations. This is why this Court has long recognized that the purpose of s. 15(1) encompasses both the prevention of discrimination and the amelioration of the conditions of disadvantaged persons (see Eaton v. Brant County

Board of Education, [1997] 1 S.C.R. 241, per Sopinka J. at para. 66).

[96] In this case substantive equality requires that the special needs of deaf persons be taken into account when implementing the Sign Language Interpretation Policy and in the delivery of federal programs. As one of the purposes of s.15(1) is the amelioration of the conditions of disadvantaged persons, the unique situation of deaf persons must be accommodated in order to provide substantive equality. Substantive equality means that all Canadians must be able to interact with government institutions when approached by them to participate in surveys and programs. Given the special situation of deaf persons, this requires accommodation through visual interpretation services.

Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

[97] The applicants argue that the Guidelines result in differential treatment based on disability. Physical disability, including deafness, is an enumerated ground under section 15(1) of the *Charter*: *Eldridge*, above, at para. 55.

Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant, in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

[98] The Supreme Court has stated that section 15 serves two distinct but related purposes. First it expresses a commitment to the equal worth and dignity of all persons, and second, it seeks to rectify and prevent discrimination against particular groups suffering social, political and legal disadvantage in society. As stated by Justice Wilson in *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1331, 96 N.R. 115 the determination of whether a law is discriminatory is contextual. It is important to look at the larger social, political and legal context in which the impugned action takes place.

[99] Under this step in the analysis, the court must determine whether the differential treatment results in discrimination. In *Law Society of British Columbia v. Andrews,* [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 at para. 31 [*Andrews*] the Supreme Court recognized that not every differentiation will amount to discrimination. In order to determine whether the distinction results in discrimination the Court must consider the treatment from both a subjective and an objective perspective: *Law*, above at paras 59-60. As stated at paragraph 61 of *Law*:

> Equality analysis under the *Charter* is concerned with the perspective of a person in circumstances similar to those of the claimant, who is informed of and rationally takes into account the various contextual factors which determine whether an impugned law infringes human dignity, as that concept is understood for the purpose of s. 15(1).

[100] In order to determine whether differential treatment amounts to discrimination, *Law* suggests that courts should consider the following four contextual factors in its analysis:

(a) pre-existing disadvantage;
(b) relationship between the grounds and the claimant's characteristics or circumstances;
(c) ameliorative purpose or effects; and
(d) nature of the interest affected.

[101] The most compelling factor favouring a conclusion that differential treatment is discriminatory will be, where it exists, pre-existing disadvantage, stereotyping, or vulnerability experienced by the individual or group: *Law*, above at 63; *Andrews*, above; *Turpin,* above; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, 142 D.L.R. (4th) 385.

[102] As articulated in *Law*, the contextual factors which determine whether legislation has the effect of demeaning a claimant's dignity must be construed and examined from the perspective of the claimant. The focus of the inquiry at this stage is both subjective and objective. The Court must look at the situation from the point of view of a reasonable person, in circumstances similar to those of the claimant.

[103] For an understanding of the social and historical context in which deaf Canadians have lived, the discussion by Justice La Forest writing on behalf of the Court in *Eldridge* is useful. At paragraph 56 Justice La Forest discusses the general history of disabled persons in Canada. He states:

> Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions…This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the "equal concern, respect and consideration" that s. 15(1) of the *Charter* demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms…One consequence of these attitudes is the persistent social and economic disadvantage faced by the disabled. Statistics indicate that persons with disabilities, in comparison to non-disabled

> persons, have less education, are more likely to be outside the labour force, face much higher unemployment rates, and are concentrated at the lower end of the pay scale when employed…

[104] Justice La Forest further stated:

> ¶ 57 Deaf persons have not escaped this general predicament. Although many of them resist the notion that deafness is an impairment and identify themselves as members of a distinct community with its own language and culture, this does not justify their compelled exclusion from the opportunities and services designed for and otherwise available to the hearing population. For many hearing persons, the dominant perception of deafness is one of silence. This perception has perpetuated ignorance of the needs of deaf persons and has resulted in a society that is for the most part organized as though everyone can hear…Not surprisingly, therefore, the disadvantage experienced by deaf persons derives largely from barriers to communication with the hearing population.

[105] It is clear that deaf persons have suffered from discrimination, vulnerability and pre-existing disadvantage. As noted above, the applicants in this case have filed evidence demonstrating that deaf persons in Canada are underemployed or unemployed at high rates and suffer from barriers to employment such as lack of sign language accommodation: see James Roots & David Kerr, *The Employment and Employability of Deaf Canadians* (Ottawa: Canadian Association of the Deaf, 1998).

[106] In order to consider the relationship between the grounds and the claimant's characteristics or circumstances, the court must focus upon the central question of whether, viewed from the perspective of the claimant, the differential treatment imposed by the legislation has the effect of violating human dignity: *Law*, above, at para. 70. In *Eldridge*, the British Columbia government's failure to provide limited funding for sign language interpreters for deaf

persons when receiving medical services was found to violate s. 15(1), in part on the basis that the government's failure to take into account the actual needs of deaf persons infringed their human dignity.

[107] In this case, a similar finding can be made. The Guidelines have failed to take into account the actual needs of deaf persons who may deal with the federal government in private situations outside of those enumerated in the Guidelines. The claimants in this case suffer from adverse effects discrimination. As stated in *Eldridge,* above at para. 64 “Adverse effects discrimination 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.”

[108] The ameliorative aim and effect of the law or other state action is another contextual factor to be considered in determining whether discrimination is present.

[109] The respondent submits that the policy of the federal government explicitly recognizes and seeks to meet these purposes. It was promulgated in furtherance of the federal government’s commitment to ensure that persons with disabilities including those who are deaf or hard of hearing have equal access to opportunities in the federal public service.

[110] Instead of discriminating on the basis of an enumerated or analogous ground, the respondent submits, the policy seeks to remedy such discrimination. The primary purpose of the policy is to accommodate federal government employees (or applicants for employment) in the

conduct of their work. A secondary provision ensures, according to the respondent, that the needs of individuals or groups required to communicate with the federal government are to be accommodated by the departments or agencies concerned.

[111] While the policy recognizes and seeks to meet the needs of deaf individuals who are employed by or seek employment with the federal public service, it neglects the needs of other Canadians who may come into contact with the federal government in the administration of its programs. The policy attempts to be inclusive but remains under-inclusive. I find that this is discriminatory as it draws a distinction between deaf and hearing individuals meeting with government officials. The individual without hearing-impairment has easier access and is able to participate in government decision-making without the burden of having to provide and pay for interpretation services where the department or agency is unable to provide them.

[112] The failure to provide interpreters for deaf or hard of hearing persons seeking access to their government is comparable to the failure to provide a wheelchair ramp to the door of a government building. In each case, the disabled Canadian is physically barred from access to government.

[113] The applicants in this case remain unaccommodated and are denied service based on their disability. As stated by the Supreme Court in *Law*, above at para. 71, “underinclusive ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination: see Vriend, supra, at paras. 94-104, per Cory J.” In my view, on the evidence it is clear that although the government has attempted to

accommodate and ameliorate the challenges faced by deaf persons employed by the public service, the resulting policy and guidelines are so under-inclusive as to be discriminatory.

[114] A further contextual factor which may be relevant in appropriate cases in determining whether the claimant's dignity has been violated will be the nature and scope of the interest affected by the legislation or action. As Canadians, deaf persons are entitled to be full participants in the democratic process and functioning of government. The role of government is to serve and represent all Canadians. It is fundamental to an inclusive society that those with disabilities be accommodated when interacting with the institutions of government. The nature of the interests affected is 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 Canadian life.

[115] I agree with the applicants that the failure to supply sign language interpreters imposed differential treatment between the applicants and the general public and that this was discriminatory on the basis of their disabilities. I find, therefore, that the application of the policy and guidelines violates the guarantee afforded the applicants by section 15(1) of the *Charter*.

[116] The government has a duty to make reasonable accommodation to the applicants for their disabilities and in the face of a finding that s.15 has been violated, the only defence is undue hardship: *Eldridge*, above at paras 79 and 92. The respondent has not provided any evidence of undue hardship. Nor has the respondent saw fit to submit evidence or submissions that the failure to provide accommodation is justified under section 1 of the *Charter*.

6. Remedy

[117] The applicants wish the Court to issue a declaration that

1. The individual applicants' s.15 *Charter* rights were violated on the basis of disability; and that such violations are not saved by section 1;

2. Professional sign language interpretation services are to be provided and paid for by the Government of Canada upon request where a deaf or hard of hearing person accesses services from the Government of Canada or seeks input in government decision-making, where the nature of communications requires such access.

[118] I have found that where sign language interpreters are necessary for effective communication in the delivery of government services, the failure to provide them constitutes a denial of s.15(1) of the *Charter* and is not a reasonable limit under s. 1. Section 24(1) of the *Charter* provides that anyone whose rights under the *Charter* have been infringed or denied may obtain "such remedy as the court considers appropriate and just in the circumstances."

[119] A remedy under section 24(1) of the *Charter* is a discretionary exercise of the Court's jurisdiction. In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 2 S.C.R. 3, 2003 SCC 62 at paras. 55-59 [*Doucet*-Boudreau] the Supreme Court of Canada articulated the principles for the exercise of discretion under section 24(1). The Court stated that an appropriate and just remedy in the context of a *Charter* claim is one that meaningfully vindicates the rights of the claimants. The remedy must "take account of the nature of the right that has been violated and the situation of the claimant. A meaningful remedy must be relevant to the experience of the

claimant and must address the circumstances in which the right was infringed or denied": *Doucet-Boudreau*, above at para. 55.

[120] The Court also made clear that in granting a remedy under the *Charter*, courts must respect the separation of functions between the legislature, the executive and the judiciary. Courts "must not, in making orders under s.24(1) depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes: *Doucet-Boudreau*, above, at para. 56.

[121] The third principle articulated by the Supreme Court is that an appropriate and just remedy must invoke the function and powers of a court. It is inappropriate for a court to leap into the types of decisions and functions for which its expertise is unsuited. The capacity of courts can be inferred from the nature of the tasks with which they are normally charged and for which there are developed procedures and precedent: *Doucet-Boudreau*, above, at para. 57.

[122] A remedy fashioned under section 24(1) must also be fair to the party against whom the order is made. "The remedy should not impose substantial hardships that are unrelated to security the right": *Doucet-Boudreau*, above, at para. 58. Finally, the Court also stated that given the broad language of section 24(1), it should be flexible and able to evolve to meet the needs of each individual case. This may require new and creative features and therefore the lack of precedent is not a barrier. The "judicial approach to remedies must remain flexible and responsive to the needs of a given case": *Doucet-Boudreau*, above, at para. 59.

[123] As in *Eldridge*, above, at para. 96, a declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are various options available to the government that may rectify the unconstitutionality of the current system. It is not the role of this Court to dictate how this is to be accomplished.

[124] With those considerations in mind, I think it appropriate to make a declaration that addresses the systemic problem raised by the applicants. One aspect of that problem is the failure to provide visual interpretation services to persons in need of them who are participating in programs administered by the government. Another aspect of the problem is the need for representatives of the deaf and hard of hearing communities to be meaningfully consulted in the development of government policy and programs.

[125] Accordingly, I will issue a declaration that professional sign language interpretation services are to be provided and paid for by the Government of Canada, upon request, where a deaf or hard of hearing person participates in programs administered by the Government of Canada and the nature of communication with the person requires such services. This last limitation is intended to recognize that many communications between the government and members of the public will take place in writing or through other means that do not require oral communication.

[126] Further, I will declare that where the Government of Canada engages in public or private consultations with non-governmental organizations in the development of policy and programs in which the deaf and hard of hearing Canadians have identifiable interests and the nature of

communications requires such services, visual interpretation services are to be provided and paid for by the Government of Canada to allow the meaningful participation of organizations representing the deaf and hard of hearing communities.

[127] It should be recognized that meaningful participation may be achieved through means other than visual interpretation services, such as in writing or through electronic media. However, departments and agencies of the federal government must ensure that consultations with the deaf and hard of hearing community, including face to face meetings, are not precluded by the failure to plan and budget for interpretation services where they are necessary to allow access to the consultation process.

[128] The applicants are entitled to their costs.

JUDGMENT

THIS COURT HEREBY ORDERS AND ADJUDGES that:

1. Professional sign language interpretation services are to be provided and paid for by the Government of Canada, upon request, where a deaf or hard of hearing person receives services from or participates in programs administered by the Government of Canada and the nature of communication between the government and the person requires such services;

2. Where the Government of Canada engages in public or private consultations with non-governmental organizations in the development of policy and programs in which the deaf and hard of hearing Canadians have identifiable interests and the nature of communications requires such services, visual interpretation services are to be provided and paid for by the Government of Canada to allow the meaningful participation of organizations representing the deaf and hard of hearing communities;

3. The applicants are entitled to their costs on the normal scale.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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