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IN THE MATTER OF THE *HUMAN RIGHTS CODE,*
RSBC 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

BETWEEN:

Okanagan Valley Association of the Deaf obo others

COMPLAINANTS

AND:

St. John Society (British Columbia & Yukon) and St. John Ambulance Canada

RESPONDENTS

REASONS FOR DECISION
TIMELINESS OF COMPLAINT – SCREENING DECISION
Section 22(2)

Tribunal Member:	Norman Trerise
Counsel for the Complainants:	Kate Feeney
Counsel for the Respondents:	Susan Sangha

I INTRODUCTION

[1] The Okanagan Valley Association of the Deaf [**Association**] filed a complaint with the Tribunal setting out a representative complaint on behalf of a group or class described as follows:

> The class comprises of individuals who are (1) D/deaf or hard of hearing; (2) Use Sign language; and (3) Have experienced one or more adverse impacts because of the Respondent's policy or practice of refusing to fund Sign language interpretation for St. John Ambulance [**SJA**] courses in British Columbia in order to accommodate one or more students. These adverse impacts may include:
>
> (i) They did not access one or more of the SJA courses in British Columbia;
>
> (ii) They had to fund sign language interpretation out of pocket in order to access one or more SJA courses in British Columbia;
>
> (iii) They had to otherwise secure their own funding for sign language interpretation in order to access one or more SJA courses in British Columbia;
>
> (iv) They attended one or more SJA courses in British Columbia without sign language interpretation and experienced diminished comprehension and/or enjoyment of the course(s) as a result.

[2] During the screening process, the Tribunal identified the possibility that there may be a timeliness issue, based on the disclosure by the Complainant that the discrimination did not happen in the last six months, and the statement by the Complainant that:

> The Respondents have a long-standing policy or practice of refusing to fund Sign interpretation for SJA courses in British Columbia where it is required to accommodate D/deaf or hard of hearing students. This policy or practice constitutes a continuing contravention.

[3] The Tribunal sought submissions from the Complainant and from the proposed Respondents on the timeliness issue. I have been designated to decide the issue and this is the Tribunal's decision.

II THE COMPLAINT

[4] The Complaint alleges an ongoing policy or practice of St. John Society [**SJS**] (British Columbia &Yukon) and SJA Canada [**Respondents**] of refusing to fund Sign interpretation for SJA courses in British Columbia for D/deaf or hard of hearing students. It alleges discriminatory actions from in or about 2013 to the present.

[5] The Complaint alleges a request to SJS – BC & Yukon in or about 2013 to the Kelowna branch to fund Sign language interpretation for a group course organized by the Association [**2013 Group Course**] which was denied. It then reveals that a request was made subsequently for SJA Canada to overturn refusal of SJS – BC & Yukon to fund Sign language interpretation for 2013 Group Course, which was again denied.

[6] The complaint then sets out that, in 2017, the Association requested the Kelowna branch deliver a different program [**2017 Group Course**] to 16 deaf students on March 4, 2017, in Kelowna. A request was made on the Association's behalf that SJS – BC & Yukon accommodate the students by providing ASL interpretation. That request was denied on the basis that SJS – BC & Yukon is a "not-for- profit charitable organization" and as such does not provide Sign language interpretation.

[7] On November 7, 2017 the founder of an entity known as Preferred Interpreters [**Founder**], an organization which agreed to provide funding for ASL interpreters for the 2013 and 2017 Group Courses, in her capacity as a counsellor for the BC School of the Deaf, contacted both the Burnaby and New Westminster branches of SJS – BC & Yukon about arranging private first aid training for students at the BC School of the Deaf. In her requests she advised those organizations that the instructor would require an ASL interpreter to make sure the students were able to access the information properly. In the Burnaby branch's response, it is stated, "Interpreters are welcome into the class for private group courses, however that is up to the customer to secure. Unfortunately we are not able to book or fund interpreters."

[8] With respect to the New Westminster application, the SJS responded, “Please note, St. John Ambulance will not cover extra cost for interpreters including ASL interpreters. The arrangement and cost will be set up by you and/or your party if the training is permitted.”

III THE TIMELINESS ISSUE

[9] Timeliness issues under the *Code* are governed by s. 22 which reads:

> 22(1) A complaint must be filed within 6 months.
>
> (2) If a continuing contravention is alleged in a complaint, the complaint must be filed within 6 months of the last alleged instance of the contravention.
>
> (3) If a complaint is filed after the expiration of the time limit referred to in subsection (1) or (2), a member or panel may accept all or part of the complaint if the member or panel determines that
>
> (a) it is in the public interest to accept the complaint, and
>
> (b) no substantial prejudice will result to any person because of the delay.

[10] The complaint was filed on January 24, 2018. It is undisputed that some of the conduct complained about occurred more than six months before this date. The issues before me are (a) whether the complaint alleges a continuing contravention, the last alleged instance of which occurred on or after July 24, 2017 under s. 22(2); and (b), if not, whether I should accept the late-filed complaint under s. 22(3)?

IV POSITION OF THE ASSOCIATION

[11] The Association submits that the events upon which the complaint is based constitute a continuing contravention which must be interpreted in a manner consistent with the liberal and purposive interpretation which must be applied to human rights legislation.

[12] The Association further submits that the continuing contravention in this case can be established by a continued state of affairs respecting provision of ASL interpreters by the

Respondents for their courses. They state that they "understand" that if a class member were to request today that the Respondents provide Sign language interpretation for an SJA course, their request would be denied.

[13] In the alternative, the Association submits that it is appropriate for the Tribunal to exercise its discretion to accept the allegations in their entirety. It explains the delay in filing the complaint on the basis that the Association did not have the financial and/or volunteer resources to advance this complaint at an earlier date. It has advanced the complaint now because it saw a strong public interest in improving class members' access to first aid training, it was concerned that a complaint would not otherwise be advanced, and it reasonably believed that the Respondents' policy or procedure was a continuing state of affairs up to and including the date of the complaint and thus timely.

V RESPONSE OF THE RESPONDENTS

[14] The Respondents submit that the Complainant has not established a continuing contravention. While acknowledging that a continuing contravention can be established where there exists an ongoing discriminatory state of affairs, the Respondents say that the Association has not established such an ongoing discriminatory state of affairs on the facts. They say that their denials were not pursuant to a policy, but rather were decisions made in response to requests and informed by a consideration of the circumstances at the material time.

[15] The Respondents submit that the only alleged contravention of the *Code* occurred when the Respondents denied the Association's request in 2013. The resulting denials in 2017 are continuing effects of that alleged contravention. They say that the mere repetition of a prior denial when faced with the same request does not constitute a continuing contravention.

[16] The Respondents rely on a series of cases which held that a mere repetition of a previous request, which elicits the same denial, does not constitute a continuing contravention.

[17] They point to the Tribunal's comments in *McKellar v. Celgar*, 2015 BCHRT 15 [***McKellar***]:

> I view individual complaints very differently than complaints which have a systemic element. There is a clear purpose in limiting individual complaints on a temporal basis to protect Respondents from being required to defend against complaints based on outdated facts. That consideration is less important in the case of a systemic complaint where the very nature of the complaint invites a review of all relevant experiences. I find that the purposes of the *Code* are best served by the Tribunal approaching the timeliness issue on a global basis rather than by considering whether each member of a representative group has a timely allegation which can be employed to pull in out-of-date allegations. In an individual complaint, the timeliness can only be determined by the alleged conduct in relation to the individual. In a systemic complaint, timeliness is most appropriately determined by the alleged conduct in relation to the alleged systemic practices (at para. 253).

[18] The Respondents say that the approach set out in *McKellar* is not applicable to the current situation because the alleged breach is not a systemic policy but rather a few instances of requests and denials separated by several years. In that regard they submit that for the purposes of discerning whether the 2017 denials were merely reiterations of the 2013 denials, it is highly relevant that the requests were advanced by the same individuals and groups.

[19] The Respondents look to *McKellar* again in stating that this is a situation where the following statement by the Tribunal applies:

> I am aware that, in certain circumstances, a Respondent could be treated unfairly by being required to defend against unreasonably-dated allegations by the application of this approach. [...] I decline to articulate an approach where such unfairness might be alleged. I leave that to a future decision where the situation actually arises.

They submit that this is a situation where they would be forced to defend against unreasonably dated allegations if the complaint is allowed to proceed.

[20] The Respondents submit that the Tribunal requires that specific instances of alleged discrimination must anchor the analysis of a continuing contravention and cannot be used merely as "evidence" of a continuing contravention. However, the cases they rely on are based upon specific requests made by a complainant at one point in time and then repeated

specifically by the same entity on subsequent occasions with the same result. In other words, they are not cases relating to systemic complaints but repeat the same individual circumstances.

[21] The Respondents also allege that the breaches are too few and too far apart to be considered a continuing contravention. In that respect they rely on the Tribunal's decision in *Dove v. GVRD and Others (No. 2)*, 2006 BCHRT 197 [***Dove (No. 2)***]. The Tribunal stated in that decision:

> The concept of a continuing contravention must be applied in a manner which is fair to Respondents. In giving the concept the liberal and purposive interpretation it requires, it must not be used to improperly sweep in allegations which would otherwise be far outside the *Code's* time limits. It is for this reason that in considering whether a continuing contravention has been alleged, the Tribunal will also consider how large any gaps in time between the alleged contraventions may be, (at para. 42).

[22] The Respondents point out that the time gap between the two sets of allegations set out in the complaint is exceptionally long at four years.

[23] Further, the Respondents submit that their denials were not pursuant to a policy but were decisions made in response to specific requests. They state that the decisions do not reflect a policy as defined in *Black's Law Dictionary* as:

> A standard course of action that has been officially established by an organization, business, political party et cetera.

They say it was not their officially established standard course of action to deny funding for Sign language interpreters; rather, the decision in 2013 was informed by the circumstances at the time and that in 2017 was informed by the circumstances which remained the same.

[24] The Respondents say that the Complainant's statement that it understands that the Respondents would deny a request that they provide Sign language interpretation, if a request were made today, is not sufficient. They say that given that the Respondents' denials occurred in only two separate sets of instances, four years apart, the facts as alleged are insufficient to

draw the inference that there exists an officially established policy for rejecting such requests. They do not assert, however, that the statement is inaccurate.

[25] Further, the Respondents submit that the Tribunal should not exercise its discretion to allow filing of the complaint because it is not in the public interest to accept the complaint, since the delay of four years between the two sets of circumstances supporting the complaint is inordinate and militates strongly against accepting the complaint. They also submit that the reason offered for the delay (that the Complainant is a volunteer advocacy organization and therefore could not have advanced a complaint at an earlier date for financial reasons) is insufficient.

[26] The Respondents also say that they would suffer substantial prejudice if the complaint were accepted in its entirety because an inordinate delay means that memories will have faded, class members will be more difficult to locate, and the scope of the class will be more difficult to ascertain. In that regard, they say that if any portion of the complaint is allowed for filing, only the timely portions of the claim are necessary for determining whether the *Code* was breached.

VI REPLY OF THE ASSOCIATION

[27] The Complainant says that the Respondents have been inconsistent in how they characterize their conduct. They say that on the one hand they describe the denials as "decisions made in response to requests and informed by a consideration of the circumstances at the material time". On the other hand, they describe the denials set out in the complaint as "a single act with continuing effects", and a "mere repetition of a prior denial". They say that if each denial was based on the circumstances at the material time, then each denial constitutes a new act of discrimination, but if the Respondents decided in 2013 to not provide Sign language interpretation to the Association and later denials were the continuing effects of that denial, or a mere repetition of that denial, the Respondents were not, in fact, assessing each accommodation request based on the circumstances at the material time. They say this suggests the existence of an established policy or practice.

[28] The Complainant points to previous correspondences from the Respondents described above and say it is reasonable to interpret these denials as communicating a policy or practice of not providing Sign language interpretation. They say that even if the Respondents do not have an official policy against providing Sign language interpretation, inadequate or non-existent accommodation policies and procedures would constitute an ongoing state of affairs that is discriminatory to class members, relying upon *Hale v. University of British Columbia, Okanagan and Another*, 2018 BCHRT 34.

[29] The Complainant says that the arguable contravention test applies. They rely on *Kirchmeier obo Others v. University of British Columbia*, 2017 BCHRT 86 to submit that the threshold respecting whether conduct set out in a representative complaint could establish a violation of the *Code* is low: the complaint must only set out a possible or arguable contravention; (at para. 46).

[30] The Complainant says that the Respondents' position that the alleged discriminations are a single act with continuing effects and that the mere repetition of a prior denial when faced with the same request does not constitute a continuing contravention, do not stand up to analysis. They point out that the Respondents have not explained how the 2013 denial relates to the treatment of all class members or, in fact, to their 2017 refusal to provide Sign language interpretation for classes organized by the BC School for the Deaf. Further, they state that there is no information to support that the Association was involved in the 2017 accommodation requests made by the Founder on behalf of the BC School for the Deaf. They say even if the Association was involved in the 2017 accommodation requests, it would not be relevant to determining whether the Respondents were meeting their duty to accommodate.

[31] The Complainant adds that it is not unfair to require the Respondents to defend themselves given that the heart of the complaint is a policy or practice that constitutes an ongoing state of affairs, not a specific interaction from 2013. They say the Respondents have been on notice about this issue because of repeated accommodation requests by and on behalf of class members. They say, further, that they would expect that the Respondents, a sophisticated organization, maintain detailed and comprehensive records.

[32] The Complainant says this is not a case where it is appropriate to require the Complainant to provide the particulars of each instance along the path because the complaint is a representative complaint of a systemic nature. They say the discriminatory conduct is anchored in the present because the Complainant alleges an ongoing state of affairs.

[33] The Complainant maintains that it is not required to prove at this stage of the proceeding each element of their complaint. They say the arguable contravention test applies and acknowledge that they will be required to provide evidence from class members to support the continuous application of the Respondent's policy or procedure from 2013 until at least the date of the complaint. They maintain that there is no gap in the discriminatory conduct because the complaint alleges an ongoing state of affairs.

[34] The Complainant also maintains that while the Respondents have denied a policy against providing Sign language interpretation they have not clarified what processes do exist to ensure that it is meeting its duty to accommodate class members, stating that inadequate or non-existent accommodation policies and procedures would also be discriminatory.

VII ANALYSIS AND DECISION

[35] A "continuing contravention" must be interpreted in a manner consistent with the liberal and purposive interpretation which must be applied to human rights legislation in order to ensure that "the rights enunciated are given their full recognition and effect": *CN v. Canada (Canadian Human Rights Commission),* [1987] 1 SCR 1114, p. 11334.

[36] As submitted by the Association, a continuing contravention can be established either through repeated acts of similar character or by a continued state of affairs: *Dove v. GVRD and others (No. 3)*, 2006 BCHRT 374 [***Dove (No. 3)***]**.**

[37] In *School District v. Parent obo the Child,* 2018 BCCA 136 [***School District***], the Court of Appeal held that a continuing contravention cannot be established merely by alleging a continuing state of affairs; rather, there must be an allegation that within six months of the filing of the complaint there had been at least one act or instance of discrimination which could

be considered as a separate contravention of the *Code*: para. 51. Citing *Dove (No. 3)*, the Court said:

> I agree that discrimination that has been ongoing for some time could in principle be regarded as a continuing contravention, although consideration would need to be given to whether such conduct is more accurately described as "one act of discrimination which may have continuing effects or consequences", within the meaning of the *Manitoba Human Rights Commission* judgment approved in *Chen* (and *Dove No. 2*). (para. 61)

[38] The Tribunal, in cases of complaints relating to the discriminatory application of policy, has not treated the application of the policy as a one-time event which thereafter has continuing effects or consequences, but rather as an ongoing series of separate contraventions over the life of the policy: *Johnston obo Others v. City of Vancouver*, 2014 BCHRT 277, at para. 41.

[39] The Complainant submits that the appropriate analysis is that which has been followed in cases defined by a continued state of affairs, whereas the Respondent suggests that the appropriate analysis is that used in instances of repeated acts of similar character. I am of the view that the appropriate analysis is that of a continued state of affairs as described in *Dove (No. 3)*, having regard to the requirement, established in the *School District*, for an instance of the discrimination in the six months before the complaint was filed. I say that for the reasons that follow.

[40] First, while the Respondents indicate that they do not have a policy to deny funding for Sign language interpreters, they do not say anything about whether or not a policy or standard course of action exists which has the effect of requiring them to deny funding for Sign language interpreters. That might include a policy to deny funding for a defined class which includes Sign language interpreters, or a policy not to fund interpreters generally.

[41] The Respondents also submit that they do not have a policy prohibiting funding of Sign language interpreters for their courses when the term policy is defined as a standard course of action that has been officially established by an organization, business, political party, et cetera.

However, the written communications from the Kelowna, Burnaby and New Westminster branches of SJA from February and November of 2017 set out above suggest that policies carrying the same import may exist. They may not be policies specific to funding for Sign language interpreters, but if the policy exists that they do not provide funding for a "not-for-profit charitable organization" or for interpreters generally, the effect may be the same and an accommodation exception would need to be provided if the implementation of such a policy resulted in a discriminatory impact on deaf students (and if possible within the confines of undue hardship).

[42] The Respondents have relied upon a series of cases for the proposition that the Tribunal has consistently "held that a mere repetition of a previous request, which elicits the same denial, does not constitute a continuing contravention." *McGrath v. British Columbia (Ministry of Children and Family Development*, 2009 BCSC 180; *Soltezky v. Greater Victoria Housing Society,* 2014 BCHRT 197; *Hoffman v. British Columbia (Ministry of Social Development,* 2012 BCHRT 187; and *Lewis v. British Columbia (Ministry of Public Safety & Solicitor General)*, 2011 BCHRT 352, to name several. A review of all of the cases relied upon by the Respondents reveals that they all involve the repetition of an ongoing request by the complainant to the same entity, for the same outcome, from the same facts, over a period of time.

[43] A review of the facts of this case reveals that that is not the case. The Complaint sets out a request to SJS – BC & Yukon in or about 2013 to the Kelowna branch to fund Sign language interpretation for a group course organized by the Association which was denied. It then reveals that a request was made subsequently for SJA Canada to overturn that refusal to fund Sign language interpretation for the 2013 Group Course, which was again denied.

[44] The Complaint then sets out that in early 2017 the Association requested the Kelowna branch deliver a different program (the 2017 Group Course) to 16 deaf students on March 4th, 2017, in Kelowna. A request was made on the Association's behalf that SJA – BC & Yukon accommodate the students by providing ASL interpretation which was denied.

[45] On November 7, 2017 the Founder, in her capacity as a counsellor for the BC School of the Deaf, contacted both the Burnaby and New Westminster branches of SJA – BC & Yukon about arranging private first aid training for students at the BC School of the Deaf. In her requests she advised those organizations that the instructor would require an ASL interpreter to make sure the students were able to access the information properly. These requests were denied.

[46] While these requests are similar, they are not all made by or on behalf of the Association. Nor are they made in respect to the same course, on behalf of the same students or to the same branch of SJS. I am satisfied that the cases relied upon by the Respondents to support their contention that a mere repetition of a previous request, which elicits the same denial, does not constitute a continuing contravention (which is not in dispute) are not applicable to the circumstances described in this complaint. Nor do I consider these facts to be analogous to those expressed in *Rai v. Annacis Auto*, 2003 BCHRT 31, where the complainant was laid off in February 2001, was not rehired in May 2001 with fellow laid-off employees, and sought to establish a continuing contravention by seeking to be rehired in February 2003.

[47] Rather, the appropriate analysis is that set out in *McKellar*. This is not a case to be examined on a single act with continuing effects basis. Nor should the analysis be that used where there are repeated acts of similar character without a systemic component. Adopting the analogy drawn in *Dove (No. 3)*, this is the kind of case "in which there is an ongoing state of affairs, for example, a public building which is inaccessible to wheelchair users or a policy withholding certain employment benefits for married persons from those in same sex relationships . . . so long as the building remains inaccessible, the policy remains in place, or the discriminatory conditions otherwise continue to exist, the discrimination is ongoing and a continuing contravention may be alleged". As the Court of Appeal stated in *School District*:

> I see no reason why these settled principles could not be applied to ongoing discrimination. To use the example discussed at the hearing, it would be open to an individual requiring the use of a wheelchair to file a complaint to the BCHRT alleging that within the past six months, the complainant had been prevented from accessing a public building by

> reason of the lack of a wheelchair ramp, and that this form of discrimination had been ongoing for years. The Tribunal would then be entitled to consider the entire time the conduct had been taking place, not just the single instance experienced by the complainant to determine whether conduct that occurred outside the six-month limitation period could nevertheless be considered by the Tribunal as part of a continuing contravention. The inquiry, however, is predicated on the existence of what was described in *Chen* at para. 23 as conduct "occurring within six months of the complaint, which, if proven, could constitute a separate contravention". (para. 70)

[48] In this case, unlike *School District,* there is no issue of an instance of the alleged continuing contravention occurring within six months of the complaint, given the refusal in November 2017 that falls within the scope of the alleged discrimination.

[49] I appreciate that *Dove (No. 3)* clearly states that the Tribunal may consider large gaps of time as contra-indicating a continuing contravention. I note, however, that in doing so the Tribunal relied on *Dickson v. Vancouver Island Human Rights Coalition*, 2005 BCHRT 209, paras. 16-17, a decision that clearly falls into the single incident with a continuing effect line of cases. While a large gap may be relevant to the continuing contravention analysis of a systemic discrimination case, it will seldom be determinative. In this case, the Complainant states that they will be able to provide "extensive evidence from class members to support the continuous application of the Respondents' policy or procedure from before 2013 until at least the date of the complaint." The information supplied in the Complaint, together with the assurance that further evidence will be forthcoming is sufficient to underpin the alleged continuing contravention. In this regard, I understand the Complainant to allege that there are instances of discrimination in the four-year span and expect that these instances will be particularized by way of amendment to the Complaint so that the Respondents have an opportunity to respond.

[50] I find that a continuing contravention has been alleged. The import of that decision is that the Complaint is not out of time.

[51] In the event that I am mistaken in these conclusions, I am persuaded to exercise my discretion to allow this complaint to proceed. I am satisfied that accepting any late-filed portion

of the complaint is in the public interest, given the issues raised and the reasons advanced for the late filing. Further, I am satisfied that in the circumstances, there is no substantial prejudice to the Respondents in accepting the complaint for filing. The specific allegations relied on are each documented and witness recollection appears to be relatively inconsequential. In such a scenario the matter would be accepted for filing in any event.

VIII CONCLUSION

[52] This complaint is accepted for filing.

Norman Trerise, Tribunal Member