

CANADIAN JOURNAL OF

# Disability Studies

Published by the Canadian Disability Studies Association · Association Canadienne des Études sur l'Incapacité

*Canadian Journal of Disability Studies*

**Published by the Canadian Disability Studies Association**

**Association Canadienne des Études sur l'Incapacité**

**Hosted by The University of Waterloo**

[www.cjds.uwaterloo.ca](http://www.cjds.uwaterloo.ca)

**This document has been made accessible and PDF/UA compliant by Accessibil-IT Inc.  
For more information go to  
<http://www.accessibilit.com>**



**Framing Deaf Children's Right to Sign Language in the  
*Canadian Charter of Rights and Freedoms***

Jennifer J. Paul, J.D.

Kristin Snoddon, Assistant Professor, School of Linguistics and Language Studies,  
Carleton University  
[kristin.snoddon@carleton.ca](mailto:kristin.snoddon@carleton.ca)

**Abstract**

Sign language rights for deaf children bring a unique perspective to bear in the fields of both disability rights and language planning. This is due to the lack of recognition in existing case law of the right to language in and of itself. Deaf children are frequently deprived of early exposure to a fully accessible language, and as a consequence may develop incomplete knowledge of any language. Thus, in the case of deaf children the concept of sign language rights encompasses rights that are ordinarily viewed as more fundamental to human equality. This paper will take as a starting point the historical treatment of the enumerated disability ground in the *Canadian Charter of Rights and Freedoms'* section 15(1) guarantee of equality rights. We argue that in order to meet deaf children's specific biological and linguistic needs, these children's right to sign language also needs to be recognized as an analogous ground for protection from discrimination. Sign language rights are framed in terms of an immutable characteristic of all children, namely the *biolinguual process* for language acquisition. The *biolinguual process* is the experiential and innate ability to acquire language.

**Keywords**

Sign Language Rights; Deaf Children; *Canadian Charter of Rights and Freedoms*;  
Disability Rights; Constitutional Law

**Framing Deaf Children's Right to Sign Language in the *Canadian Charter of Rights  
and Freedoms***

Jennifer J. Paul, J.D.

Kristin Snoddon, Assistant Professor, School of Linguistics and Language Studies,  
Carleton University  
[kristin.snoddon@carleton.ca](mailto:kristin.snoddon@carleton.ca)

**Introduction**

Sign language rights for deaf children bring a unique perspective to bear in the fields of disability rights and language planning due to the lack of recognition in existing case law of the right to language in and of itself (Mülke, 1999; Siegel, 2006). Deaf children are frequently deprived of early exposure to a fully accessible language and as a consequence, may develop incomplete knowledge of any language. Thus, in the case of deaf children the concept of linguistic human rights (Skutnabb-Kangas & Phillipson, 1995) encompasses rights that are ordinarily viewed as more fundamental to human equality. This paper presents a rationale for deaf children's right to sign language as an analogous ground in the *Canadian Charter of Rights and Freedoms*' section 15(1) guarantee of equality rights. This paper frames sign language rights in terms of an immutable characteristic of all children, namely the *biolingual process* for language acquisition. The *biolingual process* refers to the child's experiential and innate ability to acquire language and addresses the child's need for a fully accessible language.

This paper outlines the current status of sign languages in early intervention and education programs for Canadian deaf children. We then address how deaf people and sign languages are framed in Canadian constitutional legislation. Next, we explore the concept of *immutable characteristic* in section 15(1) of the *Charter*. Given the *Charter's*

precedent of representing deaf people as a disability group and the current problem of deaf children's restricted access to sign language in universal neonatal hearing screening and early intervention and education, we advance a combined approach. This approach entails recognizing deaf children's access to sign language as a *Charter* right using section 15(1)'s enumerated grounds of disability and age, supplemented by a positive interpretation of section 7 and section 12 which respectively refer to "the right to life, liberty and security of the person" and the right to be free from "any cruel and unusual treatment." We then present arguments regarding the analogous ground of *biolinguistic process*. The latter ground is made possible by recognizing the *biolinguistic process* as an immutable characteristic.

The following section outlines some points of departure for deaf communities and provides a background for the problem of sign language rights for deaf children.

### **Framing Deaf Communities**

In positioning deaf people within the larger disability community, we follow Ladd's (2003) description of "dual-category members" (p. 16) of both disability and language minority groups, who have "deeper needs" (p. 15) than a disability model alone allows for in relation to sign language and deaf culture. In fact, when the World Federation of the Deaf collaborated with other disability groups in drafting the 2006 United Nations Convention on the Rights of Persons with Disabilities (CRPD), this organization sought the "right to be different" to be enshrined as a fundamental principle in the CRPD (Kauppinen & Jokinen, 2014). The CRPD, which Canada has signed and ratified, calls for state parties to recognize and promote sign languages (Article 21), facilitate learning of sign language by deaf students, and promote the linguistic identity of the deaf

community in the education system (Article 24). While the CRPD has no legal force in Canada, it can be cited to support interpretation of domestic law (Roots, 2014). Although it has been argued that Article 24 of the CRPD has been implicitly implemented in existing Canadian legislation (Sala, 2013), this argument fails to address the criteria for inclusive education (Snoddon & Underwood, in press).

The CRPD stops short, however, of stipulating deaf children's right to acquire sign language from infancy onwards and to develop bilingually in one or more signed and spoken/written languages. This biological essentialism is often at the core of deaf community advocacy for sign language rights in early intervention and education: "the belief that sign language learning and knowledge and deaf socialization should be available to—and pursued by—every deaf person" (Kusters & de Meulder, 2013, p. 158). This point also shows the limitations of legislation directed at safeguarding minority language rights, such as constitutional recognition of sign languages. While internationally, over 31 countries have granted legal recognition to sign languages, this legislation has not resulted in deaf children's increased access to sign language programming (de Meulder, 2015; McKee & Manning, 2015). Nor has any seeming impact on sign language rights in deaf children's education been made by either the widespread popularity of sign language courses for adult second language learners (Goldberg, Looney, & Lusin, 2015), or so-called baby sign classes aimed at young hearing children (e.g., Garcia, 2004). Thus, as will be further discussed below, neither a disability nor a linguistic minority model has succeeded at enacting deaf children's sign language rights.

### ***Background***

Sign language rights for deaf children have long been framed in political terms, particularly in regard to the educational system's ignorance or suppression of native sign languages of the deaf community and lack of support for these languages' transmission from deaf adults to young deaf children. Historically, this suppression was viewed as a debate between "oralism" and "manualism," with the latter term frequently used in reference to pedagogical systems for manually encoding spoken languages rather than to native sign languages (Carbin, 1996). Deaf people voiced their conception of sign language rights long before the membership of the Ontario Association of the Deaf resolved in 1931 that "the sign language is a most beautiful language and of priceless value to the deaf" and "that any policy of education which tends to destroy, or impair or restrict the use of this beautiful language is opposed to the best interests of the deaf" (cited in Carbin, 1996, p. 188). In the present day, the threatened closure of some Canadian provincial schools for the deaf, which are virtually the only educational environments which provide adequate access to sign language, demonstrate how sign language rights in education continue to be ignored (Snoddon, 2016).

It is not simply cultural identity interests that motivate deaf community advocacy for sign language. All children need exposure to language in the early years for optimal development. For deaf children who lack access to the same auditory base that hearing children have for acquiring a spoken language (Goldin-Meadow & Mayberry, 2001), language acquisition is supported by exposure to a visual, signed language from infancy onward. This is true even for children with relatively mild levels of hearing loss; in the context of this paper, *deaf* refers to children with hearing losses spanning a 30-90 decibel

range and above (Humphries et al., 2012). In Canada, American Sign Language (ASL) and Langue des signes québécoise (LSQ) are used in parallel with the official languages, English and French, although other sign languages and sign language varieties exist in the country.

With the advent of universal neonatal hearing screening and follow-up intervention services in several provinces, government-funded entities play an even greater role in language acquisition for young deaf children. In Canada, as in most other Western contexts, cochlear implants have become the standard of care for deaf infants and young children (Komesaroff, 2008). In Ontario, as in other provinces, children who receive cochlear implants are frequently denied support for learning ASL or LSQ (Snoddon, 2008). This restriction is apparently based in the opposition of auditory-verbal therapy practitioners and children's hospital cochlear implant teams to deaf children's learning of sign language (Snoddon, 2008). When families with deaf children are able to access ASL/LSQ services, only intermittent and minimal support has been provided. It has been reported that families accessing the ASL service option under the Ontario Infant Hearing Program have been entitled to a maximum of 48 hours of ASL instruction per year until the child reaches the age of six (Snoddon, 2012). Families requesting a dual spoken-language and signed-language service option have been entitled to half of the total hours of service that they would receive under the ASL-only option; that is, a maximum of 24 hours per year (Snoddon, 2014). This service provision has been shown to be inadequate for supporting parents' learning of ASL or LSQ as a second language (Snoddon, 2014), and it does not provide deaf children with adequate access to fluent sign language models to support language development.

This paper discusses the need for a paradigm shift for deaf children in the area of early intervention and education through invoking section 15(1) of the *Charter*. The next section of this paper introduces this legislation.

### **Constitutional Democracy**

The *Charter* is a significant part of Canada’s Constitution, which is the supreme law of the land. Enacted in 1982, it was hailed as an “unremitting protection of individual rights and liberties” and a protector of a “complex of interacting values, each more or less fundamental to the free and democratic society that is Canada” (Fader, 1997, pp. 187-188). Section 32(1) of the *Constitution Act* states that the *Charter* applies “to the Parliament and government of Canada in respect of all matters within the authority of Parliament” and “to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.”

The section known as “Equality Rights” sets out as follows:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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

Section 15(2) refers to affirmative action programs. In fact, section 15(2) was inserted to bolster the purpose of section 15(1) and to avert claims of reverse discrimination which would derail the purpose of section 15(1) (Garton, 2005). It has been argued that particular regard must be paid to section 15(2)’s ameliorative implications for the equality rights of persons with disabilities (Hamilton & Koshan, 2012; McGill, 2013).

Section 15(1) lists “the most common and probably the most socially destructive and historically practiced bases of discrimination” (Russell, Knopff, Morton, & Russell, 1989, p. 596). However, the framers of the *Charter* intended for section 15(1) to be flexible enough to allow for judicial expansion. The concept of “analogous grounds” was included as an open-ended category (Kelly, 2006) because of the difficulty in reaching an agreement on a complete enumeration of the grounds for discrimination. In fact, it was obvious from the discussion among framers that the *Charter* requires an activist court in terms of interpreting analogous grounds (Kelly, 2006). Hence, additional grounds of discrimination can be considered as analogous and deserving of section 15(1) protection, to be treated in the same manner as the enumerated grounds.

### ***Enumerated and analogous grounds***

In the *Charter*, there is no distinction between an enumerated ground and an analogous ground for section 15(1) protection from discrimination. In identifying an analogous ground, the characteristic in question must be “actually immutable” or “constructively immutable” in that either the government ‘has no legitimate interest in expecting us to change’ or it “is changeable only at unacceptable cost to personal identity” (*Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999, par. 206). In addition, the government has a legitimate interest to not only promote affirmative action but also to ameliorate the circumstances attending an immutable characteristic. In the case of deaf children, this point speaks to the need to better support language acquisition via sign language. To date, clinical efforts to treat hearing loss via cochlear implants and auditory-verbal therapy with a view to preventing language delays in deaf children have met with only limited success (Humphries et al., 2012; Mellon et al., 2015). Moreover, the impact

of an exclusively oralist approach to educating deaf children can be deleterious for these children's identity development and self-efficacy (Hauser, 2015). Deaf children's need for sign language in order to fully acquire language and develop optimally remains constant. Thus, we argue that deaf children have both an actually and constructively immutable characteristic.

In the case of deaf people, the biologically essentialist concept of hearing impairment is intertwined with disability as a socially imposed limitation on deaf people's capabilities by failing to support their need for sign language. The next section discusses the enumerated ground of disability in relation to deaf people.

### **The *Eldridge* Case**

In the *Eldridge v. British Columbia (Attorney General)* decision of 1997, the enumerated ground of disability was used to uphold deaf people's right to sign language interpreters in accessing medical services. *Eldridge* involved a deaf British Columbia couple who sought a declaration that a hospital's failure to provide sign language interpreting services violated section 15(1) of the *Charter*. The B.C. Court of Appeal dismissed the couple's claim, arguing that medical services were provided to both hearing and deaf people and that providing an interpreter for deaf patients was at the hospital's discretion as a budgetary expenditure. Furthermore, the B.C. Court of Appeal found there was no legislation that required hospitals to provide an interpreter for deaf patients. However, the Supreme Court of Canada found in favour of the deaf claimants and ruled that sign language interpreting services must be provided for deaf people's access to medical services.

In the context of this paper, the significance of the *Eldridge* case is the judicial recognition that deaf people as a group have experienced a historical societal disadvantage. While the Court employed the ground of disability to affirm deaf people's right to interpreters, it also acknowledged the limitations of a medical model of disability:

This historical disadvantage [of deaf people] 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 section 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. (*Eldridge*, par. 56)

Notably, in *Eldridge* the Court took a different view of disability than it did in its *Eaton v. Brant County* decision of 1997, which dealt with the parents of a disabled child who disagreed with her special education placement. In the latter decision, disability was held to be a different type of category from gender or race because of the "individual variation" involved (McCarthy & Radbord, 1999, p. 357). The Court's social and political construction of disability in *Eldridge* is important to this paper, since sign language rights in education for deaf children are often contested by arguments about the "diversity" among deaf children that supposedly precludes the need for sign language and affiliation with deaf communities (Kusters & de Meulder, 2015).

One limitation of the *Eldridge* case is that it speaks to deaf people's right to accessibility accommodations, i.e., sign language interpreters, in the external environment and not to the intrinsic biological quality of acquiring language by means of a visual-signing process. This is also true of the Federal Court of Canada's 2006 ruling in *Canadian Association of the Deaf v. Her Majesty the Queen* that interpreters must be provided for any meeting with a federal government employee. This view of sign

language rights as an accessibility accommodation is seemingly reinforced by section 14 of the *Charter*, which refers to the right to a sign language interpreter in the courts.

However, in relation to the enumerated ground of age in section 15(1), arguments can be made that deaf children experience discriminatory treatment in regard to accessibility in the external environment and should be entitled to ameliorative social services. The next section of the paper further discusses this point.

### **Positive Rights for Deaf Children**

It is recognized in law and government policies and practices that many deaf adults access government institutions, programs, and services through ASL and/or LSQ. In fact, as shown in the preceding section regarding the *Eldridge* case, section 14 of the *Charter*, and related jurisprudence, for deaf adults many *Charter* rights are fulfilled only by sign language accommodations. Extending this argument to young deaf children's right to sign language may depend on the courts reading positive rights into section 15(1) and providing new entitlements to social services (Macfarlane, 2014). In effect, this means that governmental entities must provide ASL and LSQ programming and instruction for all young deaf children and their families.

Positive rights are distinguished from negative rights that aim to eliminate government interference with rights (Macfarlane, 2014). Generally, the courts are apprehensive of mandating entitlements to new benefits through section 15(1) because doing so is seen to encroach on the responsibilities of elected branches of government to fulfill their *Charter* obligations. For example, in the 2004 *Auton v. British Columbia* decision, the Supreme Court rejected a section 15(1) equality claim that sought the

provision of a behavioural treatment for children with autism. As Macfarlane (2014) argues, while *Eldridge* was about ensuring deaf people’s access to benefits that are available to all Canadians, the *Auton* case sought to mandate entitlement to a new benefit (p. 53). However, since several governments across Canada have already implemented universal neonatal hearing screening and follow-up early intervention programs with the stated objective of supporting deaf children’s language development, we argue that here, a new benefit is not being sought. Rather, we address the discrimination inherent in these programs’ failing to adequately support deaf children’s learning of sign language.

### ***Positive rights and section 7***

The courts have been equally apprehensive in reading positive rights into section 7 of the *Charter*, which reads as follows: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Historically, this section has been applied in cases involving administration of justice and the criminal process rather than matters involving social welfare. Notably, the *Tanudjaja v. Attorney General* decision of 2013 unsuccessfully attempted a section 7 and section 15 challenge to force governments to implement strategies to eliminate homelessness.

As conservative as the courts have been outside this traditional scope, the *Gosselin v. Quebec* case of 2005 shows that they have not completely ruled out the possibility of reading positive rights into section 7. In this case, which involved a challenge of a Quebec law that excluded citizens under the age of 30 from full social security benefits, the decision was not unanimous and the judges split three ways on this issue (Macfarlane, 2014). In her ruling, Chief Justice Beverley McLachlin suggested that

the meaning of section 7 “should be allowed to develop incrementally” (par. 79) and concluded that although the case did not warrant interpreting section 7 to include positive rights, the courts should not rule out the possibility that some future circumstances might permit it, invoking the “living tree” doctrine of constitutional interpretation (cited in Macfarlane, 2014, p. 55).

Latimer (2014) also cites the dissenting judgement in *Gosselin* in arguing that section 7 includes a positive dimension, particularly in regard to children’s rights. As Latimer argues, “because of both the special vulnerability of children, their capacity for development, and the state’s treatment of children in other contexts, recognition of positive rights for children is consistent with Canada’s legal/political traditions, current laws and jurisprudence” (p. 538). In regard to the *biolingual process*, we argue that here, Latimer is referring to the nature of children’s development becoming an immutable characteristic of the person beyond the formative years.

### ***Positive rights and section 12***

Similarly, a positive reading of section 12 of the *Charter* may support our position. This section reads as follows: “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.” In the jurisprudence, the scope of the term “treatment” under section 12 has been narrow, to apply mainly to state actions that are penal or quasi-penal in nature. For the purpose of this paper, we refer to the *Rodriguez v. British Columbia* decision of 1993, where the Supreme Court recognized that a prohibition or lack of government action may constitute “treatment” under section 12 when a claimant is “in some way within the special administrative control of the state” and that “the intentional targeting of an admittedly poor, vulnerable and disadvantaged group” by the

government constitutes a situation that is unusual under section 12. In this regard, deaf children, by virtue of their subjection to early intervention policies that place restrictions on and fail to adequately support learning sign language, are brought under the special administrative control of the state and subject to the cruel and unusual treatment of language deprivation that does not occur with non-deaf children.

In sum, in regard to deaf children's right to sign language, a positive interpretation of the *Charter* sections relevant to both sign language access and children's rights leads to the acknowledgement of deaf children's immutable characteristic of acquiring language by visual means. As we argue, this intrinsic quality is best recognized by way of granting it section 15(1) protection from discrimination.

The next section of this paper further outlines arguments about using analogous grounds for section 15(1) protection.

### **The *Bilingual Process* as an Immutable Characteristic**

In combination with the enumerated grounds of disability and age in section 15, we add an analogous ground argument that in the context of universal early invention programs as governmental services in a "rapidly evolving" (Kelly, 2005, p. 98) society, deaf children have an immutable characteristic in terms of the need for sign language for language development that is equitable to that of non-deaf children (Mühlke, 2000). This characteristic is accompanied by the historical disadvantage experienced by deaf people that was recognized in *Eldridge*. The focus of public early intervention services for deaf children in the areas of language acquisition and education is often on changing this immutable characteristic by means of auditory-oral rehabilitation without accompanying access to sign language; this can carry an unacceptable cost to children's identity and

linguistic and social-emotional development. The negative effects of these public services for deaf children can exacerbate the historical disadvantage faced by deaf people since without sign language, deaf children risk linguistic deprivation and subsequent social, cognitive, and psychological effects (Humphries et al., 2012).

Being deaf is not something chosen; it is a circumstance one is born into or acquired through factors beyond one's control. Ensuing from that circumstance, the most accessible avenue for development of language in deaf children is often a visual-signing process. Bahan (2009) refers to this phenomenon as "sensory orientation" where "people of different cultures not only speak different languages, but what is possibly more important inhabit different sensory worlds" (Hall cited in Bahan, p. 96). Similarly, Tucker (2014) argues:

[A]lthough the right to use ASL is often presented as a human right, this right is not political in nature. That is, ASL is derived from biology. There are signed languages in deaf communities all over the world. Wherever there are Deaf people, there are Signs. Sign languages have been developed for the eyes and the hands. (p. 8)

Not only have signed languages arisen to accommodate the visual and tactile abilities of deaf people, but also there are distinct sensory experiences "brought about by Deaf ways of being" and the use of the eyes for language and discourse (Bahan, 2009). This point is supported by research that shows that the retinas of deaf people develop in a way that allows for enhanced peripheral vision as compared with species-typical hearing people (Codina et al., 2011). Moreover, young deaf children's language and reading development is supported in unique ways that are related to the development of eye gaze, visual attention, and visual phonological processing (Lieberman, 2012; McQuarrie &

Abbott, 2013). This point speaks to how the bodily differences of deaf children affect how language is acquired.

This specific sensory orientation of deaf children is targeted by the culture-defined, normative rationale of public infant hearing screening and early intervention programs, which focus mainly on treatment and rehabilitation of hearing loss. In this regard, these programs reveal what Kafer (2013) refers to as "failures of the imagination supporting and supported by the drive toward normalcy and normalization" (p. 45). The eugenics-based ideological underpinnings of these programs are revealed in public health documents that make "neuroscience" claims regarding the effects of deafness and sign language on children's brains (Mauldin, 2016). However, the same brain tissue is utilized for language processing in spoken and signed languages (Petitto, 2005); signed languages are linguistically whole and most readily acquired by deaf children. In order to invoke section 15 protection for the right of deaf children to equitable language acquisition, we need to promote understanding of the *biolinguistic process* as an immutable characteristic. Such framing of an immutable characteristic needs to speak to the quality that is being discriminated against, within the "special administrative control of the state" that was cited in *Rodriguez*. This quality is not captured by the concept of language modality, which in the deaf community bears archaic connotations of "manualism" versus "oralism," since a focus on modality of transmission does not address the biological basis of language acquisition by deaf children. After all, many non-deaf people can and do learn sign language, and species-typical language acquisition in non-deaf infants also occurs via sign language (Petitto, 1994).

Deaf children's *biological process* is a characteristic that is unchangeable, since cochlear implants and auditory-verbal therapy alone do not facilitate species-typical language acquisition in a majority of deaf children. Furthermore, the stated objective of universal neonatal hearing screening and accompanying early intervention programs is to prevent language delays in deaf children. This aim runs counter to the restricted and inadequate provision of sign language programming for deaf children and their parents.

### ***Implications***

In line with legal precedent, governments should also consider strategies to "ameliorate the circumstances attending the immutable characteristic" (*Boulter v. Nova Scotia Power Inc.*, 2009, par. 42), such as applying the *Eldridge* decision in terms of providing accommodations that support deaf people's access to public services. At the same time, however, the unique ground of *biological process* recognizes that accessibility accommodations as traditionally conceived can stop short of promoting full participation and inclusion for deaf children as a group with a distinct immutable characteristic. To this point, accommodations such as interpreters and captioning must be accompanied by ASL and LSQ programming and instruction for all young deaf children and their families. This provision entails sign language planning in early intervention and education programs via teachers who are fluent in sign language, the development of further bilingual learning materials, and opportunities to study sign language as a school subject (Kauppinen & Jokinen, 2014). Moreover, early intervention for deaf children must include ongoing and rigorous parent ASL and LSQ classes following a customized curriculum (see Snoddon,

2015). The above initiatives are supported by Article 24 of the CRPD and by the World Federation of the Deaf’s (2016) Position Paper on the Language Rights of Deaf Children.

A combined grounds approach of disability, age, and *biological process* is essentially a compromise to minimize the problem of uncertainty in the judicial sphere. A similar approach was taken in the *Canadian Doctors for Refugee Care v. Canada* case of 2014. Here, the Federal Court held in favour of a section 15(1) argument that employed a strategy of combining grounds related to funding of health care for refugee claimants and others seeking the protection of Canada under the Interim Federal Health Program. In 2012, the Canadian government restricted health-care funding for refugees under this program. In response, a group that named itself Canadian Doctors for Refugee Care mounted a section 15(1) challenge against the government’s actions. The enumerated ground for protection in this case was national origin. The proposed analogous ground was “immigration status,” as the funding changes targeted refugees. Here, the claimants succeeded with the enumerated ground of national origin while the analogous ground of “immigration status” was rejected. Further, in reference to section 12, the court was satisfied that the implied prohibition on refugees obtaining medical treatment caused by cuts to health insurance coverage was cruel, “particularly, but not exclusively so as it affects children” (par. 11). The government’s appeal against the 2014 Federal Court ruling has been withdrawn, strengthening judicial consideration of the combined approach as applied to the sign language rights of deaf children on the basis of the enumerated grounds of disability and age and the analogous ground of *biological process*.

We propose that combining these enumerated grounds with the analogous ground will include the strength of each ground. Case law has established that deaf people are recognized by the courts as a disability group, but the enumerated ground of age in addition to the *biological process* offer a more precise explanation of deaf children’s right to ASL and LSQ in achieving language development comparable to that of species-typical hearing children. This development needs to be supported and not restricted by early intervention and education services for deaf children. A worst-case scenario is the judiciary rejecting deaf children’s right to equality in terms of their *biological process* in the matter of language acquisition. This rejection would be grave and deeply offensive to deaf people’s human dignity, with a heavy impact on the social, psychological, and academic development of deaf children for generations to come.

## **Conclusion**

This paper has outlined the rationale for using section 15(1) of the *Charter* to recognize Canadian deaf children’s right to sign language. Our approach combines existing recognition of deaf people as physically disabled, which along with age is an enumerated ground in section 15(1), with the analogous ground of *biological process*. The latter term seeks legal recognition of the unique case of deaf children who require the provision of sign language from infancy onward in order to achieve linguistic and other developmental milestones comparable to hearing children. In this way, sign language planning in early intervention and education for deaf children is linked to fundamental human rights.

To date, case law and human rights instruments from around the world have failed to explicitly outline deaf children's right to sign language and linguistic development as a unique issue in language planning and disability rights (Kauppinen & Jokinen, 2014; Mühlke, 1999; Siegel, 2006). The recognition of deaf children's right to sign language in the *Charter* will break new ground in disability rights law, status planning for sign languages, and Canadian law in terms of creating what McCarthy and Radbord (1999) referred to as "whole new social conversations and communities" where all are included.

## References

- Bahan, Ben. (2009). Sensory orientation. *Deaf Studies Digital Journal*, 1. Retrieved May 9, 2016 from [http://dsdj.gallaudet.edu/index.php?issue=1&section\\_id=2&entry\\_id=48](http://dsdj.gallaudet.edu/index.php?issue=1&section_id=2&entry_id=48).
- Carbin, C. (1996). *Deaf heritage in Canada*. Toronto: McGraw-Hill Ryerson Ltd.
- De Meulder, M. (2015). The legal recognition of sign languages. *Sign Language Studies*, 15(4), 498-506. doi: 10.1353/sls.2015.0018
- Codina, C., Pascalis, O., Mody, C., Toomey, P., Rose, J., Gummer, L., & Buckley, D. (2011). Visual advantage in deaf adults linked to retinal changes. *PLoS ONE*, 6(6), e20417. doi: 10.1371/journal.pone.0020417
- Fader, R. (1997). Reemergence of the *Charter* application debate: Issues for the Supreme Court in *Eldridge* and *Vriend*. *Dalhousie Journal of Legal Studies* 6,187-235.
- Garcia, J. (2004). *Sign with Your Baby: How to Communicate with Infants before They Can Speak*. Mukilteo, WA: Northlight.
- Garton, G. (2005). *The Canadian Charter of Rights Decisions Digest*. Justice Canada (CanLII). Retrieved July 24, 2015 from <http://www.canlii.org/en/commentary/charterDigest/>.
- Goldberg, D., Looney, D., Lusin, N. (2015). *Enrollments in Languages Other than English in United States Institutions of Higher Education, Fall 2013*. New York: Modern Language Association of America.
- Goldin-Meadow, S., & Mayberry, R. (2001). How do profoundly deaf children learn to read? *Learning Disabilities Research and Practice*, 16(4), 222–229. doi: 10.1111/0938-8982.00022

- Hamilton, J.W., & Koshan, J. (2013). The Supreme Court of Canada, ameliorative programs, and disability: Not getting it. *Canadian Journal of Women and the Law*, 25(1), 56-80. doi: 10.3138/cjw125.1.056
- Hauser, P. (2015, March 6). The effects of linguisticism and audism on the developing deaf person. TEDx Gallaudet. Retrieved July 23, 2015 from <https://www.youtube.com/watch?v=73zUW76OOxg>.
- Humphries, T., Kushalnagar, P., Mathur, G., Napoli, D.J., Padden, C., Rathmann, C., & Smith, S.R. (2012). Language acquisition for deaf children: Reducing the harms of zero tolerance to the use of alternative approaches. *Harm Reduction Journal*, 9(16). Retrieved May 15, 2015 from <http://www.harmreductionjournal.com/content/9/1/16>.
- Kafer, A. (2013). *Feminist, queer, crip*. Bloomington, IN: Indiana University Press.
- Kauppinen, L., & Jokinen, M. (2014). Deaf culture and linguistic rights. In M. Sabatello & M. Schulze (Eds.), *Human rights and disability advocacy* (pp.131-145). Philadelphia: University of Pennsylvania Press.
- Kelly, J.B. (2006). *Governing with the Charter: Legislative and judicial activism and framers*. Vancouver, BC: University of British Columbia Press.
- Komesaroff, L. (2008). *Disabling pedagogy: Power, politics, and deaf education*. Washington, DC: Gallaudet University Press.
- Kusters, A. & De Meulder, M. (2015, July 18). "Diversity" discourses as a way to deny access: Post-ICED reflection. *Pigs Can Fly* blog archive. Retrieved July 23, 2015 from [5/07/18/diversity-discourses-as-a-way-to-deny-access-post-iced-reflection/](http://5/07/18/diversity-discourses-as-a-way-to-deny-access-post-iced-reflection/).
- Kusters, A. & de Meulder, M. (2013). Understanding Deafhood: In search of its

- meanings. *American Annals of the Deaf*, 158(5), 428-438.  
doi:10.1353/aad.2013.0004.
- Ladd, P. (2003). *Understanding Deaf culture: In search of Deafhood*. Clevedon, UK: Multilingual Matters.
- Latimer, A.M. (2014). A positive future for section 7?: Children and Charter change. *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 67. Retrieved September 20, 2016 from <http://digitalcommons.osgoode.yorku.ca/sclr/vol67/iss1/17>.
- Lieberman, A. (2012). *Eye gaze and joint attention*. NSF Science of Learning Center on Visual Language and Visual Learning Research Brief No. 5. Retrieved September 27, 2016 from <http://v12.gallaudet.edu/files/2213/9216/6287/research-brief-5-eye-gaze-and-joint-attention.pdf>.
- Macfarlane, E. (2014). The dilemma of positive rights: Access to health care and the *Canadian Charter of Rights and Freedoms*. *Journal of Canadian Studies*, 48(3), 49-78.
- Mauldin, L. (2016). *Made to hear: Cochlear implants and raising deaf children*. Minneapolis, MN: University of Minnesota Press.
- McCarthy, M.A. & Radbord, J.L. (1999). Foundations for 15(1): Equality rights in Canada. *Michigan Journal of Gender & Law*, 6, 261-376.
- McGill, J. (2013). Section 15(2), ameliorative programs, and proportionality review. *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference*, 63(1), 521-555. Retrieved September 27, 2016 from <http://digitalcommons.osgoode.yorku.ca/sclr/vol63/iss1/22>.

- McKee, R. & Manning, V. (2015). Evaluating effects of language recognition on language rights and the vitality of New Zealand Sign Language. *Sign Language Studies, 15*(4), 473-497. doi: 10.1353/sls.2015.0017
- McQuarrie L, & Abbott M. (2013) Bilingual deaf students' phonological awareness in ASL and reading skills in English. *Sign Language Studies, 14*(1): 80-100. doi: 10.1353/sls.2013.0028
- Mellon, N.K., Niparko, J.K., Rathmann, C., Mathur, G., Humphries, T., Napoli, D.J., Handley, T., Scambler, S., & Lantos, J.D. (2015, June 15). Should all deaf children learn sign language? *Pediatrics*. Retrieved July 23, 2015 from <http://pediatrics.aappublications.org/content/early/2015/06/09/peds.2014-1632.abstract>.
- Mühlke, A. (1999). The right to language and linguistic development: Deafness from a human rights perspective. *Virginia Journal of International Law, 40*(2), 705–762.
- Petitto, L-A. (1994). Are signed languages 'real' languages? Evidence from American Sign Language and Langue des signes québécoise. *Signpost, 7*(3), 1-10.
- Petitto, L-A. (2005). How the brain bets language. In J. McGilvray (Ed.), *The Cambridge companion to Chomsky* (pp. 84-101). Cambridge, UK: Cambridge University Press.
- Roots, J. (2014, November 10). Sign language rights. Lecture for ALDS 3903 Sign Language Planning and Policy, School of Linguistics and Language Studies, Carleton University, Ottawa, ON.
- Russell, P.H., Knopff, R., Morton, F L., & Russell, Peter H. (1989). *Federalism and the*

- Charter: *Leading constitutional decisions*. Ottawa, Canada: Carleton University Press.
- Sala, J.P. (2013). *How the UN Convention on the Rights of Persons with Disabilities (CRPD) might be used in Canadian litigation*. Council of Canadians with Disabilities. Retrieved September 27, 2016 from <http://www.ccdonline.ca/en/socialpolicy/poverty-citizenship/legal-protections/crpd-in-canadian-litigation>.
- Siegel, L. (2006). The argument for a constitutional right to communication and language. *Sign Language Studies*, 6(3), 255–272.
- Skutnabb-Kangas T, & Phillipson R. (1995). Linguistic human rights, past and present. In T. Skutnabb-Kangas & R. Phillipson (Eds.), *Linguistic human rights: Overcoming linguistic discrimination* (pp. 71-110). Berlin & New York: Mouton de Gruyter.
- Snoddon, K. (2008). American Sign Language and early intervention. *Canadian Modern Language Review*, 64(4), 581-604.
- Snoddon, K. (2012). *American Sign Language and early literacy: A model parent-child program*. Washington, DC: Gallaudet University Press.
- Snoddon, K. (2014). Hearing parents as plurilingual learners of ASL. In D. McKee, R. Rosen, & R. McKee (Eds.), *Teaching and learning of signed languages: International perspectives and practices* (pp. 175-196). Basingstoke, Hampshire: Palgrave Macmillan.
- Snoddon, K. (2015). Using the *Common European Framework of Reference for Languages* to teach sign language to parents of deaf children. *Canadian Modern Language Review*, 71(3), 270-287. doi:10.3138/cmlr.2602

Snoddon, K. (2016, April 29). *Queen's Park should save schools for deaf children*. The Toronto Star. Retrieved September 27, 2016 from

<https://www.thestar.com/opinion/commentary/2016/04/29/queens-park-should-save-schools-for-deaf-children.html>.

Snoddon, K. & Underwood, K. (in press). The social relational model of deaf childhood in action. In T. Curran, K. Liddiard, & K. Runswick-Cole (Eds.), *The Palgrave Handbook of Disabled Children's Childhood Studies*. Basingstoke, UK: Palgrave Macmillan.

Tucker, J. (2014). Linguistic justice. *The Maryland Bulletin*, 135(1), 8. Retrieved April 21, 2015 from <http://www.msd.edu/mdb/current.pdf>.

World Federation of the Deaf. (2016). *Position Paper on the Language Rights of Deaf Children*. Retrieved November 7, 2016 from <https://wfdeaf.org/news/wfd-position-paper-language-rights-deaf-children>.

### **Legislation cited**

*Auton v British Columbia* (Attorney General), 3 S.C.R. 657, 2004 SCC 78.

*Boulter v. Nova Scotia Power Inc.*, 2009 NSCA 17.

*Canadian Association of the Deaf, James Roots, Gary Malkowski, Barbara LaGrange, and Mary Lou Cassie v. Her Majesty the Queen*, 2006 FC 971.

*Canadian Doctors for Refugee Care v Canada* (Attorney General), 2014 FC 651, [2014] FCJ 679.

*Constitution Act, 1982. Part I: Canadian Charter of Rights and Freedoms*. Retrieved June 1, 2015 from <http://laws-lois.justice.gc.ca/eng/const/page-15.html>.

*Corbiere v. Canada* (Minister of Indian and Northern Affairs [1999] 2 SCR 203.

*Eaton v. Brant County* [1997] 1 SCR 241.

*Eldridge v. British Columbia (Attorney General)*, [1997] 3. S.C.R. 624.

*Gosselin (Tutor of) v. Quebec (Attorney General)*, [2005] 1 SCR 238, 2005 SCC 15.

*Rodriguez v. British Columbia (Attorney General)*, [1993] 3 SCR 519, 1993.

*Tanudjaja v. Attorney General (Canada) (Application)*, 2013 ONSC 5410.

All articles in the journal are assigned a Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International (CC BY-NC-ND 4.0) license.

See: <https://creativecommons.org/licenses/by-nc-nd/4.0/>

